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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

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UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 240

ATLANTA, GEORGIA 30309

# NOTICE OF DECISION

Secretary of Labor v. Ford Motor Company

OSHRC Docket No. 81-347

1. Enclosed is a copy of my decision. It will be filed with the Commission on December 7, 1981, and will become the final order of the Commission on January 6, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N. W., Suite 601
   Washington, D. C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is January 6, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Joe D. Sparks

JOE D. SPARKS
Judge

Date: November 17, 1981

OSHRC FORM 97

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309
(404) 881-4197

| | | |
|---|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>FORD MOTOR COMPANY,<br><br>Respondent,<br><br>and<br><br>INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 1377, AFL-CIO,<br><br>Authorized Employee Representative. | ) | OSHRC Docket No. 81-347 |

APPEARANCES:

Gary A. Boncella, Esquire, Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, on behalf of the complainant.

Theodore C. Miloch, Esquire, Ford Motor Company, Dearborn, Michigan, on behalf of the respondent.

Gerald B. Chattman, Esquire, and Nancy Noall, Esquire, Cleveland, Ohio, on behalf of the authorized employee representative.

## DECISION AND ORDER

SPARKS, Judge: An inspection of the Cleveland Casting Plant of Ford Motor Company resulted in a "serious" citation and a proposed $1,000.00 penalty.

An alleged PCB leak at Substation J gave rise to charges that appropriate personal protective equipment was not used and that the procedures for use of respirators did not comply with several OSHA standards.

The International Brotherhood of Electrical Workers, Local Union 1377, AFL-CIO, which represents the affected employees, elected party status.

Prior to the scheduled hearing, attorneys for complainant and respondent submitted a Stipulation and Settlement Agreement which amended the description of the alleged violations, reduced the classification of the violations to "other than serious" and proposed no penalty (Tr. 5).

Respondent agreed to abate the alleged violation by September 1, 1981.

The International Brotherhood of Electrical Workers filed formal objections to the proposed Stipulation and Settlement Agreement on the following grounds:

1. The deletion of sub-paragraphs 1(b) through 1(g) of the citation and the substitution of a new sub-paragraph 1(b) with 1(e) removes several provable alleged violations from the citation. Substation J, where the conditions existed, is a remote work area which, for safety reasons, requires that two electricians be assigned to work in pairs.

2. Considering the dangerous conditions described in the citation, change in classification to "other than serious" and the deletion of the penalty makes a mockery of the intent and spirit of the Act.

3. The PCB spill which led to the issuance of the citation was not an isolated incident as there was another occurrence in less than a year.

4. Members of the union are genuinely concerned about the dangers of PCB, to the extent that several have been disciplined for refusing to work in or around an area after a PCB spill.

A hearing on the objections was held September 9, 1981, at Cleveland, Ohio. Necessary facts were received as profferred evidence (Tr. 7-8).

The employees consistently reiterated that their objections were made in good faith and based solely on the perceived health hazard and are not a bargaining

ploy for other negotiations (Tr. 8–9).

Attorneys for the employees argue that reducing the characterization from "serious" to "other than serious" and deleting the proposed penalties removes the motivation for Ford to fully comply with the standards as it implies the safety problem is a minor one (Tr. 18–19).

The union further contends that compliance with the revised language of the citation may be insufficient to fully protect the health of employees because the wording is so generalized there is no way to determine if the Company has complied with the agreement (Tr. 20–21).

The Review Commission's position concerning settlement agreements is set forth in Rule 100 of the Rules of Procedure, which provides as follows:

> Rule 100 Settlement
>
> (a) Policy. Settlement is permitted at any stage of the proceedings. Settlements submitted to consideration after the Judge's decision has been directed for review shall be filed with the Executive Secretary. A settlement proposal shall be approved when it is consistent with the provisions and objectives of the Act.
>
> (b) Requirements. Every settlement proposal submitted to the Judge or Commission shall include, where applicable, the following:
>
> (1) A motion to amend or withdraw a citation, notification of proposed penalty, notice of contest, or petition for modification of abatement;
>
> (2) A statement that payment of the penalty has been tendered or a statement of a promise to pay; and
>
> (3) A statement that the cited condition has been abated or a statement of the date by which abatement with be accomplished.

The current rule is a revision of the longstanding policy concerning settlements announced in Dawson Brothers, Mechanical Contractors, 72 OSAHRC

The Commission has recently reiterated its policy of encouraging settlement agreements and has approved settlement agreements which contain exculpatory language as being consistent with the intent of the Act and the spirit of the Administrative Procedure Act. Farmers Export Company, 80 OSAHRC 66/A2, 8 BNA OSHC 1655, 1980 CCH OSHD ¶ 24,569 (No. 78-1708, 1980).

Complainant and respondent rely upon recent decisions of the Circuit Courts of Appeal for the Sixth and Third Circuits in asserting that the union lacks standing to oppose the settlement agreement. In Marshall v. OSAHRC (IMC Chemical Group), 635 F.2d 544 (6th Cir. 1980), the court held that the union lacked standing to object to the Secretary's actions in withdrawing a citation. In Marshall v. Sun Petroleum Products Co., 622 F.2d 1176 (3d Cir. 1980), the court held that review of a settlement agreement by the Administrative Law Judge is allowed "only for the limited purpose of entertaining objections from the employees or employees' representative that the abatement period is unreasonable".

The union correctly points out that the Commission has permitted a union that has elected party status to raise objections other than the reasonableness of the abatement period (Brief P. 5). Farmers Export Co., 80 OSAHRC 66/A2, 8 BNA OSHC 1655, 1980 CCH OSHD ¶ 24,569 (No. 78-1708, 1980). In that case, however, Chairman Cleary writing for the Commission, stated as follows:

> "As long as a proposed settlement is consistent with the criteria set out in our decision in Dawson Brothers, Mechanical Contractors, (citation omitted) and Commission Rule 100, particularly as to the abatement of the alleged hazards, the statutory purpose of assuring a safe and healthful workplace is served by a prompt voluntary disposition of a contested case."

The proposed settlement agreement requires that the conditions described in the amended citation be abated by September 1, 1981. The safety and health of employees is not served by prolonging this proceeding. The sooner a final order is entered the sooner compliance may be verified, and if necessary, additional proceedings may be instituted.

Although the Commission respectfully declines to follow all adverse decisions of the circuit courts of appeal, Farmers Export Co., supra, the efficient administration of the Act dictates that due consideration be given to the precedent in the circuit.

In recognition of the holding of the circuit court of appeals and on its own merits as consistent with Rule 100, the settlement agreement is approved.

## CONCLUSIONS OF LAW

1. The Commission has jurisdiction of the parties and the subject matter.

2. The settlement agreement is consistent with Rule 100 of the Commission's Rules of Procedure and the Act.

ORDERED:

The settlement agreement is approved and its terms incorporated herein.

Dated this 7th day of December, 1981.

Joe D. Sparks

JOE D. SPARKS
Judge

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
SUITE 1718, PRUDENTIAL PLAZA
1050 SEVENTEENTH STREET
DENVER, COLORADO 80265
(303) 837-2281

# NOTICE OF DECISION

Secretary of Labor v. The Cedar Chest, d/b/a Waterbeds Unlimited, Inc.

OSHRC Docket No. 80-6661-B

1. Enclosed is a copy of my decision. It will be filed with the Commission on December 10, 1981, and will become the final order of the Commission on January 11, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

Chief Review Counsel
Occupational Safety and Health Review Commission
1825 K Street, N.W., Suite 601
Washington, D.C.. 20006

Any Petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is January 11, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

R. M. Child
Judge, OSHRC

Date: November 20, 1981

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>THE CEDAR CHEST, d/b/a<br>WATERBEDS UNLIMITED, INC.,<br><br>Respondent. | OSHRC DOCKET NO. 80-6661-B |

Appearances:

For the Complainant:
Jerry R. Atencio, Esq., Denver, Colorado;

For the Respondent:
Stephen A. Welsh, pro se, Colorado Springs, Colorado.

## DECISION AND ORDER

Child, R. M., Judge, OSHRC:

### Statement of the Case

This proceeding is before the Occupational Safety and Health Review Commission (the Commission), pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et. seq. (the Act).

By order dated May 19, 1981 Chief Administrative Law Judge Paul A. Tenney dismissed the Notice of Contest filed by the respondent herein to Citations No. 1 and No. 2, issued to the respondent on October 17, 1980, to the extent said notice put in issue the substance of said citations. Judge Tenney's Order reserved for determination the issue of contested penalties only and provided by its terms that

otherwise the said citation had become an order.

Judge Tenney's aforesaid Order became a final Order of the Commission on June 18, 1981.

The matter came on regularly for hearing before the undersigned judge on the issue of appropriateness of the penalties on August 18, 1981. Mr. Steven A. Welsh appeared at that time and indicated on behalf of the respondent that respondent was unable to proceed with the hearing. Mr. Welsh was extended the opportunity of a continuance in order to obtain new counsel or to prepare a defense on behalf of the respondent. He opted to waive a continuance and represented that agreement had been reached with counsel for the complainant to settle the penalties. The hearing on June 18, 1981 was thereupon terminated.

The file discloses that on August 20, 1981 counsel for complainant forwarded settlement documents to the respondent, "Mr. Steve Welsh, President." The file further discloses that by reason of lack of response, a follow-up letter was forwarded to respondent by counsel for complainant on September 14, 1981.

Since formal settlement documents were not filed with the Commission the matter was again noticed "...for hearing on the issues remaining to wit: the contested penalties proposed in the citation."

The matter came on regularly for hearing on said remaining issues at Colorado Springs, Colorado, on October 16, 1981. No one appeared at said hearing on behalf of the respondent. Complainant appeared at said hearing to seek affirmance and assessment of penalties totaling $660.00 for various items set forth in Serious Citation No. 1, aforesaid.

Default of the respondent was duly entered. Complainant moved by reason of said default that respondent's Notice of Contest be dismissed, and the proposed penalties affirmed. Said motion was taken under advisement and the complainant

presented evidence in support of the penalties proposed in said Serious Citation No. 1.

## The Evidence

Mr. Raymond Nellar, compliance officer for the complainant inspected the respondent's worksite at 410 East Fillmore Street, Colorado Springs, Colorado commencing October 2, 1980. In calculating the proposed penalties for each of the violations cited pursuant to that inspection he considered the number of employees exposed, the proximity to the danger, the frequency of the exposure, any stress to which the employees were subjected and other factors such as safety training.

With respect to the violations noted at items 1(a)[1/], 1(b)[2/] and 1(c)[3/] a fire and explosion hazard was presented. He determined that approximately eight employees used the spray booth in a three shift work day and that exposure was

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1/ A description of the violation and the standard involved:

Citation

1a 29 C.F.R. 1910.107(b)(5)(iv): Space within the spray booth(s) on the downstream and upstream sides of filters was not protected with approved automatic sprinklers:

(a) In the Spray Room, the DeVibliss exhaust spray booth.

Standard

§1910.107 Spray finishing using flammable and combustible materials.

(b) Spray booths.

(5) Dry type overspray collectors - (exhaust air filters).

In conventional dry type spray booths, overspray dry type spray booths, overspray dry filters or filter rolls, if installed, shall conform to the following:

(iv) Space within the spray booth on the downstream and upstream sides of filters shall be protected with approved automatic sprinklers.

approximately eight hours per shift. He did not find the exposed employees to be working under any particular stress and determined that some training had been given in the spraying operation. The foregoing factors together with the severity of

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2/ A description of the violation and the standard involved:

Citation

1b 29 C.F.R. 1910.107(e)(5): Container(s) supplying spray nozzles were not of the closed type or provided with metal cover(s) kept closed:

(a) In the spray room, the open 5 gallon cans containing stain and lacquer were not of the approved type.

Standard

§1910.107 Spray finishing using flammable and combustible materials.

(e) Flammable and combustible liquids - storage and handling.

(5) Spraying containers. Containers supplying spray nozzles shall be of closed type or provided with metal covers kept closed. Containers not resting on floors shall be on metal supports or suspended by wire cables. Containers supplying spray nozzles by gravity flow shall not exceed 10 gallons capacity. Original shipping containers shall not be subject to air pressure for supplying spray nozzles. Containers under air pressure supplying spray nozzles shall be of limited capacity, not exceeding that necessary for 1 day's operation; shall be designed and approved for such use; shall be provided with a visible pressure gage; and shall be provided with a relief valve set to operate in conformance with requirements of the Code for Unfired Pressure Vessels, Section VIII of the ASME Boiler and Pressure Vessel Code - 1968. Containers under air pressure supplying spray nozzles, air-storage tanks and coolers shall conform to the standards of the Code for Unfired Pressure Vessels, Section VIII of the ASME Boiler and Pressure Vessel Code - 1968 for construction, tests, and maintenance.

injury which would likely be realized in the event of a fire or explosion and the probability thereof were taken into consideration by him in determining the gravity of the violation all of which supported a base penalty of $800.00

Mr. Nellar then discounted the base penalty by 30% due to the size of the respondent's business which was eighteen employees. He also discounted the base penalty by 30% for good faith since Mr. Welsh on behalf of respondent indicated the violations would be corrected. Finally a 10% discount of the base penalty was applied for history since the respondent had not previously been inspected. In this manner a combined penalty of $240.00 was proposed for items 1(a), 1(b) and 1(c).

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3/ A description of the violation and the standard involved:

Citation

1c 29 C.F.R. 1910.107(g)(2): Spraying area(s) were not kept free from the accumulation of deposits of combustible residues:

(a) In the spray room, the DeVibliss exhaust spray booth.

Standard

§1910.107 Spray finishing using flammable and combustible materials.

(g) Operations and maintenance.

(2) Cleaning. All spraying areas shall be kept as free from the accumulation of deposits of combustible residues as practical, with cleaning conducted daily if necessary. Scrapers, spuds, or other tools used for cleaning purposes shall be of nonsparking material.

With respect to the violations noted at item 2 of said Serious Citation No. 1,[4/] Mr. Nellar testified that these electrical violations occurred in the vicinity of the paint spraying booth and presented a hazard of igniting vapors in the area. The factors in determining gravity of the violation and reduction for size,

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4/ A description of the violation and the standard involved:

Citation

2. 29 C.F.R. 1910.107(c)(6): Electrical wiring and equipment not subject to deposits of combustible residues but located within spraying area(s) was not of the explosion-proof type approved for Class I, Group D, locations conforming to the provisions of Class I, Division I, hazardous locations:

The following electrical wiring and equipment located in the spraying room was not of the explosion-proof type approved for Class I, Group D, locations conforming to the provision of Class I, Division I, hazardous locations:

(a) The conduit used in the spraying room was not approved for a Class I, Division I location in that, the conduit was not of the threaded rigid metal type.

Standard

§1910.107 Spray finishing using flammable and combustible materials.

(c) Electrical and other sources of ignition.

(6) Wiring type approved. Electrical wiring and equipment not subject to deposits of combustible residues but located in a spraying area as herein defined shall be of explosion-proof type approved for Class I, group D locations and shall otherwise conform to the provisions of Subpart S of this part, for Class I, Division 1, Hazardous Locations. Electrical wiring, motors, and other equipment outside of but within twenty (20) feet of any spraying area, and not separated therefrom by partitions, shall not produce sparks under normal operating conditions and shall otherwise conform to the provisions of Subpart S of this part for Class I, Division 2 Hazardous Locations.

good faith and history were identical to those applied with respect to items 1(a), 1(b) and 1(c) and supported the complainant's proposed penalty of $240.00 for said item 2.

With respect to items 3(a)[5/], 3(b)[6/], 3(c)[7/], 3(d)[8/] and 3(e)[9/] Mr. Nellar

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5/ A description of the violations and the standards involved:

Citation

3a 29 C.F.R. 1910.213(c)(1): Circular hand-fed ripsaw(s) were not guarded by an automatically adjusting hood which completely enclosed that portion of the saw above the table and above the material being cut:

(a) In the Rough Cutting Area, the Rockwell 12/14 Tilting Arbor Table Saw, serial #1755442.

Standard

§1910.213 Woodworking machinery requirements

(c) Hand-fed ripsaws.

(1) Each circular hand-fed ripsaw shall be guarded by a hood which shall completely enclose that portion of the saw above the table and that portion of the saw above the material being cut. The hood and mounting shall be arranged so that the hood will automatically adjust itself to the thickness of and remain in contact with the material being cut but it shall not offer any considerable resistance to insertion of material to saw or to passage of the material being sawed. The hood shall be made of adequate strength to resist blows and strains incidental to reasonable operation, adjusting, and handling, and shall be so designed as to protect the operator from flying splinters and broken saw teeth. It shall be made of material that is soft enough so that it will be unlikely to cause tooth breakage. The material should not shatter when broken, should be nonexplosive, and should be no more flammable than wood. The hood shall be so mounted as to insure that its operation will be positive, reliable, and in true alignment with the saw; and the mounting shall be adequate in strength to resist any reasonable side thrust or other force tending to throw it out of line.

determined that eight employees worked with these power wood working machines eight

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Citation

3b 29 C.F.R. 1910.213(h)(1): The sides of the lower exposed portion of the blade of radial saw(s) were not guarded to the full diameter of the blade by a device that automatically adjusted itself to the thickness of the stock and remained in contact with the material being cut:

(a) In the Rough Cutting Area, the Rockwell Radial Arm Saw, serial #16-PAS-FQ2696.

Standard

§1910.213 Woodworking machinery requirements

(h) Radial saws.

(1) ...The sides of the lower exposed portion of the blade shall be guarded to the full diameter of the blade by a device that will automatically adjust itself to the thickness of the stock and remain in contact with stock being cut to give maximum protection possible for the operation being performed.

7/

Citation

3c 29 C.F.R. 1910.213(h)(3): Radial saw(s) were not provided with an adjustable stop to prevent the forward travel of the blade beyond the position necessary to complete the cut in repetitive operations:

(a) In the Rough Cutting Area, the Rockwell Radial Arm Saw, serial #16-PAS-FQ2696.

Standard

§1910.213 Woodworking machinery requirements

(h) Radial saws.

(3) An adjustable stop shall be provided to prevent the forward travel of the blade beyond the position necessary to complete the cut in repetitive operations.

hours per day. Due to the violations involved these eight employees had their hands "right at the point of danger" and were thus exposed to the hazard of

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Citation

3d 29 C.F.R. 1910.213(h)(4): Radial saw(s) were not installed in a manner so as to cause the cutting head to return gently to the starting position when released by the operator:

(a) In the Rough Cutting Area, the Rockwell Radial Arm Saw, serial #16-PAS-FQ2696.

Standard

§1910.213 Woodworking machinery requirements

(h) Radial saws.

(4) Installation shall be in such a manner that the front end of the unit will be slightly higher than the rear, so as to cause the cutting head to return gently to the starting position when released by the operator.

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Citation

3e 29 C.F.R. 1910.213(m)(1): Cutting heads of wood shaper(s) were not enclosed with a cage or adjustable guard so designed so as to keep the operator's hand away from the cutting edge:

(a) In the Shaping Area, the Rockwell wood shaper motor model #1225304.

Standard

§1910.213 Woodworking machinery requirements

(m) Wood shapers and similar equipment.

(1) The cutting heads of each wood shaper, hand-fed panel raiser, or other similar machine not automatically fed, shall be enclosed with a cage or adjustable guard so designed as to keep the operator's hand away from the cutting edge. The diameter of circular shaper guards shall be not less than the greatest diameter of the cutter...

serious cuts or fractures or possibly amputations of the fingers and parts of the hand. Again Mr. Nellar received assurance from Mr. Welsh that the violations would be corrected. Upon consideration of those factors of gravity and discount which applied to the other violations the complainant proposed a total penalty or $180.00 for items 3(a), 3(b), 3(c), 3(d) and 3(e).

Discussion

Rule 62(a) of the Rules of Procedure of the Commission provides that a non-appearing party at a hearing shall retain the right "...to be served with a copy of the decision of the judge..."

Rule 90 of said Rules provides in part that when a hearing is held the decision shall comply with 5 U.S.C. §557.

5 U.S.C. §557 provides in pertinent part:

> "...All decisions...shall include a statement of -
>
> (A) Findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record; and
>
> (B) The appropriate rule, order, sanction, relief, or denial thereof."

Consistent with the foregoing provisions the motion of the complainant to dismiss respondent's notice of contest is denied.

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The penalty proposed by the Secretary of Labor through his area directors is assessed only if not contested; otherwise the Review Commission can affirm the penalty as proposed, modify it or vacate it. Long Manufacturing Co. v. OSHRC, 554 F.2d 903 (8th Cir. 1977); California Stevedore and Ballast Co. v. OSHRC, 517 F.2d 986 (9th Cir. 1975). The determination of an appropriate penalty is within the discretion of the Review Commission. Western Waterproofing Co. v. Marshall, 576 F.2d 139 (8th Cir. 1978).

In assessing penalties for violations of the Act, the Commission must consider the size of the business of the cited employer, the gravity of the violation, the employers good faith or absence of it and the history, if any, of previous violations. 29 U.S.C. §666(i).

Evidence bearing on said factors was presented by the complainant through the testimony of the compliance officer. Such evidence was sufficient to support the appropriateness of the penalties as proposed.

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Based upon the foregoing factors and the evidence there are hereby entered the following:

## Findings of Fact

1. The sum of $240.00 is an appropriate penalty for the violations set forth at items 1(a), 1(b) and 1(c) of Serious Citation No. 1, issued to respondent October 17, 1980.

2. The sum of $240.00 is an appropriate penalty for the violation set forth at item 2 of said Serious Citation No. 1.

3. The sum of $180.00 is an appropriate penalty for the violations set forth at items 3(a), 3(b), 3(c), 3(d) and 3(e) of said Serious Citation No. 1.

## Conclusions of Law

1. The Commission has jurisdiction of the parties and of the subject matter herein.

## ORDER

Respondent is ASSESSED a total combined penalty of $660.00.

R. M. Child
Judge, OSHRC

Dated: December 10, 1981

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1515 Broadway
Room 3800

New York, N.Y.
10036

## NOTICE OF DECISION

Secretary of Labor v. J & G Drywall Inc.
OSHRC Docket No. 80-6924

1. Enclosed is a copy of my decision. It will be filed with the Commission on December 10, 1981, and will become the final order of the Commission on January 11, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is January 11, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

James P. O'Connell
JAMES P. O'CONNELL
JUDGE, OSHRC

Date: November 20, 1981

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>J & G DRYWALL, INC.,<br><br>Respondent. | DECISION AND ORDER<br><br>OSHRC DOCKET<br><br>NO. 80-6924 |

Appearances:

Francis V. LaRuffa, Regional Solicitor, New York, N.Y., for the Secretary of Labor: Alan L. Kammerman, Esq., of Counsel.

Christina Gallop, Secretary-Treasurer, of Kingston, N.Y., for Respondent, pro se.

JAMES P. O'CONNELL, JUDGE

STATEMENT OF THE CASE

This is a proceeding pursuant to section 10 of the Act[1/] contesting a citation issued to Respondent (J&G) under section 9(a).

The citation alleges that as a result of an OSHA inspection made on October 21-23, 1980, of a workplace located on Sterling Mine Road, Sterling Forest, New York, Respondent violated a construction standard. The citation for serious violation and the notification of proposed penalty were issued

1/ Occupational Safety and Health Act of 1970 (20 U.S.C. § 651 et seq.)

on October 30, 1980. Respondent timely filed a general notice of contest.

The standard,[2/] general allegations, and proposed penalty involved in this contest are as follows:

Citation No. 1 - Serious

| ITEM | STANDARD | DESCRIPTION | PENALTY |
|---|---|---|---|
| 1 | 29 CFR 1926.400(h)(1) | Approved ground-fault circuit interruptor(s) or an assured equipment grounding conductor program was not used for the protection of employees using 120 volt, single phase, 15 and 20 ampere receptacle outlets that were not a part of the permanent wiring of a building or structure: | $ 400.00 |

Temporary Loading Dock at South side of IBM Complex. Carpenters utilizing cord & plug connected Skill hammer drill & two (2) $7^1/_4$" Black & Decker saws.

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2/ The standard provides:

§ 1926.400 - General Requirements (Electrical)

(h) Ground-fault protection.

(1) General. Notwithstanding any other provision of this part, the requirement in section 210-7 of the 1971 National Electrical Code (NFPA 70-1971; ANSI C1-1971) that all 15- and 20-ampere receptacle outlets on single-phase circuits for construction sites have approved ground-fault circuit protection for personnel does not apply. In lieu thereof, the employer shall use either ground-fault circuit interrupters as specified in paragraph (h)(2) of this section or an assured equipment grounding conductor program as specified in paragraph (h)(3) of this section, to protect employees on construction sites. These requirements are in addition to any other requirements for equipment grounding conductors.

A hearing on the merits was held at Poughkeepsie, New York on April 22, 1981. Complainant's case consisted of the testimony of David Scott, an OSHA compliance officer, and one (1) photographic exhibit depicting the ground-fault circuit interrupter (G.F.C.I.) in use on the job site (Exh. C-1). Respondent's case was the testimony of its project superintendent, Conrad Moore. No employee or employee representative was a party (Tr. 4). Complainant filed a post-hearing brief and Respondent filed a post-hearing reply brief.

## JURISDICTION AND ISSUES

Jurisdiction is conceded (Tr. 5). The issues for determination are (1) whether Respondent violated the cited standard, and if so, (2) what civil penalty is appropriate therefor.

## FINDINGS OF FACT

I make the following findings:

1. On October 21-23, 1980, Respondent was engaged as a Drywall subcontractor on a project located at the IBM Complex in Sterling Forest, New York, where a large addition was under construction. On the south side of the complex, J&G had four carpenters assemblying an outside temporary loading dock. It had been on the job site for about a week.

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2/ § 1926.400 - General Requirements (Electrical) cont'd...

(2) Ground-fault circuit interrupters. All 120-volt, single-phase, 15- and 20-ampere receptacle outlets on construction sites, which are not a part of the permanent wiring of the building or structure and which are in use by employees, shall have approved ground-fault circuit interrupters for personnel protection.

2. On October 22, 1980, at about 2:15 p.m., an OSHA inspection at the above workplace was conducted by Compliance Officer (C.O.) David Scott. Sunny and dry weather conditions existed at the time.

3. The C.O. observed J&G employees using several hand-held electrical tools such as a Skill hammer and saws. The Skill saws, each containing a three-pronged plug, when in use were plugged into two Underwriters Laboratories (UL) approved fifty foot extension cords, which lead to and were plugged into a G.F.C.I., from which another UL approved fifty foot extension cord extended to and was plugged into the permanent wall outlet or permanent wiring of the building (Tr. 13, 28-32, Exh. C-1). This entire system or arrangement, and each of its parts, was properly grounded (Tr. 24,30,32,49). The electrical tools were examined and found to be in good working condition (Tr. 34-35). Extension cords are considered to be temporary wiring (Tr. 10,19,21).

4. The C.O., upon testing the portable G.F.C.I. unit, found that it was not working properly (Tr. 9-10). When and why it became inoperable is not known (Tr. 20,47). After a certain amount of time in use, the unit does build up a carbon deposit and does not work (Tr. 21). The hazard existing at the time of the inspection was non-obvious and detectable only through the use of a testing device.

5. Respondent had obtained the G.F.C.I. unit from the electrical contractor on the job site (Tr. 18,47). There is no evidence of record that the unit was not in proper working order when first installed on the workplace (Tr. 23). There is no evidence of record that Respondent knew of the violative condition prior to or at the time of the OSHA inspection.

6. The standard at issue makes no reference to any duty upon an employer to periodically test the G.F.C.I. unit.

7. Upon being advised by the C.O. that the G.F.C.I. unit was not working properly, Respondent's foreman stopped his men from using the electrical saws and obtained a new unit from the electrician on the job site. The next day, October 23, 1980, the C.O. checked this new unit and found it working properly (Tr. 16,35).

8. J&G have no history of any OSHA violations. It was most cooperative with the C.O. during his inspection, and exhibited considerable good faith in having a G.F.C.I. unit on the temporary wiring in use at the time and by immediately correcting the hazard when it knew of its existence (Tr. 20).

9. The Secretary has failed to sustain his burden of proof by the required preponderance of the credible evidence that Respondent was in violation of 29 CFR 1926.400(h)(1) on October 22, 1980.

OPINION

The Secretary has the burden of proving all necessary elements of a violation under the Act.29 CFR 2200.73(a); 5 U.S.C. 556(d). He has the burden to prove that Respondent violated the cited standard, that its employees were exposed or had access to the violative condition, and that the employer had either actual or constructive knowledge of the violative condition. The Act does not impose strict liability. The proof must be clear and convincing. It cannot be presumed or inferred. Ellison Electric, 1 OSAHRC 547, 1 BNA OSHC 3034, CCH OSHD para. 15,133 (No. 412, 1972); Edison Lamp Works, No. 76-484, 1979. The preponderance of the evidence rule is required to establish a job safety violation in these proceedings. Armor Elevator Company, Inc., 5 OSAHRC 260, 1 BNA OSHC 1409, CCH OSHD para. 16,958 (Nos. 425 & 426, 1973).

An employer lacking either actual or constructive knowledge of a condition which contravenes a standard cannot be expected to prevent that condition, and therefore has not violated the standard. Green Const. Co. & Massman Const. Co., 4 BNA OSHC 1808, CCH OSHD para. 21,235 (No. 5356, 1976). Failure to prove that the employer had knowledge of the existence of the violation at the time of the alleged violation, warrants a finding that the Secretary has failed to sustain his burden of proof. Such is the circumstance in this proceeding.

I cannot presume that if J&G had tested the G.F.C.I. on the morning of the inspection, the unit would have been found to be inoperable. Neither may I infer from the evidence of record that the unit which Respondent had installed in compliance with the standard, had ceased to function some time prior to the C.O. finding that it was not working properly. It could very well have become inoperable five minutes before the C.O. tested the unit. The Act does not require an employer to take steps to search for a non-obvious electrical hazard every time a hand tool is used by its employees. The Review Commission has held that an employer cannot be held responsible for a non-obvious electrical hazard whose existence was unknown. See 4 G Plumbing & Heating, Inc., 6 BNA OSHC 1528, CCH OSHD para. 22,658 (No. 12892, 1978). In New England Tel. & Tel. Company v. Secretary of Labor & OSAHRC, 589 F. 2nd 81 (1st Cir., 1978), the Court commented:

> If a passageway is properly lighted, a subcontractor does not have to stand around and see that the bulb does not burn out.

Paraphrasing the above, if a temporary wiring system is properly grounded and a ground-fault interrupter unit installed, a subcontractor supplying such protection does not have to stand around and see that the unit does not become inoperable.

Accordingly, based upon the evidence of record in this proceeding, I am convinced that J&G had no knowledge that the G.F.C.I. unit it had installed on the temporary wiring system had become inoperable prior to the moment the C.O. made his test during the inspection. The citation for serious violation must be vacated.

ARGUENDO

Assuming that there was a violation of the cited standard as alleged by Complainant, in that event, it is my firm opinion that there is insufficient proof of record to support a finding that the violation was of such gravity so as to cause serious injury or death to any worker. The tools and wiring were in good condition. The entire system was properly grounded, and the voltage being used was of such limited quantity, that I doubt if any worker sustaining an electrical shock would sustain such an injury to warrant the classification of a serious violation. Accordingly, I would find any violation to be nonserious. No penalty would be assessed by virtue of Respondent's good faith and the factual findings made herein.

CONCLUSIONS OF LAW

1. Respondent, at all pertinent times, was an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act. It was subject to the requirements of the Act, including section 5(a)(2), and

the occupational safety and health standards promulgated thereunder. The Occupational Safety and Health Review Commission has jurisdiction of the parties and subject matter herein.

2. Respondent was not in serious violation of 29 CFR § 1926.400(h)(1) as alleged in the citation issued herein, and, such citation and the penalty of $400.00 proposed therefor should be vacated.

O R D E R

Based on the foregoing Findings of Fact and Conclusions of Law, and upon the entire record of this proceeding, it is ORDERED that Citation No. 1, charging a serious violation of 29 CFR 1926.400(h)(1), is vacated. The proposed penalty of $400.00 is also vacated.

James P. O'Connell
JAMES P. O'CONNELL
JUDGE, OSHRC

Dated: November 20, 1981
New York, New York

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 240

ATLANTA, GEORGIA 30309

# NOTICE OF DECISION

Secretary v. Palmer Instruments, Inc.

OSHRC Docket No. 81-407

1. Enclosed is a copy of my decision. It will be filed with the Commission on December 10, 1981, and will become the final order of the Commission on January 11, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N. W., Suite 601
   Washington, D. C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is January 11, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

John S. Patton

JOHN S. PATTON
Judge

Date: November 20, 1981

OSHRC FORM 97

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309
(404) 881-4197

| | | |
|---|---|---|
| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 81-407 |
| | ) | |
| PALMER INSTRUMENTS, INC., | ) | |
| | ) | |
| Respondent. | ) | |

APPEARANCES:

Bruce C. Heslop, Esquire, U. S. Department of Labor, Cleveland, Ohio, on behalf of complainant.

Jagdish Patel, Esquire, Palmer Instruments, Inc., Cincinnati, Ohio, on behalf of respondent.

## DECISION AND ORDER

This is a proceeding pursuant to Section 10 of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651, et seq., 84 Stat. 1590, hereinafter referred to as the Act), contesting a citation issued by the complainant against the respondent under the authority vested in complainant by Section 9(a) of the Act.

The citations alleged that as a result of the inspection of a workplace under the ownership, operation and control of the respondent located at Cincinnati, Ohio, the respondent has been charged with violating Section 5(a)(2) of the Act by failure to comply with certain Occupational Safety and Health standards.

A hearing was held in Cincinnati, Ohio, on September 9, 1981. Both parties appeared and presented evidence. There was no motion to intervene.

## ISSUES IN THE CASE

It was alleged that respondent committed a serious violation of Standard 29 C.F.R. § 1910.1001(j)(2) in that a comprehensive medical examination was not provided to employees in the assembly department who wrapped asbestos around thermometer tubes within 30 days after it was determined that the employees were exposed to airborn levels of asbestos.

At the beginning of the hearing, the parties stated upon the record that a compromise agreement had been entered into as to this alleged violation. It was agreed that the citation would be affirmed with the proposed penalty reduced to $180. It was stated that the respondent represents it has abated the violation and that the respondent withdraws its notice of contest to said citation and to the penalty as amended. Said settlement agreement as to said standard is hereby approved.

It was further alleged that the respondent was in repeat violation of Standard 29 C.F.R. § 1910.134(b)(11) in that approved or accepted respirators were not used when they were available. It was alleged that on October 23, 1980, the employee who worked in the pump room and assembly area and was exposed to mercury vapor concentrations in excess of the eight-hour permissible exposure limit wore a Pulanosan air purifying respirator at times and a 3M Section 8707 respirator at other times. It was alleged that neither of these respirators is approved for use in mercury vapor and air atmospheres above the permissible limit due to the poor warning properties of mercury vapor.

It was further alleged that respondent was in repeat violation of Standard 29 C.F.R. § 1910.1001(b)(1) in that employees were exposed to materials in excess of

the eight-hour time weighted average limits listed by the particular materials in Table Z-2 of Subpart Z of 29 C.F.R., Part 1910. It was alleged that on October 23, 1980, an employee worked four hours in the pump room and four hours in the assembly area and was exposed during a 453 minute survey to a time weighted average concentration of 0.146 $mg/m^3$ of mercury and air which is 1.46 times the eight-hour permissible exposure limit.

It was further alleged that respondent was in repeat violation of Standard 29 C.F.R. § 1910.1000(e) in that feasible administrative or engineering controls were not determined and implemented to reduce employee exposure. It was alleged that on October 23, 1980, an employee who worked four hours in the pump room filling, pressurizing and sealing the thermometers and four hours in the assembly area assembling thermometers was exposed over a full shift to airborn concentrations of mercury vapor 1.46 times the eight-hour permissible exposure limit and adequate, feasible, administrative or engineering controls were not determined and employed to reduce these levels.

## EVIDENCE AND EVALUATION OF THE CASE

This judge can only consider the evidence introduced at the hearing. No exhibits presented post hearing, and no statements of fact in briefs not appearing in the evidence introduced at the hearing can be considered.

It is undisputed that prior citations alleging violations of Standards 29 C.F.R. § 1910.134(b)(11), 29 C.F.R. § 1910.1000(b)(1) and 29 C.F.R. § 1910.1000(e) had become final orders sustaining such citations.

There is considerable dispute in the record as to whether an employee of the respondent was exposed to mercury fumes which were in excess of those permitted

by the standard. The complainant took exposure to mercury measurements by a solid state sensor mercury monitor or badge attached to the employee's breathing zone (Tr. 13). The badge consisted of a plastic holder with an opening which contained the mercury sensing device (Tr. 68). Two badges were used to monitor said employee, Mr. Lee, as to his mercury exposure on October 23, 1980 (Tr. 16). Basic sampling data, including sample identification numbers and sampling time, were recorded by Mr. Ellwood, a compliance officer of the complainant (Tr. 13-15, Ex. C-1). The first sample was taken over a period of 223 minutes in the morning and the second sample over 230 minutes in the afternoon (Tr. 17, Ex. C-1). On completion of each sample, Mr. Ellwood removed the badge and placed it in a plastic bag which was placed in a metal cannister which was taped shut and identified with a seal reflecting the date of sampling, sample number and Mr. Ellwood's signature (Tr. 18, 19). Samples were sent to the Occupational Safety and Health Administration in Salt Lake City, Utah, which forwarded them to the supplier of the badges, Advance Chemical Sensors Company, at Pompano Beach, Florida, for analysis.

Dr. Lawrence S. Locker testified for the complainant as to analysis of the sample. Dr. Locker holds a Ph.D. degree in metallurgy and a Masters degree in Chemical Engineering from the Massachusetts Institute of Technology as well as a Bachelor of Chemical Engineering Degree from Syracuse University (Tr. 86, 87). Dr. Locker is the sole proprietor of Advance Chemical Sensors Company which develops, manufactures and sells devices for monitoring personal exposure to toxic vapors (Tr. 87). He personally developed the solid state sensor mercury monitor used by Mr. Ellwood to take the samples (Tr. 87, 88).

Dr. Locker examined the metal cannisters upon them being sent to him from the Salt Lake City laboratory. He calculated the time weighted average concentration of mercury for each of the three samples submitted. (Tr. 92, 95, Ex. C-4). Dr. Locker reported the results of his analysis to the Salt Lake City laboratory (Tr. 95, Ex. C-2). Based upon the sample results and calculation, it was determined that Mr. Lee was exposed to mercury at an eight-hour time weighted average limit of 0.146 $mg/m^3$ (Tr. 23).

The complainant's testing of a mercury sniffer, however, revealed quite different results. The results with the mercury sniffer were as follows:

| Date | Max. | Min. |
|---|---|---|
| 10/22/80 | .038 | .0157 |
| 10/23/80 | .055 | .0447 |
| 10/22/80 | .04 | .038 |

It was testified, however, that the sniffer is a hand-held direct readout device used to detect and measure spot concentrations over a short period of time, usually 15 seconds (Tr. 69, 84). The sniffer is generally used by the complainant as a screening device or spotcheck to detect areas in which there are high levels of mercury and to determine whether pull shift monitoring is warranted (Tr. 58, 59, 69). It was stated that the sniffer was used to take random readings, not necessarily of the employee's reading zone exposure, to determine which employee should be monitored for full shift, and as a check on the badge monitoring to determine if any gross disparity existed (Tr. 11, 12, 70, 72). On the other hand, the badge was designed to be attached to an employee in his breathing zone to continuously monitor his exposure to mercury over a long period of time such as a full work shift or a substantial portion thereof (Tr. 70).

Complainant's witness, Mr. Ellwood, acknowledged on cross-examination that in taking the test, it was possible his hands could have been contaminated with mercury. It was testified, however, that the monitor badge is in an exterior plastic holder with an opening that contains the mercury sensing device. Mr. Ellwood testified that he touched only the exterior plastic holder and not the sensing device (Tr. 68). Dr. Locker visibly examined each badge and observed no evidence of contamination. He testified that if contamination had occurred by placement of a drop of mercury directly on the senor, analysis would reveal an extremely high concentration of mercury indicative of contamination (Tr. 79). Mr. Ellwood prepared during his inspection a blank sample badge taken from the same lot as those used to sample the employees. Analysis of the blank sample revealed a mercury concentration of only 0.004 $mg/m^3$ (Tr. 17, 18, Ex. C-2). Dr. Locker testified that this amount was insignificant and indicated no contamination prior to sampling.

On the other hand, the test taken by the respondent revealed the respondent to be in compliance with the standard. An exhibit reflecting the inspection of the State of Ohio also showed the respondent to be in compliance (Ex. R-7). Exhibits R--8, 9 and 10 show the results of 3M mercury monitor sampling performed by respondent two to five months after inspection. Exhibit R-13 is a series of reports reflecting results of sniffer samples taken during a period from September 11, 1972 to December 3, 1973. Exhibit R-13 contains results of employee urine mercury levels determined during the period from August 1, 1968 to February, 1981. Test were also taken two or three months after complainant's inspection which test reflected compliance with the standard.

It would appear that the method of testing used by the complainant is more reliable than that used by the respondent and therefore, the findings of the complainant on the dates of the inspection in October, 1980, are credited. It is entirely possible, however, that the test taken by both of the respective parties could have been accurate at the time that they were taken notwithstanding the substantial difference in the results of the test. There does not appear to have been a substantial change in the method of operation by the respondent between October 22 and 23, 1980, and the dates of the test made by the respondent two or three months later. A factor, however, that could cause a substantial difference in the mercury vapors to which the employees were exposed is the variability insofar as housekeeping is concerned. The compliance officer of the complainant testified that there were droplets of mercury on the floor and the work table where the employee worked. There was a pool of mercury five inches in diameter under one of the work tables on top of a pump (Tr. 12). This testimony was in no way disputed. The mercury was there, according to said witness, for the entire morning (Tr. 12).

The testimony of the respondent as to housekeeping was as follows:

> "Answer. We have a policy that we have it cleaned every two weeks. Now, there may have been a cleaning of that particular room before my sample or after my sample. Question. So you can't tell me whether the conditions were comparable since they were after the date? Answer. Not as far as housekeeping, no. But as far as the units, the same units being in the room, the installation of the exhaust and all that was the same" (Tr. 135).

It will be seen from the above testimony that the condition due to housekeeping was variable. It is hardly likely that at all times there was a pool of mercury five inches in diameter. Such an exposure to mercury could very well have caused considerable variation in the testing taken.

As above noted, the respondent did engage in testing and the results of the testing indicated compliance with the standard. The Review Commission, in the case of General Electric Company, ____ OSAHRC ____, 9 BNA OSHC 1722, 1981 CCH OSHD ¶ 25,345 (No. 13732, 1976-77), held as follows:

> "When the Secretary alleges that the contaminant is present in excessive amounts but the employer shows that it had made measurements and determined that the concentration was not excessive, the burden is on the Secretary to show that the employer's failure to discover the excessive concentration resulted from a failure to exercise reasonable diligence."

To the same effect, see North American Rockwell Corp., 75 OSAHRC 43/A6, 2 BNA OSHC 1710, 1974-75 CCH OSHD ¶ 19,464 (Nos. 2692 & 2875, 1975), aff'd sub nom., Dunlop v. Rockwell International, 540 F.2d 1283 (6th Cir. 1976).

The question therefore arises as to whether the respondent, having taken tests which revealed respondent to be in compliance, had exercised such diligence as to require a finding that the respondent had done all that could be reasonably expected.

It will be noted that in the above quotation, it is stated ". . . the burden is on the Secretary to show the employer's failure to discover the excessive concentrations resulted from a failure to exercise reasonable diligence." It appears that in the case at bar, this obligation of the Secretary has been met. As above stated, the evidence establishes that the employee was exposed to spilled mercury, both on the table and on the floor, and that one puddle on the floor was five inches in diameter. A five-inch puddle of mercury is a substantial amount and could well have exposed the employee to dangerous amounts of vapor. The uncontradicted evidence is that the mercury remained so exposed the entire morning of the inspection. Had the spillage only been for a few minutes, it might well be argued

that the respondent did not have adequate opportunity to ascertain such condition and, therefore, should not be held responsible. The exposure of an employee to mercury, however, is of sufficient danger to require the respondent not to permit such a condition to exist for an entire morning. There was adequate opportunity for the respondent to have ascertained the condition and more promptly corrected it. The evidence also establishes that the area was cleaned up only once every two weeks. With the amount of spillage established in the evidence, cleaning up the area once every two weeks was totally inadequate. Therefore, notwithstanding the test made by the respondent, the Secretary has established that the respondent's failure to discover the excessive concentrations resulted from a failure to exercise reasonable diligence. The allegations of violation, therefore, have been sustained.

It is undisputed that the respondent had previously been found to be in violation of the standard in that the respondent had excessive mercury vapor. The violation must therefore be held to be a repeat violation.

The complainant established that further efforts at abatement would be successful. It was recommended that local exhaust be installed at the filling location, similar to those installed where the tubes were sealed (Tr. 32). Mercury could be prevented from spilling out on the table or the floor by redesigning the fill system or installing some method of capturing the mercury as, for example, having the mercury fall into water or into some kind of trap where it would not become a vapor. It was also suggested that the spill be immediately cleaned up (Tr. 32). The opinion was expressed that better housekeeping would reduce the exposure to the permissible limit (Tr. 33). It certainly would appear that any spill of mercury should be immediately reported and cleaned up rather than for the cleanup to occur only once every two weeks.

In determining whether the proposed penalty should be assessed, it is necessary to examine the evidences of good faith on the part of the respondent. Subsequent to the finding of prior violation, the respondent did make substantial efforts to improve the situation. General exhaust ventilation was installed and air was pulled out of the room with a fan. There were also two local exhaust systems at one of the tables (Tr. 31). There was, however, no local exhaust system at the location where Mr. Lee filled the tubes with mercury (Tr. 31). There were local exhausts where the tubes were sealed (Tr. 32). The respondent also took substantial tests (Tr. 114-118, 121, 122, 125, 126, 134, 135). This included urinary sample and mercury analysis samples. The mercury analysis samples, however, were not taken on or about the time of the inspection by the complainant. It appears that the respondent did make an earnest effort to remedy the situation and that the respondent made substantial effort to monitor the situation to see whether or not the problem continued. The respondent did not go far enough in that the housekeeping was inadequate, but in view of the evidence of good faith and the substantial efforts made by the respondent, a penalty in the amount suggested would not be proper. A penalty in the amount of $200 will, therefore, be assessed.

It was also alleged that inadequate respirators were used. Standard 29 C.F.R. § 1910.134(b)(11) in pertinent part, reads as follows:

> "Approved or accepted respirators shall be used when they are available. The respirator furnished shall provide adequate respiratory protection against the particular hazard for which it is designed in accordance with standards established by competent authorities. The U. S. Department of Interior, Bureau of Mines, and the U. S. Department of Agriculture are recognized as such authorities."

The testimony of the complainant's compliance officer was to the effect that the respirators used by Mr. Lee were negative pressure respirators, that is, a

person breathes in, the air is pulled through the filtering device, and when exhaled, it goes through an exhalation device (Tr. 26). He wore a Pulmosan air purifying respirator in the pump room and a 3M 8707 respirator in the assembly room. The 3M 8707 respirator is made of paper material, and fits over the nose and mouth and is held on with two straps that go around the head. It is designed to be disposable. It was testified that documents showing approved respirators do not reflect these respirators as approved. It is further stated that there is no negative pressure respirator approved by NIOSH (Tr. 27, 28).

It was testified that the respirator is not adequate in that there is no odor provided whereby the wearer can know if he is being affected by mercury vapors. Mercury has no odor and no irritating effect. Therefore, if the respirator is not functioning properly, he would not have any indication that the respirator was defective (Tr. 28, 29). If the employee did not get a proper fit, he could be working in a huge concentration of mercury and not be able to detect it through an odor or irritation (Tr. 29). According to complainant's testimony, a continuous flow airline or a pressure demand respirator would be proper. These respirators are known as positive pressure respirators (Tr. 29).

Respondent's Exhibit 12, which is product literature of the 3M Company from whom the mask used by respondent was purchased, contains the following statement:

> "The 8707 is not NIOSH approved since present NIOSH test schedules do not cover mercury vapor. However, when used in accordance with OSHA program directive, Section 300-9 Glg, the product is considered 'accepted' respiratory protection."

It will be observed that both the testimony that the respirator had not been approved by NIOSH and the evidence that NIOSH does not test for mercury vapors

but has accepted the type of respirator used by respondent is completely hearsay evidence.

The complainant, however, attached to its post hearing brief pages from its manual listing the approved respirators. The respirators here involved do not appear in the list. Even aside from the question of whether judicial notice may be taken of such attachment, the uncontradicted hearsay statements of the compliance officer make out a prima facie case as to lack of approval by NIOSH. The uncontradicted hearsay evidence of respondent that NIOSH does not test for mercury vapor similarly makes out a prima facie case for the truth of that statement. The Review Commission has on several occasions held, that hearsay evidence must be received in an administrative proceeding. In the case of Metro-Mechanical, Inc., ____ OSAHRC ____, 3 BNA OSHC 1350, 7475 CCH OSHD ¶ 18,795 (No. 3518, 1975), the Review Commission stated:

> "The Commission has held that it will not allow a citation to stand solely on the basis of hearsay evidence where such evidence is contradicted. Millprint, Inc., No. 513 (Oct. 18, 1973). Such is not the case here. The compliance officer's testimony that the workman seen on the scaffold was an employee of respondent, while hearsay evidence, remains uncontradicted and thus, is an acceptable basis for which to find respondent in violation of Section 5(a)(2) of the Act."

This judge therefore finds that such evidence is competent and being uncontradicted by the opposite party in each instance must be credited. It therefore is held that the respirator used by the respondent has not been approved by NIOSH but that NIOSH does not test for mercury vapors.

In the respondent's brief, it is pointed out that Industrial Hygiene Field Operations Manual issued on June 9, 1977, provided that unapproved respirators could be used only if MESA-NIOSH does not have a test schedule for the specific air contaminant. The section further provided that the employer must justify the

intended purpose of such devices and demonstrate that the respirator can provide the protection required and that if OSHA concurs, the respirator is considered accepted. The brief further points out that in January, 1980, a revised manual was published which does not contain the foregoing provision relating to respiratory program acceptability.

Irrespective of whether the current manual provides for a means whereby a respirator can be "accepted" even though there is no test schedule for the specific air contaminant, it is difficult to see how the respondent could be found to be in violation because a respirator was used which had not been approved by NIOSH when NIOSH does not approve any respirators relating to exposure for mercury vapors. Therefore, under the evidence submitted in this case, a violation of Standard 29 C.F.R. § 1910.134(b)(11) has not been established.

Standard 29 C.F.R. § 1910.134(a)(2) which was not alleged in the citation, was as follows:

> "Respirators shall be provided by the employer when such equipment is necessary to protect the health of the employees. The employer shall provide the respirators which are applicable and suitable for the purpose intended. The employer shall be responsible for the establishment and maintenance of a respiratory program which shall include the requirements outlined in paragraph (b) of this section."

It will be noted that the above quotation includes the following: "The employer shall provide the respirators which are applicable and suitable for the purpose intended." As above observed, the testimony of the compliance officer was to the effect that the respirator was inadequate since it did not make allowance for the fact that there was no way from either smell or irritation that an employee could ascertain that he was being poisoned by mercury vapors. This evidence was not objected to. The citation includes the statement: "Neither of these respirators

are approved for the use in mercury vapor in air atmospheres above the permissible limit due to the poor warning properties of mercury vapor." It was therefore alleged that the respondent's employee was possibly exposed to mercury vapors due to the poor warning properties of mercury vapor. If the respirator was defective, in that it inadequately protected the employee, it could not be said that it was "suitable for the purpose intended." The respondent was put on notice by the citation that the suitability of the respirator was in question and that this was because of the lack of warning to an employee wearing such respirator in the event that the respirator might either be defective or improperly fitted.

The issue of suitability of the respirator was fully tried. As above stated, there was no objection to any of the testimony of the complainant with reference to the defects in the respirator.

The Review Commission has, on several occasions, held that in the event a respondent is on notice of the issue which is tried and if the issue is fully tried without objection, the pleadings should be amended even subsequent to the conclusion of the hearing so as to conform the pleadings to the proof. In view of this precedent, the citation is hereby amended so as to incorporate Standard 29 C.F.R. § 1910.134(a)(2). A violation of this section must therefore be found.

The respondent relied upon the above quoted statement found in the pamphlet of the manufacturer from whom the respirator was purchased. In the respirators which were supplied, the respondent, therefore, acted in utmost good faith. It does not appear that in view of the good faith actions of the respondent in this regard, a penalty above the minimum required should be assessed. This is a repeat violation, a previous violation having been found; but it occurred, not because of a defiance of the law, but because of a honest belief of the respondent that the respondent was in compliance.

A penalty in the amount of $1.00 is therefore assessed for this violation.

## FINDINGS OF FACT

1. The respondent purchased and acquired materials from beyond the State of Ohio.

2. An employee of respondent was, at times between October 23, 1980, and January 6, 1981, while working in the pump room and assembly area, exposed to a time weighted concentration of mercury vapor of 0.146 $mg/m^3$.

3. On or about October 23, 1980, said employee was exposed to mercury vapors as a result of mercury being spilled on and below a table near which the employee was working.

4. The respondent only cleaned up said area once every two weeks.

5. The methods of abatement proposed by complainant are feasible and would reduce the concentration of mercury vapor.

6. On or about October 23, 1980, said employee who worked in the pump room and assembly area while exposed to mercury vapor concentrations in excess of the eight-hour exposure limit, wore a Pulason air purifying respirator part of the time and a 3M 8707 respirator at other times.

7. Neither of these respirators was approved for use in mercury vapor in air atmospheres above the permissible limit but NIOSH did not test respirators and their adequacy in reference to mercury vapors.

8. Said respirators were negative respirators and inadequate protection to the employees because they did not adequately compensate for the fact that mercury vapors are not always detectible either from smell or irritation and the employees might not be aware of possible defective equipment or improper fit.

## CONCLUSIONS OF LAW

1. Respondent is engaged in a business affecting interstate commerce and is within the jurisdiction of the Occupational Safety and Health Act.

2. Respondent was at various times between October 23, 1980, and January 6, 1981, in violation of Standard 29 C.F.R. § 1910.1001(j)(2).

3. Respondent was, on or about said dates, in violation of Standard 29 C.F.R. § 1910.1000(b)(1).

4. Respondent was, on or about said dates, in violation of Standard 29 C.F.R. § 1910.1000(e).

5. Respondent was not, on or about said dates in violation of Standard 29 C.F.R. § 1910.134(b)(11).

6. Respondent was on said dates in violation of Standard 29 C.F.R. § 1910.134(b)(2).

## ORDER

The settlement agreement of the parties settling the alleged violations of Standard 29 C.F.R. § 1910.1001(j)(2) is approved.

In view of said settlement agreement, the penalty is reduced to $180 and the allegations in the citation in reference to said standard as well as the notification of proposed penalty as amended, are as to said standard affirmed.

Respondent was, on or about said dates, in violation of Standards 29 C.F.R. § 1910.1000(b)(1) and 29 C.F.R. § 1910.1000(e). Said standards shall be abated within 30 days of this decision becoming a final order. A penalty in the amount of $200 is assessed for said violations.

Respondent was not at anytime relevant to the cause in violation of Standard 29 C.F.R. § 1910.134(b)(11).

The citation and complaint are amended to incorporate an alleged violation of Standard 29 C.F.R. 1910.134(b)(2).

Respondent was on said dates in violation of Standard 29 C.F.R. § 1910.134(b)(2). Said violation shall be abated within 30 days of this decision becoming a final order. A penalty in the amount of $1.00 is assessed for this violation.

Dated this 10th day of December, 1981.

JOHN S. PATTON
Judge

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1515 Broadway, Room 3800
New York, New York 10036

## NOTICE OF DECISION

Secretary of Labor v. CERRITO ELECTRIC CONTRACTOR CORP.
OSHRC Docket No. 81-1227

1. Enclosed is a copy of my decision. It will be filed with the Commission on December 14, 1981, and will become the final order of the Commission on January 13, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is January 13, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Jerome C. DiTore
JEROME C. DITORE
JUDGE, OSHRC

Date: November 24, 1981

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>CERRITO ELECTRIC CONTRACTOR CORP.,<br><br>Respondent. | OSHRC DOCKET<br><br>NO. 81-1227 |

Appearances:

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for the Respondent

## DECISION AND ORDER

Ditore, J.

## PRELIMINARY STATEMENT

Respondent contested a citation for serious violations of 29 CFR §§ 1926.401(a)(1), 1926.401(c) and 1926.500(d)(1), a citation for repeat violations of 29 CFR §§ 1926.400(h)(1) and 1926.500(e)(1)(ii), and the total proposed penalty of $1,320.00. Specifically, Respondent is charged with the

failure to have proper grounding devices on an electric drill and two extension cords, and with the failure to have a stairway and an open-sided floor properly guarded. The case was heard on September 30, 1981, at New York, New York.

## I S S U E S

1. Whether the violations existed at Respondent's workplace on March 5 and March 10, 1981.

2. If the violations existed whether any employee was exposed to any hazards created by the violations.

3. If employees were exposed, whether Respondent was responsible for the violations.

4. If Respondent was responsible, whether the violations were serious.

5. If the violations were serious, whether the penalties proposed were proper.

## STATEMENT OF THE EVIDENCE

On March 5, 1981, Respondent, as the electrical subcontractor, commenced work with three employees, at a worksite at 41st Avenue, Flushing, New York. The site consisted of five or six three level multiple dwellings under construction.

One of the employees, Mr. Frederick Hueberger was Respondent's representative at the site (T. 6, 8, 9, 64, 67). The three employees were installing electrical wiring and boxes on the ground floor of building No. 136-85 (T. 9). Sometime after the lunch hour but before 2:30 p.m., Compliance Officer Henry Piencinski observed Mr. Hueberger and another employee using a portable electric drill to drill holes in a floor beam on the ground floor of the building (T. 8, 10, 12-13).

The electric plug attached to the end of the electrical cord connected to the drill, was missing its third or ground prong. This plug was connected to a junction box which in turn was connected to an extension cord. The plug on the extension cord was missing its third or ground prong. The extension cord plug was connected to another extension cord which in turn was connected to an electrical power source. The plug on the second extension cord was fitted with an adapter which transformed the plug from a three-prong to a two-prong plug. The adapter had a ground wire which was not connected to any grounding source (T. 6, 7, 8-9, 10, 12-13, 14, 18-24, 25-26, 27, 30, 31; Exhs. C-1, C-2, C-3, C-4).

Officer Piencinski also observed that the electric drill was being used without a ground fault circuit interrupter. The interrupter would have cut off the electric current to the electric drill if a short or other electrical defect occurred,

and would have provided safety protection to an employee even though the electric plugs on the line, were defective or ineffective (T. 51, 52, 54, 55-58). Officer Piencinski believed that the two defective plugs, the ineffective adapter and the lack of a ground fault circuit interrupter exposed an employee using the electric drill to a possible serious electric shock or burn (T. 15, 23, 24, 26, 51-52).

Mr. Hueberger stated to Officer Piencinski that he did not know the third prong was missing from the plug on the cord of the electric drill; that he did not have a ground fault circuit interrupter; and that the two extension cords were at the site and were set up by some other trade (T. 15, 31, 59-60). These electrical wiring violations existed only on March 5, 1981, and were abated (T. 16, 24, 31, 32-33, 60).

Officer Piencinski assessed a proposed penalty, after allowing credits for size and good faith, of $240.00 for the defective plug on the portable drill cord, $240.00 for the two extension cord violations, and $480.00 for the ground fault circuit interrupter violation which was deemed a repeat violation (T. 16, 17, 18, 33, 58-59; Exh. C-6).

Respondent's employees worked at the site on March 5 and 6, 1981, and did not return to work until March 10, 1981 (T. 76). On March 10, 1981, Officer Piencinski also returned to the site and observed two of Respondent's employees, Mr. Hueberger and

one other employee, installing electrical wiring and boxes on the third floor of building No. 136-85 (T. 10, 34). To reach the third floor worksite, the employees used a six foot wide stairwell, three feet of which was taken up by a stairway. The stairway has no handrail at its open side. At the top and to the left of stairway on the third floor, was an unguarded open-sided floor which was six feet long on one side and nine feet at another side. The two unguarded open sides and the unguarded stairway formed three sides of the stairwell area. The two employees had access to these unguarded areas in going to and from their work area on the third floor (T. 34, 35, 36, 37-39, 40, 42, 44-45, 46; Exh. C-5 shows one of Respondent's employees using stairway without handrail and a portion of unguarded open-sided floor). Officer Piencinski and Mr. Hueberger spoke to the general contractor about the conditions. The general contractor immediately abated the conditions at the stairway and at the open-side floor (T. 44, 51).

Officer Piencinski believed the unguarded open-sided floor and the lack of a handrail on the stairway were serious and exposed Respondent's employees to fall hazards of 4 1/2 to 8 feet (T. 42, 47). Officer Piencinski proposed a penalty after allowing credits for size and good faith, of $120.00 for the open-side floor violation, and $240.00 for the stairway

violation which was deemed a repeat violation (T. 42, 48, 50, 51; Exh. C-6).

Officer Piencinski spoke to Mr Robert Cerrito, Respondent's owner. Mr. Cerrito told Officer Piencinski that on March 5, 1981, he did not allow his employees to work on the third floor because the stairway and guarding had not been installed. If he had known on March 10, 1981, that the conditions had not changed he would have prevented his employees from working on the third floor of the building (T. 44, 47).

Mr. Robert Cerrito, Respondent's owner, testified that he did not dispute the observations made by Officer Piencinski. He stated that all equipment that leaves his office is in proper condition and properly grounded; that the two extension cords belonged to a plumber at the site; and that he supplied Mr. Hueberger with a ground fault circuit interrupter (T. 67, 68, 79). He further stated that on March 5, 1981, the first day his employees were at the jobsite, he informed the general contractor that his men would not work in areas where stairways and other guarding features were missing. On the night of March 5, 1981, he was informed by the general contractor that the stairways and barriers had been erected (T. 68-70, 71). He periodically gave his employees instructions not to work in areas where guarding barriers and stairways were lacking, or where there were hazardous conditions (T. 70, 77).

Mr. Cerrito's main concern at the hearing was the penalty which he considered excessive (T. 70, 80).

## O P I N I O N

The unrefuted evidence which Respondent does not dispute, establishes that the violations for which Respondent was cited, existed at its worksite on March 5 and 10, 1981 (T. 67, 79). Respondent's primary concern at the hearing was the proposed penalties which it considered to be excessive (T. 70-71, 80).

Two of the serious violations and one of the repeat violations relate to a portable electric drill and two extension cords which connected the drill with a source of electrical power. The plug on the electric drill cord and the plug on one of the extension cords were missing a third or ground prong. The other extension cord was fitted with an adapter plug which transformed the three-pronged plug of the extension cord to a two-prong plug. The adapter has a ground wire which was not attached to any grounding source. In addition, Respondent failed to use a ground fault circuit interrupter with the electric drill. The defective plugs, the ineffective adapter plug and the lack of a ground fault circuit interrupter exposed the two employees who used the electric drill on March 5, 1981, to electric shock or burn hazards. Respondent was assessed a total proposed penalty of $960.00 for these three violations.

These violations existed for a short time, from the end of the lunch break to 2:30 p.m., the end of the workday, on March 5, 1981, and were abated by March 6, 1981. Two of Respondent's employees, during the time period, used the electric drill. Under the circumstances of this case which includes a full consideration of the statutory factors of Section 17(j) of the Act, and a determination that the three violations stem from the same general condition, the violations are consolidated for purposes of assessing a penalty. The total proposed penalty of $960.00, for the three violations is reduced to one penalty of $250.00, to cover the three violations.

The one remaining serious violation and the one remaining repeat violation relate to a fall hazard from an unguarded open-sided floor and an unguarded stairway. Two of Respondent's employees on March 10, 1981, used the unguarded stairway and had access to the unguarded open-sided floor adjacent to the stairway, when going to, and from, their workplace on the third floor of one of the buildings under construction. The hazardous conditions were immediately abated by the general contractor. Respondent was assessed a total proposed penalty of $360.00 for these two violations. Based on the same rationale used above to calculate the single penalty for the electrical violations, and considering the statutory factors

of Section 17(j) of the Act, the total proposed penalty of $360.00, is excessive and is reduced to one penalty of $100.00 to cover both violations.

## FINDINGS OF FACT

The credible evidence and the record as a whole establishes preponderant proof of the following specific findings of fact.

1. Respondent is in the electrical contracting business and maintains a place of business at 85-45 Grand Avenue, Elmhurst, New York.

2. Respondent's business affects commerce.

3. On March 5 and March 10, 1981, Respondent, as a subcontractor, was performing electrical work, at a worksite located at 136-77 to 136-85, 41st Avenue, Flushing, New York.

4. The worksite consisted of five or six three-level multiple dwellings under construction.

5. On March 5, 1981, Respondent had three employees installing electrical wiring and boxes on the ground floor of building No. 136-85.

6. On March 5, 1981, two of Respondent's employees in building No. 136-85, used a portable electric drill in their work.

7. The third or ground prong on the plug of the electric drill was missing. The electric drill was connected to a junction box extension cord.

8. The third or ground prong of the plug of the junction box extension cord was missing.

9. The junction box extension cord was connected to another extension cord which in turn was plugged into a source of electrical power.

10. The plug of the second extension cord was fitted with an adapter which transformed the three-prong plug of the cord to a two-prong plug.

11. The adapter was fitted with a grounding wire which was not attached to any grounding source.

12. There was no approved ground fault circuit interrupter used in conjunction with the portable electric drill.

13. The two defective electric plugs, the ineffective adapter plug and the absence of a ground fault circuit interrupter caused Respondent's two employees to be exposed to electric shock or burn hazards.

14. Respondent was responsible for the hazardous electrical conditions that existed on March 5, 1981, at its workplace.

15. The electrical hazard to which Respondent's employees were exposed, is serious in that an employee who received an electric shock or burn because of the hazard, could suffer serious physical harm.

16. The hazardous conditions existed for a brief time on March 5, 1981, and were abated no later than the opening of the workday on March 6, 1981.

17. The two serious and one repeat violations all stem from one general condition and will be consolidated for the purposes of assessing a single penalty for the three violations.

18. On March 10, 1981, an open-sided floor on the third floor of another building at the worksite, and an adjacent stairway leading to the third floor, were unguarded.

19. Respondent had two employees performing electrical work on the third floor of this building.

20. The two employees used the unguarded stairway to reach their third floor workplace and had access to the unguarded open-sided floor adjacent to the stairway.

21. The two employees were subject to fall hazards of 4 1/2 to 8 feet when using the unguarded stairway to reach the third floor, and when walking by the unguarded open-sided floor to their workplace on the third floor.

22. Respondent, although he had reason to believe that proper guarding was erected at the third floor and at the stairway, failed to adequately instruct his employees not to use the hazardous area if proper guards were not installed.

23. The hazardous conditions at the open-sided floor and stairway were immediately corrected by the general contractor upon being informed of the conditions by the compliance officer and Respondent's representative.

24. Respondent is responsible for the two fall hazard violations.

## CONCLUSIONS OF LAW

1. Respondent, is and at all times material herein was, engaged in a business affecting commerce within the meaning of Section 3(5) of the Act (29 U.S.C. § 652(5)).

2. The Occupational Safety and Health Review Commission has jurisdiction over the subject matter and parties to this action.

3. On March 5, 1981, Respondent was in serious violation of 29 CFR §§ 1926.401(a)(1) and 1926.401(c), and in repeat violation of 29 CFR § 1926.400(h)(1).

4. Under the circumstances of this case, with due consideration of the statutory factors of Section 17(j) of the

Act, the total proposed penalty of $960.00 for the violations of 29 CFR § 1926.401(a)(1), 1926.401(c) and 1926.400(h)(1) is excessive, and a single penalty of $250.00 is assessed to cover the three violations.

5. On March 10, 1981, Respondent was in serious violation of 29 CFR § 1926.500(d)(1) and in repeat violation of 29 CFR 1926.500(e)(1)(ii).

6. Under the circumstances of this case, with due consideration of the statutory factors of Section 17(j) of the Act, the total proposed penalty of $360.00 for the violations of 29 CFR § 1926.500(d)(1) and 1926.500(e)(1)(ii) is excessive and is reduced to a single penalty of $100.00, to cover both violations.

## O R D E R

Due deliberation having been had on the whole record, it is hereby

ORDERED that the citation (No. 1) for serious violations of 29 CFR §§ 1926.401(a)(1), 1926.401(c) and 1926.500(d)(1), is affirmed, it is further

ORDERED that the citation (No. 2) for repeat violations of 29 CFR §§ 1926.400(h)(1) and 1926.500(e)(1)(ii), is affirmed, it is further

ORDERED that the total proposed penalty of $1,320.00 is reduced to $350.00.

Jerome C. DiTore

JEROME C. DITORE
JUDGE, OSHRC

Dated: December 14, 1981
New York, New York

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
SUITE 1718, PRUDENTIAL PLAZA
1050 SEVENTEENTH STREET
DENVER, COLORADO 80265
(303) 837-2281

## NOTICE OF DECISION

Secretary of Labor v. R. A. Hinton Construction, Inc.

OSHRC Docket No. 81-0552-S

1. Enclosed is a copy of my decision. It will be filed with the Commission on December 15, 1981, and will become the final order of the Commission on January 14, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

Chief Review Counsel
Occupational Safety and Health Review Commission
1825 K Street, N.W., Suite 601
Washington, D.C.. 20006

Any Petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is January 14, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

R. M. Child
Judge, OSHRC

Date: November 25, 1981

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>R. A. HINTON CONSTRUCTION, INC.,<br><br>Respondent. | OSHRC DOCKET NO. 81-0552-S |

Appearances:

Ronnie A. Howell, Esq., of Dallas, Texas for the Complainant,

R. A. Hinton of Tulsa, Oklahoma for the Respondent.

## DECISION AND ORDER

Child, R. M., Judge, OSHRC:

### Statement of the Case

This matter is before the Occupational Safety and Health Review Commission (the Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et seq. (the Act). Complainant seeks affirmance of two items of serious Citation No. 1, issued to respondent January 30, 1981 and of the proposed penalty in the sum of $280.00 for each of said items.

The citation resulted from inspection of a trenching operation for the laying of a sewer pipe at Talala, Oklahoma on January 27, 1981. Notice of Contest was timely filed, and upon motion of complainant, to which respondent raised no objection, the matter proceeded as simplified proceedings.

The matter came on for conference and hearing before the undersigned judge at Tulsa, Oklahoma on September 21, 1981. Notice of the conference/hearing was duly posted. (Tr. 5) There was no appearance by or on behalf of affected employees.

In the course of the conference it was established and agreed to by the parties:

1. Complainant moved to amend item 1 of the citation to delete therefrom reference to 29 C.F.R. 1926.652(b).

2. Complainant moved to amend item 2 of the citation to designate the violation there described as an other than serious violation to which no penalty should be assessed.

3. Respondent consented to said motions to amend and moved to withdraw its notice of contest to item 2 as so amended.

4. The parties are in agreement that the soil at the point of the alleged violation was hard or compact and therefore properly covered by 29 C.F.R. 1926.652(c).

5. Respondent is a corporation engaged in commerce as contemplated in the Occupational Safety and Health Act of 1970.

6. The inspection out of which this action arises was authorized and accomplished with the consent of the respondent.

The motions to amend the citation and to withdraw the notice of contest to item 2 were granted.

Jurisdiction of the respondent and of the subject matter are not issues in this proceeding.

Upon completion of the conference, hearing proceeded on the following:

Issues

1. Was the respondent in violation of the standard at 29 C.F.R. 1926.652(c)

by reason of the trench in question being improperly sloped?[1/]

2. If the respondent was in violation was said violation serious?

3. What, if any, penalty would be appropriate?

The parties have each filed post-hearing memorandum, raising no issues of law.

## The Evidence

William B. Hinkle, the compliance officer who made the inspection in question was called as the complainant's only witness. Mr. Hinkle observed and photographed two of respondent's employees in the trench in question. (Tr. 17, 21; Exhibit C-1)

Mr. Hinkle had a conversation with the respondent's foreman who told him that a trench box which was on the job was not being used at the point where the two men

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1/ A description of the alleged violation as amended and the standard involved:

### Citation

29 C.F.R. 1926.652(c); The side(s) of the trench(es) in hard or compact soil, including embankment(s), were not shored or otherwise supported when the trench was more than 5 feet in depth and more than 8 feet in length:

Two pipelayers were installing 8" clay tile pipe in an unshored and otherwise unprotected trench that was from 5'5" to 1'7" wide and from 7'8" to 8'4" deep and located at the intersection of Sequoyah and Maple in Talala, OK, exposing them to the hazard of being struck by soil in cave-in(s).

### Standard

§1926.652 Specific trenching requirements.

(c) Sides of trenches in hard or compact soil, including embankments, shall be shored or otherwise supported when the trench is more than 5 feet in depth and 8 feet Or more in length. In lieu of shoring, the sides of the trench above the 5-foot level may be sloped to preclude collapse, but shall not be steeper than a 1-foot rise to each 1/2-foot horizontal. When the outside diameter of pipe is greater than 6 feet, a bench of 4-foot minimum shall be provided at the toe of the sloped portion.

were observed to be working as shown in Exhibit C-1 because a waterpipe crossed the trench at that point which interferred with the use of the trench box. The foreman also claimed the trench to be adequately sloped in the area. (Tr. 19)

The depth of the trench to the point upon which the men shown in Exhibit C-1 are standing was measured by Mr. Hinkle to be 7 feet 8 inches below ground level. Below the surface upon which the men were standing was fill dirt covering an eight inch clay tile pipe. (Tr. 22, 45) Mr. Hinkle opined that the original depth of the trench before placing the pipe and the fill dirt was an estimated 8'6" or 8'8". (Tr. 23) The top of the water pipe which crossed the trench was two feet ten inches below ground level and at that point the trench was 5 feet 5 inches wide at ground level. (Tr. 25, 26, 47) Mr. Hinkle made no measurement of the width of the trench bottom but estimated it to be 4 to 4 1/2 feet wide. (Tr. 26, 35; Exhibit C-1)

Exhibits 2, 3 & 4 show the two workers standing in the manhole area at the north end of the allegedly offending trench. It is not alleged that any violation occurred in the manhole area. (Tr. 32) A trench box for protecting workers was observed and photographed about 100 yards from where the work was taking place. (Tr. 32; Exhibit C-5)

Assuming the bottom of the trench to be 4 1/2 feet wide and the trench to be 7 feet 8 inches deep, Mr. Hinkle testified the trench would have had to be 8 feet 1 inch wide at ground level in order to be in compliance. In his opinion death or serious injury would result to a worker in the trench being covered by "...a couple of tons of soil." (Tr. 39, 40)

Applying the usual concepts of establishing a base penalty giving due consideration to what he considered to be the gravity of the violation and discounting the base penalty for factors of respondent's size and good faith, Mr. Hinkle arrived at a figure of $280.00 which was the penalty proposed by the complainant for the

alleged violation. (Tr. 40-43) Mr. Hinkle did not measure the width of the bucket used to excavate this trench. (Tr. 59)

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Mr. R. A. Hinton testified that the excavating bucket was 26 inches wide. (Tr. 61) The trench was dug one bucket wide, or 26 inches. (Tr. 67) There was no reason to dig it wider. The wider the trench, the more gravel is required beneath the pipe. (Tr. 68) The trench box on the job is designed to fit in a trench dug by a 26 inch bucket and it too is a 26 inch trench box. (Tr. 70)

Assuming an 8 foot 4 inch deep trench 26 inches wide at the bottom, a trench sloped to conform to the minimum requirements of the standard in question would be about 5 feet 8 inches wide at the top according to Mr. Hinton's calculations. (Tr. 74) Seldom do his excavators vary the bottom width of the trench more than two inches wider than its intended 26 inch width. (Tr. 80)

## Discussion

It must be remembered that complainant has the burden of proving a violation by a preponderance of the evidence. The compliance officer made only one measurement of the width of this trench, presumably at its narrowest point, and found it to be 5 feet 5 inches wide at ground level. At that point the work was hampered by a 1-inch waterpipe that crossed the trench at right angles 2 feet 10 inches below ground level. It could hardly be said - and there was no evidence - that this point was typical of the trench width conditions throughout its total length.

Aside from a suggestion that a photograph indicated one side of the trench to be sloped to a lesser degree than the other at the area of the crossing waterpipe, there was no evidence of the actual degree of sloping - or lack of it - of either wall above a point 5 feet from the bottom of the trench. It has been said, and in some instances rightly so, that one picture is worth a thousand words. However, in the experience of this judge photographs can be grossly misleading when

relied upon to show angles, heights or distances.

Here the compliance officer made no measurement of the width of the trench other than at its surface level at the point of the crossing waterpipe. His opinion as to the width of the trench at the elbow level of the workmen shown in Exhibit C-1 (Tr. 36) and at the level of their feet or where the pipe is shown to be resting on gravel in the same photograph is rejected. The best that can be said for that testimony is that it establishes that the walls of the trench are vertical to a point approximately 5 feet above the floor of the trench and that any sloping had to occur above that point. Mr. Hinkle's unverified estimate made from ground level that the base width of the trench was 4 to 4 1/2 feet gives way to Mr. Hinton's testimony that the trench was dug with an excavator using a 26 inch wide bucket. Mr. Hinton's testimony that the trench was one bucket wide and that his operators rarely exceeded that width by as much as two inches is consistent with what is observed in the photo, Exhibit C-1 where a portion of an eight inch pipe emerges from the trench into the wider manhole area and two 16" cement blocks are also observed. Obviously the trench width could barely accomodate three pipes of that dimension lying side by side.

Next we consider the depth of the allegedly offending trench. It has been conceded that no violation is contended for the manhole area. There was no testimony as to whether workmen were allowed into the trench prior to gravel, pipe and some fill dirt being placed. There was no measurement made as to the trench depth other than to the level of the fill dirt upon which the workmen were observed and photographed. At that point the trench in which the men were working was measured to be 7 feet 8 inches deep. Mr. Hinkle estimated from the width of the clay pipe and an allowance for a gravel bed that the original trench depth at the point where the men are shown to be standing in Exhibit C-1, was "8 feet 4 inches" or

"8 1/2 feet" or "8 feet 8 inches." However, there was no evidence that workers were permitted in the trench in its original condition.

As is pointed out by complainant in his Post-Hearing Brief:

> "This case is admittedly one of inches, as the Court noted at the hearing..."
>
> * * *
>
> Complainant and respondent both agree that the appropriate standard requires the trench in question to be sloped one-half foot horizontally for each one foot vertical rise, above the five-foot depth level. Once the proper dimensions of the trench are established, a simple calculation will allow the Court to determine if compliance has been achieved, provided the trench is properly sloped on both sides.
>
> * * *
>
> "...Therefore, using simple calculations it can be determined that if the trench width was five feet, five inches at the surface, and seven feet, eight inches deep, then if the trench was wider than two feet, nine inches, a violation existed..."

In this contest of inches the complainant has failed to meet his burden of proof. There is no probative evidence that either side of the trench failed to have adequate slope above the five foot level. The trench base according to the more credible testimony was at minimum 26 inches and at maximum 28 inches wide. There is no evidence that the walls of the trench rose other than vertically to the five foot level. There is evidence that both walls sloped outward above the five foot level.

---

Having considered the pleadings, the stipulations entered upon the record, the testimony of the witnesses, the Exhibits received in evidence and the post-hearing submittals - and having observed the demeanor of the witnesses and having weighed the credibility thereof - there are hereby entered the following:

## Findings of Fact

1. The surface width of the trench in question was five feet five inches at its narrowest point.

2. The depth of the trench where exposure was alleged to have occurred was seven feet eight inches.

3. The trench walls rose vertically to a point approximately five feet above the trench floor at the point where exposure is alleged to have occurred.

4. The width of the trench at its floor and to a point approximately five feet above said floor was a minimum of 26 inches and, in places, a maximum of 28 inches.

5. The walls of the trench above the five foot level sloped not less than 1/2-foot horizontal for each 1-foot rise.

## Conclusions of Law

1. The Commission has jurisdiction of the parties and the subject matter of these proceedings.

2. The complainant failed to meet his burden of proof of a violation of the standard at 29 C.F.R. 1926.652(c).

3. Item 1 of serious Citation No. 1, issued to respondent January 30, 1981 should be vacated and no penalty assessed.

4. Item 2 of said Citation No. 1 should be affirmed as an other than serious violation of the Act and no penalty assessed.

**ORDER**

1. Item 1 of serious Citation No. 1, issued to respondent January 30, 1981 is VACATED as is the penalty proposed therefore.

2. Item 2 of said Citation No. 1 is AFFIRMED as an other than serious violation and no penalty is assessed.

R. M. Child
Judge, OSHRC

Dated: December 15, 1981

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

Secretary of Labor v. Wright Industries, Incorporated
OSHRC Docket No. 80-6015

1. Enclosed is a copy of my decision. It will be filed with the Commission on December 22, 1981, and will become the final order of the Commission on January 21, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is January 21, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

JOSEPH L. CHALK
Judge, OSHRC

Date: December 2, 1981

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 80-6015 |
| WRIGHT INDUSTRIES, INCORPORATED, | : | |
| Respondent. | : | |

APPEARANCES

Joseph T. Crawford, Esq.
For Complainant

David M. Neuhart, Esq.
For Respondent

DECISION AND ORDER

Chalk, Judge:

Following an inspection of an excavation dug by Respondent at Stanwix Street in Pittsburgh, Pennsylvania, during the evening hours of August 13, 1980, to expose a gas main for Equitable Gas Company, a citation for a serious violation was issued charging Respondent with failing to comply with 29 CFR 1926.651(v)[1/] in the following manner:

1/ This standard provides:

> In locations where oxygen deficiency or gaseous conditions are possible, air in the excavation shall be tested. Controls, as set forth in Subparts D and E of this part, shall be established to assure acceptable atmospheric conditions. When flammable gases are present, adequate ventilation shall be provided or sources of ignition shall be eliminated. Attended emergency rescue equipment such as breathing apparatus, a safety harness and line, basket stretcher, etc., shall be readily available where adverse atmospheric conditions may exist or develop in an excavation.

In locations where oxygen deficiency or gaseous conditions were possible, air in the excavation was not tested to assure acceptable atmospheric condition:

> (a) Ten foot wide by ten foot long by ten foot deep excavation for 24 inch gas line, on Stanwix Street at 4th Avenue; no tests were made, nor equipment available to perform the test prior to putting in shoring and cleaning around gas line.

Complainant proposed a penalty of $490 for this charge.

I

In a prehearing memorandum, Respondent asserted three reasons why the charge should not be affirmed - (1) lack of jurisdiction under the provisions of 29 U.S.C. 653 (b)(1),[2/] (2) vagueness of the standard, and (3) failure of Complainant to carry his burden of proof. As I agree with Respondent's third reason, the first two are mooted.

II

It was undisputed that Respondent contracted to dig and dug the excavation for Equitable, that the purpose was to expose a portion of a 24 inch pipe, otherwise referred to as a "main," through which natural gas, treated with an offensive smelling odorant called mercaptan, was transmitted for public consumption, that the excavation was 10 feet deep, wide and long, that Respondent did not use any man-made instrument to test the atmospheric conditions in the excavation and that Respondent had no such instrument at the worksite. It was also undisputed that the excavation was completely dug with a backhoe, except that after it was completed, but before Mr. Weyrauch arrived on the scene, an employee entered the excavation, apparently for a short period of time, to clean out the dirt by hand from under the

[2/] In asserting this argument, Respondent concedes that a majority of the Commission has already ruled adversely to its contention (Secretary v. Texas Eastern Transmission Corp., et al., 75 OSAHRC 88/D9, Docket Nos. 4091 & 4078).

exposed pipe, the bottom of the pipe being about 2 feet above the bottom of the excavation.

The foregoing facts prompted Mr. Weyrauch[3/] to recommend the issuance of the citation because he believed that "gas stays to the bottom of the trench [sic], its heavier than air;" thus, he thought there was the potential for gas to be in the bottom of the excavation (Tr. 48). He believed that the size of the excavation had no bearing on the possibility that an oxygen deficiency or a gaseous condition existed in the excavation because it was a confined space as that term was elsewhere defined in the construction standards, adding that it was his usual practice to require such testing under similar circumstances.

When questioned further about his practice, the following appears in the record:

> Q. Now, what I'm asking you is, how we determine how the Respondent was to determine whether or not an oxygen deficiency was possible and you've given me that standard, how were they to determine whether a gaseous condition was possible?
>
> A. They would test with a tester, equilizer.
>
> Q. But according to your violation Mr. Weyrauch, they only need to test if they detemine there was that possibility?
>
> A. And how would they determine that unless they test?
>
> Q. That's what I'm asking you sir.
>
> A. That's why we require the testing.
>
> Q. So in other words, you're saying that you don't require testing where it's possible, you require testing to determine if it's possible?
>
> A. We would require testing in any excavation that's considered could be a confined space for the potential of any gas leaks.

3/ Mr. Weyrauch's prior experience consisted of being a laborer in construction. Although he had attended various compliance officer courses when he first joined OSHA, he had no background in chemistry or chemical engineering, stating that he did not "profess to be an industrial hygienist" (Tr. 34).

Q. Does it say that in the regulation under which the citation was issued?

A. I can't speak for the — I didn't make the regulation.

Q. I'm not asking you if you made it, I'm asking you if it says it?

A. That's the way I interpret it, yes.

Q. Can you show me the language in the regulation that says anything about a confined space?

A. No, but in other portions of the construction standard[s], I can show you what a confined space is.

Q. But that's not the standard under which the citation was issued?

A. No sir.

* * *

JUDGE CHALK: Now, you have a copy of the standard there in front of you, do you not?

THE WITNESS: No I don't.

JUDGE CHALK: I'll just read what I'm interested in. The standard merely says, in the opening sentences, in locations where oxygen deficiency or gaseous conditions are possible.

THE WITNESS: Yes sir.

JUDGE CHALK: Air in the excavation shall be tested, and your interpretation is in that case, wherever there's a gas line, you have to test?

THE WITNESS: Yes sir.

JUDGE CHALK: It doesn't matter whether it's possible, it doesn't matter whether there's a leak or not?

THE WITNESS: No sir.

JUDGE CHALK: You're saying it's always possible?

THE WITNESS: Yes sir. (Tr. 34, 35, 36, 52, 53)

Finally, Mr. Weyrauch testified that he never tested for a leak in this excavation and in fact assumed that there was none, because "they didn't smell gas" (Tr. 33). He perceived the hazard to be the possibility of an employee being overcome or an explosion occurring, either one of which could have resulted in serious bodily harm.

Respondent's vice-president for operations for four years, Michael G. Robb, had previously worked for Equitable for 5 1/2 years, first as a "technical field man" and then as supervisor of distribution (Tr. 66). Both of these positions with Equitable placed him in charge of digging operations of this type on a daily basis. When he first joined Equitable, he was required to attend a six month's training course on the subject of natural gas,

> ...its physical properties, we had to review all of Equitable Gas' safety standards and OSHA's safety standards. (Tr. 66)

In his present position, Mr. Robb did

> ...all the bidding for Wright Industries and all their contract work and [he was] in charge of all our supervisors and operations, field supervisors and dispatching, safety, that's about it. (Tr. 65)

According to Mr. Robb, natural gas is not toxic, and it has lower and upper explosive limits and is lighter than air. If a leak of natural gas occurs below ground, a hole can be drilled into the ground and a 6-inch pipe can be installed that will "completely vent that area from the lower explosive limit" (Tr. 78, 79). When asked if it were necessary to blow air in through this pipe, he responded:

> They don't blow air in, they just put a standpipe on top of the hole and that six inch opening completely vents the whole hole.
>
> JUDGE CHALK: It rises through the pipe of its own accord?
>
> THE WITNESS: Right. (Tr. 79)

Moreover, according to Mr. Robb, Respondent's employees were routinely permitted to enter an excavation without prior testing even where there was a suspected leak, because it was "an open excavation, where you have natural venting" (Tr. 96).

Mr. Robb also said that because Equitable was a distributor of natural gas, the gas in its lines had to be odorized under regulations of the Office of Pipeline Safety, Department of Transportation, and that leaks were detected "Through the nose, you smell," even before the accumulation reached the lower explosive limit (Tr. 82). When asked if the smell could be detected during the digging process or not until "you've got the whole thing opened," he responded:

> No, at anytime, you could break the concrete and you could smell the gas and at that point they would stop, call the gas company, the gas company would determine whether we should dig it or they should dig it or they will stand by while we were digging it. (Tr. 83)

Finally, Mr. Robb testified that Equitable inspected the work of all contractors "all during the excavation and all during the work," and that he had instructed the foreman in this case and all other foremen in prior safety meetings that whenever the presence of gas was detected, all employees were to "stay out of" and "away from the hole"

> . . . because they don't have an explosive meter on their truck, to call Equitable Gas Company, call our dispatcher and our dispatcher calls Equitable Gas Company." (Tr. 52, 82, 84).

Dr. Charles Stefan Beroes received his doctorate degree as well as his bachelor's and master's degrees in chemical engineering and had taught chemical engineering at the University of Pittsburgh since 1950. In addition to his membership in numerous chemical engineering societies, he was a registered professional engineer in the State of Pennsylvania and did "quite a bit of consulting to corporations within the United States" (Tr. 110). He testified that natural gas

was primarily methane gas that had the density of approximately one-half that of air, thus rising "very rapidly" in air (Tr. 114). As this non-toxic gas was invisible and odorless, an odorant, mercaptan, a compound of sulpher hydrogen, that was readily detected by the sensor area of the human nose, was added. Actually, according to him, one part of mercaptan per million parts of natural gas was detectable by the human nose with "no trouble at all" (Tr. 115).

Having familiarized himself with the facts in this case, the allegations and the standard involved, Dr. Beroes was of the opinion that the existence of either an oxygen deficiency or gaseous condition in the excavation was scientifically impossible for several reasons:

> Probably the most important, single condition would be the light density, the low density of gas which would bring it immediately to rise up to the top of the excavation and out of the excavation, it would rise quite rapidly. The second condition would be that if we had as much as one part per million methane in the hole, it would be detectable by the human nostril and to have an oxygen deficiency we would need to have at least fifteen cubic feet in one thousand, that is fifteen volume percent oxygen, or a contaminate of methane to get the one and a half percent, one and a half percent of a thousand is fifteen, so fifteen cubic feet of methane.
>
> That is about a concentration of fifteen thousand times greater than that, that can be detected by the human nostril. So, it completely excludes the possibility of having an oxygen deficiency and then if there were any ambiant [sic] air movements, which are natural and this is on any one of our streets as well as Stanwix Street, the horizontal component of that air movement would sweep over the excavation and sweep it free of a lighter than air gas very rapidly with no chance of the gas settling, any air movement diluting it and sweeping it and its own, I'm just summarizing, its own light density causing it to rise rapidly. (Tr. 119, 120)

Moreover, because of "the keenness of the human nostril in detecting mercaptan, the presence of gas would also be very evident to anyone who was in the hole, that is in the excavation as well" (Tr. 122). It would also be detectable by anyone standing at the top of the excavation, although if the wind were blowing, it would

be more detectable on the downward side than on the other side. When asked if it were possible to have no ambient air movements, he responded:

> It's normal to have it, even in this [courtroom], you have quite a bit of ambient air movement because of strata, we're exhaling warmer air than we're inhaling and so on, but when we're talking about a gas that's only one half as dense as air, it's going to rise rather rapidly and cause movement. (Tr. 134)

After stating that the human nose could detect one cubic inch of the odorized natural gas in a "million cubic inches of area," Dr. Beroes said:

> Yes, and even more sensitive to that, the one cubic inch totally disbursed in the one million cubic inches and if you took one cubic inch of that gas, there would only be one molecule to a million molecules of air and the human nose, being the most sensitive of all instruments, we cannot construct instruments more sensitive, because it will actually detect parts per billion instead of parts per million, but it will pick that up. (Tr. 115)

Finally, Dr. Beroes testified that his testimony would be exactly the same if he were to assume that there was a gas leak some 1,500 feet away and that the gas, unvented, found its way into the excavation dug by Respondent.[4/]

III

In his posthearing brief, Complainant argues that the Commission has jurisdiction over the proceedings, and that he has sustained his burden of proving that Respondent was in serious violation of the Act.

In its posthearing brief, Respondent repeats its three arguments advanced in its prehearing memorandum in support of its claim that the charge must be vacated. In addition, it takes sharp issue, as it did at the hearing, with Mr. Weyrauch's interpretation of 29 CFR 1926.651(v) and his application of the term "confined space" to the charge.

---

4/ Counsel for Complainant questioned Dr. Beroes on this subject apparently because Mr. Robb testified that there was such a leak discovered by Equitable in one of its lines. Although the potentiality of this issue is of no consequence in light of Dr. Beroe's statement that his testimony would be the same without regard to the source of a natural gas leak, I nevertheless read Mr. Robb's testimony as stating that Equitable vented this leak by drilling "bar holes" (Tr. 76).

I agree that Mr. Weyrauch's interpretation of 29 CFR 1926.651(v) at the hearing was confusing, because he repeatedly said that the standard required Respondent to test in order to determine the possibility whether either of the two specified conditions existed in the excavation, quite the opposite of what the standard requires. However, as this excavation was dug to expose a pipeline that transmitted natural gas, he may have been inartfully expressing the opinion that the mere presence in an excavation of such a pipeline itself created the possibility that triggered the requirement for testing. In either case, the posture of the evidence in this case is such that I need not choose sides on this issue.

For the same reason, I need not assess his application of the term "confined space" to the charge for prejudice, although I am satisfied that under the facts of this case, it was improper for him to do so.

The term "confined space" itself is not mentioned anywhere in 29 CFR 1926.651 and the only definition I am aware of is that contained in 29 CFR 1926.21 entitled "SAFETY TRAINING AND EDUCATION." That standard enjoins employers to instruct their employees in the recognition and avoidance of hazards incidental to their workplaces.

As Respondent was not charged with failing to instruct its employees, and the definition itself limits its application solely to that standard (29 CFR 1926.21(b)(6)(ii)), it is inapplicable to this case. However, even were I to conclude otherwise, I doubt that the definition is broad enough to cover the excavation in this case (see Secretary v. Pittsburgh-Des Moines Steel Co., et al., 76 OSAHRC 120/D1, Docket Nos. 7290, 7291, 7301).

As I view the record evidence, Complainant's entire case rested on Mr. Weyrauch's misconception of the density of natural gas in relation to the density of air. Of course, Respondent's two witnesses, both knowledgeable in the use and

properties of natural gas, albeit deriving their expertise from entirely different sources, testified that natural gas is lighter than air, with Dr. Beroes adding that because it was about one-half the density of air, it rises "very" or "quite" rapidly. I accept the opinions of these two witnesses over that of Mr. Weyrauch.[5/]

Although this property of methane, alone, persuasively suggests that neither an oxygen deficiency nor a gaseous condition was possible in the excavation, a conclusion actually expressed by Dr. Beroes, I shall not rest my decision on that theory. Instead, I will briefly pursue an alternate route through the evidence, including of course the gas' natural venting property, in reaching my conclusion that Complainant's proof is totally deficient to sustain his charge.

The natural gas in this case, as required by a regulation of another Federal agency, was treated with mercaptan, an odorant described by Dr. Beroes as offensive or "smelly," as natural gas itself is odorless. Thus, given the venting property of natural gas, its treatment with the offensive smelling mercaptan, the size of the excavation and its location outdoors, and Dr. Beroes' testimony that air currents, sometimes seemingly nonexistent, exist even in occupied, closed rooms, I conclude that there was no possibility that any natural gas having its source in the excavation could have gone undetected through the sense of smell by Respondent's employees digging the excavation, long before any employee would have had occasion to enter it. Therefore, under the facts in this case, Respondent was not obligated to conduct the test required by the standard because the conditions specified in the standard could not possibly have existed in the excavation. My analysis of the evidence, however, does not end at this point.

Although the standard requires a test under the conditions it specifies, it does not identify any particular type of test to be performed, nor does it direct

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5/ Webster's International Dictionary defines methane as "a colorless odorless flammable gaseous saturated hydrocarbon $CH_4$ that is lighter than air." (emphasis added)

employers to any other standard for that information. Therefore, it clearly allows an employer to use any test of his choice, so long as it is one that serves to accomplish the objective of the standard.

Dr. Beroes testified that the human nose was the most efficacious way of testing for the presence of methane treated with mercaptan because man-made instruments could not be designed with such a degree of sensitivity. Therefore, I conclude that Respondent actually complied with the testing requirement of the standard merely by placing employees at the worksite to dig the excavation. The record attests to the fact that none of them smelled mercaptan treated methane during the entire operation. Mr. Weyrauch also did not detect such an odor during the time he was conducting the inspection.

The charge will be vacated.

IV

Having reviewed the briefs of the parties, I reach the findings of fact and conclusions of law that follow.

FINDINGS OF FACT

1. Natural gas, or methane, is about one-half as heavy as air and thus rises rapidly in air.

2. As natural gas is odorless, the natural gas involved in this case was treated with an odorant called mercaptan, an offensive smelling agent to which the human nose is extremely sensitive.

3. The human nose will detect the presence of mercaptan treated natural gas more readily than man-made instruments designed for that purpose.

4. At the time and place alleged, Respondent dug an excavation 10 feet in width, length and depth to expose a 24 inch pipe used by Equitable Gas Company to transmit mercaptan treated natural gas for public consumption.

5. Because of the natural venting property of natural gas and the size of the excavation, there was no possibility of the existence of an oxygen deficiency or a gaseous condition in the excavation.

6. If there had been a leak of mercaptan treated natural gas in the excavation, Respondent's employees digging the excavation or otherwise standing around the top of the excavation would have smelled it before any employee had occasion to enter the excavation.

7. Respondent's employees detected no odor of natural gas emanating from the excavation.

8. There was evidence that there was a natural gas leak in the excavation.

## CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the proceedings.

2. Under the circumstances of this case, testing by the use of the human nose for the presence of mercaptan treated natural gas emanating from the excavation constituted compliance with the testing requirement of 29 CFR 1926.651(v).

3. Respondent did not violate 29 U.S.C. 654(a)(2) by not complying with 29 CFR 1926.651(v).

V

Citation number 1 for serious violation is vacated.

So ORDERED.

JOSEPH L. CHALK
Judge, OSHRC

Dated: December 22, 1981
Hyattsville, Maryland

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

January 25, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

General Motors Corporation
Chevrolet Motor Division

OSHRC
DOCKET NO. 76-5344

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

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Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | |
| GENERAL MOTORS CORPORATION, CHEVROLET MOTOR DIVISION, | : | OSHRC Docket No. 76-5344 |
| Respondent, | : | |
| UNITED AUTOMOBILE, AEROSPACE, AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, | : | |
| Authorized Employee Representative. | : | |

DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge George W. Otto is before the Commission for review pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Judge Otto affirmed three nonserious items alleging that General Motors Corporation ("GMC") violated several occupational safety and health standards for general industry. In his decision, the judge declined to consider certain affirmative defenses which GMC raised at the hearing. For the following reasons, we hold that the defenses should have been considered and, having considered them now, we affirm two of the three items as nonserious violations and the remaining item as a de minimis violation. We also deny a motion filed by GMC before

the judge's decision was filed with the Commission in which GMC asserts that the decision must be vacated because of lack of subject matter jurisdiction.

I

GMC asserts in its motion that the judge and the Commission were deprived of subject matter jurisdiction over this case when, while it was pending before Judge Otto, the Secretary of Labor ("the Secretary") gave "final" approval to the occupational safety and health plan implemented by the State of Michigan. GMC relies on section 18 of the Act, 29 U.S.C. § 667.

On October 28, 1976, an Occupational Safety and Health Administration ("OSHA") compliance officer inspected GMC's Warren, Michigan plant. On November 17, 1976, OSHA issued to GMC a nonserious citation, three items of which are at issue in this case. On December 9, 1976, GMC filed a notice of contest which, pursuant to section 10(c) of the Act, 29 U.S.C. § 659(c), OSHA forwarded to the Commission so that a hearing could be held.

When these events occurred, Michigan was in the process of developing and implementing a state occupational safety and health plan pursuant to section 18 of the Act. Section 18 provides that any state may submit to the Secretary a state plan for the development and enforcement of occupational safety and health standards covering issues on which OSHA has developed standards. Section 18(b), 29 U.S.C. § 667(b). The Secretary must approve the plan if it meets certain criteria stated in section 18(c), 29 U.S.C. § 667(c). Michigan had submitted such a plan, which the Secretary approved under section 18(c). See 38 Fed. Reg. 27388 (1973).

After the Secretary approves a plan under section 18(c), he has discretion to continue to exercise his own enforcement authority under the Act in the state. Section 18(e), 29 U.S.C. § 667(e). However, after at least three years of discretionary enforcement, the Secretary may determine "that the criteria set forth in subsection (c) are being applied" and, after making this determination, the Secretary's enforcement authority in the state is substantially circumscribed:

> Upon making the determination referred to in the preceding sentence, the provisions of section 5(a)(2), 8 (except for the purpose of carrying out subsection (f) of this section), 9, 10, 13, and 17, and standards promulgated under section 6 of the Act, shall not apply with respect to any occupational safety or health issues covered under the plan, but the Secretary may retain jurisdiction under the above provisions in any proceeding commenced under section 9 or 10 before the date of determination.

Section 18(e), 29 U.S.C. § 667(e). Basically, the Secretary may not initiate enforcement proceedings concerning issues covered by the state plan but he may "retain jurisdiction" in enforcement proceedings initiated before he made the determination to which this part of section 18(e) refers.

GMC contends that, while this case was pending before Judge Otto, the Secretary made the "final" determination with respect to the Michigan state plan and thereby triggered the jurisdictional limitation in section 18(e). GMC also contends that, because section 18(e) mentions only that "the Secretary may retain jurisdiction," it is plain that neither the Commission nor an administrative law judge retains jurisdiction. Therefore, GMC asserts that the judge's decision must be vacated.

As the "final" determination, GMC refers to the Secretary's announcement on March 22, 1977, which stated that the Michigan plan became "operational" as of January 6, 1977,[1/] and that, therefore, OSHA and Michigan entered into an agreement limiting federal enforcement in the state. The announcement also stated that, in accordance with the agreement, 29 C.F.R. § 1952.262 was published concerning the level of federal enforcement under the Michigan plan.

Section 1952.262 provides that OSHA will not initiate enforcement proceedings concerning issues covered by standards in 29 C.F.R. Part 1910 and Part 1926 except to enforce subsequently promulgated OSHA standards until Michigan adopts "equivalent" standards. Section 1952.262 also provides for OSHA investigations and inspections to evaluate the plan under sections 18(e) and (f) of the Act, 29 U.S.C. §§ 667(e) and (f), which provide for continuing evaluation of the state's implementation of its plan.

The Secretary's announcement and section 1952.262 do not at any point state that the Secretary has made the "final" section 18(e) determination which limits his authority as a matter of law. Additionally, the determination of operational status is not the "final" section 18(e) determination. The "Background" statement in the announcement states:

> Part 1954 of Title 29, Code of Federal Regulations, sets out procedures under section 18 of the Occupaional Safety and Health Act of 1970 ( 29 U.S.C. 667) (hereinafter referred to as the Act) for the evaluation and monitoring of State plans which have been approved under section 18(c) of the Act and 29

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1/ GMC also refers to a determination effective December 6, 1977. However, GMC does not show where this was published and we have not found it in the Federal Register. We accordingly conclude that only the March 22, 1977 determination is in question.

> CFR Part 1902. Section 1954.3 of this chapter provides guidelines and procedures for the exercise of discretionary concurrent Federal enforcement authority under section 18(e) of the Act with regard to Federal standards in issues covered under an approved State plan. In accordance with § 1954.3(b) of this chapter, Federal enforcement authority will not be exercised as to occupational safety and health issues covered under a State plan where a State is operational.

42 Fed. Reg. 15411 (emphasis added). Because section 1954.3 concerns the exercise of discretionary concurrent OSHA enforcement authority while a plan is being evaluated and monitored under section 18(e) subsequent to section 18(c) approval, the operational status accorded pursuant to section 1954.3(b) is no more than a step in development of the final state plan. See AFL-CIO v. Marshall, 570 F.2d 1030 (D.C. Cir. 1978). The status is not a determination that the plan has the "final" approval of the Secretary. See 29 C.F.R. § 1954.3.

Moreover, Michigan and OSHA entered into an agreement to limit OSHA's exercise of its discretionary enforcement authority and OSHA agreed not to initiate certain enforcement activity. OSHA continued to have discretionary enforcement authority and this determination of "operational status" did not limit OSHA authority as a matter of law under section 18(e). See General Motors Corp., Central Foundry Division, 80 OSAHRC 42/A2, 8 BNA OSHC 1298, 1980 CCH OSHD ¶ 24,452 (No. 78-2696, 1980). In addition, in section 1952.262, OSHA stated that it may recommend resumption of its enforcement authority "under section 18(e)" to assure occupational safety and health protection. Accordingly, because the Secretary had not made a "final" section 18(e) determination respecting the Michigan plan, GMC's basis for contending that we have been divested of jurisdiction is based on a misconception of the status of the Michigan plan.

However, even if the Secretary had given "final" approval to that plan, we would still conclude that we retain jurisdiction over this case. Because section 18(e)'s reference to the Secretary's retention of jurisdiction concerns proceedings commenced under sections 9 or 10, the discretion given to the Secretary by section 18(e) to "retain jurisdiction" can only mean that the Secretary has the option of continuing with the proceedings in any case commenced under sections 9 or 10 before "final" approval was given to a state plan. If the Secretary decides to continue prosecuting such a case, the Commission must retain jurisdiction, for otherwise the Secretary would have no forum in which the case could proceed. Accordingly, we would deny GMC's motion even if the Secretary had given "final" approval to the Michigan state plan.[2/]

II

In its answer, GMC denied the Secretary's alleged violations of crane inspection, housekeeping, and electrical standards (the three nonserious items at issue in this case) and pleaded, as the only "Affirmative Defense," that the Secretary's complaint failed to state a claim upon which relief could be granted. At the hearing, GMC's attorney stated, however, that GMC would rely on affirmative defenses that compliance with the housekeeping standard was impossible, that the electrical standards are vague, and that compliance with them would create a greater hazard. The Secretary's attorney moved to strike these defenses.

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2/ GMC argues that it would be inequitable to subject it to two sets of standards, federal and state, which could contain "inconsistent obligations." However, GMC has not shown any conflict between state and federal requirements relevant to the alleged violations in this case. Accordingly, we need not address this potential problem of the concurrent authority contemplated by section 18(e).

He argued that GMC waived them in its answer to the complaint and claimed prejudice because further discovery would be needed to meet them.

Judge Otto reserved ruling on the Secretary's motion. During the hearing, evidence was presented on the defenses without objection by the Secretary. However, at the close of the hearing, the Secretary's attorney reiterated the Secretary's objections and asked for a continuance if GMC's defenses were allowed.

In his decision, Judge Otto disallowed GMC's impossibility and greater hazard defenses on the basis that they were raised too late in the proceedings. He reasoned that the Secretary is entitled to notice of affirmative defenses either in the answer or, at the latest, during a prehearing conference. However, Judge Otto additionally stated, "The stated affirmative defenses, if timely, would have failed to negate the . . . violation items. . . ." He also discussed GMC's vagueness defense on its merits and concluded that the electrical standards are not vague.

GMC argues on review that general notice of affirmative defenses was given in GMC's answer, which included the plea of failure to state a claim upon which relief could be granted. GMC asserts that the Secretary could have used discovery to learn the specific nature of the affirmative defenses. In any event, GMC asserts, the judge should have granted a continuance rather than striking the defenses. The Secretary argues that affirmative defenses must be specifically pleaded in the answer and that the plea of failure to state a claim did not give notice of GMC's affirmative defenses. However, the Secretary does not continue to claim prejudice.

Federal Rule of Civil Procedure 8(c)[3/] requires a defendant to affirmatively plead in its answer any matter that is an affirmative defense under applicable law. See United States v. Demmon, 72 F.Supp. 336 (D. Montana, 1947); see generally 5 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE § 1271. By the time of the inspection in this case, the affirmative defenses of vagueness of a standard, impossibility of compliance, and greater hazard had been recognized by the Commission. See Brady-Hamilton Stevedore Co., 75 OSAHRC 5/D9, 3 BNA OSHC 1925, 1975-76 CCH OSHD ¶ 20,342 (No. 2265, 1976) (vagueness as a defense); River Terminal Railway Co., 75 OSAHRC 13/A2, 3 BNA OSHC 1808, 1975-76 CCH OSHD ¶ 20,215 (No. 4419, 1975) (an employer's claim of vagueness must be raised sufficiently before the hearing to allow development of a record); Garrison & Associates, Inc., 75 OSAHRC 51/D5, 3 BNA OSHC 1110, 1974-75 CCH OSHD ¶ 19,550 (No. 4235, 1975) (lead and concurring opinions), and cases cited therein (impossibility as an affirmative defense); Lee Way Motor Freight, Inc., 75 OSAHRC 20/E12, 3 BNA OSHC 1843, 1975-76 CCH OSHD ¶ 20,250 (No. 7674, 1975), and cases cited therein (greater hazard as an affirmative defense). Therefore, GMC was required to affirmatively plead these defenses.

GMC's reliance on its plea of failure to state a claim for relief is misplaced. This plea only challenges the sufficiency of the Secretary's complaint alleging the factual and legal basis of his claim. It does not raise any affirmative defenses except if the complaint alleges

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3/ Unless the Commission adopts a different rule, its proceedings are governed by the Federal Rules of Civil Procedure ("Federal Rules"). Section 12(g), 29 U.S.C. § 661(f).

In pertinent part, Federal Rule 8(c) provides, "In pleading to a preceeding pleading, a party shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense."

the facts of a defense along with the claim. See Pointer v. American Oil Co., 295 F.Supp. 573 (S.D. Indiana, 1969); see generally 5 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1355, 1356, 1357 along with § 1202 on Federal Rule 8(a). Accordingly, GMC's plea in its answer did not give notice of affirmative defenses.

Although GMC did not raise the defenses until the hearing, the answer can be amended to include them so long as the opposing party is not prejudiced. See Fed. R. Civ. P. 15(b); Texland Drilling Corp., 80 OSAHRC 106/C13, 9 BNA OSHC 1023, 1980 CCH OSHD ¶ 24,954 (No. 76-5307, 1980); Bill C. Carroll Co., 79 OSAHRC 47/C13, 7 BNA OSHC 1806, 1979 CCH OSHD ¶ 23,940 (No. 76-2748, 1979); see generally 5 WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE § 1278. In this case, the affirmative defenses were raised at the outset of the hearing and, because the judge reserved ruling on the Secretary's motion to strike, these issues were tried. Furthermore, the record reflects that at an informal conference between counsel prior to the hearing GMC advised the Secretary of its intention to raise certain affirmative defenses. As a result, the Secretary had notice that the defenses might be allowed and had an opportunity to explore the defenses with all witnesses. Moreover, although the Secretary claimed prejudice in his argument to the judge, there has been no showing of actual prejudice and the Secretary does not argue prejudice on review. Accordingly, we amend the answer to add the defenses and shall consider the merits of the defenses.

III

Judge Otto affirmed item 1 of the nonserious citation, in which the Secretary alleged that "[f]requent inspections of the cranes and lifting equipment [were] not performed and recorded as required" by 29 C.F.R.

§ 1910.179(j)(2).[4/] Judge Otto found that GMC's crane records were three or four months behind and that during three months no crane inspections

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4/ The standard provides:

§ 1910.179 Overhead and gantry cranes.

* * *

(j) Inspection —

* * *

(2) Frequent inspection. The following items shall be inspected for defects at intervals as defined in paragraph (j)(1)(ii) of this section [which states that frequent inspection means inspection at daily to monthly intervals] or as specifically indicated, including observation during operation for any defects which might appear between regular inspections. All deficiencies such as listed shall be carefully examined and determination made as to whether they constitute a safety hazard:

(i) All functional operating mechanisms for maladjustment interfering with proper operation. Daily.

(ii) Deterioration or leaking in lines, tanks, valves, drain pumps, and other parts of air or hydraulic systems. Daily.

(iii) Hooks with deformation or cracks. Visual inspection daily; monthly inspection with signed reports. For hooks with cracks or having more than 15 percent in excess of normal throat opening or more than 10° twist from the plane of the unbent hook refer to paragraph (1)(3)(iii)(a) of this section.

(iv) Hoist chains, including end connections, for excessive wear, twist, distorted links interfering with proper function, or stretch beyond manufacturer's recommendations. Visual inspection daily; monthly inspection with signed report.

(v) [Reserved]

(vi) All functional operating mechanisms for excessive wear of components.

(vii) Rope reeving for noncompliance with manufacturer's recommendations.

were made other than daily visual inspections of upper limit switches. On review, GMC contends that these findings have insufficient support and do not show a violation.

We have reviewed the record in light of GMC's arguments, which are basically the same as made to Judge Otto. We conclude that the factual findings are supported by a preponderance of the evidence, and that the item was properly affirmed. Accordingly, we affirm the judge's decision on this item. See Gulf Oil Co., 77 OSAHRC 216/B10, 6 BNA OSHC 1240, 1978 CCH OSHD ¶ 22,737 (No. 14281, 1977).

IV

Judge Otto affirmed item 10, which alleged that GMC failed to comply with 29 C.F.R. § 1910.22(a)(1)[5/] because the floor of the "hy-bay basement" was "covered" with "metal scrap and deep puddles of oil." The hy-bay basement is a 1000-foot by 150-foot area through which a main scrap conveyor and several feed conveyors carry metal scrap to the outside from the ground level plant floor, where metal forming presses are located. Service employees, including millwrights, electricians, pipefitters, and machine repairmen, generally pass through or work in the basement on a daily basis. When the conveyors are operating properly, they are adequate to convey most of the scrap out of the basement. However, GMC additionally employs clean-up crews, consisting of four or five

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5/ The standard provides:

§ 1910.22 General requirements.

* * *

(a) Housekeeping. (1) All places of employment, passageways, storerooms, and service rooms shall be kept clean and orderly and in a sanitary condition.

employees per shift for three shifts, to clean up any metal scrap that falls from the conveyors onto the basement floor and to hose away accumulations of oil. During a 24-hour period, the three clean-up crews can generally clean the entire basement.

About once a month, one or more conveyors may break down. Because the presses on the ground floor continue to operate, metal scrap falls from the conveyors onto the basement floor in more than usual amounts. Additional employees may be assigned as needed to assist the clean-up crews to stack the scrap in piles and rows. Also, the clean-up crews will clean any area of the basement in which an employee has to work if the employee makes a request.

The judge found that there was metal scrap and oil on the hy-bay basement floor at the time of the inspection and that service employees had access to the poor housekeeping conditions. He also found that larger clean-up crews could have reduced the scrap and oil build-up.

On review, GMC argues that no employees were exposed except the clean-up crews and that the floor was not unreasonably unclean, disorderly or unsanitary. We conclude that the judge's factual findings on employee access to noncomplying conditions and on the possibility of more effective clean-up are supported by a preponderance of the evidence. Because GMC did not show that compliance would prevent performance of required work or that compliance would be functionally impossible, GMC has not established an impossibility defense. See Frank Swidzinski Co., 81 OSAHRC 4/E14, 9 BNA OSHC 1230, 1981 CCH OSHD ¶ 25,129 (No. 76-4627, 1981); cf. Marinas of the Future, Inc., 77 OSAHRC 201/B1, 6 BNA OSHC 1120, 1977-78 CCH OSHD ¶ 22,406 (No. 13507, 1977) (section 1910.22(a)(1) citation vacated because the record established that the

materials and tools on the floor at the time of the inspection were not in excess of those required to accomplish the work being performed). However, because the safety and health of employees was not substantially diminished, we conclude that the violation was de minimis. See General Motors Corp., Rochester Products Division, 81 OSAHRC 30/E13, 9 BNA OSHC 1575, 1981 CCH OSHD ¶ 25,279 (No. 78-2894, 1981), and cases cited therein.[6/] Accordingly, we assess no penalty and do not require additional abatement measures.

V

Judge Otto affirmed item 13, which alleged that, because the "electrical disconnects controlling the conveyors throughout the plant had overcurrent devices located over 12 feet in the air," the overcurrent devices were not "readily accessible" as required by the National Electrical

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6/ Under Commission precedent a violation is properly classified as de minimis only where the relationship of the violation to employee safety and health is so remote as to be negligible. General Motors Corp., Rochester Products Division, supra (lead and dissenting opinions); Continental Oil Co., 79 OSAHRC 42/C3, 7 BNA OSHC 1432, 1979 CCH OSHD ¶ 23,626 (No. 13750, 1979). Commissioner Cottine concludes that, because this violation has a direct and immediate relationship to employee safety and health, it is nonserious rather than de minimis. See Gallo Mechanical Contractors, Inc., 80 OSAHRC 122/A2, 9 BNA OSHC 1178, 1981 CCH OSHD ¶ 25,008 (No. 76-4371, 1980); Southwestern Electric Power Co., 80 OSAHRC 81/C7, 8 BNA OSHC 1974, 1980 CCH OSHD ¶ 74,732 (No. 77-3890, 1980) (dissenting opinion).

In Commissioner Cottine's view, the Secretary has established the existence of conditions presenting fall hazards from either tripping or slipping. GMC has not shown that these conditions have been rendered insignificant by efforts made to control accumulations of scrap and oil. In addition, employees are exposed to the hazards on a regular basis and the injury that could result from the fall hazards associated with tripping or slipping cannot be viewed as negligible. A fall against structural supports located in the basement, onto metal scrap littering the floor, or even onto the concrete floor itself could result in injury. See Gallo Mechanical Contractors, Inc., supra.

Code ("NEC"). The Secretary alleged that GMC violated section 240-16[7/] of the NEC and 29 C.F.R. § 1910.309(a).[8/] The Secretary also alleged

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7/ The cited provision of the NEC provides:

Article 240 — Overcurrent Protection

* * *

240-16. Location in Premises. Overcurrent devices shall be located where they will be:

(a) Readily accessible, except as provided in sections 230-91 and 230-92 for service equipment and section 364-11 for busways.

(b) Not exposed to physical damage.

(c) Not in the vicinity of easily ignitible material.

(d) Occupant shall have Ready Access. Each occupant shall have ready access to all overcurrent devices protecting the conductors supplying his occupancy.

Exception: In a multiple-occupancy building where electric service and electrical maintenance are provided by the building management and where these are under continuous building management supervision, the service overcurrent devices and feeder overcurrent devices supplying more than one occupancy may be accessible to authorized management personnel only.

8/ The standard provides, in pertinent part:

§ 1910.309 National Electrical Code.

(a) The requirements contained in the following articles and sections of the National Electrical Code, NFPA 70-1971; ANSI C1-1971 (Rev. of C1-1968) shall apply to all electrical installations and utilization equipment:

* * *

Sections

* * *

240-16(a), (b), (c), and (d). Location in Premises (for Overcurrent Protection Devices).

that GMC violated section 430-107[9/] of the NEC and 29 C.F.R. § 1910.309(b).[10/] GMC contends that the judge's decision was in error in several respects, which we consider in turn.

A

Sections 1910.309(a) and (b) are in "Subpart S — Electrical" of Part 1910. The first provisions in this subpart, 29 C.F.R. §§ 1910.308(a) and (b), state the following:

> (a) General. Section 1910.309 adopts as a national consensus standard the National Electrical Code NFPA 70-1971; ANSI C1-1971 (Rev. of C1-1968), which is incorporated by reference in this subpart.
>
> (b) Purpose of the National Electrical Code. (1) The purpose of the National Electrical Code is the practical safeguarding of any persons and of buildings and their contents from hazards arising from

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9/ The cited provision of the NEC provides:

> Article 430 — Motors, Motor Circuits and Controllers
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> * * *
>
> H. Disconnecting Means
>
> * * *
>
> 430-107. Readily Accessible. One of the disconnecting means shall be readily accessible.

10/ The standard provides:

> § 1910.309 National Electrical Code.
>
> * * *
>
> (b) Every new electrical installation and all new utilization equipment installed after March 15, 1972, and every replacement, modification, or repair or rehabilitation, after March 15, 1972, of any part of any electrical installation or utilization installed before March 15, 1972, shall be installed or made, and maintained, in accordance with the provisions of the 1971 National Electrical Code, NFPA 70-1971; ANSI C1-1971 (Rev. of C1-1968).

> the use of electricity for light, heat, power, radio, signalling, and for other purposes. The standards contained therein are occupational safety and health standards to the extent that they safeguard any person who is an employee of an employer.
>
> (2) The National Electrical Code contains basic minimum provisions considered necessary for safety.

Because section 1910.308(b)(1) says that the NEC standards are occupational safety and health standards "to the extent that they safeguard any person who is an employee of an employer," GMC contends that the Secretary adopted only a part of the NEC, that is, the NEC provisions affecting the safety of employees. Because the Secretary has not stated which NEC standards have this effect and are therefore adopted, GMC contends that the Secretary's adoption of the NEC standards was improper and the Secretary's electrical standards are impermissibly vague. Judge Otto rejected these contentions on the basis that the cited NEC standards cover employees. We agree that the contentions must be rejected and add the following comments.

In several places, the electrical standards straightforwardly indicate that the whole NEC was adopted. Section 1910.308(a) states, "Section 1910.309 adopts . . . the National Electrical Code . . . which is incorporated by reference in this subpart." Section 1910.309(a), note 8 supra, concerns the broad class of "all electrical installations and utilization equipment," no matter when it was installed, and lists the NEC provisions which apply to all such equipment. Section 1910.309(b), note 10 supra, pertains to a subclass of such equipment — equipment installed or repairs and improvements made after March 15, 1972 — and states that the installation, repair, or improvement "shall be in accordance with the provisions of the 1971 National Electrical Code. . . ."

These provisions imply that in time the whole NEC is to apply to all electrical installations and utilization equipment.

Section 1910.308(b)(1), on which GMC relies, does not necessarily indicate the contrary. It states that the NEC's purpose is the protection of people, as well as buildings and their contents. Therefore, the statement that NEC standards are OSHA standards "to the extent that they safeguard any person who is an employee . . ." simply indicates that "people" includes "employees" present on the site of electrical equipment.[11/] Essentially, then, section 1910.308(b)(1) indicates that the whole NEC is adopted because it protects employees.

Since Subpart S states that the whole NEC is adopted and specifies which NEC standards apply depending on when the electrical equipment was installed, repaired, or improved, adequate notice of the requirements was given. Accordingly, we reject GMC's arguments of vagueness and improper adoption.

B

We turn now to the alleged violation. GMC uses many electrically-powered conveyors to transport parts. Several hundred employees work along the conveyors removing and replacing parts in connection with

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11/ The NEC provisions cited in this case were not deleted as occupational safety and health standards in the Secretary's new electrical standards, 29 C.F.R. §§ 1910.301-1910.399. See § 1910.304(e)(1)(iv), (v); § 1910.305(j)(4)(ii)(A), (E), and (F). It therefore appears that the Secretary did not consider that the cited provisions were only directed to the protection of buildings. See also Power Systems Div., United Technologies Corp., 81 OSAHRC 40/C13, 9 BNA OSHC 1813, 1981 CCH OSHD ¶ 25,350 (No. 79-1552, 1981) (the Secretary's proposed rulemaking does not demonstrate that portons of the NEC "are unintelligible or . . . irrelevant to occupational safety and health" and the Secretary's recognition that a revision would make the NEC provisions easier to understand does not mean that the standards are unenforceably vague as written.)

tasks they perform. The compliance officer observed these conveyors and became concerned that, if an employee became entangled in a conveyor, it might not be stopped in time to prevent injury. Each conveyor has several sets of stop-start buttons located at operator stations along the conveyor. Each conveyor also has a disconnect switch in an electrical equipment box containing an overcurrent device — a fuse — located fourteen to sixteen feet above the production floor where the conveyors are located. A ladder would be required (and would have to be brought to the area) to reach the disconnect switch. The compliance officer's concern was with the lack of ready access to the disconnect switch if the stop-start buttons should fail.

Accordingly, the Secretary charged GMC with violating sections 240-16 and 430-107 of NEC. Section 240-16 requires, in pertinent part, "Overcurrent devices shall be located where they will be: (a) Readily accessible. . . ." Section 430-107 requires, "One of the disconnecting means shall be readily accessible." In Article 100, the NEC defines "readily accessible:" "Capable of being reached quickly, for operation, renewal, or inspection, without requiring those to whom ready access is requisite to climb over or remove obstacles or to resort to portable ladders, chairs, etc."

Because GMC contends that lack of ready access did not present any hazards to the production employees and that abatement would expose them to greater hazards, the main issue between the parties has been the nature of the hazard presented by the lack of ready access to the disconnect switch located adjacent to the overcurrent device. GMC argues and the evidence shows that its disconnect switches are not designed to be opened "under load," that is, while the electrical circuit is complete.

Accordingly, GMC argues, the switches are not intended for use as a secondary disconnecting means, that is, a stop switch, in an emergency.

Examination of the NEC indicates that disconnect switches associated with overcurrent devices are normally not intended for use as stop switches. See sections 240-18, 430-101, 430-107 through 430-109, along with definitions of "disconnecting means" and "isolating switch" in Article 100. Further, a GMC electrical engineer testified that a disconnect switch's purpose is to "isolate" or "lock-out" a circuit while an electrician or millwright works on associated electrical equipment. A GMC electrician who testified on behalf of the Secretary gave similar testimony, although he also asserted that the disconnect switch must be readily accessible for use as a stop switch. Because the NEC indicates that the purpose is isolation of the circuit, see section 240-18, we conclude that lack of ready access presents a hazard to electricians and millwrights from their possible failure to isolate the circuit before working on associated equipment.

The record shows that electricians and millwrights did not have ready access to the overcurrent devices and disconnect switches. Accordingly, the record shows noncompliance with section 240-16 and, because GMC agrees that the stop-start buttons are not a "disconnecting means" under the NEC and does not argue that other disconnecting means were readily accessible, noncompliance with section 430-107 has also been shown.[12/] GMC argues that ready access to the disconnect switches

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12/ GMC argues that the lack of ready access to the disconnect switches presented no hazard to production employees because there was little, if any, likelihood that a secondary stop switch would be needed. However,

(continued on next page)

will present a greater hazard in that there can be an arcing or explosion hazard if the production employees use the disconnect switches as secondary stop switches. However, section 501-6(b)(1) of the NEC indicates that such hazards can be eliminated if switches used to interrupt current are contained within proper enclosures. If the switch is not intended to be used to interrupt current, then the NEC suggests it should be labelled that it must not be opened under load. Compare section 501-6(b)(1) with section 430-109. Thus, compliance with the NEC should eliminate the hazards of arcing and explosion that concern GMC. Accordingly, we reject GMC's greater defense and affirm the citation. See Ed Cheff d/b/a Ed Cheff Logging, 81 OSAHRC 60/A2, 9 BNA OSHC 1883, 1981 CCH OSHD ¶ 25,431 (No. 77-2778, 1981), appeal filed, No. 81-7493 (9th Cir. July 27, 1981); Duncanson-Harrelson Co., 81 OSAHRC 28/A2, 9 BNA OSHC 1539, 1981 CCH OSHD ¶ 25,296 (No. 76-1567, 1981).

C

Judge Otto required abatement of this violation in one year. GMC takes exception to this requirement but does not argue how it is unreasonable. Abatement involves moving the overcurrent devices and disconnect switches to the production floor. Because this equipment is in an equipment box, abatement essentially involves moving the boxes. This matter of altering the electrical wiring will have to be performed on each conveyor. The record does not show how many conveyors are involved,

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12/ (continued)

because the lack of ready access affects the electricians and millwrights rather than the production employees, we do not need to reach this argument. We note that the lack of ready access to the disconnect switches has more than a negligible relationship to the safety and health of the affected employees and therefore we could not conclude that the violation is de minimis. See Gallo Mechanical Contractors, Inc., supra note 6, and cases cited therein.

but one year appears to be sufficient time for the task involved. Accordingly, we affirm the judge's requirement of abatement in one year.

IV

Judge Otto assessed no penalty for items 1 and 13 which we affirm as nonserious violations. Having considered the factors stated in section 17(j), 29 U.S.C. § 666(i), we agree that no penalty should be assessed.

Accordingly, we deny GMC's motion to vacate the judge's decision; we affirm items 1 and 13 as nonserious violations but we assess no penalty for either item, and require abatement of item 13 in one year; we affirm item 10 as a de minimis violation for which abatement is not required. SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: JAN 25 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, | : | |
| Complainant | : | |
| v. | : | |
| GENERAL MOTORS CORPORATION, Chevrolet Motor Division, | : | OSHRC |
| | : | Docket No. 76-5344 |
| Respondent. | : | |
| | : | |
| LOCAL 909, U.A.W., Chevrolet Warren Plant, | : | |
| Participant. | : | |

## AMENDED DECISION AND ORDER

Judge Otto

On April 12, 1978 my decision in the above entitled case was mailed to the parties, with notice that it will be filed on May 2, 1978 and will become a final order of the Commission on June 1, 1978, unless a Commission member directs review.

The decision incorrectly located the inspected plant at Warren, Ohio, rather than Warren, Michigan. The decision is hereby corrected to conform to the record.

The citation issued November 17, 1976 contained 13 items, all of which were originally contested by respondent but at the hearing of December 13, 1977, respondent withdrew the contest of all cited items

except items 1, 10 and 13 (T 1, 2, 3). Therefore, by operation of 29 USC 659(a) the citation and the proposed assessment of penalties shall be deemed a final order of the Commission and not subject to review as to all items set forth therein, except items 1, 10 and 13 which remain in dispute. The decision omitted reference to the finality of the citation regarding items undisputed as a result of respondent's withdrawal of objection thereto.

Now therefore the following

CONCLUSIONS OF LAW

4. The citation issued November 17, 1976 and the assessments therein proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency for all items identified and set forth therein, except for items 1, 10 and 13.

AMENDED ORDER

The order set forth on page 14 of the decision mailed April 12, 1978 is hereby set aside.

The citation issued November 17, 1976, as amended, is hereby affirmed. No penalty is assessed for items 1, 10 or 13, respectively.

Except as amended herein, the decision mailed April 12, 1978 remains in full force and effect. In the absence of prejudice, the May 2, 1978 filing date applies to the foregoing amended decision and order.

George W. Otto
Judge, OSHRC

Dated: May 2, 1978

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant | : | |
| v. | : | OSHRC |
| GENERAL MOTORS CORPORATION, Chevrolet Motor Division, | : | Docket No. 76-5344 |
| Respondent. | : | |
| | : | DECISION AND ORDER |
| LOCAL 909, U.A.W., Chevrolet Warren Plant, | : | |
| Participant. | : | |

Appearances:

Karl C. Overman, Esq., for Complainant.

Wallet B. Rogers, Esq., for Respondent.

Jerome Eichbauer, Health and Safety Representative, UAW Local 909.

Judge Otto

This is a proceeding under the Occupational Safety and Health Act of 1970 (Act).[1/] Following inspection of respondent's Warren, Ohio plant on October 28, 1976, complainant issued one citation

1. 29 U.S.C. 651 et seq., 84 Stat. 1590.

November 17, 1976 containing 13 items of alleged nonserious violation, fixing abatement dates and proposing related penalties. Respondent duly contested the citation. Local 909 UAW, authorized representative of affected Warren plant employees, elected to participate as a party.

Hearing was held in Detroit, Michigan on December 13, 1977, at which time respondent withdrew its contest of all cited items except items 1, 10 and 13 (T 1, 2, 3).

CITATION NUMBER 1 - Item #1[2/]

Description: Frequent inspections of the cranes and lifting equipment was not performed and recorded as required. Abatement date November 24, 1976. No proposed penalty (original $30 amended to zero).

29 CFR 1910.179(j): (2) Frequent inspection. The following items shall be inspected for defects at intervals as defined in subparagraph (1)(ii) of this paragraph or as specifically indicated, including observation during operation for any defects which might appear between regular inspections. All deficiencies such as listed shall be carefully examined and determination made as to whether they constitute a safety hazard:

(i) All functional operating mechanisms for maladjustment interfering with proper operation. Daily.

(ii) Deterioration of leakage in lines, tanks, valves, drain pumps, and other parts of air or hydraulic systems. Daily.

(iii) Hooks with deformation or cracks. Visual inspection daily; monthly inspection with signed reports. For hooks with cracks or having more than 15 percent in excess of normal throat opening or more than 10°-twist from the plane of the unbent hook refer to paragraph (1)(3)(iii)(a) of this section.

2/ T 17, 18, 19, 26, 28, 29, 30, 51, 52, 53, 129, 130, 131.

(iv) Hoist chains, including end connections, for excessive wear, twist, distorted links interfering with proper function or stretch beyond manufacturer's recommendations. Visual inspection daily; monthly inspection with signed report.

(v) (Revoked).

(vi) All functional operating mechanisms for excessive wear of components.

(vii) Rope reeving for noncompliance with manufacturer's recommendations.

Crane records were three to four months behind, due to vacations and increased workload. Signed reports were three months old for hoist chains; there was no record of chain hoist inspections. No crane inspections were made in June, July, August 1976, beyond crane operators checking the upper limit switches mornings before using cranes. Maximum period with no inspection was four months.

The cited standard requires "frequent inspection," defined in 29 CFR 1910.179(j)(1)(ii)(a) as "Daily to monthly intervals." Respondent failed to comply with the requirements of subparagraphs (2)(i)(ii)(iv)(vi). Reasons contended by respondent do not justify the failure to comply with the standard. Abatement date at time of citation issuance was reasonable. A zero penalty was ultimately proposed by complainant. Considering statutory factors, no penalty is assessed.

CITATION NUMBER 1 - Item #10 3/

Description: Places of employment were not kept clean and orderly, or in a sanitary condition: In the hy-bay basement where metal scrap and deep puddles of oil covered the floor. Abatement date November 24, 1976; no proposed penalty.

29 CFR 1910.22(a)(1): All places of employment, passageways, storerooms, and service rooms shall be kept clean and orderly and in a sanitary condition.

3/ T 2, 3, 26, 27, 31-35, 53-57, 108-127, 131, 136, C-3, C-4, R-2 — R-6.

Respondent admits the floor of the hy-bay basement was not in a clean and orderly or sanitary condition, (that) the floor of the hy-bay basement was littered with metal scrap and approximately 25 to 30 percent of the floor area was oily (Request for Admissions #24 and #25, C-3 and C-4).

The cited area is under the ground level plant floor where about 12 large and 100 smaller presses are located, forming sheets of metal and continuously generating scraps which are conveyed to the basement for continued removal to the outside. The area is about 1000 feet long and 150 feet wide, with a main scrap conveyor and several feeder conveyors. There was a clean-up crew on each shift and cleaning up the basement was their sole responsibility. Oil was hosed down with steam hoses. According to respondent, there were five employees on the first and second shifts and about four on the third shift. According to the authorized employee representative, there were three employees on the first two shifts and two or three on the third shift. The compliance officer saw three or four cleaning up, and observed oil puddles one to two inches deep and scrap laying about. During the walkaround respondent's safety director saw three employees and testified about 40 to 45 percent of the basement had been cleaned, that three to five employees could clean about 50 to 100 feet in eight hours.

Scrap fell off the conveyors——chutes could jam, get holes and scrap shavings fall through overhead roller conveyor cracks.

Oil accumulated on the floor; an employee was injured June 6, 1976 when a ladder slipped on oil. Respondent has disciplined employees for refusing to work in the hy-bay basement. The employee representative testified he had to walk on a fire hose on Friday before hearing, to prevent stepping in oil.

Although the basement is not a production area, all the first floor service is distributed out of the basement. Service employees--- millwrights, electricians, pipefitters, machine repairman—work in the basement as service needs require, on a daily basis although a given employee may not be required to enter the basement every day. Employees other than members of the clean-up crews used the basement daily and were exposed to the hazards caused by the failure of respondent to keep the inspected basement reasonably clean and orderly.

The abatement date in relation to the date of citation issuance is reasonable and no penalty is assessed.

At the hearing, respondent alleged as affirmative defenses lack of employee access to the hazard and impossibility of compliance. The allegation was not timely and complainant's objection is sustained (T 1, 2, 3).[4/] Complainant has proven access and exposure; compliance was possible and readily available.

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4/ See further discussion, item #13, pages 11, 12, infra.

CITATION NUMBER 1 - Item #13[5/]

Description:[6/] The electrical disconnects controlling the conveyors throughout the plant had the overcurrent devices located over 12 feet in the air and were not immediately accesible (sic). (29 CFR 1910.309(a) 240-16: Section 240-16, National Electric (sic) Code; as adopted by 29 CFR 1910.309(a): Section 430-107 as adopted by 29 CFR 1910.309(b).
Abatement date November 17, 1977. No penalty.

29 CFR 1910.309— National Electrical Code

(a) The requirements contained in the following articles and sections of the National Electrical Code, NFPA No. 70--1971; ANSI C1-1971 (Rev. of C1-1968) shall apply to all electrical installations and utilization equipment: ...240-16(a), (b), (c), and (d) Location in Premises (for Overcurrent Protection Devices).

(b) Every new electrical installation and all new utilization equipment installed after March 15, 1972, and every replacement, modification, or repair or rehabilitation, after March 15, 1972, of any part of any electrical installation or utilization equipment installed before March 15, 1972, shall be installed or made, and maintained, in accordance with the Provisions of the 1971 National Electrical Code, NFPA No. 70-1971; ANSI C1-1971 (Rev. of C1-1968).

29 CFR 1910.308— Subpart S—Electrical—Application

(a) General. Section 1910.309 adopts as a national consensus standard the National Electrical Code NFPA No. 70-1971; ANSI C1-1971 (Rev. of C1-1968), which is incorporated by reference in this support.

(b) Purpose of the National Electrical Code.
(1) The purpose of the National Electrical Code is the practical safeguarding of any persons and of buildings and their contents from hazards arising from the use of electricity for light, heat, power, radio, signaling, and for other purposes. The standards contained therein are occupational safety and health standards to the extent that they safeguard any person who is an employee of an employer.

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5/ T 20-25, 36-47, 60-107, 137-199, C-1 — C-4, C-5(a)(b)(c), C-6 — C-9.

6/ Stipulation July 1, 1977, amending complainant's amended complaint.

(2) The National Electrical Code contains basic minimum provisions considered necessary for safety.

240-16. Location in Premises. Overcurrent devices shall be located where they will be:

(a) Readily accessible, except as provided in Sections 230-91 and 230-92 for service equipment and Section 364-11 for busways.

(b) Not exposed to physical damage.

(c) Not in the vicinity of easily ignitible material.

(d) Occupant to Have Ready Access. Each occupant shall have ready access to all overcurrent devices protecting the conductors supplying his occupancy...

National Electrical Code (NEC), Chapter 1. General - Article 100 - Definitions.

Accessible: (As applied to wiring methods). Capable of being removed or exposed without damaging the building structure or finish, or not permanently closed in by the structure or finish of the building. (See "Concealed" and "Exposed"). page 70-4.

Accessible: (As applied to equipment). Admitting close approach because not guarded by locked doors, elevation or other effective means. (See "Readily Accessible"). 70-4.

Readily Accessible: Capable of being reached quickly, for operation, renewal, or inspections, without requiring those to whom ready access is requisite to climb over or remove obstacles or to resort to portable ladders, chairs, etc. (See "accessible"). 70-10.

430-101. General. The provisions of Part H are intended to require disconnecting means capable of disconnecting motors and controllers from the circuit.7/

430-107. Readily Accessible. One of the disconnecting means shall be readily accessible.

7/ NEC Article 430—Motors, Motor Circuits and Controllers - Part H. Disconnecting Means.

Circuit boxes containing overcurrent protection devices and disconnect switches are located from 14 to 16 feet above floor level, at millwright drive locations for overhead monorail conveyors. Stop/start switch buttons are accessible to employees working at or adjacent to the conveyors. The millwright stations have a screenguard on the bottom and a 30" screenguard around the perimeter. To service these circuit boxes, access can be gained only by using an extension ladder and climbing over the screenguard enclosure.[8/]

The stop/start buttons are tied in series; in the event the switch shorts out or otherwise fails, there is no other means of shutting off the conveyor. Many of the conveyors have 4 to 7 buttons in series (T. 22, 74, 75). If an employee became entangled in the conveyor system and the switch buttons failed, there is no way to readily stop it.

The amended description of this item states the electrical disconnects controlling the conveyors were not "immediately" accessible, rather than "readily" accessible. The distinction, if any, is not misleading or prejudicial.

Respondent in his brief challenges the constitutionality of 29 CFR 1910.308 and .308(b)(1), that there was no exposure to a hazard, that NEC 240-16 does not apply to the facts, that sections 240-4 through 240-30 apply only to overcurrent protection for conductors, not equipment, that the stop/start button is a disconnecting means within the meaning of NEC 430-107, that there was no hazard, that compliance would be more hazardous than noncompliance.

8/ T 13, 20, 43, 67, 68, 71-74, 142-144, 155, 161, 181, 183, C-3(D), C-6(#11).

The union representative for affected employees points out that the overcurrent devices must be readily accessible and capable of being reached quickly for operation, renewal or inspection, without requiring those to whom ready access is requisite to climb over or remove obstacles or to resort to portable ladders, chairs, etc., that the purpose of overcurrent protection is not limited to conductors, as contended by respondent. He refers to NEC 240-2 and 240-3.[9/]

In evaluating this record,[10/] it is clear the cited standards do not require more than one overcurrent device. There is but one, located in the circuit box and not readily accessible. The 110 volt stop/start switch is not an overcurrent device; the circuitry contained in the box, on the source side of 440 volts, is an overcurrent device, and in performing its function interrupts and disconnects the main power source from the equipment in question. (T 160-163, 183).

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9/ NEC 240-2. Purpose of Overcurrent Protection. Overcurrent protection for conductors and equipment is provided for the purpose of opening the electric circuit if the current reaches a value which will cause an excessive or dangerous temperature in the conductor or conductor insulation.

NEC 240-3. Protection of Equipment. Equipment shall be protected against overcurrent as specified in the references in the following list...Motors, Motor Circuits and Controllers, Article No. 430.

10/ Respondent filed a posthearing "motion to correct record," to change the testimony of its witness on page 154, line 19. Complainant objects. There is no contention the transcript does not accurately reflect what was stated by this witness, as recorded on page 154, line 19. Respondent's motion is denied.

If an employee became entangled in the conveyor and buttons were inoperative, there was no means readily available for shutting off the power (T 42). The hazard is inherent in the standard alleged. As distinguished from the general duty clause, section 654(a)(1), a cited standard presupposes the existence of a hazard when its terms are not met. Del-Cook Lumber Company, Docket #16093, February 2, 1978.

Respondent's challenge to the National Electrical Code caused by the Secretary's "failure" to interpret and declare which sections and portions apply to employees, is without merit. The NEC provisions hereinbefore set forth include worksites, and worksites contain employees.

The cited standards were violated. Complainant moved to amend the abatement date for item 13 to November 17, 1977. (T 106, 107); the citation was issued November 17, 1976. The abatement date shall be 12 months from the effective date of this decision and order. No penalty was proposed and no penalty is assessed, considering statutory factors.

Respondent is not entitled to consideration of affirmative defenses if raised for the first time at hearing, but contends the Complainant was duly apprised in the Answer to the Complaint. The Answer included as an Affirmative Defense, "Respondent states that the Complaint herein fails to state a cause of action upon which relief can be granted." This is sufficient and timely, according to respondent, by authority of Rule 12(b), Federal Rules of Civil Procedure, that it is under no obligation to disclose to complainant in any detail the specific factual bases of such defense, except in response to

properly framed, permissible discovery. The specific affirmative defenses contended at time of hearing, for both citation item #10 and #13, were not asserted prior thereto. Counsel met informally at some period prior to hearing and respondent claims there was affirmative defense specificity at that time; such occasion was not a pre-hearing conference pursuant to Commission Rule 51 and no prehearing motion for amended answer was filed, and no order upon this subject was requested or issued. Parties are encouraged to meet informally to expedite or settle proceedings, or to simplify issues and presentation of testimony, but such activity cannot serve as a substitute for or amendment of required formal pleadings. Complainant was entitled to know the specific affirmative defenses upon which respondent relied. Information for that purpose was available and could have been timely provided prior to hearing. Complainant is not required to guess as to which of many affirmative defenses respondent might elect to develop to negate a violation--- compliance prevents work, compliance impossible or not feasible, violation not foreseeable, lack of knowledge, employee fault, increased hazard, isolated occurrence, alternative protection, company rules and safety program, industry practice, quality or production affected, no or few injuries, removal from exposure, employee experience. These and many other affirmative defenses are reflected in Commission decisions.[11/]

11/ The stated affirmative defenses, if timely, would have failed to negate the effect of violation items #10 and #13.

## FINDINGS OF FACT

Item #1:

1. Crane records were 3 to 4 months late.

2. Chain hoist inspections were not recorded.

3. Adequate crane inspections were not made in June, July or August, 1976.

Item #10:

4. The hy-bay basement area contained metal scrap fallen from conveyors, with the floor containing puddles of oil.

5. Service employees used this basement and were exposed to contact with scrap and oil.

6. The floor was not in a clean and orderly or sanitary condition at time of inspection.

7. The floor conditions inspected were not unusual, nor isolated in time.

8. Clean-up crews were insufficient in number to adequately reduce the amount of scrap and oil on the floor.

9. Larger clean-up crews, adequately equipped, could materially reduce accumulation and could accelerate removal of scrap and oil.

Item #13:

10. Provisions of the NEC incorporated by reference and relevant to the cited standards were included as national consensus standards and duly promulgated by rule as occupational safety or health standards, pursuant to Section 655(a) of the Act.

11. The cited standards apply to respondent employees.

12. The applicable and cited provisions of the NEC indicate what constitutes compliant behavior, without specific or interpretive notice.

13. Section 240-16, NEC, applies to overcurrent protection for conductors and equipment.

14. The start/stop switch buttons were not disconnect devices, within the meaning of the cited standards.

15. Start/stop switch buttons were readily accessible to employees working at or adjacent to conveyors.

16. Overcurrent protection is required for the conductors and equipment comprising respondent's conveyor electrical system.

17. Circuit boxes containing overcurrent protection devices and disconnect switches were located from about 14 to 16 feet above floor level, and could be reached only by use of an extension ladder and climbing over a screenguard at millwright stations.

18. The curcuit boxes contained overcurrent or disconnect devices, within the meaning of the cited standards.

19. The inspected and cited overcurrent devices were not readily accessible.

20. Employees were exposed to hazard caused by respondent's failure to locate the overcurrent devices at levels readily accessible to employees.

21. The violation is other than serious, with no substantial probability that death or serious physical harm could result.

22. A 12-month period, commencing from the effective date of this decision and order, is a reasonable time for abatement of this violation.

## CONCLUSIONS OF LAW

1. Respondent failed to comply with occupational safety and health standard 29 CFR 1910.179(j)(2).

2. Respondent failed to comply with occupational safety and health standard 29 CFR 1910.22(a)(1).

3. Respondent failed to comply with occupational safety and health standard 29 CFR 1910.309(a) 240-16, National Electrical Code; 29 CFR 1910.309(b), Section 240-107, National Electrical Code.

## ORDER

The citation issued November 17, 1976, as amended, is hereby affirmed. No penalty is assessed.

George W. Otto
Judge, OSHRC

Dated: May 2, 1978

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 240

ATLANTA, GEORGIA 30309

# NOTICE OF DECISION

Secretary v. THE L. E. MYERS CO.

OSHRC Docket No. 81-560

1. Enclosed is a copy of my decision. It will be filed with the Commission on December 24, 1981, and will become the final order of the Commission on January 25, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N. W., Suite 601
   Washington, D. C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is January 25, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

James D. Burroughs

JAMES D. BURROUGHS
Judge

Date: December 4, 1981

OSHRC FORM 97

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

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| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 81-560 |
| | ) | |
| THE L. E. MYERS CO., | ) | |
| | ) | |
| Respondent. | ) | |

APPEARANCES:

Donald W. Hill, Esquire, Office of the Solicitor, U. S. Department of Labor, Dallas, Texas, on behalf of complainant

James S. Cheslock, Esquire, San Antonio, Texas, on behalf of respondent

## DECISION AND ORDER

BURROUGHS, Judge: Respondent, a company engaged in the construction of electrical utilities, contests an alleged serious violation of 29 C.F.R. § 1926.950(e)(1)(ii), for failure to require all members of a work crew to be knowledgeable and proficient in first aid fundamentals, and an alleged serious violation of 29 C.F.R. § 1926.952(b)(2), for failure to require an aerial lift truck to be grounded or barricaded because of work being performed near energized transmission lines. A penalty was proposed for each of the alleged violations.

The serious citation was issued to respondent on February 12, 1981. On that same date, an "other" citation, alleging a violation of 29 C.F.R. § 1904.2(a), was issued to respondent. A notice of contest was filed by respondent's corporate safety director by letter dated February 20, 1981. The letter, in pertinent part, stated as follows:

> Please be advised that in accordance with the Rules of Procedure of the Occupational Safety and Health Review Commission, THE L. E. MYERS CO. intends to contest the action initiated against it by the Department of Labor under the above referred to citation for serious violation. Our Company wishes to contest the citation and notification of proposed penalty based upon allegedly violated standards or regulations, Sections 29 CFR 1926.950(e)(1)(ii) and 29 CFR 1926.952(b)(2).

On June 24, 1981, an answer was filed by respondent's counsel. The WHEREFORE clause of the answer makes a reference to citations. Subsequent to the filing of the answer, respondent obtained different counsel. On July 23, 1981, an amended answer was filed by respondent's new counsel. Paragraph VI of the amended answer alleges that the de minimis doctrine was applicable to the alleged violation of 29 C.F.R. § 1904.2(a).

Since the notice of contest made no reference to the "other" citation or the alleged violation of 29 C.F.R. § 1904.2(a), a ruling was made at the commencement of the hearing that the Commission was without jurisdiction to hear the "other" violation of 29 C.F.R. § 1904.2(a). The answer and amended answer are insufficient to cure a defect in the notice of contest. In order for the Commission to have jurisdiction, a timely notice of contest must be filed to place the alleged violation in issue. Service Specialty, Inc., 80 OSAHRC 16/A9, 7 BNA OSHC 1770, 1979 CCH OSHD ¶ 23,928 (No. 16033, 1979). Since the notice of contest made no reference to the alleged violation of 29 C.F.R. § 1904.2(a), the Commission has no jurisdiction to review the "other" citation. Kerr-McGee Chemical Corp., 76 OSAHRC 129/C14, 4 BNA OSHC 1739, 1976-77 CCH OSHD ¶ 21,161 (No. 9890, 1976); Capital City Excavating Company, Inc., 80 OSAHRC 83/A10, 8 BNA OSHC 2008, 1980 CCH OSHD ¶ 24,734 (No. 78-4725, 1980).

## Alleged Violation of 29 C.F.R. § 1926.952(b)(2)

Respondent is engaged in the construction of electrical utilities throughout the country. While its headquarters is located in Chicago, Illinois, it is divided into

five operating divisions, one of which is the Southern Division. Divisions are divided into districts. The alleged violations occurred in the Longview District, which is part of the Southern Division.

On February 2, 1981, a work crew in the Longview District was engaged in transferring live electrical lines from an old pole to a new pole. The work was being performed at a site near Overton, Texas. An aerial bucket truck was being used to accomplish the work. There is no dispute over the fact that the truck was not grounded or barricaded. During the course of the work, the boom struck an energized transmission line and energized the truck. The foreman, Chester Young, was located at the back of the truck at the time the boom struck the transmission line and was electrocuted.

The truck was equipped with a grounding cable mounted on the front bumper. The cable was approximately 15 feet in length. For convenience purposes, the truck was backed up to the pole.[1/] As a result of the positioning of the truck, the grounding cable would not reach the pole. The terrain around the pole was level, and there was nothing to prevent the front of the truck from being driven up to the pole (Tr. 30-31). A grounding rod could also have been secured from the Overton substation located approximately five miles from the work site. There was nothing to prevent the crew from grounding or barricading the truck prior to changing the lines.

The basic facts pertaining to this issue are not in dispute. The crew was working near energized lines and failed to ground or barricade the truck. The basket and boom were insulated, but the truck was not insulated. These facts

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1/ Gill testified that it was more convenient and efficient to work off the back of the truck (Tr. 30).

establish a violation of 29 C.F.R. § 1926.952(b)(2).[2/] Respondent defends against the violation on the grounds that the failure to ground or barricade the truck was an isolated and unpreventable act of employee misconduct on the part of Chester Young, the foreman of the crew.

An employer is generally responsible for a violation created by its supervisory employees or within their actual or constructive knowledge. An employer, however, may defend against the violation by showing that it took all necessary precautions to prevent the occurrence of the violation, including adequate supervision of its supervisory employees. Merritt Electric Co., 1981 OSAHRC _____, 9 BNA OSHC 2088, 1981 CCH OSHD ¶ 25,556 (No. 77-3772, 1981); Niagara Mohawk Power Corp., 79 OSAHRC 36/A2, 7 BNA OSHC 1447, 1979 CCH OSHD ¶ 23,670 (No. 76-2414, 1979). In order to establish the defense, the employer must show that the action of its employee represented a departure from a work rule designed to prevent the violation, that it adequately communicated the rule to its employees, and that it effectively enforced the rule when violations were discovered. Merritt Electric Co., supra; Wander Iron Works, Inc., 80 OSAHRC 40/A2, 8 BNA OSHC 1354, 1980 CCH OSHD ¶ 24,457 (No. 76-3105, 1980).

The deceased foreman, Chester Young, was responsible for the safety of his crew and ensuring that his crew complied with all applicable safety rules. It was his job to assure that the truck was grounded or barricaded as required by respondent's safety rules. Young had been employed by respondent at its Longview office for approximately thirty years. During his employment with respondent, he

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2/ Section 1926.952(b)(2) states:

> When working near energized lines or equipment, aerial lift trucks shall be grounded or barricaded and considered as energized equipment, or the aerial lift truck shall be insulated for the work being performed.

worked as a lineman, foreman and general foreman. During the ten years prior to his death, Young had primarily worked as a foreman or general foreman. He was an experienced foreman with an excellent safety record.

On February 2, 1981, Young had four other employees in his crew: Larry Boaze, Michael Reed, J. C. Hendershott, and William Gill. All members of the crew, including Young, had been issued a pamphlet entitled "Basic Safety Rules."[3/] Page 4 of the pamphlet sets forth the following safety rule:

> 3. Aerial baskets and ladder equipment shall be grounded when near energized lines. When grounds are not permitted by the client, barricading shall be required.

Young had also received a copy of a 78-page "Safety Manual" which was issued to all foremen.[4/] Rule 204(e) on page 18 of the manual provides (Ex. G):

> When working near energized lines in aerial basket trucks and aerial ladder trucks, the trucks shall be grounded. Where grounds are not permitted by the client, barricading shall be required.

The existence of the work rule requiring grounding or barricading is sufficient to establish the first element of employee misconduct; i.e., the employer had an established work rule to cover the condition encountered by its crew.

It is equally clear that the safety rule had been communicated to all members of the crew. The pamphlet of basic safety rules had been received by all members of the crew.[5/] Young had also received the safety manual distributed to

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3/ Respondent's general procedure is to issue the pamphlet to an employee when he is hired and secure a signed receipt from the employee acknowledging its receipt. All members of the crew had signed receipts indicating receipt of the pamphlet (Exs. B, C, D, E, F; Tr. 92-93).

4/ Young signed a receipt on October 28, 1976, indicating he had received the safety manual (Ex. H; Tr. 97-98).

5/ Gill acknowledged that he had received the pamphlet and had looked it over (Tr. 27).

supervisors which contained the same rule although it was worded in a slightly different manner. The testimony of William Gill makes it clear that the crew was aware of the requirement for grounding the truck. He testified that the crew discussed grounding the truck before commencing work on February 2, 1981, but for the sake of convenience decided against grounding (Tr. 26, 31). In addition, Michael Reed testified that safety meetings were held "about once a week" and that grounding of trucks when working near live wires had been discussed by Young at a safety meeting (Tr. 41).[6/] The truck also had danger stickers on it that warned of a possible electrocution hazard if the truck should become electrically charged (Ex. 2, 4).

The preponderance of the evidence further establishes that respondent has an adequate system for training and supervising its crews and enforcing its safety rules. Each foreman is charged with the responsibility of assuring that his crew follows established safety rules. While the foreman is entrusted with considerable responsibility, respondent's safety program is designed to adequately train him and members of his crew with respect to hazards associated with their work. In addition to the basic safety rules pamphlet distributed to all employees, including foremen, and the safety manual distributed to foremen, respondent's safety program includes the following:

> (1) A district safety committee, consisting of the safety supervisor and supervisory personnel, meets every other month to discuss safety problems and to review any accidents which have occurred in the district and division (Tr. 120).

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6/ Gill acknowledged that tailgate safety meetings were held while he was a member of Young's crew, but he could not recall a meeting discussing the proper grounding of trucks while working around live wires (Tr. 21). He had worked for Young's crew only two or three months prior to the accident (Tr. 12). He normally did not work around live wires (Tr. 17). Most of the time he worked in Young's crew was on "cold" work (Tr. 24).

(2) Special training sessions are conducted by the safety supervisor for all foremen and general foremen at least twice each year (Tr. 121).

(3) The safety supervisor conducts "show up" safety sessions with the crews in each district approximately four times a year (Tr. 121-122).

(4) Each foreman is required to conduct a "tailgate" safety meeting with his crew each week. The meeting must be documented each week with a written report (Tr. 122-123).

(5) A monthly safety bulletin prepared by the corporate safety director is distributed to all foremen in each district. The publication is prepared separately for each district and features accidents which have occurred in the district (Ex. J; Tr. 126).

These measures are adequate to communicate safety rules and procedures to all of respondent's employees, including foremen.

Respondent also takes adequate measures to ensure that its safety program is effectively enforced. A diligent effort is made to discover and discourage violations of safety rules. The area superintendent, general foremen and safety supervisor visit the crews on a regular basis to ensure that its safety rules are being followed (Tr. 49-50, 104-105, 120). Appropriate disciplinary action has been taken where safety rules have not been followed by the foremen. Clarence Yochum, the area superintendent, testified that foremen have been fired for failing to comply with established safety rules (Tr. 105-106). Reed indicated that on three or four occasions he had observed Yochum, the safety supervisor or the general foremen, discipline employees for not following safety rules (Tr. 56). The safety program is effectively enforced.

Reed testified that there were occasions when he worked near live wires as a member of Young's crew when the truck was not grounded or barricaded (Tr. 43). No facts were offered with respect to the circumstances surrounding those

incidents, and there is no indication that he informed anyone as to possible violations of safety rules. It is also noted that 29 C.F.R. § 1926.952(b)(2) does not require lift trucks to be grounded or barricaded if the truck is insulated for the work being performed. There is no evidence to indicate the truck was not insulated for the work being performed on the occasions alluded to by Reed. The record is insufficient to conclude that safety violations did occur on those occasions.

Even if prior violations of the safety rule for grounding or barricading a truck when working near energized lines had occurred, there is no evidence to indicate that respondent had any reason to suspect Young was not implementing the company's safety rules. He had been a foreman for several years and had compiled an excellent safety record. No member of a crew supervised by Young had ever sustained an electrical injury, and no member of a crew supervised by Young had ever reported him for failure to ground or barricade a truck (Tr. 102-103). There is no evidence of a blemish on Young's safety record with the company. Respondent has met its burden in establishing that the failure to comply with the standard resulted from the unpreventable misconduct of Chester Young. The alleged violation is vacated.

Alleged Violation of 29 C.F.R. § 1926.950(e)(1)(ii)

Complainant alleges respondent violated 29 C.F.R. § 1926.950(e)(1)(ii)[7/] for failing to have all members of the crew knowledgeable and proficient in first aid

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7/ Section 1926.950(e)(1)(ii) provides:

> The employer shall provide training or require that his employees are knowledgeable and proficient in:
>
> * * *
>
> (ii) First-aid fundamentals including resuscitation.

fundamentals including resuscitation. Respondent offers first aid training to its employees but does not require them to take such training. It argues that § 1926.950(e)(2) gives it the option of complying with the requirements of § 1926.950(e)(1) or the provisions of § 1926.50(c) and submits that it was in compliance with the provisions of § 1926.50(c).

Section 1926.950(e)(2) states:

> In lieu of paragraph (e)(1) of this section the employer may comply with the provisions of § 1926.50(c) regarding first-aid requirements.

The language of the standard clearly gives the option to the employer to elect to comply with the provisions of § 1926.50(c) with regard to first aid requirements. There are some differences in the requirements of § 1926.950(e)(1)(ii) and § 1926.50(c).[8/] Section 1926.950(e)(1)(ii) requires an employer to provide training or require that his employees are knowledgeable and proficient in first aid fundamentals, whereas § 1926.50(c) simply requires a person who has a valid certificate in first aid training to be available at the work site in the absence of an infirmary, clinic, hospital or physician that is reasonably accessible in terms of time and distance to the work site. Section 1926.950(e)(1) refers to employees, but § 1926.50(c) only requires a person trained in first aid be availabe at the work site. While § 1926.950(e)(1)(ii) may require that all employees be knowledgeable and proficient in first aid fundamentals, section 1926.50(c) imposes no such requirement.

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8/ Section 1926.50(c) states:

> In the absence of an infirmary, clinic, hospital, or physician, that is reasonably accessible in terms of time and distance to the worksite, which is available for the treatment of injured employees, a person who has a valid certificate in first-aid training from the U. S. Bureau of Mines, the American Red Cross, or equivalent training that can be verified by documentary evidence, shall be available at the worksite to render first aid.

The issue must be decided on the basis of the requirements of § 1926.50(c) since § 1926.950(e)(2) clearly gives an employer the right to choose which standard he desires to be applicable. If an infirmary, clinic, hospital or physician is reasonably accessible in terms of time and distance to the work site, section 1926.50(c) does not require an employer to have any person available at the work site to render first aid. If medical facilities are not reasonably accessible, only one person who possesses a valid first aid certificate need be present at the work site. Respondent argues that it was in compliance with both provisions of section 1926.50(c).

A hospital was located in Overton, Texas, only 4.6 miles from the scene of the accident. Respondent submits that the hospital was "reasonably accessible" within the meaning of § 1926.50(c). In Love Box Co., 76 OSAHRC 45/D5, 4 BNA OSHC 1138, 1975-76 CCH OSHD ¶ 20,588 (No. 6286, 1975), which involved an interpretation of § 1910.151(b), the Commission adopted the decision of the Tenth Circuit in Brennan v. OSHRC and Santa Fe Transport Co., 505 F.2d 869 (10th Cir. 1974), which concluded that first aid must be administered within three minutes for serious accidents. While section 1910.151(b) uses the phrase "in near proximity to" in lieu of "reasonably accessible," the substance of the requirement is the same. The purpose of both standards is to provide for prompt medical attention for injured employees. While the time required to reach the hospital from the work site would vary according to the speed of the vehicle, traffic conditions and weather conditions, it seems unreasonable to assume that the distance of 4.6 miles could have been safely driven in three minutes even though the roads to the hospital were good and easily accessible from the work site.[9/] The hospital at Overton was not "reasonably accessible" to the work site.

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9/ There were paved roads from Overton to the right-of-way where the crew turned off the road (Tr. 39-40). The right-of-way to the pole was fairly smooth and grassy (Tr. 40).

Since the hospital was not reasonably accessible, respondent was required to have a person who possesses a valid first aid certificate at the work site. Immediately after the accident, Hendershott[10/] and Reed administered first aid to Young, including resuscitation. While the evidence does not reflect if Hendershott held a valid certificate in first aid training, Reed did have such a certificate issued by the American Red Cross. He completed the training on March 20, 1979, and his certificate was good for three years (Ex. L; Tr. 135-137). His certificate was verified by testimony of the individual conducting the course and a letter dated March 21, 1979, to the corporate safety director stating that Reed and several other employees had completed the first aid course (Ex. L; Tr. 135-137). Since a person holding a valid certificate in first aid training from the American Red Cross was at the work site, respondent was not in violation of § 1926.50(c).

## FINDINGS OF FACT

1. Respondent, a company engaged in the construction of electrical utilities throughout the country, is divided into five divisions. The divisions are divided into districts. The Longview District is part of the Southern Division. Respondent's headquarters is located in Chicago, Illinois (Tr. 91-92).

2. On February 2, 1981, a work crew in the Longview District consisting of Chester Young, Larry Boaze, Michael Reed, J. C. Hendershott and William Gill were erecting new electrical power poles and transferring arms from one pole to

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10/ Hendershott indicated on his receipt for the basic safety rules pamphlet issued to him on November 10, 1979, that he had training in first aid (Ex. C). The degree of his training and whether he held a valid first aid certificate were not established.

another at a work site near Overton, Texas. Young was foreman of the crew and responsible for the safety of the crew (Tr. 11-12, 19, 32, 37, 45, 87, 99, 107, 116).

3. A truck with an aerial bucket was being used to accomplish the work. There was a ground wire cable, approximately 15 feet in length, secured to the front of the truck (Ex. 3; Tr. 16, 25, 31, 50-51, 75, 100).

4. The truck was backed up to the pole on which the crew was preparing to work because the crew decided it was easier to accomplish the work with the truck in that position (Tr. 30-31, 55). Since the truck was backed up toward the pole, the grounding cable on the front of the truck was too short to reach the ground rod at the pole (Tr. 51-52).

5. There was nothing to prevent the front of the truck from being driven in toward the pole so the ground wire could have been attached to the ground rod at the pole (Tr. 25, 31, 101, 127-128). The terrain around the work site was grassy and level (Tr. 25, 40, 99-100, 127). Ground rods were available at the Overton substation and could have been obtained to ground the truck at the front (Tr. 101-102).

6. The left rear upper corner of the truck had a danger sticker on it that warned of an electrocution hazard. The sticker further warned that death or serious injury could result from contact with the vehicle if it should be electrically charged (Ex. 2; Tr. 72). The lower part of the basket boom had two danger stickers and a caution sticker on it warning of an electrocution hazard (Ex. 4; Tr. 76).

7. The aerial lift truck was not grounded or barricaded (Tr. 16, 40). The boom of the truck was 50 feet in length and was insulated. The bucket was also insulated (Tr. 100, 111, 129).

8. The members of the crew discussed grounding the truck and decided for the sake of convenience not to do it (Tr. 26, 29-30). Young was aware of the fact the work was being performed near the energized line without the truck being grounded (Tr. 30, 32, 55).

9. There was no impediment or obstruction preventing the crew from grounding the truck (Tr. 100-101).

10. Hendershott and Boaze were riding in the aerial bucket. Sometime after lunch, they came down to the ground in the bucket, picked up a new crossarm, bolt and braces, and then ascended in the bucket. As the bucket ascended, the boom of the truck struck a live electrical transmission line and energized the truck (Tr. 13-14, 33, 37-38).

11. Young was located at the back, right-hand side of the truck at the time the boom struck the transmission line (Tr. 15, 38). The truck was energized when the boom contacted the "hot" line, and Young was electrocuted (Tr. 15, 38, 99).

12. Hendershott and Reed immediately administered first aid, including cardiopulmonary resuscitation, to Young (Tr. 33, 39).

13. Reed possessed a valid first aid certificate recognized by the American Red Cross. The certificate was issued at the completion of training on March 20, 1979, and was good for three years (Ex. L; Tr. 44, 48-49, 58, 135-137).

14. Reed had received first aid training in a course sponsored by the Red Cross and conducted by Darrell Davis, the safety supervisor for respondent. The course was offered to all employees. While the company did not require the training, it was stressed to all apprentices that the company wanted them to take the training (Tr. 44, 57-58, 84, 87-88, 107).

15. The nearest hospital to the accident site was located in Overton, Texas. The hospital was located 4.6 miles from the accident site (Ex. K; Tr. 130).

16. A pamphlet entitled "Basic Safety Rules" is distributed to all employees at the time of their initial employment (Ex. A; Tr. 27-28, 44, 92). The pamphlet contains the following statement on page 4 (Ex. A; Tr. 27-28):

> Aerial baskets and ladder equipment shall be grounded when near energized lines. When grounds are not permitted by the client, barricading shall be required.

17. On February 2, 1981, Young and the other members of his crew signed receipts acknowledging that they had been issued a copy of the pamphlet (Exs. B, C, D, E, F; Tr. 93-94).

18. The receipts for the pamphlets also asked the question of whether the applicant had previously had first aid training (Ex. B-F; Tr. 94). Hendershott, whose receipt was dated November 10, 1979, and Boaze, whose receipt was dated January 16, 1980, indicated they had training in first aid. Hendershott indicated his first aid card had expired (Ex. C, F; Tr. 94-95).

19. Respondent distributes a safety manual to all of its supervisors or foremen (Ex. G; Tr. 96). Section 204(e) of the safety manual provides (Ex. G; Tr. 97):

> When working near energized lines in aerial basket trucks and aerial ladder trucks, the trucks shall be grounded. Where grounds are not permitted by the client, barricading shall be required.

20. Young signed a receipt on October 28, 1976, acknowledging a receipt of a safety manual (Ex. H; Tr. 98).

21. Respondent has a safety supervisor for its Southern Division (Tr. 119).

22. A district safety meeting consisting of supervisory personnel and the safety supervisor is held every two months. The purpose of the meeting is to discuss safety problems and to review accidents that have occurred in the district (Tr. 111-112, 120). In addition, the safety supervisor conducts training for foremen and general foremen at least twice a year (Tr. 121).

23. The safety supervisor conducts "show up" safety sessions with the crews in each district approximately four times a year (Tr. 121-122).

24. Foremen are required to hold at least one tailgate safety meeting each week. The meetings must be documented (Tr. 123). The meetings have been held by the foremen (Tr. 21, 40).

25. Young had discussed the need for grounding trucks when working near energized lines at a tailgate safety meeting (Tr. 41).

26. The area superintendent, safety supervisor and general foreman check work crews to see how they are performing their work. This check includes looking for safety violations (Tr. 49-50, 104-105, 116).

27. Two foremen and other crew members have been fired for failing to follow safety rules (Tr. 105-106). One other foreman was placed on leave without pay for two weeks for failing to follow safety rules (Tr. 106).

28. A monthly safety bulletin is prepared by the corporate safety director and distributed to all foremen in each district (Ex. J; Tr. 126).

29. Young had worked in different capacities with respondent for over thirty years. He had held the position of lineman, foreman and general foreman (Tr. 99, 110). He was working in the capacity of a foreman on February 2, 1981 (Tr. 116).

30. The area superintendent was unaware that Young had failed to ground or barricade a truck (Tr. 103). He had observed Young's work operations at least once a week but never observed a violation of any safety rules (Tr. 116-117).

31. No member of a crew supervised by Young had ever sustained an electrical injury, and no member of any crew supervised by him had ever reported him for failure to ground or barricade a truck (Tr. 102-103, 137-138).

## CONCLUSIONS OF LAW

1. Respondent, at all times material hereto, was engaged in a business affecting commerce within the meaning of section 3(5) of the Act.

2. Respondent, at all times material hereto, was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of the parties and of the subject matter herein.

3. On February 2, 1981, respondent was not in violation of 29 C.F.R. § 1926.950(e)(1)(ii) since it had complied with 29 C.F.R. § 1926.50(c), as permitted by 29 C.F.R. § 1926.950(e)(2), by having a person at the work site with a valid first aid training certificate approved by the American Red Cross.

4. On February 2, 1981, respondent was not in violation of 29 C.F.R. § 1926.952(b)(2) since the violation of the standard resulted from employee misconduct of Chester Young, the foreman.

## ORDER

Based upon the foregoing findings of fact and conclusions of law, it is

ORDERED: That the serious citation issued to respondent on February 12, 1981, is vacated.

Dated this 24th day of December, 1981.

James D. Burroughs

JAMES D. BURROUGHS
Judge

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

January 27, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Allis Chalmers Engine Division

OSHRC DOCKET NO. 77-3285

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

- Counsel for Regional Litigation
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FOR EMPLOYEES

-

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FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>ALLIS-CHALMERS CORPORATION,<br>Respondent. | OSHRC Docket No. 77-3285 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

The Secretary of Labor ("the Secretary") issued citations to Respondent, Allis-Chalmers Corporation ("Allis-Chalmers"), under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), alleging that Allis-Chalmers had violated section 5(a)(2) of the Act, 29 U.S.C. § 654(a)(2), by failing to comply with various safety and health standards. The question before us here is whether the Secretary has proved that Allis-Chalmers failed to comply with the standard at 29 C.F.R. § 1910.107(c)(2). 1/ Administrative Law Judge Frank B. Zinn issued a decision affirming item 33 of citation 2, which alleged noncompli-

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1/ Section 1910.107(c)(2) provides:

> § 1910.107 Spray finishing using flammable and combustible materials.
>
> * * *
>
> (c) Electrical and other sources of ignition--
>
> * * *
>
> (2) Minimum separation. There shall be no open flame or spark producing equipment in any spraying area nor within 20 feet thereof, unless separated by a partition.

ance with that standard. Allis-Chalmers petitioned for review of that portion of the judge's decision, and former Commissioner Barnako directed review of the issues raised by the petition.

In its brief on review, Allis-Chalmers frames the issues as:

> 1. Whether [the Secretary] failed to carry [his] burden of proving that [Allis-Chalmers'] paint booth constituted a "spraying area" within the meaning of 29 CFR 1910.107 (a)(2).
>
> 2. Whether the Judge improperly relied on 29 CFR 1910.178 in finding [Allis-Chalmers] in violation of 29 CFR 1910.107(c)(2).

I

Allis-Chalmers manufactures generators and engines in its factory in Harvey, Illinois. There is a spray booth in which the engines and generators are spray-painted. The articles to be painted are moved into and out of the spray booth by a gasoline-powered fork lift truck. Item 33 of citation 2 alleged that Allis-Chalmers did not comply with section 1910.107(c)(2) because the fork lift is spark producing machinery and was in or within 20 feet of a "spraying area." 2/

The spraying is done every day but not constantly. The spray booth is about 15 feet high, 15 feet wide, and 20 to 25 feet deep. It has three sides and a roof. The engines and generators are put in and taken out the open end. The wall at the back end has an exhaust system with filters to control the paint

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2/ 29 C.F.R. § 1910.107(a)(2) defines the term "spraying area." That section provides:

> § 1910.107 Spray finishing using flammable and combustible materials.
>
> (a) Definitions applicable to this section—
>
> * * *
>
> (2) Spraying area. Any area in which dangerous quantities of flammable vapors or mists, or combustible residues, dusts, or deposits are present due to the operation of spraying processes.

vapors. The fork lift is used for other jobs as well as for moving the articles to be painted, so it does not necessarily stand by to enter the spray booth as soon as the painting stops.

At the hearing before Judge Zinn, two compliance officers of the Occupational Safety and Health Administration ("OSHA") testified about the spray booth. Neither compliance officer testified as an expert on spray finishing. Compliance officer Morgan testified that he tested the flow of air through the spray booth with a velometer and that the readings signified that the filters in the booth "do not adequately withdraw the potentially combustible or flammable vapors out." He did not take any tests to determine the level of paint vapors in the atmosphere. He acknowledged that "it cannot be determined without tests" whether a dangerous atmosphere exists but stated that the air flow tests indicated the "possibility" that combustible vapors could accumulate.

The other compliance officer, Mr. Scott, testified that both the paint and the thinner being used were flammable, but he did not know the name or composition of either the paint or the thinner being used. He testified that during spray-painting the paint and solvents are atomized into a fine mist that gives off fumes and that unless the fumes are properly exhausted they can reach an explosive concentration and cause a fire or explosion.

Compliance officer Scott did not take any tests to determine the concentration of vapors in the booth. He testified that he agreed with Mr. Morgan's opinion about the need for tests, stating that it is not possible to "be certain" whether dangerous quantities of vapors are present without a test. He stated, however, that the paint residues on the walls and floor of the spray booth can be dangerous because they too give off ignitable fumes.

Mr. Scott further testified that he saw the gasoline-powered fork lift truck taking large generators into the booth to be painted, and removing them when the

painting had been completed. He stated that this fork lift had several potential sources of ignition and was not the kind of truck approved for use in a location where there may be explosive concentrations or ignitable mixtures. He did not see any spray-painting being done while the fork lift was in the spray booth.

Allis-Chalmers' manager of industrial safety and security testified it was not necessary for the concentration of vapors to reach the lower explosive limit in order to be dangerous, that he would not want the concentration to reach one fifth of the lower explosive limit. He testified that it would be necessary either to measure the gases in the atmosphere or to perform certain calculations in order to determine whether dangerous quantities of flammable vapors were present and that it was necessary to know what kinds of paint and solvent were being used.

II

Judge Zinn affirmed the item. He found that the gasoline-powered fork lift was spark producing equipment and that the fork lift was not approved for use in locations where dangerous concentrations of flammable vapors might accumulate. The judge stated that there were "problems with the ventilating system", and accepted the compliance officer's opinion that there was a dangerous concentration of vapors, stating that the opinion "makes good sense, even though no quantitative analysis was taken."

Allis-Chalmers petitioned for review on the grounds that the judge erred in finding that the spray booth constituted a spraying area under the definition at section 1910.107(a)(2), that the judge erred in relying on section 1910.178 to find that the fork lift truck was spark-producing equipment, and that portions of his summary of the evidence were incorrect.

In its brief on review, Allis-Chalmers argues that the Secretary has not proved that the booth constituted a spraying area because he did not establish

that there were dangerous quantities of flammable vapors. Allis-Chalmers argues that the testimony of the compliance officers cannot establish that dangerous quantities were present because they took no tests to establish the concentration of vapors in the air and did not even know what kind of paint was being used. Allis-Chalmers further argues that the dried paint residues within the booth are not evidence of a hazardous atmosphere.

The Secretary did not file a brief.

III

We find that the Secretary has not established that Allis-Chalmers' spray-painting booth is a "spraying area" within the meaning of section 1910.107(a)(2). The Commission has held that to prove that a cited area is a "spraying area," the Secretary must show that either dangerous quantities of flammable vapors or mists were present, or that combustible residues, dusts, or deposits were present. Ed Jackman Pontiac-Olds, Inc., 80 OSAHRC 26/D14, 8 BNA OSHC 1211, 1215, 1980 CCH OSHD ¶ 24,351, p. 29,681 (No. 76-20, 1980). We find insufficient evidence on both these points.

Even if we assume that dangerous quantities of mists or vapors were present in the booth at some time, there is no evidence that the fork lift was operated within 20 feet of the booth while that alleged condition existed. No spraying was done while the fork lift was in the booth. On the occasion observed by the compliance officer, the truck did not enter the booth for five minutes after the spraying was finished. There is nothing in the record to establish how long the allegedly dangerous quantities of fumes would continue to exist after the spraying stopped, or to indicate that the fork lift ever entered the booth immediately after spraying was completed.

We also cannot find that there were "combustible residues" in the spray booth within the meaning of section 1910.107(a)(2). When compliance officer Scott was

asked how he could have alleged that a spraying area existed where he took no tests to determine the concentration of vapors, he replied that he "could see the excess residue" in the booth. The compliance officer also testified that the residues are "an accumulation of other sprays from the spraying that had been done in the course of time" and that the paint and the solvent being sprayed were both flammable. This does not show, however, that the residues were combustible. Although Mr. Scott also testified that the residues give off flammable fumes, this goes to whether there were dangerous quantities of vapors or mists in the booth rather than to the combustibility of the residues. In sum, we find insufficient evidence that the residues were combustible. 3/

Accordingly, the judge's decision is reversed as to item 33 of citation 2; the item is vacated.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: JAN 27 1982

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3/ Commissioner Cottine concurs in finding insufficient evidence of "combustible residues" within the meaning of section 1910.107(a)(2). Compliance Officer Scott only testified that the liquid paint residues gave off "flammable fumes". He did not identify the specific contents of the spray paint and never testified that the residues were "combustible" in either their liquid or solid states. The terms flammable and combustible define distinct classes of liquids and are not generally interchangeable. 29 C.F.R. §§ 1910.106(a)(18), (a)(19). Moreover, section 1910.107(a)(2) identifies two separate categories for the purpose of defining a spraying area: (1) flammable mists or vapors, and (2) combustible residues, dusts or deposits. With respect to the residues involved in this case there is insufficient evidence to show that they are properly considered "combustible residues" under the definition of a spraying area in section 1910.107(a)(2).

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| THE SECRETARY OF LABOR,<br>Complainant,<br>vs.<br>ALLIS-CHALMERS CORPORATION,<br>Respondent. | DOCKET NO. 77-3285<br>DECISION AND ORDER |

Appearances

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For Respondent

Zinn, Judge

I

Statement of The Case

A. Issues. Respondent has contested three items of two citations issued to them along with other citations not in dispute that resulted from an OSHA inspection of respondent's engine factory in Harvey, Illinois. The disputed charges are, for the most part, eighteen instances of alleged machine guarding violations. There is one item alleging a paint spray area combustion hazard.

I, Statement of the Case (Cont.)

To be determined in this proceeding is whether each of the conditions described are not in compliance with the cited OSHA safety standard for general industry so as to violate the Act (The Occupational Safety and Health Act of 1970, 29 U.S.C., sec. 651 et seq.). If the violation is found, the question of an appropriate penalty must also be determined.

B. Summary of this Decision. Citation one, item 5, sub-items (a), (b), (c), (f), (g), (h), and (i) and item 10, sub-items (1), (2), (7), (8) and (9) and citation two, item 33 are affirmed as violations of the Act. Penalties are assessed for citation one, item 5, $800.00 and item 10, $800.00 and for citation two, item 33, $240.00. Abatement date for all affirmed items of citation one is 90 days after the date of filing of this decision and order. Abatement date for citation two, item 33, is immediately.

C. History of the Proceeding. OSHA officials made a lengthy inspection of respondent's plant covering a twenty day period that ended August 22, 1977. They issued the citations September 14, 1977. Respondent filed a timely notice of contest contraverting all allegations and proposed penalties. A complaint was filed carrying forward the allegations of the citations and respondent's answer followed.

I, Statement of the Case (Cont.)

Respondent by its admissions as to the interstate aspects of its business and of its status as an employer has conceded the application of the Act and of the jurisdiction of this Commission over this enforcement proceeding.

Before the hearing the parties filed a partial settlement in a written stipulation. An order was entered based upon the stipulation which eliminated a number of contested sub-items, and set out which sub-items remained for determination. At hearing, the respondent admitted that one machine cited did not meet the standard, this being a milling machine described in citation one, item 10(7), (Tr. 7). Complainant moved to drop one sub-item in dispute for lack of proof, this relating to a multiple drilling machine described in citation one, item 5(d), (Tr. 294).

II

Summary of the Evidence

Two witnesses were presented by each of the parties. Complainant called two of the OSHA compliance officers who had inspected respondent's plant. Each officer related extensive education and experience in the safety management and enforcement field. The first OSHA witness was David Morgan and the second was Robert Scott. Respondent witnesses

were Allis-Chalmers employees. Mr. Charles Swanson gave his title as manager of industrial safety and security for Allis-Chalmers Corporation. Mr. Joseph L. Wright said he worked as manager of safety and security and service for Allis-Chalmers, Engine Division. Both men told of their education and experience in industrial safety management and engineering.

When discussing testimony of a witness, for brevity, I will state only their last names. The substance of all evidence deemed material and relevant to each sub-item has been collected under the referenced sub-item.

Citation One.

Item 5(a) Unguarded Couplings in Engine Test Cells.

Scott described the engine test area which consisted of 33 testing units. There assembled engines are bolted at the fly-wheel to the drive plate and shaft of a large electric motor. They are revved up by this dynamometer and various functions of the engine are observed and noted by the test cell operator. As the motors are being tested the operator moves about within the test unit cubicle in close proximity to the exposed and revolving fly-wheel and drive plate (Tr.56). Photographs C., Ex. 7 and 8 picture one of the units. Respondent's counsel

at hearing stated that they were contesting only the penalty, thus conceding that the lack of guarding was in non-compliance with the standard cited.

The hazard as Scott described it was that the operator might be injured through body contact with or clothing being tangled in the revolving coupled plate and flywheel.

Item 5(b) Unguarded In-running Nip Points on Hole Hog Machine.

Morgan described in very little detail the device called a hole hog machine. Some pictures, C., Ex. 1 and 2 are in evidence showing exposed rollers. Respondent also conceded that this machine needed guarding and contested only the penalty proposed (Tr. 3, 14). The danger as explained by Morgan was that the operator when at the controls, was quite near the rollers and through accident or inadvertence could have clothing or a hand caught and be pulled into the machine (Tr. 16).

Item 5(c) Drilling Machine.

Morgan described this drilling machine as one with a long shanked single bit, used to drill a small hole in a crank shaft. It is pictured in C., Ex. 3. Another photograph, C., Ex. 4, shows a similar machine with a plexiglass shield. The hazard as Morgan explained, was that the operator or anyone nearby might be injured by flying fragments

if the drill bit were to break (Tr. 19). The operator worked within one or two feet of the drill according to Morgan (Tr. 16). Swanson said the operator was not usually within proximity of the drill (Tr. 220). He said that the controls were five feet away. Swanson said the machine involved had torque monitoring sensors that reduced the hazard of drill breakage. He said that if breakage occurred, it was usually inside the work (Tr. 218). It was his opinion that the rotating head did not present a hazard (Tr. 220-221).

Item 5(e) Multiple Drilling Machine.

There were several multiple drilling machines. Scott explained that these were devices with a gang of drill bits from 24 to 36 in number. The operator loaded the part, then turned on the machine, which then operated automatically to bore holes in jig mounted engine parts to a required depth, then withdrew and stopped itself. The operator removed the piece being drilled, replaced it with another, again started the machine, then went on to other tasks. One man operated as many as four machines.

II, Summary of the Evidence (Cont.)

A photograph of the machine cited in item 5(e) is R., Ex. 9. In discussing this sub-item, Scott said that another photo, C., Ex. 9, was of a typical multiple drill, but he did not identify the drill pictured as any particular machine cited (Tr. 70).

Item 5(f) Multiple Drilling Machine.

C., Ex. 10, was said by Scott to be a photo of the drill described in this citation (Tr. 75). Another photo in evidence, R., Ex. 3, is also indicated as being of this same machine. The drill bits are unguarded above the drilling table. Swanson said the controls were two or three feet from the drills. He said that these drills are lowered through the drill table shown which is a template, into the part being drilled below the table (Tr. 223).

Item 5(g) Multiple Drilling Machine.

Photograph C., Ex. 12, pictures the drilling machine covered by this sub-item. Another picture of this machine is R., Ex. 4. Scott said the operator pictured in C., Ex. 12, was within a foot of the revolving drills.

II, Summary of the Evidence (Cont.)

Swanson said no guarding was needed as the drills were in essence guarded by the fixture into which they were placed as they went into the piece being drilled (Tr. 224).

Item 5(h) and (i) Band Saws.

Scott described these devices as horizontally mounted band saws used for cutting bar stock. R., Ex. 1 - 2, and C., Ex. 15 and 16 show the machines. On either side of the guides that hold the moving blade in place at the point where the blade contacts the stock to be cut, there is a span of several inches of bare blade. This is outside the point where the blade passes into the housing that covers the rest of the continuous blade and the wheels on which it runs. This stretch of bare blade is what Scott described as posing a hazard and requiring guarding. An adjustable guard that telescoped to allow adjustment for varying the opening to accommodate different widths of stock was described by Scott as being common in industry (Tr. 93, 94). Scott pointed out that the National Safety Council Accident Prevention Manual for Industrial Operations, 7th ed. (C., Ex. 13), at pages 837-838 suggested a form of guarding for band saws Swanson said that the operators did not get near the moving

band saw. The controls were two and one-half feet away from the blade. The saw moved down automatically after the stock had been emplaced and started the cutting. He did not believe the blades needed any further guarding (Tr. 227). Swanson said he had seen some such saws guarded and many that were not.

Item 10(1) Milling Machine.

Eight milling machines are involved in this proceeding, each is claimed to lack guarding of their point of operation. In general, these are electric motor driven devices that have cutting heads of varying sizes which are used to mill or cut away metal from castings and forgings to achieve desired finished dimensions. The cutting heads resemble large toothed gears with hardened metal blades mounted in each tooth. They rotate at high speed against the piece being cut, which passes the cutting head or is passed by it. Scott said that in his opinion the rotating heads were a hazard to the operator as the exposed cutters could injure them if any contact was made by their bodies or if their clothing should be caught and entangled (Tr. 108).

Swanson identified and respondent introduced in evidence as R., Ex. 16, portions of a pamphlet entitled Machine Guarding-Assessment of Need, a NIOSH publication. He quoted from page 53 a statement under the paragraph title "Hazards" which reads, "The milling machine is rarely guarded at the point of operation."

Scott referred to the National Safety Council pamphlet (C., Ex. 13), and noted what it said on pages 835 and 836 about milling machine safety practices. It also described and illustrated ways to guard milling heads. Morgan said he saw a workman within one or two feet of the operating head of this machine (Tr. 25). The machine in this item is pictured by C., Ex. 5, and by R., Ex. 7. Scott said generally speaking about milling machines that the operators are within one foot of the milling heads when preparing them for operation (Tr. 97). All the heads needed guarding in his opinion. Swanson said that as to this particular machine, that the operator would not be closer than within two feet of the cutter head. He did not think the head needed guarding (Tr. 203 - 204).

Item 10(2) Milling Machine.

Morgan said the worker operating this machine was within one to two feet of the operating head (Tr. 25). This is pictured in C., Ex. 6, and shows three unprotected cutting heads. Swanson said the machine was not around the plant any longer. He could not say whether it needed guarding or not (Tr. 204).

Item 10(3) Milling Machine.

Respondent provided a photo of the machine covered by this sub-item (R., Ex. 13). It shows a single milling head projecting laterally. Complainant's witness, Scott,

identified ten photographs of different milling machines, C., Ex. 17 thru 26. None of these pictures seemed to be of the same machine cited in this sub-item. No particular testimony was given to describe the machine covered by the sub-item. Scott gave a general statement that all the milling machines cited needed guarding because the operators had to get within one or two feet of them (Tr. 97, 98).

Item 10(4) Milling Machine.

Respondent provided a picture of the machine covered by this sub-item (R., Ex. 12). None of the complainant's photos seemed to be of the same machine. Scott did not describe any particular machine as being the one referred to in this sub-item. Swanson said the controls on this machine were two and one-half to three feet away from the cutting head. He said that the operator had no reason to get near the cutting head. He did not believe it needed a guard and that there was no hazard (Tr. 206, 207).

Item 10(5) Milling Machine.

No pictures or description of this particular machine were offered by complainant. Respondent had no picture and Swanson had no specific recollection of the machine. On this there is only Scott's testimony that all milling machines cited had the same problems and hazards.

II, Summary of the Evidence (Cont.)

Item 10(6) Milling Machine

R., Ex. 6, was identified as being a picture of the machine cited in this sub-item. Complainant had no picture identified as being of the cited machine. Scott did not describe this machine individually nor did Swanson.

Item 10(7) Milling Machine.

The machine is shown in the photo, C., Ex. 19. The operator is pictured and the unprotected cutting head is quite near his hand. Respondent's man Swanson said the machine needed guarding (Tr. 211).

Item 10(8) Milling Machine.

Respondent supplied a picture of this machine (R., Ex. 5). It shows two cutting heads with one near the control panel. Swanson said that the machine had four cutting heads. He felt that there was a need for some control mechanism as he described it between the control panel and the nearest cutting head. He believed the remaining heads were no hazard (Tr. 212). Complainant had no pictures and presented no testimony that described the particular machine cited in this sub-item,

Item 10(9) Oil Seal Press.

Complainant supplied a picture of this machine (C., Ex. 27). It shows an open press with the ram up and

the die below, with no barrier guarding to prevent access to the point of operation. Scott described the operation of the device as being like a punch press. The control was a single pneumatic valve on top of the press. He said both of the operator's hands were free after actuating the press and could have access to the point of operation (Tr. 115-117).

Citation 2, Item 33, Paint Spray Area, Spark Source.

Complainant supplied four pictures that relate to this sub-item. C., Ex. 28 and 29 show the fork-lift truck in operation. The first picture is of the truck and operator moving a generator. Scott said this was within the spray booth (Tr. 121). He described the booth as an open commercial spray booth about fifteen feet wide and 20 to 25 feet deep and with a roof but no front. Swanson said the booth was like a garage without a door, having three sides and a roof (Tr. 227). The back wall had an exhaust system. Morgan had tested the exhaust system air flow by measuring it and obtaining readings varying from 60 to 120 feet per minute. He said a flow of under 100 linear feet per minute would allow combustible vapor to accumulate in the booth (Tr. 43, 44). Wright said that when Morgan told him of the velometer readings at the paint spray booth, that when asked, replied that the readings were satisfactory (Tr. 287).

II, Summary of the Evidence (Cont.)

Morgan said no tests of the vapor content of the air was made. Scott confirmed this (Tr. 156). Scott said he made no temperature tests. He saw the open paint and solvent containers and the spray apparatus as pictured in C., Ex. 30, 31. Scott agreed with Morgan that to verify the lower limits of the explosive character of the vapors they would have to have done some testing (Tr. 157). He based his findings of dangerous quantities of flammable vapors being present on his observation of the paint and materials and the spray painting being done (Tr. 137). He explained that the fork-lift was a gasoline motor driven machine with spark producing functions such as spark plugs, distributor, spark coil, generator and manifold, all being ignition sources.

Complainant put into evidence as C., Ex. 32, an abstract of the OSHA regulation, 1910.178 relating to powered industrial trucks. Scott explained that certain types of trucks could properly be used in flammable atmospheres. He discussed the tables N-1 in the standard, giving the different ratings for trucks indicating that the truck respondent was cited for did not meet ordinary and acceptable classification for use in Class I locations. These locations are described as places where flammable gases or vapors are present at levels sufficient to produce explosive or ignitible mixtures (Tr. 134, 135).

II, Summary of the Evidence (Cont.)

Penalties.

Scott explained how the proposed penalties in the citations had been calculated. He said he followed the OSHA field operations manual, considering gravity of the violation cited, the employer's size, good faith and history. Because of the great number of items unguarded and employee exposure, he rated the gravity as high. He gave no credit for size as respondent was a large employer. He gave no credit for good faith on the basis of the employer being a large one and there being a multiplicity of violations (Tr. 150). He gave credit for history at full value for lack of a previous record of OSHA violations at the particular factory. Using $1,000.00 as a starting point for each item, Nos. 5 and 10, he adjusted by ten percent as an allowance for history. The net penalty proposed was $900.00 for each item of the citation. For citation No. 2, item 33, Scott, without going into the details said he followed the same reasoning and came up with a net proposed penalty, $270.00 (Tr. 144).

Respondent's man, Wright, told of the general efforts made at the plant to enforce OSHA requirements. He mentioned safety awards and citations the company had received in recognition of long accident free periods and low loss experience.

III

Opinion

The OSHA standards with which this proceeding is concerned are a portion of the safety standards for general industry. The group of nine sub-items under citation one, item 5, are cited as instances of non-compliance with the standard which reads:

> "1910.212 - GENERAL REQUIREMENTS FOR ALL MACHINES
>
> (a) Machine Guarding.
>
> (1) Types of guarding. One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are barrier guards, two-hand tripping devices, electronic safety devices, etc."

The group of nine sub-items under citation one, item 10, are cited as instances of non-compliance coming under other portions of the same standard which read:

> "(3) Point of Operation Guarding.
>
> (i) Point of operation is the area on a machine where the work is actually performed unon the material being processed.
>
> (ii) The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standard therefor, or, in the absence of applicable specific standards,

shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

(iii) * * * * *

(iv) The following are some of the machines which usually require point of operation guarding:

(a) * * * * *
(b) * * * * *
(c) * * * * *
(d) Power presses.
(e) Milling machines.
(f) Power saws."

Citation two, item 33 is cited as an instance of non-compliance with a portion of the standard dealing with combustibles in the process of spray finishing. Parts of it read:

"1910.107 - SPRAY FINISHING USING FLAMMABLE AND COMBUSTIBLE MATERIALS

(a) Definitions applicable to this section.

(1) * * * * *

(2) Spraying Area. Any area in which dangerous quanities of flammable vapors or mists, or combustible residues, dusts, or deposits are present due to the operation of spraying processes.

(3) Spray Booth. A power-ventilated structure provided to enclose or accommodate a spraying operation to confine and limit the escape of spray, vapor and residue, and to safely conduct or direct them to an exhaust system.

(b) * * * * *

(c) Electrical and other sources of ignition.

(1) * * * * *

(2) Minimum separation. There shall be no open flame or spark producing equipment in any spraying area nor within 20 feet thereof, unless separated by a partition."

* * * * *

(d) Ventilation

(1) * * * * *

(2) General. All spraying areas shall be provided with mechanical ventilation adequate to remove flammable vapors, mists or powders to a safe location and to confine and control combustible residues so that life is not endangered. * *"

I will discuss each of the sub-items in the same order as they are set out in part II, of this decision, the Summary of the Evidence.

Citation One.

Item 5(a) Unguarded Coupling in the Engine Test Cells.

The lack of guarding and the need for it is admitted. Each of the 33 units was in non-compliance with the cited standard. The hazard seems great because of the number of possible sources of injury. Many engines passed through this testing process with each operation posing the danger

of injury. This is a violation of the Act and this sub-item of citation one is to be affirmed.

Item 4(b) Unguarded In-running Nip Points, Hole Hog Machine.

The respondent admitted this situation to be in non-compliance. So little information was presented of employee exposure to the rollers or as to the nature of the work done at this machine as to make weighing the gravity of the violation a difficult task. The violation is found however, and the sub-item is to be affirmed.

Item 5(c) Drilling Machine.

The rotating bit, shank and drill chuck are all sources of danger if there is a hazard of contact by a worker. A breaking drill bit and flying pieces was mentioned as another source. These are such things as need to be guarded under the standard cited. The fact that the drill is protected from breaking by a torque sensor and that the operator is not usually close to the machine after the operation is begun, reduce the likelihood of injury, but do not eliminate it. The lack of a guard is a failure to comply and is a violation of the Act. This sub-item is to be affirmed.

Item 5(d) Multiple Drilling Machine.

This citation sub-item is to be vacated on motion of complainant.

III, Opinion (Cont.)

Item 5(e) Multiple Drilling Machine.

No description of this machine or its functioning was supplied by complainant's witnesses. This sub-item is to be vacated.

Item 5(f) Multiple Drilling Machine.

This gang drill has exposed bits and heads that rotate. The operator can be near the machine as it runs its cycle and would have some access to the revolving drills. Since the drills pass through a template and into the piece being drilled below the table, the likelihood of such contact is not high. As this condition is not in compliance with the standard and is a violation the sub-item should be affirmed.

Item 5(g) Multiple Drilling Machine

This machine is a group of drills mounted horizontally, with the operator working quite near them when at the controls. The unguarded drills are within reach and as such are not in compliance and do pose a hazard. This sub-item should be affirmed.

Item 5(h) and (i) Band Saws.

The portion of open blade on either side of the point of operation of these band saws is a hazard. The controls are far enough away that if the operator were to

go no closer than the control panel then the risk factor would be low. However, the point where the stock is located makes it likely that the operator might need to perform some task closer to the exposed and moving blades. The testimony and literature in evidence suggest some guarding is customary and practical. The lack of guarding is not in compliance with the standard and is a violation. The sub-items relating to the saws should be affirmed.

Item 10(1) Milling Machine.

The exposed cutting head is unguarded. The operator could come into contact with the moving head as nothing prevents this from happening. This condition does not comply with the cited standard. This is a violation and the sub-item should be affirmed.

Item 10(2) Milling Machine.

The unprotected heads are a hazard on this three headed unit. Neither location nor barriers afford any preventative to a worker approaching the moving heads. The sub-item should be affirmed as the condition does not meet the standard and is in violation.

Item 10(3) Milling Machine.

Inadequate information was given on this machine for any determination to be made. The OSHA compliance officer's general conclusion is not sufficient to make a

III, Opinion (Cont.)

finding upon. The picture, R., Ex. 13, shows the unprotected mill head, but that alone is not enough. This sub-item is to be vacated.

Item 10(4) Milling Machine.

Here again there is only a picture supplied by respondent, R., Ex. 12, with testimony by Mr. Swanson that he did not believe the machine needed guarding, for the controls were over two feet from the head. A lack of information for a finding requires that this sub-item be vacated.

Item 10(5) Milling Machine.

This machine was not specifically discussed by either complainant's or respondent's witnesses. No pictures were supplied of it by either party. This sub-item is to be vacated.

Item 10(6( Milling Machine.

Respondent supplied a photo, R., Ex. 6, but neither side gave any particular information about this machine. The sub-item must be vacated for lack of evidence.

Item 10(7) Milling Machine.

Respondent conceded this machine needed guarding. The testimony indicates there is a hazard. The sub-item is to be affirmed.

III, Opinion (Cont.)

Item 10(8) Milling Machine.

Respondent's witness, Swanson, conceded that there was a need for protecting the nearer of the four cutting heads on the machine. This unit is pictured in R., Ex. 5. There is a hazard so there is a need for guarding. The condition does not meet the standard cited and is a violation. This sub-item is to be affirmed.

Item 10(9) Oil Seal Press.

This unit is a power press and there is nothing to keep the operator's hands away from the point of operation. This falls short of the guarding standard cited. The condition is a violation and the sub-item is to be affirmed.

Citation No. 2, Item 33, Paint Spray Area, Spark Source.

The fork-lift truck being a gasoline powered unit is one other than the kind approved for use in locations where volatile flammable liquids are handled and in which concentrations of gases or vapors are normally kept from being hazardous by ventilation, but which might become hazardous if the ventilation system did not operate normally. This is founded upon the guidelines of the OSHA standard for powered industrial trucks, 1910.178 which was put in evidence by complainant (C., Ex. 32), and of which official notice is taken. This item of the citation is claimed to

be a failure to comply with the standard 1910.107(c)(2) prohibiting any spark producing equipment within twenty feet of a spraying area. The gasoline engine on the truck is a spark producing item of equipment. I find that because of the problems with the ventilating system, and the fact that spraying was going on from time to time in the booth with the presence of the open containers of paint and solvent, that there were circumstances from which Mr. Swanson's opinion of the atmosphere in the respondent's spray booth being a hazardous collection of dangerous and flammable mists and gases makes good sense, even though no quantitative analysis was taken. The item should be affirmed.

Respondent would have the machine guarding items of the citation dismissed as de minimis matters on a theory of little showing of actual exposure and no showing of a record of injury. Van Raalte C., Inc., 76 OSAHRC 48/B8, 4 BNA OSHC 1151, 1975-76 CCH OSHD 18,067,20,633; The Gold-Mersereau Company, Inc., 76 OSAHRC 88/B6, 4 BNA OSHC 1498, 1975-76 CCH OSHD, 19,474, 20,916. Respondent contends the standard cited relating to point of operation guarding does not apply to milling machines. The basis for this argument is that in most milling machines the point where

the milling or cutting takes place on the metal being cut is in some covered or interior point remote from the operator. That does not make the standard inapplicable in the instances found to be in violation here. In each item affirmed while the milling head alone is a hazard, the point of contact with the part is also an accessible hazard presenting some danger to the operator. The facts do not quite match as there is employee approach to some if not all of the machines cited at the Allis-Chalmer's plant. There was no showing of any lack of injury experience or to the contrary that there had been injuries. The lack of compliance provides a presumption of hazard. Vecco Concrete Construction, Inc., 77 OSAHRC 183/A2, 5BNA OSHC 1960, 1977-78 CCH OSHD para. 22,247. For the de minimis treatment to be afforded the non-compliance, and it not adjudged a violation, there must be a showing that the safety of respondent's employees has not been diminished by the condition. Clifford B. Hannay & Sons, Inc., 78 OSAHRC 12/A2, 6 BNA OSHC 1336, 1977-78 CCH OSHD par. 20,812 22,525.

With regard to the last item having to do with the spray painting area, respondent contends the complainant failed to establish that the atmosphere was such as to contain dangerous quantities of flammable vapors. The

decision in Bethlehem Fabricators, Inc., 76 OSAHRC 62/C2, 4 BNA OSHC 1289, 1976-77 CCH OSHD par. 18,683, 20,782 is cited as making such proof a predicate for a determination of a violation under the cited standard. The situation here with the fork-lift truck was somewhat different than in the Bethelem Fabricators. In any spraying operation it is reasonable to expect the atmospheric concentrations will vary from moment to moment. What the standards address themselves to is what the hazard might be as well as what it is. This is illustrated by reading a portion of the standard on powered industrial trucks which was put into evidence as C., Ex. 32. The portions of the standard read:

> "1910.178 - POWERED INDUSTRIAL TRUCKS
>
> (a) General Requirements.
>
> (1) This section contains safety requirements relating to fire protection, design, maintenance, and use of fork trucks,. . . powered by electric motors or internal combustion engines.
>
> * * * * * * *
>
> (b) Designations.
>
> For the purpose of this standard there are eleven different designations of industrial trucks or tractors as follows: D, DS, DY, E, ES, EE, EX, G, GS, LP and LPS.
>
> (1) * * * * *
>
> (2) * * * * *

III, Opinion (Cont.)

(3) The DY designated units are diesel powered units that are provided with additional safeguards to the exhuast, fuel and electrical systems. * * * *

(4) * * * * * *

(5) * * * * * *

(6) The EE designated units are electrically powered units * * * *

(7) The EX designated units are electrically powered units * * * *

(8) The G designated units are gasoline powered units having minimum acceptable safeguards against inherent fire hazards.

(c) Designated Locations.

(1) * * * * * *

(2) * * * * * *

(i) * * * * * *

(ii) * * * * * *

(iii) * * * * * *

(iv) Powered-operated industrial trucks designated as DY, EE or EX may be used in locations where volatile flammable liquids or flammable gasses are handled, processed or used * * * * *; also in locations in which hazardous concentrations of gasses or vapors are normally prevented by positive mechanical ventiliation but which might become hazardous through failure or abnormal operation of the ventilating equipment; * * * * * *"

III, Opinion (Cont.)

The lift truck was described as being one with a gasoline powered engine. This seems to make of it a designation G truck, not acceptable for use in a designated location described in the quoted portion of the standard. The paint spray booth seems to meet the description of a location described in (iv) as the exhaust system if working is intended to keep the concentrations of flammables from becoming hazardous as described in 1910.107(d)(2).

Penalties.

The usual matters that are to be weighed in fixing penalties prescribed by sec. 666(1) of the Act, size of employer, gravity of violation, good faith of employer, history of compliance were all discussed by Mr. Swanson in explaining the proposed penalties. The number of employees was not mentioned but the size of the plant indicates Allis-Chalmers is a large employer entitled to no special credit under the OSHA penalty guidelines which seem fair and reasonable in this aspect. The gravity of the violation as it relates to a likelihood of injury to employees seems high when the total number of machines and instances of exposure involved is counted. Each of these were assembly-line type operations with repetitive operations carried on at each work stand. Respondent's good faith was questioned

on the basis of the large number of items found in violation, although full credit for history for a favorable record of a lack of OSHA citations at the plant was allowed. This logic is not acceptable, and I would give credit for good faith for lack of any demonstration of bad faith. If the increments of credit in the OSHA Field Operations Manual method for figuring proposed penalties are fairly given, the formulary is fair and reasonable. The OSHA pattern for calculating penalties is not a constraint upon this Commission or its Judges. The complainant's proposed penalties are merely advisory. Brennan v. OSHRC and Interstate Glass Company, 487 F2d 438, 441-2 (8th Cir. 1973); Long Manufacturing Company, N.C., Inc., 554 F 2d 903, 908 (8th Cir. 1977). Borrowing the formula however, and modifying the proposed penalties as the facts warrant it would tend to fairness and even-handed assessments and is preferred to following only the broader parameters of the Act's advice 29 U.S.C. 666(i). I believe that modifying the proposed penalties to give the ten percent good faith credit will be a proper adjustment, and will result in a fair penalty. Assessments of $800.00 on each item of citation one, and $240.00 on citation two are reasonable and should encourage future compliance with the Act by Respondent.

Abatement.

Abatement dates for all items in issue as proposed by complainant have all been passed. Respondent should be given a reasonable time for resolving any hazards that are found to require abatement by this proceeding. An abatement date of ninety days for all items needing mechanical guarding should be sufficient time. The item as to the spray painting area is more easily corrected and is of a higher gravity and immediate abatement should be required.

IV

Findings of Fact

To state formally the determinations made of the disputed factual issues, these findings of fact are made:

1. Item 5(a). The unguarded couplings in the engine test cells were a hazard of high gravity to a large number of respondent's employees.

2. Item 5(b). The unguarded in-running nip points on the hole hog machine was a hazard to respondent's employees.

3. Item 5(c). The drilling machine was unguarded; employees were exposed to hazard of injury. The likelihood of injury from the hazard is of low probability.

4. Item 5(e). The drilling machine was not identified or described adequately to support a finding.

IV, Findings of Fact (Cont.)

5. Item 5(f). This multiple drill is unguarded. Employees are exposed to a hazard of injury. The likelihood of injury is of low probability.

6. Item 5(g). This multiple drilling machine is unguarded. The operator is exposed to a hazard of injury. The likelihood of injury is of low probability.

7. Item 5(h) and (i). The exposed band saws are a hazard to the operator. The likelihood of injury is of low probability.

8. Item 10(1). This milling machine is unguarded. The operator is exposed to the hazard of injury. The likelihood of injury is of low probability.

9. Item 10(2). This three headed milling machine is unguarded. The operator is exposed to the hazard they present. The probability of injury is low.

10. Item 10(3). This milling machine was unguarded but no hazard is shown.

11. Item 10(4). This milling machine was unguarded. There is no hazard of injury to employees presented by the milling head.

12. Item 10(5). No finding of hazard can be made.

13. Item 10(6). This milling machine was unguarded but no hazard shown.

14. Item 10(7). This milling machine is unguarded and hazardous. The likelihood of injury is of low probability.

IV, Findings of Fact (Cont.)

15. Item 10(8). This milling machine has several unguarded cutting heads. They present a hazard to employees. The likelihood of injury is of moderate probability.

16. Item 10(9). The oil seal fabricating press is unguarded. The operator is exposed to the hazard of injury. The likelihood of injury is of moderate probability.

17. Citation 2, Item 33. The paint spray booth is a paint spray area where volatile flammable liquids are used and where hazardous concentrations of gases or vapors are normally prevented by positive mechanical ventilation.

18. Citation 2, Item 33. The gasoline powered fork-lift truck is a spark source which was operated in the paint spray booth in the presence of flammable materials. This condition presented a hazard of injury to employees. The likelihood of such injury is of moderate probability.

19. Respondent, Allis-Chalmers, is a large employer.

20. The machine guarding violations except item 5(a) were mostly of low or moderate gravity, but in the aggregate are serious in nature.

21. The spray area violation is of moderate gravity and is serious in nature.

IV, Findings of Fact (Cont.)

22. Respondent has demonstrated good faith in its program of trying to improve safety performance through self-inspection, and in abatement of conditions noted.

23. Respondent has a favorable history of compliance with the Act, at its Harvey, Illinois plant.

24. A reasonable penalty for the violations found should be assessed and the sum of $800.00 for item 5 and $800.00 for item 10 of citation one and $240.00 for item 33, citation two, would be appropriate.

25. Abatement of all conditions found violative under citation one can be accomplished reasonably within ninety days of the entry date of this decision. Abatement of the condition found violative under citation two can be accomplished immediately.

V

Conclusions of Law

To state formally the conclusions reached in determination of disputed issues of law, the following is stated:

1. Items 5(a), (b), (c), (f), (g), (h), and (i). The conditions as found with regard to each of these sub-items do not comply with the guarding requirements of the

standard cited, 1910.212(a), and are in violation of the special duty clause, section 654(a)(2) of the Act.

2. Item 5(d) and (e). These sub-items are not in violation for lack of compliance with the cited standard.

3. Item 10(1), (2), (7), (8) and (9). The conditions as found with regard to each of these sub-items do not comply with the guarding requirements of the standard cited, 1910.212(3)(ii), and are in violation of the special duty clause, section 654(a)(2) of the Act.

4. Item 10(3), (4), (5) and (6). These sub-items are not in violation for lack of compliance with the cited standard.

5. Citation one, item 5(a), (b), (c), (g), (h) and (i) and item 10(1), (2), (7), (8) and (9), should be affirmed.

6. Citation one, item 5(d) and (e) and item 10(3), (4), (5) and (6) should be vacated.

7. Citation two, item 33 should be affirmed.

8. A reasonable penalty should be assessed on each citation affirmed.

9. Abatement should be ordered accomplished within a reasonable time on the violations of citation one and immediately on the violation of citation two.

VI

ORDER

Citation one, item 5, sub-items (a), (b), (c), (f), (g), (h) and (i) and item 10, sub-items (1), (2), (7), (8) and (9) and citation two, item 33 are affirmed.

2. Citation one, item 5, sub-items (d) and (e) and item 10, sub-items (3), (4), (5) and (6) are vacated.

3. A penalty of $1,840.00 is assessed.

4. Abatement of the conditions described in the portions of citation one affirmed are to be accomplished by July 12, 1978. Abatement of the condition described in the portion of citation two affirmed is to be accomplished immediately.

Frank B. Zipp
Judge, OSHRC

Dated: June 12, 1978

Chicago, Illinois

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| 79-234 | PIPE-RITE UTILITIES LTD., INC. | 1/28/82 | 3/B1 |
| | (Judge's decision) | | 3/B13 |
| 81-346S | CRAYTON'S SOUTHERN SAUSAGE COMPANY, INC. | 1/28/82 | 3/C10 |
| 16096 | BAROID DIVISION OF N. L. INDUSTRIES [remand] | 1/29/82 | 3/D5 |
| | (Judge's decision) | | 3/D10 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
|---|---|---|---|---|

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 240

ATLANTA, GEORGIA 30309

# NOTICE OF DECISION

Secretary v. Mica Construction Company

OSHRC Docket No. 81-218

1. Enclosed is a copy of my decision. It will be filed with the Commission on December 28, 1981, and will become the final order of the Commission on January 27, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N. W., Suite 601
   Washington, D. C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is January 27, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Paul L. Brady

PAUL L. BRADY
Judge

Date: December 8, 1981

OSHRC FORM 97

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

| | | |
|---|---|---|
| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 81-218 |
| | ) | |
| MICA CONSTRUCTION COMPANY, | ) | |
| | ) | |
| Respondent. | ) | |

## DECISION AND ORDER

APPEARANCES:

Jordana W. Wilson, Esquire
Office of the Solicitor
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Dallas, Texas 75202
On behalf of the Complainant

Michael R. Jones, Esquire
Miller, Jones & Goldman
A Professional Association
Post Office Box 1440
Hot Springs, Arkansas 71901
On behalf of the Respondent

BRADY, Judge: This proceeding is brought pursuant to section 10 of the Occupational Safety and Health Act of 1970 (Act) to contest a citation and proposed penalty issued by the Secretary of Labor (Secretary) pursuant to section 9(a) of the Act.

The citation, which alleges willful, or in the alternative repeated violations, was issued respondent following an inspection of its work site where it was installing a ten-inch sewer pipeline in a trench.

Respondent is charged with violating the specific requirements of the trenching standards at 29 C.F.R. § 1926.652 at the work site on Terry Lane between Pringle and Comp streets, Hot Springs, Arkansas. There is no dispute that the trench collapsed on December 15, 1980, and at that time, it measured approximately 13 feet deep and 3 feet wide. Also, the evidence is not in conflict that employees were working in the trench, and the sides were neither shored or sloped nor were other means of protection provided.

ALLEGED VIOLATION OF 29 C.F.R. § 1926.652(a)

The standard states in pertinent part as follows:

> (a) Banks more than 5 feet high shall be shored, laid back to a stable slope, or some other equivalent means of protection shall be provided where employees may be exposed to moving ground or cave-ins. Refer to Table P-1 as a guide in sloping of banks.

The alleged violation is described in the complaint as:

> The banks of a trench more than five feet high were not shored, layed back to a stable slope, nor was some other equivalent means of protection provided, where employees might have been exposed to moving ground or cave-ins.

The central issue presented is whether the standard allegedly violated applies to the facts in this case. The applicable definition under 29 C.F.R. § 1926.653, sets forth, "(c) 'Bank' - a mass of soil rising above a digging level." Although the complaint states that the "banks" of the trench in question were not properly shored or sloped, there is no evidence regarding "banks" as defined in the Secretary's own regulations. The thrust of the Secretary's case pertains to the

vertical sides of the trench in question and there was no evidence presented with reference to soil arising above the digging level. The standards under 29 C.F.R. § 1926.652, which contain specific trenching requirements, make a clear distinction between "banks" and "sides" of trenches in providing for the safety of employees.

The standard has, therefore, not been violated as alleged.

ALLEGED WILLFUL VIOLATION OF 29 C.F.R. § 1926.652(c)

The standard provides in pertinent part as follows:

> (c) Sides of trenches in hard or compact soil, including embankments, shall be shored or otherwise supported when the trench is more than 5 feet in depth and 8 feet or more in length. In lieu of shoring, the sides of the trench above the 5-foot level may be sloped to preclude collapse. . . .

The complaint alleges that:

> The side(s) of the trenches in hard or compact soil embankment(s), were not shored or otherwise supported when the trench was more than five feet in depth and more than eight feet in length.

It is first necessary to decide whether a violation occurred. The Review Commission has stated, as pointed out by the Secretary, the elements necessary to make a prima facie showing of noncompliance with the standard:

> [T]he Secretary must show that (1) the trench at issue is at least five feet deep and at least eight feet long, (2) the trench is neither shored nor sloped appropriately, and (3) a significant portion of the trench wall is composed of hard or compact soil. A respondent may then rebut this prima facie case by proving that its trench was dug entirely in solid rock, shale, or cement or gravel, which are not required to be shored or sloped. See Secretary v. Co-Con., Inc., 80 OSAHRC 127/D4, _____ BNA OSHC _____, 1977-78 CCH OSHD ¶ 22,035 (No. 76-1228, 1977).

The evidence of record is abundantly clear that the trench in question was approximately 12-13 feet deep and 3 feet wide. In addition, it was neither shored nor sloped, which establishes the first two elements of a prima facie case.

A considerable amount of testimony was directed toward the composition of the soil in the trench. An emergency medical technician at the scene of the cave-in testified that the soil consisted of shale rock, sand, and clay (Tr. 43). A pipelayer, working in the trench, testified that the sides were about six feet of "dirt" and shale, and about seven feet of shale (Tr. 111-112). Mr. Korth, the Secretary's soil expert testified that subsequent to the cave-in, he made four borings and two test pits along Terry Lane to obtain samples most representative of the soil conditions in the trench. The results of the tests showed generally that the materials in the area consisted of fill materials in the top layer underlayed by silty clay with occasional weathered shale seams for depths ranging from 2.5 to 6 feet below ground surface. These conditions were consistent with information obtained from the Arkansas Geological Commission. The material was considered to be of a hard and compact nature (Tr. 160, 163-165; Exh. C-3, pp. 3-4 and logs).

On the basis of the entire record, the evidence sufficiently reflects that a significant portion of the trench walls were composed of hard or compact soil. Thus a prima facie case having been established, and not rebutted, proves the standard was violated.

The question now is whether the violation was of a willful nature. The Secretary contends respondent had knowledge of the standard because of of a prior citation was affirmed for the same violation (Exh. C-1). Also, it is argued that respondent's failure to take positive steps to assure compliance with the trenching standards, particularly with such prior knowledge constitutes careless disregard of or plain indifference to the requirements of the standard. Duane Meyer d/b/a D.T. Construction Co., 79 OSAHRC 57/D4, 7 BNA OSHC 1560, 1564, 1979 CCH OSHD

¶ 23,742 (No. 16029, July 23, 1979). Also, it is insufficient for an employer to rely on the supervisor's experience, 7 BNA OSHC at 1564, or expect employees to use their "common sense." Georgia Electric Co. v. Marshall, 595 F.2d 309 at 320 (5th Cir. 1979). In support of his contention, the Secretary refers to the testimony of Mr. Croxton, respondent's president, who stated that if he were not present, the supervisor directly in charge of the crew decides on how wide to dig the trench (Tr. 39). It is, therefore, reasoned that since the necessary steps were not taken to assure that supervisory personnel would comply with the standard, it was willfully violated.

Respondent asserts that the Secretary has failed to establish the willful nature of the violation as it is not shown there was a conscious, intentional, deliberate and voluntary decision to disregard the requirements of the standard, or that it was plainly indifferent to it. Georgia Electric Co., supra.

Mr. Croxton testified that he was aware of the requirements set forth in the standard and Table P-1, and this resulted in digging the trench with vertical sides as he knew it was being dug in shale (Tr. 36-37, 87-90, 104). He stated that prior to the cave-in, approximately 60,000 feet of trenching had also been dug in accordance with the trenching standards. This included implementation of various measures such as use of trench boxes depending on the material encountered (Tr. 91).

Mr. Korth indicated that there could be a narrow distinction between the types of materials found in the area as the shale rock and soil lie next to each other in various seams, and to a certain extent, the point at which the change occurs requires a subjective determination (Tr. 163, 248, 264-265).

The Commission has taken a clear position in resolving this type situation in stating:

> A trench wall composed of solid rock, shale, or cemented sand and gravel interlayered with areas of hard compact soil will be considered to be the weaker of the two types of materials where the hard and compact components constitute a significant portion of the trench walls. Thus, if a significant part of the material in a trench wall is hard or compact, the trench must be supported in accordance with the requirements of section 1926.652(c) even if some portion of the trench wall is composed of solid rock, shale, or cemented sand and gravel. Co-Con, Inc., supra.

The standard itself does not specify that shale shall be "solid" as a requirement for an unshored trench under Table P-I. The question, therefore, arises as to whether the actions of the company president constituted a willful violation because he was of the opinion that the trench was in compliance with the proper standard. A violation is not willful if the employer had a good faith opinion that the violation conformed to the requirement of the standard. C. N. Flagg & Co.,75 OSAHRC 32/C6, 2 BNA OSHC 1539, 1974-75 CCH OSHD ¶19,251 (No. 1409, 1975) (good faith belief concerning a factual matter critical to the existence of the violation); see also General Electric Co., 77 OSAHRC 88/A2, 5 BNA OSHC 1448, 1977 CCH OSHD ¶21,853 (No. 11344, 1977), and General Electric Co., 75 OSAHRC 50/A2, 3 BNA OSHC 1031, 1975 CCH OSHD ¶19,567 (No. 2739, 1975), (good faith misinterpretation of the terms of the cited standard).

It has also been held that the test of an employer's good faith for purposes of determining willfulness, is an objective one i.e., was the employer's belief concerning a factual matter or concerning the interpretation of a standard, reasonable under the circumstances. See Western Waterproofing Co. v. Marshall, 576 F.2d 139 (8th Cir. 1978).

Although the president erroneously believed trenches dug in shale were exempt from the standard, nonetheless, his belief was reasonable under the circumstances. He stated he was aware of shale being present, and the soil remained substantially the same throughout the trenching operation without previous incident. All witnesses indicated shale was present in the soil being dug, and Mr. Korth testified his boring and pit samples reflected the same type of soil to be found in the trench area. His test revealed a portion of shale (Exh. C-4, #33) which caused the compliance officer to admit that no citation would have been issued if the sides of the trench were composed entirely of the same material.

Shale is not defined in the standard or Table P-I, however, the compliance officer believed they have reference only to hard shale. He also agreed that personal judgment is involved in determining whether certian material comes within the purview of the standard (Tr. 314, 318-319).

The record discloses that respondent was aware of the standard, and possessed a good faith view, though mistaken view of its requirements. The evidence fails to disclose conduct which constitutes an intentional disregard of the requirements, and accordingly, no willful violation of the standard occurred.

Respondent is also charged with a repeated violation of 29 C.F.R. § 1926.652(c) in that the standard was previously violated.

The Commission has held that a violation is repeated if it has entered a final order against the same employer for a substantially similar violation. Secretary v. Potlatch Corporation, 79 OSAHRC 6/A2, 7 BNA OSHC 1061, 79 CCH OSHD ¶ 23,294 (No. 16183, 1979). In this case, a final order has been entered (Exh. C-1), but the issue is whether there has been "a substantially similar violation." In light of the

Potlatch decision, a prima facie case of similarity is established by showing the prior and present violations are for failure to comply with the same standard. This showing may be rebutted, however, by evidence of disparate conditions and hazards associated with the violations. See Secretary v. Kent Nowlin Construction Co., 80 OSAHRC 39/A10, 8 BNA OSHC 1286, 80 CCH OSHD ¶24,458 (Nos. 76-191 & 76-192, 1980).

In this case, the evidence sufficiently rebuts the prima facie showing of similarity so that a repeated violation cannot be sustained. The standard is concerned generally with soil conditions on one hand and proper protection for employees on the other. In the first case, the central issue was the adequacy of the type of protection afforded employees working in a trench. The instant case is concerned with the basic applicability of the standard, and whether respondent is exempt as it contends. Since the two cases involve two separate and distinct issues, the "substantially similar" requirement is not met to prove a repeated violation.

A violation having been established, it must now be determined whether the violation is of a serious nature. For a violation to be deemed serious under section 17(k) of the Act, there must be a substantial probability that death or serious physical harm could result if an accident occurred. The probability that an accident will occur is irrelevant. Frank Swidzinski Company, 81 OSAHRC _____, 9 BNA OSHC 1230, 1981 CCH OSHD ¶25,129 (No. 76-4627, 1981). The record clearly reflects the violation is serious in light of the cave-in on the employees.

The last question for determination concerns the amount of penalty to be assessed for the violation. Under section 17(j) of the Act, the Commission is required to find and give "due consideration" to the size of the employer's business,

the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the assessment of an appropriate penalty. The gravity of the offense is the principal factor to be considered. Nacirema Operating Company, Inc., 72 OSAHRC 1/B10, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶15,032 (No. 4, 1972). The Commission stated in Secretary v. National Realty and Construction Co., Inc., 72 OSAHRC 9/A2, 1 BNA OSHC 1049, 1971-74 CCH OSHD ¶15,188 (No. 85, 1971), that the elements to be considered in determining the gravity are: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury, if any, and (4) the degree of probability of occurrence of injury.

Weighing all the foregoing factors in light of the circumstances, it is concluded that a penalty in the amount of $500.00 is deemed appropriate.

ALLEGED VIOLATION OF 29 C.F.R. § 1926.652(e)

The standard states as follows:

> (e) Additional precautions by way of shoring and bracing shall be taken to prevent slides or cave-ins when excavations or trenches are made in locations adjacent to backfilled excavations, or where excavations are subjected to vibrations from railroad or highway traffic, the operation of machinery, or any other source.

The only evidence of this violation is that two dump trucks, a backhoe and a pneumatic compactor were used during the course of the trenching operation. While it is alleged the trench was subjected to vibrations, and perhaps operations of the machinery could produce some vibratory effect, there was no evidence concerning the presence of vibrations, or the effects of any such vibration while the work was being performed.

The Commission has held that in order to prove a violation of section 5(a)(2) of the Act, as alleged here, the Secretary must establish that a particular standard

applies to the facts, there was a failure to comply with the standard, and employees had access to the hazard. Anning-Johnson Co., 76 OSAHRC 54/A2, 4 BNA OSHC 1193, 1975-76 CCH OSHD ¶20,690 (Nos. 3694 & 4409, 1976). Since the evidence does not disclose vibrations to which the trench was subjected, the standard cannot be held to have been violated as the presence of any vibration is pure speculation.

The Commission has also pointed out that the standard speaks of "additional precautions" to be taken "where excavations are subject to vibrations." It must be held in this case that the equipment present at the work site is of the ordinary and usual type which would not require the taking of "additional precautions." Moore Construction Inc., 76 OSAHRC 47/E14, 4 BNA OSHC 1131, 1975-76 CCH OSHC ¶20,632 (No. 5093, 1976). The standard has, therefore, not be violated.

## Findings of Fact

1. Mica Construction Company at all times hereinafter mentioned maintained a place of business at Hot Springs, Arkansas, and had a workplace at Terry Lane in Hot Springs where it was equipped in laying sewer pipe.

2. On December 16-22, 1980, authorized representatives of the Secretary conducted inspections at the aforementioned work site. As a result of the inspection, respondent was issued a citation with notice of proposed penalty.

3. During the time of the inspections, respondent conducted a trenching operation for installation of a ten-inch sewer pipeline.

4. On December 15, 1980, the trench collapsed on respondent's employees. At that time, it was approximately 13 feet deep and 3 feet wide; not shored, sloped or otherwise supported.

5. The evidence does not reveal the presence of "banks" as defined in 29 C.F.R. § 1926.653(c) during the trenching operation.

6. A significant portion of the sides of the trench was composed of hard or compact soil. Shale was also present in the composition.

7. Respondent was aware of the trenching standards and believed the operation was conducted in compliance therewith.

8. Respondent previously received a citation for violation of 29 C.F.R. § 1926.652(c), which became a final order of the Commission. The former violation was not similar to the one charged in the present citation.

9. Operation of the mechanical equipment at the work site was not shown to produce vibrations which would require additional precautions for employees working in the trench.

## Conclusions of Law

1. Mica Construction Company, at all times pertinent hereto, was an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, and the Commission has jurisdiction of the parties and subject matter herein, pursuant to 10(c) of the Act.

2. Respondent is, and at all times pertinent hereto, required to comply with safety and health regulations promulgated by the Secretary pursuant to section 6(a) of the Act.

3. Respondent was not in violation of the standard at 29 C.F.R. § 1926.652(a) during the period of the inspection.

4. Respondent was in serious violation of the standard at 29 C.F.R. § 1926.652(c) during the time of the inspection.

5. Respondent was not in violation of the standard at 29 C.F.R. § 1926.652(e) during the time of the inspection.

Upon the basis of the foregoing findings of fact and conclusions of law, and the entire record, it is

ORDERED:

1. That part of the citation alleging violation of 29 C.F.R. § 1926.652(a) is hereby vacated.

2. That part of the citation alleging serious violation of 29 C.F.R. § 1926.652(c) is affirmed and a penalty in the amount of $500.00 is hereby assessed.

3. That part of the citation alleging violation of 29 C.F.R. § 1926.652(e) is hereby vacated.

Dated this 28th day of December, 1981.

Paul L. Brady

PAUL L. BRADY
Judge

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

January 28, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Pipe-Rite Utilities Ltd., Inc.

OSHRC DOCKET NO. 79-234

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR EMPLOYEES

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>PIPE-RITE UTILITIES LTD., INC.,<br>Respondent. | OSHRC Docket No. 79-234 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

This case is before the Commission for review under section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). The Secretary of Labor ("the Secretary") issued a citation to the Respondent, Pipe-Rite Utilities Ltd., Inc. ("Pipe-Rite") alleging noncompliance with the standard at 29 C.F.R. § 1926.651(c). 1/ The standard requires that walls of excavations that expose employees to danger from moving ground be shored, sloped or supported by some other equivalent means. The citation alleged that three employees were exposed to danger from moving ground in that they were "working in an unshored, unsloped excavation (approximately 16'x16' and 12' deep, sandy soil)."

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1/ Section 1926.651(c) provides:

> § 1926.651 Specific excavation requirements.
>
> * * *
>
> (c) The walls and faces of all excavations in which employees are exposed to danger from moving ground shall be guarded by a shoring system, sloping of the ground, or some other equivalent means.

Administrative Law Judge J. Paul Brenton vacated the citation. The Secretary filed a petition for review and Commissioner Cleary directed review of the issues raised in the Secretary's petition. We find that the Secretary did not prove that there was a danger from moving ground and we therefore affirm Judge Brenton's decision.

I

Pipe-Rite had been engaged to excavate an area in sandy soil for the installation of a wet well to serve as a lift station at a sewage treatment plant. Inasmuch as the water table was within 2 to 3 feet of the surface, a wellpointing system was placed around the area to be excavated three days before the excavation was dug. The judge described wellpointing as "a system of pipes, inserted into the soil surrounding an area to be opened by excavating, connected with a pumping station to remove the water and dry out the area which will become the sides, faces, or walls of the excavation."

After the bottom of the excavation had been leveled, a crane adjacent to the excavation lowered a pre-formed concrete slab, 8 feet square and 2 feet thick, into the excavation and apparently into its center. When compliance officer Mylott arrived, she observed a pipe being lowered into the excavation and placed end-up on top of the slab. The pipe was 6 feet long and nearly 6 feet in diameter. An identical piece of pipe was then placed on top of the first piece.

The dimensions of the excavation were in dispute at the hearing. Compliance officer Mylott measured the length of the sides at the top by pacing off; she testified that they were 16 feet long. Mr. Simpson, the lead operator for the sewage treatment plant, testified that the length at the top was 12 to 15 feet. Mr. Eakins, Pipe-Rite's president, testified however that the walls were 18 feet

long. Both Mr. Simpson and Mr. Eakins testified that the wellpoints were within 2 feet of the walls.

Whether and to what extent the walls of the excavation were sloped were also sharply disputed at the hearing. No measurements of the dimensions of the bottom of the excavation were taken. Compliance officer Mylott testified that the walls were not sloped, that "[i]t was a straight cut to the bottom . . . ." Mr. Simpson, who saw the excavation at the same time as the compliance officer, testified that it had "straight sides" and that he observed no sloping, except on one side where the wall had "a very slight slope to it." Mr. Eakins testified that the walls were not vertical because vertical walls of sandy soil will not stand even when wellpointed. Mr. Eakins further testified that "[t]he ditch was eight feet at the bottom because this bottom slab was graded off eight foot square," and that, given the top dimensions of the excavation, "there was three feet anyways, slope, to four feet." 2/

Other testimony suggests that the dimensions of the bottom were greater than 8 feet square and therefore that the slope was steeper. Mr. Simpson estimated that there was "[n]ot more than two to three feet" between the edge of the concrete slab and the walls, and that while the slab was lowered, an employee stood off to the side on the bottom to guide it. Compliance officer Mylott testified that the employees applying sealer to the pipe were "[a] couple of feet" from the side of the excavation.

The nature and moisture content of the soil were also at issue at the hearing. Mr. Winterholler, a civil engineer with expertise in soil conditions, testified for the Secretary that he took a sample of undisturbed soil from the area about 7 months after the inspection. The sample had been taken from below

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2/ Mr. Eakins was evidently referring to the horizontal component of the slope.

the water table; the soil had not then been dried by a wellpointing system. Mr. Winterholler tested the sampled soil for its grain size, plasticity, and moisture content. He testified that the excavation was dug in sandy soil composed of "brown, fine to medium sand with some shell [rock], and slight traces of clay and silt." The moisture content of the sampled soil was 22 1/2%. Compliance officer Mylott testified that the area was much drier when the sample was taken than at the time of the inspection. Mr. Simpson testified that the water table had fallen considerably since the inspection. Both compliance officer Mylott and Mr. Simpson observed moisture in the bottom of the excavation. The compliance officer also observed moisture up to about the 9 foot level of the walls, but Mr. Simpson testified that the walls were dry. Mr. Eakins, Pipe-Rite's president, testified that the soil was dry. Miss Mylott and Mr. Simpson observed loose sand at the bottom of the south wall of the excavation, but Mr. Simpson testified that only small amounts of sand had given way.

All four sides of the excavation had superimposed loads nearby; on two sides there were large sewage treatment tanks, on another side there was a crane, and there was a pile of sand on the fourth side. Mr. Winterholler testified that he was not supplied with information on how full the tanks were and therefore could not determine the effect of the tanks on the stability of the walls; compliance officer Mylott testified that she lacked the training to determine whether the tanks influenced the stability of the walls.

The effect of wellpointing on the stability of the walls was discussed at the hearing. Mr. Winterholler testified that because moisture adversely affects the rigidity of the soil, a wellpointing system "must be used to dry out the area," and that "[i]f the area is dry enough, cuts can be made in sand for a short period of time." Mr. Eakins testified that "wellpointing holds the ground very safely" and that "conditions in the sides were very stable." He described wellpointing as "a practice we exercise quite often for short periods of time."

Counsel for the Secretary asked Mr. Winterholler several hypothetical questions. Mr. Winterholler was first asked to assume that there was an excavation about 12 to 16 feet long on each side and about 12 feet deep in the soil he examined, that it had the superimposed loads noted above, and that the soil appeared to the eye to be moist from the bottom to the 9 foot level. He was then asked whether "[u]nder those circumstances would there be a likelihood of moving ground . . . ." He assumed that the walls were vertical and answered that "there could be a likelihood of moving ground." For the third question, Mr. Winterholler was asked to assume, in addition, that up to the 7 foot level some sand was "apparently sloughing off." He was then asked what the sloughing would indicate; he answered that "either the well points weren't deep enough or that area had some moisture in there." He added that "there is a greater danger of cave-in when the soil is wet . . ., much greater."

II

In his decision Judge Brenton vacated the citation. The judge found that "the walls of the excavation were very dry and that there was no significant amount of the giving away of soil from the walls." The judge also found that the sides and bottom of the excavation were dry, that only "[a] little bit, a small amount of sand . . . was observed to give way." He discounted the conclusion of the Secretary's expert witness that there was a danger of moving ground. The judge stated that Mr. Winterholler's answer to the Secretary's first hypothetical question assumed that the walls were vertical when they were not, that the walls were moist to the 9 foot level when they were not, and that the hypothesis did not include the effect of the wellpointing system. The answer to the third hypothetical question was discounted because the sloughing hypothesized by the Secretary did not occur. As to the effect of the superimposed loads on the stability of the excavation walls, the judge found insufficient evidence to make

a conclusion. The judge concluded that wellpointing together with some sloping were equivalent means of protection within the meaning of the standard.

The Secretary argues that it was "plain error" for the judge to conclude that the wellpoint system here afforded "equivalent protection." The Secretary notes that the slope of the walls was far steeper than that depicted in Table P-1, a table in Subpart P of 29 C.F.R. Part 1926; Subpart P contains excavation and trenching standards.

The Secretary also argues that the judge erred in finding that the soil was "very dry". In his brief, the Secretary describes the soil as "moist" and for support cites the testimony of the compliance officer and the sewage plant official who both testified that they observed moisture at the bottom of the trench. The Secretary also contends in his brief that there was a danger of moving ground because dirt was sloughing off the sides of the excavation, a large crane was adjacent to the excavation, and two large holding tanks were within a few feet of the excavation.

III

For the Secretary to prove noncompliance with section 1926.651(c), he must first prove that there is a danger from moving ground. See Seaward Construction Co., 77 OSAHRC 75/C5, 5 BNA OSHC 1422, 1977-78 CCH OSHD ¶ 21,803 (No. 8684, 1977). We conclude, for the reasons that follow, that Pipe-Rite's employees were not shown to have been exposed to a danger of moving ground. We therefore need not consider whether the judge correctly found that wellpointing together with some sloping were "equivalent means" of protection within the meaning of the standard.

The Secretary argues that Judge Brenton erred in finding that the "walls of the excavation were very dry and that there was no significant amount of the giving away of soil from the walls." However, the judge's findings were based

largely on his view of the credibility of the witnesses. We see no reason to disturb the judge's findings. See C. Kaufman, Inc., 78 OSAHRC 3/C1, 6 BNA OSHC 1295, 1297, 1977-78 CCH OSHD ¶ 22,481, p. 27,099 (No. 14249, 1978). The judge correctly found that the soil sample does not reliably indicate the stability of the excavation's walls because the soil of the walls, unlike the sampled soil, "had been under the influence of the well point system for over 48 hours and had dried out." We also agree with the judge's view that the soil expert's answers to the first and third hypothetical questions are of little value because important facts not in evidence were hypothesized and important facts in evidence were not hypothesized.

In addition, the record does not permit a reliable calculation of the degree of sloping because no measurements were taken of the dimensions of the bottom of the excavation. Furthermore, as the expert witness testified, there is insufficient evidence to determine the effect of the nearby superimposed loads on the stability of the excavation walls. Finally, noncompliance with the sloping requirements of Table P-1 is not sufficient to establish a danger from moving ground within the meaning of section 1926.651(c). See Seaward Construction, 5 BNA OSHC at 1423, 1977-78 CCH OSHD at p. 26,243.

Accordingly, the judge's decision is affirmed and the citation is vacated.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: JAN 28 1982

COTTINE, Commissioner, dissenting:

The majority's vacation of the citation in this case is inconsistent with Commission precedent and unsupported by the record evidence. Accordingly, I dissent.

The standard at §1926.651(c) provides that "[t]he walls and faces of all excavations in which employees are exposed to danger from moving ground shall be guarded by a shoring system, sloping of the ground, or some other equivalent means." (emphasis added). As part of his prima facie case for alleged violations of this standard the Secretary is required to establish that there is employee exposure to a danger of moving ground. See M.J. Lee Construction Co., 79 OSAHRC 12/A2, 7 BNA OSHC 1140, 1979 CCH OSHD ¶23,330 (No. 15094, 1979); Seaward Construction Co., 77 OSAHRC 75/C5, 5 BNA OSHC 1422, 1977-78 CCH OSHD ¶21,803 (No. 8684, 1977). The Commission has also held that the terms "danger from moving ground" in §1926.651(c) and "unstable or soft material" in §1926.652(b) describe equivalent soil conditions and that an excavation dug in "unstable soil" by definition creates a "danger from moving ground".[1/] M. J. Lee Construction Co., supra; D. Federico Co., Inc., 76 OSAHRC 13/A2, 3 BNA OSHC 1970, 1975-76 CCH OSHD ¶20,422 (No. 4395, 1976), aff'd on other grounds, 558 F.2d 614 (1st Cir. 1977); West Coast Construction Co., 76 OSAHRC 149/F1, 4 BNA OSHC 1940, 1976-77 CCH OSHD ¶21,419 (No. 7454, 1976). Furthermore, the Commission has held that the excavation and trenching standards, including Tables P-1 and P-2, create a rebuttable presumption that predominately sandy soils, unless cemented, are soft and unstable

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1/ "Unstable soil" is defined at 29 C.F.R. §1926.653(q) as "[e]arth material, other than running, that because of its nature or the influence of related conditions, cannot be depended upon to remain in place without extra support."

within the meaning of §1926.652(b). See Duane Meyer d/b/a D.T. Construction Co., 79 OSAHRC 57/D4, 7 BNA OSHC 1560, 1979 CCH OSHD ¶23,742 (No. 16029, 1979). Inasmuch as the terms "unstable soil" and "danger from moving ground" are equivalent, it follows that if sandy soil satisfies the definition of one term (unstable soil) it also satisfies the definition of the other term (danger from moving ground). Accordingly, predominately sandy soil in an excavation wall creates a danger of moving ground.

The evidence in this case clearly establishes that the cited excavation was dug in noncemented, predominately sandy soil. A sample of soil taken from the wall of the cited excavation revealed the walls to be composed of brown, fine to medium sand with some shell, and slight traces of clay and silt. Witnesses for both parties described the soil as primarily sandy in composition and no evidence was presented that the soil was cemented. Under Commission precedent the soil was unstable, could not be depended on to remain in place without support, and, accordingly, presented a danger of moving ground within the meaning of §1926.651(c). See M.J. Lee Construction Co., supra.

The majority simply relies on Seaward Construction Co., supra, for the proposition that noncompliance with the sloping requirements of Table P-1 is not sufficient to establish a danger from moving ground within the meaning of §1926.651(c). However, my colleagues ignore the other Commission case law cited above establishing as a matter of law that the unsupported soil in the cited excavation presented a danger of moving ground within the meaning of §1926.651(c).

The record in this case establishes that the walls of the excavation were not sloped to an appropriate angle of repose to guard against collapse. My colleagues correctly note that the record does not permit a reliable calculation of the degree of sloping. However, even if the

evidence is viewed in a light most favorable to the Respondent, the slope is inadequate. Based upon the more favorable dimensions presented by Pipe-Rite's president showing the excavation to be a 16 foot square on top, an 8 foot square on the bottom, and 10.5 feet deep, the walls were sloped at a 69° angle. The Secretary's soil expert testified that the appropriate angle of repose for the soil in the excavation was 29°.[2/] Table P-1 approximates the angle of repose for compacted sharp sand to be 33° 41' and for well rounded loose sand to be 26° 34'. Clearly, the excavation was not sloped to the appropriate angle of repose.

Seaward Construction Co., supra, on which my colleagues rely, was based on the erroneous conclusion that "[t]he 1926.651 excavation standards neither contain nor refer to these tables [Tables P-1 and P-2] or any other specific requirements for sloping or shoring." 5 BNA OSHC at 1423, 1977-78 CCH OSHD at p. 26,243. However, §1926.651(g) clearly states that "[a]ll slopes shall be excavated to at least the angle of repose except for areas where solid rock allows for line drilling or presplitting." Table P-1 is entitled "Approximate Angle of Repose for Sloping of Sides of Excavations." (emphasis added). The table sets forth the angles of repose at which respective soils in the walls of an excavation "will lie without sliding." See note 2, supra.[3/] Accordingly, walls of an excavation that do not comport with the table have not been sloped to their required angles of repose and do not comply with the requirements of the excavation standards.

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2/ 29 C.F.R. §1926.653(b) defines "angle of repose" as "[t]he greatest angle above the horizontal plane at which a material will lie without sliding."

3/ The Commission has stated that "the angles of repose set forth in Table P-1 represent the maximum safe slopes for the soil classifications listed." Duane Meyer, d/b/a D.T. Construction Co., supra, 7 BNA OSHC at 1563 n. 12, 1979 CCH OSHD at p. 28,793 n. 12.

The Secretary has established that the excavation was composed of sandy soil that was inadequately sloped and lacked any shoring support structures.[4/] Since three employees were exposed to the danger of moving ground, the Secretary has carried his burden of proof. The Respondent's argument that it used a wellpoint system as a method of protection is without merit. The function of the wellpoints is simply to eliminate the presence of ground water as a contributing factor to soil instability.[5/] Wellpoints do not abate the hazard of moving ground and do not constitute equivalent means of protection within the meaning of the cited standard.[6/] Respondent's argument that its employees were in the trench for only a short period of time is irrelevant to the existence of the violation. Duration of exposure to a hazard is an appropriate consideration in assessing a penalty but it is not a defense to the underlying violation. See American Bechtel, Inc., 77 OSAHRC 214/A2, 6 BNA OSHC 1246, 1977-78 CCH OSHD ¶22,466 (No. 11340, 1977).

The citation should be affirmed.

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4/ The majority correctly notes that there is insufficient evidence to determine the effect of the nearby superimposed loads on the stability of the excavation walls. However, it must be noted that, if there was any effect, it would be to detract from, not add to, the stability of the excavation walls. See §1926.651(e).

5/ The soil expert testified that because moisture adversely affects soil rigidity, "a well point system or some kind of a pumping system must be used to dry out the area." Hearing transcript at 40. Also see §1926.651(h) which requires that the angle of repose be flattened where water conditions exist.

6/ According to Mr. Simpson, the lead operator at the sewage treatment plant, "[t]he well point system itself surrounded the hole and didn't affect the hole at all." Hearing transcript at 28.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 400

ATLANTA, GEORGIA 30309

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| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 79-0234 |
| | ) | |
| PIPE-RITE UTILITIES LTD., INC., | ) | DECISION AND ORDER |
| | ) | |
| Respondent. | ) | |

APPEARANCES

Larry A. Auerbach and Stephen J. Simko, Jr., Esquires,
U. S. Department of Labor, Office of the Solicitor,
Atlanta, Georgia, on behalf of complainant.

Mr. Douglas S. Eakins, President (Pro Se)
Pipe-Rite Utilities Ltd., Inc.,
7544 Lake Worth Road,
Lake Worth, Florida 33463

Brenton, Judge

## STATEMENT OF THE CASE

This case involves an excavation in which respondent engaged in the installation of a wet well to serve as a lift station in a sewage treatment plant, located west of the city of Lake Worth, Florida.

Teresa Mylott, compliance officer for complainant, during an assigned inspection of a crane company on December 18, 1978, at that sewage plant observed the excavation, and later on the same day investigated and inspected the excavation in accordance with the Occupational Safety and Health Act of 1970. This activity resulted in the issuance of a citation and a proposed $400.00 penalty for violation of a specific excavation regulation (§5(a)(2) of the Act).

Respondent contested the citation and penalty. A complaint was filed, and after respondent's notice of contest was treated as an answer, the case was heard in West Palm Beach, Florida on July 10, 1979.

## JURISDICTION

Respondent did not deny the jurisdictional allegations of the complaint nor raise an issue of jurisdiction at any stage of the proceedings, thus it concedes that it is engaged in a business affecting commerce.

## THE CHARGE

Three employees working in the excavations were exposed to danger from moving ground because the sandy soil walls or faces of that excavation were not guarded by a shoring system, sloping of the ground, or some other equivalent means in violation of the cited standard (29 C.F.R. 1926.651(c)).

## ISSUES

Whether any employee of respondent was exposed to danger from moving ground.

Whether the walls and faces of the excavation were guarded by means equivalent to a shoring system or sloping of the ground.

If the cited standard has been violated, is it a serious violation of the Act?

If a violation exists as charged, what amount in penalty should be assessed?

## MATERIAL FACTS

1. Respondent well pointed the area to be excavated on Friday [December 15, 1978]. Excavating did not commence until the following Monday, December 18, 1978.

2. Well pointing is a system of pipes, inserted into the soil surrounding an area to be opened by excavating, connected with a pumping station to remove the water and dry out the area which will become the sides, faces, or walls of the excavation.

3. In this case, the well point pipes were in sections at 18 inch centers and formed a 20 foot square when inserted into the soil. The pump ran continuously after installation. The excavation was made inside the well point installation so as to make a 16 to 18 foot square hole at the surface. The excavating was done in two stages. Its depth was not completed until a crane arrived for the purpose of lifting, lowering and setting the concrete slab and pipes to form the lift station.

4. Immediately after the required depth was reached, three employees entered the excavation by means of a ladder and in fifteen minutes had manually leveled off an eight foot square area on the bottom. After that operation, they ascended the excavation.

5. The next operation was the setting of a concrete slab, eight feet square and two feet thick by means of the crane.

6. Following that activity, tar mastic is placed around the perimeter of the first section of pipe which has been lowered into the hole to rest on the slab by the crane. The employees again descended into the hole by means of the ladder to perform that operation.

7. The concrete pipe for the station was in two sections, six feet in diameter and six feet in length. As each piece is lowered into the excavation, the employees guide it into position from above the concrete; they are not in the excavation during these operations except one may operate from a position on the ladder.

8. The excavation was made in undistrubed soil. The soil was described as: "brown, fine to medium sand with some shell, slight traces of clay and silt." (Tr. 43).

9. The depth of the excavation was estimated by complainant's witnesses at 10 to 12 feet. Respondent's president testified it was 10 1/2 feet in depth. It was essentially square at 16 to 18 feet in length on each side at the top.

10. The walls and faces of the excavation were vertical, according to the compliance officer and one witness. According to respondent's president, they were sloped because vertical sand will not stand up and the bottom of the excavation was eight feet square.

11. The earth surfaces, vertical or inclined, formed as a result of the excavation work were not guarded by a shoring system installed within the excavation.

12. Where any excavation is made in the sand, a well point system or same kind of a pumping system must be used to dry out the area.

13. Where a well point system is in use and the area has been dried out enough, cuts can be made in the sand for a short period of time.

14. Well points installed on 18 inch centers will help stabilize and give strength to the ground [walls or faces]. Well points consolidate the soil for excavating purposes.

15. The samples taken two feet from the excavation by complainant's soil expert on July 6, 1979, contained 22 1/2 percent moisture, which would affect the rigidity of that soil.

16. The sides of the excavation during the leveling of its bottom and the installation of the materials forming the lifter station were dry (Tr. 20, 29, 34).

17. Loose sand was observed on the bottom at the south wall of the excavation.

18. There were no cracks nor seepage of water in any wall.

19. A little bit, a small amount of sand at the bottom near the base was observed to give way.

20. The excavated material was stored in a pile two to three feet from one edge of the excavation. Two sewage treatment tanks were nearby the excavation, one seven feet from the north wall and the other about 10 feet away at another location. The crane was positioned 10 to 12 feet from the excavation.

21. The compliance officer did not go into the bottom of the hole. She had no measurements of the dimensions of the excavation at its bottom.

22. After the concrete slab was set in place in the bottom of the hole, there was, according to Mr. William Simpson, no more than two to three feet from its perimeter to the walls and faces of the excavation (Tr. 32).

23. After the first section of pipe had been set on the slab, Teresa Myott observed employees walking around the pipe covering its top edge with sealer material. During that activity, the distance between the employees and the sides of the excavation was two feet (Tr. 55).

24. After the two concrete sections of pipe were set, the hole was partially filled in before employees sealed the joints in the concrete (Tr. 31).

25. Complainant's hypothesis propounded to the soil expert, James Winterholler, included facts not in evidence and failed to include facts in evidence (Tr. 41, 42). There was no evidence of soil sloughing off the sides of the excavation above seven feet from the bottom which the hypothesis included, and there was evidence that the well point system had been installed and had been pumping the moisture out for over 48 hours, which was not included in the hypothesis.

26. No witness was in possession of sufficient information to calculate the load of any nearby structure and the pressure either might impart on any one of the sides of the excavation.

27. Movement of the crane with a load on it up close to the hole could have influenced the stability of the sides of the excavation, but there is no evidence that it was ever moved from its position 10 feet away from the hole.

## LAW AND OPINION

In this case, the ground in which the excavation was to be made and the work performed was known by the respondent to be composed essentially of sand. Moreover, respondent was aware of the moisture content of that sand and its consequent instability. Thus, respondent knew that it was necessary to protect its employees, during the times they would be required to be in the proposed excavation, from the ground that could move from its walls and faces. In this kind of situation, industry practice dictates the use of well points because their primary purpose is to consolidate the soil, according to the credible testimony of Douglas Eakins, respondent's president, and James Winterholler, the soil expert. In addition, this expert testified that a properly installed well point system stabilizes and strengthens the soil, and that if the area is dry enough, cuts can be made in the sand for a short period of time.

Consolidation of the soil means that the particles of the soil have been united or combined to become firm. The drying out process causes the soil particles to cohere in the sense of cementation.

In this case, in accordance with industry practice, respondent used the well point system to make the walls and faces of its excavation stable during the short intervals that its employees would work in the hole. Respondent set the structure

[lift station] within 30 minutes after the final excavation work was completed, which was the manual leveling process at the bottom.

Complainant argues that respondent violated the Act as charged because the soil expert testified there was danger of moving ground. The expert made that observation on the hypothesis that the soil in the excavation was moist from the bottom up to about nine feet, together with the facts of the surrounding structures, equipment, and excavated soil, but the hypothesis did not include the fact of installation and operation of the well point system nor the angle, if any, of the walls and faces. Although the initial hypothesis did not describe the walls, it is inferred from the facts that the expert assumed that the walls were vertical. The expert voluntarily included that assumption when the second hypothesis was propounded to him.

The third hypothesis added sloughing of the walls up to seven feet from the bottom. No witness, however, made that kind of statement. The compliance officer did testify she saw loose sand at the bottom of the south wall that went up seven feet. This may well have been the side which Mr. Simpson had in mind when he testified one side had a slight slope in it, which was the side from which the digging equipment worked and pulled the dirt out. Mr. Simpson also testified that the walls were very dry, and that the only place where the excavation was a little damp or moist was in the very bottom. Further, Mr. Simpson testified seeing a small amount of sand give way from the sides near the bottom of the hole, a "little bit."

The preponderance of the reliable, credible and probative evidence is conclusive that the walls of the excavation were very dry and that there was no significant amount of the giving away of soil from the walls.

The compliance officer testified that the walls were vertical. Mr. Simpson's testimony indicates that two sides were vertical (Tr. 20, line 15). On the other hand, there is credence to Mr. Eakins testimony that there was some sloping of the walls. Teresa Myott and William Simpson testified that at the time the employees were in the hole, walking around the first installed pipe on the slab, putting the sealer on the perimeter of that pipe, there was only two feet distance between them and the walls of the excavation. The diameter of that pipe was six feet and it was set in the center of an eight foot slab. Thus, the dimensions of the bottom of the excavation could not have exceeded nine or possibly ten feet to each side. Mr Eakins testified it was only eight feet square. No measurements were made of the bottom dimensions. Nevertheless, the preponderance of all the facts and circumstances in evidence show that the bottom dimensions of the excavation were considerably smaller than the top. Therefore, the evidence clearly shows that there was some sloping of the ground composing the walls and faces of the excavation.

There was no cave-in nor any significant loosening of the soil of the walls during any of the time this excavation was open.

If any one of the three structural components of the lift station struck a wall of the excavation during its descent, some kind of cave-in would be likely. In this case, no employee was in the excavation during those operations. In guiding those components, they were always above them or to the side elevated upon a ladder.

The soil experts soil sample was extracted in July, 1979, and contained 22 1/2 percent moisture. This in no way compares to the soil of the walls of the excavation at the time they had been under the influence of the well point system for over 48 hours and had dried out. The angle of repose was calculated from the soil sample at 29 degrees. On that basis, complainant argues that the walls should have been sloped halfway between 1 1/2 : 1 and 2:1.

Mr. Winterholler, the expert, had difficulty in predicting the action, if any, of the sides of the excavation under all the facts and circumstances in evidence because he had not calculated the surcharge weight of the structures around [the excavation] and how they would have influenced the sides. This information was not available from any witness.

Mr. Winterholler did testify that if the well points are in correctly, two to three feet below the bottom of the cut, and if the sides are dry, the excavation should stay open if there is no other influence.

Mr. Winterholler further testified from the facts and circumstances in evidence that if the hole was open for an hour or an hour and a half, without any surcharge weight around it, that the chances are that a cave-in would not have occurred. Also, in answer to the question "would [it] cave-in in ten or fifteen minutes," he testified: "again, I can't predict it but I would doubt it." In these latter two instances, it is inferred that Mr. Winterholler assumed the walls of the excavation were vertical.

No employee was subject to injury or death during the course of his work in this excavation because respondent guarded the walls and faces, protecting its employees from the danger of moving ground, by the installation of an appropriate well point system which consolidated the particles of the soil composing those walls and faces, and gave that soil strength and stability. This action, together with some sloping of the walls and faces, was equivalent to either the installation of a shoring system, trench box, or a sloping of the ground 2:1 (26 degrees, 34 minutes). Moreover, respondent did not permit an employee to be in the excavation at any point which would subject him to danger of moving ground had the lowering of the concrete adversly bumped a wall which could have caused a cave-in.

The use of means to guard the walls and faces of an excavation from ground movement equivalent to a shoring system or sloping of the ground is authorized by the cited standard (29 C.F.R. 1926.651(c)).

Complainant by his citation undertook the burden of proving that the walls and faces of respondent's excavation in which respondent's employees would or could be exposed to danger from moving ground were not guarded by a shoring system, sloping of the ground, or some other equivalent means. Complainant successfully met this burden with respect to proving there was no visible shoring system such as a trench box installed against the walls and faces, and that there was inadequate sloping of those walls and faces. Complainant, however, failed to carry his burden of showing that those walls and faces were not guarded by a means equivalent to a shoring system or an adequate sloping of the ground.

The preponderance of the reliable, probative, and credible evidence having shown that the means used by respondent to protect his employees from moving ground, at the times they were down in the excavation, was equivalent to the specific means of shoring or sloping the citation should be vacated.

## CONCLUSIONS OF LAW

The Review Commission has jurisdiction to hear and decide this case.

Where an excavation is to be made in wet sand and a well point system is correctly installed around the area to be excavated, and utilized to pump that area dry, it will make the walls and faces of the excavation when opened stable and unlikely to move for a short period of time.

If the walls and faces of that excavation are sloped to some extent, those walls and faces will possess an added or extra dimension of strength.

Under all the particular and peculiar facts and surrounding circumstances of this case, respondent did not violate the Act as charged and tried.

ORDER

The citation is vacated.

No penalty is assessed.

J. Paul Brenton

JUDGE

Date: September 26, 1979
Atlanta, Georgia

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 240

ATLANTA, GEORGIA 30309

# NOTICE OF DECISION

Secretary v. Crayton's Southern Sausage Company, Inc.

OSHRC Docket No. 81-346S

1. Enclosed is a copy of my decision. It will be filed with the Commission on December 29, 1981, and will become the final order of the Commission on January 28, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N. W., Suite 601
   Washington, D. C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is January 28, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Jess D. Ewing

JESS D. EWING
Judge

Date: December 9, 1981

OSHRC FORM 97

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

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| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 81-346S |
| | ) | |
| CRAYTON'S SOUTHERN SAUSAGE COMPANY, INC., | ) | |
| | ) | |
| Respondent. | ) | |

APPEARANCES:

Mary Anne Garvey and Bruce C. Heslop, Esquires, Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, on behalf of complainant

Arthur B. Heard, Esquire, Cleveland, Ohio, on behalf of respondent

## DECISION AND ORDER

EWING, Judge: This is a proceeding brought before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10 of the Occupational Safety and Health Act of 1970 ("the Act"), 29 U.S.C. § 651 et seq. Respondent contests item 2 of an "other" citation.

An inspection was conducted at respondent's workplace on January 12, 1980. Simplified proceedings were ordered in this case at the request of complainant.

Respondent was represented by counsel. A hearing was held in this matter on May 15, 1981, in Cleveland, Ohio. No additional persons desired to intervene in this matter.

Both parties filed post-hearing briefs.

The parties stipulated that respondent is engaged in a business affecting commerce and has employees within the meaning of the Act, and the Commission has jurisdiction of the parties and of the subject matter (Joint Ex. 1).

The issue remaining is: (1) whether respondent is in nonserious violation of 29 C.F.R. § 1910.23(d)(1)(ii).[1/]

The allegations in item 2 of the citation, in pertinent part, read as follows:

> Flight(s) of stairs with 4 or more risers, less than 44 inches wide and having one side open, were not equipped with a standard stair railing on the open side:
>
> In dock area, 2 flights of stairs without railings on open side.

No penalty was proposed for the alleged violation in item 2 of the citation.

## SUMMARY OF EVIDENCE

Compliance Officer Joan A. Anderson was called to testify on behalf of complainant (Tr. 7-8). She conducted an inspection of respondent's workplace in Cleveland, Ohio, on January 12, 1980 (Tr. 9). She testified that she observed that

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1/ § 1910.23 Guarding floor and wall openings and holes.

* * *

(d) Stairway railings and guards. (1) Every flight of stairs having four or more risers shall be equipped with standard stair railings or standard handrails as specified in paragraphs (d)(1)(i) through (v) of this section, the width of the stair to be measured clear of all obstructions except handrails:

* * *

(ii) On stairways less than 44 inches wide having one side open, at least one stair railing on open side.

there were two flights of stairs leading from the ground level to a loading dock (Tr. 10-13). Mrs. Anderson took a photograph of one flight of stairs (Tr. 11-12; Ex. C-1). She indicated the two flights of stairs were identical (Tr. 10-13). Mrs. Anderson indicated each flight of stairs had four risers, and each stairway was less than 44 inches wide and each had one side open (Tr. 12-13). The stairways were actually 36 inches wide (Tr. 13). The stairs were exposed to the weather (Tr. 13; Ex. C-1). She was of the opinion that the open side of the stairs posed a falling hazard to respondent's employees using them (Tr. 13). She indicated that if an employee fell from the stairs, he could sustain contusions, lacerations, abrasions and possibly more serious injuries (Tr. 13). Two of respondent's truck drivers used the stairs on a daily basis (Tr. 14).

She testified an opening and closing conference was held (Tr. 9-10, 14).

Mrs. Anderson indicated the hazard could be abated by the installation of railings on the open sides.

As a result of Mrs. Anderson's findings, a citation was issued on January 16, 1981.

Mrs. Anderson indicated there was snow and ice on the stairs (Tr. 16).

Mr. Eric D. Jeffries, president of respondent, was called as a witness for respondent (Tr. 19). He indicated the building, loading dock and stairs were constructed in 1954 (Tr. 20). He testified the loading dock roof extended out over the stairs (Tr. 20). He indicated there has never been an injury on the stairs since they were built (Tr. 20). He testified no more than two truck drivers use the stairs each day; other employees are prohibited from using the stairs (Tr. 20-21). He indicated the flights of stairs had handrails on their wall side (Tr. 21). He testified it was difficult, if not impossible, for two people to walk up and down the stairs at once (Tr. 21). He contended that the installation of handrailing on the stairs would

create a greater hazard than the use of the stairs without handrails on the open side (Tr. 22). He indicated the handrailing support posts would create a tripping hazard where they would be anchored to the risers and dock floor (Tr. 22-24). He testified that he had not applied for a variance (Tr. 25-26). He indicated he had never heard of the rule. He stated that respondent had not tried to install handrails (Tr. 27-28). Mr. Jeffries stated the bumper guards were secured by bolts through the brick mortar (Tr. 28; Ex. C-1).

## OPINION

In order to prove a violation of § 5(a)(2) of the Act in an ordinary case, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) there was a failure to comply with the cited standard; (3) employees had access to the violative conditions; and (4) the cited employer knew or, with the exercise of reasonable diligence, could have known of the condition. Daniel International Corporation, _____ OSAHRC _____, 9 BNA OSHC 2027, 1981 CCH OSHD ¶ _____ (No. 76-181, June 30, 1981). One of the intended purposes of the Act is to prevent the first accident. Secretary of Labor v. Lee Way Motor Freight, Inc., 511 F.2d 864, 869-870 (10th Cir. 1975).

Applying the criteria set forth in Daniel International Corporation, supra, to the facts in this case, I conclude that complainant established a prima facie violation of § 5(a)(2) of the Act. It is undisputed that each of the flights of stairs had four risers, the width of the stairs were less than 44 inches, and they had an open side that was not provided with standard stair railings. Two of respondent's truck drivers used the stairs on a daily basis. The compliance officer testified that a fall from the stairs could result in injuries ranging from contusions, lacerations and abrasions to those of a more serious nature. The stairs were exposed to the

elements and had accumulations of ice and snow on them. Respondent knew of the condition. Respondent can avoid liability only by establishing an affirmative defense.

Respondent argues the cited standard is arbitrary in its application. The Commission lacks the power to question the wisdom of a standard; e.g., Van Raalte Co., Inc., 76 OSAHRC 48/B8, 4 BNA OSHC 1151, 1975-76 CCH OSHD ¶ 20,633 (No. 5007, 1976).

Respondent contends that the open-sided stairs posed no hazard to employees because none of its employees had been injured from a fall from the stairs. I reject this contention. The Commission has held that the existence of a hazard is not negated by a favorable safety record that an individual employer may have experienced. F. H. Lawson Co., 80 OSAHRC 19/A14, 8 BNA OSHC 1063, 1980 CCH OSHD ¶ 24,277 (No. 12883, 1980). See A. E. Burgess Leather Company, Inc., 77 OSAHRC 25/D6, 5 BNA OSHC 1096, 1977-78 CCH OSHD ¶ 21,573 (No. 12501, 1977), aff'd, 576 F.2d 948 (1st Cir. 1978).

Respondent contends that compliance with the standard would create a greater hazard than the use of the stairs without stair railings. Respondent argues that the upright supports for stair railings would have to be installed on the outer edge of the bottom step and on the surface of the loading dock at the top of the stairs, and this might cause a tripping hazard.

In order to sustain a claim of greater hazard as a defense, respondent must prove that (1) compliance with the cited standard would diminish rather than enhance employee safety; (2) alternative means of protecting the employees are unavailable or, if available, are used; and (3) a variance under 29 U.S.C. § 655(d) is inappropriate. H. S. Holtze Construction Company, 79 OSAHRC 82/A2, 7 BNA OSHC 1753, 1979 CCH OSHD ¶ 23,925 (No. 16059, 1979), rev'd in part on other

grounds, No. 79-1957 (8th Cir., August 8, 1980). Respondent has made no attempt to install standard stair railings.

Respondent has failed to make a showing that alternative means of employee protection are unavailable or, if available, are being used, and that a variance is inappropriate. It made no application for a variance.[2/] Complainant's Exhibit C-1 shows a wall stair railing anchored to the brick wall and truck back-up bumpers anchored to the metal facing of the dock floor and the brick wall foundation. It is obvious that a stair railing support could be anchored to the vertical side of the stairs and the brick wall under the dock floor.

The defense of greater hazard requires a showing of increased risk, not the mere possibility of a different hazard. Hurlock Roofing Co., 79 OSAHRC 93/A2, 7 BNA OSHC 1867, 1979 CCH OSHD ¶ 24,006 (No. 14907, 1979). Even where an employer cannot fully comply with all standards, it must still provide such protection as is possible. See Martin Tomlinson Roofing Company, Inc., 80 OSAHRC 4/B12, 7 BNA OSHC 2122, 1979 CCH OSHD ¶ 24,167 (No. 76-2339, 1979).

Complainant made out the elements necessary to prove a violation of the standard at 29 C.F.R. § 1910.23(d)(1)(ii). Respondent has failed to rebut this showing and has failed to sustain the interposed defense of greater hazard.

## FINDINGS OF FACT

1. Respondent is a corporation that was engaged in the sausage processing business in Cleveland, Ohio, on Januray 12, 1980 (Tr. 9).

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2/ Respondent states in its brief that it has applied for a variance since the hearing. I conclude this statement should have no influence on this decision.

2. On January 12, 1980, Compliance Officer Joan A. Anderson conducted an inspection of respondent's workplace in Cleveland, Ohio (Tr. 7-8).

3. The compliance officer held an opening and closing conference with respondent's management (Tr. 9-10, 14).

4. There were two flights of stairs leading from the outside ground level to the loading dock at respondent's workplace (Tr. 11-13; Ex. C-1).

5. Each flight of stairs had four risers; the stairs were less than 44 inches wide and had one side open (Tr. 12-13).

6. The stairs were actually 36 inches wide (Tr. 13).

7. The stairs were exposed to the weather and had an accummulation of ice and snow on them (Tr. 13-16; Ex. C-1).

8. Two of respondent's employees used the stairs on a daily basis (Tr. 14).

9. The open side of the stairs presented a fall hazard.

10. If an employee fell from the stairs, he could sustain contusions, lacerations, abrasions and possibly a concussion (Tr. 13).

11. Respondent knew or, with the exercise of reasonable diligence, could have known of the fall hazard.

12. There was not a substantial probability that death or serious physical injury could result from a fall from the stairs (Tr. 13).

13. Respondent failed to protect its employees from the fall hazard posed in § 1910.23(d)(1)(ii).

## CONCLUSIONS OF LAW

1. Respondent, Crayton's Southern Sausage Company, Inc., is a corporation engaged in a business affecting commerce and has employees within the meaning of

section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter in this proceeding.

2. Respondent was in nonserious violation of 29 C.F.R. § 1910.23(d)(1)(ii).

## ORDER

Based upon the findings of fact and conclusions of law, it is

ORDERED: (1) Item 2 of the nonserious Citation No. 1 is AFFIRMED, with no penalty proposed, and no penalty is ASSESSED.

(2) The respondent shall abate the cited hazard immediately.

Dated this 29th day of December, 1981.

Jess D. Ewing

JESS D. EWING
Judge

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

January 29, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Baroid Division of N. L. Industries

OSHRC DOCKET NO. 16096

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION AND REMAND

To wit: See attached.

FOR THE SECRETARY OF LABOR

- Counsel for Regional Litigation
  Office of the Solicitor, USDOL
  200 Constitution Ave., NW. - Rm. S-4014
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FOR THE COMMISSION

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EXECUTIVE SECRETARY

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Rev. 10/1/76

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>BAROID DIVISION OF NL INDUSTRIES, INC.,<br>Respondent. | OSHRC Docket No. 16096 |

ORDER

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

This case is before the Commission on remand from the United States Court of Appeals for the Tenth Circuit. Baroid Division of NL Industries, Inc. v. OSHRC, 660 F.2d 439 (10th Cir. 1981).

In a previous decision in this case, 1/ the Commission determined that Respondent, Baroid Division of NL Industries ("Baroid"), violated section 5(a)(1) 2/ of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, in that Baroid failed to protect its employee working at an oil drilling site from fire and explosion hazards resulting from natural gas accumulation. Among other things,

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1/ 79 OSAHRC 45/A9, 7 BNA OSHC 1466, 1979 CCH OSHD ¶ 23,661 (No. 16096, 1979).

2/ Section 5(a)(1) provides:

Sec. 5.(a) Each employer —

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

the Commission found that Baroid had failed to adequately train its "mud man," Boden, concerning the detection and evaluation of natural gas accumulation hazards so that Boden would know under what circumstances it would be necessary to leave the oil drilling site.

In its decision, the Tenth Circuit refrained from ruling on whether it was feasible to train Baroid's mud man to detect hazardous levels of gas accumulation by sense of smell. 3/ Because this basis of liability was not mentioned in the citation, the court determined that the parties should be afforded the opportunity to reopen the record to present evidence on this issue. The court stated:

> We therefore remand this case for further development of the record through a hearing on the issue whether training employees to measure hazardous levels of gas accumulation by sense of smell is feasible. If the evidence shows that detection by employees of hazardous levels of gas accumulation by sense of smell is feasible, and if training employees to so detect the gas accumulations is feasible, then the citation will stand. If, on the other hand, the evidence does not show that training to detect hazardous levels of gas accumulation by sense of smell is feasible, the citation must fall. Both parties will be permitted on remand to supplement the record through the presentation of evidence. The Secretary, however, will be limited to presenting evidence on the issue of training employees to detect gas accumulations by sense of smell, and may not present evidence on training in other detection methods such as the use of electronic monitors.

660 F.2d at 448.

Accordingly, this case is remanded to Judge James A. Cronin, the judge who initially heard and decided this case. 4/ The judge shall permit the parties to

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3/ The court concluded, however, that other theories of liability that were advanced in this case did not establish a violation of § 5(a)(1).

4/ Chairman Rowland was not a member of the Commission when the prior decision was issued in this case. He expresses no opinion on the merits of the case and joins in the instant remand order for the limited reason that the decision of the Tenth Circuit has established the law of the case.

present further evidence and argument with respect to the remanded issue. He also shall make findings of fact on the issue and shall enter an order disposing of the section 5(a)(1) citation consistent with those findings and with the court's remand order.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
Executive Secretary

DATED: JAN 29 1982

CLEARY, Commissioner, concurring:

I concur.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>BAROID DIVISION<br>N L INDUSTRIES, INC.<br>Respondent. | OSHRC DOCKET NO. 16096 |

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For the Respondent

DECISION AND ORDER

Cronin, Judge, OSHRC: This is a proceeding under section 10 of the Occupational Safety and Health Act of 1970 (29 U.S.C. §651, et seq., hereinafter called the Act) involving an investigation commenced on October 16, 1975,

by the U. S. Department of Labor of an accident occurring on October 10, 1975, at a worksite east of Custer City, Oklahoma.

As a result of this investigation a citation characterized as "SERIOUS" and alleging a violation of section 5 (a)(1) of the Act (29 U.S.C. §654(a)(1))was issued to respondent on November 11, 1975. A Notification of Proposed Penalty, issued the same date, proposes a penalty of $500.00. By timely Notice of Contest, respondent contested the alleged violation and proposed penalty.

The alleged violation was described in the citation as follows:

> "The employer failed to provide his employees working on a rotary drilling rig a place of employment which was free from recognized hazards that could cause death or serious physical harm to an employee in that a natural gas separator and vent line were not in operation to remove natural gas a safe distance from the rig area thus creating a fire and explosion hazard."

Section 5(a)(1) of the Act provides:

> "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees;"

## Jurisdiction and Issues

In its answer respondent generally denied all of the allegations of the complainant and specifically denied,

(1) the violation of section 5(a)(1) of the Act, (2) knowledge of, creation of, or responsibility for, any hazardous conditions, (3) that the alleged incident occurred at a respondent workplace, and (4) that it had any employees at the site of the incident that were not "servants loaned to the drilling contractor, drilling operator or others."

Respondent is a division of N L Industries employing approximately thirty-five hundred employees in every state where there is drilling activity and also overseas (Tr. 64-65). It is engaged in the sale and servicing of "drilling mud" and lease of related equipment to oil and gas well operators and drilling contractors. The materials constituting drilling mud come from "all over the country". On these facts respondent is found to be engaged in a business affecting interstate commerce, and jurisdiction, therefore, is conferred on this Commission.

At the hearing held at Oklahoma City on July 9, 1976, respondent stipulated to the reasonableness of the proposed penalty. Therefore, the only issues to be determined are:

(1) Whether Larry Boden, respondent's sales engineer, was an employee of respondent on October 10, 1975, within the meaning of the Act?

(2) If he was, did respondent violate section 5 (a)(1) of the Act on October 10, 1975?

## Findings of Fact

Upon the credible evidence of record the following facts are found; Proposed Findings of Fact submitted by the parties inconsistent therewith are denied:

1. Respondent is in the business of supplying materials and equipment to the drilling industry, primarily consisting of "drilling mud" and associated equipment.

2. Ladd Petroleum Company (hereafter Ladd) was the operator on a gas well located near Custer City, Oklahoma on October 10, 1975. E. W. Moran Drilling Company (hereafter Moran) was the drilling contractor and operated under a "day work" contract with Ladd. A drilling contractor usually performs under a "footage" or "day work" agreement with the well operator. Under a "footage" agreement the drilling contractor assumes responsibility for the overall drilling operations. When a "day work" agreement is in effect, the operator contracts for the use of the driller's rig equipment and his drilling crews on a 24 hour basis, and assumes responsibility for, and exercises control over drilling activities (Tr. 84-85).

3. Respondent, under a verbal agreement, was to furnish the drilling rig requirements for drilling mud on this well site to the operator, Ladd. The cost of the drilling mud to Ladd included the consultant services of a respondent Sales Engineer, Larry Boden.

4. Larry Boden who has been on respondent's payroll as an employee since 1973, had the sole duty under this agreement to make recommendations to Ladd as to the appropriate properties and density of the drilling fluid that should be maintained under the conditions encountered during drilling the particular well. Ladd's representative and drilling foreman, Al Fern, was in charge of the drilling operations at the well site and made all final decisions regarding the properties and density of the drilling mud to be used.

5. At all relevant times during his presence at the worksite in question, Larry Boden was under the direct supervision and control of Ladd with respect to his duties at the well site. Respondent did, however, retain sufficient control over Larry Boden to remove him from the well site.

6. Respondent customarily assigns a sales engineer to every well site to which it is supplying drilling mud. These sales engineers usually service 4 or 5 wells in a given geographical area on a daily basis. They are instructed by respondent to be informed of the progress of their customers' drilling operations, to check the condition of drilling mud, and offer assistance and advice whenever required and requested. Their visits to the well sites are virtually unsupervised by respondent. A sales engineer writes

daily reports concerning his activities and forwards them weekly to respondent's district manager. When a sales engineer requires information, or has questions, he contacts his immediate supervisor or district manager by way of the telephone or personal visits away from the well sites.

7. On or about October 1, 1975, Ladd encountered a large volume of gas prior to the time expected. At the time the gas was encountered the intermediate drill casing had not been set.

8. Larry Boden was notified that the well in question had received a "gas kick", which meant that the operation had struck a formation containing a large volume of pressurized gas, and that this gas was on its way up the drill hole toward the surface. He, in turn, notified respondent's district manager, Donald Cassel, and his immediate supervisor, George Strecker, who also is in the employ of respondent. Mr. Boden then went to the well site to offer his recommendations and suggestions to Ladd on how to best maintain circulation of the drilling mud and maintain sufficient hydrostatic pressure to keep the gas in the ground.

9. Upon being telephonically advised that Ladd had taken a "kick", respondent's district manager asked Larry Boden if they had a gas separator at the well site. He replied "Well, they're making one." The district manager then told Larry Boden that he might remind Ladd that if it

needs a separator respondent has them for lease. Larry Boden replied, "I already talked to them. I mentioned it to them."

10. The terms "gas separator" and "gas buster" are not terms of art and often times are used synonomously and interchangeably (Tr. 158-159). There are, however, technical differences between a commercial mud/gas separator and the type of fabricated separator in use on October 10, 1975, at the well site. Although both function to separate out the gas from the drilling mud, the non-commercial separator, a less sophisticated piece of equipment, is not usually a sealed unit, and separates the gas from the mud by gravity and the "lighter than air" principle. In this latter type of separator the gas is vented straight up into the air because there is insufficient pressure to vent the gas "to the side any distance". A commercial gas separator, on the other hand, is a sealed unit operating off of the pressure contained in gas and mud. This pressure forces the gas out of vent lines which can carry the gas a considerable distance away from the rig. These multiple vent lines also permit the operator to take advantage of the prevailing wind conditions when venting the gas.

11. In view of the experience and knowledge of respondent's district manager with respect to the drilling industry, it is reasonable to infer that he understood from the context of Mr. Boden's statements that a non-commercial mud/gas separator was to be used at the well site.

12. If gas separated from drilling mud is being vented a safe distance from the drilling rig, the failure to use a commercial mud/gas separator with a 40 to 50 feet vent hose is not a recognized industry-wide hazard in the petroleum and related industries.

13. On October 10, 1975, the drilling rig was equipped with a blow-out preventer to keep any gas encountered from blowing out of the bore hole, a choke line running from the rig to the reserve pit to be used to vent gas whenever necessary to relieve the pressure on the blow-out preventer, a mud/gas separator or "gas buster" fabricated by Moran employees on orders of Ladd to separate the gas from the mud, and a degasser customarily used for further separating out gas and air bubbles from the drilling mud. The fabricated mud/gas separator in use had a 8 foot vent line that vented the gas straight up into the atmosphere. The top of the vent line was approximately 12 to 15 feet above the ground. There was an absence of wind on October 10th, and the vented gas from the mud/gas separator was not being carried away from the drilling rig.

14. The fiery explosion which took place on October 10, 1975, and resulted in serious injury to Larry Boden and other persons at the well site, was caused by the ignition of gas vapors by reason of an exhaust on the

Swaco-Dresser diesel engine operating the degasser that was not equipped with a spark arrester. It is a customary safety practice in the drilling industry to have spark arresters installed on engines operating in the vicinity of drilling rigs.

15. At the time of the fire on October 10, 1975, respondent had only one employee, Larry Boden, at the well site. Supervisory personnel and employees of both Ladd and Moran also were present at the site.

16. Larry Boden, respondent's employee, had not reported to respondent's supervisory personnel for two days prior to the accident in question. He is a competent employee with wide knowledge regarding safety practices in the oil field, and petroleum related industries. He has been generally instructed by respondent that if the conditions at a drilling site become hazardous he should leave.

17. On October 10, 1975, the high volume of gas being separated from the fabricated mud/gas separator was not being vented a safe distance away from the drilling rig. Under the existing conditions, a reasonable and prudent man familiar with the drilling and related industries would have recognized that the failure to so vent the gas was hazardous.

18. The absence of a spark arrester on the Swaco-Dresser diesel engine on October 10, 1975, constituted a recognized hazard in the petroleum and related industries.

19. Respondent did not create or cause any of the conditions which resulted in the fire, or create or cause the recognized hazards referenced in Findings 17 and 18.

20. Respondent did not have knowledge of the conditions existing on October 10, 1975, at the well site which resulted in the fire, or knowledge of the conditions which constituted the recognized hazards referenced in Findings 17 and 18.

## Discussion

The citation alleging a "SERIOUS" violation of section 5(a)(1) of the Act (29 U.S.C. §654(a)(1) will be vacated.

This section, the so-called "general duty" clause of the Act, requires employers to discover and exclude from the workplace of the employees "[a]ll [feasibly] preventable forms and instances of hazardous conduct", Getty Oil Company v. Occupational Safety and Health Review Commission et al, No. 75-1828 (5th Cir; April 23, 1976), citing National Realty and Construction Co. v. OSHRC and Secretary, 489 F.2d 1257 & nn 34, 37 (D. C. Cir. 1973).

Unquestionably, the record contains substantial evidence that the drilling worksite in this case was not free of hazards likely to cause serious physical harm, even death on October 10, 1975, and that a reasonable and prudent employer familiar with oil drilling industry would have protected against the existing hazards.

Conducting drilling operations in the presence of a large volume of highly flammable gas is a universally-recognized hazard in the oil and gas drilling industry. That it is so recognized in this industry is shown on this record by the procedures and practices customarily followed in the industry and at this worksite. These include the use of a blow-out preventor with choke lines designed to vent the pressurized gas a safe distance away from the drilling rig and the strict enforcement of a no smoking ban at all well sites. Also, whenever mud/gas separators are employed, the gas is vented as far away from the rig as the equipment permits. Finally, it is standard operating procedure to install spark arresters on all motors operating in the vicinity of the wells.

The potential for serious physical injury, of course, is made plain by the serious burns resulting from the gas fire on October 10, 1975.

When drilling was resumed by Ladd on the morning of October 10, 1975, the mud/gas separator in operation was venting a large volume of highly combustible gas into the air in the vicinity of the well, and due to absence of any wind at that time,the gas remained in the rig area. In addition, the Swaco-Dresser diesel engine operating the

degasser was without a spark arrester. Obviously, these conditions were preventable by the simple expedient of terminating drilling operations until wind conditions were such as to remove the gas a safe distance from the well and a spark arrester was installed.

In defense, respondent relies in part on the common-law doctrine of the "borrowed employee"; and argues that it was not Mr. Boden's "employer" for purposes of the Act because it lacked control over the worksite and his activities.

The Commission recently stated in Secretary v. Gordon Construction Company, Docket No. 7390 (August 10, 1976), that the term "borrowed employee", is "a term of tort law and has no place in an administrative proceeding brought under remedial legislation designed to provide a safe place to work for every working man and woman in the nation." This decision, as well as previous decisions of the Commission, however, recognize that the question of whether a particular respondent is an "employer" is a crucial factor in determining his obligations and liability under the Act. According to the Commission, employment relationships for purposes of the Act must be defined on a case by case basis, considering both the economic realities of the situation and the remedial purposes intended by Congress. Secretary v. Gilles & Cotting Inc, 4 OSAHRC 1080 (1973), remanded on other grounds sub nom

Brennan v. Gilles & Cotting Inc., 504 F.2d 1255 (4th Cir. 1974).

The Commission has considered the following in identifying an "employer" for purposes of the Act: (1) the person whom the employees considered to be their employer; (2) who pays the employees their wages; and (3) who is responsible for controlling the employees activities. See Secretary v. Bayside Pipe Coaters Inc., Docket Nos. 1953 and 1974, 11 OSAHRC 751 (1974), and Secretary v. Weicker Transfer and Storage Company, Docket No. 1362, 15 OSAHRC 80 (1975).

Although both respondent and Larry Boden considered that the latter's activities at the well site were under the complete supervisory control of Ladd, Mr. Boden maintained both oral and written contact with this respondent's supervisors and apparently continued to receive his wages from respondent. Certainly, respondent also retained the power to remove him from the worksite should the circumstances warrant it. On those facts, this Judge is persuaded that the prerequisites of an employment relationship between respondent and Mr. Boden for the purposes of the Act have been satisfied.

The remaining question, therefore, is whether respondent on the facts of his record can be held responsible for a failure to furnish its employee, Mr. Boden, with a place of employment free of recognized hazards likely to cause serious physical harm, even death.

An employer is guilty of a "serious" violation of the Act for which a penalty can be assessed only if it knew or with the exercise of reasonable diligence should have known of the violation. Because it is undisputed that respondent did not have actual knowledge of the conditions constituting the recognized hazards, the sole question becomes whether Baroid could have discovered them by "reasonable diligence".

The economic realities of the situation here convince this Judge that the Act was not intended to require an employer, like respondent, to constantly scrutinize the equipment and work processes that are under another employer's complete control and away from the respondent's premises. To hold otherwise would be totally impracticable and an unreasonable burden. See generally, Secretary v. Conrad Precision Industries Inc., Hanovia Lamp Division, Docket No. 89, 2 OSAHRC 55 and 18 OSAHRC 154.

This does not mean, however, that an employer is relieved of his general duty to protect his employees if he has learned or should have learned of the presence of recognized hazards. But here the reports received from Mr. Boden by respondent's supervisory personnel did not place them on notice that recognized hazardous conditions existed or that the situation required respondent to visit and inspect the worksite. Baroid had placed a competent, well trained and knowledgeable employee on the site, and had always stressed to its employees, including

Mr. Boden, that they could leave any worksite if they felt endangered by the existing conditions. On the state of this record, respondent will not be held in violation of the 29 U.S.C. §654(a)(1).

## Conclusions of Law

1. Under the conditions existing on October 10, 1975, the well site in question was not "free" of "recognized hazards" as those terms are used in 29 U.S.C. §654(a)(1). The failure to vent the gas being separated from the drilling mud a safe distance away from the drilling rig and the use of a diesel engine without a spark arrester constituted "recognized hazards" in the petroleum and respondent's industries.

2. The complaint failed to prove by a preponderance of the evidence that respondent knew, or with the exercise of reasonable diligence should have known, of the existence of these recognized hazards on October 10, 1975.

3. The respondent was not in violation of 29 U.S.C. §654(a)(1) on October 10, 1975.

## ORDER

Based on the above findings of fact, conclusions of law, and the entire record, it is ORDERED:

The alleged "SERIOUS" violation of 29 U.S.C. §654(a)(1), and the proposed penalty based thereon, are hereby VACATED.

James A. Cronin, Jr.
James A. Cronin, Jr.
Judge, OSHRC

Dated: September 20, 1976

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

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UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

January 29, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

E. I. DuPont DeNemours & Co., Inc.

OSHRC DOCKET NO. 76-2400

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION (Remand)

To wit: See attached.

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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>E.I. DU PONT DE NEMOURS & CO., INC.,<br>Respondent. | OSHRC Docket No. 76-2400 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

This is a case under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). A decision of Administrative Law Judge Joseph Chodes is before the Commission for review under section 12(j) of the Act, 29 U.S.C. § 661(i). In his decision, Judge Chodes affirmed items 18 and 21 in a citation issued by the Secretary of Labor ("the Secretary") alleging other-than-serious violations of the Act. 1/ The two items charged noncompliance with the standards at, respectively, 29 C.F.R. § 1910.94(c)(2) and 29 C.F.R. § 1910.151(c). Former Commissioner Barnako directed review of this case on the issues raised in the petition for discretionary review filed by Respondent, E.I. du Pont de Nemours & Co., Inc. The issues before us on review are:

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1/ Respondent was issued a total of 15 citations for alleged violations at its Chambers Works facility in Deepwater, New Jersey. The only issues on review concern two of the 35 items in citation 1.

(1) Whether the judge erred in affirming the item alleging noncompliance with section 1910.94(c)(2) 2/ in the Pump Shop. More particularly, whether Respondent's spray painting operation was performed in a "spray room." 3/

(2) Whether the judge erred in affirming the item alleging noncompliance with section 1910.151(c) 4/ in the Analyzer Room. More specifically, whether the standard safety shower provided by Respondent was "suitable" for quickly flushing the eyes.

For the reasons stated below, we remand item 18 to a judge to determine whether the spray painting was done in a "spray room," and we vacate item 21 due to the Secretary's failure to prove that the shower provided was not suitable.

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2/ The standard provides in pertinent part:

> Subpart C - Occupational Health and Environmental Control
> § 1910.94 Ventilation.
> * * *
> (c) Spray finishing operations -
> * * *
> (2) Location and application. Spray booths or spray rooms are to be used to enclose or confine all operations.

3/ 29 C.F.R. § 1910.94(c)(1)(iii) defines a "spray room" as follows:

> A spray room is a room in which spray-finishing operations not conducted in a spray booth are performed separately from other areas.

4/ The standard reads as follows:

> Subpart K - Medical and First Aid
> § 1910.151 Medical services and first aid.
> * * *
> (c) Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.

I

A

Item 18 alleges noncompliance with section 1910.94(c)(2) in the Pump Shop, one of the buildings in the Central Crafts area of Respondent's Chambers Works facility, which was inspected by compliance officer Albert Smith of the Occupational Safety and Health Administration ("OSHA"). The shop was approximately 30 feet wide, 100 feet long, and 16 feet high, with fully enclosed offices and a lunchroom, which were only 8 feet high, at one end of the building. The rest of the building was the "work area," which was approximately 70 feet in length.

In the work area, nine of Respondent's employees reconditioned and repaired pumps, 5/ which were generally 2 feet by 3 feet in size. The regular work procedure for each of these nine employees, except when they were working on "submerged" pumps, was to recondition and repair a pump at the employee's individual work bench, then clean it in a caustic bath, and finally hang it on a chain hoist and spray it with a can of aerosol paint. The spray painting was done at or near the double door located midway along the 30-foot wide front of the building. At least one employee put his back to the door and sprayed towards the rest of the room. Each of the nine employees sprayed an average of two to five pumps a day for five days a week, with each pump taking two to five minutes to paint. At least two to three 13-ounce cans of spray paint were used in the Pump Shop each day. Usually, only one employee would be spray painting a pump at any given time, while the other eight would be repairing other pumps. The nearest bench where employees were repairing pumps was 20 to 30 feet from the spray painting operations. However, repair work on "submerged" pumps was performed at a distance of 10 feet or less from the spray painting area. One to

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5/ A tenth employee who worked in the room only tested pumps. No further testimony concerning this employee's job was given.

five of these pumps were assigned to each of the nine employees every week. "Submerged" pumps were not sprayed.

The Pump Shop had a fan, which was located in the upper corner of one side of the building above the enclosed rooms and about 80 feet from the spray painting operations. On the day of the inspection, the fan was not in operation, and the windows along one side of the building and the double door at the front of the building were all closed. The fan was rarely used in the winter and was used only intermittently at other times. The doors and windows were not opened when the weather was cold. 6/

During his inspection of the Pump Shop, compliance officer Smith observed Gary Novotny, one of Respondent's Pump Shop mechanics, spray painting a pump that was hanging from a chain hoist in the work area near the front door. Smith smelled "pungent" vapors emanating from the paint, but he did not perform any test to determine the paint's toxicity. Respondent's employee Novotny testified that, when he repaired pumps at his work bench some 60 feet from the painting area while another employee was spray painting, he could taste the paint and smell its "nasty odor." He stated that the vapors from the paint got stronger as one walked toward the painting operation. Novotny testified that he was told by his foreman that a spray booth with its own exhaust fan had been provided at one time for the pump spraying operation, but it had been removed before Novotny began working in the Pump Shop.

Compliance officer Smith testified that a spray booth or spray room, where there is adequate mechanical or natural ventilation, should have been used to protect employees from the paint's toxic and flammable vapors. He testified

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6/ Respondent's supervisor of the Pump Shop ambiguously testified, "There is a small fan also located inbetween (sic) two louvers on the south end of the shop, but, those louvers are blocked off so you do have that additional exhaust."

that a fan should have been located close to the point of the spray painting operation to prevent the vapors from reaching employees working at the nearby benches.

A penalty of $80 was proposed for the violation alleged in item 18, and Respondent's counsel stipulated that it was an appropriate amount if the violation were affirmed.

B

In his decision, Judge Chodes concluded that Respondent failed to comply with section 1910.94(c)(2) in that its pump painting operation was not enclosed or confined in a "spray booth," as defined in 29 C.F.R. § 1910.107(a)(3), 7/ nor in a "spray room," as defined in section 1910.94(c)(1)(iii). See note 3 supra. He determined that the "fairly large" work area in Respondent's Pump Shop, with its only powered ventilation being 80 feet from the painting operation, was not a "spray booth." He further concluded that the work area was not a "spray room" because the spray painting operation was not separated from the other pump repair activities that were being performed in the Pump Shop. The judge rejected Respondent's contention that, in accordance with Bethlehem Fabricators, Inc., 76

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7/ The applicable standard provides in pertinent part:

> Subpart G - Occupational Health and Environmental Control
> § 1910.94 Ventilation.
>
> * * *
>
> (c) Spray finishing operations - (1) Definitions applicable to this paragraph -
>
> * * *
>
> (ii) Spray booth. Spray booths are defined and described in § 1910.107(a).

Section 1910.107(a)(3) defines a "spray booth" as follows:

> A power-ventilated structure provided to enclose or accommodate a spraying operation to confine and limit the escape of spray, vapor, and residue, and to safely conduct or direct them to an exhaust system.

OSAHRC 62/C2, 4 BNA OSHC 1289, 1976-77 CCH OSHD ¶ 20,782 (No. 7176, 1976) ("Bethlehem Fabricators"), the Secretary failed to prove a violation in that he did not sustain his burden of establishing that the vapors or other emissions from the spray paint were dangerous. Judge Chodes noted that in Bethlehem Fabricators an expert called by the employer testified that the paint vapors did not present a health hazard to employees. He distinguished the instant case on the basis that here no such rebuttal evidence was introduced. Moreover, the judge made a specific finding that the nine employees of Respondent "were exposed to dangerous quantities of flammable vapors and combustible residues." He based this finding on what he deemed to be reasonable inferences drawn from the testimony of compliance officer Smith and Respondent's employee Novotny. He thus affirmed item 18 and assessed the stipulated penalty of $80, which he found to be appropriate.

C

In its initial arguments on review, Respondent contended that the judge erred in finding that the nine employees were exposed to dangerous amounts of flammable emissions from the paint and in thus affirming item 18. Respondent maintained that the Secretary failed to meet his burden of proof under Bethlehem Fabricators in that he did not test for toxicity or flammability of the paint emissions. In response, the Secretary argued that Judge Chodes was correct in distinguishing Bethlehem Fabricators from the instant case and in thus affirming item 18.

However, in a supplemental memorandum filed while this case was pending on review, Respondent acknowledged that, after it filed its brief on review, the Commission issued its decision in Westinghouse Electric Corp., 79 OSAHRC 28/B8, 7 BNA OSHC 1318, 1979 CCH OSHD ¶ 23,542 (No. 13955, 1979), rev'd and remanded, 617 F.2d 497 (7th Cir. 1980) ("Westinghouse"). In that case, the Commission

held that section 1910.94(c)(2) requires that all spray finishing operations within its scope be enclosed or confined by spray booths or spray rooms without regard to whether emissions are present in dangerous amounts. Noting that in Westinghouse the Commission expressly overruled that portion of Bethlehem Fabricators upon which Respondent had relied in its initial arguments on review, Respondent set forth other contentions in support of its continuing argument that Judge Chodes' decision should be reversed. Accordingly, we conclude that the following contentions are the issues now before us on review.

Respondent asserts that the spraying area in its Pump Shop conformed to the definition of "spray room" in section 1910.94(c)(1)(iii) because the spray painting of the pumps was "performed separately from other areas," i.e., it was done 20 to 30 feet from the area where employees were repairing pumps and even further from the lunchroom and offices, which were completely enclosed by 8-foot high walls and a ceiling. Respondent notes that section 1910.94(c)(1)(iii) does not specify a minimum distance of separation, and it asserts that the Secretary failed to prove that the spray painting was not "performed separately from other areas" within the meaning of that definition. According to Respondent, because each of the nine employees who were repairing pumps also spray painted pumps at some time each day, those employees were not unnecessarily exposed to emissions to which they otherwise would not have been subjected. Respondent further contends that the Secretary did not offer any proof that Respondent had not complied with the design or mechanical specifications for spray rooms, e.g., section 1910.94(c)(4)(iii), which requires the air in the breathing zone of the operator to be maintained at a certain level. Noting that no penalty was imposed by the Commission in Westinghouse, Respondent additionally argues that, if the Commission "retroactively applies" Westinghouse and finds a violation in the instant case, it should not assess any penalty due to the lack of proof that

Respondent's employees were exposed to dangerous quantities of flammable vapors and combustible residues.

D

As stated by Respondent in its supplemental memorandum, the Commission concluded in Westinghouse, supra, that section 1910.94(c)(2) requires that all spray finishing operations within its scope be enclosed or confined by spray booths or spray rooms without regard to whether emissions are present in dangerous amounts. 8/ In that case, the Commission noted that the room in which the spray painting was done measured approximately 200 feet long, 80 feet wide, and 100 feet high and that there was no physical separation of the spray finishing area from other production activities, which were performed as close as 5 feet from the spray finishing operation. The Commission noted that a spray room is a room where spray painting is done "with adequate physical separation from other areas," and that the requirement in 29 C.F.R. § 1910.107(b)(8) that spray booths be removed at least 3 feet from other operations "does not indicate that spray rooms may be separated from other areas by as little as 3 feet." Westinghouse, supra, 7 BNA OSHC at 1323 n.14, 1979 CCH OSHD at p. 28,521 n.14. Based on the facts above, the Commission concluded that Westinghouse's spray finishing operation was not enclosed or confined by a spray room.

On appeal from this decision, the United States Court of Appeals for the Seventh Circuit concluded that section 1910.94(c)(2) does not necessarily require a physical barrier between spray painting operations and other activities but rather, by using the term "room," the standard "suggests that activities other than spray painting may be in the same general room provided the spray painting

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8/ Accordingly, we need not determine in this case whether the judge erred in finding that the employees were exposed to "dangerous quantities" of flammable vapors and combustible residues. The finding is set aside because it is immaterial to the alleged violation.

is sufficiently separated from any other activities so that the spray painting causes no interference." Westinghouse Electric Corp. v. OSHRC, 617 F.2d 497, 502 (7th Cir. 1980). The court stated, "The record was not developed for the purpose and is not sufficient to support a determination of whether or not the location of the Westinghouse spray painting is sufficiently separated from other activities in the particular circumstances so as to qualify as being conducted in a spray room." 617 F.2d at 503 [footnote omitted]. Therefore, the court vacated the Commission's order and remanded the case for a determination of whether the spray painting was performed in a "spray room."

Noting that the court's decision required that the parties be afforded the opportunity to present further evidence on the separation of Respondent's spray finishing operations from other activities, the Commission, on remand from the court, further remanded the case to the judge who had initially heard the case to determine whether the spray painting was performed in a "spray room." Westinghouse Electric Corp., 80 OSAHRC 120/G1, 9 BNA OSHC 1183, 1981 CCH OSHD ¶ 25,004 (No. 13955, 1980).

As in Westinghouse, the record in the instant case was not developed for the purpose of determining whether the spatial separation between Respondent's spray painting operations and other activities in the Pump Shop was sufficient to meet Respondent's duty to provide a "spray room." Indeed, because this case was tried before the various decisions in Westinghouse were issued, the parties were not clearly on notice that the absence of a physical barrier is not determinative on this issue. We therefore must give the parties the opportunity to introduce evidence relevant to the spatial or physical separation of Respondent's spray finishing from other activities. Accordingly, we remand this case to the Chief Administrative Law Judge for assignment to an administrative law judge 9/

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9/ Administrative Law Judge Joseph Chodes, who initially decided this case, has since retired.

for the purpose of conducting further proceedings consistent with this decision, including providing the parties an opportunity to present additional evidence as to whether Respondent's spray painting was performed in a "spray room" within the meaning of section 1910.94(c)(1)(iii) and entering a finding on this issue.

II

A

Item 21 relates to conditions observed by OSHA compliance officer Vincent Gallagher during an inspection of the Analyzer Room in the Chemical Building of Respondent's Chambers Works facility. The room was a laboratory measuring 17 feet by 30 feet in which employees analyzed the industrial waste water generated by the plant to determine if it had been treated properly before its release into the Delaware River. Analysis of the waste water involved the use of various corrosive chemicals, including sulfuric acid. The corrosive chemicals, which were stored in bottles and then placed in secondary containers, were used continually every day, but only in small quantities. At least one employee was in the room when the inspection was conducted. A "standard safety shower" 10/ was the only means provided in that room for drenching the body and flushing the eyes. An employee in that room would always be no further than 30 feet away from that shower. When the handle of the standard safety shower was pulled down completely, the shower operated at a pressure of 35 pounds per square inch at its head, with the flow pressure being somewhat less on the user's face. In item 21, the Secretary alleged that an eyewash fountain was required under section 1910.151(c), but not provided, and proposed a penalty of $135.

At the hearing, compliance officer Gallagher testified that he and Harry Allendorf, the OSHA Area Director, both interpreted the cited standard to require

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10/ This "standard safety shower" was an overhead, full-body shower operated by pulling a handle to start the flow of water from the shower head.

an eyewash fountain because, in their view, the standard shower was not a "suitable facility" for flushing eyes. Gallagher noted that no directives concerning the interpretation of section 1910.151(c) had been issued by the Secretary. However, Gallagher expressed his opinion, concerning flushing corrosive chemicals from the eyes, that "[i]t's normal first-aid emergency procedure to wash the eye for fifteen minutes with a gentle flow of water." Gallagher testified that he believed an eyewash fountain in the Analyzer Room was necessary because, with only the full body shower immediately available, if a small quantity of acid got into an employee's eyes, flushing it out would involve holding the "head in an upright position for fifteen minutes" while standing under the shower. Gallagher pointed out several drawbacks to such flushing methods. He stated that employees, besides probably being reluctant to get themselves completely drenched just to wash out their eyes, would have difficulty breathing with their heads held "in an upright position for fifteen minutes" under the shower. According to Gallagher, employees not wishing to get entirely wet "may elect to go into the men's room or other source of water" where they would not be able to get the required quantity of water from the basins or spigots to adequately flush their affected corneas.

In response, James Bowman, Senior Safety Supervisor for the Chambers Works plant, testified that employees working in the laboratory are required to wear "standard side shield safety glasses" that are issued to them by Respondent. He stated that, in addition to such glasses, employees are required to wear "slash proof goggles or face shields" when working with corrosive materials. Nevertheless, he noted that Respondent recognizes the possibility of some chemical getting into a person's eyes even while that person is wearing the eye protection. Bowman expressed his opinion and Respondent's position that the shower provided is a suitable facility for the quick flushing of eyes. With regard

to how an employee could flush the eyes with the shower, Bowman testified, "The shower would be operated by pulling the waiting handle . . . . The water would run down his face and run through his eyes. He could tilt his head back and the water would go through his eyes or he could cup his hands and flush the water up into his face." He further stated that the flow of the shower was a maximum of 35 pounds per square inch. He also noted his company's policy that any employee who gets corrosive material on himself or herself should be transported to the medical division as soon as possible. Bowman testified that Respondent has no history of eye injuries in the Analyzer Room.

B

Judge Chodes concluded in his decision that, by not providing an eyewash fountain in the Analyzer Room, Respondent did not comply with section 1910.151(c). He noted that the cited standard refers separately to the eyes and body, and that "the eyes need special consideration due to their vulnerability to injury, and the dire consequences which could result from contact with corrosive material." He determined that the standard full-body shower was not a "suitable facility" under section 1910.151(c) for "immediate emergency use" for "quick drenching or flushing" of the eyes because it did not permit the application of water directly to the eyes, but rather supplied only diffused water. The judge noted several unreviewed judges' decisions that Respondent cited in its post-hearing brief for the propositions that an eyewash fountain is not required under the standard and that other methods of supplying water are suitable. However, he distinguished the instant case from those cases on the ground that in each of those cases the water supplied for flushing the eyes was not diffused. Judge Chodes thus affirmed item 21 and assessed the proposed penalty of $135.

Respondent argues on review that the shower provided in the Analyzer Room was a "suitable" facility for flushing the eyes. For support, Respondent cites

Gibson Discount Center, Store No. 15, 78 OSAHRC 30/C1, 6 BNA OSHC 1526, 1978 CCH OSHD ¶ 22,669 (No. 14657, 1978), and Gulf Oil Co., 77 OSAHRC 216/B10, 6 BNA OSHC 1240, 1978 CCH OSHD ¶ 22,737 (No. 14281, 1977), as well as numerous unreviewed judge's decisions determining whether certain sources of water were "suitable facilities" under section 1910.151(c). It asserts that the shower it provided is just as "suitable" as an eyewash fountain. Respondent also cites to the evidence in the record concerning the alternative precautions it took to protect the eyes of its employees. Respondent further contends that the term "suitable" in section 1910.151(c) is so vague as to render the standard unenforceable and invalid. The Secretary contends on review that, for the reasons stated by the compliance officer at the hearing and by Judge Chodes in his decision, the shower provided in the Analyzer Room was not a suitable facility for quick drenching of the eyes within the meaning of section 1910.151(c).

C

In Gibson Discount Center, supra, and Gulf Oil Co., supra, the Commission determined that the issue of whether facilities are "suitable" under section 1910.151(c) depends on the particular circumstances of the case, including such factors as the nature and amount of the material to which the eyes are exposed and the distance between the work area and the washing facility. Therefore, we agree with Respondent that more than one type of eyewash facility may be suitable. The issue before us is not whether Respondent is required to provide an eyewash fountain but rather whether the shower provided is suitable under the circumstances.

We conclude, on the basis of the record before us, that the Secretary has failed to meet his burden of proving that the shower provided by Respondent was not suitable. 11/ The only evidence regarding the configuration and operation

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11/ In light of this disposition, we need not rule upon Respondent's contention that the standard is unenforceably vague.

of the shower put forth by compliance officer Gallagher was his testimony that the shower flowed from overhead and that employees would have to hold their heads "in an upright position for fifteen minutes" to use it to flush out their eyes. Gallagher testified that he did not remember what the Analyzer Room looked like nor where the shower was located in the room. Moreover, he testified on cross-examination that the safety shower would be "one of the methods that an employee may use to get a corrosive out of his eyes" and that the shower was there to provide water for quick drenching as a first aid measure. He further stated, "I don't think there would be anything to prevent an employee from drenching his eyes with that shower." Gallagher also testified that he made no effort to determine at what pressure the shower flowed. Consequently, the Secretary offered no evidence that the flow of the shower could not be moderated to produce a gentle stream. In addition, the Secretary does not contend that the shower was so located that employees could not reach it without unreasonable delay even if they were working at the maximum distance of 30 feet from the shower.

It was Respondent's witness Bowman who testified that, according to his measurement, the shower flowed at a maximum pressure of 35 pounds per square inch. However, Bowman did not testify concerning the full range of the shower's flow rate. Bowman's testimony provided the only further description of the shower--that it was operated by pulling a handle.

Accordingly, we conclude that the judge erred in affirming item 21. 12/ We hold that the Secretary failed to prove that the shower provided by Respondent

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12/ In affirming the item, the judge relied primarily on the fact that the shower supplied only diffused water. However, there is no foundation in the record for a finding that a facility cannot be suitable if it supplies diffused water.

was not suitable, and that the Secretary therefore did not establish that Respondent failed to comply with section 1910.151(c). For this reason, we vacate item 21.

III

Accordingly, we remand this case to the Chief Administrative Law Judge for assignment to an administrative law judge for the limited purpose of conducting further proceedings on item 18, which alleges noncompliance with section 1910.94(c)(2), including entering findings of fact and conclusions of law consistent with this opinion. We vacate item 21, which alleges noncompliance with section 1910.151(c), as well as the penalty proposed therefor.

IT IS SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: JAN 29 1982

CLEARY, Commissioner, concurring in part and dissenting in part:

I join in Part I of the lead decision, remanding item 18 for a determination of whether Respondent's spray painting operation was performed in a "spray room." However, I dissent from the majority's decision to vacate item 21. I conclude that the standard safety shower provided by Respondent was not a suitable facility for use by employees to wash corrosive chemicals out of their eyes and that Respondent therefore failed to comply with 29 C.F.R. § 1910.151(c). 13/

As noted by the majority, both the compliance officer and the area director testified that an eyewash fountain should have been provided because the standard safety shower was not "suitable" for flushing corrosive chemicals from the eyes. In support of his opinion, compliance officer Gallagher gave unrebutted testimony that "[i]t's normal first-aid emergency procedure to wash the eye for fifteen minutes with a gentle flow of water." In contrast, the standard safety

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13/ I reject Respondent's contention that § 1910.151(c) is unenforceably vague. Section 1910.151(c) is not vague on its face because, given the wide variety of situations in which the eyes or a part of the body may come into contact with various corrosive materials, the standard was drafted "with as much exactitude as possible in light of the myriad conceivable situations which could arise and which would be capable of causing injury." See Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230 at 233 (5th Cir. 1974).

Furthermore, the standard is not vague as applied to the facts of this case. In mentioning the "eyes" separately from the rest of the "body" in two instances, section 1910.151(c) gives notice that facilities that are suitable for drenching the body may not be suitable for flushing the eyes. In addition, it is a matter of common understanding that, as stated by Judge Chodes, "the eyes need special consideration due to their vulnerability to injury, and the dire consequences which could result from contact with corrosive material." I therefore conclude that the standard provides "a reasonable warning of the proscribed conduct in light of common understanding and practices." See Ryder Truck Lines, Inc. v. Brennan, 497 F.2d at 233; see also Brennan v. OSHRC (Santa Fe Trail Transport Co.), 505 F.2d 869 (10th Cir. 1974). In fact, as the Secretary correctly notes, Respondent provided eyewash fountains in some of its other chemical-manufacturing facilities, thereby indicating recognition on its part that such facilities are suitable for protection of employees working with corrosive chemicals.

shower provided by Respondent operated at a maximum force of 35 pounds per square inch, considerably more pressure than a gentle flow. Nor is there anything in the record to indicate that employees with corrosive chemicals in their eyes could reduce this to a gentle flow. Employees seeking to use the shower to flush corrosive chemicals out of their eyes would suffer discomfort, if not harm, from the considerable pressure of the water flowing onto their eyes. In fact, it seems doubtful that employees could hold their eyes open for the 15 minutes required to adequately flush their eyes, considering the force of the shower. Employees cupping their hands for water to rinse their eyes, to avoid the force of the water from the shower head onto their eyes, would probably be unable to create a constant flow of water over their eyes. The record does not clearly establish that employees could rinse their eyes by cupping their hands, because it does not disclose whether the shower remains in operation if the handle is released. Moreover, employees using these facilities would get their whole bodies wet from the overhead shower. Not wishing to get entirely wet just to flush their eyes, employees could lose valuable time seeking other sources of water and would find those alternative sources inadequate for flushing their eyes. In my view, Respondent essentially admitted that the shower was not suitable when it stated in its submissions on review: "Indeed, common sense dictates that an adult who stands under a shower which provides 35 pounds of pressure at the head, would be subjected to a rather forceful and concentrated rush of water in the area of his eyes."

I agree with Judge Chodes that the unreviewed judge's decisions cited by Respondent are not controlling in this case, see Leone Construction Co., 76 OSAHRC 12/E6, 3 BNA OSHC 1979, 1975-76 CCH OSHD ¶ 20,387 (No. 4090, 1976), and that the cases are distinguishable on the ground tnat they did not involve facilities providing diffused water. I also agree with the judge that a facility

supplying only diffused water is not a suitable facility for quickly flushing the eyes, an operation requiring a "flow of water" rather than a spray of water in order to successfully wash out any corrosive chemical.

Accordingly, I dissent from the majority's refusal to affirm item 21.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR | : | |
| Complainant | : | |
| v. | : | DECISION AND ORDER |
| E. I. du PONT de NEMOURS & COMPANY, INC. | : | OSHRC Docket No. 76-2400 |
| Respondent | : | |

APPEARANCES:

Stephen D. Dubnoff, Esq., and Douglas Weiner, Esq.,
of New York, New York
for the Secretary of Labor

John C. Heavey, Jr., Esq., and W. B. DeRiemer, Esq.,
of Wilmington, Delaware
for the Respondent

Chodes, Judge

## I. STATEMENT OF THE CASE

This is a proceeding pursuant to section 10 of the Occupational Safety and Health Act of 1970 (29 U.S.C. §651, et seq., hereinafter referred to as the Act), in which the respondent is contesting citations issued by the complainant against the respondent under the authority vested by section 9(a) of the Act. The citations which were issued on May 6, 1976, alleged that on the basis of an inspection made April 5-22, 1976, of a place of employment located at the respondent's Chambers

Works, Deepwater, New Jersey, the respondent allegedly violated the Act by failing to comply with certain occupational safety and health standards promulgated pursuant to section 6 of the Act (29 U.S.C. §655).

Specifically, respondent was issued Citations Nos. 1 through 15. On May 28, 1976, respondent filed with complainant a notice of intention to contest only the following citations and items:

Citation #1

item No. 2(a)
item No. 7(b)
item No. 9
item No. 15(a) and (b)
item No. 18
item No. 19(a) and (b)
item No. 20(h)
item No. 21
item No. 26

Citation #2, item 1(a) and (b)

Citation #3, item 1(b)

Citation #5, item 1

Citation #7, item 1

Citation #8, item 1

Citation #9, item 1

Citation #12, item 1(b) and (c)

Citation #13, item 1

Citation #14, item 1(a) through 1(g)

Citation #15, item 1

Under the provisions of section 10(a) of the Act, 29 U.S.C. §659(a), the citations and items not contested became the final order of the Commission and are not involved in this proceeding.

The parties have entered into a "Stipulation Amending Complaint" and a "Stipulation Order" which dispose of all contested citations and items excepting the following:

Citation No. 1, item 2(a)
Citation No. 1, item 7(b)
Citation No. 1, item 15(a) and (b)
Citation No. 1, item 18(a)
Citation No. 1, item 20(h)
Citation No. 1, item 21
Citation No. 12, items 1(b) and (c)
Citation No. 13, item 1

The stipulations which are on file as part of the record in this case are approved.

The case was tried on May 4 and 5, 1977, in Philadelphia, Pennsylvania.

At the start of the hearing, complainant moved to withdraw item 20(h) of Citation No. 1 for violation of 29 C.F.R. §1910.132(a) on the grounds that a reevaluation of the facts indicated that a prima facie case could not be established. The motion is granted.

The alleged violations which were contested at the hearing will be discussed below in the order presented at the hearing.

## II. CITATION NO. 1, ITEM 2(a) -- ALLEGED VIOLATION OF 29 C.F.R. §1910.22(a)(2) 1/

This item alleged that floors in D Building Chemical Area were not maintained in a dry condition. The proposed penalty was $75.

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1/ The standard provides:

> The floor of every workroom shall be maintained in a clean and, so far as possible, a dry condition. Where wet

The only witness who had personal knowledge of this alleged violation was John Holsch. Complainant did not inform respondent prior to the hearing that Mr. Holsch would testify regarding this violation as required by prehearing instructions to the parties, nor was the fact that Mr. Holsch would testify in support of the alleged violation disclosed to the respondent in prehearing depositions taken by the respondent. Respondent represented that it was not prepared to deal with Mr. Holsch's testimony and would be prejudiced if he were allowed to testify. Since the only evidence complainant was prepared to present, other than the testimony of Mr. Holsch, was hearsay evidence by the compliance officer who had not observed the alleged violation, the item was vacated (Tr. I-29).[2/]

## III. CITATION NO. 1, ITEM 18 -- ALLEGED VIOLATION OF 29 C.F.R. §1910.94(c)(2)[3/]

### A. Summary of Evidence

This item alleges that a spray booth or spray room was not used to enclose or confine spray-finishing operations.

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1/ (Footnote cont'd.)

> processes are used, drainage shall be maintained, and false floors, platforms, mats or other dry standing places should be provided where practicable.

2/ The transcript of the hearing held on May 4, 1977, is referred to as Tr. I and of the hearing held on May 5, 1977, as Tr. II.

3/ Under the general heading "Ventilation" and the sub-heading "Spray finishing operations," the standard, provides:

On April 6, 1976, Albert Smith, one of the complainant's compliance officers, inspected the Pump Shop in the Central Crafts Building, an area of about 30 feet by 100 feet. The shop was divided by 8-foot high partitions into a work area and enclosed offices and lunchroom. The work area, depicted in photographic exhibits R-2a and 2c, was ventilated by a fan located about 80 feet from the work area that was capable of changing the air about every 2-1/2 minutes. The fan was operable by a switch readily available to employees. However, the fan is rarely used in the wintertime and is used intermittently at other times. Ventilation was also achieved through two doors in the shop and windows on one side of the building. Here again, the doors and windows were not open when the weather was cold. (Tr. I-31, 57, 62, 78, 85, 89, 94, 98, 99, 101.)

Normally, seven to ten employees worked in the Pump Shop reconditioning and repairing pumps. Mr. Smith, the compliance officer, observed one employee spraying a pump about two or three feet in size, using an aerosol can of paint weighing 13 ounces, made by Spray Products Corporation. On a "heavy" day, an employee could spray five pumps and use two cans of the spray. Mr. Smith noted that the paint vapors were pungent and that in his opinion the paint was extremely flammable. An employee of respondent testified that the paint had a "nasty odor and

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3/ (Footnote cont'd.)

> LOCATION AND APPLICATION. Spray booths or spray rooms are to be used to enclose or confine all operations. Spray-finishing operations shall be located as provided in sections 201 through 206 of the Standard for Spray Finishing Using Flammable and Combustible Materials, NFPA No. 33, 1969.

the worst part of it was that you tasted the paint" and that paint particles got into his mouth. In the actual spraying area "it was worse." (Tr. I-31, 32, 39, 62, 66, 83.)

Nine of the employees working in the Pump Shop did spray painting, one at a time. A spray operation takes up to five minutes to complete and is done in the center of the shop about 20 to 60 feet from where the other employees are working, although sometimes employees got to within five feet of the spray area. (Tr. I-38, 39, 65, 77, 81.)

Mr. Smith recommended that a citation be issued because a flammable material was being used outside of a spray room or booth in an atmosphere that was not ventilated and there was a possibility that the toxic material and vapor could be detrimental to the employees, plus possible flammability. It was Mr. Smith's opinion that there should have been adequate ventilation to remove flammable vapors and that this should have been accomplished by having the spray painting done in a spray room or booth that had adequate ventilation to remove flammable vapors. (Tr. I-32, 35.)

Mr. Smith proposed a penalty[4/] of $80 which respondent stipulated was appropriate in the event that a violation was established (Tr. I-36).

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4/ Section 17(j) of the Act (29 U.S.C. §666(i)) provides:

> The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

## B. Discussion

The evidence establishes that the spray finishing operation conducted in the Pump Shop was not in a "spray booth" which is defined in §1910.107(a)(3) as "[a] power ventilated structure provided to enclose or accommodate a spraying operation to confine and limit the escape of spray, vapor, and residue, and to safely conduct or direct them to an exhaust system." Here the spraying was done in a fairly large room with the only power ventilation located about 80 feet from where the spraying was carried on. Nor was the operation carried on in a "spray room" defined in §1910.94(c)(1)(iii) as "a room in which spray-finishing operations not conducted in a spray booth are performed separately from other areas." In the instant case, the spraying operation was not separated from where the other work of repairing parts was being done in the Pump Shop.

It is the position of the respondent that the complainant has failed to prove a violation of the standard because he has failed to prove the dangerous nature of the vapors or emissions emanating from the spraying operations. The case of Secretary v. Bethlehem Fabricators, Inc., 76/62/C2, 4 OSHC 1289, Docket No. 7176 (1976) is cited as authority for vacating the citation. In that case the standard allegedly violated was identical to the standard in issue herein. In the lead opinion, Chairman Barnako held that the standard involved herein, §1910.94(c)(2), should be construed together with §1910.107(d)(2) which contained a qualifying phrase providing that mechanical ventilation was required "so that life or property is not endangered" and §1910.107(a)(2) which

defines a spraying area as: "[a]ny area in which dangerous quantities of flammable vapors or mist, or combustible residues, dusts, or deposits are present due to the operation of spraying processes."

The Bethlehem Fabricators case is not considered to be a binding precedent inasmuch as in that case there was direct evidence from a hygienist who testified on behalf of the employer that tests conducted indicated that the vapors in the atmosphere did not present a hazard to the health of employees. No such testimony was presented in the instant case. The testimony of the compliance officer was that the vapors were pungent and extremely flammable and one of respondent's employees testified that the paint had a nasty odor and you could taste it. This testimony was not contradicted by the respondent. Absent contrary evidence, it is considered a fair inference that dangerous quantities of flammable vapors and combustible residues were present due to the spraying operations. Moreover, the Commission recently held in Secretary v. Gene L. Willison, d/b/a Gene L. Willison, Contractor, Docket No. 13603 (7-25-77) that the existence of a hazard may be presumed where there is noncompliance with the requirements of a standard.

Respondent also cites Secretary v. Eagle-Picher Industries, 74/63/E1, 2 OSHC 3124, Docket No. 4922 (1974). However, the case is distinguishable from the instant case because the respondent in that case was cited for violation of a different standard, namely, 29 C.F.R. §1910.107(a)(2) for spraying outside of predetermined areas. Although the question of the presence of "dangerous quantities of flammable vapors or mists, or combustible residues, dusts or deposits" was referred to in

the decision, Judge Duvall found that the "Respondent did in fact conduct its spray painting in predetermined areas," and this was the basis for dismissal of the citation.

C. Findings of Fact

1. Respondent did not use spray booths or spray rooms to enclose or confine spray-finishing operations carried on in the Pump Shop, Central Crafts Building.

2. Nine employees of the respondent were exposed to dangerous quantities of flammable vapors and combustible residues.

3. Respondent knew, or with the exercise of reasonable diligence, could have known of the presence of the violation.

4. Giving due consideration to size of the respondent's business, the gravity of the violation, the good faith of the respondent and the history of previous violations, it is determined that the stipulated penalty for the violation of $80 is appropriate and not repugnant to the purposes of the Act. (Secretary v. Thorleif Larsen & Sons, Inc., 74/74/C8, 130 OSAHRC 313 (1974).)

IV. CITATION NO. 12, ITEMS 1(b) AND (c) -- ALLEGED VIOLATION OF 29 C.F.R. §1910.212(a)(3)(ii)[5/]

A. Summary of Evidence

The contested items 1(b) and (c) of the citation allege that two "Bertsch" forming rollers were not guarded at the point of operation

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5/ The standard provides:

> The point of operation of machines whose operation exposes an employee to injury, shall

to prevent an employee from having any part of his body in the danger zone during the operating cycle.

On April 6 and 7, 1976, Mr. Smith, the Compliance Officer, inspected the "old plate shop" where he observed a forming roller 16 inches in diameter and 10 feet long (Serial No. 6829) and another forming roller 8 inches in diameter and 6 to 8 feet long (Serial Number 7351).[6/] The rollers were used to shape large metal plates into cylindrical shapes for use in the fabrication of retaining tanks for water and chemicals. When the plates are heavy they are fed into the machine with a crane. The "point of operation" is where the rollers meet. There was no guarding on the machines. During the operation of the machine the operator's hands come within a foot or two of the machines. (Tr. I-104-106, 108, 109, 125, 145, 161.)

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5/ (Footnote cont'd.)

> be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

At the hearing (Tr. I-116-119) respondent raised the question of the validity of the standard on the grounds that the standard was not properly adopted, citing as authority the case of Secretary v. Parr, Inc., 76/76/A2, 4 OSHC 1449, Docket No. 9352 (1976). That decision by Judge Watkins was overruled by the Commission in Secretary v. Western Steel Manufacturing Co., 76/44/C11, 4 OSHC 1107, Docket No. 3528 (1976).

6/ The rollers are depicted in Exhibits C-1 and C-2.

The larger roller had a deadman's switch which required the operator to depress a button to make the rolls turn. Upon release of the button, the rolls stopped turning. Mr. Smith did not consider the deadman control sufficient protection because it takes two men to operate the machine and the operator cannot see whether the man on the other side of the machine is in the danger zone. The smaller roller, which did not have a deadman's switch, was controlled by a trolley switch. To start the roller, the operator turned the switch to the right or left depending on whether the rollers were to go forward or in reverse. With the switch in the center, the machine is in a stop position. Safety rules of the respondent require the operator not to leave the switch while the machine is running, but if there was no one at the switch, it would take five or six seconds to shut the machine off in the event that an employee got entangled. (Tr. I-134, 145, 146, 161, 170, 171.)

The hazard presented by the operation of the rollers is the possibility that someone could inadvertently get his hand into the point of operation and, should this happen, the hand and possibly the arm could be crushed (Tr. I-109).

The testimony of witnesses for complainant and respondent establish that guarding of the point of operation would not be feasible on either machine because such guarding would make it impossible for the machines to do their work (Tr. I-111, 112, 131, 162, 163). However, Mr. Smith testified that there were available other methods of guarding which could protect the operator and yet not interfere with the oper-

ation of the machines.[7/] One such device was an electrical pressure-sensitive pad in front of the points of operation on the machines which would shut off the machine if an employee got near the point of operation. (Tr. I-120, 121.)

J. M. Burkhart, respondent's superintendent with responsibility for the operation of the Central Crafts Division which included the shop where the Bertsch rollers involved herein are located, testified that the rollers had been in the shop for at least 30 years without an accident. It was Mr. Burkhart's opinion that a barrier guard would make it impossible to get heavy sheet metal or plate metal into the machine (Tr. I-164). He was also of the opinion that a trip or treadle would not diminish injuries to the hand or body as compared to the method of operation utilized by the respondent. With respect to an electronic guard, Mr. Burkhart testified that the movement of the plate could trip the machine out while the plate was being fed into the machine. (Tr. I-165, 168.) Also, the electronic beam would have to be placed very close to the machine to keep it from being tripped. It was Mr. Burkhart's opinion that the deadman's switch offered better protection than would an electric beam. (Tr. I-162, 167.)

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7/ Respondent objected to the admission in evidence of any testimony relating to types of guarding other than guarding of the point of operation. The testimony was received pending a reserved ruling on the admissibility of the evidence. The testimony is considered relevant, respondent's objection is overruled and the testimony is received in evidence.

## B. Discussion

Respondent is charged with failure to guard the point of operation of two Bertsch rollers. Since physical guarding of the point of operation would prevent the machines from functioning, a violation of the standard cannot be predicated upon the failure to erect such guarding. Secretary v. Dic-Underhill, a Joint Venture, Docket No. 2232, 75/35/F10, 2 OSHC 1651 (1975). The inquiry then is whether other methods of guarding are available which would guard against injury and at the same time not prevent the machine from operating.

The methods utilized by respondent to control the operation are a deadman's switch for one machine and a trolley switch for the other. The deadman's switch completely protects the operator because if he takes his hand off the switch, the machine stops. However, it is possible that the person working with the operator could be in a dangerous position and yet not be seen by the operator in time to stop the machine and prevent injury. To this extent, the deadman's switch is not a complete safety device, albeit no accidents have occurred over the years.

The trolley switch controls operation of the machine with a lever and the respondent's safety rules require that the operator not leave the switch while the machine is operating so that, if necessary, the machine could be stopped by a flick of the switch. This method of controlling the machine is not foolproof because the operator could leave the switch while the machine is in operation.

It may, therefore, be conceded that a method of guarding other than a physical guard should be utilized if available and feasible.

The complainant's compliance officer recommended use of an electronic beam to stop the machine when an employee got into the danger zone of the machine. However, respondent's superintendent testified that an electronic beam could stop the machines when the metal plates were being positioned for feeding into the rollers and that the methods now being used to operate the machine imposed less hazard to employees than would be the case if an electric beam were installed. Testimony concerning the possible utilization of trip or treadle devices indicated that their use would not diminish injuries to employees. This testimony was not contradicted. To require respondent to install guarding methods which could interfere with the machines' function or increase the hazard to employees would not serve the purposes of the Act, particularly in light of the accident-free record of the machines over the years. Commissioner Cleary, in Secretary v. Industrial Steel Erectors, Inc., Docket No. 703, 74/2/E5, 1 OSHC 1497 (1974) stated that "[e]mployers and employees alike should not be required to comply with a standard so sedulously as to follow a course of conduct that is shown by the weight of the evidence to be less safe than an existing work practice."

C. Findings of Fact

A preponderance of the evidence supports the following findings of fact:

1. The operation of Bertsch forming roller (No. 6829) is controlled by a deadman's switch and the operation of Bertsch forming roller (No. 7351) is controlled by a trolley switch.

2. The machines have been in operation at least 30 years without an accident.

3. Physical guards to prevent exposure to injury at the point of operation of the Bertsch forming rollers would prevent the machines from performing their function of shaping metal plates into cylindrical shapes.

4. The evidence does not establish that other types of guarding, such as electronic beams and trip or treadle devices which would permit the machines to perform their function would be more effective in preventing injury to employees at the point of operation than the controls utilized by the respondent to operate the machines.

## V. CITATION NO. 13 -- ALLEGED VIOLATION OF 29 C.F.R. §1910.213(n)(3)[8/]

### A. Summary of Evidence

The citation alleges that respondent did not provide guards for a head molder.

On April 6, 1976, Mr. Smith inspected the carpenter shop and observed a J. A. Fay and Eagan Company molder, depicted in Exhibit C-3. The molder is a mechanically-fed planer which reduces wood

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8/ The standard provides:

> Feed rolls shall be guarded by a hood or suitable guard to prevent the hands of the operator from coming in contact with the in-running rolls at any point. The guard shall be fastened to the frame carrying the rolls so as to remain in adjustment for any thickness of stock.

fed into the machine to the desired width. Mr. Smith noted that the feed rolls which pull the wood in and feed it to the planer were not guarded so as to prevent the operator from getting his hands into the roll area. (Tr. I-179-183.)

An employee, demonstrating the operation of the machine, fed an 8-foot length of wood into the machine (in so doing the employee would get about 4 feet from the roller) let the wood go and the machine would draw the wood through. Mr. Smith was informed that the only wood put through the machine was 8 feet in length. Because the operator did not come close to the roller when feeding the machine, there was no hazard involved in feeding the wood into the machine. The hazard to employees was the possibility that in starting the machine with the start button located about 2 feet from the feed roller (designated as "A" on Exhibit C-3), or in adjusting the roller for the size of the wood with the lever or switch (marked "B" on Exhibit C-3) located about one and a half feet from the roller, the operator would be exposed to injury. Mr. Smith testified that when the operator pushed the starter button with his right hand, his left hand would be within two inches of the machine and he could be drawn into the machine. The operator could also be injured if he tripped or fell when starting or adjusting the machine.

To protect employees from injury, Mr. Smith testified that the machine needed a floating guard which would rise automatically with the thickness of the stock being cut and prevent hands from getting into the rolls. (Tr. I-182-190, 195.)

Mr. Burkhart testified for the respondent that the machine in question was 40 years old and the machine had never been involved in an accident. Mr. Burkhart was of the opinion that the possibility of an accident occurring was remote and that this was so regardless of the presence of a floating guard as recommended by Mr. Smith. (Tr. I-203.)

A penalty of $800 was proposed based on the same factors (referred to above) considered in arriving at the proposed penalties for the other violations. (Tr. I-187.)

B. Discussion

The evidence shows (and the parties agree) that the machine in question poses no hazard to the operator during the time he is feeding stock because the nearest the operator gets to the rollers is four feet. Presumably, this aspect of the operator's work takes up most of the working day.

The question for decision, therefore, is whether the operator is exposed to injury when he uses the switch two feet from the rollers to start the machine and when he uses the lever to adjust the rollers a foot and a half away. In performing these functions, the operator's hand could come within two inches of the rollers so that there is the hazard, given some unforeseen accident, distraction or carelessness, that the operator's hand could become caught in the rollers and this could result in serious injury. The hazard could be diminished, if not done away with entirely, by the installation of a floating guard.

The evidence indicates that there has been no accident involving

the machine in 40 years. The absence of a prior accident is not a defense to a citation for a violation because one purpose of the Act is to prevent the first accident. See Lee Way Motor Freight, Inc., v. Secretary of Labor, 511 F.2d 864, 870 (1975). However, a good accident record may be considered in the assessment of the penalty. Complainant proposed a penalty of $800 which is considered excessive in light of the accident-free record, the limited time the operator is exposed to the hazard, and the minimal likelihood of an accident occurring. Giving due consideration to the criteria for the assessment of penalties set forth in section 17(j) of the Act, it is determined that the appropriate penalty for this violation is $100.

## C. Findings of Fact

A preponderance of the evidence supports the following findings of fact:

1. The J. A. Fay and Eagan Company molder located in respondent's carpenter shop was not provided with guards to prevent the hands of the operator from being caught in the machine's rollers.

2. The operator of the machine was exposed to the hazard of having his hand caught in the machine's in-running rolls and, if this occurred, there would be a substantial probability that serious physical harm could result.

3. The respondent knew, or with the exercise of reasonable diligence, could have known, of the presence of the facts recited in paragraphs (1) and (2) above.

4. Giving due consideration to the size of the respondent's business, the gravity of the violations, the good faith of the respondent and the history of previous violations, the appropriate penalty for the serious violation of 29 C.F.R. §1910.213(n)(3) is $100.

## VI. CITATION NO. 1, ITEMS 15(a) AND (b) -- ALLEGED VIOLATION OF 29 C.F.R. §1910.36(d)(2)[9/]

Complainant moved to vacate the citation on the grounds that there was insufficient evidence to make out a prima facie case. The motion was granted. (Tr. I-204, 205.)

## VII. CITATION NO. 1, ITEM 7(b) -- ALLEGED VIOLATION OF 29 C.F.R. §1910.23(c)(1)[10/]

The citation alleged that a lime silo (Exhibits C-4, 5, 6 and 7) on top of which employees worked was not guarded by a standard railing

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9/ The standard provides:

> Every automatic sprinkler system, fire detection and alarm system, exit lighting, fire door, and other item of equipment, where provided, shall be continuously in proper operating condition.

10/ The standard provides:

> Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a toeboard wherever, beneath the open sides,
> (i) Persons can pass,
> (ii) There is moving machinery, or
> (iii) There is equipment with which falling materials could create a hazard.

or equivalent. The evidence indicated that all employees at all times while working on the silo, wore tied-off safety belts which would prevent their falling over the edge.

The only hazard alleged by the complainant was the possibility of an employee tripping or falling when he climbed onto the silo through or over the railing shown on Exhibits C-3 and 4, left side. A railing on the edge of the silo would not prevent such a hazard. On respondent's motion, this item was vacated (Tr. II-79).

## VIII. CITATION NO. 1, ITEM 21 -- ALLEGED VIOLATION OF 29 C.F.R. §1910.151(c)[11/]

### A. Summary of Evidence

The citation alleges that employees who were exposed to injurious corrosive material were not provided with suitable facilities for flushing of the eyes.

On April 7, 1976, the Analyzer Room in the Chemical Building was inspected by Vincent Gallagher, Compliance Officer. The room is 17 feet by 30 feet and is used to analyze waste water generated by the plant prior to its return to the Delaware River. Analyzing the water involves the use of corrosives, including sulphuric acid, which are

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11/ The standard provides:

> Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.

stored in bottles and poured into other items. At least one employee was working in the room when the inspection took place. (Tr. II-79, 80, 88, 111, 118.)

The facility provided by respondent for drenching or flushing of the eyes was a safety shower so that if an employee got corrosive material on his body or in his eye, he would immediately get under the shower. To drench or flush the eyes, the employee could tilt his head back and allow the water to run down his face or he could cup his hands and flush the water into his face. (Tr. II-112, 113.)

Mr. Gallagher was of the view that a suitable eyewash facility was an eyewash fountain located in the Analyzer Room. Mr. Gallagher pointed out drawbacks to the use of the safety shower for washing the eyes. These included the reluctance an employee might have to getting totally drenched just to wash his eyes and going instead to the nearby washroom, and the difficulty breathing with the head tilted back while in the shower for the length of time needed to thoroughly wash the eyes. (Tr. II-84, 85.)

B. Discussion

The standard refers to the eyes and body separately, an indication that insofar as injurious corrosives are concerned, the eyes need special consideration due to their vulnerability to injury, and the dire consequences which could result from contact with corrosive material. Consequently, it is not considered that a shower is a "suitable" facility for drenching or flushing the eyes. The standard refers to "quick drenching or flushing" for "immediate emergency use."

This is not accomplished by a shower designed primarily for drenching or flushing the body. In the cases referred to by respondent[12/] at the hearing, the facilities available permitted application of water directly to the eyes, whereas with a shower the water is diffused.

C. Findings of Fact

A preponderance of the evidence supports the following findings of fact:

1. Employees in the Analyzer Room, Chemical Building, were exposed to injurious corrosive materials.

2. Suitable facilities for quick drenching or flushing of the eyes were not provided by the respondent.

3. Respondent knew, or with the exercise of reasonable diligence could have known, of the facts recited in paragraphs (1) and (2) above.

4. Giving due consideration to the size of respondent's business, the gravity of the violation, the respondent's good faith and history of previous violations, it is determined that the penalty of $135 proposed by complainant for the violation referred to above is appropriate.

ORDER

Upon the basis of the foregoing and upon the entire record, it is ORDERED that:

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12/ Secretary v. Idaho Travertine Corp., Docket No. 1134 (1977) 77 OSAHRC (57/A2, 5 OSHC 1504 (two hoses and nozzles)); Secretary v. Lee-Way Motors, Inc., Docket No. 1105 (1974), 74 OSAHRC 22/D12, 1 OSHC 1689 (screw type water faucet); Secretary v. Courier Newsom Express, Inc., Docket No. 2231 (1973), 73 OSAHRC 49/F2, 1 OSHRC 3213 (washroom facilities); Secretary v. Colmak Industries, Inc., Docket No. 1874 (1974), 74 OSAHRC 37/D11, 2 OSHC 3049 (fresh water available in nearby tanks).

1. Citation No. 1, item 20(h) for violation of 29 C.F.R. §1910.132(a) is vacated.

2. Citation No. 1, item 2(a) for violation of 29 C.F.R. §1910.22(a)(2) is vacated.

3. Citation No. 1, item 18 for violation of 29 C.F.R. §1910.94(c)(2) is affirmed and a penalty of $80 is assessed.

4. Citation No. 12, items 1(b) and (c) for violation of 29 C.F.R. §1910.212(a)(3)(ii) are vacated.

5. Citation No. 13 for violation of 29 C.F.R. §1910.213(n)(3) is affirmed and a penalty of $100 is assessed.

6. Citation No. 1, items 15(a) and (b) for violation of 29 C.F.R. §1910.36(d)(2) are vacated.

7. Citation No. 1, item 7(b) for violation of 29 C.F.R. §1910.23(c)(1) is vacated.

8. Citation No. 1, item 21 for violation of 29 C.F.R. §1910.151(c) is affirmed and a penalty of $135 is assessed.

JOSEPH CHODES
Judge, OSHRC

Dated: October 11, 1977
Hyattsville, Maryland

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

January 29, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Edward Kelly & Sons, Inc.

OSHRC DOCKET NO. 76-2802

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

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- Cecil L. Cutler, Jr., Judge
  Occupational Safety & Health
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  Atlant, GA. 30309

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 76-2802 |
| EDWARD KELLY & SONS, INC., | : | |
| Respondent. | : | |
| | : | |

DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge Cecil L. Cutler is before the Commission pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). In his decision, Judge Cutler affirmed a citation that alleged a serious violation of the Act for the failure of Respondent, Edward Kelly & Sons, Inc., to comply with the standard found at 29 C.F.R. § 1926.652(b).[1/] Respondent had sloped the top seven feet of soft, unstable soil in a twelve-foot deep trench, but had not sloped the bottom

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1/ 29 C.F.R. § 1926.652(b) provides:

> § 1926.652 Specific trenching requirements.
>
> * * *
>
> (b) Sides of trenches in unstable or soft material, 5 feet or more in depth, shall be shored, sheeted, braced, sloped, or otherwise supported by means of sufficient strength to protect the employees working within them. See Tables P-1, P-2 (following paragraph (g) of this section).

five feet of hard and compact soil. For the reasons that follow, we conclude Respondent complied with the applicable sloping requirements. Accordingly, we reverse Judge Cutler's decision and vacate the section 1926.652(b) citation.

I

Respondent is a Toledo sewer contractor employing twenty to twenty-five employees. On May 13, 1976, Respondent was laying thirty-inch concrete sewer pipe into a trench in Holland, Ohio. The trench was twelve feet deep, four to five feet wide at the bottom, and twenty to twenty-two feet wide at the top. During the course of the morning, the depth of the trench increased from seven or eight feet to twelve feet as the work progressed up the rise of a slight hill. The bottom five feet of the trench consisted of hard, blue clay; the soil above the five-foot level consisted of "average" soil, composed of brown, sandy clay. Only the top portion of the trench above the five-foot section of hard, blue clay was sloped. The bottom five feet of the walls were vertical. The soil was wet around utility pipes which were about five feet from the surface and which had broken. As the work proceeded up the hill, Doug McKee, an Occupational Safety and Health Administration ("OSHA") compliance officer, inspected the site. He observed three men working in the trench near the bottom.[2/]

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2/ The compliance officer was the Secretary's only witness. At the close of his testimony, Respondent moved for an involuntary dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure. Respondent argued that the Secretary had failed to show that the sides of the trench were not sloped sufficiently to protect employees working within and that there was no showing employees were subjected to a hazard. Administrative Law Judge Garl Watkins, who was initially assigned

(continued on next page)

Henry Combs, Respondent's foreman at the construction site, testified that as the work on the trench proceeded up the hill, the bottom of the trench, about the lower five feet, was composed of blue, hard clay and the remainder of the trench, approximately seven feet, was composed of average soil consisting of a brown, sandy clay. On the hill, three gas line conduits and drain tiles laid to get rid of water in the field had been broken. Mr. Combs stated that some water had run out of the broken drain tiles into the bottom of the trench. The water was drained through the sewer pipe already laid. The foreman stated that the average soil

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2/ (continued)

to hear the case, granted the motion and asked for briefs from both parties. Prior to issuing an official order, Judge Watkins died. The case was reassigned to Judge Cutler, who concluded that Judge Watkins had incorrectly granted Respondent's motion and issued an order on March 8, 1978, denying Respondent's motion. Respondent argues on review that Judge Watkins' oral statement granting Respondent's motion was a judicial action leaving entry of a written order only a ministerial formality and, therefore, that Judge Cutler erred in denying Respondent's motion.

We reject Respondent's argument. Under § 12(j), 29 U.S.C. § 661(i), of the Act and Commission Rule 90, 29 C.F.R. § 2200.90, a judge retains jurisdiction of a case until his report of the case is docketed by the Commission's Executive Secretary. Once a judge's report is docketed, he no longer has jurisdiction. Singleton Sheet Metal Works, 73 OSAHRC 6/F6, 1 BNA OSHC 1062, 1971-73 CCH OSHD ¶ 15,273 (No. 878, 1972). However, until the judge's report is docketed, it is not submitted for consideration to Commission members and may be modified by the judge. Rob't W. Setterlin, 76 OSAHRC 53/D8, 4 BNA OSHC 1214, 1975-76 CCH OSHD ¶ 20,682 (No. 7377, 1976); Gurney Industries, 74 OSAHRC 8/A2, 1 BNA OSHC 1376, 1973-74 CCH OSHD ¶ 16,805 (No. 722, 1973). Accord, H.S. Holtze Construction Co. v. Marshall, 627 F.2d 149 (8th Cir. 1980).

In this case, Judge Watkins did not file a written decision with the Executive Secretary. Therefore, the judge retained jurisdiction of the case and could have reversed or modified his ruling. The parties agreed that the record made before Judge Watkins would stand and be considered part of the record before Judge Cutler. Judge Cutler therefore had the same authority to consider the record as had Judge Watkins. Accordingly, Judge Cutler had jurisdiction of the case and had the power to deny Respondent's motion to dismiss.

above the five-foot level was sloped but that the bottom five feet was not sloped because the soil was hard, blue clay. Mr. Combs stated that he thought the trench was safe.

Respondent also presented as witnesses two experienced safety inspectors, Lloyd Oliver and William Moening, from the Ohio Industrial Commission's Division of Safety and Hygiene. They had arrived at Respondent's worksite to make a routine inspection at the same time that the OSHA compliance officer was making his inspection. Mr. Oliver stated that there was some clay towards the bottom of the trench and then some sand and a loam top soil. Mr. Moening stated that the bottom four or five feet was solid blue clay and the next five or six feet was sand. On top, there was some top soil and clay-type soil. They both testified that the sides of the trench were being sloped at an angle of repose for the type of soil excavated and they concluded that the sides of the trench were sufficiently sloped to protect employees working within them from the danger of moving ground. They stated they found no evidence that any soil was likely to slip, slide, or move. Respondent introduced into evidence the Ohio inspectors' reports to that effect.

On May 17, 1976, four days after the compliance officer's inspection, Merle Allen of the Ohio Industrial Commission's On-Site Consultation Service arrived at the site, pursuant to Respondent's request. Mr. Allen previously had been an OSHA compliance officer for the Toledo district office. The On-Site Consultation Service is an Ohio state agency that advises employers concerning the applicability of OSHA regulations. Mr. Allen testified that the bottom five feet consisted of hard, compact soil and he concluded that the sides of the trench were sloped in compliance with applicable OSHA regulations.

II

Respondent argued to Judge Cutler that the Secretary had failed to establish that the soil in the trench was "soft and unstable" within the meaning of section 1926.652(b). Respondent further argued that, even if the soil in the trench was considered soft and unstable, Respondent had complied with section 1926.652(b) by sloping all the sandy, brown clay soil above the bottom five feet of hard, blue clay in accordance with the one-to-one sloping requirements for average soil found in Table P-1 to which section 1926.652(b) refers. Respondent argued that section 1926.652(b) should be read in conjunction with section 1926.652(c),[3/] which requires sloping of hard, compact soil only above the bottom five feet. Accordingly, Respondent contended that the bottom five feet of hard soil in a trench need not be sloped even if the soil above it is soft and unstable.

Judge Cutler rejected Respondent's arguments. The judge found that the trench "ranged in depth from seven or eight to twelve feet" and was four to five feet wide at the bottom. He also found, relying on Respondent's evidence, that the trench was sloped above the five-foot level to a

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3/ 29 C.F.R. § 1926.652(c) provides:

§ 1926.652 Specific trenching requirements.

* * *

(c) Sides of trenches in hard or compact soil including embankments, shall be shored or otherwise supported when the trench is more than 5 feet in depth and 8 feet or more in length. In lieu of shoring, the sides of the trench above the 5-foot level may be sloped to preclude collapse, but shall not be steeper than a 1-foot rise to each 1/2-foot horizontal. When the outside diameter of a pipe is greater than 6 feet, a bench of 4-foot minimum shall be provided at the toe of the sloped portion.

width of twenty to twenty-two feet at the top. The judge found that the bottom five feet of soil in the trench was blue, hard clay and, above that to the surface, the soil was brown clay with sand in it, described as "average" soil. Judge Cutler concluded this average soil above the five-foot level was soft and unstable soil within the meaning of section 1926.652(b). The judge noted that if sloping were required for only the average soil resting on the hard clay, then Respondent's sloping of the soil above the five-foot level was sufficient to comply with Table P-1 and section 1926.652(b). Relying on Connecticut Natural Gas Corp., 78 OSAHRC 60/B3, 6 BNA OSHC 1796, 1978 CCH OSHD ¶ 22,874 (No. 13964, 1978), Judge Cutler concluded that Respondent violated section 1926.652(b) by failing to slope the trench from the bottom because the amount of unstable soil was not negligible. However, because the trench, as sloped, presented a minimal hazard of cave-in or collapse and since Respondent had acted in considerable good faith in attempting to comply with the Secretary's regulations, Judge Cutler assessed a penalty of $1.00.

III

Respondent petitioned for review of the judge's decision. Former Commissioner Barnako directed review of the issues raised in Respondent's petition.

On review, Respondent argues that there was no hazard presented to employees from its failure to slope the bottom five feet of the trench. Respondent relies on the Commission's decision in W.N. Couch Construction Co., 76 OSAHRC 44/A2, 4 BNA OSHC 1054, 1975-76 CCH OSHD ¶ 20,574 (No. 7370, 1976) ("Couch"), and points to the Commission's statement in that case that section 1926.652(b) only requires an employer to slope

or shore the "soft or unstable constituents of trench walls" in trenches at least five feet deep. 4 BNA OSHC at 1056, 1975-76 CCH OSHD at p. 24,592. Respondent concludes it complied with the requirements of section 1926.652(b) by sloping all unstable soil in its trench. Respondent further contends that Judge Cutler misinterpreted Connecticut Natural Gas Corp. since Couch, supra, to which Connecticut Natural Gas Corp. refers, only held that section 1926.652(b) requires the sloping of the "soft or unstable constituents of trench walls."[4/]

The Secretary argues that a preponderance of the evidence supports the judge's conclusion that the trench was not properly sloped. The Secretary states that to comply with the one-to-one sloping requirements which Table P-1 establishes for average soil, the trench, which was twelve feet deep and four and one-third feet wide at the bottom, should have been twenty-eight and one-third feet wide at the top. The Secretary continues that since no testimony estimated that the trench's width at the top was twenty-eight and one-third feet, and since the judge accepted Respondent's testimony that the trench was twenty-two feet wide at the top, the trench was not sufficiently sloped.[5/] The Secretary concludes that Judge Cutler properly applied the Commission's decision in Connecticut

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4/ The Associated General Contractors of America has filed an amicus brief in support of Respondent, contending that no violation can be affirmed absent a finding that the trench was dug in soft or unstable soil; that Couch only requires sloping of soft, unstable soil; and that there is no evidentiary basis in this case to conclude employees were not sufficiently protected by sloping soil only above the five-foot level.

5/ In his brief on review, the Secretary states that although the only factual dispute at the hearing, the width of the trench at the surface, was decided adversely to him, he does not take exception to the judge's resolution of the factual dispute since a violation was established even accepting Respondent's testimony of the trench's width at the surface. Accordingly, the dimensions of the trench are not in dispute.

Natural Gas Corp., supra, to affirm the citation and that his decision should be affirmed.

IV

In this case, the trench walls were composed of a distinct layer of hard soil underneath a distinct layer of soft soil.[6/] Respondent sloped the soft layer but not the hard layer. In Couch, supra, on which Respondent relies, the trench was composed of four and one-half feet of soft and unstable soil above about six and one-half feet of hard or compact soil. The Commission stated that the trench was regulated by section 1926.652(b) and, because Couch failed to slope any soil in its trench, the Commission concluded that Couch violated section 1926.652(b). The Commission also stated that section 1926.652(b) requires an employer to slope or shore "all soft or unstable constituents" of trench walls so long as the trench is five feet or more in depth and the soft or unstable portion is not so small as to be "insignificant." Id. at note 5 and accompanying text, 4 BNA OSHC at 1056, 1975-76 CCH OSHD at p. 24,592.

If a trench is excavated in hard, compact soil, the trench is regulated by section 1926.652(c) and may have vertical walls up to five feet from the bottom. National Industrial Constructors, Inc., 81 OSAHRC

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6/ Respondent argues that the judge did not make a finding that the soil in the trench was unstable. However, the judge specifically found that the sandy, brown clay in the top of the trench was soft or unstable soil within the meaning of § 1926.652(b). We adopt the judge's finding. See Kent Nowlin Construction Co., 80 OSAHRC 39/A10, 8 BNA OSHC 1286, 1980 CCH OSHD ¶ 24,459 (No. 76-192, 1980) (the trenching standards including Table P-1 create a rebuttable presumption that primarily sandy soils, unless cemented, are unstable within the meaning of § 1926.652(b)).

Chairman Rowland agrees to adopt the judge's finding that the soil in the top of the trench was soft or unstable. However, Chairman Rowland does not rely on the "rebuttable presumption." Rather, he adopts the judge's finding because the record as a whole shows that the soil in the top of the trench was soft or unstable.

10 BNA OSHC 1081, 1091 n. 25, 1981 CCH OSHD ¶ 25,473 at p. 32,132 n. 25 (No. 76-4507, 1981). If a trench is excavated in soft and unstable soil, it is regulated by section 1926.652(b) and it must be sloped from the bottom. Connecticut Natural Gas Corp., supra. However, where a trench wall is clearly divided into a soft soil section above a hard soil section, we conclude that section 1926.652(b) must be read with section 1926.652(c). Since the bottom five feet of soil in this case was hard and compact, only the soil above the five-foot level was required to be sloped.[7/] The Secretary has pointed to no evidence showing that the strength of the entire trench wall was affected by the layer of soft or unstable soil above the layer of hard, compact soil.[8/] Our construction of section 1926.652(b) in

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7/ Since Couch, the Commission has required that trench walls be sloped from the bottom despite claims that the trench walls were composed of nonhomogenous soil and claims that portions of the wall did not require sloping because of the stability of the soil material. However, in no case since Couch have we been confronted with a trench wall clearly divided into a soft section above a hard soil section. In Connecticut Natural Gas Corp., supra, the Commission accepted a judge's finding that all soil below a concrete overhang in a trench was unstable and stated that "as long as the trench is more than five feet in depth and the amount of unstable soil is not negligible, all soil in the trench must be shored or sloped." 6 BNA OSHC at 1799, 1978 CCH OSHD at p. 27,669. There, the phrase "all soil must be shored or sloped" referred to the soft, unstable soil which composed that trench. In Communications, Inc., 79 OSAHRC 61/A2, 7 BNA OSHC 1598, 1979 CCH OSHD ¶ 23,759 (No. 76-1924, 1979), aff'd, No. 79-2148 (D.C. Cir., Dec. 29, 1981), the Commission accepted the judge's findings, based on credibility, that the soil was unstable and, therefore, section 1926.652(b) required that the trench wall be sloped from the bottom. In CCI, Inc., 80 OSAHRC 127/D4, 9 BNA OSHC 1169, 1981 CCH OSHD ¶ 25,091 (No. 76-1228, 1980), appeal filed, No. 81-1218 (10th Cir., Feb. 25, 1981), the Commission applied the principle that a trench wall composed of nonhomogenous soil was only as stable as its weakest component and therefore required the wall composed of rock and less stable materials to be sloped. However, the trench wall was not composed of two distinct and uniform soil sections.

8/ The testimony concerning water in the trench was that it was present around utility pipes, which cut across the trench. Although some water had run out of the broken utility pipes, the water drained through the

(continued on next page)

this case recognizes what is implicit within section 1926.652(c): hard or compact soil in the bottom five feet of a trench does not pose a cave-in hazard to employees working within that trench.

All of the Respondent's witnesses agreed that the trench, as sloped, was safe. Judge Cutler also found that Respondent had properly sloped the top seven feet of soft or unstable soil, in accordance with section 1926.652(b). Accordingly, we conclude that the trench walls were properly sloped within the meaning of section 1926.652(b). The judge's decision affirming the citation is therefore reversed and the citation is vacated. SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: JAN 29 1982

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8/ (continued)

sewer pipe already laid. Thus, the water was present only to a limited extent. Therefore, there was only a very small section of soil (around the pipes) which could possibly be affected by the presence of water. We do not believe this evidence to be sufficient to find that the soil in the trench was destabilized due to the presence of water. Cf. Joseph J. Stolar Construction Co., 81 OSAHRC 66/C6, 9 BNA OSHC 2020, 1981 CCH OSHD ¶ 25,488 (No. 78-2528, 1981), aff'd, No. 81-4146 (2nd Cir., Dec. 11, 1981) (section 1926.652(b) required twelve-foot trench wall to be sloped from bottom where water in the lower part of wall destabilized the hard, compact soil above the wet, unstable part).

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 400

ATLANTA, GEORGIA 30309

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|---|---|---|
| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 76-2802 |
| | ) | |
| EDWARD KELLY & SONS, INC., | ) | |
| | ) | |
| Respondent. | ) | |

## DECISION AND ORDER

APPEARANCES: William S. Kloepfer, Esquire, Associate Regional Solicitor, U. S. Department of Labor, Cleveland, Ohio, by Benjamin T. Chinni, Esquire, for complainant.

Richard S. Baker, Esquire, Toledo, Ohio, for respondent.

## STATEMENT OF THE CASE

Cutler, Judge

On May 25, 1976, respondent, Edward Kelly & Sons, Inc., (hereinafter "Kelly"), was issued two citations by the Secretary pursuant to section 9(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 551 et seq., hereinafter the "Act"). Following a timely Notice of Contest, hearings were held on January 19 and March 10, 1977, before Judge Garl Watkins. At the hearing on January 19, the Secretary moved to dismiss one citation and it was accordingly vacated by Judge Watkins.

Under Citation 1, which remains for decision, Kelly was cited for failure to comply with the provisions of 29 C.F.R. § 1926.652(a)[1/] as follows:

> "The sides of a trench in unstable, soft, sandy soil were not sloped or supported by means of sufficient strength to protect employees working in it.
> Location: Spring Meadows project."

At the first hearing, the Secretary moved to amend the citation to allege a violation of 29 C.F.R. § 1926.652(b).[2/] Over respondent's objection, Judge Watkins granted the motion.

At the continuation of the hearing on March 10, 1977, the Government presented the testimony of one witness and then rested. Kelly moved to dismiss the citation for lack of proof. This motion was granted by Judge Watkins but he reserved final decision for the parties were afforded the opportunity to submit briefs on the issue.

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1/ This section provides:

> "Banks more than 5 feet high shall be shored, laid back to a stable slope, or some other equivalent means of protection shall be provided where employees may be exposed to moving ground or cave-ins. Refer to Table P-1 as a guide in sloping banks. Trenches less than 5 feet in depth shall also be effectively protected when examination of the ground indicates hazardous ground movement may be expected."

2/ This section states:

> "Sides of trenches in unstable or soft material, 5 feet or more in depth, shall be shored, sheeted, braced, sloped, or otherwise supported by means of sufficient strength to protect the employees working within them. See Tables P-1, P-2 (following paragraph (g) of this section)."

Before a formal ruling on the motion was issued, Judge Watkins passed away and the case was assigned to me. Both parties agreed that a decision on the motion could be made on the existing record, although Kelly argued that Judge Watkins' ruling should be considered as final.

Upon my examination of the record, I concluded that the Secretary had established a prima facie case and respondent's Motion to Dismiss should be denied. Accordingly, an order, dated March 6, 1978, was so entered.

To provide respondent the opportunity to present its case in chief, I directed that the hearing be reconvened. Both parties agreed that the the Secretary's case in chief need not be presented again and that the existing testimony be made a part of the record. The hearing was reconvened by me on May 11, 1978, in Toledo, Ohio. No affected employee or employee representative elected to participate.

I

The Government's case rests primarily upon the testimony of Mr. Doug McKee, a compliance officer for the Secretary, together with the photographs and sketches he made. Mr. McKee is an environmental hygienist who testified he was untrained in safety hazards except for a four-week OSHA course in 1973. However, he was not offered as an expert in soil composition or trenching hazards (Tr. I-42-43).[3/]

According to Mr. McKee, on the date of the inspection he was driving past respondent's work site in Holland, Ohio, when he observed a man working in a trench by the roadside. Since it appeared to be a possible

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3/ To avoid confusion, reference to pages in the March 1977 transcript will be preceded by the Roman numeral I and by II for the May 1978 hearing transcript.

dangerous situation, he stopped to investigate. At the site he identified himself and talked with Kelly's on-site foreman (Tr. I-12,13). He observed three men, whom he ascertained to be Kelly's employees, laying sewer tile in the trench. One man was at the bottom shoveling and the other two were standing on the pipe which was five feet from the top (Tr. I-15, 18). The foreman telephoned Mr. Kelly, the vice-president of the company, and Mr. McKee was then asked to hold up his inspection until Mr. Kelly arrived. After Mr. Kelly arrived and the two conversed, Mr. McKee stated he wanted to talk with his boss on the phone "because of my inexperience with these matters; that I hadn't done that much trenching." After the call, he returned to the site and saw the sides of the trenches were being pulled back with a digging machine. He then quickly began to take measurements (Tr. I-14, 18).

Continuing his testimony, Mr. McKee stated that he paced the width of the trench at the top and ascertained it to be 10 to 12 feet wide. From visual obseration of the width of the shovel and pipe, he estimated the bottom width to be four to five feet. The foreman measured the depth with a measuring stick and mentioned it to be 12 feet (Tr. I-15, 16).

According to Mr. McKee, the trench was not shored, braced, or supported in any way. The horizontal slope was "60 to 70, 75 degrees, somewhere in that vicinity" (Tr. I-17). "Water seemed to be all around the utility pipes" and "a couple of inches" were in the bottom of the trench (Tr. I-18). He also observed that "quite a bit of soil crumbled off and went into the bottom of the trench." It "seemed to be oozing at times and at other

times it would kind of crumble, but it seemed to be very wet" (Tr. I-19). Near the top it was fairly damp and there was some slight undercutting (Tr. I-20). The soil at the bottom of the trench he believed was clay material which extended four feet high and above that there was "yellow soil of some kind" (Tr. I-41). He did not pick up or touch the soil (Tr. I-41), and it does not appear from the evidence that he entered the trench.

In his testimony concerning the use of the pictures placed in evidence, Mr. McKee stated that they played no role in his computation of angles, the composition of the soil, or in the decision-making process (Tr. I-30, 31).

At the hearing on May 11, 1978, respondent presented the following evidence. Edward J. Kelly & Sons, Inc. is a small Toledo sewer contractor with some 20 years in business employing 20 to 25 employees. According to Mr. Henry Combs, general foreman, on the morning of May 13, 1976, the firm was engaged in laying a 30-inch concrete pipe sewer north from a catch basin at Airport Highway near McCord Road in Lucas County, Ohio. A hydraulic back hoe with a 52-inch-wide bucket was being used to excavate the trench (Tr. II-31, 32). During the course of the morning, the depth of the trench increased from seven or eight feet to 12 feet as the work progressed up to the rise of a slight hill. The excavation was made in a stair-step configuration and the trench was finished by taking the bottom dirt with a full bucket and pushing on both sides of the trench to get the soil out from the bottom. The result was to take the edges off "the stairs" and to remove all loose material from the trench (Tr. II-12). After the work progressed towards the top of the hill, there was five feet of blue, hard clay from the

bottom of the trench and, above that to the surface, seven feet of "average soil which would be a brown clay with sand in it" (Tr. II-13, 14, 112, 128). The average soil or sandy clay was being laid back on the slope to a width of 20 to 22 feet at the top of the trench (Tr. II-14). The sloping was stable with no indication of crumbling or falling earth (Tr. II-24). Water in the bottom of the trench drained naturally by gravity down through the pipe and presented no danger (Tr. II-26).

At 10:30 or 11:00 a.m., Mr. McKee arrived and introduced himself to Mr. Combs. Mr. McKee then proceeded to ask Mr. Combs if he thought the trench was safe; Mr. Combs said, "Yes it was." Mr. McKee said it was not (Tr. II-15). Mr. Combs then asked Mr. McKee to wait for Mr. Al Kelly, who was on his way to the jobsite. When Mr. Kelly arrive, the three men engaged in a discussion during which Mr. McKee was asked what would be a safe trench. Mr. McKee replied he didn't know (Tr. II-16, 113). Mr. McKee then went to make a telephone call and returned some ten minutes later with an answer that "It should be a forty-five degree angle" (Tr. II-15, 113). Mr. Kelly then asked Mr. McKee how wide a 45-degree angle would be and Mr. McKee stated that he didn't know (Tr. II-16, 113). Mr. McKee was asked to point out on the ground or explain how wide the trench should be and he stated that he could not do that (Tr. II-17, 18, 113).

Mr. McKee explained that there was no one at his office who could help him and that this was about the first time he had really looked at a construction job (Tr. II-114).

No measurements of any kind were taken by Mr. McKee and none were discussed during his conversations with Mr. Combs and Mr. Kelly (Tr. II-17,

114). At this point, work was again commenced and the upper width of the trench was increased to 26 feet. Mr. McKee was asked whether "that was far enough and he would not give us an answer" (Tr. II-20, 115). Mr. Kelly asked Mr. McKee whether he was going to test the soil and Mr. McKee stated that he would but no samples were ever taken (Tr. II-116).

At the same time that Mr. McKee was looking around the site, two construction safety consultants from the Division of Safety and Hygiene of the Industrial Commission of Ohio arrived at the site. One was Lloyd Oliver, a construction safety inspector for the state of Ohio for some eight years, and the other was William Moening, Supervisor of Construction Safety for Northwestern Ohio, and formerly himself an inspector for ten years. Each man had conducted 1,500 to 2,000 sewer construction project inspections during the course of their respective employments.

Mr. Oliver and Mr. Moening was present to make a routine inspection and not because of any complaint or objection of any kind (Tr. II-21). They examined the work and determined that the slopes of the trench were at an angle of repose for the material being excavated (Tr. II-53, 54, 55, 58, 75, 84). They found no evidence that there was anything liable to slip, slide or move (Tr. II-76, 77). Mr. Oliver "was very well satisfied after looking the situation over, that he was doing as good a job that it was possible to do and I didn't see any reason to feel that anyone would be unsafe in that trench" (Tr. II-55). Mr. Moening was of the opinion that the sides of the trench were sloped sufficiently to protect the employees working within them from moving ground, cave-ins or collapse (Tr. II-78). Having satisfied themselves that the work was progressing properly, Mr. Oliver and Mr. Moening then left the jobsite.

Sloping of the sides of the trench had proceeded according to OSHA regulations as they had been explained to Mr. Edward Kelly during an earlier conference with Mr. Olsen, the assistant area director for the OSHA Toledo district office (Tr. II-129). Mr. Olsen had advised that sloping was required in hard, compact soil only about five feet, and an earlier citation had been dismissed on that basis (Tr. II-130). Because this project was bottomed in five feet of hard, compact, blue clay, sloping was commenced at the five-foot level where average soil (sandy, brown clay) was reached, resulting in a slope from 35 degrees to 43 degrees.

After Messrs. McKee, Oliver and Moening had departed, Mr. Al Kelly telephoned the director of the On-site Consultation Service of the Ohio Industrial Commission and requested an immediate consultation (Tr. II-116). That agency is a state agency funded partially by the federal government to give advice upon the application of OSHA regulations (Tr. II-89; respondent's Exhibit D). In response to that request, Mr. Merle Allen conducted an inspection of the jobsite on the following Monday, May 17, 1976. At the time of Mr. Allen's inspection, the work had progressed 200 to 220 feet from the utility pole (Tr. II-30, 118), but the excavation continued in basically the same soil, blue clay on the bottom and average soil (sandy, brown clay) on top (Tr. II-30, 119). At the point of Mr. Allen's inspection, the trench was ten feet in depth with five feet of clay at the bottom. The trench was four feet wide at the bottom and 18 feet wide at the top. Mr. Allen concluded that the bottom five feet were constituted of hard, compact soil (Tr. II-106) and therefore calculated an angle of repose commencing at the five-foot level, resulting in an angle of 35.5 degrees which in his opinion was in

compliance with applicable OSHA regulations (Tr. II-102; respondent's Exhibit D). Before joining the Ohio On-site Consultation Service, Mr. Allen had himself been an OSHA safety compliance officer for the Toledo district OSHA office.

Mr. Allen's application of OSHA regulations to the trench in question was the same application which had previously been explained to Mr. Edward Kelly by Mr. Olsen, the assistant district director in Toledo, in connection with a previous citation (Tr. II-130).

II

Reduced to its simplest terms, the issue in this case is the manner in which a trench cited under section 1926.652(b) must be sloped. Respondent argues that this section must be read in conjunction with section 1926.652(c)[4/] relating to sides of trenches in hard or compact soil. Thus, the sloping of the trench in question could be started after the hard-clay level could be reached.

Giving the respondent a reasonable benefit of doubt, I evaluate the evidence to show the trench was 12 feet deep, five feet wide at the bottom, and laid back above the five-foot level to a width of 20 to 22 feet. The first five-foot layer of soil was composed of blue, hard clay and above that to the top, it was brown clay with sand in it and described as "average" soil.

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4/ This section states:

> "Sides of trenches in hard or compact soil, including embankments, shall be shored or otherwise supported when the trench is more than 5 feet in depth and 8 feet or more in length. In lieu of shoring, the sides of the trench above the 5-foot level may be sloped to preclude collapse, but shall not be steeper than a 1-foot rise to each 1/2-foot horizontal. When the outside diameter of a pipe is greater than 6 feet, a bench of 4-foot minimum shall be provided at the toe of the sloped portion."

It is clear that, if respondent's theory of the case is applied, the trench was properly sloped. If sloping need only be made for the seven feet of average soil resting on the hard clay, then the trench need only be 19 feet wide (7 + 7 + 5). This is reached by applying the 1-to-1 formula set forth for average soil in Table P-1 under section 1926.652 and referred to in subsection (b). Respondent's evidence is that the soil was laid back to a greater width.

On the other hand, complainant argues that subsection 1926.652(b) and (c) cannot be combined and Commission cases support the Secretary's position. In a very recent case involving an alleged violation of 1926.652(b), Connecticut Natural Gas Corporation (____ OSAHRC ____, ___ CCH OSHD ___, Docket No. 13964, decided June 30, 1978), the Commission, citing W. H. Couch Construction Co.,[5/] stated:

> "[A]s long as the trench is more than five feet in depth and the amount of unstable soil is not negligible, all soil in the trench must be shored or sloped" (emphasis added).

Connecticut Natural Gas, supra, appears to be the final word by the Commission and thus would foreclose combining the standards.

Respondent argues that there is no evidence to establish that the top seven-foot layer of soil was "soft or unstable" as set forth in section 1926.652(b). It is contended that, if there is no proof that the soil was unstable, as defined by section 1926.653(q),[6/] it must be "hard compact soil"

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5/ 76 OSAHRC 44/A2, 1975-76 CCH OSHD ¶ 20,574 (1971).

6/ Section 1926.653(q) states:

> "(q) 'Unstable soil'—Earth material, other than running, that because of its nature or the influence of related conditions, cannot be depended upon to remain in place without extra support, such as would be furnished by a system of shoring."

as defined in section 1926.653(h).[7/] Thus, section 1926.652(c) would be the appropriate standard to apply in this case.

I agree that evidence as to the composition of the soil cannot be based upon the testimony of Mr. McKee, the government's witness. He neither examined nor tested the soil and patently was no expert. However, respondent's witnesses have described the soil as brown clay with sand in it or average soil. I will accept this but it does not help respondent.

In Connecticut Natural Gas, supra, the Commission stated:

> "In addition to the definitions of 'unstable soil' and 'hard compact soil' in §1926.653, §1926.652 contains Table P-1, which illustrates the approximate angle of repose for different types of earth material. This Table lists an angle of repose of 1/2 to 1 for compacted angular gravels, and less steep slopes for average soils, compacted sharp sand, and well rounded loose sand. Since §1926.652(c) requires a slope of not steeper than 1/2 to 1 for hard or compact soil, it is evident that those materials listed in Table P-1 as having a less steep angle of repose must be considered soft or unstable, and are therefore regulated by §1926.652(b)."

Considering the evidence even in the light most favorable to respondent, it is clear that, based upon the holding of Connecticut Natural Gas, supra, a significant amount of soil in the trench was "soft or unstable" and therefore properly charged under § 1926.652(b). Further, as this recent case dictates, respondent's sloping should have started at the bottom and not at the five-foot mark.

In reaching my decision, I am fully aware of and respect the opinions of the experts as to the safety of the trench. I conclude that, while a cave-in or collapse could cause death or serious injury to an employee working

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7/ Section 1926.653(h) states:

> "(h) 'Hard compact soil'—All earth materials not classified as running or unstable."

therein, the probability of such was very remote. I further find that respondent has acted in good faith having based its interpretation of the standards upon opinions of several experts, including a former OSHA compliance officer and an assistant district director. However, the Couch, supra, and Shaw[8/] decisions, as explicated in Connecticut Natural Gas, supra, make it abundantly clear that their interpretation was erroneous.

The Secretary has proposed a penalty of $850 for this alleged serious violation. However, considering the factors previously alluded to of good faith and the improbability of cave-in or collapse and the fact that the trench was appreciably sloped, a penalty of $1.00 is appropriate and equitable.

I reach the following findings of fact and conclusions of law:

## FINDINGS OF FACT

1. Respondent is a small Toledo, Ohio, sewer contractor employing 20 to 25 employees.

2. On May 13, 1976, respondent was engaged in laying a 30-inch concrete pipe sewer at Airport Highway near McCord Road in Lucas County, Ohio.

3. The trench being dug by respondent's employees ranged in depth from seven or eight feet to 12 feet. It was four to five feet wide at the bottom and laid back above a height of five feet to about 20 to 22 feet at the top. The composition of the soil of the bottom five feet was blue, hard clay and, above that to the surface, it was average soil (sandy, brown clay).

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8/ 78 OSAHRC 9/B6; 1978 CCH OSHD ¶ 22,524 (1978).

4. The trench, as sloped in this case, presented minimal hazard of cave-in or collapse such as would expose respondent's employees to death or serious physical harm.

5. Respondent has acted in considerable good faith in attempting to comply with the regulations.

## CONCLUSIONS OF LAW

1. Respondent is engaged in a business affecting interstate commerce and the Commission has jurisdiction over the subject matter and parties to this action.

2. Respondent was in violation of article 5(a)(2) of the Act by failing to comply with the provisions of 29 C.F.R. § 1926.652(b).

Based upon the foregoing findings of fact and conclusions of law, Citation Number 1 for a serious violation is affirmed and a penalty of $1.00 is assessed therefor.

SO ORDERED.

Dated this 9th day of August, 1978.

CECIL L. CUTLER, JR.
Judge

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

January 29, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

American Can Company

OSHRC DOCKET NO. 76-5162, 77-0773 and 78-4478

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION AND REMAND

To wit: See attached.

FOR THE SECRETARY OF LABOR

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Rev. 10/1/76

FOR EMPLOYEES

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UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>AMERICAN CAN COMPANY,<br><br>Respondent.<br><br>UNITED STEELWORKERS of AMERICA and its LOCAL 1478,<br><br>Authorized Employee Representatives. | OSHRC Docket Nos. 76-5162, 77-773, and 78-4478 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

The primary question for decision is whether the occupational noise standard at 29 C.F.R. § 1910.95(b)(1) is invalid. American Can Company claims that the standard is invalid because: (1) scope and application provisions that accompanied the established federal standard from which it was derived were not adopted with it; and (2) the established federal standard was itself invalid. We hold that the first argument lacks merit and that the second argument may not now be considered.

I.

The Secretary of Labor ("the Secretary") issued to American Can Company ("American Can") citations alleging that, contrary to paragraph (b)(1) of the occupational noise standard at 29 C.F.R. § 1910.95 ("the OSHA noise standard"), American Can's employees were exposed to sound levels above those in Table G-16,

and that feasible administrative or engineering controls were not used. 1/ American Can contested the citations and the Secretary filed complaints; one of the complaints added the allegation that American Can violated the hearing conservation program provision in section 1910.95(b)(3). The United Steelworkers of America and its Local 1478 elected party status.

In all three cases, American Can filed motions to dismiss the complaints and vacate the citations on the grounds that the noise standard is invalid and that the allegations of violation are "wholly conclusory." American Can also requested, in the alternative, that the Secretary be required to furnish a more

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1/ Section 1910.95 then stated in part:

§ 1910.95 Occupational noise exposure.

* * *

(b)(1) When employees are subjected to sound exceeding those listed in Table G-16, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table.

* * *

(3) In all cases where the sound levels exceed the values shown herein, a continuing effective hearing conservation program shall be administered.

TABLE G-16--PERMISSIBLE NOISE EXPOSURES

| Duration per day, hours | Sound level dBA slow response |
|---|---|
| 8 | 90 |
| 6 | 92 |
| 4 | 95 |
| 3 | 97 |
| 2 | 100 |
| 1 1/2 | 102 |
| 1 | 105 |
| 1/2 | 110 |
| 1/4 or less | 115 |

* * *

Exposure to impulsive or impact noise should not exceed 140 dB peak sound pressure level.

(Footnote to table omitted.)

definite statement. Administrative Law Judge Goldstein denied American Can's motions in OSHRC Docket No. 76-5162 and ordered American Can to file an answer. American Can then requested that the judge certify his ruling for interlocutory appeal under former Commission Rule 75. 2/ The judge granted the request, certifying that "there is a substantial difference of opinion regarding the validity of the standard," and that an immediate appeal would obviate litigation concerning the development of the noise standard. In No. 78-4478, Judge Tenney denied the motion to dismiss and ordered American Can to file an answer. He then granted American Can's motion for a certification for interlocutory appeal. He characterized the controlling question of law as the "power of the Commission to review the rulemaking by the Secretary of Labor . . . and . . . whether the OSHA noise standard was validly adopted under OSHA." In No. 77-773, Judge Knight took under advisement the argument that the standard is invalid, but ordered the Secretary to file a more definite statement. Judge Knight then granted a motion by the Secretary to certify his ruling to the Commission. Judge Knight heard from the parties and was evidently informed by them that the interlocutory appeal certified by Judge Goldstein in No. 76-5162 raised a question substantially similar to that raised by his order requiring a more definite statement. He therefore certified to the Commission his order for a more definite statement.

We first clarify what issues are properly before us for review. The only issues before us in Docket Nos. 76-5162 and 78-4478 concern the validity of the

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2/ Former Commission Rule 75, 29 C.F.R. § 2200.75 (1977), stated in part:

> § 2200.75 Interlocutory appeals; special; as of right.
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> (c) Interlocutory appeal from a ruling of the judge shall be allowed as of right where the judge certifies that: (1) The ruling involves an important question of law concerning which there is substantial ground for difference of opinion; and (2) an immediate appeal from the ruling will materially expedite the proceedings.
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> * * *

standard; Judges Tenney's and Goldstein's certifications identified only issues pertaining to the validity of the standards as warranting interlocutory review. The only issue raised by the certification in No. 77-773 is whether Judge Knight erred in ordering the Secretary to furnish a more definite statement; the judge did not certify the validity of the noise standard but rather took it under advisement.

II.

A.

A review of the regulatory background is important to an understanding of this controversy. In 1936, Congress passed the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45 ("the Walsh-Healey Act"). Section 1(e) of the Walsh-Healey Act, 41 U.S.C. § 35(e), requires contracts with the federal government for materials in amounts over $10,000 to provide that "no part of such contract will be performed . . . under working conditions which are unsanitary or hazardous or dangerous to the health and safety of the employees engaged in the performance of said contract." That subsection also provides, however, that "Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection." Section 4 of the Walsh-Healey Act, 41 U.S.C. § 38, authorizes the Secretary of Labor to adopt rules and regulations to carry out the statute; the Administrative Procedure Act, 5 U.S.C. §§ 551-706 ("the APA"), is applicable to the making of these rules. Section 10 of the Walsh-Healey Act as amended in 1952, 41 U.S.C. § 43a.

Section 4(a) of the APA, 5 U.S.C. § 553(b), requires that a general notice of proposed rulemaking be published describing the terms or substance of a proposed rule or the subjects and issues involved; "interpretative rules" are exempted from this requirement unless a specific statute provides otherwise.

After the notice is published, interested persons are to be given an opportunity to submit written data, views or arguments. Section 4(b) of the APA, 5 U.S.C. § 553(c). "After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." Id.

On January 17, 1969, the Secretary published a revision of 41 C.F.R. Part 50-204, Safety and Health Standards for Federal Supply Contracts. 34 Fed. Reg. 788 (1969). The revision came after a proposed revision of Part 50-204 had been published and public comment invited. 33 Fed. Reg. 14258 (1968). A new Walsh-Healey noise standard was adopted at 41 C.F.R. § 50-204.10. 34 Fed. Reg. at 790-791. 3/ The Secretary stated that the new standards in the revised Part 50-204 were adopted "[a]fter consideration of all . . . relevant matter as was presented by interested persons" during a three-day period in November 1969. Id. at 788. The revision of Part 50-204 was to have been effective 30 days after its publication.

On February 14, 1969, the effective date of the revision was postponed until May 17, 1969, "to permit a careful review" of the new standards by the new Secretary of Labor. 34 Fed. Reg. 7946 (1969) (preamble); 34 Fed. Reg. 2207 (1969). On May 20, 1969, the Secretary amended the Walsh-Healey noise standard by adding a requirement that feasible administrative controls be used to reduce noise, and by substituting a provision that a "continuing effective hearing conservation program shall be administered" for an audiometric testing provision.

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3/ The previous Walsh-Healey noise standard, section 50-204.293, stated that "Noise shall be reasonably reduced or eliminated as a means of preventing fatigue or accidents." 25 Fed. Reg. 13809 (1960). The new standard imposed a maximum exposure level of 90 decibels for 8 hours. It also required that feasible engineering methods be used to control noise levels, that personal protective equipment be used where feasible controls could not reduce noise to permissible levels, that employees be given audiometric tests in some circumstances and that the test results be made available to them. Administrative controls were not mentioned.

34 Fed. Reg. at 7946, 7948-9. The Secretary explained that he had given consideration to public comments received earlier and to the recommendations of an advisory committee composed of representatives of labor, management and public groups interested in occupational safety and health. On January 24, 1970, the Secretary also made some "minor amendments" to paragraphs (c) and (d) of the Walsh-Healey noise standard. 35 Fed. Reg. 1015 (1970).

The revised Part 50-204 also contained a general, introductory provision, section 50-204.1, entitled "Scope and Application." 34 Fed. Reg. at 788; 34 Fed. Reg. 7946. Section 50-204.1(a) explained the coverage of the Walsh-Healey Act and quoted the health and safety provision in section 1(e) of the Walsh-Healey Act, as well as the sentence that "Compliance with the safety, sanitary, and factory inspection laws of the State in which the work . . . is to be performed shall be prima-facie evidence of compliance with [subsection 1(e) of the Walsh-Healey Act]." Section 50-204.1(a) also stated that Part 50-204 "expresses the Secretary of Labor's interpretation and application of [subsection 1(e) of the Walsh-Healey Act] with regard to particular working conditions." Section 50-204.1(c) provided that "[w]henever any applicable standard in this Part 50-204 is relied upon by the Department of Labor in a formal enforcement proceeding . . . to support a finding of violation of the safety and health provisions of the Act and of a contract subject thereto, any respondent . . . shall have the right . . . to challenge the legality, fairness or propriety of any such reliance."

B.

The Occupational Safety and Health Act was passed on December 29, 1970, and became effective on April 28, 1971. Section 6(a) of the Act, 29 U.S.C. § 655(a), required that the Secretary, within two years, adopt as occupational safety and health standards under the Act "established Federal standards" and "national consensus standards" without following the rulemaking requirements of the APA or

of other subsections of section 6 of the Act. The Secretary was to do so unless he found that the adoption of a standard would not improve safety or health for specifically designated employees; in the event of a conflict among standards, the Secretary was required to adopt the most protective one. 4/ Section 3(10) of the Act, 29 U.S.C. § 652(10), defines "established Federal standard" as "an operative occupational safety and health standard established by any [federal] agency . . . and presently in effect, or contained in any Act of Congress in force on the date of enactment of this Act."

On May 29, 1971, the Secretary, acting under section 6(a), adopted many Walsh-Healey standards as occupational safety and health standards. 36 Fed. Reg. 10466 (1971). The Walsh-Healey noise standard was adopted and was codified as an occupational safety and health standard at 29 C.F.R. § 1910.95. Id. at 10466, 10518; 29 C.F.R. § 1910.99. The Secretary did not adopt any part of 41 C.F.R. § 50-204.1, the scope and application provision of 41 C.F.R. Part 50-204.

On that same day, the Secretary also amended 41 C.F.R. Part 50-204. 36 Fed. Reg. 9868 (1971). Among other things, the Secretary revoked 41 C.F.R. § 50-204.1(c). The Secretary's explanation for the amendments relied on the last sentence

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4/ Section 6(a) states:

> Without regard to chapter 5 of title 5, United States Code, or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this Act and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

of section 4(b)(2) of the Act, 29 U.S.C. § 653(b)(2), which states that "Standards issued under the [Walsh-Healey Act] . . . and in effect on or after the effective date of the this Act shall be deemed to be occupational safety and health standards issued under this Act, as well as under such other Acts." 5/ The Secretary explained that an occupational safety and health standard is "a substantive rule, i.e., a rule having the force and effect of law." He reasoned that because the last sentence of section 4(b)(2) made the Walsh-Healey standards substantive rules, they ought to be revised to reflect their new nature.

III.

A.

American Can has argued before the Commission and its judges that the OSHA noise standard is invalid for two reasons.

First, American Can argues that the OSHA noise standard was invalidly adopted under section 6(a) of the Occupational Safety and Health Act. It maintains that the Secretary's failure to adopt the scope and application provision that had accompanied the Walsh-Healey noise standard made the OSHA noise standard impermissibly different in substance. American Can reasons that under the

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5/ Section 4(b)(2) states:

> The safety and health standards promulgated under the Act of June 30, 1936, commonly known as the Walsh-Healey Act (41 U.S.C. 35 et seq.), the Service Contract Act of 1965 (41 U.S.C. 351 et seq.), [the Contract Work Hours and Safety Standards Act, usually known as the Construction Safety Act,] Public Law 91-54, Act of August 9, 1969 (40 U.S.C. 333), [the Longshoremen's and Harbor Workers' Compensation Act,] Public Law 85-742, Act of August 23, 1958 (33 U.S.C. 941), and the National Foundation on Arts and Humanities Act (20 U.S.C. 951 et seq.) are superseded on the effective date of corresponding standards, promulgated under this Act, which are determined by the Secretary to be more effective. Standards issued under the laws listed in this paragraph and in effect on or after the effective date of this Act shall be deemed to be occupational safety and health standards issued under this Act, as well as under such other Acts.

Walsh-Healey scope and application provision, a government contractor could have challenged the "legality, fairness or propriety" of the Labor Department's reliance upon the standard. "Thus, the Walsh-Healey Act noise standard did not purport to impose any rigid requirements. . . . [It] was drafted to allow for flexibility in its application to particular circumstances." American Can maintains that by contrast the OSHA noise standard has "drastically altered [the Walsh-Healey noise standard] by omitting this crucial language." American Can also points to the Secretary's failure "to incorporate the Walsh-Healey Act provision that compliance with state law 'shall be prima-facie evidence of compliance' with the [Walsh-Healey Act]." It argues that these omissions amounted to an alteration of the duties imposed by the Walsh-Healey noise standard and therefore violated the principle that in adopting an established federal standard under section 6(a), the Secretary was not permitted to alter its substance.

Second, American Can argues that the OSHA noise standard is invalid because the ancestor Walsh-Healey noise standard is invalid. It maintains that the Secretary was required by section 4(b) of the APA, 5 U.S.C. § 553(c), to incorporate into the Walsh-Healey regulations "a concise general statement of their basis and purpose" and that the Secretary failed to do so. It reasons that the derivative OSHA noise standard is therefore also invalid.

The Secretary argues that American Can's invalidity arguments are not properly before the Commission. He argues that section 6(f) of the Act, 29 U.S.C. § 655(f), 6/ provides the exclusive means for challenging the validity of

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6/ Section 6(f) states:

> Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a

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an occupational safety and health standard, and urges that we overrule Commission decisions to the contrary. The Secretary and the United Steelworkers argue in addition that the Commission should not overturn an OSHA standard on the ground that the Walsh-Healey standard from which it was derived was invalidly adopted.

Both the Secretary and the United Steelworkers argue that the OSHA noise standard is valid in any event. They maintain that the application and scope provisions in 41 C.F.R. § 50-204.1 that were not adopted under the Act were not substantive provisions that the Secretary was required to adopt. They maintain that the application and scope provisions were not "occupational safety and health standards" as defined in section 3(8) of the Act, 29 U.S.C. § 652(8), because they did not "require" conditions or practices "reasonably necessary or appropriate to provide safe or healthful employment . . . ." 7/ Therefore, they reason, the Secretary was not even permitted to adopt them. The Secretary also argues that Congress desired that the Secretary adopt uniform national standards

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(Footnote 6 cont'd)

> petition challenging the validity of such standard with the United States court of appeals for the circuit wherein such person resides or has his principal place of business, for judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole.

7/ Section 3(8) states:

> The term "occupational safety and health standard" means a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment.

under the Act and that it could not have desired that the Secretary adopt a provision giving great weight to various state laws.

The Secretary and the United Steelworkers also maintain that the basis and purpose of the Walsh-Healey noise standard are obvious from its rulemaking history, particularly the course of changes it underwent. The United Steelworkers point to "the obvious administrative intent to eliminate 'working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees [under section 1(e) of the Walsh-Healey Act].'"

B.

In No. 78-4478, Judge Tenney held first that inasmuch as American Can's "collateral" attack upon the OSHA noise standard is based on "essentially procedural" arguments, it cannot now be entertained. The judge cited National Industrial Constructors, Inc. v. OSHRC, 583 F.2d 1048, 1052 (8th Cir. 1978). Judge Tenney found that the attacks upon the standard lack merit in any event. He stated that although the OSHA noise standard is "substantively different" from the Walsh-Healey noise standard, "this is precisely what Congress intended." The judge noted that when the Secretary amended 41 C.F.R. Part 50-204 on May 29, 1971, the Secretary interpreted the last sentence of section 4(b)(2) as having changed "by operation of law" the nature of the Walsh-Healey standards from interpretative rules to substantive rules, and having in effect rendered 41 C.F.R. § 50-204.1 inoperative under the Walsh-Healey Act. Judge Tenney gave weight to the Secretary's view. Finally, Judge Tenney reasoned that for the Secretary to have adopted the state law and the "legality, fairness or propriety" provisions of 41 C.F.R. § 50-204.1(a) and (c) "would . . . have been difficult to reconcile . . . [with] the treatment of Federal-State regulations prescribed under section 18 of the [the Act], 29 U.S.C. § 667, and the express provision for variances (waivers) from safety rules in section 6(d) [of the Act], 29 U.S.C. § 655(d)."

Judge Tenney also concluded that any failure to comply with the basis and purpose requirement of the APA did not invalidate the Walsh-Healey standard. He was of the view that the Walsh-Healey standard was merely an interpretative rather than a substantive rule because it interpreted the health and safety clause of section 1(e) of the Walsh-Healey Act. Judge Tenney held that the APA's requirement of a statement of basis and purpose does not apply to interpretative rules.

Judge Goldstein held in No. 76-5162 that the case is controlled by Turner Co., 76 OSAHRC 108/A2, 4 BNA OSHC 1554, 1976-77 CCH OSHD ¶ 21,023 (No. 3635, 1976), rev'd on other grounds, 561 F.2d 82 (7th Cir. 1977).

IV.

Some of these issues have recently been settled. In Rockwell International Corp., 80 OSAHRC 118/A2, 9 BNA OSHC 1092, 1094-7, 1980 CCH OSHD ¶ 24,979, pp. 30,843-5 (No. 12470, 1980), the Commission held that it is generally authorized to consider the validity of occupational safety and health standards. Although we examined the employer's argument that the standard cited there is invalid because it is different in substance from the established federal standard from which it was derived, we reserved decision on whether a challenge to the procedural regularity of the adoption of the ancestor standard itself would be considered.

Shortly thereafter we considered the issue that Rockwell left open. In General Motors Corp., 81 OSAHRC 13/C10, 9 BNA OSHC 1331, 1981 CCH OSHD ¶ 25,202 (No. 79-4478, 1981), the Commission thoroughly examined all aspects of the matter, and held that the validity of the procedures by which Walsh-Healey standards were adopted under the Walsh-Healey Act may not now be challenged. General Motors disposes of American Can's argument that the OSHA noise standard is invalid because the Walsh-Healey noise standard lacked a statement of basis

and purpose when it was adopted under the Walsh-Healey Act. We therefore turn to a question of first impression: Is the OSHA noise standard impermissibly different in substance from the Walsh-Healey noise standard?

First, we find it difficult to say what, if any, change occurred when the Secretary did not adopt the "legality, fairness or propriety" provision in 41 C.F.R. § 50-204.1(c). American Can argues that the omission "drastically altered" the noise standard because it was no longer "flexibl[e] in its application to particular circumstances" but was instead rendered "absolute." This considerably overstates the matter. The application of all OSHA standards derived from Walsh-Healey standards is qualified under the Occupational Safety and Health Act in ways that afford flexibility to employers.

Section 6(d) of the Act, 29 U.S.C. § 655(d), requires the Secretary to grant a variance from a standard if a different means of protection will provide workplace conditions as safe and healthful as those that would prevail if the standard were strictly followed; the Secretary has used this power to afford substantial flexibility in the application of standards. 8/ Even where a variance application would be inappropriate, employers need not comply strictly with a standard if to do so would be more hazardous than noncompliance and if available alternative protective measures are taken. 9/ Similarly, where strict compliance with a standard is physically impossible or would prevent performance of the work, employers may instead take alternative protective measures. 10/ Employers also

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8/ See e.g., Grant of Variance to General Motors Corp., 45 Fed. Reg. 46922, 1 BNA OSHR Reference File 35:1311, 1979-80 CCH Emp. S. & H. Guide Developments ¶ 12,032 (1980)(variance from lead and arsenic standards).

9/ See, e.g., General Electric Co., 77 OSAHRC 37/A2, 5 BNA OSHC 1186, 1977-78 CCH OSHD ¶ 21,658 (No. 12063, 1977), aff'd, 576 F.2d 558 (3d Cir. 1978).

10/ See, e.g., M.J. Lee Constr. Co., 79 OSAHRC 12/A2, 7 BNA OSHC 1140, 1146-7, 1979 CCH OSHD ¶ 23,330, p. 28,230 (No. 15094, 1979).

need not abate violative conditions if the hazards are de minimis, i.e., too trifling to warrant an abatement order or penalty, 11/ nor are employers held liable for violations caused by unpreventable acts of their employees. 12/ The Commission also considers the difficulties of compliance caused by the possible constructions of a standard when it chooses one construction over another. 13/ And finally, the most important duty imposed by the OSHA noise standard itself--the duty to provide engineering or administrative controls of excessive noise--is expressly qualified by the word "feasible."

We are therefore unconvinced that the omission of the phrase "legality, fairness or propriety" in 41 C.F.R. § 50-204.1(c) "drastically altered" the application of the Walsh-Healey standards. Indeed, we cannot be sure what, if any, change has occurred. American Can speculates that government contractors need not have complied with the Walsh-Healey standards "if compliance . . . would have interfered with plant operations, been unduly expensive, or simply unwarranted under the circumstances." But this is only speculation. Given the flexibility of application of standards under the Occupational Safety and Health Act, American Can's speculation is not sufficient ground for invalidating the OSHA noise standard.

There is a more fundamental reason for our rejection of American Can's argument, however. It is possible that the application of the noise standard under the Occupational Safety and Health Act differs in some respects from its application under the Walsh-Healey Act. We are nevertheless of the view that,

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11/ See, e.g., Southwestern Electric Power Co., 80 OSAHRC 81/C7, 8 BNA OSHC 1974, 1980 CCH OSHD ¶ 24,730 (Nos. 77-3890 & 77-3391, 1980). The last sentence of § 9(a) of the Act, 29 U.S.C. § 658(a), defines a de minimis violation as one that has "no direct or immediate relationship to safety or health."

12/ See, e.g., Texland Drilling Corp., 80 OSAHRC 106/C13, 9 BNA OSHC 1023, 1980 CCH OSHD ¶ 24,954 (No. 76-5307, 1980).

13/ See Ormet Corp., 81 OSAHRC 35/C3, 9 BNA OSHC 1828, 1831 (No. 76-4398, 1981).

to whatever extent its application does differ, the substance of the noise standard was not impermissibly changed.

Although it is true as a general principle that a standard adopted under section 6(a) may not be different in substance from the established federal or national consensus standard from which it was derived, this is only a general principle. Some changes are permissible. For example, in Bechtel Power Corp., 76 OSAHRC 38/E2, 4 BNA OSHC 1005, 1008, 1975-76 CCH OSHD ¶ 20,503, p. 24,500 (No. 5064, 1976), aff'd, 548 F.2d 248 (8th Cir. 1977), we examined the legislative history of section 6(a) of the Act and concluded that Congress authorized the Secretary to summarily expand the scope of established federal standards to employers not originally covered by them. We therefore held that the Secretary was not required to adopt scope and application provisions of standards originally adopted under the Construction Safety Act. 14/ We have also held that the Secretary was not required to adopt under the Act effective date provisions of established federal standards, but could instead establish new ones. See Underhill Construction Corp., 75 OSAHRC 32/B8, 2 BNA OSHC 1556, 1974-75 CCH OSHD ¶ 19,276 (No. 1307, 1975), aff'd, 526 F.2d 53 (2d Cir. 1975).

American Can argues that the above cases are not dispositive here because the modifications at issue in those cases "did not change the requirements imposed on employers; they simply enlarged the class of employers subject to the preexisting standard." Regardless of American Can's interpretation of those cases, it nevertheless remains that changes in a source standard are permissible if they are the sort of changes that Congress allowed the Secretary to make. The changes American Can points to here are of that sort.

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14/ See also Brown & Root, Inc., 81 OSAHRC 17/D14, 9 BNA OSHC 1407, 1981 CCH OSHD ¶ 25,226 (No. 77-805, 1981)(Longshoremen's and Harbor Workers' Compensation Act standards not limited to persons originally subject to them); Lee Way Motor Freight, Inc., 74 OSAHRC 22/D12, 1 BNA OSHC 1689, 1691, 1973-74 CCH OSHD ¶ 17,693, p. 22,088 (No. 1105, 1974), aff'd, 511 F.2d 864, 869 (10th Cir. 1975)(same as to Walsh-Healey standards).

We observed in General Motors that "[t]he drafters of the Act were aware that the then recently-adopted Walsh-Healey standards would be the primary source of established federal standards for industrial working conditions covered by the Act." 15/ However, there is no express evidence in the Act or its legislative history that Congress formed a specific intent on whether the Secretary also had to adopt provisions like those in 41 C.F.R. § 50-204.1(a) and (c). One section of the Act does suggest that Congress was thinking of rather conventional safety and health regulations. Section 3(8) defines "occupational safety and health standard" as a standard that "requires" conditions or practices--a description that does not easily fit the scope and application provisions of 41 C.F.R. § 50-204.1. Nevertheless, section 3(8) does not demonstrate congressional intent so clearly that our inquiry can end there. As American Can points out, too narrow a reading of section 3(8) would mean that an exemptory provision within a standard could have been deleted by the Secretary. We must therefore go on to ascertain the legislative intent by starting from the areas where the legislative intent is discernible, and project to fair and reasonable corollaries of that intent for the issue before us. See Montana Power Co. v. F.P.C., 445 F.2d 739, 746 (D.C. Cir. 1970) (en banc), cert. denied, 400 U.S. 1013 (1971).

We first examine the role that the phrase "legality, fairness or propriety" in 41 C.F.R. § 50-204.1(c) played under the Walsh-Healey Act. The Department of Labor evidently did not treat a violation of a Walsh-Healey standard as necessarily amounting to a breach of the contractor's duty under section 1(e) to provide working conditions that are not "unsanitary or hazardous or dangerous." Although Labor Department employees were instructed by section 50-204.1(b) to "treat a failure to comply with . . . any of the safety and health measures contained in

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15/ 9 BNA OSHC at 1335-6 & n.13, 1981 CCH OSHD at p. 31,122 & n.13.

this Part 50-204 as resulting in working conditions which are 'unsanitary or hazardous or dangerous . . .' within the meaning of section 1(e) of the [Walsh-Healey] Act," an exception was provided "in the conduct of formal enforcement proceedings." Subsection (c) provided the rule for formal enforcement proceedings: The standard allegedly violated would be "relied upon by the Department of Labor . . . to support a finding of violation of the safety and health provisions of the [Walsh-Healey] Act," i.e., the requirement of section 1(e) that working conditions not be "unsanitary or hazardous or dangerous." The charged contractor would then have the opportunity to challenge the "legality, fairness or propriety of any such reliance." In short, a contractor was permitted to challenge the reliance upon a standard to show that a working condition was "unsanitary or hazardous or dangerous." The phrase "legality, fairness or propriety" in section 50-204.1(c) specially reflected and implemented the general criterion of section 1(e) of the Walsh-Healey Act.

It may also be that the phrase "legality, fairness or propriety" served another purpose: to permit the Secretary to judge whether the enforcement of a standard in a particular case would be unduly detrimental to the Government's contractual relationship. The purpose of the Walsh-Healey Act was to "eliminate the practice under which the Government is compelled to deal with sweat shops." 16/ Although the Labor Department set safety and health standards for Government contractors, enforcement was problematic. The only remedies available for safety and health violations were cancellation of the contract and contract debarment

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16/ H.R. Rep. No. 2946, 74th Cong., 2d Sess. 4 (1936), quoted in Perkins v. Lukens Steel Co., 310 U.S. 113, 128 (1940). The Court stated that the Walsh-Healey Act's purpose was "to obviate the possibility that any part of our tremendous national expenditures would go to forces tending to depress wages . . . and offending fair social standards of employment." Id.

for three years (blacklisting). 17/ By providing for hearings on the fairness and propriety of relying upon the standards to judge the contractor's actions, the Secretary may have attempted to alleviate in adjudication some of the rigidity of the Walsh-Healey enforcement scheme. In short, section 50-204.1(c) may have helped the Secretary assure that the Government's contractual relationships would not be terminated lightly.

Although Congress expected the Secretary to adopt the Walsh-Healey standards under section 6(a), it provided him with an enforcement scheme very different from that of the Walsh-Healey Act. Instead of providing merely a general criterion like that in section 1(e) of the Walsh-Healey Act, Congress made the standards themselves the primary focus of an employer's duty. 18/ Instead of an inflexible enforcement scheme based upon the Government's contractual relationships, Congress provided a flexible scheme based upon its commerce power. 19/ Section 50-204.1(c),

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17/ Sections 2 and 3 of the Walsh-Healey Act, 41 U.S.C. §§ 36 and 37. See 2 Fed. Reg. of Job S. & H. 9:3 (1981)(blacklisting only remedy, rarely used). See also N.Y. Times, Jan. 2, 1970, § 1, at 17, cols. 1, 4:

> Many observers have attributed the Labor Department's rare use of the sanction [blacklisting] to the feeling that it is too inflexible to impose in some instances, too drastic in others, and hence impractical in any.
>
> "It sure would help if we had some less serious penalties," one official said recently. "I'm not saying that we ought to do away with the blacklist, but we ought to have a fine or a court injunction or something more."

18/ See Brisk Waterproofing Co., 73 OSAHRC 30/E1, 1 BNA OSHC 1263, 1973-74 CCH OSHD ¶ 16,345 (No. 1046, 1973)(discussion of role of standards and the general duty clause). Congress viewed section 1(e) of the Walsh-Healey Act as akin to the Act's general duty clause. See S. Rep. No. 91-1282, 91st Cong., 2d Sess., at 10 (1970), and H. Rep. No. 91-1291, 91st Cong., 2d Sess., at 21 (1970), reprinted in Senate Committee on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970, at 150, 851 (1971).

19/ See the remarks of Representative Perkins explaining the conference bill to the House of Representatives, reprinted in Senate Comm. on Labor & Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety Health Act of 1970, 1204 (1971). Under the Act, the Secretary may issue citations, propose penalties, and seek injunctions against imminent dangers. Sections 9, 10 and 13, 29 U.S.C. §§ 658, 659 and 662.

which reflects the different approaches of the Walsh-Healey Act, would therefore have been more than anomalous under the Act. Its adoption would have introduced elements of an enforcement scheme that Congress found unsuitable for broadly regulating worker safety and health. We are therefore unconvinced that the Secretary was required, when he adopted the Walsh-Healey standards under section 6(a), to have specifically adopted 41 C.F.R. § 50-204.1(c).

We take a similar view of American Can's argument that by omitting the state law provision of section 1(e) of the Walsh-Healey Act quoted in 41 C.F.R. § 50-204.1(a), the Secretary made an impermissible change. The implication of American Can's argument is that the Secretary could not have adopted established federal standards without also adopting the statutes under which the federal standards were established. We think it highly unlikely that Congress intended to require such an odd state of affairs. As a practical matter, Congress' purpose was to supersede rather than perpetuate statutory schemes such as the Walsh-Healey Act's. Yet, the state law provision of section 1(e) reflects the peculiar features of the Walsh-Healey Act. It manifests not only the deference given to state law by the Walsh-Healey Act, but tied the effect of state law to the Walsh-Healey Act's generalized requirement that employees work in conditions that are not "unsanitary or hazardous or dangerous." By contrast, the Occupational Safety and Health Act made standards the primary focus of its enforcement scheme, and in section 18, 29 U.S.C. § 667, the state plan provision, allowed only state standards adopted under federally-approved state plans to supersede federal standards. For the Secretary to have adopted the state law provision of the Walsh-Healey Act would have circumvented for many industrial hazards the state plan provision of the Occupational Safety and Health Act. We cannot say that the Secretary was required, when he adopted the Walsh-Healey standards under section 6(a), to have specifically adopted the state law provision of the Walsh-Healey Act.

Accordingly, we have not been convinced by American Can that the Secretary's omission of 41 C.F.R. § 50-204.1(a) and (c) was impermissible and that the OSHA noise standard is invalid.

V.

The only matter remaining is Judge Knight's certification of his order in No. 77-773 requiring the Secretary to file a more definite statement.

The Secretary's complaint alleged that at various locations within an American Can plant, "feasible administative or engineering controls" were not in use. Judge Knight granted American Can's motion to require a more definite statement under Federal Rule of Civil Procedure 12(e). The judge required the Secretary to specify the feasible controls that American Can failed to use at each location. Judge Knight explained that he granted American Can's motion

> in an effort to force the parties--who, in light of the motion to dismiss and reply and the prior proceedings in similar matters probably know well what is in question--to identify from the beginning the issues of fact to be resolved so that problems of relevancy and materiality of proof as they arise during the period for discovery and at trial may be quickly disposed. This is especially true in complicated "noise" cases. For the judge, it is the essential purpose of the pleadings[;] and whatever discovery procedures the parties may employ to cure any deficiency in an otherwise legally sufficient pleading do not help him at all.
>
> In this case, the complaint which alleges that no controls were utilized becomes vague when the Secretary's reply to the motion to dismiss, etc., appears to indicate that some efforts to comply perhaps have been made. Hence, the factual situation is not clear and [American Can], if this is the case, cannot respond to the complaint in any meaningful manner. The proceeding is necessarily delayed and discovery must now be used to clarify the pleadings and identify the issue to be tried which should have been set out initially.

The issue here is whether the judge abused his discretion in ordering a more definite statement. 20/ We conclude that because the judge's reasons for

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20/ Cf. Mitchell v. E-Z Way Towers, Inc., 269 F.2d 126, 130 (5th Cir. 1959)(federal district court).

ordering the more definite statement are inconsistent with the purpose of Federal Rule 12(e), he abused the discretion granted by the rule.

The purpose of a more definite statement is narrow. Federal Rule 12(e) permits a motion for a more definite statement if a pleading "is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading." Contrary to the judge's view, Rule 12(e) is not designed to assist in trial preparation; that is the function of discovery. It was for this reason that Rule 12(e) was amended in 1940 to eliminate the phrase "or to prepare for trial." 21/ Similarly, it is not the purpose of Rule 12(e) to impose greater bounds on discovery than the liberal notice pleading scheme of the federal rules imposes. 22/ And contrary to American Can's argument, it is not necessary on a motion for a more definite statement to determine whether the complaint satisfies minimal pleading requirements; that may be determined by a motion to dismiss for failure to state a claim under Rule 12(b)(6). 23/

Finally, the judge erroneously found that the complaint became too vague to answer when the Secretary's reply to American Can's motion indicated that American Can had made some efforts at noise control. Our rules require American Can to answer the complaint that the Secretary filed, not allegations or representations outside it. The judge should have therefore focused upon the test stated in Rule

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21/ See 2A Moore's Federal Practice ¶ 12.17 at 2369-2376 (1981); Wright & Miller, Federal Practice & Procedure: Civil § 1375 at 729-730 (1969); see, e.g., Mitchell v. E-Z Way Towers, Inc., 269 F.2d 126, 132 (5th Cir. 1959). See also Cement Asbestos Products Co., 80 OSAHRC 26/C7, 8 BNA OSHC 1151, 1155, 1980 CCH OSHD ¶ 24,343, p. 29,667 (No. 78-1054, 1980) (test is unintelligibility, not trial preparation).

22/ Cf. United States v. Georgia Power Co., 301 F. Supp. 538, 544 (N.D. Ga. 1969) ("Rule 12(e) is not designed to frustrate the concept of notice pleading.").

23/ See Wright & Miller, supra note 21, § 1376 at 732-3; Juneau Square Corp. v. First Wisconsin Nat. Bank, 60 F.R.D. 46 (E.D. Wisc. 1973).

12(e): Can an answer to the complaint reasonably be required to be framed? When the issue is so stated, the answer is clear.

American Can can reasonably be required to frame an answer. American Can understands that the Secretary alleges that it failed to use feasible controls to reduce noise. All it need do to answer this allegation is to ask itself whether this is so. If it believes that the allegation is true or false, it need only so state. If American Can lacks knowledge or information sufficient to form a belief as to the truth of the Secretary's allegation, it need only so state, and its statement will be treated as a denial. Fed. R. Civ. P. 8(b). Inasmuch as it could not be said that American Can cannot respond, even with a simple denial in good faith or without prejudice to itself, 24/ the motion for a more definite statement should not have been granted. 25/

Accordingly, the judge's rulings in Nos. 76-5162 and 78-4478 are affirmed. In No. 77-773, the judge's order is vacated; American Can shall answer the complaint within twenty days of this decision. The cases are remanded for further proceedings consistent with this opinion.

FOR THE COMMISSION

DATED: JAN 29 1982

Ray H. Darling, Jr.
RAY H. DARLING, JR.
EXECUTIVE SECRETARY

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24/ Wright & Miller, supra note 21, § 1376 at 733.

25/ Chairman Rowland would not reach the question of whether Judge Knight abused his discretion, nor would he find whether American Can can reasonably be required to answer this complaint. It is sufficient to hold, for the reasons stated above, that the judge's approach was inconsistent with Rule 12(e). Because the disposition of American Can's motion is a matter committed to the judge's discretion, Chairman Rowland would vacate the judge's order but leave Judge Knight free on remand to reconsider the matter and to enter a new finding in light of the Commission's opinion.

COTTINE, Commissioner, concurring,

I concur in my colleagues' determination that the occupational noise standard was not shown to have been invalidly promulgated and that the judge's order granting American Can's Motion for More Definite Statement was in error. However, I conclude that no substantive change occurred in the promulgation of the earlier noise standard as an established federal standard under section 6(a) of the Act, 29 U.S.C. §655(a), because there was no change in the standard of care required by the standard.

I

The purpose of the Walsh-Healey Act is to ensure that federal contract monies do not go to "forces. . .offending fair social standards of employment," Perkins v. Lukens Steel Co., 310 U.S. 113, 128 (1940), and "that the Federal Government. . .procure and use only goods produced under safe and fair working conditions." George v. Mitchell, 282 F.2d 486, 493 (D.C. Cir. 1960). To this end, section 1(e) of the Walsh-Healey Act, provides with respect to federal procurement contracts as follows:

> (e) That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection.

41 U.S.C. §35(e).

A.

American Can claims that the Secretary's failure to adopt the following provisions from the scope and application section covering all Walsh-Healey standards rendered the adoption of the occupational noise standard, 29 C.F.R. §1910.95, invalid:

> Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance. [41 C.F.R. §50-204.1(a)]
>
> * * *
>
> Whenever any applicable standard in this Part 50-204 is relied upon by the Department of Labor in a formal enforcement proceeding under section 5 of the Walsh-Healey Public Contracts Act to support a finding of violation of the safety and health provisions of the Act and of a contract subject thereto, any respondent in the proceeding shall have the right and shall be afforded the opportunity to challenge the legality, fairness or propriety of any such reliance. [41 C.F.R. §50-204.1(c)]

Respondent does not suggest that the Secretary altered the provisions of the noise standard itself when the source standard was adopted. Rather, it claims that the failure to also adopt the above cited provisions resulted in impermissible substantive changes in the cited standard, rendering its promulgation invalid under section 6(a) of the Act, 29 U.S.C. §655(a).

The portion of 41 C.F.R. §50-204.1(a) cited above that is referred to by American Can is taken out of context. The full text of the provision is as follows:

> §50-204.1 Scope and Application.
>
> (a) The Walsh-Healey Public Contracts Act requires that contracts entered into by any agency of the United States for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000 must contain, among other provisions, a stipulation that "no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or

> dangerous to the health and safety of employees engaged in the erformance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection." (sec. 1(e), 49 Stat. 2036, 41 U.S.C. 35(e)). This Part 50-204 expresses the Secretary of Labor's interpretation and application of this provision with regard to certain particular working conditions. In addition, §§50-204.27, 50-204.30, 50-204.31, 50-204.32, 50-204.33, and 50-204,36 contain requirements concerning the instruction of personnel, notification of incidents, reports of exposures, and maintenance and disclosure of records.

The portion cited by American Can is a quotation from the Walsh-Healey Act and the provisions that follow interpret and apply that statute. There is nothing in subsequent provisions of the Walsh-Healey regulations published by the Secretary of Labor to suggest that a government contractor would be permitted to comply with a state standard as an alternative to compliance with an applicable federal standard. The relevant portion of 41 U.S.C. §35(e) that is quoted in §50-204.1(a) merely provides that compliance with state laws "shall be prima facie evidence of compliance" with the requirement that federal contracts not be performed under "unsanitary or hazardous or dangerous" working conditions.

Decisions of the Department of Labor indicate that compliance with state requirements was not viewed as an acceptable substitute for compliance with federal standards promulgated under the Walsh-Healey Act. In finding the employer in violation of 41 U.S.C. §35(e) in Rushton Cotton Mills, it was concluded:

> Compliance with State standards constitutes but prima facie evidence of compliance with the health and safety stipulations of the Act. The conditions described. . .were below the basic safety and health standards set by the Administrator for establishments subject to the Act.

8 Wage & Hour Cases U.S. Labor Dep't 470, 479 (1948) (footnote omitted). Similarly, in Casey-Jones, Inc., 6 Wage & Hour Cases U.S. Labor Dep't 1137 (1946) the Wage and Hour Administrator stated:

> All that can be said for respondent's contention in this respect is that employers take a step in the right direction if they comply strictly with State health and safety requirements, but it cannot be said Congress intended such compliance would work an estoppel of the Federal Government's efforts to set a higher standard in factories engaged in performing its contracts. If Congress had so intended it could have so provided with equal facilities.

6 Wage & Hour Cases U.S. Labor Dep't at 1140.[1/] Accordingly, American Can's assertion that the Secretary's failure to adopt §50-204.1(a) amounted to a substantive modification of the noise standard because it altered an employer's compliance duties is without support.

The legislative history of the Occupational Safety and Health Act clearly indicates that the drafters intended a comprehensive national, occupational safety and health policy for all employees that would supersede what was considered to be an inadequate state-by-state approach to a serious national problem.[2/] Congress indicated its intent to ensure

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1/ Section 50-204.1(b)(1), as revised on May 29, 1971, at 36 Fed.Reg. 9868, has incorporated these interpretations, stating, in pertinent part, the following:

> Evidence of compliance with the safety, sanitary, and factory inspection laws of a State in which the work, or part thereof, is performed will be considered prima facie evidence of compliance with the safety and health requirements of the Act, and of any contract subject thereto; and it shall be sufficient unless rebutted or overcome by a preponderance of evidence of a failure to comply with any applicable safety and health rules contained in this report.

2/ S.REP. No. 91-1281, 91st Cong., 2d Sess. 4 (1970), reprinted in SEN. COMM. ON LABOR & PUBLIC WELFARE, 92d CONG, 1st SESS., LEGISLATIVE HISTORY OF THE OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970, at 144 (1971) ("LEGIS. HISTORY"); H.REP. No. 91-1291, 91st Cong., 2d Sess. 15 (1970), reprinted in LEGIS. HISTORY, at 845.

a minimum federal level of employee protection by requiring in the Act's state plan provision, 29 U.S.C. §667, that state standards be at least as effective as the federal standards they were to supersede.[3/] 29 U.S.C. §667(c)(2). Clearly a regulation purporting to permit compliance with various state standards as an alternative to compliance with federal standards, regardless of the basic level of protection afforded by the state standards and without the scrutiny required by the Act's state plan provision, would be inconsistent with the purposes and provisions of the Act.[4/] Accordingly, such a regulation could not be adopted under the Act.

B.

As noted by the majority, if working conditions were found to be "unsanitary or hazardous or dangerous," under the Walsh-Healey Act, the federal contractor would be in violation of section 1(e) of that statute. The available remedies were contract cancellation and/or blacklisting. 41 U.S.C. §§36 & 37. Under the Secretary's regulations, noncompliance with any safety and health measure contained in 41 C.F.R. Part 50-204 was treated as resulting in working conditions that were "unsanitary

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3/ See S.REP. No. 91-1281, supra at 18, reprinted in LEGIS. HISTORY, at 158; H.REP. No. 91-1291, supra at 32, reprinted in LEGIS. HISTORY, at 862. This provision is not unique in comprehensive safety regulation. See 49 U.S.C. §1673(a), section 3(a) of the Natural Gas Pipeline and Safety Act. 49 U.S.C. §1671 et seq.; see Enserch Corp., d/b/a Lone Star Gas Co., OSAHRC , 10 BNA OSHC 1285, 1982 CCH OSHD ¶25,838 (No. 77-2289, 1981).

4/ Such a provision arguably could be nullified on that basis alone. See Manhattan Gen. Equip. Co. v. Commissioner of Internal Revenue, 297 U.S. 129 (1936).

or hazardous or dangerous" within the meaning of section 1(e). 41 C.F.R. §50-204.1(b). Section 50-204.1(c) of the Walsh-Healey regulations permitted a challenge to this finding to avoid harsh results. The regulation provides that whenever the Secretary relies on an applicable standard in Part 50-204 to support a violation of section 1(e) "any respondent in the proceeding shall have the right and shall be afforded the opportunity to challenge the legality, fairness or propriety of any such reliance."

American Can claims that under this regulation a contractor could challenge not only the legality of the standard but also its fairness and propriety. However, the provision clearly permits a challenge to the "legality, fairness or propriety" of the Secretary's reliance on a standard to find a violation and thereby impose sanctions, not a challenge to the standard. The flexibility afforded by the regulation applied to enforcement sanctions, not to the application of mandatory standards. The Secretary's failure to adopt section 50-204.1(c) as part of the OSHA regulations in no way affected the requirements of the noise standard. The regulation related to the unique enforcement scheme of the Walsh-Healey Act and simply had no relevance to enforcement of the Occupational Safety and Health Act with its less severe remedial measures[5/] and specific defenses relating to the particular cited conditions.[6/]

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5/ See lead opinion, note 17 supra.

6/ See lead opinion, notes 8-13 and accompanying text supra.

C.

For these reasons I would reject American Can's assertion that the Secretary's failure to adopt Section 50-204.1(a) & (c) of the Walsh-Healey regulations as part of the OSHA regulations resulted in substantive modifications of the cited standard.

II

The majority concludes that the judge erred in granting American Can's Motion for More Definite Statement because his basis for granting the motion is inconsistent with Rule 12(e) and the notice-pleading theory of the Federal Rules of Civil Procedure.[7/] However, the Commission noted in Cement Asbestos Products Co., 80 OSAHRC 26/C7, 8 BNA OSHC 1151, 1980 CCH OSHD ¶24,343 (No. 78-1054, 1980), that in federal court proceedings Rule 12(e) must be read in conjunction with the federal rule on complaints, Fed.R.Civ.P. 8. Similarly, in Commission proceedings Rule 12(e) must be read with the Commission rule on complaints, 29 C.F.R. §2200.33(a)(2).[8/] Id.

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7/ See lead opinion, quoted material preceding note 20 supra.

8/ Under 29 U.S.C. §661(f) and Commission Rule 2, 29 C.F.R. §2200.2, the Federal Rules of Civil Procedure apply only in the absence of an applicable Commission rule. Commission Rule 33(a)(2) provides:

> (2) The complaint shall set forth all alleged violations and proposed penalties which are contested, stating with particularity:
>
> (i) The basis for jurisdiction;
> (ii) The time, location, place, and circumstances of each such alleged violation; and
> (iii) The considerations upon which the period for abatement and the proposed penalty on each such alleged violation is based.

In granting the Motion for More Definite Statement the judge abused the discretion granted him by Commission Rule 66, 29 C.F.R. §2200.66. A motion for more definite statement seeks to cure unintelligibility in a pleading and is not a substitute for discovery. Cement Asbestos Products Co., supra. It is appropriate only where a complaint is so lacking in its description of the claim that an answer cannot be framed. The complaint in this case satisfies the requirements of Commission Rule 33(a)(2) and gives sufficient notice of the claim that an answer can be framed. See Id. Any additional information necessary to prepare its defense can be obtained by American Can during the course of discovery. Similarly, a pretrial conference is available to the judge to identify and narrow relevant issues. See Commission Rule 66(g), 29 C.F.R. §2200.66(g).

The judge's order granting the motion for more definite statement is properly vacated.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>AMERICAN CAN COMPANY,<br>Respondent. | OSHRC<br>Docket No. 76-5162 |

ORDER ON RESPONDENT'S
REQUEST FOR INTERLOCUTORY APPEAL

Heretofore the Respondent filed a Motion (accompanied by a supporting memorandum) to Dismiss the Secretary of Labor's Complaint in this matter for the reason that the Occupational Safety and Health Administration Regulation in question - 29 CFR 1910.95(a) - is invalid. In response the Secretary submitted opposing arguments to the Respondent's Motion.

In order to afford the parties additional opportunity to advance further details in support of their respective theories of the case, oral argument was held in Chicago, Illinois on August 11, 1977. At these proceedings, unreported, the Secretary of Labor, the United Steelworkers of America, and the Respondent

were represented by counsel and presented their views regarding the validity of the standard.

On August 30, 1977, an Order was issued denying the Respondent's Motion to Dismiss the Complaint.

The Respondent now requests that an immediate interlocutory appeal from the Order be allowed.

Section 2200.75(c) of the Commission Rules of Procedure provides that:

> "Interlocutory appeal from a ruling of the Judge shall be allowed as of right where the Judge certifies that (1) the ruling involves an important question of law concerning which there is substantial ground for difference of opinion; and (2) an immediate appeal from the ruling will materiall expedite the proceedings. . . ."

In this matter, based upon the theory of the case as advanced by the Respondent, there is a substantial difference of opinion regarding the validity of the standard in issue. An immediate appeal will materially expedite the proceedings because a ruling on this point by the Commission will either terminate the matter or avoid extensive testimony and litigation concerning the development of this standard from its inception in the Walsh-Healy Act to its actual adoption by the Occupational Safety and Health Administration. In any event, the case will not be delayed because, as provided by Rule 75(d),

of the Petition shall not stay the current proceedings unless specifically ordered by the Commission.

Accordingly, the undersigned certifies that:

(1) the ruling involves an important question concerning which there is substantial ground for difference of opinion; and

(2) an immediate appeal from the ruling will materially expedite the proceedings.

The file is returned to the Commission.

Sidney J. Goldstein, Judge, OSHRC

Dated: August 30, 1977

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

January 29, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

S. Zara and Sons Contracting Company, Inc.

OSHRC DOCKET NO. 78-2125

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

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Rev. 10/1/76

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>S. ZARA & SONS CONTRACTING CO., INC.,<br>Respondent. | OSHRC Docket No. 78-2125 |

DECISION

Before: CLEARY and COTTINE, Commissioners.*/

BY THE COMMISSION:

A decision of Administrative Law Judge Jerome C. Ditore is before the Commission for review pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Judge Ditore modified the Secretary's amended citation which alleged that Respondent ("Zara") had committed a willful and repeated violation of the Act for failing to comply with the standard at 29 C.F.R. § 1926.651(c).1/ The judge concluded that the

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*/ Chairman Rowland did not participate in this decision .

1/ This standard provides:

Subpart P Excavations, Trenching, and Shoring

* * *

§ 1926.651 Specific excavation requirements

* * *

(c) The walls and faces of all excavations in which employees are exposed to danger from moving ground shall be guarded by a shoring system, sloping of the ground, or some other equivalent means.

violation was repeated but not willful in nature, and he assessed a $3,000 penalty. Commissioner Cleary directed review of the judge's decision.[2/] We conclude that the judge erred in failing to find the violation willful in nature, and we assess a $5,000 penalty.

I.

The citation was issued after an employee of Zara was killed on March 24, 1978 in the collapse of a manhole excavation in which he had been working. This excavation was part of an extensive project for the installation of a sewer line which Zara was constructing for Nassau County, New York. The project had commenced in December 1977 and was still continuing at the time of the hearing in this case.[3/] It was under the management of a county engineer. The county engineer also served as project engineer and in that position supervised at least 20 inspectors whose responsibility was to ensure that work was done according to specifications. The specifications, which were contractual requirements imposed on the contractor, included a requirement that any excavation deeper than five feet be sheeted "as required" to protect employees and that trenches be adequately shored and securely braced or sheeted where required. The specifications permited the use of a trench

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2/ Review was directed on the issue of whether the judge "erred by characterizing the violation . . . as repeated instead of willful." However, neither party takes exception to that part of the judge's decision finding the violation repeated, and there is no compelling public interest to warrant review of this finding. Accordingly, to the extent that the direction for review raises an issue with respect to the propriety of the finding of a repeated violation, we summarily affirm this portion of the judge's decision and accord it the precedential value of an unreviewed judge's decision. Stone & Webster Eng'r Corp., 80 OSAHRC 72/D11, 8 BNA OSHC 1753, 1754 n.1, 1980 CCH OSHD ¶ 24,646 at 30,235 n.1 (No. 15314, 1980).

3/ At the time of the hearing Respondent was operating seven projects with at least one superintendent on each project. The volume of the sewer construction work performed by Respondent over the past five years was estimated at $150 million, or about two million feet of sewer line. During that time, Respondent's total employment varied between 350 and 600 employees.

box to support an excavation less than 18 feet deep. However, trench boxes were not used in excavations having exposed utility lines that could be struck by the trench box as it was lowered into the excavation.[4/] Zara instructed its employees that in instances where a trench box was not used the excavation must be sloped. The foreman at the worksite where the fatal accident occurred, Benasutti, testified that he had been instructed to slope all four sides of an excavation to an angle of 45 degrees.

According to Ploska, the inspector assigned to monitor Benasutti's work, Benasutti normally used a trench box except where its use would not be practical due to the presence of utility lines. Prior to the accident, Benasutti consistently used a trench box. However, on the day before the accident, Benasutti encountered gas and water service lines as well as a curve in the road. Benasutti believed that use of a trench box in the vicinity of the utility lines would be hazardous and that the road curvature would impede installation of a box. Therefore, he decided to slope the excavation as an alternative to using the trench box. However, despite Benasutti's understanding of Zara's safety rule, he failed to slope the

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4/ Both Tomasetti, a former safety director for Zara, and Huber, the shop steward for Zara's operating engineers, had personal knowledge of incidents in which gas lines ruptured by trench boxes had caught on fire, exploded, or resulted in the asphyxiation of workers. Similarly, Buckley, the business agent for the laborers' union, considered excavating near a service gas main to be hazardous because contact with a trench box could ignite the main. Papa, a county engineer, conceded that trench boxes cannot be used in close proximity to gas and water mains. Although the witnesses did not expressly state the hazards resulting from rupture of a water line, Tomasetti indicated that normally the water utility would shut off a water main on request if the service needs of the area would not be unduly affected and if a work crew were available. However, both Tomasetti and Benasutti, the foreman at the site where the fatality occurred, testified without rebuttal that the gas utility normally refused to shut off service. The county inspector assigned to Benasutti's worksite, Ploska, agreed that Benasutti could not continue to use the trench box because of "interference" from gas and water lines.

approximately 17-foot deep excavation to a 45-degree angle.[5/] Nor did he shore or otherwise support the excavation against collapse. The excavation caved in early the next day.

Benasutti's supervisor, job superintendent DiPaolo, previously had been contacted by a county officer concerning inadequately protected excavations. Dreyer, one of the county engineers supervising inspectors on the Zara project, testified that from inception of the contract until the day of the fatal accident, he made "just about" daily visits to Zara's worksites and had approximately five to ten conversations with either DiPaolo or his foremen regarding their failure to use an available trench box. On these occasions he advised DiPaolo or the foreman that without a trench box the excavation was hazardous. On December 22, 1977, he gave DiPaolo a written notice ordering Zara to use a trench box in any excavation deeper than six feet. This order was issued following Dreyer's observation of a trench, approximately 8 to 12 feet deep, without a box. The record does not indicate whether any of the excavations which Dreyer considered hazardous occurred at worksites under Benasutti's control.[6/]

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5/ Ploska, the county inspector, testified that the excavation was sloped on the east and west sides but did not specify the degree of slope. The north face, which was used by employees for entrance and exit, was sloped 30-40 degrees from the vertical. The south face was almost vertical. According to Ornellas, the Secretary's compliance officer, the east side was sloped 22 degrees and the west side 18 degrees from the vertical. He gave the slope on the north face at between 45 and 60 degrees. The judge rejected Benasutti's testimony regarding the dimensions of the excavation as not credible and found that the east and west sides were sloped at less than 45 degrees from the vertical. The judge made no findings regarding the degree of sloping on the north and south faces. However, he determined that the soil composition of the excavation was predominantly loose sand and noted that the Secretary's standards require a slope of approximately 26 degrees from the horizontal, or approximately 64 degrees from the vertical, for such soil. Neither party excepts to these findings.

6/ DiPaolo supervised as many as 10 foremen and had a total of between 100 and 150 employees under his control.

On March 23, 1978, the day before the fatal accident at Benasutti's worksite, a trench at a worksite under the control of another foreman, Palumbo, collapsed. One of Zara's employees who was in the trench at a depth of 10 to 12 feet was slightly injured. The trench, which at that time was crossed by an exposed and active gas line, was not protected by either shoring or a trench box. During the morning before the cave-in as well as on prior days, Gallagher, the county inspector at the site, had repeatedly instructed Palumbo to use a trench box that was available at the site. According to Gallagher, Palumbo stated that a trench box was not "necessary." Gallagher further testified that after the accident Palumbo began using the trench box where its use was "feasible."

The Zara project at issue in this case was the first sewer project on which Dreyer had worked as a supervising engineer for the county. Similarly, Gallagher had never previously worked as a construction inspector. Ploska had no experience in construction work prior to his assignment as inspector on the Zara project. Neither Dreyer, Gallagher, nor Ploska had any familiarity with the Secretary's trench and excavation standards, nor had they received any formal safety training. On the other hand, Zara's general superintendent, Tomasetti, had been associated with Zara for eight years and had prior experience in sewer construction. He had received safety training from the gas utility, Long Island Lighting Company ("LILCO"), and the county and state departments of labor. He also had completed the Secretary's safety course in trenching and excavation.

Tomasetti previously had served as Zara's safety director and in this capacity, in 1974 or 1975, initiated Zara's safety program. The program included written safety rules and provided for the discussion of safety matters at annual general meetings of all company employees and at job meetings at construction sites with foremen and superintendents monthly or "as necessary." Superintendents and assistant superintendents also were required periodically to inspect and make a written

report on the safety and health conditions at worksites. Tomasetti made weekly or monthly inspections of all worksites accompanied by representatives of Zara's insurance carrier. According to Tomasetti, he discussed the Secretary's standards regarding sloping and shoring with foremen and superintendents and instructed them to use a trench box where practical and otherwise to slope. In Tomasetti's opinion, a trench box would be impractical in excavations where utility lines existed because of the possibility of damage to utility lines.

Zara's safety director, Trotter, was hired on May 31, 1977 to establish an internal insurance department and to continue implementation of the existing safety program. After his employment with Zara commenced, he took a course given by the county in trenching and excavation. This course was attended by 40 of Zara's foremen and superintendents. He and approximately 35 of Zara's employees also took LILCO's safety course. At the time of the hearing in this case, Trotter was attending a course in occupational safety and health standards at Hofstra University.

On October 28, 1977, Trotter first met with Zara's employees involved in trench and excavation work to discuss the Secretary's standards. According to Trotter, employees were generally instructed to use a trench box and customarily did so. If a box could not to be used, foremen were instructed to excavate to the proper angle of repose. Shoring equipment was available at the request of a foreman. Trotter and a representative of Zara's insurance department also conducted daily inspections of field sites. If an infraction of a safety rule was observed, it was photographed, brought to the attention of the employees, and discussed with the superintendent.[7/] Trotter arrived at the site here approximately five to ten

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7/ Benasutti testified that he frequently saw Trotter at his jobsites; among other things, Trotter checked that a trench box was in use and examined the condition of the box.

minutes after the accident. At that time Benasutti told him that the excavation had been sloped in compliance with the standards.

During the past four years, Buckley, the business agent for the laborers' union, visited Zara's worksites three to five times. He noted that trench boxes or other shoring devices were always used where there was no danger of damaging a utility line. Similarly, the shop steward for Zara's operating engineers, Huber, who made daily visits to Zara's worksites, had never seen Zara fail to use a box where he felt one should have been used. He also had seen excavations sloped where no box was in use. On the other hand, Papa, a county engineer in charge of a Zara sewer project in progress at the time of the hearing and involved with Zara sewer projects since 1970, testified that on a few occasions Zara had failed to use a trench box in an excavation where Papa felt one should have been used. In each instance, Zara's superintendent would install a trench box when told to do so by Papa.

Finally, the record shows that during a five year period preceding the issuance of the citation here, Zara committed seven violations of standards pertaining to the shoring or sloping of trenches and excavations.[8/]

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8/ Six prior citations, alleging violations of shoring or sloping requirements, were admitted into evidence by stipulation of the parties. All citations became final orders of the Commission prior to the inspection in this case. These prior violations may be summarized as follows:

Nonserious citation issued May 4, 1973: 29 C.F.R. § 1926.652(c) for failure to adequately support trenches more than five feet in depth and eight feet in length;

Nonserious citation issued June 6, 1973: § 1926.652(c) for failure to adequately support or slope trenches more than eight feet in length and five feet in depth (two trenches approximately seven and twelve feet deep);

Nonserious citation issued April 30, 1974: § 1926.652(b) for failure to adequately shore two trenches in that spacing of uprights and number of

(Cont.)

II.

Judge Ditore determined that Zara was aware of the requirements of the Act and had maintained a safety program including the issuance of "general" safety instructions and the provision of equipment for protecting employees in trenches and excavations. However, the judge found substantial deficiencies in the safety program, particularly with regard to the adequacy of the safety instructions. In the judge's view, employees were not specifically trained to recognize hazards that might be encountered at a worksite or in the methods of protecting against those hazards. Although safety responsibility was delegated to foremen and depended on the exercise of their judgement, Zara failed to give them detailed training on proper sloping or sloping methods. Employees received no training regarding soil conditions. Noting that Benasutti understood that the proper angle of slope was 45 degrees, the judge concluded that this instruction was insufficient considering the "myriad" conditions that may exist at an excavation site.

Nevertheless, the judge found that these deficiences in Zara's safety program did not constitute either an intentional or reckless disregard of, or plain indifference to, the requirements of the excavation and trench standards. He further

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8/ (Cont.)

crossbraces was inadequate and § 1926.652(g)(1) in that cross braces used in another trench did not meet "minimum requirements";

Serious citation issued July 8, 1975: § 1926.652(d) in that sheeting and bracing was not effective to the bottom of the excavation resulting in "partial collapse" of one side;

Nonserious citation issued January 26, 1976: § 1926.651(c) in that an excavation 10 feet square and about 6 1/2 feet deep was not shored, sloped, or otherwise supported;

Serious citation issued January 26, 1976: § 1926.652(b) in that a trench approximately 30 feet long, 8 feet wide, and varying between 18 and 20 feet deep in unstable and sandy soil was not adequately shored, sheeted, braced, sloped, or otherwise supported; sheeting 40 inches in width was not properly spaced and lacked cross bracing.

found that Benasutti previously had used a trench box but could not continue to do so at the worksite in question because of interference from gas and water lines. Accordingly, he concluded that the violation was not shown to be willful in nature as alleged.

III.

On review, the Secretary contends that the judge erred in failing to find the violation willful. According to the Secretary, Zara had knowledge not only of the requirements of the Act but also of the need to improve its safety program as a result of the prior citations for substantially similar violations and the repeated warnings by the local inspectors that its employees were not adequately protected. The Secretary points out that the judge found numerous inadequacies in Zara's safety program and contends that, contrary to the judge's conclusion, a finding of willfulness is not precluded by the existence of a general safety program and the provision of safety equipment for some operations. In the Secretary's view, the facts establish either an intentional or reckless disregard of, or plain indifference to, the requirements of the Act. Finally, the Secretary asserts that in the light of all the circumstances, including prior violations and warnings, the gravity of the violation, and Zara's size, the maximum penalty of $10,000 is appropriate.[9/]

Zara argues that the judge's decision is supported by a preponderance of the evidence and should be affirmed. In support of its argument, Zara asserts that Benasutti decided in good faith to slope the excavation rather than endanger employees by using a trench box in the vicinity of utility service lines. Zara emphasizes that Benasutti had consistently used the trench box at this worksite until it was removed on this occasion. In Zara's view, the judge properly concluded

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9/ 29 U.S.C. § 666(a) provides that an employer who willfully violates the Act or a standard issued under the Act may be assessed a civil penalty of up to $10,000.

that Benasutti's actions did not constitute an intentional or reckless disregard of, or plain indifference to, the requirements of the standard.

Zara also disputes the significance of the prior violations of the trench and excavation standards and the warnings by county personnel. According to Zara, the prior violations, with one exception, concern a standard different than the one at issue in this case and involved situations of substantial compliance with the shoring requirements rather than a complete absence of protective measures. As to the warnings by the county officers, Zara contends that their testimony should not be credited because they had not been adequately trained. Zara further contends that its safety officers, Tomasetti and Trotter, were better trained and qualified than the county personnel. Zara also submits that improvements in its safety program, implemented after the occurrence of the prior violations, demonstrate Zara's commitment to employee safety and its intention to comply fully with the requirements of the Act.

IV

A violation is willful in character if it was committed "with either an intentional disregard of or plain indifference to the Act's requirements." Mel Jarvis Construction Co., 81 OSAHRC 89/B13, 10 BNA OSHC 1052, 1981 CCH OSHD ¶ 25,713 (No. 77-2100, 1981) ("Mel Jarvis"). However, as stated in Mel Jarvis, a violation is not willful if an employer has a good faith opinion that the violative conditions conformed to the requirement of the standard. The test of an employer's good faith, for the purpose of determining willfulness, is an objective one, i.e., was the employer's belief concerning a factual matter or concerning the interpretation of a standard, reasonable under the circumstances. See Western Waterproofing Co. v. Marshall, 576 F.2d 139 (8th Cir. 1978), cert. denied, 439 U.S. 965 (1978).

The standard contained at section 1926.651(c) required Zara to slope, shore or provide equivalent means of protection in excavations where employees were exposed to

danger from moving ground. Under Commissioner Cleary's view, the factors set forth in section 1926.651(e) 10/ must be evaluated to determine the proper angle of repose for sloping a particular excavation. Commissioner Cleary concludes that an employer, reading section 1926.651(c) together with section 1926.651(e), could reasonably determine that a safety rule, predesignating the angle of repose in all excavations, was inadequate. Zara's safety rule required a 45 degree angle of repose in all excavations where a trench box was not used. Zara was aware that trench boxes could not be used in all excavations and that sloping was alternatively required. Zara did not instruct its employees to consider and apply the factors contained in section 1926.651(e) to determine the proper angle of repose. As a result, in sloping the excavation in question, Benasutti was unable to evaluate factors which affected the excavation's stability. The evidence also shows that Zara failed to instruct its employees in the methods by which a particular degree of sloping might be achieved. Zara's safety rule also failed to provide for shoring excavations in which a trench box was not used and where sloping was impracticable. Judge Ditore determined that Zara's sloping instruction was insufficient considering the "myriad" conditions that may exist at an excavation site. Based upon the foregoing rationale, Commissioner Cleary agrees with the judge's finding that Zara's safety rule failed to reasonably implement the cited standard's requirements in excavations where a trench box was not used.

Commissioner Cottine concurs in this result on different grounds. Section 1926.651(g) requires that "[a]ll slopes shall be excavated to at least the angle

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10/ Section 1926.651(e) specifies that:

> The determination of the angle of repose and design of the supporting system shall be based on careful evaluation of pertinent factors such as: Depth of cut; possible variation in water content of the material while the excavation is open; anticipated changes in materials from exposure to air, sun, water, or freezing; loading imposed by structures, equipment, overlying material, or stored material; and vibration from equipment, blasting, traffic, or other sources.

of repose." "Angle of repose" is defined at section 1926.653 as "[t]he greatest angle above the horizontal plane at which a material will lie without sliding." Table P-1, accompanying the trenching and excavation standards, is entitled "Approximate Angle of Repose for Sloping of Sides of Excavation." It sets forth the maximum safe slopes for the soil compositions listed. 11/ Duane Meyer, d/b/a D.T. Construction Co., 79 OSAHRC 57/D4, 7 BNA OSHC 1560, 1561 n. 12, 1979 CCH OSHD ¶23,742 at p. 28,793 n. 12 (No. 16029, 1979). In Commissioner Cottine's view, walls of an excavation that do not comport with the angles of repose set forth in the table for the type of soil involved are not adequately guarded to prevent collapse and do not comply with the requirements of the excavation standards. Pipe-Rite Utilities Ltd., Inc., OSHRC Docket No. 79-234 (Jan. 28, 1982) (Cottine, Commissioner, dissenting). Furthermore, sections 1926.651(e) and (h) 12/ require that additional factors affecting the stability of the soil be considered when determining the degree of sloping necessary to guard against collapse.

Zara's safety rule requiring a 45 degree slope for all excavations in which a trench box is not used fails to take into consideration either the nature of the soil or other factors affecting its stability. 13/ Accordingly, Commissioner

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11/ Angles of repose listed in Table P-1 for different soil classifications are as follows:

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| Solid Rock, Shale or Cemented Sand and Gravels | -- | 90° |
| Compacted Angular Gravels | -- | 63° 26' |
| Average Soils | -- | 45° |
| Compacted Sharp Sand | -- | 33° 41' |
| Well-Rounded Loose Sand | -- | 26° 34' |

12/ Section 1926.651(h) provides:

> (h) The angle of repose shall be flattened when an excavation has water conditions, silty materials, loose boulders, and areas where erosion, deep frost action, and slide planes appear.

13/ A 45 degree slope is steeper than the angle set forth in Table P-1 as the greatest angle above the horizontal at which either compacted sharp sand or well-rounded loose sand will lie without sliding. See Duane Meyer, d/b/a D.T. Constr. Co., supra. See note 11 supra.

Cottine agrees that the judge properly found Zara's safety rule to be inadequate.

We note further that Zara had been involved in the installation of sewer lines in Nassau County for five years prior to the fatal accident and during that period installed approximately two million feet of sewer line. Certain of Zara's supervisory personnel received specialized training in trenching and excavation which, in some cases, included instruction from the Secretary. Prior to the accident, Zara had violated not only the standard at issue here but also related trenching standards. 14/ Despite its extensive prior involvement in excavation, the training of its supervisors, and the fact that it had notice of the sloping and shoring requirements of section 1926.651(c) and related trenching standards from several prior citations, Zara failed to insure compliance with the cited standard in excavations where a trench box was not used. Zara's failure to take positive steps to insure compliance with the sloping and shoring requirements of the cited standard demonstrates at least a plain indifference to the standard and employee safety. Mel Jarvis, supra; Georgia Electric Co. v. Marshall, 595 F.2d 309 (5th Cir. 1979).

We are not persuaded by Zara's argument that the precautions, allegedly taken in good faith by Benasutti, preclude a finding of willfulness here. Because of the inadequacy of Zara's instructions, it was impossible for Benasutti to determine the proper angle of repose in the excavation where the accident occurred. We find that his belief that the excavation was sloped in compliance with the standard was not reasonable and, thus, not held in good faith. See Western Waterproofing Co.

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14/ We reject Zara's challenges to the relevance of the prior violations. All of the prior violations involve standards pertaining to the shoring and sloping of excavations and trenches. Therefore, Zara should have been aware of the requirement to protect employees by shoring or sloping trenches and excavations regardless of whether the prior violations involved precisely the specific standard at issue in this case. See Georgia Elec. Co. v. Marshall, 595 F.2d 309 (5th Cir. 1979). Also, assuming, as Zara contends, that the prior violations predominantly involved situations of partial compliance with shoring requirements, Zara would still be put on notice that its safety program was not sufficient to prevent violations of these standards.

v. Marshall, supra. 15/ Accordingly, we reverse the judge and affirm a willful violation.

V

We now turn to the assessment of an appropriate penalty. Considering the factors contained in section 17(j) of the Act, 29 U.S.C. § 661(i), we find that, in view of the resultant fatality, the gravity of the violation is high. We further note that Zara is a large employer with a history of violations of trench and excavation standards. With respect to good faith, we find that, although Zara failed to implement the requirements of the cited standard, good faith efforts were expended in establishing a safety program and training certain supervisory personnel. In view of these efforts, we cannot agree with the Secretary's assertion that a $10,000 penalty is warranted in this case. On balance, we find a $5,000 penalty is appropriate.

Accordingly, the citation alleging a willful and repeated violation of the standard contained at 29 C.F.R. § 1926.651(c) is affirmed. A $5,000 penalty is assessed.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: JAN 29 1982

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15/ Moreover, we find that Zara's safety rule, albeit inadequate, was not observed by Benasutti on the day of the accident. Although Benasutti's decision to remove the trench box appears justified, he was nevertheless required under Zara's safety rule to slope all sides of the excavation to an angle of 45 degrees. As Judge Ditore found, two of the sides of the excavation were sloped steeper than 45 degrees. The evidence further indicates that one of the other sides of the excavation was either unsloped or very inadequately sloped. Clearly, the sloping done by Benasutti in this case did not conform to the requirements of Zara's rule. Thus, even assuming that Zara's rule implemented the cited standard's requirements, the evidence does not support a finding that Benasutti's belief that the trench was properly sloped was reasonable. See Western Waterproofing Co. v. Marshall, supra.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>S. ZARA & SONS, CONTRACTING, INC.,<br>Respondent. | OSHRC DOCKET<br>NO. 78-2125 |

Appearances:

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## DECISION AND ORDER

Ditore, J.:

## PRELIMINARY STATEMENT

Respondent contested a citation for a willful violation of 29 CFR § 1926.651(c), and the proposed penalty of $10,000. Specifically, Respondent was charged with the willful failure

on March 24, 1978, to guard the walls of an excavation by shoring, sloping or other equivalent means to protect its employees working in the excavation.

Section 1926.651 which relates to specific excavation requirements, states in subsection (c) that:

> "[t]he walls and faces of all excavations in which employees are exposed to danger from moving ground shall be guarded by a shoring system, sloping of the ground, or some other equivalent means."

A hearing was held on October 30, 31 and November 1, 1978, at New York, New York.

## ISSUES

1. Whether a violation of 29 CFR § 1926.651(c) existed at Respondent's workplace on March 24, 1978.

2. If a violation existed, were any of Respondent's employees exposed to the hazard created by the violation.

3. If Respondent's employees were exposed, was the hazardous condition serious.

4. If the condition was serious, did Respondent know of the condition.

5. If Respondent knew of the condition, was it responsible for the violation.

6. If Respondent was responsible, was it a willful act on the part of Respondent.

7. If the violation was willful, is the proposed penalty reasonable and proper.

## STATEMENT OF THE EVIDENCE

### A. Background

From December 1977 through March 24, 1978, Respondent pursuant to a contract with the County of Nassau, State of New York, was constructing a lateral or center pipe sewer line (T. 20, 21, 24, 25, 142). The work was being performed by a number of Respondent's work crews. Each crew was assigned an inspector from the Department of Public Works of Nassau County. Each Nassau County inspector daily monitored the work being performed by Respondent's employees to ascertain whether the work was performed according to County specifications and whether safe trenching or excavation procedures were used (T. 18, 19, 26, 28, 29, 30, 63, 68, 69, 107-108, 141; Exh. C-1).

### B. The Incident of March 24, 1978

On the afternoon of March 23, 1978, between 3:30 and 4:30 p.m., one of Respondent's work crews began excavating an area of street adjacent to 110 Columbia Drive in Jericho, Long Island, for the installation of a manhole. The crew consisted of foreman George Benasutti, three laborers, Maia, Vespa and Rodriguez, a backhoe operator and an oiler (T. 111-112, 147, 445, 456, 457). In their prior excavation work on this project, Benasutti and his

crew utilized a steel trench box to protect against excavation cave-ins. Due to the presence of a lateral gas service line, a water pipe, and a slight curvature in the road bed, foreman Benasutti could not use the trench box at the Columbia Drive excavation (T. 113, 149, 446, 447).

On the morning of March 24, 1978, about 8:00 a.m., Benasutti and his crew continued their excavation for the manhole. After the backhoe finished its operation, Benasutti, Vespa and Rodriguez worked in the excavation laying a length of sewer pipe which would eventually be connected to, and 10 inches above the bottom of, the manhole. The trench box was not used, nor was the excavation shored or sheeted (T. 113, 118, 128, 129, 166, 167, 168, 169, 467, 469-470). Between 8:30 and 9:00 a.m., Maia, another laborer of the work crew, was standing at the top of, and looking down into, the excavation, directly over the area where Rodriguez was working in the excavation. He observed the right side wall of the excavation cave in, the water main break, and the excavation fill with water. He observed sliding sand push Rodriguez to the other side of the excavation and cover him up to his shoulders, and observed the water rise above Rodriguez's head. Benasutti and Vespa, at the other end of the excavation were able to escape (T. 166, 167, 173, 178, 180, 181, 182-186).

C. Dimensions of the Excavation and Soil Condition

Two eyewitnesses at the excavation at the time of the accident testified to the dimensions of the excavation and the nature of the soil.

George Maia, Respondent's laborer in Benasutti's work crew who was standing at the top right side of, and looking down into, the excavation when the accident occurred, estimated the excavation to be 17 feet wide, 17 feet deep, and 25 feet long. The excavation's walls were sloped like a "V", and the soil was sand (T. 169-171, 172, 173, 189, 190).

George Benasutti, Respondent's foreman, stated the road where the excavation was dug was 30 feet wide, and the excavation was 25 feet long. On the morning of March 24th, the excavation had been dug approximately 14 feet, another 3 feet had to be excavated to accomodate the manhole. The excavation's top or opening was two feet from the road curb on the water main or west side, and three feet from the east side curb. The width of the opening at the excavation's top was about 25 feet. The width of the bottom of the trench was about five feet. The soil was composed of sand with a little gravel and stone. Benasutti further stated that as his crew deepened the excavation they widened it (T. 452, 453, 454, 461, 462, 477, 478, 480-481).

On March 27, 1978, three days after the excavation accident, Mr. Benasutti made a written statement, signed and read by him, that the excavation was 30 feet long, 18 feet wide at road

level; and that the north and south sides of the excavations were sloped down to a trench portion of the excavation. The trench was 12 feet long, 6 feet deep and 5 to 6 feet wide. The exposed water main was 18 feet long, and 4 feet below road level. The east and west walls of the excavation were sloped (T. 462, 463; Exh. C-16).

George Plosko, the Nassau County inspector assigned to monitor Benasutti's work crew, stated that on the morning of March 24, 1978, the excavation was 17 feet deep, 6 or 7 feet wide at the bottom, 20 feet long and 20 or 25 feet wide at road level. His later testimony appears equivocal as to the "20 to 25" foot width. He estimated the north wall of the excavation was sloped 30 or 40 degrees. The south wall was not sloped. The east and west walls were sloped like a hill but less than 30 or 40 degrees. The west wall was one or two feet from the west road curb. The soil was of a "sandy nature, just sandy, small stones like a bank run" (T. 120, 124, 129, 155, 158-159, 160).

Joseph Ornellas, a compliance officer for OSHA investigated the worksite on March 24, 1979, about two hours after the accident occurred (T. 191, 193; Exhs. C-5 through C-8). Based on his observations and measurements, his conversations with Respondent's employees, Benasutti, Vespa and Maia, and on information as to the location of a water pipe, obtained from the Jericho Water District, Ornellas reconstructed the pre-accident dimensions of the excavation (T. 198-204, 208, 278-286; Exh. C-3).

His reconstruction figures revealed that the road bed was 30 feet wide from curb to curb; that 10 feet of road asphalt remained from the east curb to the east wall of the excavation; that prior to the accident, the west wall of the excavation was four feet from the west side road curb; that the width of the top of the excavation was 16 feet; that the excavation was 17 feet deep and 6 to 7 feet wide at the bottom; and that the excavation was about 25 to 30 feet long (T. 198-200, 201, 203-204, 208, 218-221, 222; Exh. C-3). George Ploska, the county inspector, stated that exhibit C-3 closely resembled the observations he made of the excavation on the morning of March 24, 1978 (T. 136).

Ornellas from his information and calculations, estimated that prior to the accident on the morning of March 24, 1978, the east wall of the excavation was sloped about 22 degrees from the vertical, the west wall was sloped about 18 degrees from the vertical. The soil was loose, sandy, and mixed with pebbles (T. 223-224, 229, 230). Based on his examination of the excavation's soil, he estimated the angle of repose* required the east and west walls of the excavation to be sloped between 45 degrees for average soil, to 64 degrees for well rounded loose soil, from a vertical plane, or 45 degrees to 26 degrees from a horizontal plane (T. 224-225, 229-234, 257-260, 262-264).

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*The angle of repose is "the greatest angle above the horizontal plane at which a material will lie without sliding" 29 CFR § 1926.653(b).

Douglas Quick, president of a laboratory which tests soil, among other materials, stated that an analysis of the soil taken from the excavation adjacent to 110 Columbia Drive, indicated that the soil was average soil and the angle of repose for this type of soil was a one-to-one ratio, or an angle of repose of 45 degrees from a horizontal or vertical plane (T. 482, 485-489; see: 1926.652, Table P-1). The density analysis of the soil, i.e., the degree of compaction of the soil, indicated that the soil was loose but he did not think that this type of soil would collapse because of its density characteristics (T. 490, 491, 492).

D. Alleged Willful Nature of the Violation

Respondent received six prior citations (final orders) which involved either a failure on Respondent's part to shore, sheet or slope trenches or to adequately shore, sheet or slope trenches (T. 276-278; Exhs. C-9 through C-14).

There was testimony from three county inspectors, Jack Dreyer, George Ploska and James Gallagher, that on several occasions during Respondent's construction of the sewer line, Respondent had to be advised or informed to use adequate protective means in its trenches and excavations (T. 17, 44, 45, 47, 48, 50, 69-74, 79, 126).

George Ploska also stated that he worked closely with foreman Benasutti and his crew on this sewer project; that

Benasutti always used a trench box except on certain occasions, i.e., interference from water and gas lines, when the trench box could not be used; and that Benasutti was concerned with the safety of his men (T. 142-144).

Respondent maintains a general safety program and has a safety director. The duties of the safety director include issuing safety rules to, and conducting safety sessions with, Respondent's employees. The safety sessions include discussions on trench and excavation safety. Employees are instructed to use a steel trench box, or if that is not possible, to either sheet, shore or slope trenches and excavations. Respondent leaves it to the judgment of its foremen to determine whether a trench or excavation slope is sufficient or adequate for safety purposes (T. 326, 338, 340, 341, 347-348, 353-357, 359, 416, 421-422, 424-428, 430, 437-438, 449, 450; Exhs. R-1, R-8, R-9, R-10(a), R-10(b)). Respondent's instructions to its employees as to excavation and trench safety are general instructions; no specific instructions are given (T. 361-363). Foreman Benasutti stated that he was instructed at one of Respondent's safety meetings, if sloping was used, to slope each of the four walls of a trench to a 45 degree angle (T. 453-454). Respondent through its safety director, superintendents and foreman knew of OSHA standards concerning the protective requirements for trench and excavation safety (T. 340, 347, 349-350, 358, 411, 412, 423, 429-430, 450-451).

## OPINION

On the morning of March 24, 1978, prior to the accident, the excavation in which three of Respondent's employees were working, was not shored, sheeted or protected by any other device against the hazard of an excavation collapse. Respondent maintains that its foreman, Benasutti, sloped the east and west sides of the excavation to a one-to-one ratio, or to an angle of repose of 45 degrees above the horizontal plane.

The credible evidence establishes that the excavation prior to the accident was about 25 to 30 feet long, about 17 feet wide at road level, about 17 feet deep, and about 6 feet wide at the bottom. The east and west sides of the excavation were sloped like a "V" or at an angle of repose greater than 45 degrees above the horizontal plane. (See 29 CFR § 1926.653(b) and Table P-1.) The soil consisted of loose sand with a little gravel and stone.

Foreman Benasutti's testimony at the hearing conflicted with a written and signed statement he made three days after the accident (see Exh. 16). At the hearing, Benasutti testified that the excavation was about 25 feet wide at road level, about 14 feet deep and five feet wide at the bottom.

Prior to the accident Benasutti and his crew laid a stretch of pipe in the excavation. The pipe was to be connected ten inches above the bottom of a manhole that was to be installed at a depth of 17 feet, 10 inches. Since the pipe was laid at its

proper grade, the excavation had to be dug to a depth of at least 17 feet. This negates Benasutti's statement at the hearing that the depth of the excavation was about 14 feet. The witnesses Maia and Ploska estimated the pre-accident depth of the excavation to be about 17 feet.

Benasutti stated at the hearing, that prior to the accident, the excavation's top at road level was two feet from the west side road curb and three feet from the east side road curb. This left five feet of the original 30-foot width of the roadway undisturbed. Officer Ornella's actual measurement of the remaining roadway after the accident, revealed that 10 feet of roadway remained from the east curb to the east side or wall of the excavation, and from other data, ascertained that four feet of the roadway prior to the accident, remained from the west road curb to the west side of the excavation. Since the roadway was 30 feet wide, simple arithmetic indicates that the excavation was about 16 feet wide - 30 feet of original road minus 14 feet of remaining road. These figures approximate what the witnesses Maia and Benasutti (written statement) stated the width of the excavation was before the accident. Ploska's testimony as to the excavation's width was equivocal but he adopted Ornellas' sketch (Exh. C-3) as closely resembling the excavation's dimensions as he observed them on the morning of March 24, 1978.

If Benasutti's pre-accident estimates given at the hearing, that the width of the excavation at road level was about 25 feet;

that the depth was 14 feet; and that the east and west sides or walls sloped to 45 degree angles or a one-to-one ratio, it follows that the east side and west sides of the excavation had to be sloped back horizontally 14 feet at road level to correspond with the excavation's depth. This would total 28 feet of removed roadway width out of the original 30 feet*, and would approximate a 45-degree angle slope for the east and west walls of the excavation. However, Benasutti's calculations at the hearing, failed to take into account the 5 or 6 feet of width at the bottom of the excavation which when added to the 28 feet caused by the 45-degree slopes, would indicate that the excavation was 33 feet wide at road level or 3 feet wider than the road from curb to curb. There is no evidence that the excavation extended beyond the curb area to the sidewalks. Neither Respondent nor its witness Benasutti made any such claim. For the reasons given above, Benasutti's hearing testimony as to the pre-accident dimensions of the excavation is given no credence.

The evidence establishes that the excavation soil was loose sand with a little gravel and stone. This type of soil according to Table P-1 (following 29 CFR § 1926.652(g)) required that the east and west walls of the excavation be sloped to a two-to-one ratio, or at an angle of repose of 26 degrees above the horizontal plane. Respondent neither claimed or established that the east and west sides of the excavation were sloped to an angle of

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*Benasutti also stated at the hearing, that the excavation was about 25 feet wide with 5 feet of roadway remaining - 2 feet on west side, 3 feet on east side.

26 degrees above the horizontal. Assuming arguendo, that the nature of the soil was such as to require a one-to-one ratio, or a slope of 45 degrees, the credible evidence establishes that the east and west side of the excavation were not sloped to a 45-degree angle from either the horizontal or vertical, but were sloped at an angle greater than 45 degrees from the horizontal.

Respondent inadequately sloped the excavation's east and west walls, and exposed its employee working in the excavation to a cave-in hazard. The hazard was serious in that it could, and did here, result in a fatal injury to an employee. Since Respondent places the responsibility upon its crew foreman to determine the adequacy of excavation and trench sloping, the foreman's knowledge is imputed to Respondent. Secretary of Labor v. F. H. Sparks of Maryland, Inc., 78 OSAHRC 13/C12, 6 BNA OSHC 1356, 1977-78 CCH OSHD para. 22,543 (Nos. 15472 and 15760, 1978). Respondent is responsible for the serious violation.

Respondent was charged with a willful violation of j29 CFR § 1926.651(c). "Willful" as defined by the Commission and a majority of Circuit Courts of Appeal is "an act done voluntarily with either intentional disregard of, or plain indifference to, the Act's requirements", or as an act "done knowingly and purposely" by someone who, "having a free will or choice, either intentionally disobeys the standard or recklessly disregards its requirements". Cedar Construction Company v. OSHRC, et al, No. 77-1538, slip op. pp 3-4 (D. C. Cir., October 20, 1978) and cases cited therein.

The evidence does not establish that Respondent either intentionally or recklessly disregarded or exhibited plain indifference to the Act's excavation and trenching safety requirements. Respondent is fully aware of the Act's requirements and has maintained a general safety program, and has held general safety instruction sessions with its employees. Respondent has provided steel trench boxes and other equipment for the purpose of protecting its employees engaged in excavation and trench work.

Unfortunately Respondent's general safety program and general instructions are inadequate to support its safety responsibilities under the Act. Respondent issues no specific enforced rules or instructions. Respondent gives no specific training to its employees concerning the specific or actual hazards that may be encountered at a jobsite, or the specific methods of guarding against the hazards. Respondent gives no detailed training to its crew foreman regarding sloping, or how to achieve proper sloping, and gives no training as to soil conditions, and other activities that they may in concert with soil conditions, create hazardous excavation conditions. Foreman Benasutti stated he attended a safety session held by Respondent where he was told, when sloping, to slope one-to-one or to an angle of 45 degrees. This instruction is woefully inadequate when considered with the myriad conditions that may exist at an excavation site,

and when considered with Respondent's delegation of safety responsibility for excavations and trenches to the judgment of its inadequately trained crew foremen.

These discrepancies and weaknesses in Respondent's safety program do not rise to the level of an intentional or reckless disregard, or a plain indifference to the Act's excavation and trench requirements. The evidence does not establish a willful violation of the standard herein but does establish a repeat violation.

Respondent's prior six citations which became final orders (Exhs. C-9 to C-14) reveal that in each of the six citations (four nonserious, two serious) there was one violation in which Respondent has either failed to shore, sheet or slope a trench, or failed to adequately sheet, shore or slope a trench. Although none of the previous six violations involved the specific standard here (29 CFR § 1926.651(c)), they were substantially similar i.e., failing to guard or adequately guard, trenches against cave-in hazards, to the violation and hazard here. Secretary of Labor v. Potlatch Corporation, OSHRC Docket No. 16183, decided January 22, 1979. The violation will be reduced to a repeat violation.

Based on all the circumstances of this case including the gravity and the repeat nature of the violation, and a consideration of all the statutory factors of section 17(j) of the Act, the proposed penalty of $10,000 is unreasonable and is reduced to $3,000.

## FINDINGS OF FACT

The credible evidence and the record as a whole establishes preponderant proof of the following specific findings of fact.

1. On March 24, 1978, pursuant to a contract with the County of Nassau, State of New York, Respondent was engaged in the construction of a lateral or center pipe sewer line.

2. On the morning of March 24, 1978, a work crew of Respondent consisting of foreman George Benasutti, three laborers, Maia, Vespa and Rodriguez, a backhoe operator and an oiler were working at, and in, an excavation located adjacent to 110 Columbia Drive, Jericho, Long Island. The excavation was being prepared for the installation of a manhole at a depth of 17 feet, 10 inches.

3. George Ploska, a Nassau County inspector, was assigned to Benasutti's work crew to monitor the work being done by the crew.

4. Benasutti, Vespa and Rodriguez were working in the excavation and had laid a stretch of pipe which was to be connected 10 inches above the bottom of the manhole which had not as yet, been installed.

5. The excavation was about 25 feet long, about 17 feet wide, about 17 feet deep and about 6 feet wide at the bottom. The east and west sides of the excavation were sloped at an angle greater than 45 degrees above the horizontal plane. The road bed from curb to curb (east to west) was 30 feet wide.

6. The soil of the excavation consisted of loose sand with some gravel, and required a sloping angle of at least 45 degrees above the horizontal plane.

7. The excavation was neither shored nor sheeted. A trench box, previously used, was not in use due to an interference from gas and water lines.

8. Between 8:30 and 9:00 a.m., on March 24, 1978, while Benasutti, Vespa and Rodriguez were in the excavation, the west wall collapsed trapping Rodriguez. The wall collapse caused the water main to break and flood the excavation, drowning Rodriguez. Benasutti and Vespa escaped without any mishap.

9. The excavation was inadequately sloped and did not comply with 29 CFR § 1926.651(c) and with the sloping requirements of Table P-1 (following 29 CFR § 1926.652(g)).

10. Respondent knew of the standard's requirements for excavation safety.

11. Respondent maintains a general safety program and holds general safety instruction sessions with its employees.

12. Respondent provides trench boxes and other materials to be used in protecting its employees against the hazards of excavation collapse.

13. Respondent does not maintain, or provide any specific and rigidly enforced safety instructions, rules, or training for its employees as to specific trench and excavation hazards they may encounter at a jobsite, and as to specific methods to be employed to protect against the hazards.

14. Respondent delegates to its crew foremen the responsibility to determine when a sloping method is to be used, and to determine, if sloping is used, whether it is adequate to protect Respondent's employees from the hazards of an excavation or trench collapse.

15. The evidence is insufficient to establish that Respondent either intentionally, or recklessly, or with plain indifference, disregarded OSHA's safety requirements for excavations and trenches.

16. Respondent on six prior occasions, received citations which became final orders, for violations substantially similar to the violation herein.

17. The prior six violations, four nonserious and two serious, involved situations where Respondent either failed to shore, sheet or slope a trench, or failed to adequately shore, sheet or slope a trench for the protection of its employees.

18. Respondent is responsible for the violation herein which was serious and repeat.

## CONCLUSIONS OF LAW

1. Respondent is, and at all times material herein was, engaged in a business affecting commerce within the meaning of section 3(5) of the Act (29 U.S.C. § 652(5)).

2. The Occupational Safety and Health Review Commission has jurisdiction over the subject matter and parties to this action.

3. On March 24, 1978, Respondent was not in willful violation of 29 CFR § 1926.651(c) but was in repeat violation of 29 CFR 1926.651(c) for failing to adequately slope an excavation in which its employees were working.

4. Under all the circumstances of this case with due consideration of all the statutory factors of section 17(j) of the Act, and of the repeat nature of the violation, the proposed penalty of $10,000 is unreasonable and is reduced to $3,000.

## O R D E R

Due deliberation having been had on the whole record, it is hereby

ORDERED that the citation for a willful violation of 29 CFR § 1926.651(c) is reduced to a repeat violation, and as reduced is affirmed, it is further

ORDERED that the proposed penalty of $10,000 is reduced to $3,000, and as reduced is affirmed.

Jerome C. DiTore

JEROME C. DITORE
JUDGE, OSHRC

Dated: March 12, 1979
New York, New York

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

January 29, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Better Baked Foods, Inc.

OSHRC DOCKET NO. 80-3689-A

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION AND REMAND

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR EMPLOYEES

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Judge, OSHRC
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FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 80-3689A |
| BETTER BAKED FOODS, INC., | : | |
| Respondent. | : | |
| | : | |

DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

An order of Chief Administrative Law Judge Paul A. Tenney is before the Commission for review pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act").

On January 15, 1981, Chief Judge Tenney issued an order to Respondent, Better Baked Foods, Inc., to show cause within 10 days why its notice of contest should not be dismissed for its failure to file proof that it posted its notice of contest, as required by Commission Rule 7, 29 C.F.R. § 2200.7. On March 11, 1981, Chief Judge Tenney vacated Respondent's notice of contest for Respondent's failure to respond to his January 15th order.

On April 9, 1981, Respondent's General Manager Ralph W. Wilson sent a telegram to the Commission stating that although Commission records indicate that Respondent's mail clerk signed a receipt for Chief Judge Tenney's January 15, 1981 order, the General Manager never saw the order,

and has searched his records and can find no trace of it. He stated the failure to respond to the order was inadvertant and requested reinstatement of Respondent's notice of contest. On April 10, 1981, Commissioner Cleary granted Respondent's request for review.

Dismissal for failure to comply with the Commission's procedural rules is a matter for the judge's sound exercise of discretion but a decision on the merits rather than on a procedural flaw is favored. See Asarco, Inc., El Paso Div., 80 OSAHRC 99/A3, 8 BNA OSHC 2156, 1980 CCH OSHD ¶ 24,838 (No. 79-6850, 1980). Respondent requests reinstatement and offers an explanation for its failure to comply with the Commission's procedural rules. In order to give the parties an opportunity to present any evidence and argument about the requested reinstatement and to permit the judge to rule on it, we set aside the Chief Judge's dismissal and remand for appropriate further proceedings. SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: JAN 29 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|---|
| SECRETARY OF LABOR | : | |
| Complainant | : | |
| v. | : | DOCKET NUMBER 80-3689 |
| BETTER BAKED FOODS, INC. | : | |
| Respondent | : | |

ORDER

There has been no response to the January 15, 1981, order to the extent in paragraph number 1 thereof it orders the employer to show cause why the notice of contest should not be dismissed for failure to comply with the Commission's rules concerning the service of the notice of contest upon affected employees or their authorized representative.

In light of the absence of a response the notice of contest is hereby vacated except to the extent that it puts in issue the contested proposed penalties. See Commission Rule 1(e) defining the term "affected employee". By the terms of this order there is no outstanding issue concerning the allegations of a hazard. Therefore, there is no prejudice to affected employees by continuing the contest as it relates to the proposed penalties.

The case shall be assigned for further proceedings.

PAUL A. TENNEY
Judge, OSHRC

Dated: March 11, 1981
Washington, D.C.

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

January 29, 1982

**IN REFERENCE TO SECRETARY OF LABOR v.**

HUBER, HUNT & NICHOLS, INC.

OSHRC DOCKET NO. 81-1366

**NOTICE IS HEREBY GIVEN TO THE FOLLOWING:**

OF ORDER

To wit: See Attached.

**FOR THE SECRETARY OF LABOR**

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**FOR EMPLOYEES**

-

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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>HUBER, HUNT & NICHOLS, INC.,<br>Respondent. | OSHRC Docket No. 81-1366 |

**ORDER**

The Commission conditionally approves the parties' stipulation and Settlement Agreement upon proof of service on the affected employees for at least 10 days, in accordance with Commission Rules 7 and 100. The parties are directed to submit the date and proof of service within 15 days of the receipt of this order.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Dated: JAN 29 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>HUBER, HUNT & NICHOLS, INC.,<br><br>Respondent. | OSHRC DOCKET NO. 81-1366S |

DECISION AND ORDER

Appearances: Richard L. Collier, Esq., of Dallas, Texas, for the complainant.

Carl E. Clubb, safety director, of Indianapolis, Indiana, for the Respondent.

BLYTHE, Judge:

STATEMENT OF THE CASE

The sole issue in this case is whether the respondent, Huber, Hunt & Nichols, Inc., a general contractor, can be held responsible for a subcontractor's safety violations in view of the stipulated fact that none of respondent's employees was exposed to the hazards. This issue subsumes the question of whether the Secretary of Labor ("the Secretary") is bound by a Field Operations Manual provision against issuing citations to employers whose employees are not exposed.

After an inspection of respondent's workplace at 9201 Pan American Freeway, N.E., Albuquerque, New Mexico, on April 29, 1981, by a compliance officer

of the Occupational Safety and Health Administration ("OSHA"), one citation was issued to respondent May 4, 1981, alleging serious violations of §5(a)(2) of the Occupational Safety and Health Act of 1970 ("the Act") and safety standards for scaffolds codified at 29 CFR 1926 §§500(e)(1)(ii) and 451(c)(12). The citation was amended May 18, 1981, to allege a serious violation of 29 CFR 1926.451(a)(4) instead of 29 CFR 1926.500(e)(1)(ii). The respondent timely filed notice of contest May 22, 1981, thus initiating this proceeding before the Occupational Safety and Health Review Commission ("the Commission") under §10(c) of the Act. Thereafter respondent filed a request for simplified proceedings [1] which the Secretary did not oppose.

The case came on regularly for hearing in Albuquerque on September 4, 1981. No affected employee or authorized representative of affected employees participated. Respondent submitted a posthearing brief; the Secretary did not.

## DISCUSSION AND OPINION

At the workplace here involved, respondent, as general contractor, was constructing a large building on a 65-acre site for the Signetics Corporation. One of its subcontractors was Bob Davis Masonry, Inc. ("Davis"), which erected and used the two scaffolds which are the subject of the citation. Item 1a, as amended, alleges that "[h]andrails were not provided for the open ends and areas" of one of a 15-foot-high scaffold, in violation of 29 CFR 1926.

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[1] See Rules 200-211 of the Commission's Rules of Procedure.

451(a)(4) [2], and item 1b alleges a violation of 29 CFR 1926.451(c)(12)[3] in that a scaffold 15 feet high and 48 feet long was not secured to the building.

In its posthearing brief, respondent does not contend that the violations did not exist. Rather, it contends, as previously stated, that it should not have been cited because its employees were not exposed to hazards created by its subcontractor.

The answer to this contention is found in Perini Corp., 78 OSAHRC 41/C5, 6 BNA OSHC 1609, 1978 CCH OSHD ¶22,772 (No. 13029, 1978), where the Commission held a general contractor responsible for safety violations it could prevent or abate by reason of its supervisory authority over a multi-employer workplace, regardless of whether it created the hazard or whether its own employees were exposed thereto.

Respondent points out that the Secretary's Field Operations Manual, CH. X(F)(1)(b)(1), provides:

> Citations under the general duty clause and under standards will be issued only against employers where their own employees are exposed or are potentially exposed to unsafe or unhealthful conditions.

(Emphasis supplied). The case law is well settled that the Field Operations Manual provides only guidelines for compliance officers and does not confer substantive rights on employers. Combustion Engineering, 77 OSAHRC 182/A2, 5 BNA OSHC 1943, 1979-78 CCH OSHD ¶22,241 (No. 76-2210, 1977).

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[2] This standard provides:

> Guardrails and toeboards shall be installed on all open sides and ends of platforms more than 10 feet above the ground or floor...[with exceptions not here pertinent].

[3] This standard provides, with regard to tube and coupler scaffolds:

> To prevent movement, the scaffold shall be secured to the building or structure at intervals not to exceed 30 feet horizontally and 26 feet vertically.

Respondent further contends that "the violative conditions were not obvious to the casual observer, and would require almost moment-to-moment observation if they were to be discovered." (Brief, P.5). The scaffold on which guardrails were absent was about 100 feet directly in front of respondent's office and had been in use by Davis' bricklayers two days (Tr.14-15). The scaffold involved in item 1b adjoined the other on one end but was around a corner of the building and had also been used two days by Davis' employees (Tr.32).

Compliance Officer Ambrose Claus testified that the scaffold in item 1a was in plain view (Tr.16) and that the lack of a tie to the building on the scaffold in item 1b could be detected from a distance of 20 or 25 feet by looking between the scaffold and the building (Tr.35).

In Knutson Construction Co., 76 OSAHRC 131/F3, 4 BNA OSHC 1759, 1976-77 CCH OSHD ¶21,185 (No. 765,1976), aff'd., 566 F.2d 596 (8th Cir. 1977), the Commission held a general contractor responsible for detecting the lack of guardrails on a scaffold but not for a hidden crack which caused a scaffold to collapse but which the respondent could not reasonably be expected to detect or prevent.

It is clear that under Knutson the respondent here should have been able to detect the absence of guardrails. The absence of a tie-in to the building on the other scaffold is a closer question because it was not so obvious. However, I find that it was not unreasonable to expect respondent to detect the lack of a tie to the building.

Respondent's general superintendent and safety officer, Dan Holmberg, made daily tours of the project and weekly safety inspections (Tr.92,100). He had

never noticed any safety violations on the scaffolds here involved but if he had he would have required Davis to correct them, he testified (Tr.102). However, he said he just looked for obvious violations (Tr.102). This is not sufficient.

Respondent points out (Brief, P.2) that Davis' subcontract (Exhibit R-1) required Davis to furnish all scaffolding and supervision in connection with the masonry work. The contract also required Davis to comply with OSHA regulations and made it "responsible for any costs, damages or penalties that Huber, Hunt & Nichols, Inc., may suffer or incur as a result of any violation of such regulations by the subcontractor, his agents or employees". However, it is well settled that an employer cannot by contract absolve itself of its responsibilities under the Act. Bill C. Carroll Co., Inc., 79 OSAHRC____, 7 BNA OSHC 1806, 1979 CCH OSHD ¶23,940 (No. 76-2748, 1979).

I find the respondent in violation of both standards as charged and that these violations were serious. The compliance officer testified without contradiction that the likely result of a 15-foot fall from these scaffolds would be serious fractures (Tr.21).

There remains the assessment of an appropriate penalty, the Secretary having proposed an aggregate penalty of $360.

Section 17(j) of the Act requires the Commission, in assessing penalties, to consider the gravity of the violation and the employer's size, good faith and history of previous violations. These factors need not be accorded equal weight, but the gravity is usually of greater significance than the others. Colonial Craft Reproductions, 72 OSAHRC 11/B10, 1 BNA OSHC 1063, 1971-73 CCH OSHD ¶15,277 (No. 881,1972). Elements to be considered in determining gravity include the number of employees exposed to the risk of injury,

duration of the exposure, precautions taken against injury, and the degree of probability of occurrence of an injury. National Realty & Construction Co.,Inc., 72 OSAHRC 9/A2, 1 BNA OSHC 1049, 1971-73 CCH OSHD ¶15,188 (No. 85, 1972) rev'd on other grounds, 489 F.2d 1257 (D.C. Cir., 1973).

After considering these criteria, I find the proposed penalty of $360 appropriate.

## FINDINGS OF FACT

1. The respondent, Huber, Hunt & Nichols, Inc., is a large construction company which on April 29, 1981, was a general contractor engaged in the construction of a large building for Signetics Corporation at Albuquerque, New Mexico. It was engaged in a business affecting commerce and had employees within the meaning of §3(5) of the Act.

2. Two 15-foot-high tube and coupler scaffolds on this workplace erected and used by a subcontractor, Bob Davis Masonry, Inc., were in violation of 29 CFR 1926 §§451(a)(4) and 451(c)(12) in that one lacked guardrails on the open ends and at places left open for offloading materials and the other, which was 48 feet long, was not tied to the building.

3. It was reasonable to expect the respondent, in its supervisory capacity as general contractor, to detect these violative conditions and require them to be corrected. These conditions had existed two days prior to the inspection. The lack of guardrails was readily apparent, and the lack of a tie to the building could have been detected by a reasonably thorough safety inspection.

4. There was a substantial probability that death or serious physical injury could result from these vioaltions.

5. A penalty of $360 is appropriate.

## CONCLUSIONS OF LAW

1. The Commission has jurisdiction of the parties and of the subject matter of this proceeding.

2. On April 29, 1981, the respondent was in serious vioaltion of 29 CFR 1926 §§451(a)(4) and 451(c)(12).

## ORDER

It is ORDERED that:

1. Item 1a of citation 1, for serious violation of 29 CFR 1926.451(a)(4), is AFFIRMED.

2. Item 1b of citation 1, for serious violation of 29 CFR 1926.451(c)(12), is AFFIRMED.

3. An aggregate penalty of $360 is ASSESSED.

DEE C. BLYTHE
Administrative Law Judge

Date: November 9, 1981

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|---|---|---|---|
| 80-0888 | SHAWNEE CONSTRUCTION, INCORPORATED | 1/29/82 | 6/A2 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
SUITE 1718, PRUDENTIAL PLAZA
1050 SEVENTEENTH STREET
DENVER, COLORADO 80265
(303) 837-2281

# NOTICE OF DECISION

Secretary of Labor v. Shawnee Construction, Incorporated
OSHRC Docket No. 80-0888

1. Enclosed is a copy of my decision. It will be filed with the Commission on December 30, 1981, and will become the final order of the Commission on January 29, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

Chief Review Counsel
Occupational Safety and Health Review Commission
1825 K Street, N.W., Suite 601
Washington, D.C.. 20006

Any Petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is January 29, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Quentin P. McColgin

Quentin P. McColgin
Judge, OSHRC

Date: December 10, 1981

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>SHAWNEE CONSTRUCTION, INCORPORATED,<br><br>Respondent. | OSHRC DOCKET NO. 80-0888 |

APPEARANCES:

Jerry R. Atencio, Esq., of Denver, Colorado for Complainant,

Alan A. Armour, Esq., of Denver, Colorado for Respondent.

DECISION AND ORDER

Quentin P. McColgin, Administrative Law Judge: This is a proceeding under Section 10 of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. §659(c), involving alleged violations of §5(a) of the Act, 29 U.S.C. §654(a)(2).[1/]

This matter arose out of an inspection of respondent's worksite that took place on January 17, 1980 in Colorado Springs, Colorado. As a result of that inspection, respondent was issued two citations. The first, Citation No. 1, charges respondent with three serious violations of the trenching and excavation standards for which a single penalty of $360.00 is proposed. The other citation, Citation No. 2, alleges a single non-serious violation for which no penalty was proposed.

1/ "Each employer- shall comply with occupational safety and health standards promulgated under this chapter."

The citations were duly contested. Thereafter, a complaint and answer were filed. Except for admitting that respondent is a corporation, that two citations were issued to it and that respondent filed a notice of contest, respondent denies virtually all the remaining allegations of the complaint. Additionally, respondent's answer contains a number of express denials including denials that it is engaged in a business affecting commerce and that it is an employer within the meaning of the Act. Additionally, respondent alleges that it contested all the citations that were issued to it and did not limit its notice of contest to Citation No. 1 as is alleged in the complaint. Respondent's answer does not raise any affirmative defenses; however, such answer was amended at the conclusion of the hearing to raise the affirmative defense of impossibility. (Tr. 129)[2/]

A hearing was held in this matter on June 23, 1980 at Denver, Colorado. No appearance was entered on behalf of the affected employees or any of them. During the course of the hearing, complainant announced that he would not pursue the violation alleged in Citation No. 2. Thus, Citation No. 2 is deemed to have been withdrawn.

At the conclusion of the evidence, both parties waived closing argument and indicated that they would file briefs. Respondent filed Proposed Findings of Fact and a Brief in support thereof: complainant did not. Having heard and observed the witnesses and having fully considered all the evidence as well as the pleadings, the arguments of counsel and respondent's post-hearing submissions, the undersigned hereby makes the findings, conclusions and order set forth below. To the extent

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2/ The following abbreviations shall be used in this decision:

| | | |
|---|---|---|
| Tr. | - | Transcript |
| C- | - | Complainant's Exhibit |
| RB | - | Respondent's Brief |

that proposed findings of fact have not been adopted in this decision, they are rejected as being either inaccurate or unnecessary to the disposition of this case. To the extent that there are any pending motions which have not been expressly granted herein, they are denied.

## Findings Of Fact

1. Respondent is a corporation which is headquartered in Kansas City, Kansas. (Tr. 76) It has an office in Monument, Colorado (Tr. 78), and does business in the states of Kansas and Colorado. (Tr. 76)

2. On January 17, 1980, respondent was engaged in the installation of a sewer line at the intersection of Circle Drive and LeLaray Street in Colorado Springs, Colorado. (Tr. 7) Six employees of respondent were engaged in such project including David C. Davis, respondent's foreman who was in charge of that project. (Tr. 8, 58 & 89)

3. In order to protect its employees, respondent was using a trench box in connection with the installation of the sewer line. (Tr. 93) However, due to the presence of an intersecting gas line, it was impossible to use the trench box to install the last two sections of pipe which are depicted in C-2. (Tr. 20, 93)

4. The gas line which intersected the sewer pipe was approximately ten feet from the end of the sewer pipe. (Tr. 57) Such line was located from three to four feet below ground level. (Tr. 53)

5. Respondent had been installing sewer pipe which was sixty inches in diameter measured from the interior. (Tr. 125) The thickness of the sewer pipe walls was six inches. (Tr. 125) However, the diameter of the pipe had changed and the diameter of the pipe depicted in C-2 was fifty-four inches. (Tr. 126)

6. To install the sewer pipe, respondent employed the construction technique of excavating the trench with a backhoe (Tr. 92) and then lowering the pipe

sections into the trench by means of a cable attached to the backhoe which cable was wrapped around the pipe section. (Tr. 93) The cable had a slip hook on the end which would be released by an individual after its placement. (Tr. 94)

7. The aforesaid construction technique contemplated the employment of a person inside the pipe who, aided with a laser beam, was responsible for getting the pipe sections in line and grade. (Tr. 103) The duties of the employee inside the pipe did not require him to be exposed to the open trench. (Tr. 45) He exited from the other end of the trench. (Tr. 45)

8. While approaching the trench and before initiating the opening conference, compliance officer Nellor observed three of respondent's employees in the trench. (Tr. 9, 12, 14, 16, 17 & 45) Two of them were standing on the pipe depicted in C-2. (Tr. 9, 14-17) The third, was standing on the ground outside the end of the pipe depicted in C-2. (Tr. 12, 14, C-1)

9. The trench was eleven feet deep and approximately twelve feet wide and seventeen feet long. (Tr. 9)

10. The walls of the trench including the wall which constituted the end of the trench depicted in C-2 were not sloped but were, instead, vertical. (Tr. 20, 22 & C-2)

11. The distance from the section of pipe depicted in C-2 to the vertical wall which comprised the trench end was from twelve inches to eighteen inches. (Tr. 102)

12. Next to the trench was a spoil pile which was approximately one foot from the edge of the trench. (Tr. 10-11, 13, 26 & C-1)

13. The soil in the immediate area of the trench end depicted in C-2 was virgin soil. (Tr. 124-125) The lower eight feet of the eleven foot deep trench consisted of hard shale. (Tr. 104, 123) Above the shale was two feet of hard compacted clay (Tr. 104) above which was roadbase topped with asphalt. (Tr. 104, 110)

14. The only means of providing support for the trench walls other than by the use of a trench box was by the use of trench jacks. (Tr. 115) However, trench jacks could not be used when the pipe was in the trench. (Tr. 115-116)

15. During the inspection, the walls of the trench were subjected to vibrations from the idling backhoe which was situated next to the trench, a heavy vibration compactor that was working nearby, a hand-operated power tamper that was also working nearby and automobile traffic emanating from the road that was adjacent to the end of the trench. (Tr. 25, 27, 119-121; C-1, 2 & 3)

16. The hazard presented by the location of the spoil pile within two feet of the trench edge, the absence of sloping of the sides of the trench and the absence of additional precautions having been taken by way of shoring the walls of the trench is a cave-in. (Tr. 48).

17. The two employees who were on top of the sewer pipes were not exposed to danger by reason of respondent's failure to comply with the standards set forth in Citation No. 1. (Tr. 45)

18. The employee who was observed standing outside the end of the sewer pipe depicted in C-2 was exposed to the hazard of a cave-in of the walls of the trench. (Tr. 43)

## Conclusions of Law

1. Respondent, at all times material hereto, was engaged in a business affecting commerce within the meaning of §3(5) of the Act, 29 U.S.C. §625(5).

2. Respondent is subject to the requirements of the Act and the standards promulgated thereunder.

3. The Commission has jurisdiction of the parties and the subject matter of this proceeding.

4. Respondent violated 29 C.F.R. §1926.652(c) in that it failed to appropriately slope or otherwise provide appropriate protection for the sides of its trench.

5. Respondent violated 29 C.F.R. §1926.652(e) in that it failed to provide additional protection by way of shoring or bracing for the sides of its trench which was subjected to vibrations emanating from the operations of machinery and from highway traffic.

6. Respondent violated 29 C.F.R. §1926.651(i)(1) in that it failed to set back at least two feet from the edge of its trench, the spoil pile which was adjacent to one of the trench sides.

7. The aforesaid violations were non-serious in nature.

8. Taking into consideration the short duration of exposure to the conditions present in respondent's trench, the limited number of respondent's employees who were exposed to such hazard as well as respondent's manifest good faith effort to provide a safe working place for its employees, it would be inappropriate to assess a penalty for the aforesaid non-serious violations.

## Discussion

Respondent vigorously contends that the Commission is without subject matter jurisdiction in this case. The substantive argument advanced in support of this contention is that the evidence does not establish that respondent is engaged in a business affecting commerce. (RB at 6)

The evidence establishes that respondent's corporate office was in Kansas City, Kansas, (Tr. 76) that it "...had a job going in Colorado and also in Kansas" (Tr. 77) and that it had an office in Monument, Colorado. (Tr. 79) It is clear from the foregoing that respondent conducts business in more than one state. This alone is sufficient to establish that it is engaged in business affecting commerce and is subject to the jurisdiction of the Act. Shorecrest Concrete Contractors, 75 OSAHRC ___, 3 BNA OSHC 1739, 1975-76 CCH OSHD ¶20,166 (No. 3249, 1979).

In its brief, respondent takes vigorous exception to the ruling by the undersigned which permitted complainant to reopen his case-in-chief and present the evidence upon which the finding of commerce is based. As respondent correctly points out in its brief, there was no evidence offered during the case-in-chief upon which a finding of commerce could be based. Immediately after complainant rested, complainant's counsel was asked to be prepared to address the issue of commerce when the hearing resumed. Immediately thereafter, respondent formally moved to dismiss for failure to prove commerce. After the ensuing recess, complainant moved to reopen the case-in-chief to present additional evidence going to the issue of commerce. This request was granted notwithstanding respondent's strenuous objection. The stated basis for granting the request was that respondent had not shown any prejudice that would result to it by permitting the reopening of the case-in-chief.

Respondent argues that permitting complainant to reopen his case-in-chief was improper and constituted error. (RB at 4) To the extent that there is a rationale for respondent's stated position, such rationale appears to be on page 3 of its brief. There it is stated:

> "...although there may be some additional latitude permitted in a hearing before an administrative law judge in cases of this nature, we submit it is not for the Court to become a participant in this proceeding, but is rather for the Court to rule upon objections, motions and on the basis of the evidence presented to make findings of fact and conclusions of law. If a Court intervenes in proceedings to permit a party to cure a defect in its proof or defense, as the case may be, this will most certainly interfere with the adversary process which is contemplated by the Occupational Safety and Health Act, and for that matter, all other litigated matters."

This view of the responsibilities of a Commission judge is essentially the "game theory" of administrative adjudication which was rejected in the single case

respondent cites in support of its position. Brennan v. Occupational Safety and Health Review Commission, 492 F.2d 1027 (2d Cir. 1974). Indeed, respondent's view conflicts with the role of a judge envisioned by Commission Rule 26, 29 C.F.R. §2200.66, which provides in pertinent part:

> "It shall be the duty of the Judge to conduct a fair and impartial hearing, to assure that the facts are fully elicited, to adjudicate all the issues and avoid delay..." (Emphasis added)

Thus, the undersigned's action in suggesting and permitting the reopening of the case-in-chief appears to be fully consistent with the responsibilities of a Commission judge; hence, such action was proper. Since the evidence elicited during the reopened case-in-chief established that respondent was engaged in a business affecting commerce, respondent's pending motion to dismiss which was taken under advisement is hereby denied.

Turning now to the substantive allegations, respondent is charged with having violated three of the trenching and excavation standards.[3/] The first charge, Citation No. 1, Item No. 1a, alleges that respondent violated 29 C.F.R. §1926.652(c) which standard provides:

> Sides of trenches in hard or compact soil, including embankments, shall be shored or otherwise supported when the trench is more than five feet in depth and eight feet or more in length. In lieu of shoring the sides of the trench above the 5-foot level may be sloped to preclude collapse, but shall not be steeper than a 1-foot rise to each 1/2 foot horizontal...

To establish a prima facie showing of noncompliance with this standard, the Secretary must show that the trench at issue is at least five foot deep and at least five foot long, that the trench is neither shored or sloped appropriately, and a significant portion of the trench wall is composed of hard or compact soil. A respondent

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3/ The specific allegations, as set forth in Citation No. 1, Items 1a-1c are appended hereto as Appendix A.

may then rebut this prima facie showing by proving that its trench was dug entirely in solid rock, shale, or cemented sand or gravel, which are not required to be shored or sloped. CCI, Inc., 80 OSAHRC 127/D4, 9 BNA OSHC 1169, 1981 CCH OSHD ¶25,091 (No. 76-1228, 1980), appeal filed No. 81-1218 (10th Cir. February 25, 1981).

Here, it is undisputed that the trench was at least five foot deep and at least eight feet long and that it was neither shored or appropriately sloped. Furthermore, the testimony of respondent's foreman establishes that two feet of the trench wall is composed of hard compacted clay topsoil. (Tr. 104) Thus, complainant has established a prima facie case of noncompliance with the cited standard.

Respondent, nevertheless, argues that the materials comprising the trench walls are of solid bedrock and are not required to be shored or sloped. This argument is essentially an argument that the cited standard is inapplicable. This argument relies upon the implicit exemption from the sloping or shoring requirements of 29 C.F.R. §1926.652(c) contemplated under Table P-1 which exemption is recognized by the Commission in its decision in CCI, Inc., supra. This table which is set forth below 29 C.F.R. §1926.652(g) permits a 90° sloping of the sides of excavations when such sides are comprised of "solid rock, shale or cemented sand or gravel."

Here, only eight of the eleven foot deep trench was comprised of the enumerated categories of materials exempted from the sloping requirements. The other three feet were comprised of a two foot layer of hard compacted clay and the remaining one foot was comprised of an unspecified portion of roadbed topped by asphalt.

Thus, the materials comprising the trench walls were heterogenous. As such, the determination of the applicable standard is controlled by the principle that a trench consisting of soils of differing strengths is only as stable as its weakest component. CCI, Inc., supra. Here, a significant portion of the trench walls was

comprised of soils which are hard or compact. Since these materials are obviously less stable than solid rock or shale, the cited standard, 29 C.F.R. §1926.652(c), applies.

The argument could be made that the cited standard is inapplicable because here, the less stable soil which was less than three foot in depth rests upon what is, in essence, a ledge of solid rock or shale. There is a certain logic in this argument in that it would seem less likely that a cave-in would occur under these circumstances than if the layer of less stable material were lower in the trench walls. Nevertheless, the Commission's holding in W.N. Couch Construction Co., 76 OSHARC 44/A2, 4 BNA OSHC 1054, 1975-76 CCH OSHD ¶20,574 (No. 7370, 1976) makes clear that even if the layer of less stable soil comprising a trench wall is located on top of other materials which are, by themselves, exempted from the sloping requirements, the prescribed protective measures are, nevertheless, required so long as the layer of less stable materials is not insignificant.[4/] In this case, the two foot layer of compacted clay topsoil coupled with the layer of roadbed which was less than one foot in depth cannot be said to be so shallow as to be insignificant. Thus, under the authority of W.N. Couch, supra., the undersigned is constrained to find that the cited standard is applicable.

The undisputed evidence establishes that the respondent failed to comply with 29 C.F.R. §1926.652(e) as alleged in the second charge (Item No. 1b). This standard provides:

> Additional precautions by way of shoring and bracing shall be taken to prevent sides or cave-ins when excavations or trenches are made in locations...where excavations are subjected to vibrations from railroad or highway traffic, the operation of machinery, or any other source.

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4/ In that case, there was a 4-1/2 foot layer of soft or unstable soil in an eleven foot deep trench which layer was located within 5 feet of ground level.

Thus, it is found that the cited standard is applicable to respondent's operation and that respondent failed to comply with such standard.

Likewise, the evidence establishes respondent's failure to comply with 29 C.F.R. $1926.651(i)(1) as alleged in the third charge (Item No. 1c). This standard provides:

> In excavations which employees may be required to enter, excavated or other materials shall be effectively stored and retained at least 2 feet or more from the edge of the excavation.

The evidence pertaining to the location of the spoil pile is primarily the testimony of the compliance officer. He testified that during his inspection, he observed the spoil pile "approximately a foot" from the edge of the trench. (Tr. 26) He further testified that respondent's foreman "agreed that the spoil pile was too close." Respondent's own foreman, did not refute this testimony. While testifying that they "had been keeping a 24-inch recess...from the edge of the trench to the spoil..." He conceded "we perhaps might have got some closer than that." (Tr. 106)

This evidence is sufficient to establish respondent's failure to comply with the cited standard.

Respondent's non-compliance with all three of the cited standards having been established, the next issue is whether respondent's employees were exposed to the hazard created by such non-compliance. Respondent argues that none of its employees were exposed to the hazard - a cave-in - despite the evidence that three of respondent's employees were observed in the trench during the January 17, 1980 inspection.

In support of this argument, respondent relies upon the concession made by the compliance officer during his testimony that two of the employees who were working on top of the sewage pipe depicted in C-2 were not exposed to any danger. As to the other employee who was working inside the pipe, respondent first argues that he was not outside the pipe. Secondly, respondent relies upon the testimony

of the compliance officer that while in the pipe, this employee was not exposed to any danger.

In view of these concessions by the compliance officer, it is found that the two employees observed on top of the pipe were not exposed to the hazard of a cave-in. It is further found that to the extent that the employee was inside the pipe, he was not exposed to the hazard the standards were designed to prevent. Nevertheless, it is found that this third employee was outside the pipe, albeit briefly; hence, he was exposed to the hazard the standards were designed to prevent.

Respondent argues that there is a conflict in the evidence concerning whether the employee was outside or inside the pipe. This conflict, respondent argues, should be resolved in its favor. However, the evidence is not interpreted as conflicting on this issue.

To the extent that the evidence can be construed as conflicting on this issue, such conflict arises out of the following testimony by compliance officer Nellor and respondent's foreman, Mr. Davis:

> Mr. Nellor: A. ...I observed three employees; two of them were working on top of the pipe section in the trench, one was standing outside the pipe section who was supposed to be in the pipe section, he was outside when I arrived. (Tr. 9)
>
> Mr. Davis: A. When I walked over and was talking with Mr. Nellor, there was an employee that reached out of the pipe and looked up at us like that, and ducked back inside. (Tr. 102-103)

The above-quoted testimony can be construed as conflicting only if it is assumed that the two witnesses observed the same event. However, despite the fact that both witnesses may have observed the same employee duck back into the pipe section (Tr. 16-17, 45), it does not app ar that they witnessed the same event. To the contrary, the record shows that these were sequential events.

The compliance officer testified that his observation of the employees standing outside the pipe section was made "when [he] arrived." It appears that this observation was made before he met with respondent's foreman and identified himself. (Tr. 16, 45) Conversely, the observation reported by respondent's foreman took place while respondent's foreman "was talking to Mr. Nellor." Thus, it is found that respondent's employee was observed standing on the bottom of the trench between the pipe section depicted in C-2 and the vertical wall which constituted the end of the trench. It is further found that at this location, respondent's employees were exposed to the hazard which each of the three cited standards were designed to prevent.

The final consideration in determining whether prima facie cases of violations have been established is whether respondent had actual or constructive knowledge of the violative conditions. Through its foreman who supervised the construction of the trench, respondent was clearly aware that the trench did not comply with the cited standards. Similarly, it was also aware that its employee who worked inside the pipe section had access to the hazardous area, namely, the 12 to 18 inches of open space between the end of the pipe and the vertical wall which constituted the end of the trench. Merely by stepping out of the pipe onto the bottom of the trench, respondent's employee would be exposed to the hazard of a cave-in. Thus, prima facie cases of violations of the cited standards has been established.

Respondent suggests in its brief the possibility of the affirmative defense of impossibility of performance. (RB at 9) However, the facts relied upon in support of this defense apply to only the first of the three charges involved here. Therefore, the violation of the standards specified in the second and third charges are found to have been established.

To establish the affirmative defense of impossibility of performance it must be proven that (1) compliance with the requirements of the cited standards would

preclude performance of the required work and (2) alternative means of employee protection were unavailable. N.J. Lee Construction Co., 79 OSAHRC 12/A2, 7 BNA OSHC 1140, 1979 CCH OSHD ¶23,330 (No. 15094, 1979).

The evidence supports the finding that respondent could not have sloped one side of the trench due to the necessity to maintain traffic on the road which abutted that side of the trench. Nevertheless, respondent has failed to prove that alternative means of employee protection were unavailable. Respondent concedes in its brief that it could have sloped one of the sides of the trench. (Tr. 9) Such concession is fatal to establishing the asserted defense. It is not enough to show that the alternative means of protection which would have provided the full measure of protection contemplated by the standard was unavailable, it must also be shown that the alternatives which would have provided some measure of protection were either unavailable or were taken. Hurlock Roofing Co., 79 OSAHRC 93/A2, 7 BNA OSHC 1867, 1979 CCH OSHD ¶24,006 (No. 14907, 1979).

By sloping just one side of the trench, respondent would have taken a measure contemplated by the standard which would have prevented that side of the trench from caving in. While that would not have provided the full measure of protection contemplated by the standard it would, nevertheless, provide a significant measure of protection. Thus, respondent has failed to establish the asserted defense of impossibility of performance and respondent is found to have violated 29 C.F.R. §1926.652(c) as charged.

The next issue to be considered is whether the violations established by this record are properly classified as serious. By statute, violations are deemed serious "...if there is a substantial probability that death or serious physical harm could result..." Section 17(k) of the Act, 29 U.S.C. §666(j). Here, the relevant consideration is the probable result of an accident not whether an accident is probable.

Niagara Mohawk Power Corp., 79 OSAHRC 36/A2, 7 BNA OSHC 1447, 1979 CCH OSHD ¶23,670 (No. 76-2414, 1979). Thus, in determining whether the violations involved are serious, the focus is upon the predicted severity of the injury should an accident occur as a result of such violations.

In this case, there is insufficient evidence to establish that death or serious physical harm is likely to occur in the event of an accident attributable to the violations of the cited standards. Indeed, the particular facts and circumstances of this case strongly support the conclusion that if there was a cave-in of the sides of the trench the resulting injuries sustained would be minor rather than major.

Here the hazardous area is limited to the end of the trench depicted in C-2 where the third employee was exposed to the hazardous conditions. This employee is surrounded on three sides by vertical walls that are not sloped or shored and no additional protection was provided. On the remaining side of this employee is the sewer pipe which has an outer diameter of 66 inches. The distance between the end of the sewer pipe and the vertical wall which comprises the end of the trench is from twelve inches to eighteen inches.

If either side of the trench were to cave in, the width of the materials which could be expected to fall beyond the end pipe section would not exceed the distance between the end of the pipe and the end of the trench i.e., from twelve inches to eighteen inches. Further, the depth of the materials which could be expected to cave-in would be limited to the three foot layer of materials immediately below ground level which are not solid rock or clay. Given these circumstances, it is difficult to conceive that in the event of a cave-in such a limited amount of materials could cause the employee located at the bottom and middle of the trench serious physical harm.

It could be argued that the major hazard presented by the conditions described above is the possibility of a cave-in of the vertical wall which constitutes the trench end. Nevertheless, the failure to slope, shore or otherwise protect against the hazard presented by such vertical wall is not found to constitute a violation of any of the cited standards for the reason that the theory of the case, as presented and defended, did not encompass any such hazard.

In view of the foregoing, each of the three violations are found to be non-serious in nature. It is further found that it would be inappropriate to assess a penalty for such violations.

ORDER

Based upon the foregoing, it is HEREBY ORDERED that:

1. Citation No. 1, Item Nos. 1a, b & c are AFFIRMED, as non-serious violations, and no penalty is assessed.

2. Citation No. 2, Item No. 1 is VACATED.

Quentin P. McColgin
Judge, OSHRC

Dated: December 30, 1981

## APPENDIX A

1a
29 CFR 1926.652(c): The side(s) of the trench(es) in hard or compact soil, including embankment(s), were not shored or otherwise supported when the trench was more than 5 feet in depth and more than 8 feet in length:

> The trench located at the Corner of Circle Drive and LeLaray Street, Colorado Springs, Colorado, which was crossing Circle Drive to the east.

1b
29 CFR 1926.652(e): Additional precautions by way of shoring or bracing were not taken to prevent slides or cave-ins where trench(es) were made adjacent to back-filled excavations, or where excavations were subjected to vibrations from railroads or highway traffic, operation of machinery, or any other source(s):

> The trench located at the Corner of Circle Drive and LeLaray Street which has 2 lanes of traffic traveling north and south creating a source of vibration.

1c
29 CFR 1926.651(i)(1): Excavated or other material was not effectively stored or retained at least 2 feet or more from the edge of the excavation(s) which employee(s) were required to enter:

> The trench located at the corner of Circle Drive and LeLaray Street which had excavated material stored on the north side and at the edge.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

TABLE OF CITATIONS

| OSHRC Docket No. | OSAHRC Reports* | BNA OSHC | CCH OSHD |
|---|---|---|---|
| 1 | 73/15/A2 (2/1318) | 1:1219 | 15,047, 15,687 |
| 2 | 72/1/B5 (1/28) | | 16,092 |
| 3 | 72/2/A2 (1/99) | 1:1007 | 15,025, 15,026, 15,041 |
| 4 | 72/1/B10 (1/33) | 1:1001 | 15,032 |
| 5 | 73/30/A2 (3/1077) | 1:1250 | 15,052 |
| 6 | 73/38/F2 (4/607) | 1:1309 | 15,056, 16,538 |
| 7 | 71/1/A3 (1/1) | 1:3135 | 16,288 |
| 8 | 72/2/B4 (1/115) | 1:3135 | 15,031 |
| 9 (D) | 72/2/F9 (1/176) | 1:1030 | 15,027, 15,048, 15,049, 18,354 |
| 10 (D) | 73/37/A2, 76/5/A2 (4/445) | 1:1256, 3:1992 | 15,043, 16,456, 18,229, 20,345 |
| 11 | 72/1/D11 (1/62) | 1:1005 | 15,035 |
| 12 | 72/5/B8 (1/386) | 1:1024 | 15,039 |
| 13 | | | 16,620 |
| 14 (D) | 73/39/B5 (4/642) | 1:1305 | 15,080, 16,520 |
| 15 | 72/10/C3 (1/844) | 1:1046 | 15,042, 15,189 |
| 16 | 72/3/B3 (1/208) | | 16,093 |
| 17 | 72/5/B11 (1/389) | 1:3043 | 15,072, 16,094 |
| 18 (D) | 73/2/B6 (2/275) | 1:1115 | 15,294, 15,403 |
| 19 | 73/2/E10 (2/321) | 1:1110 | 15,291, 15,417 |
| 20 | | | 15,838 |
| 21 | 72/1/A10 (1/19) | 1:3142 | 15,059 |
| 22 (D) | 73/3/D6 (2/400) | 1:1124 | 15,062, 15,466 |
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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
55 EAST MONROE STREET, ROOM 1250
CHICAGO, ILLINOIS 60603
(312) 353-2944

NOTICE OF DECISION

SECRETARY v. FEDERAL CLEARING DIE CASTING COMPANY.

OSHRC DOCKET NO. 80-2903

1. Enclosed herewith is my decision in the above-entitled case. It is being filed on this date and will become the final order of the Commission pursuant to 29 U.S.C. §661(j) on January 4, 1982 unless a Member of the Commission directs that it be reviewed.

2. Parties will not receive any further communication from the Commission on this case unless review is directed by a Member of the Commission. In that case each party will be notified and given an opportunity to submit a brief to the Commission Members prior to their final disposition of the case.

Ralph B. Maxwell
Judge, OSHRC

Enclosure

Date: January 4, 1982

OSHRC FORM NO. 99
DEC 74

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 80-2903 |
| FEDERAL CLEARING DIE CASTING COMPANY, a Corporation, | : | |
| Respondent. | : | |

ORDER OF DISMISSAL

The warrant upon which the inspection in this case is based was challenged by respondent. On July 29, 1981, the U. S. Court of Appeals for the Seventh Circuit ruled the inspection warrant was invalid, having been issued without probable cause. The complainant's petition for rehearing was denied December 3, 1981.

On December 9, 1981, respondent filed motions for suppression of all evidence obtained pursuant to the warrant, and for dismissal of these proceedings.

No response to these motions has been filed.

Now, therefore, for good cause shown, the motions of the respondent are granted, and it is

ORDERED, that all evidence obtained through the inspection warrant herein be suppressed.

FURTHER ORDERED, that these proceedings be, and the same are hereby in all things dismissed.

Ralph B. Maxwell
Judge, OSHRC

Dated: January 4, 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 240

ATLANTA, GEORGIA 30309

# NOTICE OF DECISION

Secretary v. Capital City Excavating Company, Inc.

OSHRC Docket No. 81-1423

1. Enclosed is a copy of my decision. It will be filed with the Commission on January 6, 1982, and will become the final order of the Commission on February 5, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N. W., Suite 601
   Washington, D. C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is February 5, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

CECIL L. CUTLER, JR.
Judge

Date: December 17, 1981

OSHRC FORM 97

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 230
ATLANTA, GEORGIA 30309
(404) 881-4197

| | | |
|---|---|---|
| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 81-1423 |
| | ) | |
| CAPITAL CITY EXCAVATING COMPANY, INC., | ) | |
| | ) | |
| Respondent. | ) | |

APPEARANCES:

Sandra B. Kramer, Esquire, U. S. Department of Labor, Cleveland, Ohio, on behalf of the complainant.

Steven D. Rowe, Esquire, Kemp, Schaeffer & Rowe, Columbus, Ohio, on behalf of the respondent.

## DECISION AND ORDER

Following an inspection of its work site in Zanesville, Ohio, on May 5, 1981, Capital City Excavating Company, Inc., (hereinafter Capital City) was issued a willful citation pursuant to Section 9(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, et seq., hereinafter the "Act"). The Secretary proposes a $5,600 penalty for the alleged violation.

A hearing was held in this cause on October 15, 1981, in Columbus, Ohio. No affected employee or authorized employee representative elected to participate as a party.

There is no issue as to jurisdiction in that respondent, in its answer and at the hearing, conceded it was an employer engaged in a business affecting commerce within the meaning of the Act.

Initially, Capital City was issued a citation alleging a failure to comply with the provisions of 29 C.F.R. § 1926.652(a)[1/] as follows:

> "Soil bank(s) which were more than 5 feet high, and where employee(s) may be exposed to moving ground or cave-ins, were not shored, laid back to a stable slope, or protected by some other equivalent means:
>
> a) Two men were working in a trench that was not adequately sloped or otherwise protected from a cave-in at the Garden Road area of the Falls Township sewer project."

In his complaint, the Secretary moved to amend the citation to allege the correct legal name of respondent to "Capital City Excavating Company, Inc." It was shown as "Capital City Excavating and Company." No objection was lodged at the hearing at this clerical amendment. The motion, accordingly, is granted.

Respondent, however, did object to a motion to amend the complaint to allege a violation of 29 C.F.R. § 1926.652(b)[2/] as follows:

> "Sides of trenches in unstable or soft material, 5 feet or more in depth, were not shored, sheeted, braced, sloped or otherwise supported by means of sufficient strength to protect the employees working within them.
>
> a) Two men were working in a trench that was not adequately sloped or otherwise protected from a cave-in at the Garden Road area of the Falls Township sewer project."

---

[1/] This provision states:

Banks more than 5 feet high shall be shored, laid back to a stable slope, or some other equivalent means of protection shall be provided where employees may be exposed to moving ground or cave-ins. Refer to Table P-1 as a guide in sloping of banks. Trenches less than 5 feet in depth shall also be effectively protected when examination of the ground indicates hazardous ground movement may be expected.

[2/] This states:

Sides of trenches in unstable or soft material, 5 feet or more in depth, shall be shored, sheeted, braced sloped, or otherwise supported by means of sufficient strength to protect the employees working within them. See Tables P-1, P-2 (following paragraph (g) of this section).

The Commission has consistently approved the granting of a prehearing amendment where there is no showing by the party objecting to the amendment that it would be prejudiced in the preparation or presentation of the case. Miller Brewing Company, 80 OSAHRC 5/A2, 7 BNA 2155, 1980 CCH OSHD ¶ 24,168 (No. 78-3216, Jan. 22, 1980). Further, amendments well before the hearing rarely result in any prejudice. Miller, supra.

In this case, the complaint was served on respondent on July 10, 1981, and the hearing was held over three months later.

Respondent, however, argues that, because over two months elapsed between the inspection date and the date the complaint was issued, it was unable to obtain evidence to rebut the amended citation. Since the amendment changes the type of soil involved, respondent alleges it was unable, because of the passage of time and changed conditions, to obtain soil samples for analysis. Respondent further alleges that respondent was not advised specifically by the compliance officer at the time of the inspection that a citation would be issued.

According to Ray Mendenhall, the compliance officer, respondent's representative, Larry Miranda, was advised at the closing conference on the day of the inspection a hazardous condition existed and that a citation "may or may not" be issued for the alleged trenching violation (Tr. 28).

It is obvious that respondent was alerted after the inspection that a citation could be forthcoming and that it would involve a trenching standard. This necessarily involves consideration of the type of soil. At that time, respondent could have obtained samples.

Considering all the facts, I find no prejudice. Respondent's objections to the Motion to Amend are not well founded and the ruling made at the hearing granting the motion was correct.

I.

According to the evidence of record, on May 5, 1981, Capitol City was engaged in installing a sanitary sewer line at Gordon Road in Zanesville, Ohio, known as the Falls Township project. On that date, Ray Mendenhall, a compliance officer of the Secretary, testified that he conducted an inspection of the work site and observed two of respondent's employees emerging from the trench involved in the citation. The trench was approximately 10 feet deep and 11 feet wide at the widest point. The bottom width was estimated at seven feet at its widest point. He used a tape measure for the depth and top dimensions but did not get into the trench to measure its bottom width (Tr. 14-16). He picked up some of the dirt from the trench and determined that "it didn't have a very good cohesion" and "was mostly sandy, silty type soil" (Tr. 16).

The compliance officer noted that there was a backhoe parked at the end of the trench which had been working at one end. In addition, there was a front-end or pay-loader taking dirt out of the trench and loading it into a dump truck. According to Mr. Mendenhall, the operation of these vehicles could cause vibrations around the edge of the trench and increase the hazard of cave-in. He observed water seeping along the bottom and side at the upper end of the trench where digging was being performed. This water was running into the trench and into the pipe being laid. According to Mr. Mendenhall, the presence of water causes a

hydrostatic pressure on the sides of a trench and could cause it to cave-in more readily than normal (Tr. 17).

From his measurements, Mr. Mendenhall found the angle of the trench was 79 degrees. Using Table P-1 of the Standard, the appropriate angle for the trench should have been 1 to 1 or a 45 degree angle (Tr. 19). He conceded that it would have been virtually impossible to slope the trench because of the roadway. However, the respondent could have put in shoring or a trench box (Tr. 18-19).

Mr. Mendenhall took four photographs depicting the trench which were admitted into evidence (Tr. 20, Exs. C-1-C-4). Exhibit C-1, he noted, showed a utility line across the trench which indicated a previous disturbance or excavation of the soil. Exhibit C-2, he stated, showed material alongside the trench sluffing in under tree roots (Tr. 21-22).

Referring to Exhibit C-3, Mr. Mendenhall noted a compression crack along the side which indicated some instability (Tr. 22). Exhibit C-4 showed how dirt had caved and fallen into the trench due to the loading operation (Tr. 23).

Upon cross-examination, Mr. Mendenhall testified he did not see any employee near the portion of the trench depicted in Exhibit C-3 and the employees were working near the widest point of the trench (Tr. 32-33). He admitted he saw no shearing or cave-in of the banks nor did he feel any vibrations from the backhoe (Tr. 50-51). He did not know when the utility line was laid or if the soil had been mechanically compacted at that time (Tr. 51).

Marshall Flynn, an official of the union representing Capital City employees, testified he visited respondent's work site the day preceding the inspection. He

observed a unshored trench which he deemed to be unsafe and brought this to the attention of Larry Miranda, the on-site Capital City superintendant (Tr. 67, 71, 74). This trench was not the same trench which the compliance officer inspected the following day (Tr. 82-83).

Larry Miranda, testifying for respondent, stated he was Capital City's foreman for one of the two sewer crews at the site of the inspection. According to Mr. Miranda, his men were working at the pipe end of the trench and not near the portion of the trench where the tree roots protruded and where backfilling was being performed. They exited also from the trench at the pipe end. The top three-quarters of the trench was composed of clay material. Underneath was sandy matter with a little water in it.

As for the measurements of the trench, he testified the trench was 10 feet deep and approximately 11-1/2 feet wide. The bottom was three feet wide-the width of the hoe bucket (Tr. 89-93). At no time was it seven feet wide at the bottom (Tr. 96). His job report for the day noted measurements as "Ditch 10 feet deep and 12 feet wide" (Tr. 95, Exh. R-3).

Concerning the safety of the trench, Mr. Miranda stated he used his own judgment. He also talked with his men in the trench and they did not object to working in it. He has not had any employees injured on this project nor had any caving or shearing of the side walls of the trench occurred (Tr. 93, 97, 99).

Steve McClure, a laborer for Capital City, was laying pipe in the trench at the time of the inspection. In his words, "basically, it [the trench] was pretty good." Water and sand were running down the sides, but there was nothing to be

afraid of and he felt safe. It only took two to three minutes to spread gravel and lay a section of pipe in and the ladder was no more than five feet away (Tr. 105-106). According to Mr. McClure, the trench was 38 to 40 inches wide at the bottom (Tr. 107).

Using the engineering plans for the Falls Township sewer project, James R. Lang, respondent's vice-president, testified that at the spot of the inspection, the elevation had been changed from 7.6 feet to 9.6 feet (Tr. 113, Exs. R-4, R-5).

II.

Section 29 C.F.R. § 1926.652(b), mandates that "sides of trenches in unstable or soft material, 5 feet or more in depth, shall be shored, sheeted, braced, sloped or otherwise supported by means of sufficient strength to protect the employees working within them."

Concerning the type of soil at the trench, the evidence is clear that it was soft and unstable. Mr. Mendenhall described it as "mostly sandy, silty type soil which didn't have a very good cohesion" (Tr. 16). Mr. Flynn described the soil in the general area as sandy and very crumbly (Tr. 73, 81). Respondent's foreman described the soil of the lower portion by the trench as sandy with a little moisture in it (Tr. 93). Finally, Mr. McClure, while stating the trench was "pretty good," said "there was water and sand running down off the sides of it" (Tr. 105).

The excavation and trenching standards, including Tables P-1, create a presumption that predominately sandy soils, unless cemented, are by their very nature soft or unstable within the meaning of Section 1926.652(b). Duane Meyer, d/b/a D. T. Construction Company, 79 OSHARC 57/D4, 7 BNA OSHC 1560, 1979 CCH OSHD ¶ 23,742 (Docket No. 16029, 1979).

Besides its sandy quality, other factors contributed to a lack of stability of the soil. Witnesses attested to the presence of water. Equipment was being operated along the sides of the trench (Tr. 17). The soil had previously been disturbed (Tr. 21). Finally, there was a compression crack along one side (Tr. 22).

It is uncontroverted that there was no shoring, sheeting, bracing or other similar method used to support the trench. Thus, the trench would have had to have been sloped in order to comply with the standard. The degree of sloping is dependent upon the type of soil. Table P-1 requires an angle of 45 degrees for average soil. An even greater angle of repose is required for less stable soil-and the evidence is clear that the soil was of this type.

Mr. Mendenhall's measurements, which included some estimates, clearly show the trench was not laid back to the required angle. But even if respondent's figures would be used-that the trench was 10 feet deep, 3 feet wide at the bottom and 11-1/2 feet wide-the angle of repose was clearly not in compliance with the standard even for average soil.

Considering the foregoing, it is quite clear that respondent failed to comply with the cited regulation. The violation was serious since a cave-in could cause serious injury or death to an employee. Mr. Mendenhall testified as to a fatality occurring a mile away from such a cave-in (Tr. 25). Mr. Flynn also described a serious injury from such a mishap (Tr. 76).

The violation is also charged as willful. Complainant avers that respondent was made aware of the danger because Mr. Flynn, the union agent, had warned the company the preceding day. Larry Miranda, the foreman, was familiar with OSHA standards and had been involved in an earlier trenching violation.

I cannot reach the same conclusion as the Secretary. Mr. Flynn did not observe the same trench here cited and he did not speak with Mr. Miranda except to greet him (Tr. 88). According to Mr. Miranda, prior to the time when the compliance officer inspected the trench, the workers were at the pipe end and could exit in that area. There was no reason for them to work at the other end which apparently was less safe due to the tree roots. He used his own judgment and talked with his men and with the backhoe operator and concluded it was safe at the time. Further, he stated he had a sewer box "on the way" which he had called for before the inspection (Tr. 99) and installed it the following day. He has had no injuries or cave-ins. This does not bespeak conduct or belief on the part of Mr. Miranda such as to equate to either an intentional disregard of, or plain indifference to, the Act's requirements. Under the circumstances, I cannot conclude that the violation was willful.

The Secretary has proposed a penalty of $5,600 for the alleged willful violation. However, in view of my finding that the violation was not willful, a substantial reduction in the penalty is necessary.

Respondent is a rather small company employing about 150 employees. While it has had a previous citation for a trenching violation, there is no evidence that any accidents have occurred or employees injured from trench failures. Further, the length of time of exposure of employees was minimal. Considering all facts, I find a penalty of $300 is reasonable and equitable.

I reach the following findings of fact and conclusions of law:

## FINDINGS OF FACT

1. Respondent is a small company which, on May 5, 1981, was engaged in installing a township sewer line in Zanesville, Ohio.

2. On May 5, 1981, a compliance officer for the Secretary inspected the jobsite. Two employees had been working in a trench which was approximately 10 feet deep and 11 feet wide. The bottom width was estimated by the compliance officer to be seven feet. Respondent's evidence was to the effect that it was three feet wide at the bottom.

3. The soil of the trench was sandy and silty in nature without good cohesion and had moisture such as to render the soil soft and unstable.

4. The trench was not shored, sheeted, braced or otherwise supported, and it was not laid back to a safe angle of repose as required by the cited standard and Table P-1 thereof.

5. Employees working in the trench were subjected to the hazard of cave-in or collapse of the trench which could lead to death or serious injury. There was, however, minimal length of time of exposure by employees.

6. The union agent on the preceding date visited the jobsite and observed a trench which he considered unsafe and which he brought to the attention of Capital City representatives. This was not the same trench as here cited.

7. Respondent's foreman normally did have a trench box on the jobsite and, on this occasion, had ordered one to be delivered.

8. Respondent did not exhibit either an intentional disregard of, or plain indifference to, the Act's requirements as to equate to willfulness.

## CONCLUSIONS OF LAW

1. Respondent is engaged in a business affecting commerce within the meaning of the Act and this Commission has jurisdiction over the subject matter and parties to this action.

2. Respondent was in violation of Section 5(a)(2) of the Act by failing to comply with the provisions of 29 C.F.R. § 1926.652(b).

3. The violation was serious.

4. The violation was not willful.

Based upon the foregoing findings of fact and conclusions of law, Citation Number 1 is affirmed, as amended, and a penalty of $300 is assessed therefor.

SO ORDERED.

Dated this 6th day of January, 1982.

CECIL L. CUTLER, JR.
Judge

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
SUITE 1718, PRUDENTIAL PLAZA
1050 SEVENTEENTH STREET
DENVER, COLORADO 80265
(303) 837-2281

# NOTICE OF DECISION

Secretary of Labor v. Don Carter Industrial Coatings

OSHRC Docket No. 81-0493-B

1. Enclosed is a copy of my decision. It will be filed with the Commission on January 11, 1982, and will become the final order of the Commission on February 10, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

Chief Review Counsel
Occupational Safety and Health Review Commission
1825 K Street, N.W., Suite 601
Washington, D.C.. 20006

Any Petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is February 10, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

R. M. Child
Judge, OSHRC

Date: December 22, 1981

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>DON CARTER INDUSTRIAL COATINGS,<br><br>Respondent. | OSHRC DOCKET NO. 81-0493-B |

Appearances:

For the Complainant:
Eloise Velucci, Esq., Dallas, Texas,

For the Respondent:
No appearance at the hearing,
Paul Z. Moses, Cheney, Kansas, on the Notice of Contest.

Child, R. M., Judge, OSHRC:

## Statement of the Case

This proceeding is before the Occupational Safety and Health Review Commission (the Commission), pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et seq. (the Act).

By order dated July 31, 1981 Chief Administrative Law Judge Paul A. Tenney dismissed the Notice of Contest filed by the respondent herein to Serious Citation No. 1, issued to the respondent on January 23, 1981, to the extent said notice put in issue the substance of said citation. Judge Tenney's Order reserved for determination the issue of contested penalties only.

Judge Tenney's aforesaid Order became a final Order of the Commission on August 31, 1981.

The matter came on regularly for hearing at Tulsa, Oklahoma before the undersigned judge on the issue of appropriateness of the penalties on October 28, 1981.

No one appeared at said hearing on behalf of the respondent. Complainant appeared at said hearing to seek affirmance and assessment of penalties totaling $1,320.00 for various items set forth in Serious Citation No. 1, aforesaid. Default of the respondent was duly entered. The complainant thereupon presented evidence in support of the penalties proposed in said Serious Citation No. 1.

## The Evidence

Mr. Dan D. Cook, Supervisory Industrial Hygienist for the Tulsa area office of the United States Occupational Safety and Health Administration testified on behalf of the complainant. The inspection, citation and penalties herein were accomplished under his supervision.

With respect to the violations noted at items 1A[1/] and 1B[2/] the likely injury would be some permanent hearing damage or loss. These two items were com-

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1/ A description of the violation and the standard involved.

Citation

1A 29 C.F.R. 1910.95(b)(1): Employee(s) were subjected to sound levels exceeding those listed in Table G-16 of subpart G of 29 C.F.R. part 1910 and feasible administrative or engineering controls were not utilized to reduce sound levels:

At the Conoco Refinery in Ponca City, employees working for Don Carter Industrial Coatings were exposed to noise levels in excess of the permissible exposure limit (100%):

| Item | Operator/Location | Employee Exposure | Decibel Range | Exposure Period |
|---|---|---|---|---|
| a) | Sand blaster | 390.1% | 95-109 | 173 min. |

bined for purposes of determining the degree of seriousness and penalty. Factors considered in determining probability and severity of the hazard were the number

1/ [CONTINUED]

Standard

§1910.95 Occupational noise exposure.

(b)(1) When employees are subjected to sound exceeding those listed in Table G-16, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table.

2/ A description of the violation and the standard involved.

Citation

1B 29 C.F.R. 1910.95(b)(3): Sound levels exceeded the values in table G-16 of subpart G of 29 C.F.R. 1910 and continuing, effective hearing conservation program was not aministered; i.e., for compliance purposes, a minimally effective hearing conservation program consists of the following elements: 1) A baseline audiogram for all employees exposed to noise levels equal to or in excess of the standard; 2) Periodic audiograms for each overexposed employee; 3) Analysis of audiogram results with retesting and/or referral to an otolaryngologist or qualified physician when a significant threshold shift occurs. A significant shift will be considered to be equal to or or greater than 20 dB at any test frequency; 4) Where insert ear plugs are utilized, individual employee fitting shall be conducted by a trained person, and employee fitting shall be conducted by a trained person, and employees shall be instructed in the care and use of the devices:

For employee engaged in sandblasting operation at the Conoco Refinery in Ponca City. Employer's program was deficient in element 1.

COMBINING STATEMENT
Failure to comply with the above standards constitutes an alleged serious violation.

Standard

§1910.95 Occupational noise exposure.

(b)(3) In all cases where the sound levels exceed the values shown herein, a continuing, effective hearing conservation program shall be administered.

of employees exposed (one), the duration of exposure (one half day), the type of protective equipment, if any, being utilized (earplugs), and the lack of an effective hearing conservation program including adequate medical surveilance.

The base penalty was then adjusted by allowing credit to the respondent for size (26 employees), good faith based upon conduct during the inspection and the overall program of the respondent concerning safety and health and finally the respondent's history. As a result of following this procedure a combined penalty of $420.00 was proposed for items 1A and 1B.

With respect to the violations noted at items 2A[3/], 2B[4/] and 2C[5/] of said Serious Citation No. 1 the same employee was involved and all other factors considered were the same with the exception that the protective equipment being utilized

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3/ A description of the violation and the standard involved.

Citation

2A 29 C.F.R. 1910.134(a)(2): The employer did not establish and maintain a respiratory protection program which included the requirements outlined in paragraph (b) of this section:

For sandblaster who was exposed to a time weighted average concentration of silica dust at a level of 1.35 milligrams per cubic meter.

* * *

Standard

§1910.134 Respiratory protection.

(a) Permissible practice.

(2) Respirators shall be provided by the employer when such equipment is necessary to protect the health of the employee. The employer shall provide the respirators which are applicable and suitable for the purpose intended. The employer shall be responsible for the establishment and maintenance of a respiratory protective program which shall include the requirements outlined in paragraph (b) of this section.

which was considered in arriving at this proposed penalty was a hood being worn. This hood, however, was less than adequate protection to prevent the inhalation of silica.

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4/ A description of the violation and the standard involved.

Citation

2B 29 C.F.R. 1910.1000(c): Employee(s) were exposed to material(s) in excess of the 8-hour time weighted average limit(s) listed for that material(s) in table Z-3 of subpart Z of 29 C.F.R. part 1910:

For sandblaster who was exposed to a time weighted average concentration of silica dust at a level of 1.35 milligrams per cubic meter. The permissible exposure limit for silica with 20% quartz is .45 milligrams per cubic meter.

Standard

§1910.1000(c) Air contaminants.

(c) Table Z-3: An employee's exposure to any material listed in table Z-3, in any 8-hour work shift of a 40-hour work week, shall not exceed the 8-hour time weighted average limit given for that material in the table.

5/ A description of the violation and the standard involved.

Citation

2C 29 C.F.R. 1910.1000(e): Feasible administrative or engineering controls were not determined and implemented to reduce employee exposure(s):

For sandblaster who was exposed to a time weighted average concentration of silica dust at a level of 1.35 milligrams per cubic meter.

COMBINING STATEMENT
Failure to comply with the above standards constitutes an alleged serious violation.

Standard

§1910.1000(e) Air contaminants.

(e) To achieve compliance with paragraph (a) through (d) of this section, administrative or engineering controls must first be determined and implemented whenever feasible. When such controls are not feasible to achieve full compliance, protective equipment or any other protective measures shall be used to keep the exposure of employees to air contaminants within the limits prescribed in this section. Any equipment and/or technical measures used for this purpose must be approved for each particular use by a competent industrial hygienist or other technically qualified person. Whenever respirators are used, their use shall comply with § 1910.134.

The combined penalty proposed for items 2A, 2B and 2C was $420.00.

With respect to the violation noted at item 3[6/] of said Serious Citation No. 1, the hazard presented was that of severe lacerations, broken bones and possibly death resulting from the whipping action of the nozzle should the operator lose control of it.

It was determined that one employee had exposure to the hazard, sometimes for a full day, but on the day of the inspection for approximately 173 minutes. The operator was considered to be at the point of danger and subjected to some stress in that he was working in very cold temperature conditions and high winds. All other factors considered in arriving at the penalty to be proposed for this violation were as discussed in the preceeding items and caused a penalty of $480.00 to be proposed for item 3.

## Discussion

The penalty proposed by the Secretary of Labor through his area directors is assessed only if not contested; otherwise the Review Commission can affirm the penalty as proposed, modify it or vacate it. Long Manufacturing Co. v. OSHRC, 554 F.2d 903

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6/ A description of the violation and the standard involved.

### Citation

3 29 C.F.R. 1910.244(b): Abrasive blast cleaning nozzle(s) were not equipped with an operating valve which had to be held open manually:

Sandblasting operation located north of the east plant pumphouse at the Conoco Refinery in Ponca City.

### Standard

§1910.244 Other portable tools and equipment.

(b) For jacks sent out of shop for special work, when sent out and when returned.

(8th Cir. 1977); California Stevedore and Ballast Co. v. OSHRC, 517 F.2d 986 (9th Cir. 1975). The determination of an appropriate penalty is within the discretion of the Review Commission. Western Waterproofing Co. v. Marshall, 576 F.2d 139 (8th Cir. 1978).

In assessing penalties for violations of the Act, the Commission must consider the size of the business of the cited employer, the gravity of the violation, the employers good faith or absence of it and the history, if any, of previous violations. 29 U.S.C. §666(i).

Evidence bearing on said factors was presented by the complainant. Such evidence was sufficient to support the appropriateness of the penalties as proposed.

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Based upon the foregoing factors and the evidence there are hereby entered the following:

## Findings of Fact

1. The sum of $420.00 is an appropriate penalty for the violations set forth at items 1A and 1B of Serious Citation No. 1, issued to respondent January 23, 1981.

2. The sum of $420.00 is an appropriate penalty for the violations set forth at items 2A, 2B and 2C of said Serious Citation No. 1.

3. The sum of $480.00 is an appropriate penalty for the violation set forth at item 3 of said Serious Citation No. 1.

## Conclusions of Law

1. The Commission has jurisdiction of the parties and of the subject matter herein.

2. Items 1A and 1B of Serious Citation No. 1, issued to respondent January 23, 1981 should be affirmed and a combined penalty of $420.00 assessed.

3. Items 2A, 2B and 2C of said Serious Citation No. 1 should be affirmed and a combined penalty of $420.00 assessed.

4. Item 3 of said Serious Citation No. 1 should be affirmed and a penalty of $480.00 assessed.

ORDER

All items of Serious Citation No. 1, issued to respondent January 23, 1981 are AFFIRMED and a total combined penalty of $1,320.00 is ASSESSED.

R. M. Child
Judge, OSHRC

Dated: January 11, 1982

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
ROOM 7B11, FEDERAL BUILDING
1100 COMMERCE
DALLAS, TEXAS 75242
FTS 729-5271
COM (214) 767-5271

## NOTICE OF DECISION

Secretary of Labor v. Farrell Roofing & Sheet Metal Co., Inc.
OSHRC Docket NO. 81-0954S and 81-1121S

1. Enclosed is a copy of my decision. It will be filed with the Commission on January 11, 1982, and will become the final order of the Commission on February 10, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D. C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is February 10, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed portcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92 and 93.

Administrative Law Judge

Date: 12-22-81

OSHRC Form 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>FARRELL ROOFING & SHEET METAL CO., INC.,<br><br>Respondent. | OSHRC DOCKET NO. 81-0954-S and 81-1121-S |

DECISION AND ORDER

Appearances: Max A. Wernick, Esq., of Dallas, Texas, for the complainant.

Travis G. Wilson, Esq., and Lynne W. Parsons, Esq., of Houston, Texas, for the respondent.

PROCEDURAL HISTORY

BLYTHE, Judge:

This consolidated proceeding, brought under the simplified procedure rules of the Occupational Safety and Health Review Commission ("the Commission") involves three citations issued to the respondent, Farrell Roofing & Sheet Metal Co., Inc. ("Farrell"), for allegedly violating three safety standards promulgated by the Secretary of Labor ("the Secretary") under §6 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651-658 ("the Act").

The citation in Docket No. 81-0954S was issued March 30, 1981, after

a general inspection March 23, 1981, of a building construction site at Fairbanks North Houston at Highway 290, Houston, Texas, by two compliance officers of the Occupational Safety and Health Administration ("OSHA") and alleges two serious violations of 29 CFR 1926.500(g)(1) for failure to guard the edges of a low-pitched roof. Farrell gave timely notice of contest April 6, 1981.

The two citations in Docket No. 81-1121S were issued April 3, 1981, after an investigation by an OSHA compliance officer March 19-31, 1981, of a fatality at a building construction site at 11381 Meadowglen Lane, Houston, Texas. Citation 1 alleged a serious violation of 29 CFR 1926.450(a)(9) for use of an extension ladder the side rails of which did not extend 36 inches above the landing. Citation 2 alleged a willful violation of 29 CFR 1926.500(b)(1) for failure to guard a skylight opening in the roof. Farrell timely contested these citations April 13, 1981.

The two cases came on regularly for hearing at Houston, Texas, on October 27, 1981. No affected employee or representative of affected employees took part in this proceeding. Farrell submitted a posthearing brief. The Secretary submitted proposed findings of fact and conclusions of law, but did not submit a posthearing brief.

## THE ISSUES

Farrell conceded jurisdiction and coverage at the hearing (Tr.5-7). The issues remaining to be decided are:

1. Whether Farrell was in serious violation of 29 CFR 1926.500(g)(1).

2. Whether Farrell was in serious violation of 29 CFR 1926.450(a)(9).

3. Whether Farrell was in willful violation of 29 CFR 1926.500(b)(1).

4. The appropriate penalty for any violations found.

## DISCUSSION AND OPINION

The alleged serious violations of §1926.500(g)(1).

Item 1 of citation 1 (Docket No. 81-0954S) alleges two violations of §1926.500(g)(1), [1] as follows:

> Employee(s) were not protected from falling from all unprotected sides and edges of roof during the performance of built up roofing work on low-pitched roofs with a ground to eave height greater than 16 feet (4.9 meters):
>
> (a) employees working on the northeast corner of the roof on top Building #1 for Farrell Roofing Company at Fairbanks North Houston Road and Highway 290, Houston, Texas;

---

[1] The cited standard provides:

> (g) Guarding of low-pitched roof perimeters during the performance of built-up roofing work.
>
> (1) General provisions. During the performance of built-up roofing work on low pitched roofs with a ground to eave height greater than 16 feet (4.9 meters), employees engaged in such work shall be protected from falling from all unprotected sides and edges of the roof as follows:
>
> (i) By the use of a motion-stopping-safety system (MSS system); or
>
> (ii) By the use of a warning line system erected and maintained as provided in paragraph (g)(3) of this section and supplemented for employees working between the warning line and the roof edge by the use of either an MSS system or, where mechanical equipment is not being used or stored, by the use of a safety monitoring system; or
>
> (iii) By the use of a safety monitoring system on roofs fifty feet (15.25 meters) or less in width (see Appendix A), where mechanical equipment is not being used or stored.

(b) employees working on the southwest corner of the roof on top of Building #1 for Farrell Roofing Company at Fairbanks North Houston Road and Highway 290, Houston, Texas.

Item 1(a) must be vacated because of an almost complete lack of evidence. The actual inspection was conducted by Louis Smith, an OSHA compliance officer, who was not produced as a witness although he still is employed by OSHA in its Little Rock, Arkansas, office. He was accompanied to the inspection site by a trainee, Mrs. Yolandia Murphy, but she did not go up on the roof. She stood at the foot of the access ladder at the southwest corner of the building, whereas item 1(a) concerns the northeast corner. According to Charley Wright, Farrell's foreman, no Farrell employees were working at the northeast corner during the inspection (Tr.239). It appears from questions asked of Wright that this item concerns workers who were tacking sheet metal (Tr.242,243), but according to Wright no Farrell employees were so engaged. He said there were non-Farrell employees, including carpenters, on the roof at that time (Tr.242). He also testified that two Farrell crews were working on the roof, but one was at the southwest corner and the other was in the middle of the roof, 30 feet from any edge (Tr.239), and that there was a warning line six feet from the edge on the "backside"--apparently meaning the northeast (Tr.247).

In this state of the record, item 1(a) must be vacated.

Farrell relies on the use of a safety monitoring system as a defense to the item 1(b) charge. Such a system is permitted by §1926.500(g)(1)(iii) and is defined by §1926.502(p)(7) as follows:

> "Safety-monitoring system"--a safety system in which a competent person monitors the safety of all employees in a roofing crew, and warns them when it appears to the monitor that they are unaware of the hazard or are acting in an unsafe

manner. The competent person must be on the same roof as and within visual sighting distance of the employees, and must be close enough to verbally communicate with the employees..

The flaw in Farrell's defense is that the use of a safety monitoring system is limited by §1926.500(g)(1)(iii) to roofs 50 feet or less in width, whereas the roof in question, according to Farrell's own foreman, Wright, was 100 or 150 feet wide (Tr.238,242).

Therefore, it is not necessary to resolve a conflict in the testimony of Wright and Mrs. Murphy regarding a conversation between Wright and Smith which is actually the Secretary's only evidence negating the use of a monitoring system. Mrs. Murphy testified that after Smith completed his inspection he and Wright returned to the ground and she heard Wright admit to Smith that he didn't have anyone watching to make sure that employees didn't get too near the roof's edge (Tr.21). Wright denied that such a conversation took place or that he even returned to the ground with Smith (Tr.233). Actually, a photograph taken by Smith (Exhibit C-1) shows Wright in position to act as a monitor, as he says he did (Tr.228, 231, 244). Mrs. Murphy's testimony is, at best, a poor substitute for the direct evidence Smith could have given, and Wright's seemed to me to be more credible. However, as previously stated, it makes no difference because the roof was too wide for a safety monitoring system.

Four or five Farrell employees were spreading gravel on the roof, 21 or 22 feet off the ground, as the material was brought up by a high-lift forklift, or "lull". In doing so they approached within a foot or two of the edge (Tr.15,16,228,237,238). There was no form of fall protection permitted by the standard. The surface below was littered with debris and machinery, and a fall would probably have resulted in death or serious physical injury (Tr.26,49).

The alleged violations of §§1926.450(a)(9) and 1926.500(b)(1).

The alleged serious violation of §1926.450(a)(9) [2] and alleged willful violation of §1926.500(b)(1) [3] (Docket No. 81-1121S) will be discussed together because Farrell's defense to both citations is the same--that the exposed employees were those of an independent subcontractor who were not supervised in any way by Farrell.

Farrell does not dispute the existence of the violative conditions, and indeed the evidence is conclusive on that score. However, it must be noted at the outset that §1926.500(b)(1), which pertains to floor openings, is not the correct standard for the violation alleged--failure to guard a skylight opening. It is well settled that a flat roof is not a floor. Central City Roofing Co., Inc., 76 OSAHRC 45/B12, 4 BNA OSHC 1085, 1976-77 CCH OSHD ¶20,761 (No. 8173, 1976). Moreover, there is a specific standard for guarding of skylight openings, §1926.500(f)(6), which provides:

> Skylight openings that create a falling hazard shall be guarded with a standard railing, or covered in accordance with subparagraph (5)(ii) of this paragraph.

---

2 §1926.450(a)(9), pertaining to general requirements for ladders, provides:

> The side rails shall extend not less than 36 inches above the landing. When this is not practical, grab rails, which provide a secure grip for an employee moving to or from the point of access, shall be installed.

3 §1926.500(b)(1) provides:

> Floor openings shall be guarded by a standard railing and toe boards or cover, as specified in paragraph (f) of this section. In general, the railing shall be provided on all exposed sides, except at entrances to stairways.

Since there is no question but that the skylight opening here involved was unguarded, item 1 of citation 2, alleging a willful violation of §1926.500(b)(1), will be amended sua sponte to allege a willful violation of §1926.500(f)(6). Rodney E. Fossett d/b/a Southern Lighweight Concrete Co., 79 OSAHRC 92/D2, 7 BNA OSHC 1915, 1979 CCH OSHD ¶23,989 (No. 76-3944, 1979).

An OSHA compliance officer, Donald Valentine, inspected a construction site at 11381 Meadowglen Lane in Houston after an employee was fatally injured in a fall through an unguarded skylight opening. In the course of the inspection, Valentine noted that an access ladder to the roof did not have siderails extending the required 36 inches above the landing. Ownership of the ladder was not established, but it provided the only access to the roof and was used by the roofers and others (Tr.171).

Jackie L. Perkins identified himself to Valentine as the foreman of the roofing crew. Perkins denied representing himself as a Farrell employee (Tr.173), and Valentine's testimony on this point is somewhat equivocal (Tr.118,119). Darlene Webb Blackburn, secretary to a Farrell official, reported the fatality to OSHA and Farrell's workmen compensation carrier, giving Farrell as the decedent's employer in both instances (Exhibits C-6 and C-14). However, the evidence clearly shows that the decedent was not a Farrell employee but was employed by Perkins, an independent contractor to whom Farrell had subcontracted this roofing job.

Perkins' statements to Valentine are hardly binding on Farrell, especially since they had the effect, if indeed not the intent, of avoiding liability to himself. Although Mrs. Blackburn handled insurance claims for Farrell and its subcontractors, she had no official capacity which would make

her representations binding on Farrell in the absence of ratification.

In any event, it is clear from a preponderance of the evidence that Perkins was in fact an independent contractor and that he was the employer of the roofing crew. It was Farrell's practice to use five or six such subcontractors to supplement its own crews, since it was difficult to anticipate far enough in advance just when the various construction jobs would be ready for roof work. Most of its subcontractors had no workmens compensation policies of their own, so Farrell, to avoid the risk of itself becoming liable, arranged with its own carrier to have its subcontractors' employees covered by Farrell's policy. Farrell deducted the insurance premiums from moneys earned by its subcontractors and remitted same to the carrier (Tr.209-212; Exhibits R-6, R-7, R-8). Neither Perkins nor any of his crew was carried on Farrell's payroll (Tr.205; Exhibit R-8). Perkins reported on his 1980 U.S. individual income tax return that he was self-employed as Jackie L. Perkins Roofing (Tr.169, Exhibit R-2).

The next question is whether Farrell exercised enough supervisory control over the workplace that it reasonably could have been expected to detect the violative conditions and require them to be abated. Such a rule has been applied to general contractors, as in Knutson Construction Co., 76 OSAHRC 131/F3, 4 BNA OSHC 1759, 1976-77 CCH OSHD ¶21,185 (No. 765, 1976), aff'd, 566 F. 2d 596 (8th Cir., 1977) and has been extended to others than general contractors in analogous situations, as in Red Lobster Inns of America, Inc., 80 OSAHRC 73/A14, 8 BNA OSHC 1762, 1980 CCH OSHD ¶24,636 (No. 76-4754, 1980).

Here, however, the evidence establishes that Farrell did not actually

supervise Perkins' work but merely checked to see how much work he had completed when he asked for a "draw" or partial payment (Tr.164,216). He was not told how the work was to be performed (Tr.158). The subcontract between Farrell and Perkins (Exhibit R-1) reserved no supervisory authority in Farrell.

No doubt Farrell could have asserted such supervisory authority, and in reality that is the only basis for holding it responsible for the safety violations. I hold this is not enough.

On a somewhat different question, whether a construction manager or an architect is engaged in construction work so as to be subject to the construction standards, the Commission has based its determination on whether the employer was performing actual construction work or exercising substantial supervision over actual construction. Skidmore, Owings & Merrill, 78 OSAHRC 1/A2, 5 BNA OSHC 1782, 1977-78 CCH OSHD ¶22,101 (No. 2165, 1977); Cauldwell-Wingate Corp., 78 OSAHRC 39/A2,1978 CCH OSHD ¶22,729 (Nos. 14620 & 14858, 1978). It is clear that Farrell did not exercise substantial supervision over the roofing job. Therefore, these citations must be vacated.

The appropriate penalty.

There remains the assessing of an appropriate penalty for the one violation found.

Section 17(j) of the Act requires the Commission, in assessing penalties, to consider the gravity of the violation and the employer's size, good faith and history of previous violations. These factors need not be accorded equal weight, but the gravity is usually of greater significance than the others. Colonial Craft Reproductions, 72 OSAHRC 11/B10, 1 BNA OSHC 1063, 1971-73 CCH OSHD ¶15,277 (No. 881, 1972). Elements to be considered in determining

gravity include the number of employees exposed to the risk of injury, duration of the exposure, precautions taken against injury, and the degree of probability of occurrence of an injury. National Realty & Construction Co., Inc., 72 OSAHRC 9/A2, 1 BNA OSHC 1049, 1971-73 CCH OSHD ¶15,188 (No. 85,1972) rev'd on other grounds, 489 F.2d 1257 (D.C. Cir., 1973).

After considering the statutory criteria, I find a penalty of $250 to be appropriate for Farrell's violation of §1926.500(g)(1).

## FINDINGS OF FACT

1. Farrell is an employer engaged in a business affecting commerce, who has employees, within the meaning of §3(5) of the Act.

2. On March 23, 1981, Farrell was putting a built-up roof on the essentially flat roof of a building at Fairbanks North Houston at Highway 290, Houston, Texas. Its employees were working within one or two feet of the edge of the southwest corner without any fall protection except safety monitoring by the foreman, Charley Wright, or persons designated by him. The roof was between 100 and 150 feet wide and between 400 and 500 feet long. The roof was 21 or 22 feet high, and a fall therefrom probably would result in death or serious physical injury. A penalty of $250 is appropriate for this violation. There is no evidence of a violation of the roof-guarding standard at the northeast corner of the building as alleged.

3. On March 18, 1981, Jackie L. Perkins, an independent roofing contractor acting under a subcontract with Farrell, was putting a built-up roof on a building at 11381 Meadowglen Lane, Houston, Texas, when an employee fell through an unguarded skylight opening and was fatally injured. Access

to the roof was provided by a ladder the siderails of which reached only 26 inches above the landing on the roof. Neither Perkins or any member of his crew was employed by Farrell. Farrell exercised no supervisory authority over Perkins' crew or the construction site and could not reasonably have been expected to detect and abate, or cause to be abated, the violative conditions.

## CONCLUSIONS OF LAW

1. The Commission has jurisdiction of the parties and of the subject matter of this proceeding.

2. On March 23, 1981, Farrell was in serious violation of 29 CFR 1926.500(g)(1) as alleged in subitem 1(b) of citation 1, issued to it on March 30, 1981, but not as alleged in subitem 1(a) thereof.

3. On March 18, 1981, Farrell was not in violation of 29 CFR 1926.450(a)(9).

4. Item 1 of citation 2, issued to Farrell April 3, 1981, should be amended to allege a violation of 29 CFR 1926.500(f)(6) rather than 29 CFR 1926.500(b)(1).

5. On March 18, 1981, Farrell was not in violation of 29 CFR 1926.500(f)(6).

## ORDER

1. Item 1 of citation 1, issued to Farrell March 30, 1981, alleging a serious violation of 29 CFR 1926.500(g)(1), is AFFIRMED and a penalty of $250 is ASSESSED.

2. Item 1 of citation 1, issued to Farrell April 3, 1981, alleging a serious violation of 29 CFR 1926.450(a)(9) is VACATED.

3. Item 1 of citation 2, issued to Farrell April 3, 1981, is amended to allege a willful violation of 29 CFR 1926.500(f)(6), and, as so amended, it is VACATED.

4. The Secretary's requested findings of fact and conclusions of law, to the extent that they are inconsistent with this decision, are denied.

DEE C. BLYTHE
Administrative Law Judge

Date: January 11, 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
Room 7B11, Federal Building
1100 Commerce Street
Dallas, Texas 75242

NOTICE OF DECISION

Secretary of Labor v. Longerier Construction Company
OSHRC Docket No. 80-4245

1. Enclosed is a copy of my decision. It will be filed with the Commission on January 12, 1982, and will become the final order of the Commission on February 11, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is February 11, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Stanley M. Schwartz
Administrative Law Judge

Date: December 23, 1981

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>LONGCRIER CONSTRUCTION COMPANY,<br>Respondent. | OSHRC DOCKET NO. 80-4245 |

Appearances:

George R. Collins, Esq.
Dallas, Texas

For the Complainant.

David J. White, Esq.
Dallas, Texas

For the Respondent.

DECISION AND ORDER

SCHWARTZ, Judge:

This is a proceeding brought before the Occupational Safety and Health Reveiw Commission ("The Commission") pursuant to Section 10 of the Occupational Safety and Health Act of 1970, 29 USC §651 et. seq. ("the Act"). Respondent contests a serious citation containing three alleged violations of the Act and a non-serious citation alleging four violations of the Act. Complainant withdrew item number 1 of the non-serious citation at the hearing.

An inspection was conducted at Respondent's workplace on June 10, 1980. The Longcrier Company timely contested the subject citations. A hearing was held in Dallas, Texas, on September 25, 1981. No additional persons desired to intervene in this matter. Both parties have filed post-hearing briefs.

Respondent concedes that it is engaged in a business affecting commerce within the meaning of the Act and that the Commission has jurisdiction of the parties and subject matter. The issues remaining to be decided are two-fold. First whether the Respondent was in Serious violation of 29 CFR 1926.451(a)(4); 1926.500(e)(1)(iv); 1926.501(f) and non-serious violation of 1926.400(h)(1); 1926.401(a)(1); and 1926.500(e)(1)(iii). If so the appropriate penalty therefor.

## THE EVIDENCE

The Secretary presented its compliance officer, Mr. George Davis. He has been with OSHA for seven years and has previous experience as a safety technician and safety engineer (T. 7-8). He conducted an inspection of Respondent's workplace on June 10, 1980. He observed two men on a scaffold approximately 15 feet high. The scaffold did not have guardrails (T. 10, C's Exh. 1&2). He was told by the management official who accompanied him on the walkaround that they were Respondent's employees on the scaffold (T. 28).

Mr. Davis also observed that there were no guardrails on the inside stairways leading to the upper floors. He testified that he determined the width of the stairways with a tape measure and that the stairway had more than four risers. Respondent had 47 employees on the jobsite and the stairway was the only access to the upper floors of the building. The other stairwell was closed off. He also observed that the pans in the stairwell were not filled from the fourth to the eighth or ninth floor. The pans have nosings which become tripping hazards. Wooden fillers would correct this problem (T. 13-19; C's Exh 3&4).

The compliance officer also testified concerning the lack of ground-fault interrupters on the electrical system or an assured equipment grounding program. He also observed an electric handsaw which was ungrounded and plugged up. He completed his testimony by indicating that the steps leading into the ground floor of the building only had one guardrail. He determined the width of the stairway was less than 44 inches by measuring it. It has more than four risers (T. 19-25; C's Exh. 5-7).

Respondent called Ms. Barbara Blount. She is Vice President of Administration for the Longcrier Company which includes responsibility for safety matters. The company was formed in 1978. The subject project was one of the earliest undertakings of the company (T. 33-35).

Ms. Blount testified concerning the company's safety program. The company adopted the "Manual of Accident Prevention and Construction" published by the Associated General Contractors of America as the safety manual for the subject project. It conducted weekly safety meetings open to subcontractors and employees on the jobsite at which safety topics were outlined and discussed (T. 38-41). Respondent also expended funds for the use of safety equipment including safety belts to be used on the job (T. 37-38). Employees had been issued instructions to wear safety belts when they were at a height such as that depicted in complainant's exhibit 1 & 2. The policy of the company was to enforce the safety regulations with reprimands and disciplinary action (T. 41).

## OPINION

### 29 CFR 1926.451(a)(4) - Lack of Guardrails

There is no question that two of Respondent's employees were observed on a 15 foot high scaffold which did not have guardrails. Respondent contends that the presence of these men on the scaffold without a guardrail constituted an isolated

incident of employee misconduct. It is well established that in order to defend successfully against a citation on the grounds that a violation arose from unpreventable employee misconduct, an employer must establish that the action of the employee was a departure from a uniformly and effectively communicated and enforced work rule designed to prevent the non-compliance. Laclede Gas Company, 79 OSAHRC 94/E13, 7 BNA OSHC 1874, 1978, 1979 CCH OSHD ¶24,007, at 29, 154 (No. 76-3241, 1979); Jensen Construction Company, 79 OSAHRC 49/D3, 7 BNA OSHC 1477, 1479, 1979 CCH OSHD ¶23,664 at 28,695 (No. 76-1538, 1979). The evidence has been considered within the parameters of this test. Respondent has failed to establish its affirmative defense. My reasons follow.

Respondent indicates it had a general rule that employees should wear safety belts when performing work on scaffolds 15' above the ground. In addition Respondent included a safety reminder in one weekly safety meeting to "spot and report missing guardrails". This meeting was held in February 1980 some four months before the inspection.

I cannot conclude that the above efforts constitute effective communication of a specific workrule to employees concerning the need to be protected when working on scaffolds 15' high. The two employees were in an area readily accessible to Respondent's management personnel. There is no probative evidence that the foreman of these two employees was even aware of the subject workrules. Nor does the record establish that the foreman with responsibility for this area made a reasonably diligent effort to anticipate and detect these hazards. Finally the record does not establish that the general instructions mentioned above were adequate to inform employees of hazards peculiar to the construction job being performed at the Sanger-Harris center in June 1980. Respondent's generalized testimony by Ms. Blount fails to establish that Longcrier took all necessary precautions to prevent the occurrence of the violation in this case.

Respondent's alternative argument is that the degree of the violation should be reduced from serious to non-serious because of the limited fall hazard. It is well settled that a serious violation is established if there is a possibility of an accident which, if it occurs, creates a substantial probability that death or serious injury will result. Portland Stevedoring Co., 73 OSAHRC 30/A2, 1 BNA OSHC 1250, 1973-74, CCH OSHD ¶16,347 (No. 5, 1973).

I conclude that the record establishes that the resulting harm would be death or serious physical harm. The compliance officer gave his opinion that a fall would present a substantial probability of death or serious physical harm. This opinion is supported by a review of Complainant's exhibits 1 & 2. The scaffold is 15' high with no protection whatsoever such as guardrails to prevent a fall off the back edge. The ground appears hard and is covered with various materials which would add to the severity of the fall. Consequently I conclude the violation was serious.

The remaining issue concerns the assessment of an appropriate penalty. Respondent has failed to establish the specific defense of unpreventable employee misconduct. This defense is a difficult one to establish. However, this failure does not detract from the fact that Ms. Blount and Longcrier have established a good general safety program. I have observed Ms. Blount and believe she is totally committed to safety at the workplace. In addition the fall distance was in that gray area of 10'-15'. The violation was serious as set forth above. However the probability of an accident was described as low by the compliance officer. Finally Ms. Blount testified that Longcrier had no history of prior violations before the June 10, 1980, inspection. The only citation which had been issued was withdrawn by the Secretary in another case. The proposed $400 penalty would not further the purposes of the Act. On balance I conclude that a penalty of $75 is appropriate.

## FINDINGS OF FACT

1. Respondent's employees were working on a scaffold 15' above the ground on June 10, 1980.

2. The scaffold did not have guardrails and the employees were not wearing tied off safety belts.

3. Respondent with the exercise of reasonable diligence could have learned of the violative condition.

4. There was a substantial probability that death or serious physical injury could result from Respondent's failure to protect its employees by the use of guardrails or safety belts.

## 29 CFR 1926.500(e)(1)(IV) and 29 CFR 1926.501(f)

Complainant combined 1926.500(e)(1)(iv) and 1926.501(f) to constitute a single serious violation. 29 CFR 1926.500(e)(1)(iv) provides:

> "(1) Every flight of stairs having four or more risers shall be equipped with standard stair railings or standard handrails as specified below, the width of the stair to be measured clear of all obstructions except hendrails:
>
> (iv) On stairways more than 44 inches wide but less than 88 inches wide, one handrail on each enclosed side and one stair railing on each open side;"

Respondent contends that Complainant has failed to establish an essential element of proof. I agree. The compliance officer testified that he determined the width of the stairway with a tape measure. However he did not testify as to his findings with respect to the width of the stairs. Consequently there is no evidence to base a finding that the subject stairway was between 44" and 88" wide. Absent such evidence Complainant has failed to establish the applicability of the cited standard to the stairway in issue. Consequently this item of the citation must be vacated.

The second item concerns an alleged violation of 29 CFR 1926.501(f). This regulation provides as follows:

> "Permanent steel or other metal stairways and landings with hollow pan-type treads that are to be filled with concrete or other materials, when used during construction, shall be filled to the level of the nosing with solid material. The requirement shall not apply during the period of actual construction of the stairways themselves.

Respondent contends the standard was not violated because the inspection took place during a period of time when the stairway was under actual construction. It argues that the stairway must be considered to be in a state of actual construction since the pans were yet to be filled. Thus Respondent attempts to come within the exception contained in the last sentence of 29 CFR 1926.501(f).

Complainant argues that the stairs were completed in this case within the meaning of the cited regulation. I agree. The stairway, in question, was the only access to the upper floors of the project. The only portion remaining to be completed was the filling in of the steps with concrete or other materials. The standard intends to except stairways as they are being constructed. It recognizes that once a framework has been established there is usually a time lag before the steps are filled. It is this hazard that must be protected against by the use of temporary solid materials. Respondent's own safety rules recognized that solid fillers should be used until the hollow pan stairs could be filled with concrete. Consequently Complainant has established a violation of 29 CFR 1926.501(f).

The question remaining to be resolved is whether item 2(b), 29 CFR 1926.501(f) standing alone can be considered a serious violation within the meaning of the definition set forth above. Complainant cited the lack of stair railings and the hollow pan-type treads as a combination violation. Stated another way the two violations, if taken together, presented a substantial probability of death or serious physical harm. However the compliance officer indicated that the basic hazard

was a tripping hazard because the workers' feet don't fit in the nosings. A tripping hazard has consistently been cited as a non-serious violation by Complainant. The hazard which concerned the compliance officer was tripping and falling off the side of the stairway. This combination of hazards is no longer present. Consequently a non-serious violation with no penalty is appropriate.

NON-SERIOUS VIOLATIONS - 1926.400(h)(1); 1926.401(a)(1); and 1926.500(e)(1)(iii)

Complainant has established a prima facie case with respect to the lack of ground-fault interrupters, unguarded electric handsaw and steps less than 44 inches wide with only one guardrail. The compliance officer observed these conditions on the day of the inspection. Consequently Complainant has carried its burden of proof on these items and they are affirmed.

## CONCLUSIONS OF LAW

1. Respondent Longerier Construction Co. is engaged in a business affecting commerce and has employees within the meaning of Section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. On June 10, 1980, Respondent was in serious violation of 29 CFR 1926.451(a)(4) and non-serious violation of 29 CFR 1926.501(f); 1926.400(h)(1); 1926.401(a)(1); and 1926.500(e)(1)(iii).

3. On June 10, 1980, Respondent was not in serious violation of 29 CFR 1926.500(e)(1)(iv).

## ORDER

On the basis of the foregoing Filndings of Fact and Conclusions of Law, it is ORDERED that:

1. Item 1 of serious citation number 1 is AFFIRMED.

2. Item 2(b) of serious citation number 1 is affirmed as a non-serious violation.

3. Items 2, 3, & 4 of non-serious citation number 2 are affirmed.

4. Item 2(a) of serious citation number 1 and item 1 of non-serious citation number 2 are VACATED.

5. A penalty of $75 is assessed for Item 1 of serious citation number 1 and no penalty is assessed for the non-serious violations.

STANLEY M. SCHWARTZ
Administrative Law Judge

Dated: January 12, 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| RAYMOND J. DONOVAN, SECRETARY OF LABOR, | : |
| Complainant, | : |
| v. | :OSHRC DOCKET NO. 80-4245 |
| LONGCRIER CONSTRUCTION COMPANY, | : |
| Respondent. | : |

## SECRETARY'S PETITION FOR DISCRETIONARY REVIEW

Complainant, the Secretary of Labor, being aggrieved by the Decision and Order of the Administrative Law Judge in the above matter, hereby submits this Petition for Discretionary Review pursuant to § 2200.91 of the Rules of Procedure of the Occupational Safety and Health Review Commission.

## STATEMENT OF PORTIONS OF THE DECISION AND ORDER TO WHICH EXCEPTION IS TAKEN

The Secretary takes exception to that portion of the Decision and Order in which the administrative law judge vacated the serious citation for violation of 29 CFR 1926 .500(e)(1)(iv)[1/] on the grounds that there was no evidence

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1/ 29 CFR 1926.500(e)(1)(iv) requires:

> On stairways more than 44 inches wide but less than 88 inches wide, one handrail on each enclosed side and one stair railing on each open side;

regarding the width of the cited stairway (J.D. 6). The Secretary further takes exception to the judge's reduction of the characterization of a second item of that citation, for violation of 29 CFR 1926.501(f), 2/ from serious to non-serious.

STATEMENT OF REASONS FOR WHICH EXCEPTION IS TAKEN

1. The administrative law judge erred in holding that the cited standard did not apply to the stairway at issue because there was "no evidence to base a finding that the subject stairway was between 44" and 88" wide (J.D. 6). The citation and complaint alleged the stairway to be 60 inches wide, but, as the judge found, this fact was not specifically established in the record (see Tr. 14). However, even absent proof of the exact width of the stairway, a violation of 1926.500(e)(1) should have been affirmed. Section 1926.500 (e)(1) provides:

> (e) Stairway railings and guards.(1) Every flight of stairs having four or more risers shall be equipped with standard stair railings or standard handrails as specified below, the width of the stair to be measured clear of all obstructions except handrails:

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2/ 29 CFR 1926.501(f) states in pertinent part

> Permanent steel or other metal stairways, and landings with hollow pan-type treads that are to be filled with concrete or other materials, when used during construction, shall be filled to the level of the nosing with solid material.

Immediately following in the standard is a list of five specific situations reflecting the width of the stairway and whether the stairway is open or enclosed. What is important to this case is that regardless of width a stairway with one or more open sides must be equipped with a stair railing on each open side:

> (i) On stairways less than 44 inches wide having both sides enclosed, at least one handrail, preferably on the right side descending;
> (ii) On stairways less than 44 inches wide having one side open, <u>at least one stair railing on the open side;</u>
> (iii) On stairways less than 44 inches wide having <u>both sides open</u>, <u>one stair railing on each side;</u>
> (iv) On stairways more than 44 inches wide but less than 88 inches wide, one handrail on each enclosed side and <u>one stair railing on each open side;</u>
> (v) On stairways 88 or more inches wide, one handrail on each enclosed side, <u>one stair railing on each open side</u>, and one intermediate stair railing located approximately midway of the width.

(emphasis added). Because it is undisputed that the cited stairway had more than four risers and was not equipped with a railing on the open side (Tr. 14, Exhibits C-3 and C-4), respondent was clearly in violation of either subsection (ii) or subsection (iv) or subsection (v). Thus, a violation of 29 CFR 1926.500(e)(1) should have been affirmed even though, in view of the lack of proof of width, a particu-

lar subsection of that standard cannot be specified. [3/] To hold otherwise would be an elevation of form over substance in a case in which absolutely no prejudice to respondent would result form affirmance of a citation under .500(e)(1).

2. The judge further erred in holding that, although the combination of open-sided stairways and unfilled pan treads on the same stairway was a serious hazard (J.D. 7), without that combination the second item alone was only a non-serious violation. It follows that if the first item of the citation is reinstated for the reasons discussed above, then the violation of .501(f) should be affirmed as serious. Moreover, the judge notes that "the hazard which concerned the compliance officer was tripping and falling off the side of the stairway" (J.D. 8). Contrary to the judge's statement (id), the "combination of hazards" was still present even though he believed he could not affirm the first item of the citation because of a technical deficiency in the Secretary's evidence. In other words, vacation of the first item, even if affirmed by the Commission, does not alter the plain fact that the open-sided stairway exposed respondent's em-

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3/ The violation would be for failure to equip the stairway with a railing on the open side. Because the Secretary did not establish the stairway to be more than 44 inches wide, he does not request the Commission to find a violation with respect to the absence of a railing on the enclosed side. Subsection (ii) of 1926.500(e)(1) indicates that a stairway less than 44 inches wide need not have a railing on the enclosed side. Accordingly, the citation should be for violation of 1926.500(e)(1), since it is clear that one of the subsections of that standard applies to the cited stairway.

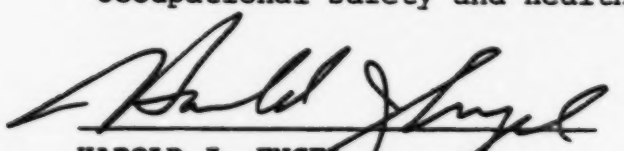
ployees to a fall from one floor to the next, on four or five separate floors (J.D. 2; Tr. 13-19). On these facts, the harm from an employee tripping and falling from these stairs would undoubtedly be serious. Portland Stevedoring Co., No. 5, 1973-74 CCH OSHD ¶16,347 (R.C. 1973)

For the above reasons, the Secretary respectfully requests that the Commission grant this Petition for Discretionary Review.

Respectfully submitted,

T. TIMOTHY RYAN, JR.
Solicitor of Labor

FRANK A. WHITE
Associate Solicitor for
Occupational Safety and Health



HAROLD J. ENGEL
Counsel for Regional Trial
Litigation

EMILIE N. JUNGE
Attorney

Dated January 28, 1982

## CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Secretary's Petition for Discretionary Review was mailed, postage prepaid to, David J. White, Esquire, Meyers, Miller, Middleton, Weiner & Warren, 2700, 2001 Bryan Tower, Dallas, Texas, 75201 on this 28th day of January, 1982.

Emilie N. Junge

EMILIE N. JUNGE
Attorney

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
Room 7B11, Federal Building
1100 Commerce Street
Dallas, Texas 75242

NOTICE OF DECISION

Secretary of Labor v. Hutton Electric Company
OSHRC Docket No. 80-5714

1. Enclosed is a copy of my decision. It will be filed with the Commission on January 12, 1982, and will become the final order of the Commission on February 11, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is February 11, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Stanley M. Schwartz
Administrative Law Judge

Date: December 23, 1981

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>HUTTON ELECTRIC COMPANY,<br>Respondent. | OSHRC DOCKET NO. 80-5714 |

Appearances: Patricia D. Keane, Esq.
Dallas, Texas

For the Complainant.

David J. White, Esq.
Dallas, Texas

For the Respondent.

## DECISION AND ORDER

SCHWARTZ, Judge:

This is a proceeding brought before the Occupational Safety and Health Reveiw Commission ("The Commission") pursuant to Section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et. seq. ("the Act"). Respondent contests an alleged serious violation of 29 C.F.R. 1926.400(a), 1926.401(a)(1) and 1926.400(h)(1). A hearing was held in this matter on September 24, 1981. No additional parties desired to intervene. Complainant withdrew item 1(c) of the citation, 29 CFR 1926.400(h)(1) at the hearing.

Respondent concedes that it is engaged in a business affecting commerce within the meaning of the Act. The issues remaining to be decided are two-fold.

First whether the Respondent was in serious violation of the two aforementioned standards. If so, the appropriate penalty therefor.

## EVIDENCE

Mr. Ronald H. Sarnacki, an OSHA compliance officer appeared and testified on behalf of the complainant. He conducted an inspection of Respondent's workplace on July 29, 1980. Mr. Sarnacki observed a four receptacle plug which was missing a cover. He testified that this condition exposed employees to live conductors. He also observed a Greenlee hydraulic pump which he cited for improper grounding due to the improper grounding of the same four receptacle plug. He testified that the pump itself was properly grounded internally (T. 6-8).

The compliance officer also testified concerning his conversations with Mr. Paul Carter, Respondent's foreman. Mr. Carter told him the Greenlee hydraulic pump had been plugged into the receptacle and had been used by him on the day prior to the inspection July 28, 1980. Mr. Sarnacki conceded the pump was not in operation during the inspection and he did not witness any Hutton employee within proximity of the pump (T. 9, 16). Mr. Sarnacki also testified that on the day of the inspection the Greenlee pump in question was not plugged into the receptacle (T. 16). On redirect examination Mr. Sarnacki answered "No" to the question of whether Mr. Carter told him that he had made any changes in the receptacle since the time he had used it on the day before (T. 17).

## OPINION

Complainant presented the compliance officer Mr. Sarnacki and rested its case. Respondent moved to dismiss the citation on the ground that the complainant failed to establish employee exposure to the alleged violations. The undersigned reserved ruling on the motion. Respondent rested its case on the motion to dismiss. Both parties have filed post-hearing briefs.

To prove a violation of section 5(a)(2) of the Act, 29 U.S.C. §654 (a)(2), the Secretary must demonstrate by a preponderance of the evidence an employer's noncompliance with an applicable standard and employee access to the hazard created by the violative condition. Otis Elevator Co., 78 OSAHRC 88/E5, 6 BNA OSHC 2048, 1978 CCH OSHD ¶23,135 (No. 16057, 1978). The Secretary need not establish a fact with absolute certainty. However the evidence must convince the trier of fact that the existence of the fact the Secretary seeks to prove is more likely than not. Anaconda Aluminum Co., 9 BNA OSHC 1460, 1465, 1981 CCH OSHD ¶25,300 (No. 13102, 1981).

Applying the preponderance of evidence test, the resolution of this case is reduced to the question of whether based upon all the evidence, the fact asserted by Complainant, that Hutton's foreman Carter used the receptacle in an uncovered condition on the previous day is more likely than not.

The Secretary relies entirely on Compliance Officer Sarnacki's recounting of Hutton's foreman Carter's statement concerning the use of the subject receptacle. There is no question that Mr. Carter used the receptacle on the day prior to the inspection. The only other evidence on the issue concerned Mr. Sarnacki's answer to a question on redirect. He answered "No" to the question whether Mr. Carter told him that he had made any changes in the receptacle since the time he had used it on the day before.

Complainant contends that I should infer from this testimony that the receptacle was uncovered on the day Mr. Carter used it. I disagree. Respondent correctly points out that the testimony by no means indicates that the condition of the receptacle had not changed since it had been used. It merely shows that Mr. Carter did not tell the compliance officer of any change in the condition of the receptacle. The fatal flaw in Complainant's argument is that the suggested

inference is not valid in this case because the condition of the receptacle is by no means a condition which is permanent in nature. The condition of the receptacle could change on a construction site within a one hour period or less. The compliance officer should have established whether the receptacle was uncovered by asking Mr. Carter. Recounting of an affirmative answer to the question would have convinced me that it was more probable than not the receptacle was uncovered when Foreman Carter used it. The burden would have then shifted to the Respondent. Absent such evidence I conclude the Complainant has failed to establish that Respondent's employees had access to the unguarded receptacle on the day prior to the inspection as asserted in this case.

## FINDINGS OF FACT

1. The Compliance Officer did not observe anyone operate the hydraulic pump on the day of the inspection.

2. At no time during the inspection did the Compliance Officer witness or have knowledge that any Hutton employee was within the proximity of the pump or receptacle.

3. The hydraulic pump was not plugged into the receptacle at any time during the subject inspection.

4. There is no evidence in the record that establishes the receptacle was in the same condition at the time of its use by Respondent's foreman on July 28, 1980, as it was at the time of the inspection on July 29, 1980.

## CONCLUSIONS OF LAW

1. Respondent, Hutton Electric Company, is engaged in a business affecting commerce and has employees within the meaning of Section 3(5) Of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. On July 28 & 29, 1980, Respondent was not in serious violation of 29 CFR 1926.400(a); 1926.401(a)(1); and 1926.400(h)(1).

## ORDER

On the basis of the foregoing Findings of Fact and Conclusions of Law it is ORDERED that:

1. Items 1(a), 1(b), and 1(c) of Serious Citation number 1 are VACATED.

STANLEY M. SCHWARTZ
Administrative Law Judge

Dated: January 12, 1982

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

February 22, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

BETHLEHEM STEEL CORPORATION

OSHRC DOCKET NO. 79-746

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

- Counsel for Regional Litigation
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- Marshall H. Harris
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FOR EMPLOYEES

- Nicholas Kiak, Pres.
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- George Schrader, Sfty, Coordinator
  United Steelworkers of America
  District 9 - 1330 Center St.
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Edward V. Alfieri
Judge, OSHRC

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| Secretary of Labor | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 79-746 |
| Bethlehem Steel Corporation | : | |
| Respondent. | : | |

ORDER

The Parties' Stipulated Notice of Dismissal is Approved.

For The Commission
Ray H. Darling, Jr.
Ray H. Darling, Jr.
Executive Secretary

Dated: FEB 22 1982

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| Raymond J. Donovan, Secretary of Labor<br>United States Department of Labor,<br><br>Complainant<br><br>vs.<br><br>Bethlehem Steel Corporation,<br><br>Respondent,<br><br>and<br><br>Local 2599, United Steelworkers of America<br><br>Authorized Employee Representative | OSHRC DOCKET<br>NO. 79-746 |

STIPULATED NOTICE OF DISMISSAL

Raymond J. Donovan, Secretary of Labor, United States Department of Labor, Complainant, Bethlehem Steel Corporation, Respondent, Local 2599, United Steelworkers of America, Authorized Employee Representative, parties to the above-captioned matter, in order to resolve the contest herein agree and stipulate as follows:

1. On January 17, 1979, Complainant issued to Respondent a serious citation for an alleged violation of Section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §654(a)(1). The citation specified the violation as follows:

> Operators of "Hyster" straddle carrier number 260 which was operated and stored in the Structural Steel and Auxiliary Structural Steel Yard, did not have adequate vision from the carrier cab to the front and right sides of the carrier, November 22, 1978 to January 5, 1979.

2. Respondent timely contested the citation and the matter was referred to the Occupational Safety and Health Review Commission

FEB 1982

("the Commission") for adjudication.

3. The Authorized Employee Representative elected and was accorded party status before the Commission.

4. A hearing was held before the Commission's Administrative Law Judge Alfieri who, thereafter on January 24, 1980, filed a Decision and Order with the Commission. In his Decision Judge Alfieri vacated the citation for several reasons including his finding that while limited carrier visibility created a hazard and while Respondent had knowledge of the hazard, nonetheless the evidence did not establish the feasibility and likely utility of the Secretary's suggested means of abatement, i.e., mirrors mounted on the carrier.

5. None of the parties petitioned the Commission for review of the judge's decision. Nevertheless, Commissioner Cottine, on February 25, 1980, directed the judge's decision for review to consider:

> Whether the Judge erred in vacating the citation alleging a violation of 29 U.S.C. §654(a)(1) on the basis that "the Secretary did not carry his burden of proof that Respondent violated the general duty clause."

6. On December 10, 1981, the Commission issued a briefing notice to the parties.

7. Since the issuance of the briefing order the parties have discussed the case and the record. From this review the parties have determined that the record supports the decision of the judge.

Complainant, in view of the foregoing and in reliance on respondent's assertions that the carrier, in addition to its clearly visible size and shape, is equipped with certain devices intended

to alert employees to the approach of the carrier, agrees to withdraw the citation and notification of proposed penalty.

Respondent, in view of the foregoing agrees to withdraw its notice of contest.

The Authorized Employee Representative has no objections to the above withdrawals.

WHEREFORE, in the light of the foregoing the parties agree that there is no longer any contest or controversy as to this case and agree to the dismissal of this matter and the entry of a final order in accordance with the terms herein.

George B. Levasseur

GEORGE B. LEVASSEUR
Attorney for Respondent

Nicholas Kiak

NICHOLAS KIAK
President of the Authorized Employee Representative

Robert M. Wolff 2/11/82

ROBERT M. WOLFF
Attorney for Complainant

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>BETHLEHEM STEEL CORPORATION,<br><br>Respondent. | OSHRC DOCKET<br><br>NO. 79-0746 |

Appearances:

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George Schrader, Safety Coordinator
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1330 Center Street
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DECISION AND ORDER

Edward V. Alfieri, Judge.

## STATEMENT OF THE CASE

This is a proceeding under section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq. (the Act). It involves an inspection initiated by the fatal accident of Mr. Calvin Smith, an employee of the Philadelphia, Bethlehem and New England Railroad, a wholly-owned subsidiary of Respondent.

## BACKGROUND

The events leading to the accidental death are essentially undisputed. On November 22, 1978, while working in the 25 run area of the structural steel yard, brakeman Smith was uncoupling and blocking a gondola railroad car on track No. 513. After uncoupling the railroad car from an engine, Smith, walking in a southerly direction towards the yard roadway, took two or three steps away from the railroad car, and came in contact with the right side of Hyster straddle carrier No. 260 (the 260 carrier) driven by Herbert Nicholas.

During November 28, 1978 and January 8, 1979, Michael Glowatz, the Secretary's Compliance Officer, visited the scene of the accident and inspected the 260 carrier. He also interviewed the operator Nicholas and two witnesses to the accident, crane operators Rhoback and Deutsch.

Based on the inspection and the information gathered by Glowatz, the Secretary issued a citation to Respondent on

January 17, 1979. It charged Respondent with a violation of the general duty clause, section 5(a)(1) of the Act, 29 U.S.C. section 654(a)(1). That section provides:

> "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees."

The alleged violative condition is described as follows:

> Operators of "Hyster" straddle carrier number 260, which was operated and stored in the Structural Steel and the Auxiliary Structural Steel Yard, did not have adequate vision from the carrier cab to the front and right sides of the carrier, November 22, 1978 to January 5, 1979.

Immediate abatement was called. A penalty of $1,000.00 is sought by the Secretary.

The issues to be determined are whether or not Respondent failed to comply with the general duty clause and if so, is the penalty proposed appropriate.

Testimony of Compliance Officer Michael Glowatz

At the scene of the accident Respondent's safety engineer Mr. Serfass, explained to him how the accident happened. Glowatz then took several photographs[1] which were placed in evidence. He explained that Exhibit C-8 showed a locomotive and a railroad car positioned similarly to the ones from which Smith walked

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1 Exhibits C-1 through C-23.

when he was fatally injured (Tr. 16). Testifying about Exhibit C-9, Glowatz said it showed that the track in the front of the photograph was about eight feet from the railroad cars (Tr. 17).

He estimated that the 260 carrier was 19 to 20 feet long, the operators cab 101 inches above the ground, set back 83 inches from the front end and 67 inches in from the front of the right side (Tr. 19, Exhibits C-16, 19, 20 and 21).

Glowatz tested the field of vision from the 260 carrier operator's cab by having Union Representative Kametz stand at various places along the right side of the 260 carrier. When standing 66 inches away from the 260 carrier's side Kametz could not be seen from the cab.

Kametz could not be seen when standing 52 inches from the front right section of the 260 carrier. Glowatz could barely see the top of the yellow hard hat worn by Kamitz who had moved to 54 inches. Kamitz's height with the hard hat on was 5 feet 11 1/2 inches. The test also showed that in order for the 260 carrier's operator to see a 6 foot 3 inches high object, it had to be 5 1/2 feet away from the 260 carrier's right side (Tr. 22-25, Exhs. C-13, 14 and 15).

Glowatz drew the conclusion that the limited visibility on the right side of the 260 carrier was a recognized hazard in the industry because:

1. Carriers made by the Clark Equipment Company had, as standard equipment, convex mirrors mounted on the handrail to

provide vision at the front and at the right rear (Tr. 36, Exh. C-23).

2. National Safety Council data sheet #257[2] relating to Gantry Trucks,[3] informs the reader about the blind spots on some model carriers and particularly the older models[4] (Exh. C-22).

Glowatz attributed knowledge of the hazard directly to Respondent because it is a member of the National Safety Council (Tr. 38). However, he did not know when the data sheet #257 was published, if Respondent ever received a copy of it from the council, when Respondent purchased either the 260 carrier involved in the accident or purchased any of its other carriers (Tr. 39).

According to Glowatz the violative conditons could be abated. He suggested that convex mirrors be placed on the perimeter of the 260 carrier at the right rear and left front as they are on the carrier made by Clark Equipment Company (Tr. 42-43). This would eliminate much of the blind spot and afford the 260 carrier operator better visibility of the front side (Tr. 43). The mirrors are available from both Clark (Exh. C-23) and Hyster (Tr. 43).

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2 Prepared by Industrial Department, National Safety Council, 444 N. Michigan Avenue, Chicago, Illinois.

3 Also known as "hysters" and straddle trucks."

4 Item 6 of Exh. C-22.

In arriving at an unadjusted penalty of $1,000.00 Glowatz considered the serious nature of the violation, the number of employees exposed, the time of their exposure and the high probability of an accident occuring. He made no adjustment for size, because Respondent has 14,000 employees, none for history because of prior violations and none for good faith because of Respondent's reluctance to abate (Tr. 49-50).

On cross-examination, Glowatz said that he was speculating when he testified that Smith was struck by the 260 carrier (Tr. 57). He was also uncertain that the convex mirrors when used as he suggested would have helped either to avoid the accident or lessen the severity of injury (Tr. 73). He agreed that Smith's fatal accident was similar to accidents that occur when a pedestrian unexpectedly walks from between parked cars (Tr. 73).

Glowatz was asked to examine a specification sheet for the Clark 60,000 lbs. carrier which is similar to the subject 260 carrier (Tr. 62-64, Exh. R-45), another for a Gerlinger carrier (Tr. 64, Exh. R-46) and a third one for the Hyster 260 carrier involved in the accident (Tr. 60-61, Exh. R-47). After examining the documents he said none of them made mention of front and right side mirrors as being either standard or optional equipment.

When cross-examined about abatement, Glowatz said that he was told by some of Respondent's employees that mirrors

placed on the 260 carrier would be knocked off because the carrier worked close to other yard equipment (Tr. 66).

Glowatz further testified that he did not know exactly where the mirrors should be placed (Tr. 69, 85) but thought he would generally follow the Clark Equipment Company's specifications (Tr. 69, Exh. C-23). He also suggested that Respondent do an engineering study (Tr. 77). He was unable to say how effective the mirrors would be in reducing the blind spot on the right side and front of the 260 carrier (Tr. 70, 83, 86). He thought that if a man were to stand eight feet away from the 260 carrier, parts of his body probably could not be seen (Tr. 72).

He acknowledged that in his report of investigation he noted that even if the straddle carrier was equipped with mirrors it was questionable if the operator could have stopped in time (Tr. 74). He had no information about where the carrier was when Smith walked from between the railroad cars (Tr. 87).

Testimony of William Rohbach

It was stipulated that if called he would testify that he is a crane operator in 25 run. He observed Smith uncouple a railroad car and throw blocking under the wheel, start to walk, take about three steps and be hit by the 260 carrier. He saw Smith put his hands up.

He would further testify that Smith's feet must have been

hit first and that the 260 carrier operator did not know Smith had been knocked over and drove over him (Tr. 88-89).

Testimony of Ronald Deutsch

It was stipulated that if called he would testify that he is a crane operator for Respondent. He observed Smith uncouple the railroad car and throw blocks to keep it from drifting.

The locomotive moved away and Smith turned and walked about two or three steps. Smith was then hit by the right front side, the blind side, of the 260 carrier.

It was going about 20 or 30 feet and was barely moving.

After the collision, Smith was knocked down, the 260 carrier ran over him. He was hit by the carrier's front tires, the shoes and the rear tire. Deutsch did not see the rear tire. He saw only the front tire and the shoes hit Smith (Tr. 90).

Testimony of Herbert Nicholas

He has been a carrier operator at the Respondent's plant for the past 19 years and was operating the 260 carrier when the accident occurred. He described the happening as follows.

> Q Where were you working on tne 22nd of November of 1978?
>
> A I was working -- I had just gone outside of 25 run, I do not remember what road, to pick up a lift for this truck in 25 run. I was coming into 25 run. I put the lift down and backed off and it had happened (Tr. 97).

* * *

Q All right, you had put the lift down and you had gone where?

A I put the lift down on the tracks aside of the truck and then I backed off. Then I saw an engine coming down, it was Track 512. I saw an engine come down and I was going to go in and pick the lift up so the engine could get out. This crane operator on 25 run started hollering. I did not know I had hit the guy. I would have run right over him again (Tr. 98).

He denied seeing Smith prior to the accident (Tr. 100).

When asked about his field of vision from the 260 carrier's cab Nicholas said he could look forward but could see nothing on the ground. He could see to the left just outside of the cab on the driver's side but could not see to the rear unless he turned around (Tr. 103). There were no mirrors on the right side to help his vision and doubted that he could see a six foot tall person who was standing within a foot or two of the 260 carrier's right side. Neither could such a person standing at the right front fender be seen from the cab (Tr. 104). He found the field of vision from the cabs of the smaller carriers to be limited but to a lesser degree than the 260 carrier (Tr. 105).

When asked for suggestions on how to overcome the visibility limitations Nicholas answered:

Q If mirrors were to be placed on the 260 straddle carrier where should they be placed in order to give you visibility on the right-hand side?

A I am taking orders when I drove it Wednesday, drove the 260, and they had a bracket up front.

Q They had a what up front?

A Right front corner where it had mirrors on before but they have gotten torn off, but then you can only see out along the side. I do not know where you would put a mirror where you can see down along the carrier.

Q Did you say that you could see along the right side with a mirror if it was placed on the front?

A Yes, out along the carrier, but I do not think you would be able to see down on the front. It would get knocked off too quick along the cars.

Q With the mirror that you did mention, you would be able to see along the right side?

A That is along the right side, but not down on the ground (Tr. 106).

Nicholas concluded his direct testimony saying that the roadway in the area was used by different types of vehicles and that about 68 employees worked there (Tr. 107).

In response to questioning on cross-examination and at times referring to the diagram (Exh. R-1) Nicholas said he had placed the 260 carrier about 20 feet away from the load that

he decided to remove from the area of the track 512 (Tr. 115). From that distance he could not have seen Smith (Tr. 118, 125, 128) because of the height of the 260 carrier (Tr. 127). However, he believed if a man was standing 25 feet away from the 260 carrier the top of his head could be seen. But a man five or ten feet away would not be visible (Tr. 128-129).

Nicholas further testified that he has not operated a 260 carrier or its duplicate 261 carrier that was equipped with mirrors (Tr. 125).

Testimony of Julius Mihala

He has been operating various models of straddle carriers for Respondent for the past 15 years. He described the 25 run, where the accident happened, as an area of much vehicular traffic and many pedestrian employees (Tr. 130-133).

When operating the 260 carrier involved in the accident or the 261 carrier he finds it difficult to see any person or object that may be close to the right side. He has no way of knowing if a person is there (Tr. 134). He experiences the same visibility limitations when operating Respondent's other Hyster carriers which are about one foot lower (Tr. 137). Some of the lower carriers have mirrors set back on the hood and they permit some vision far back of the carrier's right rear (Tr. 139).

Mihala thought that a convex mirror attached to the right front could increase the right side visibility to the ground.

However, it had to be positioned to avoid being knocked off (Tr. 141).

On cross-examination, Mihala testified that he did not know to what extent the use of a convex mirror would reduce the blind area on the right side of the 260 carrier (Tr. 143-144).

Testimony of Howard Miller

He has been operating straddle carriers for Respondent for about 20 years. He has operated the 260 carrier and is aware of the operator's limited visibility along the entire right side (Tr. 159-160). Prior to and after the accident, he discussed the visibility problem occasionally with his foreman Donald Cooper and suggested putting mirrors on the hood of the 260 carrier (Tr. 160-161). Respondent's Hyster carrier, Nos. 269, 304 and 305, are lower than the 260 carrier, and have convex mirrors on the hood (Tr. 162). They gave the operator greater visibility to the rear only (Tr. 166). After the accident everyone had suggestions. His was to place a mirror on the 260 carrier's hood on an arm that would be about one or two feet out from the side (Tr. 167-168).

When cross-examined, Miller changed his testimony by answering that he spoke to his foreman only once before the accident and that was a long time ago (Tr. 163). He further testified that the mirror on the hood of the 269 carrier only increased the visibility to the rear (Tr. 164). He agreed

with the testimony of other witnesses that a mirror extending beyond the side of the carrier would be knocked off because of the close working conditions (Tr. 165, 170-171).

Testimony of William K. Schellhaas
Respondent's Safety and Health Coordinator

He testified that it is his responsibility to be alert to any hazardous or potentially hazardous conditions at the plant (Tr. 184). From his observations and the fact that (1) during the 25 years Respondent has used carriers no other accident occurred in which a carrier struck an employee and (2) that in 1978, Respondent's carriers traveled 432,000 miles within the plant, he concluded that there was neither a 260 carrier visibility problem nor a recognized hazard associated with its use. However, he realized that there is an area around the 260 carrier where there is limited visibility which he equated to conditions prevailing in passanger cars (Tr. 254). The operator's field of vision from the 261 carrier cab (260 and 261 are identical) was quite good. An operator could see a person approaching from the 260 carrier's right front. However, the operator would lose sight of the person once he got very close, within several feet, of the 260 carrier's right side (Tr. 255).

Schellhaas was critical of the abatement methods suggested by the Secretary's witnesses, Mihala, Miller and Nicholas.

He stated that if mirrors were placed outboard they would be knocked off because of the close work. Mirrors placed inboard would only increase the operator's vision to the rear. It would also create a greater hazard because in order to use it the operator would have to divert his attention from the road and the load (Tr. 257-260, 280).

He tested the right side visibility of a carrier by holding a 14-inch convex mirror at the various places suggested by the Secretary's witnesses (Tr. 263-264). The mirrors positioned inboard and outboard did not improve the critical area of visibility close to the carrier (Tr. 319-320).

Schellhaas further stated that the mirror bracket on the 260 carrier mentioned by Nicholas[5] was mounted inboard and was used to hold a small convex mirror. Its function was to enable the operator to see the position of the load directly below the carrier (Tr. 264-265). He recalled that between 1950 and 1960, Respondent purchased 19 or 20 carriers, four or five more between 1972 and 1974 (Tr. 278) and that none of them were equipped with mirrors as the Secretary suggests (Tr. 279).

Schellhaas also testified that the probability of an accident occurring was not high. He based that on the Respondent's record of almost 26 years of operation of carriers traveling hundreds of thousands in plant miles without a prior pedestrian accident (Tr. 280).

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5 At Tr. 106.

He explained that the Respondent's safety committee members are representives of unions, and members of Respondent's central safety department at the plant. His examination of the monthly meetings held from 1975 to date showed no reference to any complaints concerning visibility problems on carriers (Tr. 281). He concluded his direct testimony saying Respondent uses a number of safety measures in the yard including careful orientation of new employees to make them aware that there can be some potential danger while they are working in the vicinity of straddle carriers and the other mobile equipment in the yard (Tr. 282-283).

When cross-examined, Schellhaas said that he and Joseph Egan, Respondent's senior safety engineer, did not use either the 260 or 261 Hyster carriers when they did the mirror placement test. They used a smaller Hyster, about 12 inches lower, that was undergoing repairs in the shop. Throughout the test, various photographs were taken (Exhs. R-34 through 43) but no written report was prepared (Tr. 289-290).

He further testified that the investigation report[6] of the accident makes no reference to Smith not looking to the right or left (Tr. 318).

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6 Identified as Respondent's "2533 reports".

Testimony of David A. Pike
Assistant General Foreman

He started working in Respondent's shipping yards in 1956. From 1967 through 1969, he operated the 260 and 261 Hyster carriers. At the time they were fairly new. He has neither seen any straddle carrier come from the manufacturer equipped with side mirrors like those proposed by the Occupational Safety and Health Administration (OSHA) nor was he aware of any recommendations by the manufacturer to add mirrors. Based on his experience, the operation of straddle carriers without mirrors is not viewed as a recognized hazard (Tr. 324). He never complained about the visibility on the carrier's right side or the lack of mirrors (Tr. 324-325).

He has damaged the carrier while operating it close to railroad cars and moving in areas with columns and trucks. The close work would cause outboard mirrors to be knocked off (Tr. 325-326).

In his opinion, the suggestions made by Mihala and Miller about the placing of mirrors inboard and outboard are neither feasible nor effective. Mirrors placed outboard would be knocked off. Mirrors placed outboard or inboard will not increase the right side field of vision (Tr. 327-328).

He said there was a very good field of vision from the cab of a 260 carrier. The operator could see a man or another vehicle coming towards it. He also felt that it would be

difficult for anything coming towards the 260 carrier to get so close that the operator could not see it but there are times that the operator would not see it quickly (Tr. 328).

In reply to questions on cross-examination Pike answered that a person, about six feet tall, approaching the carrier from its right front side would not be visible to the operator when that person was four or five feet from the carrier (Tr. 331); that carrier vibration would make the outboard mirror ineffective (Tr. 333-334); that he did not believe an inboard mirror even when adjusted to various angles, would enhance the right side visibility (Tr. 334).

Testimony of Joseph P. Eagan
Senior Corporate Safety Corporate Safety Engineer

Referring to various photographs taken from the carrier's cab (Exhs. R-34 through R-43) during the test done by him and Schellhaas, Eagan testified substantially as follows:

The test was conducted by having a supervisor hold a 14-inch convex mirror inboard and, measured from its bottom, two feet above the carrier's frame as shown in Exhibit R-42. From time to time Eagan would move to different points along the carrier's right side and the mirror would be tilted to different angles (Tr. 350-351).

He could not be seen in the mirror when standing at the carrier's right side 18 inches forward of the front fender (Tr. 345, Exh. R-34). When he moved back 18 inches, only the

top of his hard hat could be seen (Tr. 347-348, Exh. R-35). Moving to different positions from that distance of 18 inches he could not be seen (Tr. 352, Exh. R-36).

Exhibit R-37 shows his image in the mirror. At the time he was about four feet from the carrier's side (Tr. 352). When he moved in closer than four feet his image was lost (Tr. 352, Exh. R-38). His image appeared when he again stood about four feet from the side but further back than where he stood in Exhibit R-37 (Tr. 352-353, Exh. R-39).

Exhibit R-41 shows the mirror in the outboard position 20 inches out and two feet above the deck of the carrier (Tr. 353). In Exhibit R-43 the mirror is being held at the right rear where, according to Eagan, there was no place to mount it. Even if it could be mounted there, it would be of no value since it showed nothing along the right side and required the operator to turn around fully to look at it (Tr. 354).

Eagan further testified that the test showed the placement of mirrors as suggested by the Secretary's witnesses Glowatz, Nicholas and Miller would not abate the condition (Tr. 356-359).

Based on his investigation, and in his opinion, the operation of the carrier was not a recognized hazard. His investigation included examining the manufacturers' specification sheets for the Clark 60,000 lb. carrier Series 121, the Gerlinger 60,000 lb. carrier and for the Hyster 60,000 lb. 260 carrier involved in the accident. None of the literature

stated that side view mirrors were standard or optional equipment (Tr. 360-365, Exhs. R-45, R-46, R-47).

When questioned by the Secretary's counsel, Eagan said that about five months ago he saw the new Clark straddle carriers used at the Sparrows Point shipbuilding plant. They had mirrors on all four corners as standard equipment. He noticed that the mirrors were severely damaged and broken (Tr. 396).

In Exhibit R-35, which shows the top of his hard hat, the mirror was positioned to reflect the wheel area where Smith came in contact with the 260 carrier (Tr. 398).

On re-direct Eagan stated that the use of mirrors would neither improve the carrier operator's visibility on the right side nor improve the safe operation of the vehicle (Tr. 402). The new Clark carriers that he referred to were probably purchased by Respondent in 1975 or 1976 (Tr. 403).

## DISCUSSION

Respondent was cited for violating section 5(a)(1) of the Act because it allowed its employees to operate Hyster Straddle Carrier 260 which, it is alleged, did not have adequate vision from the operator's cab to the front and right side.

We consider first Respondent's contention that section 5 (a)(1) is not applicable because there is a standard which covers the areas of safety for straddle carriers that are raised in the

citation. The specific standard referred to by Respondent, 29 CFR 1910.178, is entitled Powered Industrial Trucks. It comprises numerous subsections relating to the operation, safety, design and construction of the vehicles. Subpart 2 incorporates by reference the "American National Standard for Powered Industrial Trucks, Part II, ANSI B56.1 - 1969."[7]

The Secretary argues that since 29 CFR 1910.178 and the referenced ANSI standard cover a large variety of vehicles, they have to be general and address those hazards which are common to the majority. Therefore, it is not comprehensive in scope.[8]

It is a well settled law that if any specific safety standard is applicable to the conduct at issue, a citation under the general duty clause of the Act will not lie. Secretary v. Sun Shipbuilding Company, 4 OSAHRC 1020 (1973).

A reading of the standard 29 CFR 1910.178 and the referenced ANSI standard shows that it relates to powered industrial trucks of various fork lift types which are graphically shown (Exh. R-48 App. A. p. 49-52) to be different in design and size from the 260 carrier.

The term Powered Industrial Truck, as used in the standard is defined as: "A mobile, power-driven vehicle used to carry, push, pull, lift, stack, or tier material."[9]

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7 Respondent's Brief p. 30-32.

8 Secretary's Brief p. 11-12.

9 Exh. R-48, App. A. p. 48.

The type of straddle vehicle which the framers of the standard intended that it covers is defined as:

> STRADDLE TRUCK: A general class of cantilever truck with horizontal, structural wheel-suppported members extending forward from the main body of the truck, generally high-lift, for picking up and hauling loads between its outrigger arms. (Fig. 10)[10]

The numerous photographs of straddle carriers placed in evidence show that it is a massive four-wheeled vehicle that carries loads of materials beneath its elevated frame. It neither bears any resemblence in size, design nor operating function to the powered industrial trucks covered by 29 CFR 1910.178.

The Respondent relies upon Secretary v. Ingalls Shipbuilding Division, No. 76-900 (5/1977) and Secretary v. The Anderson Company, 2 BNA OSHC 3024. Both decisions are final orders of the Commission. Although such decisions may be persuasive they are not binding Commission precedent. Secretary v. Leone Construction Company, 3 BNA OSHC 1979, appeal withdrawn, No. 76-4070 (2nd Cir. 5/17/76). The standard is inapplicable.

In order to establish a violation of section 5(a)(1) the Secretary must prove:

(1) that the employer failed to render its workplace "free" of a hazard which was

(2) "recognized" and

(3) causing or likely to cause death or serious physical harm.

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[10] Exh. R-48, App. A. Figure 10 at p. 52.

National Realty & Constr. Co., Inc. v. O.S.H.R.C., 489 F.2d 1257, 1265 (D.C. Cir. 1973); Cormier Well Service, 4 BNA OSHC 1085, 1975-76 CCH OSHD para. 20,583 (No. 8123, 1976). The Secretary must also demonstrate that there were feasible steps that the employer could have taken to avoid citation. National Realty & Constr. Co., Inc., v. O.S.H.R.C., supra at 1268; Cormier Well Service, supra.

To meet his burdern of proof,[11] the Secretary must prove by a preponderance of the evidence the existence of a serious hazard, Secretary v. A. E. Burgess Leather Co., Inc., 5 BNA OSHC 1096 (No. 12507, 1977), aff'd 576 F.2d 948 (1st Cir., 1978), It is established law that just as the existence of a violation need not result in an accident neither does the mere fact that an accident happened prove that a violation existed. National Realty & Constr. Co., Inc. v. O.S.H.R.C., supra; Secretary v. Hanovia Lamp Division (Conrad Precision Industries), reversed and remanded on other grounds, 502 F.2d 946, 949 (3rd Cir., 1974). However, the occurrence of and the circumstances surrounding an accident may be probative evidence of a violation. Secretary v. Ralston Purina Company, 7 BNA OSHC 1302 (No. 76-2551 RC).

The 260 carrier is a massive industrial vehicle that weighs 60,000 lbs. It is operated from a cab that is more than eight feet above the roadways it traverses. The structural steel yard where it is used is well-travelled by Respondent's pedestrian

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11 Commission Rule 73(a).

employees and by various other powered industrial vehicles. There is unanimous testimony by four of Respondent's carrier operators that when operating a 260 carrier they have a limited area of visibility along the right side. Compliance Officer Glowatz experienced the same limited visibility. Furthermore, Respondent concedes there is limited visibility in a four or five feet area along the right side of the carrier.[12]

The evidence demonstrates that the operation of the 260 carrier without mirrors which would increase the operator's field of vision on the front and right sides of the 260 carrier constitutes a hazard. To hold otherwise would require the capacity to ignore the obvious.

Respondent's contention that no hazard exists with respect to the areas of limited visibility except in circumstances where an employee imprudently exposes himself to the blind spot[13] is without merit. The very absence of visibility associated with the operation of the 260 carrier under the facts and circumstances is an inherent hazard.

A serious violation exists when there is a substantial probability that death or serious physical harm could result if an accident occurs. Secretary v. Gaetano Construction Corp., 6 BNA OSHC 1463 (No. 14,886 RC, 1978). It undisputed that a fatality occurred.

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12 Respondent's brief p. 36.

13 Respondent's brief p. 37.

The next question posed is whether or not the operation of the 260 carrier without adequate vision along its front and right sides constitutes a "recognized hazard" within the meaning of section 5(a)(1) of the Act. The Appelate Courts have held that to constitute a recognized hazard, the dangerous potential of a condition or activity must be known to the particular employer or generally in the industry. Brennan v. The Review Commission and Vy Lactos Laboratories, 494 F.2d 460, 463-464 (8th Cir. 1974); National Realty and Construction Co., Inc., v. O.S.H.R.C., 489 F.2d 1257, 1265 M.32.

As indicated elsewhere in this opinion, Respondent concedes that the 260 carrier has an area of limited visibility along right and front sides. As part of its safety program Respondent alerts its new employees to the "potential danger" while working close to the carriers (Tr. 282-283). Respondent's OSHA coordinator at the plant testified that he was aware of the limited visibility area but denies it was recognized.

The flaw in Respondent's denial of actual knowledge is that it equates a work area that has a potential hazard with one that is free of a hazard. Put another way, Respondent argues that a hazard does not exist unless an accident occurs to an employee and that the Secretary must prove the presence of an actual hazard. Respondent's argument flies in face of the purposes of the Act. The National Realty Court, supra.,

489 F.2d at 1265 N.33 held. "The keystone of the Act . . . is preventability," . . . for the Act is intended to protect against "possible hazards" and "potential hazards." accord. Usery v. Marquette Cement Mfg., Co., 568 F.2d 902.

Here the hazard was apparent to all of Respondent's employees and to the Respondent. Furthermore it scarcely requires any speculation or expertise to recognize that it is hazardous to operate a 60,000 lb. massive straddle carrier, whose operator has limited vision on one side, in an area where there are concededly pedestrian employees.

The Secretary has established that Respondent had the requisite knowledge. We need not therefore address the question of industry recognition.

As noted previously in this opinion, the Secretary must also establish the existence of feasible means the Respondent could have employed to abate the hazard and, therefore avoid being cited. The Secretary maintains that it was possible for the Respondent to install convex mirrors placed on the perimeter of the 260 carrier on the right rear and left front. The abatement measure offered by the Secretary was not the result of any tests done by the Secretary but rather they were based upon speculation and surmise. While it was suggested that the mirrors be placed on the 260 carrier as done by another manufacturer, the Secretary's main witness conceded that the

effectiveness of the mirrors to reduce the hazardous condition was an unknown quantity. He expressed uncertainty about the benefits of using the mirrors that he suggested.

The reservations and doubts that taint the Secretary's case are forcefully supported by the mirror placement test conducted on a carrier only one foot lower than the 260 carrier by Respondent's plant OSHA coordinator and its expert safety engineer.

It is not foreign to the issue that the Secretary's witnesses as well as the Respondent's agreed that mirrors installed to any extent outboard of the 260 carrier would be knocked off, damaged beyond use or otherwise rendered useless as a result of working in close quarters. It was undisputed by the Secretary that mirrors placed outboard on carriers, similar to the 260 carrier, that were used in another of Respondent's workplaces were damaged and rendered useless.

The court in the National Realty case in addressing the question of abatement at the conclusion of its opinion held:

> To assure that citations issue only upon careful deliberation, the Secretary must be constrained to specify the particular steps a cited employer should have taken to avoid citation, and to demonstrate the feasibility and likely utility of those measures.

Considered within the framework of that ruling the Secretary did not carry his burden of proof that Respondent violated

the general duty clause.

Had the Secretary established that Respondent was in violation of the general duty clause nevertheless the Respondent's "isolated incident" or "unpreventability" affirmative defense would be sustained.

The evidence proves that Respondent has a comprehensive safety program. The employees in the structural steel yard receive adequate training and instructions designed to prevent accidents, particularly those involving the powered industrial trucks utilized in the area. The occurrance of a single accident involving carriers in 25 years underscores the effectiveness of the program and is indicative of its enforcement.

Under the facts and circumstances present in this case it is reasonable to conclude that the unfortunate accident was an isolated incident that resulted from an employee's departure from an effectively enforced work rule. Secretary v. B. G. Maintenance Management, Inc., 4 BNA OSHC 1282; National Realty and Construction Co., Inc., v. O.S.H.R.C. and Secretary of Labor, supra.

Having heard the testimony of the witnesses and having observed their demeanor, it is concluded that the following findings of fact are supported by a preponderance of the credible evidence.

## FINDINGS OF FACT

1. The field of visibility from the 260 carrier operator's cab is limited along the carrier's front and right sides.

2. The hazard is inherent in the operation of the 260 carrier and is apparent.

3. The operation of the 260 carrier without mirrors which would increase the operator's field of vision from the cab constitutes a hazard at Respondent's workplace.

4. Respondent had knowledge of the hazard.

5. The Secretary's evidence does not prove the feasibility and likely utility of the use of mirrors to increase the field of visibility along the 260 carrier's front and right sides.

6. The Respondent has a safety program that is effectively and uniformly enforced.

7. Calvin Smith's fatal accident was an isolated incident that resulted from his departure from the work rule.

## CONCLUSIONS OF LAW

1. The Respondent is, and at all times material hereto was, engaged in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970.

2. The Respondent is, and at all times material hereto, was subject to the requirements of the Occupational Safety and Health Act and the standards promulgated thereunder and the Commission

has jurisdiction of the parties and of the subject matter herein.

3. Respondent was not in violation of section 5(a)(1) of the Act (29 U.S.C. 654(a)(1)).

Accordingly, it is ORDERED that:

The citation alleging a serious violation of section 5(a)(1) of the Act 29 U.S.C. 654(a)(1), and the penalty proposed therefore be vacated.

Edward V. Alfieri
EDWARD V. ALFIERI
JUDGE, OSHRC

Dated: January 24, 1980
New York, New York

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| | (see prior order at 77/211/F5) | | |
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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

February 23, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

United Cotton Goods, Inc.

OSHRC DOCKET NO. 77-1894

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION (REMAND)

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR EMPLOYEES

-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Judge's Office
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Review Commission
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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 77-1894 |
| UNITED COTTON GOODS, INC., | : | |
| Respondent, | : | |
| | : | |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge J. Paul Brenton is before the Commission pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Judge Brenton vacated a citation alleging that Respondent, United Cotton Goods, Inc., violated the Act by failing to comply with the personal protective equipment standard at 29 C.F.R. § 1910.132(a).[1/] Also, at the

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1/ 29 C.F.R. § 1910.132(a) provides:

Subpart I — Personal Protective Equipment

§ 1910.132 General requirements.

(a) Application. Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

hearing, Judge Brenton denied a motion by the Secretary of Labor ("the Secretary") to amend the citation to allege, in the alternative, noncompliance with the machine guarding standard at 29 C.F.R. § 1910.212(a)(3)(ii).[2/] The Secretary filed a petition for discretionary review which Commissioner Cleary granted. For the reasons that follow, we reverse the judge's ruling on the Secretary's motion to amend and we remand for further proceedings.

Respondent manufactures linen supplies at its plant in Griffin, Georgia. Respondent's employees use electric knives to cut through stacks of material. The plant was inspected on May 25, 1977 and on June 2, 1977 the Secretary issued a citation alleging that Respondent failed to comply with section 1910.132(a) in the following manner:

> Protective equipment was not used where it was necessary by reason of hazards encountered in a manner capable of causing injury or impairment in the function of any part of the body:
>
> Cutting Room - metal mesh gloves were not worn by employees during fabric cutting operations.

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2/ 29 C.F.R. § 1910.212(a)(3)(ii) provides:

Subpart O -- Machinery and Machine Guarding

* * *

§ 1910.212 General requirements for all machines.

(a) Machine guarding—

* * *

(3) Point of operation guarding.

* * *

(ii) The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

Thirteen days before the hearing on November 10, 1977,[3/] the Secretary moved to amend the citation to add the following charge of noncompliance with 29 C.F.R. § 1910.212(a)(3)(ii):

> [R]espondent failed effectively to guard the point of operation of fabric cutting knives in its cutting room with a guard so designed and constructed as to prevent an exposed employee from having any part of his body in the danger zone during the operating cycle.

By order dated November 7, 1977, Judge Brenton denied the Secretary's motion as being "too late."

In Brown & Root, Inc., Power Plant Division, 80 OSAHRC 17/B8, 8 BNA OSHC 1055, 1980 CCH OSHD ¶ 24,275 (No. 76-3942, 1980) ("Brown & Root"), the Commission upheld an amendment first presented by the Secretary six days before the hearing. The Commission stated that, under Rule 15(a) of the Federal Rules of Civil Procedure,[4/] "prehearing amendments should be granted as long as the objecting party would not be prejudiced in the preparation and presentation of its case" and that "amendments well before the hearing rarely result in any prejudice." 8 BNA OSHC at 1058-59, 1980 CCH OSHD at p. 29,569.[5/] Because the original and amended charges arose out of the same conduct or occurrence, the Commission concluded that the Secretary's claim remained unchanged and therefore that the amendment was not prejudicial. The Commission further held that any prejudice that may have arisen in that case,

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3/ The hearing had been postponed twice at the Secretary's request.

4/ Unless the Commission adopts a different rule, its proceedings are governed by the Federal Rules of Civil Procedure. Section 12(g), 29 U.S.C. § 661(f).

5/ The Commission has consistently allowed amendments to citations under Federal Rule of Civil Procedure 15(a). See, e.g., Miller Brewing Co., 80 OSAHRC 5/A2, 7 BNA OSHC 2155, 1980 CCH OSHD ¶ 24,168 (No. 78-3216, 1980); P.A.F. Equipment Co., 79 OSAHRC 18/A2, 7 BNA OSHC 1209, 1979 CCH OSHD ¶ 23,421 (No. 14315, 1979), aff'd, 637 F.2d 741 (10th Cir. 1980); Constructura Maza, Inc., 78 OSAHRC 6/E2, 6 BNA OSHC 1309, 1977-78 CCH OSHD ¶ 22,487 (No. 14509, 1978).

because the original and amended charges required different abatement methods, could have been cured by a continuance. The Commission noted that, because the amendment was presented prior to the hearing, Respondent had an adequate opportunity to determine whether a continuance would be necessary to prepare defenses to the amended charge. The Secretary's delay in presenting the amendment was rejected as a basis for denying the prehearing amendment. 8 BNA OSHC 1059, 1980 CCH OSHD at p. 29,569, and cases cited therein.

In this case, one condition, exposure to injury at the points of operation of fabric cutting knives, is the basis of both charges. Accordingly, the Secretary's claim remained unchanged. As in Brown & Root, the amendment in this case changed the abatement method — from metal mesh gloves to point of operation guarding — and this change affected Respondent's defenses, such as impossibility of compliance or greater hazard. See Frank Swidzinski Co., 81 OSAHRC 4/E14, 9 BNA OSHC 1230, 1981 CCH OSHD ¶ 25,129 (No. 76-4627, 1981); Duncanson-Harrelson Co., 81 OSAHRC 28/A2, 9 BNA OSHC 1539, 1981 CCH OSHD ¶ 25,296 (No. 76-1567, 1981). However, as Brown & Root indicates, a continuance could have been employed to cure any possible prejudice. Accordingly, we grant the amendment and remand the case to the judge for further proceedings so that the parties may try the amended charge.[6/] SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: FEB 23 1982

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6/ In Commissioner Cleary's view, the parties should consider whether this alleged violation should be characterized as de minimis. See Fabricraft, Inc., 79 OSAHRC 49/A2, 7 BNA OSHC 1540, 1979 CCH OSHD ¶ 23,691, (No. 76-1410, 1979); Hood Sailmakers, Inc., 77 OSAHRC 212/C12, 6 BNA OSHC 1206, 1977 CCH OSHD ¶ 22,422 (No. 13996, 1977).

ROWLAND, Chairman, dissenting:

I dissent from the majority's decision to amend the citation so as to allege noncompliance with section 1910.212(a)(3)(ii). I would affirm Judge Brenton because in my view he did not abuse his discretion in denying the amendment. I do not reach the question of whether Judge Brenton erred in vacating the alleged violation of section 1910.132(a), the standard originally cited.

Leave to amend under Rule 15(a) is within the discretion of the trial judge, and may be denied for undue and unjustified delay where the movant had sufficient prior opportunity to amend. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971) (discretion); Forman v. Davis, 371 U.S. 178 (1962) (discretion, undue delay); Frank Briscoe Co., 76 OSAHRC 129/A2, 4 BNA OSHC 1729, 1976-77, CCH OSHC ¶ 21,162 (No. 7792, 1976) (undue and unexcused delay).

Although this case had been pending for over five months, the Secretary did not move to amend until less than two weeks before trial. During the preceding months, the Secretary filed with the judge two motions for a continuance, a settlement conference report, and a response to a motion to strike; yet the Secretary did not request leave to amend in any of his prior correspondence with the judge. In this regard, I note that the discussions of the case during the settlement negotiations should have alerted the Secretary to the potential section 1910.212(a)(3)(ii) charge. Moreover, when the Secretary eventually sought an amendment shortly before trial, he gave no explanation for his delay. In light of the Secretary's unexplained delay in requesting an amendment despite prior opportunity to do so, I conclude that Judge Brenton did not abuse his discretion in denying the amendment.

Inasmuch as the majority amends the citation and remands the case for further proceedings on the amended charge, I need not at this time consider whether the judge erred in his disposition of the originally alleged violation of section 1910.132(a). Accordingly, I do not now express an opinion as to the merits of the section 1910.132(a) allegation.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 400

ATLANTA, GEORGIA 30309

| | | |
|---|---|---|
| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 77-1894 |
| | ) | |
| UNITED COTTON GOODS, INC., | ) | |
| | ) | |
| Respondent. | ) | |

## DECISION AND ORDER

APPEARANCES

Ken S. Welsch, Esquire, Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia, on behalf of complainant

Fred M. Richardson and E. Bruce Mather, Esquires, Atlanta, Georgia, on behalf of respondent

Brenton, Judge

## STATEMENT OF THE CASE

On June 2, 1977, complainant issued to respondent a citation, pursuant to the provisions of the Occupational Safety and Health Act of 1970 ("Act"), charging violations of § 5(a)(2) of that Act. That action followed a May 25, 1977, inspection of respondent's cut/sew industrial workplace in Griffin, Georgia, by complainant.

Respondent contests item 1 of citation 1 and its correlative proposed $360.00 penalty.

Respondent's answer to the complaint concedes it is engaged in a business affecting commerce.

This case was heard in Atlanta, Georgia, on November 10, 1977.

## THE CHARGE

The citation describes the contested violation as follows:

> "29 CFR 1910.132(a): Protective equipment was not used where it was necessary by reason of hazards encountered in a manner capable of causing injury or impairment in the function of any part of the body:
>
> > Cutting Room - metal mesh gloves were not worn by employees during fabric cutting operations."

## THE STANDARD

29 CFR 1910.132(a) provides:

> "Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact."

The alleged violation was fashioned by complainant upon observation of the operations and practices employed by respondent in its cutting room where it cuts linen supplies, tablecloths, hospital gowns, sheets, scrub uniforms, and surgical wraps from materials of woven cotton and synthetic blends.

Eight cutters have access to and use seven electric Eastman Ultronic straight knives and two Eastman round knives[1/] in the cutting processes.

## WORKPLACE, KNIFE, AND OPERATIONS

The alleged violation occurred in the cutting room which is well lighted, equipped with four long tables, a spreader for stacking plies of cloth, racks of fabrics, overhead electric cables, the cutting knives, material handling equipment, and miscellaneous tools and equipment.

Each straight knife addressed to the citation has three moving parts, a blade, abrasive bands, and a pressure foot or guard. The electric motor and operating mechanisms are mounted on a perpendicular shaft which rises from a baseplate. The blade is confined within that shaft with its cutting edge exposed so it can perform its work. The abrasive bands are mounted at the top of the blade, connected with a worm gear or screw shaft and moves up and down along the sides of the blade at its cutting edge when activated for the purpose of sharpening the blade. A perpendicular bar or guardrod extended not more than one and one-half inches in front of the blade

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1/ At the hearing, complainant withdrew any violation of 29 CFR 1910.132(a) as having any application to the Eastman round knives (Tr. 122).

is attached to the pressure foot and rises to the top of the knife where it is attached to a lever for manual lifting. The foot surrounds the blade, extends in front of the guardrod, and rises and falls around the blade (Ex. R-2). A trigger to the right of the operating handle controls the position and movement of the guard. When the trigger is not depressed, the guard is locked in its then position. When the knife is activated, the stroke of the blade is one and one-half inches perpendicularly.

The knife is manually controlled by the right hand from a horizontal operating handle located to the rear of the knife. All controls of the moving parts of the knife are located topside. An apron under and in front of the pressure foot or guard, an extension of the baseplate, rides on the surface of the table under the fabric during the cutting operation.

A cutting operation begins after a cutter has laid out the plies or layers of cloth to be cut on a table, cut out seams and defects, and marked out the required pattern or patterns.

A knife is then brought to the table. A drop cable with a female connector is engaged with the three prong male connector atop the knife and locked by the cutter. He then sharpens the blade by first activating it after securing the pressure foot or guard in the down position and then activating the sharpener which drives the abrasive bands down the full length of the blade and returns them. During these operations the right hand is on the operating handle and the left is atop the knife to depress the sharpening button and

attend the other operating levers and devices (Tr. 138-139).

Now with the guard in the down position the knife is moved, by the right hand on the operating handle and with the left hand he lifts the guard to a position high enough to allow the knife blade to enter the stack of cloth and then releases the guard causing it to fall onto the lay of cloth. The cutter then raises the lay with his left hand, pushes the knife with his right hand on the operating handle which places the apron of the knife under the lay. At that point the cutter proceeds with the cutting by moving and guiding the knife with his right hand on the operating handle with his left positioned on the lay of cloth in front of the guard or pressure foot to smooth out ripples and hold the fabric down. He may also use the left hand to straighten edges, re-sharpen the blade, and remove waste. Whenever the hands are removed from the knife, the action of the blade is switched off and the guard is in the down position. The left hand is usually out in front of the pressure foot or guard five to six inches and never closer than three inches on a few close cuts. The left hand moves in unison with the right and at the same speed. Upon the completion of the cutting of the patterns, the knife is disconnected from the electric cable and removed from the table (Tr. 140-145).

## THE HAZARD ALLEGED

At the time of the inspection of respondent's fabric cutting operations by complainant, the cutters were not wearing a thumb and

first two finger metal mesh glove nor was the point of operation of the blade of the knife completely enclosed. It is clear that had either form of alleged protection been afforded, the item of the citation at issue would not have been issued. (Complainant's brief p. 7). Because the blade is not completely enclosed by an undefined barrier guard, complainant contends there is some exposure to the action of the blade. In absence of a barrier, complainant would have the Review Commission mandate the metal mesh glove by authority of 29 CFR 1910.132(a).

The contention of the complainant is grounded on the proposition that by reason of the close proximity of the left hand to the blade as the cutter propels the knife through the mark of his pattern, the pressure foot or guard is insufficient to preclude accidental knicks and cuts. Complainant argues that a severe cut is possible if a cutter pushed his hand into the blade, but concedes that in respondent's operation the most likely injury is a minor nick or cut.

## ISSUES

Whether respondent was on notice by the commands of 29 CFR 1910.132(a) that its cutters were required to wear a metal mesh glove on the hand used to position and hold down the lays or plies of fabric during the cutting process.

Whether the utility of the metal mesh glove when worn by cutters in the cut/sew industry has been established.

Whether respondent's straight cut knives are machines and subject to a specific standard rather than the general cited standard.[2/]

DISCUSSION

This case is identical or almost identical with Fashion Industries, Inc., _____OSHRC_____, _____BNA OSHC _____, _____CCH-OSHD_____ ¶_____(No. 71-1027, 1977), recently heard and decided by this tribunal and unreviewed by the Review Commission. Upon the inception of the hearing, complainant conceded the identity (Tr. 4-5). It is on all fours with the facts and law as found and held in that case except, there, respondent had no injuries to its cutters, and here respondent experienced two and perhaps three minor injuries to cutters during operations in the year 1976. And, respondent's cutters each average about three hours each day in operating the knife and in Fashion Industries, Inc., supra, about 30 minutes each.

Thus, do those factual differences supply the missing links encountered in Fashion Industries, Inc., supra, to make a case that respondent was on notice that it was required to cause its cutters to wear metal mesh gloves.

Because respondent had two injuries in 1976 occurring during the cutting process, complainant argues at length that this factor

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2/ This issue was not raised directly by respondent, however, it is an issue of law imposed by the undisputed facts.

is sufficient to put it on notice that the cited standard commands the use of metal mesh gloves by its cutters. He attempts to buttress that argument with the very method which must be used by respondent's cutters to cut the fabrics for uniforms and tablecloths.

There is no significant difference between the method or process used by respondent here and that by the employer in Fashion Industries, Inc., supra. Moreover, complainant ignores the Review Commission decision in Grand Union Co., 75 OSHRC 88/A2 (20/663), 3 BNA OSHC 1597, 1975-76 CCH-OSHD ¶ 20,107 (Nos. 7031 and 7033, 1975). There it held that 18 knife cuts, one of which was recordable under 29 CFR § 1904.12(c), over a period of a three and one-half year period, to meat department store employees did not establish a hazard of processes within the meaning of 29 CFR 1910.132(a), such as to put the employer on notice that such employees shall be provided and caused to use metal mesh gloves. Included in that determination was the fact that no other standard informed the employer of a metal mesh glove requirement for retail meat cutters, and the fact that there was no industry custom or practice commanding its use.

Respondent has not had any other injuries over the past seven years resulting at a time a knife was operational, and the two or three in evidence here have not been shown as recordable by complainant's standards. The evidence does show that no one of those resulted in any lost work time.

There is no evidence that any other standard informs respondent that it had a duty to require its cutters to wear metal mesh gloves (Tr. 120).

With respect to the use of metal mesh gloves by cutters in the cut/sew industry, respondent's manager, John McMillan, with 17 years experience in the cut/sew industry and having seen the operations of about 12 cut/sew plants had never seen nor heard of cutters wearing metal mesh gloves.

Complainant's compliance officer offered no testimony that the metal mesh glove was in use in the cutting room of any plant in the cut/sew industry. Complainant did produce evidence which shows that the cutters at Manhattan Shirt Company have been wearing the thumb and two finger metal mesh glove for the past two years as an equivalent means of guarding for violation of 29 CFR 1910.212(a)(3)(ii). On the other hand, John Schwartzott has visited 2,000 to 2,500 plants and has never seen the gloves used in any cutting room until beginning with the year 1974 where he observed about six out of two to three hundred where they were on hand as a result of an OSHA inspection but rarely used by the cutters unless an inspection was imminent. His testimony is considered reliable and trustworthy.

The preponderance of the substantial, reliable, probative, and relevant evidence shows conclusively that cutters in the cut/sew industry in any area or place do not universally wear metal mesh gloves except at Manhattan Shirt Company. But the exclusive cutting of dress shirts is a different operation. The cuts are mostly short

cuts requiring the cutter to place his thumb and index finger as close to the blade as the pressure foot will permit. And this is an eight-hour day operation.

Upon the record made in this case, Manhattan's experience with OSHA is an isolated case. All the evidence bearing on it simply and clearly shows that at the time of the inspection of respondent's cutting room, respondent had not received a reasonable warning of the proscribed conduct. The hazard alleged was not generally known in the cut/sew industry.

The utility of the metal mesh glove in respondent's operations is suspect. Complainant through his compliance officers admits that the utility of the metal mesh glove in the cut/sew industry was not tested in any respect, nor did he investigate industry practices prior to introducing the failure to use it as a violation under the personal protective provision of 29 CFR 1910.132(a) (Tr. 168 and 212-214).

Respondent and Mr. John Schwartzott, the latter, the only qualified expert to testify, made separate tests and used the glove under actual cutting operations. Those tests show that the blade can and did snatch the gloves and tear holes or cut through the glove. Further, that its use intrusively interferes with the operations such as the removal of waste, raising thick lays of cloth, the hanging up of the glove on the cloth as it is moved along on top in the cutting procedure, renders unto the cutter a false sense of security, and reduces his sense of touch. The witness from Manhattan Shirt Company agreed that indeed the glove does give a false sense of security and that

his cutting operations were different than those at respondents.

The parties agree that if any part of the operator's hand was under any part of the one and one-half inch stroke of the blade the metal mesh glove would be ineffective.

Also, it is noteworthy to observe that complainant had conducted a prior inspection which included respondent's cutting operation with the electric knife but failed to allege or discuss an unprotected hazard at that time (Ex. R-10). Also, that the knives are sold to and used by United States Government agencies, and their cutters are not required to use a metal mesh glove (Tr. 188-189).

Finally, the proposition that the wearing of the metal mesh glove during the operation of powered equipment, the constant problem of the glove becoming caught in the moving parts of the machine is presented. The evidence preponderantly indicates that the glove could jam and be caught up in the mechanism of the sharpening device. Also, the evidence demonstrates that the moving knife blade is particularly vulnerable in snatching the glove. In evidence is OSHA Program Directive, No. 100-49, in which the Secretary states that metal mesh gloves should not be used by meat cutters operating powered equipment (Ex. R-11).

Carlisle Bunn, complainant's technical support expert generated the memo which introduced the use of metal mesh gloves for guarding of cutting blade powered cutting knives in the cut/sew industry. He was on the witness stand and failed to demonstrate the distinction, if any, between the cutting blade powered cutting knives used

in the cut/sew industry and powered knives and machines used in the meat industry. It is obvious that in each case the knives are items of powered equipment and in the real world there is no distinction.

Respondent's knives are machines. And this fact was admitted by complainant through Mr. Carlisle Bunn. He testified:

> "[29 CFR 1910]212 is the basic paragraph for machine guarding from point of operation (Tr. 214)."

Moreover, he issued his personal protective equipment memo of September 4, 1975, upon an inquiry:

> "[T]hat the machines [electric knife cutters] are not adequately guarded, and that there was a necessity for some personal protective equipment in addition to the guard (Tr. 214)."

Section 1910.212 seeks to guard against the hazards created by point of operation and rotating parts among other matters. But it also provides that:

> "[T]he guard shall be such that it does not offer an accident hazard in itself."

By complainant's memo of September 4, 1975, he admits that respondent's knives are provided with a guard. But, because there is a gap between the blade and the guard he seeks to enclose it with a metal mesh glove. That kind of device will not prevent the operator from having any part of the covered or uncovered portion of the hand in the danger zone during the operating cycle. Moreover, the evidence demonstrates that although its use may prevent a minor nick or cut it could be the source of a very serious injury when used around and about the moving parts, particularly the rectilinearly and perpendicularly reciprocating blade, of the high powered knife cutting machine.

Furthermore, complainant's enforcement action of 29 CFR § 1910.132(a) upon the cut/sew industry is an unchartered course of conduct without any regard to the differences in the duties and processes employed among the many hundreds of cut/sew establishments.

The preponderance of the reliable, probative, and relevant evidence on the record as a whole shows, in light of common understanding and practices, that the mandate of 29 CFR 1910.132(a) failed to afford a reasonable warning of the proscribed conduct. Thus, respondent should not be held in violation of § 5(a)(2) of the Act as charged by the citation.

## FINDINGS OF FACT

1. Respondent's knives are electrically powered and equipped with a very fast moving blade. Also they are equipped with abrasive bands which move up and down the blade.

2. The pressure foot on each knife is designed, constructed, and used so as to prevent the operator from having his left hand in the danger zone, the point of operation, during the operating cycles of the blade.

3. Respondent neither provided for wearing nor required its cloth cutters to wear metal mesh gloves.

4. A thumb and two finger metal mesh glove will not prevent any part of the hand of the cutter from penetrating the gap between the pressure foot--guard and the blade.

5. The cut/sew industry does not have a custom nor a practice of supplying the operators of the electric powered knife with a thumb

and two finger metal mesh glove.

6. The metal mesh glove when worn offers an accident hazard itself. It can be snatched, pulled into, and be caught up with by the knife blade.

7. The action of the blade of the knife penetrates the metal mesh glove even when lightly encountering the blade.

8. Respondent employs eight cutters and, although there have been two and perhaps three nicks or cuts from its cutting operation with the knife over a seven-year period, none has been a lost-time accident or a recordable injury by complainant's standards as defined under 29 CFR 1904.12.

9. There is no evidence that there has ever been a recordable injury to any cutter in the cut/sew industry at any plant in the country during the cutting process, with an Eastman Ultronic straight knife, in the absence of a metal mesh glove on the hand.

## CONCLUSIONS OF LAW

1. The Review Commission has jurisdiction to hear and decide this case.

2. The wearing of metal mesh gloves by cutters in the cut/sew industry is not specifically mandated by any regulation promulgated under the Act.

3. It is apparently axiomatic that a prudent and reasonable man would not require a cutter in the cut/sew industry to wear a metal mesh glove where history in the industry shows no recordable injury under the standards promulgated therefor by the Secretary of Labor.

4. The utility of a metal mesh glove in respondent's cloth cutting operation has not been established.

5. Respondent did not have fair notice that its cutters must be provided with metal mesh gloves because the regulation, 29 CFR 1910.132(a), failed to provide constitutional adequate warning to respondent in light of the understanding and experience of those working in the industry that the wearing of a metal mesh glove is a reasonable requirement.

6. 29 CFR 1910.212(a)(3)(ii) is specifically applicable to the conditions and processes existing in the use of respondent's knives and by virtue of 29 CFR 1910.5 prevails over the different general standard alleged which might otherwise be applicable to the same conditions and processes.

7. Respondent did not violate § 5(a)(2) of the Act as alleged or charged and as tried on the record in this case.

8. Penalty considerations have been rendered moot.

## ORDER

It is ordered that:

Item 1 of citation 1 and its correlative proposed penalty be and each is, vacated.

So ordered.

J. Paul Brewster
JUDGE

Date: February 6, 1978
Atlanta, Georgia

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

# NOTICE OF DECISION

Secretary v. Campbell Construction Engineers, Inc.

OSHRC Docket No. 81-1378

1. Enclosed is a copy of my decision. It will be filed with the Commission on January 25, 1982, and will become the final order of the Commission on February 24, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N. W., Suite 601
   Washington, D. C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is February 24, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

/s/ Cecil L. Cutler, Jr.
CECIL L. CUTLER, JR.
Judge

Date: January 5, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309
(404) 881-4197

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| SECRETARY OF LABOR, | ) | |
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| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 81-1378 |
| | ) | |
| CAMPBELL CONSTRUCTION ENGINEERS, INC., | ) | |
| | ) | |
| | ) | |
| Respondent. | ) | |

APPEARANCES:

Lawrence J. Hallett, Jr., Esquire, Stout, Roebuck & Hallett, Mobile, Alabama, on behalf of the respondent.

Debra H. Green, Esquire, U. S. Department of Labor, Birmingham, Alabama, on behalf of the complainant.

## DECISION AND ORDER

Following an inspection of its work site in Mobile, Alabama, on May 8, 1981, Campbell Construction Engineers, Inc. (Campbell) was issued two citations pursuant to Section 9(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, et seq., the "Act").

A hearing was held in Mobile, Alabama, on October 26 and 27, 1981. No affected employee or authorized employee representative elected to participate as a party.

Under Citation 1, Campbell was charged as follows:

"1A - 29 C.F.R. 1926.651(c)[1/]: The walls or faces of excavation(s) in which employee(s) were exposed to danger from moving ground were not guarded by a shoring system, sloping of the ground, or some other equivalent means:

(a) Along Highway 90 at Fairway Drive - excavation in wet soil, in which employees were required to enter was not shored or sloped.

"1B - 29 C.F.R. 1926.651(i)(1)[2/]: Excavated or other material was not effectively stored or retained at least 2 feet or more from the edge of the excavation(s) which employee(s) were required to enter:

(a) Excavation at Highway 90 and Fairway Drive - spoil was piled four feet high at the edge of the excavation."

The alleged violations are characterized as serious with a penalty of $420 proposed.

Citation 2 alleges nonserious violations with no penalty as follows:

"1A - 29 C.F.R. 1926.450(a)(2)[3/]: Ladder(s) discovered to be defective were not immediately withdrawn from service:

(a) In excavation, north wall - ladder had one split and broken rung and two bent rungs.

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1/ This provides:

The walls and faces of all excavations in which employees are exposed to danger from moving ground shall be guarded by a shoring system, sloping of the ground, or some other equivalent means.

2/ This section states:

In excavations which employees may be required to enter, excavated or other material shall be effectively stored and retained at least 2 feet or more from the edge of the excavation.

3/ This section provides:

The use of ladders with broken or missing rungs or steps, broken or split side rails, or other faulty or defective construction is prohibited. When ladders with such defects are discovered, they shall be immediately withdrawn from service. Inspection of metal ladders shall include checking for corrosion of interiors of open end hollow rungs.

"1B - 29 C.F.R. 1926.450(a)(10)[4/]: Portable ladder(s) in use were not tied, blocked, or otherwise secured to prevent their being displaced:

(a) In excavation, north wall - ladder in use was not tied or blocked."

There is no issue as to jurisdiction in that respondent, in its answer, concedes it is an employer engaged in commerce within the meaning of the Act.

I.

According to the evidence, on May 7, 1981, Campbell was engaged in a pipe laying project at Highway 90 and Fairway Drive in Mobile, Alabama. On that day, Billy Layton, a compliance officer for the Secretary, inspected the jobsite and took a number of photographs introduced as exhibits (Exs. C-1-C-8). He observed three of respondent's employees standing and working in an excavation which he measured as being 42 feet long, 15 feet wide and 10 feet, 9 inches deep (Tr. 78-80, Exs. C-6, C-7).

Oyster shells were being placed in the bottom of the excavation in a four-inch deep layer. The ground underneath was soft white sand (Tr. 81-82). A backhoe was being operated at one end of the trench (Tr. 81). According to Mr. Layton, there was no shoring or sloping of the excavation (Tr. 82, 83). In the event of a collapse of the walls, the great pressure and the amount of soil would be such that workmen could be suffocated before rescue (Tr. 84).

Mr. Layton also observed earth piled approximately four feet high on the right edge of the excavation which was not placed at least two feet from the edges (Tr. 80, 85, 86, Ex. C-7).

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4/ This section states:

Portable ladders in use shall be tied, blocked, or otherwise secured to prevent their being displaced.

During his inspection, Mr. Layton also observed a ladder in the excavation which had one broken rung and two bent rungs. It was also not tied or blocked off to prevent slipping (Tr. 92, 93, Ex. C-8).

Harvey N. Blakeney, a professional engineer, is chief of the Geotechnical and Materials Branch, Mobile District, Corps of Engineers. He has also been Chief of the Soil Design Section. On August 10, 1981, he conducted a soil sample test at the location of the excavation. He determined that the soil was composed of soft to moderately stiff fat clay down to the eight-foot level. From this level down to a depth of 9.8 feet, he found a mixture of this clay material mixed with oyster shells. Below this to a depth of 11 feet, he found fine and water bearing sand (Tr. 28, 29, Ex. C-4).

He found there had been movement of the soil since the auger went in and out of the virgin soil in its downward movement (Tr. 39, 40).

Mr. Blakeney took soil samples back to his office and tested them with a Pocket Pentrometer and a Torvane device. These tests enabled him to determine the shear strength of the soil and thus ascertain how much stress the soil could be subjected to without failure (Tr. 30, 31, C-5). In his opinion, the soil should fail under a vertical cut of 13.6 feet. Vibrations from machinery and nearby traffic could influence the failure point (Tr. 32, 33). Also, if this type of clay had been dry and then received a good rainfall of even four inches, water could penetrate tension tracks and increase stress (Tr. 34). He testified he would not have worked on the excavation without shoring, sloping or other equivalent means of protection (Tr. 35).

Ray H. Barnes, Meterologist in Charge, National Service Office, Mobile, testified as to the unusual weather conditions which existed in Mobile on May 5 and 6, 1981. Eight inches of rainfall were recorded at the Airport during that time (Tr. 7, 8). Other rain gauges in the area indicated up to 12 inches (Tr. 12, Exs. C-1 & C-2). He was unable to testify as to the amount of rainfall at the intersection of Highway 90 and Fairway Drive, since he did not know where the latter road was (Tr. 13). He conceded that the rainfall in the Mobile area was not uniform and that some outlying locations received only two inches or less (Tr. 18).

John R. Overturf testified he was President of Southern Safety and Environmental Engineering, Inc., a firm which establishes safety programs for various companies. He has a bachelor of science degree in chemical engineering and has taken courses in industrial hygiene and law (Tr. 111, 112). He is a certified Safety Professional (Tr. 113).

As respondent is one of his clients, Mr. Overturf, responding to a call from Campbell, came to the site the same day of the inspection but after the compliance officer had left (Tr. 124, 125).

According to Mr. Overturf, he examined the type of soil in the excavation and determined that it was of a clay and sandy consistence-the type of material out of which adobe bricks were made. He observed no sloughing, spoiling, tension cracks or pressure deformation such as to indicate a shift or movement of the soil (Tr. 126, 127). While the walls of the excavation were of moist clay material, there was no intrusion of water and the bottom was dry (Tr. 128). From his observation, there was a slope of the top five feet of the excavation (Tr. 128, 129).

Mr. Overturf testified he took soil samples back to the lab to see what the binder was. He used a bonding test to see if there was any cause of sloughing. This consisted of gripping the soil to see how it bonds together (Tr. 137, 158). He conceded that at any time ground water would be found, there would be unstable soil which would require driving sheet pile (Tr. 159).

Concerning the spoil on the side of the excavation, he found it was approximately three feet "overall, in average" and in places where "it might be more. . .you would have to stretch it to make four feet out of it" (Tr. 129-130).

With respect to the ladder, the subject of Citation Number 2, Mr. Overturf testified that he used it to get into and out of the excavation. He weighs 300 pounds and specifically stepped on the apparently broken rung and it held his weight (Tr. 135). The other men on the site used the ladder and there were no reports of injuries (Tr. 136).

II.

Respondent is charged under Item 1A of Citation 1 with failing to guard the walls or faces of an excavation in which employees were exposed to danger from moving ground by the use of a shoring system, sloping of the ground, or some equivalent guarding means.

The Secretary introduced evidence of the composition of the soil through the expert testimony of Mr. Blakeney. His tests showed the soil to be soft to moderately stiff fat clay, fine sand, and a water bearing sand. He found evidence of negative sloping or overhang near the bottom (Tr. 56, 57). He was able to ascertain a specific depth (13.6 feet) at which soil of this constituency and

composition would fail. Other factors indicated, however, that the likelihood of failure could easily occur at a lesser depth.

There was the presence of significant rainfall in the Mobile area on the prior two days ranging from 4 to 12 inches in the closer environs. Because he did not know its specific location, Mr. Barnes could not testify as to the amount of rainfall at the work site. Nevertheless, it is fair to assume that there was a significant amount such as would permeate at least upper levels of soil and penetrate tension cracks and thus increase stress.

There is also evidence of the use of machinery by the excavation. This consisted of a backhoe and a boring machine which had to be set in the excavation (Tr. 154). There also was traffic on adjacent streets. These factors would create additional stress.

Finally, the spoil on the sides of the excavation described as four feet high by Mr. Layton and three feet by Mr. Overturf would increase pressure on the walls of the excavation.

All of these factors indicate that the excavation, as it existed at the time of the inspection, required guarding by a shoring system, sloping, or equivalent methods to insure the safety of the workers.

I have carefully considered the testimony of Mr. Overturf, presented by respondent as an expert. His testing, which consisted of visual inspection and a bonding test, was not nearly as comprehensive as that of Mr. Blakeney, an expert in the specific area of soil analysis.

Mr. Overturf also testified that there was some sloping of the first five feet of the excavation which he determined was adequate for safety (Tr. 128, 129).

However, he did not measure the angle. Mr. Layton disputed that there was any sloping at all (Tr. 83). Examination of the photographs indicate there may have been slight sloping of one wall (Ex. C-7) but of such a minimal degree as not to be significant.

Considering all of the evidence, I must conclude that respondent did not comply with the requirements of the cited standard. The violation was serious. It is clear that a cave-in of the walls of the excavation could cause death by suffocation to the three workmen.

Under Item 1B of Citation 1, respondent is charged with failing to comply with the provisions of 29 C.F.R. § 1926.651(i)(1) by not effectively storing or retaining excavated or other material at least two feet or more from the edge of the excavation.

The evidence is clear that there was spoil piled on the right edge of the excavation. The compliance officer stated that it was four feet high and Mr. Overturf conceded the spoil averaged three feet. This amount of soil so placed at the edge could slip into the excavation and fall on the workmen directly below. Vibrations from nearby traffic and on-site machinery increased the hazard.

Mr. Overturf testified that the spoil could not be moved back because of the adjacent road and, in fact, several businesses at the location had complained of same spillage of soil on the street (Tr. 130). However, the evidence suggests that compliance could have been achieved by moving the soil back the required two feet or by hauling it away (Tr. 86, 150-157).

The violation is alleged as serious. However, from review of the exhibits and the testimony, I cannot conclude that death or serious injury would result merely from the slippage of the soil banked on the edge of one side of the excavation. Certainly, it would compound the hazard created if a wall of the excavation would cave and contribute to the added weight and mass of dirt. However, evidence that the slippage of the spoil alone into the excavation would cause death or serious injury is lacking. Accordingly, I do not find that this violation of Citation 1 is serious.

The Secretary proposes a penalty of $420 for the combined violations alleged under Citation Number 1. As noted, I have found Item 1B to be nonserious. The violation charged under 1A is undoubtedly serious with the probability of death by suffocation resulting in the event of a cave-in. Considering this and the statutory adjustment factors, I conclude that a penalty of $300 for Item 1A is appropriate and equitable.

Under Citation Number 2, respondent is charged with failing to comply with 29 C.F.R. § 1926.450(a)(2) and (a)(10) by permitting employees to use an unsecured defective ladder.

The evidence is clear that the third rung of the ladder was broken and two rungs were bent and Mr. Overturf conceded that the ladder was defective (Tr. 159, 160). While Mr. Overturf may have been able to use the ladder and apply his 300 pounds of weight, this is no guarantee that at some future time the defective or bent rungs would fail and cause injury to a workman. In any event, the standard requires that defective ladders not be used and, if defects discovered, they are to

be removed from service. It is clear, therefore, that respondent was not in compliance with the cited regulation.

The evidence is also clear that the ladder was not tied, blocked, or otherwise secured to prevent displacement. It was sitting on oyster shells which had been placed on soft water bearing sand. Under the circumstances, it is evident that it could be displaced and cause injury to workmen. Accordingly, I find respondent failed to comply with the cited regulation.

III.

Based upon the evidence of record, I reach the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On May 7, 1981, respondent was engaged in a pipe laying project at Highway 90 and Fairway Drive, in Mobile, Alabama.

2. On the morning of that date, a compliance officer for the Secretary made an inspection of the work site.

3. Three of Campbell's employees were working or standing in an excavation which was approximately 42 feet long, 15 feet wide and 10 feet, 9 inches deep. Oyster shells were being placed in the bottom of the excavation in a four-inch layer over soft white sand. A backhoe was being operated at one end.

4. The excavation was not shored, sloped, or otherwise guarded to effectively prevent the hazard of cave-in.

5. There was spoil of a depth of three to four feet piled along one side of the excavation which was not laid back at least two feet from the edge.

6. The soil at the excavation was composed of soft to moderately stiff fat clay down to the eight-foot level. From this level down to a depth of 9.8 feet, there was a mixture of clay material and oyster shells. Below this to a depth of 11 feet, there was fine and water bearing sand. There had been movement of the soil as evidenced by the fact that the auger used in testing penetrated in and out of virgin soil.

7. Soil stress tests disclosed that failure of the soil could occur under a vertical cut of 13.6 feet. This failure point could occur at a lesser height due to other factors such as vibrations from machinery at the site, nearby traffic, and rainwater penetrating tension cracks in the soil.

8. Respondent did operate machinery by the excavation which also was adjacent to a road with vehicular traffic. There also had been a heavy rainfall of between 4 to 12 inches in the Mobile area in the previous two days and the work site was subjected to a significant amount of this rainfall.

9. The composition of the soil and the weight of the spoil on the edge, together with the above-noted factors, were such as to create a hazard of cave-in of the walls of the excavation.

10. A cave-in of the excavation could bury workmen in it and cause death by suffocation.

11. The evidence does not establish that death or serious injury would result from the slippage above of the spoil piled on the edge of the side of the excavation.

12. A ladder used by workmen to enter and leave the excavation had one broken and two bent rungs. It also was not tied, blocked, or otherwise secured.

## CONCLUSIONS OF LAW

1. Respondent is engaged in a business affecting commerce within the meaning of the Act and this Commission has jurisdiction over the subject matter and parties to this action.

2. Respondent was in violation of Section 5(a)(2) of the Act by failing to comply with the provisions of 29 C.F.R. § 1926.651(c). The violation was serious.

3. Respondent was in violation of Section 5(a)(2) of the Act by failing to comply with the provisions of 29 C.F.R. § 1926.651(i)(1), 1926.450(a)(2), and 1926.450(a)(10). The violations were not serious.

Based upon the foregoing findings of fact and conclusions of law, Item 1A of Citation 1, as amended, for a serious violation is affirmed and a penalty of $300 is assessed therefor. Item 1B of Citation Number 1, as amended, and Citation 2 for non-serious violations are affirmed.

SO ORDERED.

Dated this 25th day of January, 1982.

CECIL L. CUTLER, JR.
Judge

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

February 26, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

P & Z Company, Inc.

OSHRC DOCKET NO. 76-431

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

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FOR EMPLOYEES

-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Judge's Office
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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>P & Z COMPANY, INC.,<br>Respondent. | OSHRC Docket No. 76-431 |

ORDER

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

This case involves allegations by the Secretary of Labor that P & Z Company, Inc., violated a standard requiring covers on garbage containers, and willfully violated standards requiring the clearing of scrap lumber from work areas and passageways, and the illumination of work areas. The case is before us for the second time. In P & Z Co., 77 OSAHRC 211/F5, 6 BNA OSHC 1189, 1977-78 CCH OSHD ¶ 23,413 (No. 76-413, 1977), the Commission vacated the administrative law judge's first decision and remanded the case with instructions to make specific findings of fact based upon an analysis of the entire record and to explain his credibility evaluations. After the judge issued another decision largely adverse to the Secretary, the Secretary requested that the Commission again grant review to correct alleged errors and oversights in the judge's factual findings. Review was directed by Commissioner Cleary under 29 U.S.C. § 661(i). Because we are now of the opinion that review is no longer provident, we vacate the direction for review.

The issues now remaining in this case are largely factual; the case poses no unresolved legal questions. See Keystone Roofing Co. v. OSHRC, 539 F.2d 960, 964 (3rd Cir. 1976). Although the Secretary's primary interest in this case was apparently to show that P & Z committed willful violations, the Commission has, since review was directed, issued many fully considered opinions on willfulness. See, e.g., Mel Jarvis Construction Co., 81 OSAHRC 89/B13, 10 BNA OSHC 1052, 1981 CCH OSHD ¶ 25,713 (No. 77-2100, 1981). To consider again whether willfulness appears in the record would serve little purpose, particularly here, where the record is unclear. The alleged violations involved conditions of low gravity and abatement is not a concern because construction at the worksite has been completed. Under all these circumstances, it would no longer be provident to review this case. See A.C. & S., Inc., 76 OSAHRC 93/A2, 4 BNA OSHC 1529, 1976-77 CCH OSHD ¶ 20,955 (No. 2229 et al., 1976).

Accordingly, the direction for review is vacated.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
Executive Secretary

DATED: FEB 26 1982

COTTINE, Commissioner, dissenting:

The majority decision to vacate the direction for review in this case deprives the aggrieved party of his day in court and marks a serious departure from prior Commission practice.

In response to a petition for discretionary review filed by the Secretary of Labor, Commissioner Cleary directed this case for review on May 12, 1978. On September 7, 1978, the Commission denied the Respondent's motion to strike the Secretary's petition or in the alternative to reconsider the decision to direct the case for review. On September 29, 1978, the Commission denied the Respondent's motion for oral argument. Three and a half years later, with no intervening change in law, no apparent lack of party interest, and after the directed issues have been briefed, the Commission has determined that review is no longer provident. In support of their result my colleagues cite A.C. & S., Inc., 76 OSAHRC 93/A2, 4 BNA OSHC 1529, 1976-77 CCH OSHD ¶20,955 (Nos. 2229 et al., 1976). However, A.C. & S. provides no support for the majority action in this case.

In the past the Commission has declined to review cases where the record revealed both an absence of party interest and no compelling public interest warranting review. See, e.g., Middletown Volkswagen, Inc., 80 OSAHRC 50/F7, 1980 CCH OSHD ¶24,493 (No. 77-349, 1980)(not reported in BNA); Chrysler Casting Corp. - Fostoria Foundry, 79 OSAHRC 98/A2, 8 BNA OSHC 1088, 1979 CCH OSHD ¶24,035 (No. 76-3877, 1979; Cargill, Inc., 79 OSAHRC 90/A2, 7 BNA OSHC 2045, 1979 CCH OSHD ¶23,981 (Nos. 78-2862 & 78-2864, 1979); Structural Metals, Inc., 79 OSAHRC 43/E4, 7 BNA OSHC 1452, 1979 CCH OSHD ¶23,635 (No. 78-3352, 1979); Potlatch Corp., 79 OSAHRC 34/F6, 7 BNA OSHC 1370, 1979 CCH OSHD ¶23,549 (No. 77-3589, 1979); John R. Jurgensen Co., 79 OSAHRC 17/E4, 7 BNA OSHC 1251, 1979 CCH OSHD ¶23,403 (No. 77-256, 1979). However, in no case

has the Commission declined to review specifically directed issues[1/] without either: (1) affording affected parties the opportunity to object, A.C. & S., Inc., supra; (2) concluding there is a lack of party interest, Trans World Airlines, Inc., 79 OSAHRC 4/D10, 7 BNA OSHC 1047, 1979 CCH OSHD ¶23,277 (No. 76-3506, 1979); or, (3) permitting the parties to clarify whether there is party interest in Commission review in light of an ambiguous record on this point, Champion Construction & Engineering Co., 78 OSAHRC 102/A2, 6 BNA OSHC 2116, 1978 CCH OSHD ¶23,186 (No. 76-2576, 1978).

A.C. & S., Inc., supra, ("the Sears Tower cases"), involved a judge's decision in 16 consolidated cases arising out of inspections conducted in 1972 at the Sears Tower construction project in Chicago. Of the 16 original Sears Tower cases on review, four lacked both party interest and compelling public interest and the relevant portions of the judge's decision were affirmed without review under Abbott-Sommer Inc., 76 OSAHRC 21/A2, 3 BNA OSHC 2032, 1975-76 CCH OSHD ¶20,428 (No. 9507, 1976). One case involved issues of law and fact not present in the 11 remaining cases and was severed for decisional purposes under Commission Rule 10, 29 C.F.R. §2200.10, and later decided on the merits.[2/] The remaining 11 cases involved common legal issues that had been decided by the Commission after the Sears Tower cases were directed for review and briefed by the parties. Accordingly, in the Commission's view, the cases "no longer present[ed] novel or unsettled questions," and "a decision on these issues [was] no longer crucial in formulating national policy to aid in the Act's administration." 4 BNA OSHC at 1532, 1976-77 CCH OSHD ¶20,955 at p. 25,175. The attention of the parties was directed

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1/ See also Commission Policy Statement, 41 Fed. Reg. 53014 (1976).

2/ Crescent Erection Co., 77 OSAHRC 145/B12, 5 BNA OSHC 1711 (No. 2159, 1977) (not reported in CCH).

to relevant new case law. In deciding that review was no longer provident the Commission noted that recently decided precedent would require supplementary presentations by the parties in order to provide full review.[3/] However, the Commission did not simply vacate the orders directing review of these cases. Rather, each affected party was afforded the opportunity to object to the vacation of the directions for review. In addition, an affected party could request a decision on the existing record, a remand for further proceedings, or an opportunity to pursue a negotiated settlement. Of the 11 affected respondents, three filed objections and their cases were subsequently decided on the merits.[4/]

In contrast to the record on review in the Sears Tower cases, the record in this case is complete. There has been no intervening change in law that would require supplementary evidence or argument by the parties. Finally, the parties have not been afforded an opportunity to object and thus have been denied their day in court.

The Commission states that "the issues now remaining are largely factual; the case poses no unresolved legal issues." The issues in this case always have been factual; there never have been unresolved legal questions.[5/] Furthermore, an absence of legal issues is not fatal to

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3/ Under Commission Rule 93, 29 C.F.R. §2200.93, adopted on Dec. 5, 1979, 44 Fed. Reg. 70111, parties whose cases have been directed for review are issued a briefing notice "at a time reasonably in advance of the date when the case is scheduled for disposition at a Commission meeting." Under prior Commission practice briefs were to be filed within 30 days after the case was directed for review.

4/ Mayfair Const. Co., 77 OSAHRC 178/A14, 5 BNA OSHC 1877, 1977-78 CCH OSHD ¶22,214 (No. 2171, 1977); Illinois Bell Telephone Co., 77 OSAHRC 178/A2, 5 BNA OSHC 1884, 1977-78 CCH OSHD ¶22,209 (No. 2097, 1977); Skidmore, Owings, & Merrill, 78 OSAHRC 1/A2, 5 BNA OSHC 1762 1977-78 CCH OSHD ¶22,101 (No. 2165, 1977).

Two other respondents in the consolidated Sears Tower cases that had originally sought Commission review, Anning-Johnson Co. and Inland-Ryerson Construction Products Co., did not object to the vacation of the orders for review.

5/ The absence of legal questions may be sufficient to preclude a finding of compelling public interest warranting review. See Middletown Volkswagen, Inc., supra, 1980 CCH OSHD ¶24,493 at p. 29,922 n. *. However, it does not affect party interest in review.

Commission review. Under Commission Rule 92(b), 29 C.F.R. §2200.92(b), assertions that a judge's finding of material fact is not supported by a preponderance of the evidence or a judge's decision is contrary to decisions of the Commission are appropriate grounds to be considered by Commission members in the exercise of their statutory review authority under 29 U.S.C. §661(i). Similarily, Commission Rule 92(d), 29 C.F.R. §2200.92(d), provides that "Except in extraordinary circumstances, the Commission's power to review is limited to issues of law or fact raised by the parties in the proceedings below." (Emphasis added.)

The Secretary of Labor petitioned for review. The petition was granted by Commissioner Cleary and the parties have briefed the issues. There is no sound reason for not deciding the issues on review.[5/] If providence is lacking in this appeal, it has been lacking since it was originally directed for review. Furthermore, fundamental fairness requires at a minimum that the parties be afforded the same opportunity to object to the lack of decision as was afforded the parties in the Sears Tower cases.

Accordingly, I dissent.

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5/ The majority concludes that "whether willfulness appears in the record would serve little purpose, particularly here, where the record is unclear." The record in this case is long, and the factual issues presented are many. However, it is the role of the Commission as the adjudicatory body under the Act to resolve disputed issues, not to avoid those that may be lengthy, tedious, or not subject to easy resolution.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant<br>v.<br>P AND Z COMPANY, INC.,<br>Respondent | OSHRC DOCKET NO. 76-431 |

Appearances:

Harry W. Scott, Jr., Esq.
Richard Voigt, Esq.
For Complainant

Harold Gordon, Esq.
Lorin H. Bleecker, Esq.
For Respondent

DECISION ON REMAND

The Complainant, Secretary of Labor, received a complaint from an unnamed employee of the Respondent, P and Z Company, Inc., that P and Z's employees were being subjected to safety hazards at a job site in the vicinity of 12th and Pennsylvania Avenue in Washington, D.C. where the Respondent was one of many construction contractors involved in building a subway system in that city.

The Secretary sent an inspector to the site on December 9, 1975. After his inspection was completed two days later on December 11, 1975, four citations were issued against the Respondent alleging that P and Z had been found to be in violation of numerous construction

standards and recommending that a penalty of $6,110 be assessed. P and Z filed a notice of contest of all citations and penalties. After a hearing which began on June 2, 1976 and was concluded on July 1, 1977, the citations were vacated in part and affirmed in part.

Upon review, the Commission ordered that the judge's decision be vacated, the case be remanded and that specific findings be made on each item of all citations.

Citation No. 2 alleging a violation of 29 CFR 1926.550(a)(9) and proposing a penalty of $2,000 was withdrawn prior to the original hearing and is therefore not in issue.

CITATION NO. 1

| | | | |
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| Item 1 | 29 CFR 1926.25(c) | Containers used for garbage and other refuse were not equipped with covers in the following locations:<br><br>a) Wooden container on the west side of the 300 block of 12th Street, N.W. by the north arch<br><br>b) 55 gallon container located on the north end of the change trailers<br><br>c) Containers located inside the carpenters, also laborers change trailers<br><br>d) Containers located on New York Avenue by the vent shaft. | $50 |
| Item 2 | 29 CFR 1926.201(a) | A flagman was not provided with and did not wear a red or orange garmet while flagging on the west side of the 300 block of 12th Street, N.W. | $60 |

| | | | |
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| Item 3 | 29 CFR 1926.251(b) | Used lumber did not have all nails withdrawn before stacking on the west side of the 300 block of 12th Street, N.W. by the north archway entrance. | $0 |
| Item 4 | 29 CFR 1926.351(e) | Arc welding operations at the north end of the escalator area of the station platform were not shielded by non-combustible or flame proof screens which would protect employees and other persons working in the vicinity from the direct rays of the arc. | $0 |

CITATION NO. 3

| | | | |
|---|---|---|---|
| Item 1 | 29 CFR 1926.25(a) | During the course of construction form and scrap lumber with protruding nails and all other debris in the following locations were not cleared from work areas and passageways in the following locations:<br><br>a) West side of the 300 block of 12th Street, N.W. by the south vent shaft<br><br>b) West side of the 300 block of 12th Street, N.W. by the north arch<br><br>c) West side of the 300 block of 12th Street, N.W. by the electric control panel<br><br>d) West side of the 300 block of 12th Street, N.W. by the Mechanics Shed and Toilets<br><br>e) West side of the 300 block of 12th Street, N.W. by the change trailers | $2,000 |

f) Inside the "E" Street vent shaft

g) Street level and bottom section of the New York Avenue vent shaft

h) West side of 12th Street, N.W. between E & F Streets

i) West side of the 300 block of 12th Street, N.W. south of Beam S36.

CITATION NO. 4

| | | | |
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| Item 1 | 29 CFR 1926.56(a) | Minimum illumination (5 foot candles) was not provided for employees working in the construction areas in the following locations:<br><br>a) Outbound tunnel at entrance of section A-1 under the Traction Power Station<br><br>b) Escalator area on station platform<br><br>c) Inbound tunnel at south end of station<br><br>d) South service room<br><br>e) E Street vent shaft. | $2,000 |

In compliance with the remand order I make the following Findings of Fact. As the evidence hereinafter cited will show neither the wooden box referred to in Citation No. 1, Item 1(a) nor the 55-gallon drum mentioned in Citation No. 1, Item 1(b) was equipped with a cover but there also is no proof that these receptacles were identified as trash barrels or containers belonging to P and Z and designated for use

by its employees. There were a great number of contractors performing work in this area. Moreover these receptacles were close to public streets and sidewalks where employees of the other contractors and pedestrians passed by in great numbers.

With reference to Citation No.1, Item 2, I find, as will hereafter be shown, that the alleged flagman was in fact a pile driver who had been employed two or three days. A red or orange vest had been provided for him and all other employees by P and Z. Because of Compliance Officer Wiseman's failure to make diligent inquiry, I am unable to find as a fact that this man had even been told by a P and Z supervisor to direct traffic or that he was to wear a flagman's vest while doing so.

Items 3 and 4 of Citation No. 1 were affirmed and will be covered in a detailed discussion of evidence below. Because of the complexity of the numerous issues involved in the eight sub-items mentioned in Citation No. 3, they will be discussed in sequence below.

For the reasons hereinafter set forth I can find no basis upon which to find P and Z was guilty of intentional, conscious and deliberate acts which subjected its employees to occupational hazards. I concur in the Commission's conclusion that the trial judge, who has the opportunity to observe the demeanor of the witness when testifying under oath, is best able to determine their credibility. The findings and conclusions hereinafter set forth take into consideration the ill-concealed and very obvious anti-P and Z bias of Jennings and Bamsey (both had been fired for safety violations) and Compliance Officer Wiseman's inept and inadequate pursuit of the facts.

THE ALLEGATION OF WILLFUL VIOLATION
IN CITATIONS NO. 3 AND 4

Citations Nos. 3 and 4 alleged that P and Z willfully exposed its employees to injury from scrap lumber with protruding nails and poor lighting in a tunnel. Neither of the alleged violations could be considered to be likely to cause serious injury or death. However, because they were classified as being willful violations by the Compliance Officer Wiseman and his supervisor Saulter, each of these citations resulted in the recommendation that the employer be assessed a penalty of $2,000.

Under the provisions of 29 U.S.C.A. §666(a) any employer who willfully violates the Act of any standard, rule or order may be assessed a civil penalty up to but not more than $10,000 for each such violation. 29 U.S.C.A. §666(i) provides that determination of the appropriate amount of penalty is to be computed by giving due consideration to size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

The evidence adduced by the Secretary through the witness Wiseman in support of the proposed penalties although liberally supplied with Wiseman's conclusions based upon the arbitrary formula devised by the Secretary does not comply with the requirements of Section 666(i). Size of the business obviously is intended to be considered in determining how much of a penalty is required to have a deterrent effect upon the employer, but the Secretary uses an arbitrary formula based upon the number of employees which does not necessarily show the

the ability of an employer to pay a penalty (Tr. 3, p. 179, L. 15). What, if any, consideration to the criteria prescribed by the statute were followed by Wiseman in computing the penalty must be derived from his arbitrary conclusion based upon statistical data he accumulated as shown by his testimony (See Tr. 2, p. 64, 65, 66, L. 15 and L. 23; 67, L. 1-7; p. 68, L. 1-14 and 23; p. 80, and Tr. 3, p. 179 and Exh. C-35, Penalty Worksheet).

Wiseman said that under history he considered any citation which had been previously issued to the same employer (Tr. 3, p. 181), whether it had become a final order or not. The previous citation could have been withdrawn by the Secretary himself or vacated after a hearing.

Good faith, as nearly as can be ascertained from the skimpy evidence Mr. Wiseman gave on that subject, was determined solely upon his interview with the employer's project manager who was said to have "indicated" that there was a lighting problem. It was Wiseman's belief that "there was some reluctance on his part" about correcting the condition (Tr. 3, p. 184, L. 20, 25). Finally Wiseman admitted that his final figure when he recommended a $2,000 penalty in each of the alleged willful violations was arbitrarily determined. When asked how he computed the two penalties for alleged willful violation, he said (Tr. 3, p. 199, L. 1-6)

> "This being a willful violation, of the two I felt were willful violations, I did not feel that I could arbitrarily go to the highest mark which would have been the $10,000 mark, so I tried to weigh this in fairness to the contractor and ARBITRARILY (emphasis added) I came up with a $2,000 factor."

Wiseman also said that he gave the employer a zero rating on history because of previous citations and two trips made to the job site (Tr. 3, p. 200, L. 1-5). The significance of two trips to the job site was not explained.

His good faith figure was derived chiefly from hearsay remarks and his own opinion of P and Z's General Superintendent Christiansen. He admitted that he had relied upon hearsay opinions that Christiansen had a very poor performance record after complaints (Tr. 3, p. 201, L. 1-8). He said he "verified" these complaints by conversations with P and Z's safety superintendent and other individuals who were unnamed. This hearsay was uncorroborated. He said, in his opinion, some evidence of a previous citation under the same standard, even where there was a settlement without the matter being tried on its merits, and proof of complaints by employees showed willfulness (Tr. 3, p. 156, 164). He made no distinction between a settlement and a case which is contested (Tr. 3, p. 164, Exh. R-9).

Wiseman also said that he took into consideration a 1973 citation of P and Z for violation of Section 1926.25(a) which was at a different work site and involved hoses, lumber skids, electric wires, concrete scrap, wet concrete spillage; not protruding nails, scrap lumber and debris (Tr. 3, p. 166, 167, Exh. R-10).

Wiseman's supervisor, the Area Director Gilbert J. Saulter approved the issuance of willful citations in Citation No. 3 and No. 4. He said that his decision that a willful citation should be issued was based upon a combination of Wiseman's comments and the Secretary's files. Previous citations were taken into consideration.

He said that if the employer had previous "contact" with OSHA, had been provided with copies of standards, and had an opportunity to accompany the compliance officer in a walk-around that this indicated willfulness (Tr. 8, p. 23). No doubt he also considered Wiseman's derogatory conclusions in his initial report (Exh. R-3, p. 2) that the Respondent had a bad record and that its Construction Superintendent Christiansen ignored all notices of safety deficiencies. This was not sustantiated by any testimony. It was only an accusation.

When asked why he approved the issuance of a willful citation Saulter said that after reviewing the documents in the file (which no doubt included Wiseman's conclusions) and the employer's knowledge of the condition, he thought that a willful citation was justified. He said (Vol. 10, p. 21) "the entire case file, past history, the people involved, the management involved in P and Z. The experience that OSHA has had with the management of P and Z and the knowledge we had that people in management with P and Z were aware of the standards, were aware of the conditions .... that we found at the time of the inspection."

Saulter also explained how the penalty was determined. He said that the "willfulness factor" meant "the degree of willfulness". He explained that "attitude" is where the employer has knowledge and disregards the situation, where he refuses to abate (Vol. 10, p. 26, L. 13-23).

He then referred to the Secretary's Field Manual which defines "degrees of willfulness" for penalty purposes. The Secretary's

(not statutory or by rule) guidelines are: (a) High degree: where the employer intensely disregards safety; (b) Moderate degree: where the employer is indifferent to safety; (c) Low degree: the employer neglects to provide protection (Vol. 10, p. 34). He said that a degree of 2 in a scale of 1 to 10 was used in the instant case which is equivalent to a low degree, that is where there is no intentional disregard (Vol. 10, p. 35, L. 13-17).

Saulter also testified that careless disregard of a standard or employer neglect or indifference indicates willfulness (Vol. 10, p. 36); that his attitude, which can be determined by what precautions the employer has engaged in regarding safety prior to the inspection, is a factor (Vol. 10, p. 39). His attitude is also reflected in what happens after the inspector arrives (L. 10).

Saulter said that even though an allegation of willful violation based upon an inspection must have been derived from an attitude of willfulness before the inspection, that he also considered what happened after the OSHA inspector arrived, the fact that OSHA had made previous inspections, hearsay reports of employees (even though Wiseman was unable to substantiate most of the complaints made by the employees) (Vol. 10, p. 40, 43, 45). Finally Saulter conceded that, based upon the Secretary's Field Manual which he is assumed to have followed, "there...there has to be some basis for concluding that the employer had a chance to comply and deliberately did not." Q. "Is that what you understand it to mean?"

Saulter: "I think that is a fair interpretation, yes, sir."

Upon consideration of the record as a whole after review of the entire transcript of the testimony, I find as a fact that there is no evidence which shows that P and Z had an opportunity to comply with the standards mentioned in Citations Nos. 3 and 4 and deliberately did not.

I further find and conclude, as a matter of law, that where, as here conceded by Saulter, (Vol. 10, p. 35, L. 13-17) there was no "intentional disregard"; that the Secretary of Labor failed to sustain the burden of proof that the alleged violations described in Citations Nos. 3 and 4 were willful. There must be an intentional, knowing or voluntary act. Secretary of Labor v. C. N. Flagg & Company, 11 OSHARC 632 (No. 1734, Sept. 19, 1974). It must be a conscious, intentional, deliberate voluntary decision. F. X. Messina Construction Corporation v. Secretary of Labor, 505 F.2d 701, 702 (1st Cir. 1974).

LACK OF CREDIBILITY OF THE WITNESSES JENNINGS AND BAMSEY

The Secretary's witness Jennings, when asked why he left the employ of P and Z, said "I was fired." (Vol. 6, p. 199). The record reveals that on June 20, 1975, Jennings, who was a shop steward, the representative of the employees, one who should have been interested in their welfare, was given a non-compliance notice by P and Z for failure to direct personnel to pick up their lunch debris after eating (Exh. R-25). He was also given a non-compliance notice by P and Z on November 10, 1975 for permitting an employee under his supervision to work without a safety belt and, finally after his third infraction of rules was fired. He admitted that he had been reprimanded by the superintendent about his failure to clear up the

lunch trash (Vol. 6, p. 202). He testified on direct examination that once he emptied a full trash can on the ground near the trailers (Vol. 5, p. 159, L. 8-10). All of this witness' testimony about overflowing trash pertained either to overflowing trash cans without lids in places where he, as the union steward, had the responsibility of seeing both that they had lids and that they were promptly emptied.

The witness Bamsey was also fired for cause (Exh. R-23). The reason given was refusal to follow orders (Tr. 6, p. 118). He denied this and claimed that he had a legitimate complaint about the hazardous manner in which he was told to perform his work. On cross examination he admitted that it was part of his responsibility to keep his work area clean (Tr. 6, p. 78-80). On the day of the inspection he was engaged in taking out street beams. They were put down on the west side of 12th Street. The areas shown in Exhs. C-32, 33, 34 was a designated area for deposit as directed by his foreman (L. 22-23). This material was later removed by truck (Vol. 6, p. 89). He also identified Jennings as the individual shown in Exh. C-19 as a shop steward and said that he understood that Jennings was supposed to clean the pile driver's change trailers. Although he had previously testified that there was no passageway to the change trailers he then (L. 6-24, Tr. 6, p. 96) admitted that there was a 10 foot wide path through the archway (Vol. 6, p. 97). He admitted that he was given a safety violation notice by P and Z on November 10, 1975, for not wearing a safety belt and another one on November 12, 1975 (Exh. R-22, Tr. 6, p. 116, L. 18-25). He also

admitted that he was served with a termination notice on December 12, 1975 (Vol. 6, p. 118, Exh. R-23) although he disputes the allegation that he had defied his foreman and refused to follow orders. On redirect examination he contended that the way he was told to perform his duties was, in his opinion, hazardous and for that reason he refused to do it. In any event it is clear that this employee, like Jennings, was fired because he persistently disregarded company rules involving safety. Even though he was not so obviously an unreliable witness as Jennings, his record cannot be ignored in evaluating his testimony.

DISMISSAL AND VACATION OF CITATION 1, ITEM 1(d) ON MOTION

The Respondent's motion at the close of the case for the Secretary directed to Item 1(d) of Citation No. 1 alleging that containers on New York Avenue by the vent shaft used for garbage and other refuse were not equipped with covers was granted. The record revealed that this container was a 55 gallon drum overflowing with rubbish, whiskey bottles, wine bottles, and paper. No employee of P and Z was observed using these rubbish cans nor was it even established that they belonged to P and Z or were placed in the public street for the use of P and Z employees. Wiseman testified that he saw "some" 55 gallon drums on New York Avenue near a vent shaft, but his attention to his duties was so casual and inadequate that he wasn't even sure how many he saw. He said there were "at least two". He was asked if he could tell what color they were and again he showed his lack of recollection of the facts by saying

"probably a rusty looking metal color". When he was asked if he could be more specific he couldn't even remember whether they were painted or not (Tr. 2, p. 148).

When he was asked whether there were any identifying marks on them showing that they belonged to P and Z, he acknowledged that there were not. He couldn't remember whether he took pictures. He admitted that he had not seen any P and Z personnel using them (Tr. 2, p. 149). When he described the area where they were located he said the vent shaft was in the center of the street, that there was a bus station on one side of the street, a restaurant on the other side and a book store in the middle of the block and that there was a median strip in the center of the street. It was a natural median strip travelled by the public where pedestrians crossing from the sidewalks from either side could pass by. It was an area of trees, shrubbery and grass. There were a number of fast food outlets in the area also, places where it is likely that there would be debris from discarded containers procured from the fast food outlets (Tr. 2, p. 150).

The Respondent's motion, also made at the close of the case for the Secretary, to vacate so much of Citations Nos. 3 and 4 as alleged willful violation of the Act was also granted. As has been previously pointed out, the recommendation of Wiseman that a willful citation be issued was predicated upon such a flimsy premise that his supervisor Saulter should have refrained from accepting his recommendation. Wiseman relied solely on uncorroborated complaints by disgruntled employees and other third hand information. There is not even a

scintilla of evidence of a conscious, intentional, deliberate, voluntary decision (F. X. Messina Construction Corp. v. Secretary of Labor, 505 F.2d 701, 702 (1st Cir. 1974)) to permit protruding nails and other debris to be accumulated in work areas and passage ways or deprive employees of the minimum requirements for illumination in the work place.

CITATION 1, ITEM 1(a)

Citation 1, Item 1(a) alleges that a wooden container used as a refuse container was not equipped with a cover. The record revealed that P and Z had not designated any wooden containers for trash (Christiansen, P and Z's superintendent, Tr. 10, p. 79, June 29, 1976; Tr. 12, p. 10). Wiseman only "assumed" that this box was a P and Z designated trash container (Tr. 2, P. 141, L. 23, 24), but admitted that there were no markings to identify it as such (Tr. 2, p. 142), and that it was in an area accessible to the general public between the street and the sidewalk (Tr. 2, p. 143). Wiseman made no attempt to find out who put the box there or who, if anyone, told P and Z employees or any other employee on the project to dispose of trash there (Tr. 2, p. 144). He admitted that the employer representative who accompanied him on the walk-around (Fallon) was unable to enlighten him (Tr. 2, p. 144, L. 21, 22), yet he made no attempt to inquire further. He said he relied on a statement of the union steward, Jennings, the same Jennings who was disciplined by P and Z for failure to dispose of accumulated trash (Tr. 3, p. 210). The assumptions of a compliance officer supported only by the testimony of an unreliable witness who has been shown to be a contributor to

an accumulation of trash are insufficient to support this allegation of violation.

CITATION 1, ITEM 1(b)

The allegation that P and Z furnished 55 gallon drums without lids for use of its employees as trash containers was also based upon Wiseman's assumptions and unsupported conclusions derived from comments by the union steward (Tr. 1, p. 140, L. 1-6). Wiseman admitted that there were no markings on the drums identifying them as P and Z property (Tr. 2, p. 144, 156). The Shop Steward Jennings, whose hostile attitude towards P and Z was apparent, attempted to make it look like these were P and Z trash cans, by depositing some trash in one of the drums in Wiseman's presence during the walk-around (Tr. 2, p. 147).

P and Z's Safety Superintendent Fallon who had since left the employ of P and Z and was at the time he testified employed by Volpe-Head, a joint venture, was a witness for the Secretary. He was also with Wiseman during the entire tour of the job site. He said P and Z had never designated 55 gallon drums as trash containers (Tr. 4, p. 179, L. 3-5, p. 187, L. 6 & 7). 55 gallon drums furnished by P and Z were supposed to be used for segregation of materials such as bolts, plates and washers, according to Fallon (Tr. 4, p. 178) and to hold water for fire protection (Tr. 5, p. 116, Tr. 5, p. 90, L. 17-25, p. 91. L. 4-6 testimony of Christiansen, job superintendent). Christiansen also said as did Fallon that no 55 gallon drums were ever designated as trash containers by P and Z (Tr. 10, June 29, 1976, p. 79).

CITATION 1, ITEM 1(c)

It was alleged that garbage containers located inside the carpenters and laborers change trailers were not equipped with covers. It is not disputed that this condition existed on the day of the inspection. They not only did not have lids but some of them were overflowing (Tr. 5, p. 157, 158; Tr. 1, p. 140, L. 19). Wiseman's recollection of details however was very vague and uncertain. When asked to describe the containers his answer was qualified by such expressions of uncertainty as "...if I remember rightly" "...from the best I can remember, they were more or less (emphasis added) of the cardboard box type". When asked if some were plastic he said "possibly, yes". When asked again if they were cardboard he said "not necessarily" thus contradicting himself (Tr.2, p. 147, L. 11).

P and Z's former safety superintendent conceded that keeping the trash cans in the trailers neat had been a problem (Tr. 4, p. 96). The Secretary's witness Jennings was part of the problem. Six months before the inspection he was disciplined by P and Z for failing to make sure lunch debris was properly disposed of (Exh. R-25). This was part of his responsibility (Tr. 6, p. 163; Tr. 5, p. 159, 160). He could have complained to the union business agent if P and Z had not been cooperating with him but he never did (Tr. 6, p. 182). He admitted being reprimanded for not keeping the trash in the trailers cleared (Tr. 6, p. 195, 201, 202).

CITATION 1, ITEM 2

In Citation 1, Item 2 it was alleged that a flagman was not provided with and did not wear a red or orange garment while flagging on the west side of the 300 block of 12th Street, Northwest. The documentary record shows that on June 9, 1975, P and Z issued a directive applicable to flagmen to all supervisors and foremen. In addition to instructions as to how to signal it was specified that flags and vests were available in the tool room. Nothing else was to be used as a substitute except during inclement weather when raincoat jackets might be used instead of vests (Exh. R-17). This item was vacated on the motion of the Respondent at the close of the case for the Secretaary. It is not disputed that vests were provided. The employee was a new one, the question was whether he had been told where to get a vest and when it was required that it be worn. Wiseman neglected to inquire about this. Not even a prima facie case of violation as alleged in Item 2 was established.

The Pile Driver Steward Jennings testified that he knew the man shown in Complainant's Exh. C-13, that he was a pile driver in his own crew, had only been on the job two or three days, and admitted (Tr. 6, p. 176, L. 10) that he had never instructed this man that he had to wear a vest. He acknowledged that under the union contract only a member of the union, such as he who was the pile driver steward, could give such instructions. A supervisor was prohibited from doing it (Tr. 6, p. 177, L. 17-18, p. 178, 179).

This item was properly ordered vacated on motion of the Respondent because of the Secretary's failure to sustain the burden of proof.

CITATION NO. 1, ITEM 3

The allegation that used lumber with protruding nails was stacked on the west side of the 300 block of 12th Street by the north archway entrance was not disputed. It is true that there was some debris from passing pedestrians and other persons not employed by P and Z (Tr. 10, p. 96, L. 10; Exh. C-18, C-21, C-31). However it is obvious that the Secretary thought that the risk of injury was slight. No penalty was recommended. The evidence fully supports a finding that a violation as alleged in Item 3 of Citation No. 1 should be affirmed without penalty as proposed by the Secretary.

CITATION NO. 1, ITEM 4

It was alleged that arc welding operations at the north end of the escalator area of the station platform were not shielded by non-combustible or flame proof screens which would protect other persons in the area from flash burns. No penalty was proposed.

The overwhelming weight of the evidence shows that the Respondent did not adequately comply with the requirement that shields be in place during welding operations but the risk to passing employees from flash burn because of exposure of their eyes to this intense light was minimal due to the fact that the welders were so positioned that the structural formation of the tunnel screened them off from most of the light (see testimony of Wiseman Tr. 1, p. 157-172 and Fallon Tr. 4, p. 110-116). The evidence sustains the allegation of violation and the recommendation that no penalty be assessed.

CITATION 3, ITEM 1 (g)

It was alleged in this citation that there was a violation of 29 CFR §1926.25(a) for failure to protect employees from protruding nails in construction form and scrap lumber at nine different locations. It was asserted that this material had not been adequately cleared from work areas and passageways. Item 1(g) was vacated on motion of the Respondent at the close of the case for the Secretary because the evidence revealed that area involved was in the center of a public street. An unidentified workman was observed as shown in Exh. C-23, C-25 in the area referred to but neither Wiseman nor Fallon was able to connect him with any work being performed there by P and Z (Tr. 2, p. 25, Tr. 4, p. 129). This item too was vacated at the close of the case for the Secretary.

CITATION 3, ITEM 1(a)

This area included a designated trash site (Tr. 10, p. 109, Exh. C-33). P and Z's sub-contractor provided rollaway containers for debris and also periodically hauled away debris. Skip boxes were on the job site along with the rollaway containers on December 9, 10 and 11, 1975 (Tr. 5, p. 94 and 95). Because of the shortage of storage space scrap material like some of that shown in the exhibits introduced in support of Citation No. 3, was often stacked if there wasn't transportation for its removal available immediately. If it was reusable some of it was put in skip boxes or dumpsters in a designated trash storage area. The west side of 12th Street was one of those areas (P and Z supervisor Huffman, Tr. 11, p. 48).

This site was in a congested area where concrete had been previously poured. It is common knowledge that when concrete forms are stripped there can be a rapid accumulation of scrap material so that instant removal is not possible, However, it cannot be said, in the absence of more convincing evidence than that adduced by the Secretary, that a violation has been established. Inspector Wiseman and his colleagues failed to find out precisely how long this material had been accumulated. There is no persuasive evidence that the Respondent violated Section 25(a) at this site.

CITATION 3, ITEM 1(b)

Some of the debris present in Exh. C-14 is the type of debris thrown by passing pedestrians. This site was in a public street (Tr. 10 2nd, p. 127, 128). No one was working there. Welding machines shown in Exh. C-18 were not in use (Tr. 5, p. 70, L. 13-21). Huffman, P and Z's general superintendent, testified that on December 10th there were two 14 yard trash trucks and a 20 yard dumpster at the 300 block at 12th Street. They also had a John Deere tractor and skip boxes in the excavation. Building materials were loaded into dump trucks and skip boxes (Tr. 11, p. 42, 44). Moreover the area was under the control of another contractor, Crough, an electrician. His offices were located in that area. Huffman said that if an employee was required to get any of the reusable materials he could just reach in and pick it up or if it wasn't accessible he could have a crane pick it up (Tr. 12, p. 25). The toilets shown in the Secretary's photographs (Exh. C-21, C-31) made it appear that the only means of access was over a pile of debris. This was not true. There was an unobstructed means of access to these toilets

(Exh. R-30, Tr. 12, p. 25 & 50).

CITATION NO. 3, ITEM 1(c)

Wiseman testified that he observed debris and trash blocking the path to the control panel shown in Exh. C-17 and C-27 (Tr. 2, p. 19 & 32). He added gratuitously that the housekeeping was the worst he had seen in any metro project he had ever inspected thus revealing his pre-determined conclusion (Tr. 2, p. 35). On the other hand the Secretary's witness Fallon remarked that the panel box was locked and was exclusively under the control of Plymouth Electric. He said that P and Z employees had no electrical responsibility or means of access to it or need to use it (Tr. 5, p. 77). Superintendent Christiansen testified that the area shown in Exh. C-17 was a picture of a designated trash area. This was another example of Wiseman's positioning himself behind a trash area to take pictures to make it look like there was no means of access (Tr. 10, p. 116). Both Christiansen and Huffman testified that only an electrician would have access to the panel (Tr. 10, p. 117, 127, Tr. 11, p. 54). Huffman testified that he was there when the picture was taken, that there was an aisle which was not shown. He had walked through it himself with the electrician (Tr. 11, p. 55 and 56). Witness Christiansen explained that the photograph identified as Exh. C-27 was taken at the east end of the change sheds. He said that no one going to the change sheds would have had to climb over the debris shown in the picture. Reference to Exh. R-30 shows that the camera was pointed over a designated trash area from a location where the passageway could not be seen (Tr. 10, p. 6).

The job site involved several million pounds of steel, sixty thousand yards of concrete, a million board feet of lumber, ten thousand tons of structural steel and very little space for storage of debris (Tr. 10, p. 8 - 11). The Respondent put in the record numerous documents showing that the Respondent contracted for trash dumpsters, containers for the deposit of trash, that numerous invoices had been submitted for trash removal performed by sub-contractors (see Exhs. R-33, 34, 35, 36, Tr. 10, p. 13-17).

CITATION NO. 3, ITEM 1(d)

In this item it was alleged that there was debris blocking the passageway in the vicinity of the mechanics' shed. According to Wiseman, he observed "used materials, trash and other things (Tr. 2, p. 19) and that he saw an employee wearing a red hat passing back and forth through the area (Tr. 2, p. 20, 21) but as was pointed out by the witness Christiansen (Tr. 10, p. 121, Exh. R-30) this picture again was taken from a position in front of a trash pile where no one would walk in order to enter the mechanics' shed. There was no entrance to the shed from that side (Tr. 10, p. 57, 58). The Secretary's witness Poole admitted that there was access to the toilets without going over the trash pile (Tr. 12, p. 62).

CITATION NO. 3, ITEM 1(e)

In this item the respondent was alleged to have permitted passageways to be blocked by accumulation of used materials on the west side of the 300 block of 12th Street near the change trailers. P and Z's discharged employee Ramsey was offered as a

witness by the Secretary in support of this allegation. He said there was no passageway to the change trailers, that it was necessary to climb over rebars and H beams in the area shown in the photographs identified as Exhs. C-16 & C-19 (the latter is the one where the other discharged former employee Jennings posed for Wiseman) in order to get to the change trailers (Tr. 6, p. 61). On cross examination he admitted that there was in fact a pathway 10 to 15 feet wide which provided access to the trailers without making it necessary to climb over the steel materials shown in the picture (Tr. 6, p. 96). This admission is in direct conflict with his previous testimony where he said "we had to climb over rebars" in order to get to the change trailers (Tr. 6, p. 61). Exh. R-30 shows where Wiseman stood when he took the photograph identified as Exh. C-16. It was taken from a position where the pedestrian sidewalk which provided access to the change trailers could not be seen.

Bamsey's testimony is unworthy of belief. Wiseman's photograph distorted the true situation. Bamsey admitted that there was a passageway behind the debris shown in Exh. C-16 (Tr. 6, p. 99), but he said he usually climbed over the stored material anyway because it was a shorter route to the trailers (Tr. 6, p. 111). He admitted receiving written citations (Exhs. R-21, R-22) for safety violations from P and Z on November 10, 1975 and November 24, 1975 and being discharged for refusal to follow orders.

Wiseman when shown the photograph Exh. C-19 with Jennings posing beside piles of steel failed to mention that employees did not have to cross over this material to get to the change trailers. He instead

said "This is one of the entrance ways that goes into the change trailers" (Tr. 2, p. 21, L. 19 & 20).

The area shown in Exh. C-19 was a designated area for deposit of used materials (Tr. 10, p. 120). Wiseman's photograph and his testimony was inaccurate. There was an unblocked means of access to the change trailers.

CITATION NO. 3, ITEM 1(f)

The testimony offered in support of this item although lacking in accuracy because of Wiseman's usual reliance upon assumptions and casual observations without asking pertinent questions to bring out the facts never-the-less is barely sufficient to support an affirmance of the citation. It was not disputed, in fact it was admitted through testimony of two of the Respondent's supervisors Christiansen and Huffman, that the man shown working in the material shown in Exhs. C-28 and C-29 was one of their employees (Tr. 10, p. 122, Tr. 12, p. 26). They had been stripping forms at this site.

CITATION NO. 3, ITEM 1(g)

This item was vacated on the motion of the Respondent at the conclusion of the case for the Secretary.

CITATION NO. 3, ITEM 1(h)

This alleged violation involved an allegation of failure to maintain open aisles free from debris on the west side of 12th Street, between E and F Streets. Wiseman's testimony in support of this item depicted, according to him, in the photographs identified as Exh. C-21 and C-31 was far from specific. He said that when they were coming back from the walk-around they observed men working in and

along the street in an area which was full of debris. They were "evidently" (again he failed to find out) finishing a concrete floor "or they were placing some concrete down into the ground area." (again speculating). He said that there was a compressor in this area where an employee was observed walking across a trash area to get to it (Tr. 2, p. 26). He said Mr. Fallon the safety superintendent told him one of these employees was a compressor operator but he couldn't remember the man's name.

P and Z's Superintendent Huffman disagreed with Wiseman saying that P and Z was not performing any work at this location on December 10th (Tr. 11, p. 62). He said that the finish contractor Crough had his men working there at the time.

CITATION NO. 3, ITEM 1(i)

This item alleges failure to keep aisles and passageways clear of protruding nails and other debris on the west side of the 300 block of 12th Street, N.W., south of Beam S36. The photographs identified as Exhs. C-15, 22, and 23, pertain to this item. P and Z's Superintendent Huffman said that the work going on there was the installation of the outside forms on the dome relief which is the highest part of the subway station immediately below the street. The men depicted in the pictures were forming up in preparation for a concrete pour. Some of the materials there belonged to other contractor's employees. The rebars shown in C-15 belonged to Byurick. The circular piece of concrete shown in the lower right hand corner of Exh. C-15 is a part of a manhole which would later be installed by P and Z.

It is very difficult to ascertain, on the basis of Wiseman's testimony, what the Respondent is alleged to have failed to do in this particular area. When asked what was the basis of the recommendation for the issuance of the citation involved in Item 1(i) he said "regarding Item 1(i) which is the west side of 12th St., this would be the south of Beam S36, which is a very large beam crossing over. There was used materials and lumber scattered in this area and I observed employees walking through this." (Tr. 2, p. 29).

He said that the violation was illustrated in the photograph identified as C-15 but as has been already noted the testimony of Huffman that the material shown there was not debris but material which was to be used in the ensuing completion of what is known as the dome relief. It was impossible to tell what, on the basis of Wiseman's testimony, P and Z should have done here that was not done. There is simply no proof that there were protruding nails and debris in the area depicted in Complainant's Exh. C-15 and the area referred to in Citation No. 3, Item 1(i).

CITATION NO. 4

In Citation No. 4 it was alleged P and Z failed to provide the the amount of lighting required by 29 CFR 1926.56(a) in five different locations. This standard requires a minimum illumination of five foot candles in the area where the employee is working. Although P and Z questioned the accurancy of the readings procured by the Secretary's Investigator Galloway, I am convinced that the equipment used had been properly calibrated before the tests were

made and that the methods utilized by Galloway in making the tests were performed in such a manner that an accurate reading of the light in the area where employees were required to perform work, was accurately determined (Tr. 3, p. 197, 198, Tr. 2, p. 52 - 57).

The readings that Galloway made revealed the following:

(a) outbound tunnel at the entrance of section A-1 under the Traction Power Station - 1.5 foot candle

(b) escalator area on station platform - 1.5 foot candle

(c) inbound tunnel at south end of station - 2.52 foot candle

(d) south service room - .5 foot candle

(e) E Street vent shaft - 2.00 foot candle.

There is clear and conclusive proof that P and Z did not meet the requirements of the standard in this particular instance. Moreover it was revealed in the closing conference (Tr. 2, p. 62) that management was aware of this. That is not disputed. According to P and Z's Safety Superintendent Fallon there had been inadequate lighting on prior occasions during the time he was employed by P and Z. This was in May, 1975 (Tr. 5, p. 31). However it was in a different area - the south service room. He noted that the electrician had it on his schedule to correct two days later on May 14, 1975 which indicates that P and Z's policy was to abate hazards promptly (Tr. 5, p. 32). It was revealed that on June 26, 1975 the lighting had been increased to 5 foot candles. Subsequently Fallon had discussed inadequate lighting with Plymouth Electric whose responsibility it was to take care of such matters (Tr. 5, p. 33).

P and Z's general superintendent, Christiansen, said when testifying for the Respondent that the sand blasting sub-contractor's employees who worked at night often destroyed light bulbs which created an illumination problem when P and Z employees came to work the next day (Tr. 10, p. 24, 25). Superintendent Huffman testified that he visited the job site every day. He recalled that a string of lights was up on December 10th (Tr. 12, p. 6 and 7). Huffman said that strings of lights and spotlights with an extra extension cord were always available when needed. He agrees with Christiansen that the sand blasters broke a lot of light bulbs. He said that they had been working the night before the inspection on December 10th (Tr. 12, p. 8) but employees were instructed to get additional lighting if there was not enough light (Tr. 12 p. 9).

It cannot be disputed that a prima facie case of violation was established and that the evidence adduced in behalf of the Respondent failed to diminish the presumption that a violation had occurred. However evidence of any willfulness is totally lacking. To the contrary the evidence shows that whenever there was a light problem that prompt action was taken by P and Z's safety superintendent to rectify the deficiency. Employees were aware that adequate lighting equipment was available and were on notice that they could secure it when requested. P and Z's only deficiency was its inability to bring the lighting up to standard in less than two days. This however is far short of indicating a conscious, intentional, and deliberate attempt to subject its employees to the hazards caused by inadequate light.

FINDINGS AS TO WHETHER ALLEGED VIOLATIONS STATED IN CITATIONS NOS. 3 AND 4 WERE WILLFUL

In C. N. Flagg and Co., Inc., d/b/a Northeastern Contracting Co., v. Secretary of Labor, OSHRC Docket No. 1409, February 4, 1975, the Commission reversed this judge's finding of willful violation of the Act. There the Secretary had issued a second citation five days after the initial inspection. The willful violation citation was issued because the employer's supervisor persisted in his assertion that he didn't need to shore a trench all the way to the bottom after having been put on notice after the first inspection that the Secretary considered it to be required by the standards. This superintendent persisted in this attitude while testifying at the hearing. There could be no question about his intention to disregard the requirements of the standard as promulgated and asserted by the Secretary as applicable. However, Commissioners Moran, VaNamee and Cleary were unaminous in reversing this conclusion of this judge in this instance.

In the instant case there is no evidence of intentional, conscious, and deliberate disregard of the standards such as was shown in the Flagg case (supra). Wiseman's justification for his recommendation that a willful violation be charged was that he thought the housekeeping conditions were "deplorable". (Tr. 2, p. 46, L. 12). He also said that he relied to a certain degree on conversation with employees. This no doubt included employees like Jennings and Bamsey who were not only censured for failure to perform their own tasks in disregard of safety regulations but were subsequently fired because of continued violation of company rules.

Wiseman relied chiefly upon employee statements that complaints about inadequate safety practices were ignored by management. However he apparently based his conclusions upon the unreliable word of Jennings and Bamsey, neither of whom is worthy of belief.

It is clear that P and Z was aware of its failure to supply adequate illumination. The evidence adduced by the Respondent itself revealed that their Safety Superintendent Fallon had notified management that he had found some insufficient illumination more than six months before the inspection. P and Z abated the condition which casts doubt upon the Secretary's allegation that there was intentional failure to remedy known deficiencies in lighting. The fact that National Law Control Service Inc. may have discovered safety deficiencies does not show willfulness. There must also be proof that, at sometime, after such notice was received, P and Z intentionally, consciously, and deliberately failed to act.

It is not disputed that two employees accused P and Z of failing to respond to complaints about unsafe working conditions, but these were the same employees who were discharged for repeated violations of P and Z's safety rules and instructions. Their testimony has no probative value.

CONCLUSIONS OF LAW

On the basis of the foregoing findings of fact I make the following conclusions of law.

1. The Respondent, P and Z Company, Inc., did not violate the standards as alleged in Items 1 and 2, Citation No. 1; Citation No. 2; and Citation No. 3, Item No. 1(b), (c), (d), (e), (g), (h), and (i).

2. The Complainant sustained the burden of proof of nonserious violation of the standards as alleged in Items 3 and 4 of Citation No. 1; Item 1(a) and (f) of Citation No. 3 and Citation No. 4.

3. There is an absence of evidence of intentional, knowing and voluntary subjection of employees to risk of injury from accumulated lumber and debris. The Secretary did, however, adduce a preponderance of evidence that an employee work in some form stripping materials inside the "E" Street vent shaft was exposed to a risk of very slight injury for which a penalty of $25 is appropriate.

4. There was inadequate enforcement of the requirement that at least 5 foot candles of light be supplied in all work areas as alleged in Citation No. 4. However, it was partly the result of the failure of affected employees to ask for additional equipment which was available. For that reason a penalty of $50 is considered to be adequate.

ORDER

It is therefore hereby ordered that:

1. Citation No. 1 and the proposed penalty of $50 be vacated.

2. Citation No. 2 and the proposed penalty of $60 be vacated.

3. That Citation No. 1, Item 3 and 4 be affirmed without penalty.

4. That Citation No. 2 and the proposed penalty of $2,000 having been withdrawn by the Secretary be vacated.

5. That Citation No. 3, Item 1(a), (b), (c), (d), (e), (g), (h), and (i) and the proposed penalty of $2,000 be vacated; that Item 1(f) be affirmed and that a penalty of $25 be assessed.

6. That Citation No. 4 be affirmed, and that the penalty be reduced from $2,000 to $50.

Ben D. Worcester

BEN D. WORCESTER
Judge, OSHRC

Dated: April 12, 1978
Boston, Massachusetts

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

FEB 26 1982

IN REFERENCE TO SECRETARY OF LABOR v.

George C. Christopher & Son, Inc.

OSHRC DOCKET NO. 76-647

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

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FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>GEORGE C. CHRISTOPHER & SON, INC.,<br><br>Respondent. | OSHRC Docket No. 76-647 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge Paul E. Dixon is before the Commission for review under section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Judge Dixon vacated one subitem and affirmed the remaining items of a citation alleging that Respondent, George C. Christopher & Son, Inc. ("Christopher"), violated section 5(a)(2) of the Act by failing to comply with the machine guarding standards at 29 C.F.R. §§ 1910.212(a)(1) and 1910.212(a)(3)(ii). 1/ A total penalty of $200

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1/ Sections 1910.212(a)(1) and (a)(3)(ii) provide as follows:

> § 1910.212 General requirements for all machines.
> (a) Machine guarding - (1) Types of guarding.
> One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation,

(cont'd)

was assessed. On review, Christopher takes exception to the judge's disposition of all but three subitems of the citation. 2/ We vacate two subitems affirmed by Judge Dixon, but affirm the remainder of the judge's decision for the reasons stated below.

I.

Christopher is an employer engaged in structural steel fabrication at a plant in Wichita, Kansas. Following an inspection at its plant, the Secretary of Labor ("the Secretary") issued to Christopher a citation alleging that, contrary to section 1910.212(a)(1), the nip points and rotating parts of several shears and plate rolls were unguarded, and that, contrary to section 1910.212 (a)(3)(ii), the points of operation of several shears, combination punches and

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(Footnote 1 cont'd)

> ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are - barrier guards, two-hand tripping devices, electronic safety devices, etc.
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> (3) Point of operation guarding.
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> (ii) The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

2/ Neither party has taken exception to those parts of the decision in which the judge affirmed subitems 1(b)(2)(c) and 1(b)(2)(d) and vacated subitem 1(b)(3)(d). In addition, there is no compelling public interest warranting Commission consideration of those subitems. Accordingly, the Commission will not review those dispositions. See Water Works Installation Corp., 76 OSAHRC 61/B8, 4 BNA OSHC 1339, 1976-77 CCH OSHD ¶ 20,780 (No. 4136, 1976); Abbott-Sommer, Inc., 76 OSAHRC 21/A2, 3 BNA OSHC 2032, 1975-76 CCH OSHD ¶ 20,428 (No. 9507, 1976).

shears, and ironworkers were unguarded. 3/ Christopher also was cited under section 1910.212(a)(3)(ii) for failure to guard and to put nonslip pads on the pedals used to activate the ironworkers.

The case was decided on a stipulated record. The parties agreed that there were no "positive physical guards" on the points of operation, nip points, and rotating parts of the cited machines. 4/ Christopher had, however, posted signs warning of the dangers of the machines and indicating the proper method of operation. In addition, Christopher had color coded the moving parts, had supplied guards on other portions of the machines, and had conducted a continuing training

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3/ "Ironworker" is a general term that covers a variety of power tools that punch, shear, notch, cope, and form metals and other materials. Christopher objects to the judge's conclusion that ironworkers are governed by §§ 1910.212(a)(1) and 1910.212(a)(3)(ii) because they are not among the machines listed in § 1910.212(a)(3)(iv), which states:

> The following are some of the machines which usually require point of operation guarding:
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> (a) Guillotine cutters.
> (b) Shears.
> (c) Alligator shears.
> (d) Power presses.
> (e) Milling machines.
> (f) Power saws.
> (g) Jointers.
> (h) Portable power tools.
> (i) Forming rolls and calendars.

The Commission has held, as Judge Dixon correctly noted, that the standard applies to all machines, regardless of whether they are included in the list. Irvington Moore, Division of U.S. Natural Resources, Inc., 75 OSAHRC 45/A2, 3 BNA OSHC 1018, 1974-75 CCH OSHD ¶ 19,523 (No. 3116, 1975), aff'd, 556 F.2d 431 (9th Cir. 1977). The list indicates only some of the machines that usually require point of operation guarding; the list is illustrative only.

4/ Christopher did not admit in the stipulation that the pedals activating the ironworkers were not guarded or padded. There is no evidence of record, therefore, to support the citations regarding subitems 1(b)(3)(b) and 1(b)(3)(c). Accordingly, these subitems are vacated.

program to inform employees of the proper ways to operate the machines and the dangers they present. All of these steps were stipulated to have "create[d] an awareness of the machine's danger and assist[ed] in the safe operation thereof." It was also stipulated that no employees had been injured from the unguarded portions of the machines during their normal operation over the previous fifteen years.

The parties further stipulated that two of Christopher's vice-presidents and two of its attorneys would have testified that, at a meeting with the Area Director of the Occupational Safety and Health Administration ("OSHA") in Wichita following the inspection, the Area Director stated, with respect to the guarding of ironworkers, that OSHA would "be governed" by the standard set forth in the draft of a standard issued by the American National Standard Institute ("ANSI"), ANSI B11.5-1975, Safety Requirements for the Construction, Care, and Use of Iron Workers. One of Christopher's vice-presidents also would have testified that before the meeting Christopher was not aware of the draft ANSI standard, that it was not available, and that Christopher could have complied with the draft standard before the inspection if it had known of it. A second vice-president would have corroborated part of this testimony.

It was also stipulated that an assistant to one of Christopher's vice-presidents would have testified "that at certain times and under certain conditions certain of [its] machines <u>cannot be guarded</u> because of the nature of the work and type of material being put through said machines." (Emphasis in the original.) Finally, Christopher's vice-president for engineering would have testified that "attempts were made to develop guards which the employer felt might comply with the OSHA requirements but that they proved to be unsatisfactory as they were impractical for the type of work performed by the employer."

II.

Christopher argues that compliance with the cited standards was either impractical or impossible in that use of such guards would have rendered the equipment inoperable for its type of work. Christopher asserts that it complied with paragraph 11.2.1 of ANSI standard Z229.1-1973, Safety Requirements for Shops Fabricating Structural Steel and Steel Plate, 5/ rather than the occupational safety and health standard at 29 C.F.R § 1910.212(a)(3)(ii), because it is impossible to provide the point-of-operation guarding required by the OSHA standard.

Christopher's claim that compliance with ANSI Z229.1 fulfills its obligation under the Act raises the issue of what the phrase "appropriate standards therefor" in section 1910.212(a)(3)(ii) refers to. In order to permit the parties to fully address these issues and a number of collateral issues, the Commission issued an order requesting briefs on those issues.

A review of the origin of section 1910.212(a)(3)(ii) and its promulgation as an OSHA standard is important to an understanding of these matters. The source of 29 C.F.R. § 1910.212(a)(3)(ii) is 41 C.F.R. § 50-204.5(c)(2). 29 C.F.R. § 1910.221. Section 50-204.5(c)(2) was adopted in 1969 by the Secretary

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5/ The American National Standards Institute ("ANSI") standard at Z229.1, paragraph 11.2.1 provides as follows:

> 11. General Requirements for All Machines and Equipment
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> 11.2 Safeguarding Machines and Equipment
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> 11.2.1 Safeguards. Safeguards (guards or devices) shall be installed and used when the application or manufacturing process requires the operator or any other employee to be in the danger area of the point of operation of the machine. If the application or manufacturing process is such that point-of-operation guarding is impractical, appropriate warning signs shall be used to make all persons aware of the dangers at point of operation.

of Labor under the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45 ("the Walsh-Healey Act"). 6/ Section 50-204.5(c)(2) ("the Walsh-Healey point of operation guarding standard") has never been amended. It states:

> § 50-204.5 Machine guarding.
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> * * *
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> (c) Point of Operation Guarding.
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> (2) Where existing standards prepared by organizations listed in § 50-204.2 provide for point of operation guarding such standards shall prevail. Other types of machines for which there are no specific standards, and the operation exposes an employee to injury, the point of operation shall be guarded. The guarding device shall be so designed and constructed so as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

The list of organizations in section 50-204.2(a), which is referred to in section 50-204.5(c)(2), read, after a minor, insubstantial amendment in January of 1970, as follows:

> § 50-204.2 General safety and health standards; incorporation by reference.
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> (a) Every contractor shall protect the safety and health of his employees by complying with the applicable standards, specifications, and codes developed and published by the following organizations:
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> American National Standards Institute Incorporated
> National Fire Protection Association.
> American Society of Mechanical Engineers.
> American Society for Testing and Materials.
> United States Governmental Agencies, including by way of illustration the following publications of the indicated agencies:

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6/ 34 Fed. Reg. 788, 789 (1969)(adoption); 34 Fed. Reg. 2207 (1969)(effective date postponed); 34 Fed. Reg. 7946, 7948 (1969)(new effective date given). The Walsh-Healey Act was passed by Congress in 1936. It requires that no part of a contract with the federal government exceeding $10,000 be performed "under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contracts." 41 U.S.C. § 35(e). For a discussion of the Walsh-Healey Act, and the safety and health standards issued under the Walsh-Healey Act, see General Motors Corp., 81 OSAHRC 13/C10, 9 BNA OSHC 1331, 1981 CCH OSHD ¶ 25,202 (No. 79-4478, 1981).

(1) U.S. Department of Labor

Title 29 (CFR):
Part 1501--Safety and Health Regulations for Ship Repairing.
Part 1502--Safety and Health Regulations for Shipbuilding.
Part 1503--Safety and Health Regulations for Shipbreaking.
Part 1504--Safety and Health Regulations for Longshoring.

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34 Fed. Reg. at 788-789; 34 Fed. Reg. at 7947; 35 Fed. Reg. 1015 (1970). Section 50-204.2(a) was later amended. None of the ANSI standards Christopher claims it complied with was in existence while the first version of section 50-204.2(a) existed. ANSI Z229.1-1973 was approved by ANSI on January 18, 1973; ANSI B11.4-1973 was approved on August 16, 1973; and ANSI B11.5-1975 was approved on September 18, 1975.

The Occupational Safety and Health Act was enacted on December 29, 1970, and became effective on April 28, 1971. Section 6(a) of the Act commanded the Secretary of Labor to "promulgate as an occupational safety and health standard any national consensus standard, and any established federal standard, unless he determines that the promulgation of such a standard would not result in improved safety and health for employees." 7/ Section 3(9) of the Act defined a national

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7/ Section 6(a) of the Act, 29 U.S.C. § 655(a), provides:

> Without regard to chapter 5 of title 5, United States Code or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this Act and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

consensus standard as "any occupational safety and health standard . . . which has been adopted and promulgated by a nationally recognized standards-producing organization. . . ." 8/ Section 3(10) of the Act defined an established federal standard as "any operational occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any Act of Congress in force on the date of enactment of this Act." 9/

On May 29, 1971, the Secretary, acting under the Walsh-Healey Act, amended the Walsh-Healey regulation at section 50-204.2(a) to read in part:

> (a) Every contractor shall protect the safety and health of his employees by complying with the standards described in the subparagraphs of this paragraph whenever a standard

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8/ Section 3(9) of the Act, 29 U.S.C. § 652(9), provides:

> The term "national consensus standard" means any occupational safety and health standard or modification thereof which (1), has been adopted and promulgated by a nationally recognized standards-producing organization under procedures whereby it can be determined by the Secretary that persons interested and affected by the scope or provisions of the standard have reached substantial agreement on its adoption, (2) was formulated in a manner which afforded an opportunity for diverse views to be considered and (3) has been designated as such a standard by the Secretary, after consultation with other appropriate Federal agencies.

ANSI standards are national consensus standards. See Newport News Shipbuilding & Drydock Co., 9 BNA OSHC 1085, 1088-89, 1980 CCH OSHD ¶ 25,003, pp. 30,889-890 (No. 76-171, 1980), following Noblecraft Industries, Inc. v. Secretary of Labor, 614 F.2d 199, 203 (9th Cir. 1980).

9/ Section 3(10) of the Act, 29 U.S.C. § 652(10), provides:

> The term "established Federal standard" means any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any Act of Congress in force on the date of enactment of this Act.

deals with an occupational safety or health subject or issue involved in the performance of the contract.

(1) U.S. Department of Labor--Title 29 CFR--

Part 1501--Safety and Health Regulations for Ship Repairing.
Part 1502--Safety and Health Regulations for Shipbuilding.
Part 1503--Safety and Health Regulations for Shipbreaking.
Part 1504--Safety and Health Regulations for Longshoring.
Part 1910--Subpart C through Subpart S (national consensus standards).

* * *

36 Fed. Reg. 9868-9869 (1971) (emphasis added). The Secretary replaced the incorporation by reference of private safety and health standards such as ANSI standards with the incorporation by reference of the national consensus standards he had adopted under section 6(a) of the Act and published in Subparts C through S of 29 C.F.R. Part 1910.

On that same day, the Secretary adopted a new Part 1910 of Title 29 of the Code of Federal Regulations. 36 Fed. Reg. 10466 (1971). The new Part 1910 contained occupational safety and health standards adopted under section 6(a) that were either national consensus standards or established federal standards. The Secretary characterized as national consensus standards "those standards in Part 1910 which are standards adopted and promulgated by either the American National Standard Institute ('ANSI') or the National Fire Protection Association ('NFPA')." Id. He characterized as established federal standards those "operative occupational safety and health standards in effect on April 28, 1971, and established by the Department of Labor pursuant to . . . the Walsh-Healey Public Contracts Act, as amended (41 U.S.C. 35)." Id. At 29 C.F.R. § 1910.212(a)(3)(ii), a section in Subpart O of Part 1910, the Secretary promulgated a point of operation guarding standard ("the OSHA point of operation guarding standard") that read as follows:

> (ii) The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

36 Fed. Reg. at 10466, 10632. The source of this standard is 41 C.F.R. § 50-204.5(c)(2). The other point of operation guarding standards adopted in Subpart O of Part 1910 were derived from ANSI standards. 36 Fed. Reg. at 10466. See 29 C.F.R. § 1910.221. 10/

III.

In his response to the request for briefs, the Secretary claims that "any appropriate standards" refers to "applicable specific standards." He argues that the phrase "appropriate standards therefor" is informational and refers employers

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10/ The section provides:

§ 1910.221 Sources of standards.

The standards contained in this Subpart O are derived from the following sources:

| Section | Source |
|---|---|
| § 1910.212 | -- 41 CFR 50-204.5. |
| § 1910.213 | -- ANSI 01.1-1954 (R1961), Safety Code for Woodworking Machinery. |
| § 1910.214 | -- ANSI 01.1-1954--(R1961), Safety Code for Woodworking Machinery. |
| § 1910.215 | -- ANSI B7.1--1970, Safety Code for Abrasive Wheels. |
| § 1910.216 | -- ANSI B28.1-1967, Safety Code for Mills Calenders in the Rubber and Plastic Industries. |
| § 1910.217 | -- ANSI B11.1-1971, Safety Standard for Construction, Care and Use of Mechanical Power Presses. |
| § 1910.218 | -- ANSI B24.1 1971, Safety Standards for Forging. |
| § 1910.219 | -- ANSI B15.1-1953--(P1958) Safety Code for Mechanical Power Transmission Apparatus. |

to other OSHA point of operation guarding standards that might apply to their machines. If no other OSHA standard applies, then the requirement of section 1910.212(a)(3)(ii) that guarding be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle comes into play. The Secretary relies on the Commission's decision in Kroehler Mfg. Co., 78 OSAHRC 88/B9, 6 BNA OSHC 2045, 1978 CCH OSHD ¶ 23,110 (No. 76-2120, 1978), in which the Commission held that under section 1910.212(a)(3)(ii) an "appropriate standard must be an applicable specific standard." The Secretary also argues that the legislative history of the Walsh-Healey machine guarding standard "makes it clear that the only standards of private organizations which were incorporated by reference into Part 1910 of 29 C.F.R. were specific national consensus standards that were either published in Part 1910 as an OSHA standard . . . or explicitly incorporated by reference in an OSHA standard . . . ." He notes that 41 C.F.R. § 50-204.5(c)(2) referred to 41 C.F.R. § 50-204.2 which in turn referred to standards published by a number of standards producing organizations. However, the Secretary points out that on the same day Part 1910 was published, 41 C.F.R. § 50-204.2 was amended to delete the reference to private standards producing organizations. The Secretary contends that since section 1910.212 derives at least partially from the Walsh-Healey standard, it would be anomalous to suggest that ANSI standards would be incorporated sub silentio into a standard, the source of which had been cleansed of any reference to ANSI. The Secretary also maintains that ANSI Z229.1-1973, the only ANSI standard Christopher mentions that was in effect during the two year period in which the Secretary could adopt ANSI standards under section 6(a) of the Act, was a discretionary rather than a mandatory standard. Promulgation of such a standard would, the Secretary argues, be contrary to section 6(a) of the Act, which requires the Secretary to adopt established federal standards and national

consensus standards unless he determines that such promulgation would not result in improved safety and health for specifically designated employees. In short, the Secretary argues that the phrase "any appropriate standards therefor" does not incorporate any ANSI standards by reference.

In its supplemental brief, Christopher also argues that ANSI standards are not incorporated by reference in the present OSHA standard or in the present Walsh-Healey standard. Christopher points out that neither 29 C.F.R. § 1910.221, which gives the source of 29 C.F.R. § 1910.212(a)(3)(ii) as 41 C.F.R. § 50-204.5(c)(2), nor the present version of 41 C.F.R. § 50-204.2(a) makes any mention of ANSI standards. Christopher also asserts that the reference to "national consensus standards" in the present version of section 50-204.2 fails to identify the material that would be incorporated by reference with the degree of specificity required by 1 C.F.R. §§ 51.6-51.7 and does not indicate the address of organizations from which copies of the standards could be obtained as required by 1 C.F.R. § 51.8(a).

Christopher does take issue with the Secretary's adoption of 29 C.F.R. § 1910.212(a)(3)(ii). Christopher contends that the Secretary failed to adopt 41 C.F.R. § 50-204.5(c)(2) verbatim but made significant changes. In Christopher's view, the language of the Walsh-Healey standard affords an employer a much clearer idea of his duties. It refers to standards published by organizations that provide for point of operation guarding and requires guarding that meets a performance criterion only if none of those organizations has issued specific standards. Christopher argues that in contrast, section 1910.212(a)(3)(ii) does not specifically identify what are "appropriate standards therefor." Christopher contends that this change creates ambiguity and confusion. Relying on Usery v. Kennecott Copper Corp., 577 F.2d 1113 (10th Cir. 1977)("Kennecott"), Christopher contends that the Secretary's failure to promulgate 41 C.F.R. § 50-204.5 verbatim renders the standard unenforceable.

Christopher disagrees with the holding of Rockwell International Corp., 81 OSAHRC 118/A2, 9 BNA OSHC 1092, 1980 CCH OSHD ¶ 24,979 (No. 12470, 1980) ("Rockwell"), that section 1910.212(a)(3)(ii) can be read to convey the same meaning as 41 C.F.R. § 50-204.5(c)(2). Christopher contends, contrary to Rockwell, that the phrase "standards prepared by organizations listed in § 50-204.2" does not mean the same as "appropriate standards therefor." Christopher also questions whether standards can be "appropriate standards" if they were not developed by the organizations listed in section 50-204.2. Christopher suggests that the Secretary may have intended the phrase "standards prepared by organizations listed in § 50-204.2" to mean "specific standards," which in turn was supposed to mean the phrase "appropriate standards therefor." However, Christopher argues that it is not required to guess what the Secretary meant when he promulgated the OSHA standard in the manner he did. 11/

IV.

A.

Section 5(a)(2) of the Occupational Safety and Health Act requires employers to comply with occupational safety and health standards "promulgated under this

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11/ As a second ground for its contention that the adoption of section 1910.212 (a)(3)(ii) by the Secretary was improper, Christopher argues that section 1910.212(a)(3)(ii) was not derived from an established federal standard as defined in section 3(10) of the Act, note 9 supra. Christopher contends that the phrase "presently in effect" in section 3(10) refers to occupational safety and health standards adopted by an agency and in effect on the date of enactment of the Act, December 29, 1970. Christopher contends that the drafters of the Act intended that the "presently in effect" language referring to agency standards should be read in parallel with the phrase "in force on the date of enactment of the Act" that pertains to congressionally-adopted standards. Christopher therefore argues that by promulgating the Walsh-Healey standards as they read on April 28, 1971, instead of on December 29, 1970, the Secretary did not adopt an established federal standard, and, accordingly, that section 1910.212(a)(3)(ii) is invalid. Christopher apparently is of the view that the Walsh-Healey standards differed on those dates.

Act." Thus, an employer does not necessarily satisfy his duty under section 5(a)(2) by complying with a private standard, such as an ANSI standard, if the private standard has not been adopted as an occupational safety and health standard under the Act. 12/ However, section 1910.212(a)(3)(ii) requires employers to comply with "appropriate standards" for point-of-operation guarding. The question therefore arises whether the ANSI standards Christopher mentions are such standards. In Rockwell, we held that the phrase "any appropriate standards therefor" in the OSHA standard would be interpreted "as referring to the standards prepared by organizations listed in section 50-204.2." 9 BNA OSHC at 1097, 1980 CCH OSHD at p. 30,845. We examined the history of section 1910.212(a)(3)(ii) in light of the principle that in adopting established federal standards under section 6(a) the Secretary could not make substantive changes in them, 13/ and upheld its validity by reading the OSHA standard to be consistent with its Walsh-Healey ancestor. We reserved decision, however, on which version of the list in section 50-204.2(a) would be referred to in applying section 1910.212(a)(3)(ii) because that issue was neither raised by the parties nor necessary to the resolution of that case. The first version of that list incorporates ANSI standards by reference; the second version cross-references OSHA standards, including those in Subparts C through S of Part 1910.

Christopher contends, however, that Rockwell erroneously held that the phrase "appropriate standards therefor" refers to standards prepared by organizations

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12/ See Clifford B. Hannay & Sons, Inc., 78 OSAHRC 12/A2, 6 BNA OSHC 1335, 1978 CCH OSHD ¶ 22,525 (No. 15983, 1978)(new edition of National Electrical Code). Cf. Dayton Tire & Rubber Co., 80 OSAHRC 95/D4, 8 BNA OSHC 2086, 2091, 1980 CCH OSHD ¶ 24,842, p. 30,638 (No. 16188, 1980)(forthcoming ANSI standard), pet. for rev. filed, No. 80-3755 (6th Cir. Nov. 25, 1980).

13/ Diebold, Inc. v. OSHRC, 585 F.2d 1327, 1332 (6th Cir. 1978); C.R. Burnett & Sons, Inc., 80 OSAHRC 111/A2, 9 BNA OSHC 1009, 1019, 1980 CCH OSHD ¶ 24,964 (No. 78-1103 & 78-1105, 1980).

listed in section 50-204.2(a). We have re-examined Rockwell in light of Christopher's arguments and we agree. 14/

First, when the Secretary adopted section 1910.212(a)(3)(ii), he deleted the express reference in section 50-204.5(c)(2) to the list of organizations in section 50-204.2(a). This signifies that the language of section 1910.212(a)(3)(ii) was intended not to refer employers to the list of organizations in section 50-204.2(a). It also seems quite unlikely that the Secretary would have implicitly referred employers--who were then unfamiliar with the new OSHA standards in Title 29 of the Code of Federal Regulations--to a list of organizations in a different volume of the Code of Federal Regulations. Second, on the same day he adopted section 1910.212(a)(3)(ii), the Secretary also amended the list in section 50-204.2(a) by deleting references to ANSI and other independent standards-producing organizations; thus, the old list would no longer have appeared in future editions of the Code of Federal Regulations. Indeed, on that same day, the Secretary directly adopted under OSHA many of the ANSI standards formerly incorporated by reference in the first version of section 50-204.2(a). These events suggest that the Secretary did not intend to refer employers to the old version of the list.

Third, for the Secretary to have required employers to refer to the old version of the list would have violated the regulations of the Director of the Federal Register that were in effect when the Secretary adopted section 1910.212 (a)(3)(ii). 1 C.F.R. §§ 20.10-20.12 (1971) required an unequivocal statement of incorporation, identification of incorporated material and a statement of the

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14/ The conclusions reached here in regard to Rockwell concern only the interpretation of section 1910.212(a)(3)(ii) set out there. Our other holdings in that decision, including our holding that the Commission has authority to consider the validity of a standard's promulgation, are not affected.

material's availability. Yet, when section 1910.212(a)(3)(ii) was adopted, section 50-204.2(a) no longer incorporated ANSI standards by reference, Part 50-204 no longer identified and described ANSI standards as matters referred to, and the part did not indicate the availability of the ANSI standards. Requiring employers to refer to the old list would probably have also violated the APA's requirement that "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C. § 552(a)(1).

Fourth, if the phrase "appropriate standards therefor" in section 1910.212 (a)(3)(ii) is interpreted to refer to the second version of section 50-204.2(a), an employer under the Act would refer to a Walsh-Healey regulation that in turn refers to OSHA standards published alongside section 1910.212. The Secretary cannot possibly have intended such a useless circularity.

We therefore hold that the phrase "any appropriate standards therefor" refers only to "applicable specific standards" 15/ published or incorporated by reference as occupational safety and health standards in Title 29 of the Code of Federal Regulations. We think that it is implicit that only such standards would have been referenced in section 1910.212(a)(3)(ii). It is unlikely, at the least, that the Secretary would have had employers look to standards not published or incorporated by reference as OSHA standards. The holding of Rockwell that "appropriate standards therefor" refers to standards adopted by organizations listed in 41 C.F.R. § 50-204.2 is therefore overruled.

B.

Christopher argues, however, that the OSHA standard is invalid because it is different from its source standard. We are unconvinced.

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15/ Kroehler Mfg. Co., 78 OSAHRC 88/B9, 6 BNA OSHC 2045, 2046-2047, 1978 CCH OSHD ¶ 23,110, pp. 27,929-930 (No. 76-2120, 1978).

Whether a standard is validly promulgated does not turn on differences in language. The Secretary was not required by section 6(a) of the Act to promulgate national consensus or established federal standards verbatim. Deering-Milliken, Inc. v. OSHRC, 630 F.2d 1094, 1110 (5th Cir. 1980). The proper inquiry is whether the Secretary made a substantive change when he transformed the Walsh-Healey standard into an OSHA standard. See id. The burden of proving that a substantive change was made is on Christopher. See Turner Co., 76 OSAHRC 108/A2, 4 BNA OSHC 1554, 1558, 1976-77 CCH OSHD ¶ 21,023, p. 25,276 (No. 3635, 1976), rev'd on other grounds, 561 F.2d 82 (7th Cir. 1977).

The OSHA point of operation guarding standard, 29 C.F.R. § 1910.212(a)(3)(ii), requires that an employer comply with applicable point of operation guarding standards published in Part 1910 or, if there are none, with the general performance criterion. The source of section 1910.212(a)(3)(ii), 41 C.F.R. § 50-204.5(c)(2), required compliance with point of operation guarding standards published by organizations listed in section 50-204.2(a), or if none of those standards applied, with a general performance criterion identical to that in section 1910.212(3)(ii). The issue is therefore whether Christopher has shown that a point of operation guarding standard incorporated by reference in section 50-204.2(a) was not adopted under the Occupational Safety and Health Act.

Our consideration is, however, confined to the first version of the list of organizations in section 50-204.2(a). Section 3(10) permitted the Secretary to adopt only those federal standards "presently in effect." Yet, only the first version of the list was in effect on both the Act's date of enactment, December 29, 1970, and effective date, April 28, 1971. Moreover, the Secretary stated that the established federal standards he adopted were those in effect on April 28, 1971. 36 Fed. Reg. 10466 (1971). Therefore, we will look to 41 C.F.R. §§ 50-204.

2(a) and 50-204.5(c)(2), and the standards they incorporated by reference as they stood no later than April 28, 1971. 16/

Christopher has not, however, directed us to any point of operation guarding standard that was then incorporated by reference in the first version of section 50-204.2(a). The ANSI standards Christopher does bring to our attention were not then in existence. 17/ Accordingly, we conclude that Christopher has failed to show that the standard is invalid because a substantive change was made.

Christopher also argues that in varying section 1910.212(a)(3)(ii) from its source, the Secretary created ambiguity and confusion because he did not clearly identify which standards were "appropriate standards therefor." When Christopher was cited for failing to comply with section 1910.212(a)(3)(ii), we had not defined "appropriate standards therefor" as clearly as we do here. However, we note that Christopher did not indicate any confusion concerning "appropriate standards" in its brief to the judge. In that brief, which it adopted as part of its brief before the Commission, Christopher stated that:

> The Occupational Safety and Health Administration has failed to adopt any "specific standards" relating to the particular type of machines involved in this Complaint. A literal reading of the alternative requirement set forth above clearly

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16/ Because the Walsh-Healey regulations were identical on both the date of enactment of the Act and the Act's effective date, it is unnecessary to decide here which of those dates "presently in effect" refers to. We also do not decide here whether standards adopted by ANSI after the publication of the first version of the list in § 50-204.2(a) were incorporated by reference under the Walsh-Healey regulations.

17/ The Commission attempted to discover whether there were any point of operation guarding standards incorporated by reference in the first version of § 50-204.2 that had not been promulgated as OSHA standards under section 6(a) of the Act. Although we conducted an extensive search, we were unable to discover any such standards. Because the burden of proof is on the employer, and Christopher has failed to bring any such standard to our attention, we can only conclude for the purposes of this case that there are no such standards.

> indicates that positive guards completely restricting the machine operator from any reasonable possibility of accident are necessary.

Thus, Christopher knew what "appropriate standards therefor" meant and recognized that none existed for its machines.

V.

In order to prove noncompliance with 29 C.F.R. § 1910.212(a)(3)(ii), the Secretary must demonstrate that the point of operation is unguarded and that the operation of the machine exposes an employee to injury. See Hughes Brothers, Inc., 78 OSAHRC 65/A2, 6 BNA OSHC 1830, 1978 CCH OSHD ¶ 22,909 (No. 12523, 1978). To prove noncompliance with section 1910.212(a)(1) as to Christopher, the Secretary must show that employees in the machine area were not protected from hazards created by ingoing nip points and rotating parts. Christopher does not argue on review that the points of operation did not expose employees to injury or that the nip points and rotating parts were not hazardous. Christopher has taken no exception to the judge's findings on the point, 18/ but claims that the use of awareness barriers under ANSI Z229.1-1973 constitutes compliance with sections 1910.212(a)(1) and 1910.212(a)(3)(ii). Christopher points to a record of no injuries for fifteen years as an indication that awareness guarding meets the requirements of the standard. Christopher also contends that awareness guarding is the only type of guarding possible for its machines because the guarding required by the standard would render the machines inoperable.

The cited machines lacked the guarding devices required by the standards. 19/ As we concluded earlier, ANSI Z229.1-1973 is not applicable under the Act.

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18/ Judge Dixon found, from the description of the machines in the stipulations and the photographs, that during their operation the dies could amputate or crush the arms, hands and fingers of Christopher's employees.

19/ Christopher also contends that the punching stations on its ironworkers are equipped with strippers that serve as adjustable restrictors and comply with section 1910.212(a)(3)(ii). There is no mention in the stipulated record of the existence of the strippers or of their adequacy as guards.

Christopher's reliance on "awareness barriers," which depend upon employee behavior for protection, is misplaced. The standards require that guarding be provided by a device that itself prevents the operator from endangering himself. They do not permit an employer to depend instead on the skill or attentiveness of his employees. Hughes Brothers, Inc., 6 BNA OSHC at 1834, 1978 CCH OSHD at p. 27,718. The absence of a history of injury does not relieve an employer of his duty under the standards to prevent future injuries if, as here, there are hazards to which employees are exposed. See A.E. Burgess Leather Company, Inc., 77 OSAHRC 25/D6, 5 BNA OSHC 1096, 1977-78 CCH OSHD ¶ 21,573 (No. 12501, 1977), aff'd, 576 F.2d 948 (1st Cir. 1978). We therefore find that Christopher did not comply with sections 1910.212(a)(1) and 1910.212(a)(3)(ii). We now turn to whether Christopher has established an affirmative defense.

In order to establish the affirmative defense of impossibility of compliance, an employer must demonstrate that (1) compliance with the standard would preclude performance of required work and (2) alternative means of protection are unavailable. M.J. Lee Construction Co., 79 OSHARC 12/A2, 7 BNA OSHC 1140, 1979 CCH OSHD ¶ 23,330 (No. 15094, 1979). Whether it is impractical to provide guarding is not the inquiry. Hughes Brothers, Inc., 6 BNA at 1836, 1978 CCH OSHD at p. 27,720. The only evidence in the stipulated record is that "certain" unnamed machines under "certain" unspecified conditions could not be guarded because of the nature of the work for which the machines were used. This furnishes insufficient ground to find impossibility for we would have no basis to know which citation items to vacate and which to affirm. We therefore conclude that Christopher has failed to prove the first element of the defense of impossibility.

Christopher further contends, regarding this defense, that the area director agreed that it was impossible to guard the cited machines with positive physical

guards. The stipulated record does not indicate such a concession by the area director, however. Christopher also contends that the area director stated that OSHA would be governed by the "awareness barrier" guarding procedures as set forth in the draft in ANSI B11.5. However, because the area director's statement was made after the violations are alleged to have occurred, Christopher could not have relied on that statement to its detriment. See Bethlehem Steel Corp., OSHRC Docket No. 16067 (December 31, 1981). 20/

Christopher contends that section 1910.212 is vague because it does not specify an approved method of guarding. It states that it therefore relied on the ANSI standards for guidance as to what methods of guarding would meet the Secretary's requirements. Judge Dixon found this assertion unpersuasive, noting that the standard gives examples of guarding methods and thus provides guidelines for employers. 21/

The Commission has repeatedly rejected the argument that the performance criterion of section 1910.212(a)(3)(ii) is unenforceably vague. See, e.g., Diebold, Inc., 76 OSAHRC 3/E5, 3 BNA OSHC 1897, 1900, 1975-76 CCH OSHD ¶ 20,333, p. 24,250 (No. 6767, 1976), rev'd on other grounds, 585 F.2d 1327 (6th Cir. 1978); 22/ K & T Steel Corp., 76 OSAHRC 31/A2, 3 BNA OSHC 2026, 2027, 1975-76 CCH OSHD

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20/ Commissioner Cottine concurs regarding the impossibility of reliance in this case. However, he would further note that an erroneous interpretation of law by an area director is not binding on the Secretary or the Commission. See United States Steel Corp., 77 OSAHRC 12/C3, 2 BNA OSHC 1343, 1974-75 CCH OSHD ¶ 19,047 (Nos. 2975 and 4349, 1974), appeal dismissed, 517 F.2d 1400 (3d Cir. 1975). See also Holman Erection Co., Inc., 77 OSAHRC 196/A2, 5 BNA OSHC 2078, 1977-78 CCH OSHD ¶ 22,318 (No. 13529, 1977).

21/ See note 1 supra.

22/ The Sixth Circuit held in Diebold that the standard at 29 C.F.R. § 1910.212 standing alone was not impermissibly vague, and that the standard was vague

(cont'd)

¶ 20,445, p. 24,414 (No. 5769, 1976). On the contrary, the criterion is unequivocal: the guarding device must prevent the operator from having any part of his body in the danger zone during the operating cycle. Section 1910.212(a)(1) is similarly unambiguous: employees must be protected from the hazards of nip points and rotating parts. See PBR, Inc. v. Secretary of Labor, 643 F.2d 890, 897 (1st Cir. 1981). An employer can easily tell from the performance criteria of these standards whether his machines are in compliance, and indeed Christopher has labored under no uncertainties on this point. Christopher's problem is not uncertainty over whether it is in compliance--it knows that it is not--but the difficulty of compliance, a matter that goes to the defense of impossibility. A standard is not impermissibly vague because an employer must exercise judgment in determining how its requirements are to be met. See Western Waterproofing Co., 78 OSAHRC 68/D11, 7 BNA OSHC 1625, 1629, 1979 CCH OSHD ¶ 23,785, pp. 28,862-3 (No. 1087, 1979). Sections 1910.212(a)(1) and 1910.212(a)(3)(ii) give sufficient notice of the performance required.

Christopher also argues that, because of the alleged vagueness of the standards, it lacked knowledge of the "presence of the violation" within the meaning of section 17(k) of the Act. It argues that it neither knew nor could have known with the exercise of reasonable diligence that its use of warning signs and safety training to guard the machines did not abate the violative conditions. This argument lacks merit. As we have said above, the standards are not

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(Footnote 22 cont'd)

only when it was applied to press brakes and read in conjunction with § 1910.217. The Court's holding concerning press brakes is not relevant to this case.

In the last sentence of § 6(b)(5) of the Act, 29 U.S.C. § 655(b)(5), Congress required the Secretary to use performance criteria for health standards "[w]henever practicable." On the value of performance criteria to employers, see the Commission decision in Diebold, 3 BNA OSHC at 1900, 1975-76 CCH OSHD at p. 24,250.

vague; as Christopher acknowledges, they require more than warning signs and safety training. It is also well settled that the knowledge element of section 17(k) of the Act refers to knowledge of the physical conditions that constitute a violation, not to knowledge of the requirements of the law. Charles A. Gaetano Construction Corp., 78 OSAHRC 24/A2, 6 BNA OSHC 1463, 1465 n.3, 1978 CCH OSHD ¶ 22,630, p. 27,303 n.3 (No. 14886, 1978).

VI.

Christopher's final contention is that the violation should be characterized as nonserious rather than serious. In support of this argument, Christopher cites several Commission decisions in which similar violations were cited as nonserious by the Secretary. The Commission has held that the Secretary's characterization of a violation in another case is not controlling in a case before the Commission. See Fleming Foods of Nebraska, Inc., 77 OSAHRC 196/C12, 6 BNA OSHC 1233, 1978 CCH OSHD ¶ 22,889 (No. 14484, 1977).

Christopher further relies on language in the Secretary's Field Operations Manual to support its contention that should violations exist in this case, they are nonserious. The Manual at one time provided a definition of "substantial probability" that would have made a violation serious only if, among other things, industry experience indicated that death or serious physical harm would result from an accident caused by a violative condition. The Commission has held that the guidelines provided by the Manual do not have the force and effect of law, nor do they accord important procedural or substantive rights to individuals. See FMC Corporation, 77 OSAHRC 153/D4, 5 BNA OSHC 1707, 1977-78 CCH OSHD ¶ 22,060 (No. 13155, 1977). Accordingly, any variance from the instructions in the Manual by the Secretary is not a basis for changing the characterization of a violation.

In addition, Christopher's reliance on its accident-free record as evidence of the nonserious nature of the violation is misplaced. The probability that an

accident might occur is not a consideration in determining the seriousness of a violation. Instead, the inquiry is whether, in the event of an accident, there is a substantial probability that the result would be death or serious physical harm. California Stevedore & Ballast Co., 73 OSAHRC 39/B5, 1 BNA OSHC 1305, 1974-74 CCH OSHD ¶ 16,520 (No. 14, 1973), aff'd, 517 F.2d 986 (9th Cir. 1975).

There was no agreement between the parties as to what the probable injuries would be if an accident occurred on the cited machines. The injuries that Judge Dixon found would be caused are serious, however. It was also stipulated that the compliance officer who inspected the worksite recommended that the citation be characterized as serious, but there is no indication as to what the testimony of any of Christopher's witnesses would have been regarding the probable consequences of an accident. The parties stipulated that the photographs of the machines that were admitted accurately represent conditions at the plant on the day of inspection. The photographs show that the machines are used to form, punch, and perform other shaping and cutting operations on metal. We therefore find that there was a substantial probability that serious physical injury, such as amputation or crushing, could have resulted from the violative conditions.

Although we do not take into account the probability that an accident might occur in determining the seriousness of a violation, it is a factor in deciding the gravity and, in turn, the appropriate penalty. Judge Dixon assessed a penalty of $200, instead of the $600 proposed by the Secretary. The gravity of the violation is low, as evidenced by the absence of injuries in the past fifteen years and the partial protection afforded by the warning signs and respondent's safety training program. We take into consideration these factors as well as Christopher's good faith efforts to protect its employees, and conclude that the reduced penalty of $200 is appropriate.

Finally, we note that while ANSI B11.4-1973 and B11.5-1975 are not OSHA standards, they may nevertheless be used to guide Christopher's abatement efforts,

particularly in view of the Secretary's stipulation that under certain conditions some of Christopher's machines cannot be guarded. On June 30, 1981, OSHA issued an enforcement directive concerning ironworkers, OSHA Instruction STD 1-12.27, 1 BNA OSHR Reference File 21:8259, 1980-81 CCH Emp. S. & H. Guide Developments ¶ 12,274 (1980). The directive stated that "29 C.F.R. § 1910.212 [was] the appropriate standard to apply to ironworker machines . . . [but that] ANSI B11.5-1975 should be consulted when considering a citation under § 1910.212 . . . on an ironworker machine . . . [because it] provide[s] useful guidance in evaluating and correcting ironworker hazards." Similarly, on February 23, 1981, OSHA issued an enforcement directive concerning metal cutting shears, OSHA Instruction STD 1-12.25, 1 BNA OSHR Reference File 21:8256, 1980-81 CCH Emp. S. & H. Guide Developments ¶ 12,219 (1980). The directive orders OSHA officials to accept awareness barrier guards specified in ANSI B11.4 on metal cutting shears where "it is impossible to employ a fixed guard or point of operation device due to the diversity of operations performed on the shear." While we must reject Christopher's impossibility defense because this record does not support it, we will, under the unusual circumstances of this case, exercise our discretionary authority under section 10(c) of the Act, 29 U.S.C. § 659(c), to grant "other appropriate relief." We shall therefore order the parties to confer on what abatement steps would be acceptable in light of these directives.

Accordingly, the judge's decision is reversed with respect to subitems 1(b)(3)(b) and 1(b)(3)(c), alleging failure to guard and pad the pedals on the ironworkers, and these subitems are vacated. The remainder of his decision is affirmed to the extent it is consistent with this opinion. A penalty of $200 is assessed. The parties are directed to exchange information on the difficulty of

compliance, and to confer within thirty days on what abatement steps would be acceptable for the cited machines in light of OSHA Instructions STD 1-12.25 and 1-12.27.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: FEB 26 1982

ROWLAND, Chairman, concurring in part:

I join in the majority's opinion except with respect to its discussion of the subitems alleging violations of 29 C.F.R. § 1910.212(a)(1), i.e., subitems (a)(1)(a)-(d), (a)(2)(a)-(b), and (a)(3)(a)-(b) of item 1 of serious citation 2. I would affirm these violations but for different reasons.

I agree with the majority's view that section 1910.212(a)(1) is not vague because its plain language puts employers on fair notice that they must provide guarding methods for nip points and rotating parts that will protect employees. I think that employers generally appreciate the hazards posed by nip points and rotating parts and will ordinarily recognize whether the guarding methods they employ protect their employees.

However, in concluding that section 1910.212(a)(1) is not vague, my colleagues rely on PBR, Inc. v. Secretary of Labor, 643 F.2d 890 (1st Cir. 1981). That decision, as well as the decision it cites, A.E. Burgess Leather Co. v. OSHRC, 576 F.2d 948, 951 (1st Cir. 1978), concerned point-of-operation guarding and construed section 1910.212(a)(1) in light of the specific point-of-operation standard, section 1910.212(a)(3)(ii). But Christopher has been cited under section 1910.212(a)(1) with respect to nip points and rotating parts--not points of operation. I cannot agree that, at least with respect to nip points and rotating points, the requirement of section 1910.212(a)(1) ought to be construed together with that of section 1910.212(a)(3)(ii). In order to guard nip points and rotating parts under section 1910.212(a)(1), an employer is required to provide "one or more methods of machine guarding . . . to protect the operator and other employees in the machine area." Section 1910.212(a)(3)(ii) on the other hand imposes a more specific requirement that addresses only the problem posed by points of operation. It requires guarding that will "prevent the operator from having any part of his body in the danger zone during

the operating cycle." It therefore cannot be said that the guarding required to protect against rotating parts and nip points under section 1910.212(a)(1) is necessarily that required for points of operation by section 1910.212(a)(3)(ii).

For this same reason, it also does not follow that rotating parts and nip points must be protected, as the Commission holds, "by a device that itself prevents the operator from endangering himself"; nor can I join the implication in the lead opinion that section 1910.212(a)(1) requires "positive physical guards." The standard requires only that one or more methods of machine guarding be provided to "protect" the operator and other employees from the hazards of nip points and rotating parts. It therefore ought to be enough to say that the employees were not protected against hazards of nip points and rotating parts. It has not been disputed before the judge or before the Commission that hazards existed or that the machines lacked guards meeting the standard's requirement. The record was stipulated, and these matters have not been a point of controversy. Indeed, the focus of controversy has been elsewhere. See Commission Rule 92(d), 29 C.F.R. § 2200.92(d)(issues ordinarily limited to those raised before the judge). For these reasons, I concur.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant<br><br>v.<br><br>GEO. C. CHRISTOPHER & SON, INC.,<br><br>Respondent | OSHRC DOCKET 76-647 |

REPRESENTING COMPLAINANT:

JAMES M. CLEETON, ESQ., Office of the Solicitor, U. S. Department of Labor, 911 Walnut Street, Kansas City, Missouri

REPRESENTING RESPONDENT:

H. ALLAN CALDWELL, ESQ., Arn, Mullins, Unruh, Kuhn & Wilson, 300 West Douglas, Wichita, Kansas

Cause submitted upon agreed stipulation of facts and exhibits.

J-17

Paul E. Dixon, Judge:

This is an action under section 10(c) of the Occupational Safety & Health Act of 1970, 29 USC 651, et seq. (hereinafter referred to as the Act), as a result of an inspection conducted December 3-9, 1975, at respondent's worksite at 1220 Blaine, Wichita, Kansas, where respondent was engaged in the business of structural steel fabrication.

Respondent was originally issued citation 1 for non-serious violation, citation 2 and citation 3 for serious violation, and a notification of proposed penalty on December 23, 1975.

Those citations and notification of proposed penalty were received by respondent on December 29, 1975.

On January 6, 1976, an amended citation 1 was issued, which extended certain of the abatement dates, and on January 15, 1976, citation 2 for serious violation was amended to change certain of the abatement dates in the citation and to add part (b)(3) to citation 2.

On the same date, citation 3 for serious violation, and the proposed penalty therefor, was deleted and was received by respondent on January 19, 1976.

On February 9, 1976, respondent filed its notice of intent to contest citation 2 for serious violation as amended, and the notification of proposed penalty therefor, pursuant to section 10(c) of the Act.

The respondent's notice of contest did not place in issue

citation 1 for non-serious violation, as amended, or the penalty proposed therefor in the amount of $85.00.

Complaint was filed on the 27th day of February, 1976, with respondent answering on the 15th day of March, 1976, and the case was at issue.

THE CITATION
Citation 2 for Serious Violation

29 CFR 1910.212(a)(1)

"(a) One or more methods of machine guarding was not provided to protect the operator and other employees in the machine areas from hazards such as those created by point of operation, ingoing nip points and rotating parts on the following named and located equipment:

(1) The openings between the bed and the hold down pads were such, on the shears, so as to permit employees to inadvertently place their fingers and/or hands into the danger zone during the operating cycle:

(a) The Steelweld 5/8 inch shears, #M-6230, located in bay 5, Warehouse and Shear building.

(b) The Cincinnati 3/8 inch shears, #36588, located in the Main building, north side.

(c) The Cincinnati 3/8 inch shears #30267, located in bay 5, Warehouse and Shear building.

(d) The Cincinnati 1 inch shears, #32982, located in bay 6, Warehouse and Shear building.

(2) Operator's fingers, hands and/or arms were exposed to injury created by the ingoing rolls on the following:

(a) The front side (operator's position) and the rear side, when the table guard is removed on the small 5 foot plate roll located in the center of shop, Main building.

(b) The front and rear sides of the Kling, 11 foot roll located in the center shop, Main building, north side.

(3) No guards or devices were provided which would prevent the employees from injury created by the downward movement of the back guages located in the rear of the following:

(a) Cincinnati 3/8 inch shear, #36588, located in the Main building, north side.

(b) Cincinnati 1 inch shear #32982, located in bay 6, Warehouse and Shear building.

29 CFR 1910.212(a)(3)(ii)

(b) The point of operation of the following named and located equipment whose operation exposes an employee to serious injury was not guarded by a device so constructed and designed as to prevent the operator from having any part of his body in the danger zone during the operating cycle:

(1) Fingers and/or hands are exposed to injury created by the blade on the:

(a) Cincinnati 1 inch shear #32982, located in bay 6, Warehouse and Shear building.

(b) Cincinnati 3/8 inch shear, #36588, located in the Main building, north side.

(c) Steelweld 5/8 inch shear, #M-6230, located in bay 5, Warehouse and Shear building.

(d) Cincinnati 3/8 inch shear #30267, located in bay 5, Warehouse and Shear building.

(2) The opening between the bed and the blade and/or punch exposed operator's fingers to injury during operation on the following:

(a) Shear station on the Eclipse Combination punch and shear (no identification number), located in bay 4A in the north building.

(b) Rear side of the Kling angle shear, located in the center of shop, Main building.

(c) The guard was inadequate on the alligator shear (no identification number) located in bay 6A in the north building in that the operator could reach around the guard and inadvertently contact the danger zone with his fingers.

(d) Front and rear sides of the Long and All Statter shear located in bay 6A in the North Building.

(e) Shear station on the Eclipse small combination punch and shear (no identification number) located in the center of Main Building west end.

(d) Punch station on the Eclipse small combination punch and shear (no identification number) located in bay 4A in the north building.

(3) The 220-volts Cleveland mechanical power presses #1 and #2, located in the Main building, near the center, south side; and the cleveland mechanical power press #3, located in the Main Building, near the center, north side, exposed the operator and other employees in the machine area to serious injury due to the following unsafe conditions:

(a) Operator's fingers were exposed to injury in that no point of operation guards or properly applied and adjusted point of operation devices were provided on the Cleveland #1 and #2 power presses.

(b) The pedal mechanisms were not protected to prevent unintended operation from falling or moving objects or by accidental stepping onto the pedal on the Cleveland power presses #1, #2 and #3.

(c) A pad with a nonslip contact area was not firmly attached to the pedals on the Cleveland power presses #1, #2 and #3.

(d) No program of periodic and regular inspections of power presses was established and followed to insure that all their parts, auxiliary equipment and safe guards are in safe operating condition and adjustment and records of inspections and maintenance work performed was not being maintained in the establishment."

A penalty in the amount of $600.00 was proposed.

## THE STANDARDS

### 29 CFR 1910.212(a)(1)

"1910.212--General Requirements for All Machines
(a) Machine guarding.
(1) Types of guarding. One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are--barrier guards, two-hand tripping devices, electronic safety devices, etc."

### 29 CFR 1910.212(a)(3)(ii)

"1910.212--General Requirements for All Machines
(a) Machine guarding.
(3) Point of operation guarding.
(ii) The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle."

## STIPULATION OF FACTS AND EXHIBITS

"In addition to those matters already agreed to in the pleadings, it is hereby stipulated by and between the parties named above as follows:

1. That George C. Christopher II, Executive Vice President of Geo. C. Christopher & Son; Monty Angulo, Executive Vice President of Geo. C. Christopher & Son, Inc.; and Edward F. Arn and Allan Caldwell of Arn, Mullins, Unruh, Kuhn & Wilson, attorneys for Geo. C. Christopher & Son, Inc. were all present at an informal meeting between the respondent and the Area Director of OSHA,

Roger A. Clark, on the 6th day of January, 1976, and if they were to testify as to the events which took place at that meeting or the statements made by the parties at that meeting, their testimony would be substantially as follows:

> That at that informal meeting the Area Director of OSHA, Roger A. Clark, stated that OSHA would be governed by the standards as set forth in ANSI Standard B11.5 (draft) as they relate to 'iron workers'. That on the same date the Area Director delivered to George C. Christopher II, ANSI Standard B11.5 (draft) which sets forth the safety requirements for the construction, safeguarding, care and use of iron workers for the respondent's information and copying.

2. That the machines listed in Items 1(b)(3) characterized as 'power presses' are not 'power presses' but are 'iron workers' and that this change in designation was agreed to by the local Area Director, Roger A. Clark, at a January 15, 1976 informal meeting with the respondent.

3. That regular safety inspections are conducted of the entire premises of the respondent and all machines contained therein with written reports of said inspections being prepared and filed by the inspector, James L. Nickel, Senior Engineer for the American Mutual Liability Company. That there are regular safety meetings of key employees and management wherein safety measures and requirements are discussed of which written reports are also prepared and filed.

4. That it is a standard operating procedure for all employees of the respondent to conduct a visual inspection of machinery prior to its use and to perform minor maintenance thereon, and to report any maintenance required which can not be immediately performed by the operator to the plant manager or superior for his action.

5. Respondent admits the allegations of paragraph V of complainant's complaint in that respondent admits that on the day of complainant's

inspection there were no positive physical guards placed at the point of operation, at the ingoing nip points or at the rotating points on respondent's machinery which respondent's employees use as set out in that paragraph. There were, however, warning signs as to the dangers of the machines and the proper operation thereof, an active and ongoing training program whereby employees/operators of the machines are informed of their operating processes and the dangers involved therein, color coding of the machine's moving parts, and positive guards on other portions of the machines other than the point of operation, all of which create an awareness of the machine's danger and assist in the safe operation thereof. Respondent contends that these procedures were a substitute for placing actual physical guards at the point of operation on the machines. Respondent and complainant agree that the photographs included herewith are true and accurate representations of the conditions in respondent's establishment on the day of complainant's inspection.

6. That there were no persons or employees of respondent injured at the time and place of the alleged violations...Nor have there been any such injuries from the cited portions of the machines involved in this complaint during their normal operation over a period of the past fifteen (15) years.

7. That the respondent has never been previously cited or charged with any violation of any laws or regulations affecting health or safety of its employees.

8. That the individuals, officers and employees of the respondent who were designated as witnesses in the scheduled hearing of this matter were acting within the scope of their authority on the date of the inspection and dates prior thereto as necessary and would testify as indicated in respondent's pretrial submissions.

9. That James L. Nickel as the Senior Engineer for American Mutual Liability Company and the preparer of certain reports of safety and inspection submitted as evidence in this case acted within the scope of his authority, when conducting

inspections of respondent's plant.

10. That if George C. Christopher II were to testify as to the capability of Geo. C. Christopher & Son, Inc. to comply with ANSI Standard B11.5 (draft) his statement would be substantially as follows:

> That if Geo. C. Christopher & Son, Inc. had known of ANSI Standard B11.5 (draft) and its acceptance by OSHA as a guide for guarding 'iron workers', it could have complied therewith prior to the inspection as it did after being made aware of the existence of said Standard and its acceptance by OSHA thereafter.

11. That the copies of all documents forwarded to complainant as set forth in respondent's pretrial submissions are true and correct copies of the originals thereof.

12. That Stephen R. Frye, the Compliance officer who conducted the inspection of respondent has had 2-1/2 years of experience with the Occupational Safety and Health Administration. Prior to that, he was a safety inspector for seven years for Mason and Hanger-Silas Mason Company, Inc. He worked for 1-1/2 years as a machinist for the J. I. Case Company. He has completed the Basic Course for OSHA Compliance Officers. Other training includes courses in hazardous materials, compressed gasses, accident investigation, respirator training, industrial health and hygiene, radiological studies, medical self-help, emergency radiological monitoring, communications, and munitions saftery [sic]. He studied mathematics at S. E. Iowa Community College. That he recommended that the citation resulting from his inspection of respondent's plant be characterized as serious. He computed the penalties proposed in this case, basing his computations on his background and on what he observed or otherwise ascertained on his inspection. His computations are attached hereto.

13. Pursuant to 29 CFR 2200.36 the respective parties hereto may include in their briefs their respective 'Statements of Position' with respect to any or all issues to be considered by the Administrative Judge."

Additional submissions consisted of proposed penalty assessment worksheet and 30 photographs keyed to subitems of citation 2 of the machinery involved.

## DISCUSSION

### Alleged Violation of 29 CFR 1910.212(a)(1)

Citation 2, item 1(a)(1), involved four shears, one a Steelweld and three Cincinnati, wherein it is charged that the machines were not equipped with machine guarding to protect either the operator or other employees from hazards presented by point of operation, ingoing nip points and rotating parts.

Citation 2, item 1(a)(2), involved ingoing rolls on (a)) the front and rear side of a 5-foot plate roll and (b) the front and rear sides of a Kling 11-foot roll.

Citation 2, item 1(a)(3), involved two Cincinnati shears with no guards or devices provided to protect employees from the downward movement of the back guages.

### Alleged Violation of 29 CFR 1910.212(a)(3)(ii)

Citation 2, item 1(b)(1), described the failure of guarding to prevent employee and operator exposure on (a) a Cincinnati shear; (b) a Cincinnati shear; (c) a Steelweld shear; and, (d) a Cincinnati shear.

Citation 2, item 1(b)(2), alleges opening between the bed and blade and/or punch exposing operator's fingers to injury, which was unguarded on (a) the shear station on an Eclipse Combination

punch and shear; (b) a Kling angle shear; (c) an alligator shear; (d) front and rear sides of a Long and All Statter shear; (e) shear station on an Eclipse combination punch and shear; and, (f) the punch station on an Eclipse combination punch and shear.

Citation 2, item 1(b)(3), involved Cleveland mechanical power presses 1, 2 and 3 as exposing operators and employees to injury due to (a) no point of operation guards or adjusted point of operation devices on Cleveland power presses 1 and 2; (b) unguarded pedal mechanisms on Cleveland power presses 1, 2 and 3; (c) failure to have a nonslip contact pad on the pedals of the three Cleveland power presses; and, (d) no program of periodic and regular inspections of power presses was established to insure that their parts, auxiliary equipment and safe guards are in safe operating condition and adjustments, with lack of records of inspection and maintenance work performed being maintained.

As to the machines charged in 29 CFR 1910.212, the respondent in its answer and stipulation of facts admitted that the machines were not physically guarded at their respective danger zones.

The photographs jointly submitted demonstrate both access and exposure of operators and employees to ingoing nip points, ingoing rolls, shear blades, punch and shear mechanisms; so too, with machinery listed as being in violation of 29 CFR 1910.212(a)(3)(ii).

It does not require expert testimony to adduce from the evidence of record, including photographs of the machines' operators in position, to note that the operators are in extreme close

proximity to a hazardous zone and should they encounter such an operation the injury would be either amputation or crushing.

Respondent, in its brief, raises several points that must be discussed.

Respondent takes the position that positive guards are unreasonable and impossible to provide in order to allow it to do its work, arguing that it is given no guidelines as to what types of guards are required, and further arguing that based upon American National Standards Institute (ANSI) publications, B11.4, regarding the care and use of shears; B11.3, regarding the care and use of power press brakes; and, B11.5, the care and use of iron workers, respondent has a three-year grace period to bring its equipment into compliance.

As to the defense of the ANSI standards, it is noted that these standards are non-operational, and that until duly promulgated in the Federal Register and adopted by the Code of Federal Regulations, the Writer must be governed by the standard as written and its interpretation by the Review Commission.

It is further noted that any administrative determination made by the Area Director is not binding on the Government and cannot be made in derogation of a duly promulgated and established standard.

Guidelines are specifically specified at 29 CFR 1910.212(a), wherein there is enumerated guarding methods of barrier guards, two-hand tripping devices, and electronic safety devices.

Further, the applicability of 29 CFR 1910.212, wherein (a)(3)(ii)

is expanded by subparagraph (iv), wherein it states:

> "The following are some of the machines which usually require point of operation guarding:
> (a) Guillotine cutters.
> (b) Shears.
> (c) Alligator shears.
> (d) Power presses.
> (e) Milling machines.
> (f) Power saws.
> (g) Jointers.
> (h) Portable power tools.
> (i) Forming rolls and calenders."

Clearly, the standard encompasses each and every machine contemplated in the citation without exception.

Respondent makes further argument that at the time of inspection, December 3-9, 1975, OSHA had no specific standards relating to the machines involved, and the only guidelines respondent had were those of ANSI standards B11.5 and Z229.1.

This posture is untenable, in that OSHA came into existence in December of 1970 and 29 CFR 1910.212, which was derived from 41 CFR 50-204.5, had an effective date of February 15, 1972, approximately three years and 10 months prior to respondent's inspection.

Respondent cannot defend upon its lack of diligence in apprising itself of legislation and standards affecting its operations.

Further, had respondent apprised itself of the standards affecting its operations it further had the option of applying for a variance from the Department of Labor if it encountered any problems in bringing its equipment into compliance.

The Review Commission, in treating of machine guarding against the hazards of nip points, rotating parts, etc., stating in the

case of Secretary v. Irvington Moore, Div. of U. S. Natural Resources, Inc., 16 OSHRC 608 (RC 1975) (majority opinion), involving a Cincinnati press brake:

> "Since press brakes are specifically excluded from the requirements of section 217, they must either be covered by the terms of section 212 or not at all by the Secretary's standards."

held that section 212 applied to all machines, and in particular section 212(a)(3)(iv), which provides for the point of operation guarding of "(d) Power presses".

See also Secretary v. Gem-Top Mfg., Inc., 16 OSHRC 591 (RC 1975) (majority opinion), and Secretary v. Diebold, 76 OSAHRC 3/E5 (RC 1976) (majority opinion).

In the Diebold case, supra., the defense was asserted that ANSI standard B11.1 excluded press brakes from the standard. This is similar to the argument made herein with regard to respondent's Cleveland mechanical power presses 1, 2 and 3. This argument was rejected.

Also, in Diebold, supra., the argument was made that the standard was impermissibly vague, in that it failed to state with particularity how guarding of press brakes is to be accomplished. This argument was also rejected with the majority of the Commissioners holding that the standard was a "performance standard" stating the results required, rather than specifying the specific type of guard to be used.

The question of impossibility of compliance was also offered

as an argument, and the majority of the Commissioners in rejecting this argument stated:

> "Because the point of operation of any machine must be sufficiently accessible to permit insertion of the material being processed, for some types of machines and some operations it will not be possible to utilize a guarding device 'so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle' as required by §1910.212 (a)(3)(ii). In some cases involving press brakes, we have stated that compliance can be achieved by means such as hand tools and work rests which keep the hands of employees at a safe distance from the point of operation."

See also Secretary v. Garrison & Assoc., Inc., 17 OSAHRC 188 (RC 1975), and Secretary v. Sheet Metal Specialty Co., 17 OSAHRC 212 (RC 1975).

In Secretary v. Buckeye Industries, Inc., 75 OSAHRC 21/B3 (RC 1975), the majority opinion dealt with an interpretation of 29 CFR 1910.212(a)(3)(ii) where a citation had been vacated on the ground that the Secretary had failed to prove that it was "mechanically possible" for guards to be placed upon the machines, and that if guards were installed they would not themselves create hazards to the employee.

The majority held:

> "That compliance with a standard is impossible is, at most, an affirmative defense to a finding of non-compliance with a standard. (Brennan v. OSHRC & Underhill Constr. Corp., 513 F.2d 1032, 1036 (2d Cir. 1975)) and particularly 29 CFR §1910.212(a)(3)(ii) (see Garrison & Associates, Inc., No. 4235 (April 22, 1975) (lead and concurring opinions)). Placing the burden of proof of this defense upon the Secretary was error."

With respect to respondent's argument that the Secretary must show how respondent's machines must be guarded, the majority went on to say:

> "We do not consider it incumbent upon the Secretary to demonstrate what the employer should have done to comply with section 1910.212(a)(3)(ii). The standard itself prescribes the performance required by guarding. It also suggests several guarding methods such as barrier guards, two hand-tripping devices and electronic safety devices. See 29 CFR §1910.212(a)(1). An employer's own abilities and that of industry may be relied upon to devise suitable ways to conform to the requirements of a standard. Society of the Plastics Industry, Inc. v. O.S.H.A., 509 F.2d 1301, 1309 (2d Cir. 1975, cert. denied 95 S. Ct. 1998 (1975))."

For purposes of finding a serious violation, it need only be shown by the evidence or the record that there is substantial probability that death or serious physical harm could result from the operations of respondent.

The presence of past injuries is unnecessary for finding of non-compliance (Lee Way Motor Freight, Inc. v. Secretary of Labor, 7 OSAHRC 1128 (RC 1974), aff'd 511 F.2d 864 (10th Cir., 1975)).

Consideration of serious citation 2, item 1(b)(3)(d), from the facts stipulated by the parties, it is apparent and agreed to by complainant that regular safety inspections are conducted of the entire premises of the respondent and all machines contained therein, with written reports of said inspections deemed prepared and filed by the inspector, one James L. Nickel, Senior Engineer for American Mutual Liability Co.

There are regular safety meetings of key employees and management,

wherein safety measures and requirements are discussed of which written reports are also prepared and filed.

It is also standard operating procedure for all employees of respondent to conduct a visual inspection of machinery prior to its use and to perform minor maintenance thereon, and to report any maintenance required which cannot be immediately performed by the operator to the plant manager or superior for his action.

We turn to the criteria to be considered with respect to appropriate assessment of civil penalty: Due consideration being given to the size of business of the respondent, which is found to be small; the gravity of the violation, which in this case would involve either amputation or mutilation, so therefore must be considered moderate to severe; the fact that respondent has never been cited for a safety violation prior to the inspection in question; and, in particular respondent's exemplary history, namely, that respondent has had no history of any injuries from any of the cited equipment during its normal operation over a period of the past 15 years.

Respondent, from record evidence, made a good faith effort to protect its employees albeit not in accordance with the standard, in that it had posted warning signs as to the dangers of the machine in the proper operation thereof; maintained an active and ongoing training program whereby employees and operators of the machines were informed of their operating processes and the dangers involved therein; and, color coding of the machine's moving parts

and positive guards on other portions of the machine other than the point of operation. While all of this was not comporting to the standard, it evidences a concern by respondent for employee safety.

Also taking into account other Commission precedential cases on point of operation guarding, i.e., Secretary v. Central Steel & Tank Co., 75 OSAHRC 9/A2 (RC 1975); Secretary v. Buckeye Industries, supra.; Secretary v. Diebold, supra.; and, Secretary v. Paccar, Inc., 17 OSAHRC 595 (RC 1975), it is felt that a penalty of $200.00 is appropriate.

## FINDINGS OF FACT

Based upon the preponderance of the credible evidence of record, the following findings of fact are made:

1. Respondent's accurate legal corporate name is Geo. C. Christopher & Son, Inc., incorporated in the State of Kansas with its principal office at 1220 Blaine, Wichita, Kansas 67201.

2. The respondent operates steel fabricating facilities in the State of Kansas, and regularly conducts business transactions in numerous states and its business activities are such that they affect commerce at the time of the alleged violation.

3. At the time of the inspection, the respondent was the owner of and had control of any equipment or machinery, the use of which is referred to in the citation.

4. During the year 1975 respondent shipped approximately 9,299

tons of structural steel.

5. Respondent presently employs approximately 250 production and management employees.

6. The original citation and all amended citations were posted on the company bulletin boards located in each shop on the date of their receipt by respondent.

7. The citation and notice of proposed penalty was properly served upon respondent.

8. Stephen R. Frye was the safety inspector for OSHA on the inspection date and he had the training and experience as set forth in complainant's pre-trial submissions.

9. With respect to citation 2, item 1, 29 CFR 1910.212(a)(1), during the period of December 3-9, 1975, one or more methods of machine guarding was not provided to protect the operator and other employees from hazards such as those created by point of operation, ingoing nip points and rotating parts on three Cincinnati and one Steelweld shears.

10. Operators' fingers, hands and/or arms were exposed to injury by the ingoing rolls on one 5-foot plate roll machine and a Kling foot roll.

11. No guards or devices were provided to prevent employees from injury created by downward movement of back guages located on two Cincinnati shears.

12. With respect to citation 2, item 1, 29 CFR 1910.212(a)(3)(ii), during the period of December 3-9, 1975, the point of operation

was not guarded where the operation exposed an operator and/or employee to injury during the operating cycle wherein the operator's fingers or hands were exposed to injury created by the blade on three Cincinnati shears and one Steelweld shear.

13. The opening between the bed and blade and/or punch exposed the operator's fingers to injury on an Eclipse Combination punch and shear, the rear side of a Kling angle shear, an alligator shear, the front and rear sides of a Long and All Statter shear, an Eclipse small combination punch and shear, and the punch station on an Eclipse small combination punch and shear.

14. Respondent's two Cleveland mechanical power presses 1 and 2 exposed the operator's fingers to injury, in that no point of operation guard or properly applied and adjusted point of operation devices were provided on Cleveland 1 and 2 power presses; the pedal mechanisms were not protected to prevent unintended operation from falling or moving objects or accidental stepping onto Cleveland power presses 1, 2 and 3; non-slip pads were not firmly attached to the pedals on Cleveland power presses 1, 2 and 3.

15. Respondent had a program of periodic and regular inspection of power presses, which was established and followed with written reports being prepared and filed, along with regular safety meetings of key employees in management with a system of reporting any maintenance requirements immediately to the plant manager or superior for action.

## CONCLUSIONS OF LAW

1. Respondent was in serious violation of 29 CFR 1910.212(a)(1), item 1, subitem (a)(I)(a)(b)(c)(d); subitem (a)(2)(a)(b); and, subitem (a)(3)(a)(b).

2. Respondent was in serious violation of 29 CFR 1910.212(a)(3)(ii), item 1, subitem (b)(1)(a)(b)(c)(d); subitem (b)(2)(a)(b)(c)(d)(e)(f), and, subitem (b)(3)(a)(b)(c).

3. Respondent was not in violation of 29 CFR 1910.212(a)(3)(ii), item 1, subitem (b)(3)(d).

## DECISION AND ORDER

Based upon the foregoing findings of fact and conclusions of law, it is hereby ordered that:

1. Citation 2 for serious violation of 29 CFR 1910.212(a)(1), subitems (a) through and including (a)(3)(b) are affirmed.

2. Citation 2 for serious violation of 29 CFR 1910.212(a)(3)(ii), item 1, subitem (b)(1)(a)(b)(c)(d), subitem (b)(2)(a)(b)(c)(d)(e)(f), and subitem (b)(3)(a)(b)(c), are affirmed.

3. Citation for serious violation of 29 CFR 1910.212(a)(3)(ii), item 1, subitem (b)(3)(d), is vacated.

4. A penalty of $200.00 is assessed.

DATE: February 28, 1977

Paul E. Dixon, Judge, OSHRC

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

February 26, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

John T. Brady & Co., Inc.

OSHRC DOCKET NO. 76-2894

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR EMPLOYEES

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Judge's Office
Occupational Safety & Health
Review Commission
1515 Broadway Room 3800
New York, New York 10036

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 76-2894 |
| JOHN T. BRADY & CO., INC., | : | |
| Respondent. | : | |
| | : | |

DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge Seymour Fier is before us for review pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Judge Fier ruled that the John T. Brady & Co., Inc., committed a violation of the general duty clause, section 5(a)(1) of the Act.[1/] We reverse the judge and vacate the citation on the ground that specific standards render citation to the general duty clause inappropriate.

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1/ Section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1), provides that "[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

Commissioner Cleary directed review of the judge's disposition of the § 5(a)(1) charge. John T. Brady was also found in violation of the construction safety standards at 29 C.F.R. §§ 1926.150(e)(1), 1926.150(e)(3), and 1926.500(d)(2). These items are before the Commission pursuant to a direction for review "for error" by former Commissioner Moran. Because neither party has taken exception to the judge's disposition of these items, and in the absence of a compelling public interest, the Commission will not review them. Water Works Installation Corp., 76 OSAHRC 61/B8, 4 BNA OSHC 1339, 1976-77 CCH OSHD ¶ 20,780 (No. 4136, 1976); Abbott-Sommer, Inc., 76 OSAHRC 21/A2, 3 BNA OSHC 2032, 1976-76 CCH OSHD ¶ 20,428 (No. 9507, 1976).

The citation at issue alleged that John T. Brady violated the general duty clause by failing to provide overhead protection at entrances to a building that was under construction. The citation identified two conditions, or practices, at the construction site which allegedly posed a danger of physical injury: objects could fall onto employees from overhead loads being transported by a crawler crane, and objects could fall onto employees from the open-sided upper levels of the building. The Secretary contended that the entrances to the building should have been equipped with canopies.

The issues directed for review centered on whether the Secretary carried his burden in proving such elements of a general duty clause violation as employee exposure to the hazard and recognition of the hazard. However, after this case had been directed for review and the parties had submitted their review briefs, we issued our decision in A. Prokosch & Sons Sheet Metal, Inc., 81 OSAHRC 96/A2, 8 BNA OSHC 2077, 1981 CCH OSHD ¶ 24,840 (No. 76-406, 1980)("Prokosch"). We held there that the general duty clause does not apply to the hazard of objects falling from a crane at a construction site. Although ordinarily we will not decide issues not directed for review,[2/] in order that our decision in this case be consistent with Prokosch, we will decide the case on grounds other than those touched upon in the direction for review.

It is well established that the applicability of a standard renders citation to the general duty clause inappropriate. Mississippi Power & Light Co., 79 OSAHRC 109/D12, 7 BNA OSHC 2036, 1980 CCH OSHD ¶ 24,146 (No. 76-2044, 1979). Citation to the general duty clause in the instant case is rendered inappropriate both as to the hazard of objects falling

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2/ Commission Rule 92(d), 29 C.F.R. § 2200.92(d).

from a crane and the hazard of objects falling from upper levels of a building. ANSI B30.5-1968, section 5-3.2.3(f), which provides that "[t]he operator should avoid carrying loads over people,"[3/] renders the general duty clause inapplicable to the hazard of objects falling from a crawler crane. The hardhat standard at 29 C.F.R. § 1926.100(a)[4/] and the perimeter guarding standards at 29 C.F.R. §§ 1926.500(d)(1)[5/] and 500(f)(3)(ii)[6/] render the general duty clause inapplicable to the hazard of objects falling from upper levels of the building. See Prokosch, supra.

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3/ ANSI B30.5-1968, Safety Code for Crawler, Locomotive and Truck Cranes, is incorporated by reference into the construction industry standards at 29 C.F.R. § 1926.550(b)(2).

4/ 29 C.F.R. § 1926.100(a) provides in pertinent part:

> Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects . . . shall be protected by protective helmets.

5/ 29 C.F.R. § 1926.500(d)(1) provides as follows:

> (d) Guarding of open-sided floors, platforms, and runways. (1) Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent . . . on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a standard toeboard wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard.

6/ 29 C.F.R. § 1926.500(f)(3)(ii) provides as follows:

> Where material is piled to such height that a standard toeboard does not provide protection, paneling or screening from floor to intermediate rail or to top rail shall be provided.

"Toeboard" is defined at 29 C.F.R. § 1926.502(m):

> A vertical barrier at floor level erected along exposed edges of a floor opening, wall opening, platform, runway, or ramp to prevent falls of materials.

Although we conclude that specific standards rather than the general duty clause apply to the cited hazard and workplace conditions and practices,[7/] we will not amend the citation and complaint to allege violations of those standards. ANSI B30.5-1968, section 5-3.2.3(f) is an advisory standard and therefore cannot serve as a basis for finding a violation of the Act. Prokosch, supra, 8 BNA OSHC at 2080-81, 1980 CCH OSHD at p. 30,630. The standards at 29 C.F.R. §§ 1926.100(a), 1926.500(d)(1) and 1926.500(f)(3)(ii) are mandatory, not advisory, but amendment at this juncture would be inappropriate inasmuch as citations resting on these standards would raise questions of law and fact which the parties have not had an opportunity to address. Mississippi Power & Light Co., supra.

Accordingly, the section 5(a)(1) citation is vacated. In all other respects, the judge's decision is affirmed. SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: FEB 26 1982

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7/ Chairman Rowland does not agree with his dissenting colleague's suggestion that the standards on which the majority relies do not render the 5(a)(1) citation inappropriate because they would not provide employees with complete protection against the hazards of falling objects. He notes that it is not the Commission's function to question the wisdom or adequacy of the Secretary's standards. See The Budd Co., 74 OSAHRC 12/A2, 1 BNA OSHC 1548, 1973-74 CCH OSHD ¶ 17,387 (No. 199, 1974), aff'd, 513 F. 2d 201 (3d Cir. 1975). The applicability of a specific standard or standards to the cited conditions renders § 5(a)(1) inapplicable regardless of whether more protection against the cited hazard would be desirable.

Chairman Rowland further disagrees with his colleague's suggestion that the majority errs in holding that the floor guarding standards at § 1926.500 are applicable because different standards apply during steel erection in tiered buildings. He notes that, even if the steel erection perimeter guarding standard applies in this case, the critical point is that there is an applicable standard. Whether that standard is sufficiently stringent is not an appropriate inquiry.

BRADY



COTTINE, Commissioner, dissenting:

In A. Prokosch & Sons Sheet Metal, Inc., 81 OSAHRC 96/A2, 8 BNA OSHC 2077, 1980 CCH OSHD ¶24,840 (No. 76-406, 1980), appeal dismissed, No. 80-4241 (2d Cir. March 27, 1981), I stated in dissent that my colleagues had once again created a void in the protection afforded American workers. Today that void expands again. See also Cornell & Co., Inc., OSHRC Docket No. 78-5956 (Feb. 26, 1982)(lead & dissenting opinions).

I

Testimonial evidence establishes that employees at the construction site using the unprotected or inadequately protected entrances were exposed to the hazard of being struck by any one, or any combination of, the following: sparks, slag, bolts, wire, hand tools, concrete chips, lumber, nails, steel decking, reinforcing rods, and other miscellaneous debris. The sources of these overhead hazards from work being performed above and adjacent to the entrances included the following: hauling of steel by crane, overhead welding, concrete pouring and concrete stripping, forming out of columns, placement of reinforcing rods, and spot welding of steel decking. According to both the compliance officer and the Respondent's field superintendent, the purpose of an overhead canopy at entrances is to protect employees from materials accidentally dropped or kicked over the edge of the building. Furthermore, the compliance officer testified that wind conditions at this site created an additional problem because materials on the roof or open-sided floors could be blown off. These included untacked sections of steel decking.

II

The Commission majority concludes that citation under section 5(a)(1) of the Act, the general duty clause, is inappropriate because specific safety standards are applicable. The standards they cite are:

(1) ANSI B30.5-1968, section 5-3.2.3(f), an ANSI standard that deals with the carrying of crane loads over people and assertedly incorporated by reference at 29 C.F.R. §1926.550(b)(2); (2) 29 C.F.R. §1926.100(a), the construction hardhat standard; and, (3) 29 C.F.R. §§1926.500(d)(1) and 500(f)(3)(ii), construction standards covering the guarding of open-sided floors, platforms, and runways. For the reasons that follow their conclusion is in error.

A.

Commission precedent clearly establishes that "a citation for a violation of section 5(a)(1) is invalid and will not lie where a duly promulgated occupational safety and health standard is applicable to the condition or practice that is alleged to constitute a violation of the Act." Brisk Waterproofing Co., Inc., 73 OSAHRC 30/E1, 1 BNA OSHC 1263, 1264, 1973-74 CCH OSHD ¶16,345 at p. 21,261 (No. 1046, 1973) (emphasis added). See A. Prokosch & Sons Sheet Metal, Inc., supra (dissenting opinion) and cases cited.

Section 5-3.2.3(f) of ANSI B30.5-1968, Safety Code for Crawler, Locomotive, and Truck Cranes, states that "[t]he operator should avoid carrying loads over people." This provision is advisory, not mandatory. A. Prokosch & Sons Sheet Metal, Inc., supra (lead & dissenting opinions). Consequently, it is not a standard nor was it duly promulgated. A. Prokosch & Sons (dissenting opinion). As I noted in Prokosch, section 5(a)(1) is intended "to cover those situations which might not be treated by a standard promulgated by the . . .[Secretary]." Sun Shipbuilding & Drydock Co., 73 OSAHRC 44/A9, 1 BNA OSHC 1381, 1973-74 CCH OSHD ¶16,725 (No. 161, 1973). The hazard of overhead falling objects from the crane operating above the cited entrances is not regulated by a promulgated occupational

safety and health standard. Accordingly, for the reasons more fully set forth in my separate opinion in Prokosch, the ANSI provision discovered by my colleagues does not preclude application of section 5(a)(1) to these facts.

B.

The record evidence regarding the usefulness of hard hats in protecting against falling objects at this site consists of the following testimony of the compliance officer:

> Q. Would the fact that the employer's man may be wearing a hard hat prevent the kind of injury that you are talking about from occurring?
>
> A. If a man is lucky enough to be hit on the head and he has a hard hat on, he might not have a serious injury there, but other parts of his body are exposed, which is the reason for a canopy. A canopy is the general protection in an entrance area. A man, if he walked under an unprotected area, then his shoulder or maybe worse, his extremities are exposed even if he is wearing a hard hat. If he is struck by a bolt falling three, four stories and he gets hit on the shoulder it could cause serious harm.

Hearing transcript at 42.

Section 1926.100(a) requires that employees working in areas where there is a danger of head injury from falling objects be protected by protective helmets. However, the only relevant evidence indicates that although a hard hat may protect against serious head injury, it provides no protection against other bodily injury.[1/] Simply stated, it is not a substitute for other protection against falling materials.

C.

At the time of inspection the structure was in various stages of construction with areas above and adjacent to the cited entrances

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1/ It must also be noted that the Commission has previously acknowledged that a hard hat would not abate the hazard of a heavy overhead load falling onto a worker. General Electric Co., 80 OSAHRC 9/B9, 7 BNA OSHC 2183, 2186 n. 10, 1980 CCH OSHD ¶24,268 at p. 29,552 n. 10 (No. 15037, 1980).

either completed with roof areas, or in the steel erection stage, including erection of structural steel members and placement and welding of steel decking. The compliance officer noted that the floors of the structure were open-sided, did not have toeboards, but did have perimeter protection in the form of a wire cable.

The final standards my colleagues have uncovered that assertedly apply to the cited conditions are the construction perimeter guarding standards published at 29 C.F.R. §§1926.500(d)(1) and 500(f)(3)(ii), dealing with guarding of open-sided floors, platforms, and runways. Their conclusion is in error for several reasons.

First, during steel erection in tiered buildings the perimeter guarding standards at section 1926.500, requiring standard railings and toeboards, do not apply. Rather, the requirement in section 1926.750(b)(1)(iii) that the periphery be guarded by a "safety railing of 1/2-inch wire rope or equal" applies.[2/] Wire cables were in place where required. Second, certain sections of the structure had completed roof areas. Under Commission and courts of appeals precedent, a roof is not a floor within the meaning of section 1926.500(d)(1) and the standard would not apply to these areas.[3/] See Dun-Par Engineered Form Co., 80 OSAHRC 14/E6, 8 BNA OSHC 1044, 1980 CCH OSHD ¶24,238 (No. 16062, 1980), appeal filed, No. 80-1401 (10th Cir. Apr. 17, 1980); Central City Roofing Co., Inc., 76 OSAHRC 61/A2, 4 BNA OSHC 1286, 1976-77 CCH OSHD ¶20,761 (No. 8173, 1976). Finally, perimeter protection in the form of a wire cable or standard railing and a toeboard would not prevent materials from being

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2/ The Respondent was not cited for noncompliance with perimeter protection requirements. The Respondent was cited for a violation of section 1926.500(d)(2) for failing to erect guardrails on a 30-foot-long, 2 - 3 foot wide runway leading to its office trailer. This item was affirmed by the judge. The Respondent did not petition for review of this item.

3/ Although there is no direct testimony that work was being performed on the roof, the compliance officer specifically stated that materials on a roof area could be blown off because of wind conditions.

dropped over the perimeter by employees working near the edge, would not stop sparks and slag created by the welding of metal decking to the structural steel from falling over the edge, and would not be an effective barrier to material being carried by the wind, particularly sheets of decking.

III

For the reasons set forth above, citation to section 5(a)(1) of the Act is appropriate and the merits of the charge should be decided by the Commission. Accordingly, I dissent.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>JOHN T. BRADY & CO., INC.,<br>Respondent. | OSHRC DOCKET<br>NO. 76-2894 |

Appearances:

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by Jithender Rao, Esq., of counsel

M. Carl Levine Morgulas & Foreman
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New York, New York 10017
Attorney for respondent
by Marvin J. Levine, Esq. of counsel

## DECISION AND ORDER

Fier, Judge:

## PRELIMINARY STATEMENT

This is a proceeding pursuant to section 659 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*, hereinafter called the Act), wherein respondent contests the citations and penalties for one serious and three nonserious alleged violations. The citations dated

June 24, 1976, were based on an inspection conducted April 13, 14, 15, 19, 20, 21 of 1976. The citations and proposed penalties were issued pursuant to sections 9(a) and 10(a) of the Act.

Pursuant to section 10(c) of the Act, 29 U.S.C. 659(c), respondent through its attorney by letter dated June 30, 1976, noted its timely contest to the citations and proposed penalties. The citations for the alleged violations sets forth the following:

Citation No. 1 (Nonserious)

| Item | Standard | Description of Alleged Violation |
|---|---|---|
| 1 | 29 CFR 1926.150 (e)(1) | 29 CFR 1926.150(e)(1) in that an alarm system was not established by the employer whereby employees on the site and the local fire department can be be alerted in case of fire or other emergency at the jobsite. |

A penalty of $50.00 was proposed.

| | | |
|---|---|---|
| 2 | 29 CFR 1926.150 (e)(2) | The alarm code and reporting instructions were not conspicuously posted at phones and at employee entrances to the jobsite. |

No penalty was proposed.

| | | |
|---|---|---|
| 3 | 29 CFR 1926.500 (d)(2) | Failure to provide a standard railing or equivalent protection of the main passageway that led to the outdoor office trailer that was located on or above grade elevation by section B/C. The passageway was approximately 30 feet long and a drop of 8 to 9 feet could result. Such passageways shall be guarded by a standard railing or equivalent on all open sides 4 feet or more above floor or ground level. |

A penalty of $55.00 was proposed.

Citation No. 2 (Serious)

| Item | Standard | Description of Alleged Violation |
|---|---|---|
| 1 | Public Law 91-596 General Duty Clause Section 5(a)(1) | Exposure of employees to the dangers of falling material where inadequate or no overhead protection was provided over two designated entrances to section B/C and section E. This is a recognized hazard in the construction industry. Employees were exposed through their normal duties in the course of their work in and about the structure. Overhead hazards were high in that materials were being transported from grade to upper levels by means of tower cranes located in the immediate areas of these main entrances. Should any materials fall from these overhead floor levels, a resulting accident could be death or serious physical harm to employees. |

A penalty of $500.00 was proposed.

STANDARD AS PROMULGATED

29 CFR 1926.150(e) Fire alarm devices.

(1) An alarm system, e.g., telephone system, siren, etc., shall be established by the employer whereby employees on the site and the local fire department can be alerted for an emergency.

(2) The alarm code and reporting instructions shall be conspicuously posted at phones and at employee entrances.

29 CFR 1926.500(d)

(2) Runways shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f) of this section, on all open sides, 4 feet or more above floor or ground level. Wherever tools, machine parts, or materials are likely to be used on the runway, a toeboard shall also be provided on each exposed side.

29 U.S.C. 654(a)(1) which provides as follows:

> Sec. 5(a) Each employer--(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees.

## ISSUES

1. Whether the respondent violated the Occupational Safety and Health Act as alleged.

2. Whether the respondent failed to comply with sections 29 CFR 1926.150(e)(1); 29 CFR 1926.150(e)(2); 29 CFR 1926.500 (d)(2); if so did it violate section 29 U.S.C. 654(a)(2) of the Act.

3. Whether the respondent violated 29 U.S.C. 654(a)(1).

4. If the respondent is found to have violated any or all of the above; what penalty if any should be assessed.

## EVIDENCE

The respondent is a corporation organized under the laws of the State of New York. Many of the materials and supplies used are manufactured in other states.

John Tomich a compliance officer with the Occupational Safety and Health Administration of the U.S. Department of Labor, (hereafter referred to as C.O.) visited the respondent's worksite on April 13, 14, 15, 19, 20 and 21 of 1976 (Tr. 12)*.

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* Denotes transcript page.

The worksite consisted of additional structures to be added to the Veteran's Hospital, located on Kingsbridge Road in the Bronx, New York (Tr. 10). The C.O. met with the respondent's representative Joseph Meli, field superintendent (Tr. 12, 79).

In the course of the inspection, the C.O. observed that there was no fire protection or alarm system in violation of 29 CFR 1926.150(e)(1) (Tr. 47). In addition the C.O. noted that there was also an absence of an alarm code and reporting instructions. These were required to be posted at the phone locations and employee entrances (Tr. 52). The respondent was thereupon cited for an alleged violation of 29 CFR 1926.150 (e)(2).

The C.O. next observed that at the main passageway leading to the respondent's outdoor office trailer, there was no standard railing or equivalent protection. The walkway was approximately 2 to 3 feet wide and 30 feet long. A fall of 8 or 9 feet could result from the walkway to the ground below (Tr. 45-46). The respondent's employees have access and use the walkway to get to the trailer (Tr. 47). The C.O. did not see any of respondent's employees using the walkway (Tr. 72). The respondent was subsequently cited for an alleged violation of 29 CFR 1926.500(d)(2) (Tr. 45-46). The Secretary made a

motion to amend the citations and reduce all of the above "nonserious" violations to "zero" penalty (Tr. 5). The decision on Secretary's motion was reserved pending receipt of all of the evidence.

The C.O. during his inspection noted that there was no overhead protection at the designated entrances. The exposure of respondent's employees to this danger constituted a serious violation that could result in death or serious injury. There was also a large crane hauling steel travelling parallel to the B&C area where one of the designated entrances was located (Tr. 24). The C.O. testified that he observed an amployee of the respondent using the unprotected area (Tr. 39,71). This was denied by the respondent (Tr. 90). The C.O. indicated that the failure to have a protective canopy constituted a violation of 29 CFR 654(a)(1). The testimony showed that construction work was going on at the time in the area of the "purported" designated entrance (Tr. 24, 26). In addition, there were toilets located in front of the area at "B-C" and also the employer trailers (Tr. 27, 23). The hazard is said to be recognized as such throughout the construction industry. In furtherance of this contention the Secretary introduced a copy of a New York State statute (Complainant's Exh. C-2). The Secretary asserts that the above statute has been in effect for over 80 years (Tr. 29).

OPINION

The issue of jurisdiction can be quickly disposed of by noting the pleadings where the respondent readily concedes that it is engaged in general contracting. Also the concession that it uses materials and supplies which cross state lines. As such there is enough evidence to find that the respondent is subject to the provisions of the Act.

The citation for the nonserious violations are not factually in dispute. The evidence shows that the fire alarm system and requirement for the posting of instructions was not in existence at the worksite. The respondent asserts that one of the employers did have a whistle on the site and another employer had a horn (Tr. 48). It was also asserted that some of the employers did have telephones in their trailers located in front or near the worksites. However, none were located "inside" of the worksite (Tr. 48). Further, the use of these devices were for the purpose of signalling "into" the site and not for the purpose of signalling "out". Thus an employee working in a structure who needed help to report a fire or other hazard, would not have any signal device to summon aid in an emergency. It is reasonable to assume that if an employee's clothes caught fire, time would be important, and the close proximity of an alarm system can easily make the difference regarding the outcome of the emergency. The

respondent asserts that the responsibility of installing the alarm system and instruction code should rest on the prime contractor. The respondent did not seek or file for a variance of the standard. There is also no evidence to show that an effort was made to seek compliance by the prime contractor. Accordingly, the Secretary has carried its burden of proof. The respondent is found to have violated the standards 29 CFR 1926.150(e)(1) and (e)(2). As to the penalty in the above violations, the low gravity of the violations in this particular instance justifies a reduction in the penalty. Therefore, the Secretary's motion to reduce the above two violations to zero will be adopted.

The remaining "nonserious" alleged violation of 29 CFR 1926.500(d)(2) is concerned with the absence of guardrails on the walkway to the respondent's trailer. The hazard of a fall of 8 to 9 feet is not denied (Tr. 45-46). A fall of such a distance could easily result in a serious injury. The C.O. testified that he did not see any guardrails on the walkway. The testimony shows that the walkway did lead to the respondent's trailer where equipment was stored and it was used as an office (Tr. 46). The C.O. did not see any of respondent's employees on the walkway at the time of inspection. However, the employees did report to the trailer office when coming to work (Tr. 47). Accordingly, access has been established. The Secretary has

carried its burden of proof. The Secretary has moved that the proposed penalty be reduced to zero. In view of the fact that no employees were observed using the walkway, the Secretary's motion will be adopted and the penalty reduced to zero.

The final question to be determined herein, is whether in the language of section 5(a)(1) of the Act, respondent met the requirement that he furnish to each of his employees employment and a place of employment which was free from "recognized hazards" that are causing or are liable to cause death or serious physical harm to his employees. As previously indicated, complainant has charged respondent with violating section 5(a)(1) of the Act, generally referred to as the "general duty clause", in that the employer did not cause to be constructed, a canopy over the entrance of the worksite, so as to provide safe egress and ingress. The testimony shows that one of the respondent's employees was observed using the designated entrance with no overhead canopy (Tr. 39, 71). While the respondent denies using the entrance, a review of the evidence and testimony gives ample support to the observation of the C.O. (Exhs. C-1, Resp-A). The stage of construction and testimony relative thereto support the Secretary in its contention that an employee of respondent was observed using the designated entrance without a protective canopy. The C.O.

produced a copy of a New York Industrial Code Rule (Exh. C-2), Part 23 of Title 12 of the Official Compilation of Codes, Rules and Regulations of the State of New York.

> 23-17 Protection from general hazards. (a) Overhead hazards. (1) Every place where persons are required to work or pass that is normally exposed to falling material or objects shall be provided with suitable overhead protection. Such overhead protection shall consist of tightly laid sound planks at least two inches thick full size, tightly laid three-quarter inch exterior grade plywood or other material of equivalent strength. Such overhead protection shall be provided with a supporting structure capable of supporting a loading of 100 pounds per square foot."

This provision although no longer a State statute, would tend to support the C.O.'s position that the use of an overhead canopy is an accepted industry practice, recognized in the construction industry to protect its workers against overhead hazards. Secretary v. Puget Sound Power and Light Co., Docket No. 15, 1 OSAHRC 844 (September 28, 1972); Brennan v. Occupational Safety and Health Review Commission, 494 F.2d 460 (8th CA 1974). A statute even though it has been repealed for various reasons, may still be received as part of the total evidence to identify an industry-wide practice and existing hazard. The hazard was apparent. The likelihood of a serious or fatal injury from a falling object could easily cause a fatal injury. While the respondent asserts that it did not use the entrance the weight of evidence shows otherwise.

Secretary v. Stephenson Enterprises, Inc., Docket No. 5873 (R.C., September 22, 1976). One purpose of the Act is to prevent the first accident. Lee Way Motor Freight, Inc. v. Secretary (1 OSHC 1689); 511 F.2d 864 (10th C.A.-February 19, 1975).

The Secretary has established the presence of a "recognized" hazardous condition. The question of actual knowledge is established from the respondent's statement that he has been in the construction industry about thirty-five years (Tr. 80). The evidence has gone further than required. The Court has previously determined; once the Secretary proves that a condition is "recognized" as a hazard in the industry, he need not prove that the employer had actual knowledge of the hazard. National Realty and Construction Co., v. Occupational Safety and Health Review Commission, Docket No. 85; 489 F.2d 1257, 1265 n 32 (D.C. Cir. 1973). See also Secretary v. Mid-Hudson Automatic Sprinkler Co., Inc., Docket No. 76-0575 (October 12, 1976). The Secretary has established; (1) that the employer failed to render its workplace "free" of a hazard which was (2) "recognized" and (3) "causing" or likely to cause death or serious physical "harm"; supra

The Secretary has carried its burden of proof. The respondent in mitigation, had only eight employees on the

worksite. In addition, the abatement of the violation was undertaken without delay. Under the circumstances, a penalty of $200.00 would not be inappropriate.

The respondent's brief has been carefully considered.

All motions not previously disposed of are denied.

## FINDINGS OF FACT

The credible evidence and the record as a whole establishes preponderant proof of the following facts:

1. Respondent, John T. Brady & Co., Inc., is engaged in the construction business. The materials used and effects on commerce establishes that it is engaged in interstate commerce.

2. Respondent did not have an alarm system for fire and other emergencies at the worksite.

3. Respondent did not have reporting instructions and an alarm code reduced to writing, posted at employee entrances and conspicuously posted at phones as required.

4. Respondent did not have a standard railing on its runway as required.

5. The danger of falling objects at or near the entrance to the subject worksite was a recognized hazard likely to cause death or other serious injuries to respondent's employees.

6. The absence of a protective canopy at the entrance to the worksite to shield respondent's employees from the inherent dangers within, were within the scope of respondent's knowledge.

7. The use of a construction shield canopy and the hazards it seeks to prevent are common knowledge to the industry and to employers such as respondent.

8. The evidence is sufficient to show respondent's failure to safeguard its employees by failing to provide a construction shield canopy.

9. Respondent made no effort to prevent its employees from entering the area of the hazard.

## CONCLUSIONS OF LAW

1. The respondent is and was at all times herein, in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970.

2. The Occupational Safety and Health Review Commission has jurisdiction over the subject matter and parties to this action.

3. Respondent violated 29 U.S.C. 654(a)(2) by failing to comply with 29 CFR 1926.150(e)(1); (e)(2); and 29 CFR 1926.500(d)(2).

4. Respondent violated 29 U.S.C. 654(a)(1) by failing to furnish its employees employment in a place free from recognized hazards in a place likely to cause death or serious physical harm to them.

O R D E R

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record, it is hereby ORDERED that:

Citation number one, items one, two and three, are affirmed. No penalty is assessed for the items of citation one.

Citation number two is affirmed. A penalty of $200.00 is assessed.

Seymour Fier

SEYMOUR FIER
JUDGE, OSHRC

Dated: January 10, 1977
New York, New York

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| | (Judge's decision) | | 10/A8 |
| 77-1334 | SNYDER WELL SERVICING, INC. | 2/26/82 | 10/C5 |
| | (Judge's decision) | | 10/E2 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

FEB 26 1982

IN REFERENCE TO SECRETARY OF LABOR v.

DELTA FIELD ERECTION, INC.

OSHRC DOCKET NO. 76-4153

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

FOR THE SECRETARY OF LABOR

OF COMMISSION DECISION

- Counsel for Regional Litigation
  Office of the Solicitor, USDOL
  200 Constitution Ave., NW. - Rm. S-4014
  Washington, D.C. 20210

To wit: See attached.

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FOR EMPLOYER

- Horace A. Thompson, III, Esq.
  Jones, Walker, Waechter, Poitevent,
  Carrere and Denegre
  225 Baronne Street
  New Orleans, La. 70112

FOR EMPLOYEES

-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

- James D. Burroughs
  Judge, OSHRC
  1365 Peachtree Street, N.E.
  Suite 240
  Atlanta, Georgia 30309

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 76-4153 |
| DELTA FIELD ERECTION, INC., | : | |
| Respondent. | : | |
| | : | |

DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

The issue in this case is whether Delta Field Erection, Inc. ("Delta Field") committed a serious violation of the electrical standard for construction work at 29 C.F.R. § 1926.401(j)(4).[1/] This section prohibits the operation of portable electric lighting at more than 12 volts in moist and/or other hazardous locations. We conclude that the Secretary of Labor ("the Secretary") failed to establish that Delta Field had knowledge of the violative condition and reverse the administrative law judge's finding of a violation.

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1/ 29 C.F.R. § 1926.401(j)(4) provides:

§ 1926.401 Grounding and bonding.

* * *

(j) Temporary lighting.

* * *

(4) Portable electric lighting used in moist and/or other hazardous locations, as for example, drums, tanks, and vessels shall be operated at a maximum of 12 volts.

Delta Field is a general construction firm which had subcontracted with the Tennessee Oil Company ("Tenneco") to replace damaged parts in an ethyl benzene storage tower in Chalmette, Tennessee. Delta Field's assignment was to bolt back into place metal trays which had been removed from the tower for repair. Delta Field's employees used ratchets and wrenches to bolt the trays onto metal racks.

In preparation for this work, Tenneco had purged the tower of ethyl benzene and closed off all natural gas pipelines leading into the structure. It had also, prior to Delta Field's arrival at the tower, installed a system of portable electric lights. This system included an undetermined number of 32-volt lights and one 110-volt drop cord, all connected by extension cords to portable transformers outside the tower. All but two of the light fixtures were the explosion-proof type.

While Delta Field's employees were engaged in replacing the metal trays, a Tenneco employee opened one of the natural gas lines leading into the structure under the mistaken impression that he was opening a fresh air line. Shortly thereafter the atmosphere inside the tower exploded; thirteen men were killed and others injured. The record does not indicate whether the lighting system contributed to the explosion.

In order to prove that an employer committed a violation, the Secretary must show, inter alia, that the employer knew, or in the exercise of reasonable diligence, could have known of the violative condition. Prestressed Systems, Inc., 81 OSAHRC 43/D5, 9 BNA OSHC 1864, 1981 CCH OSHD ¶ 25,358 (No. 16147, 1981); General Electric Co., 81 OSAHRC 42/A2, 9 BNA OSHC 1722, 1981 CCH OSHD ¶ 25,345 (No. 13732, 1981). We conclude, based on the record before us, that the Secretary has not made out a prima facie showing that Delta Field knew or in the exercise of reasonable diligence could have known that the lights were being operated in excess of the permitted voltage.

The only evidence bearing on Delta Field's actual knowledge regarding voltage is the testimony of its two supervisory employees. The night superintendent testified variously that the transformers were "supposed" to be marked for voltage, that "some were not marked," that none was marked, and that he was not sure whether any were marked.[2/] The day superintendent testified that he had never looked at the transformers so could not say whether they were marked, but that in any case he would not have understood the significance of any markings because he has no electrical expertise. Tenneco's own electrician testified at the hear-

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2/ Delta Field's night superintendent testified as follows:

> Q. Would you know what wattage the lights were?
> A. Twelve volts.
> Q. Excuse me, I didn't hear your answer?
> A. I am sure that they were 12 volts.
> Q. You say that you are sure. Do you know that they are 12 volts?
> A. I don't know if I was sure. They were connected to the boxes outside, and I am pretty sure that they were 12 volts.
> Q. Did you examine those light fixtures to determine what they were?
> A. Yes, you could.
> Q. How could you tell what the voltage was from those light fixtures?
> A. It's suppose [sic] to be marked on the boxes that they are plugged into because they are a reducer box. They are plugged into one thing and they are reduced down to 12 volts.
> Q. Did you ever look at the boxes to determine whether they were 12 volts?
> A. No, I didn't, but I would assume they were. That's what they were suppose [sic] to be.
> Q. Could you have looked at those boxes to determine whether they were reducing boxes?
> A. Yes, sir. I'm not sure if its [sic] marked on there or not. Some of the boxes don't have any markings on them.
> Q. But the question is, "Were these boxes available to you so that you could tell what was on them?"
> A. Yes, they were.

ing that the system had included both 32 and 110-volt wiring but was never asked how he made that determination. Consequently, his testimony provides no basis for an inference that the equipment was visibly marked for voltage.

Nor did the Secretary prove that Delta Field failed to exercise reasonable diligence to discover the voltage at which the lights were operating. A contractor entering another employer's facility would not ordinarily be concerned with the voltage of the lights,[3/] and the Secretary has not established any reason why Delta Field should not reasonably have relied on Tenneco, which controlled the facility and employed electricians, to assure that the lighting system was operating at an appropriate number of volts.[4/]

Accordingly, we vacate the citation[5/] on the ground that the

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3/ We note that the general industry standards regulate electrical equipment and wiring in hazardous locations but set no limit on voltage per se in such locations. See 29 C.F.R. § 1910.307 and the National Electrical Code, NFPA 70.

4/ The record indicates that it was Tenneco's practice to provide all equipment and tools used by Delta Field on Tenneco's premises and that Delta Field was contractually prohibited from bringing electricians to the refinery.

5/ Commissioner Cottine dissents to the Commission decision in this case. Commissioner Cottine notes that under the Occupational Safety and Health Act each employer is principally responsible for the safety of its own employees. Central of Georgia R.R. Co. v. OSHRC, 576 F.2d 620 (5th Cir. 1978); Frohlick Crane Service, Inc. v. OSHRC, 521 F.2d 628 (10th Cir. 1975); Sam Hall & Sons, Inc., 80 OSAHRC 106/A2, 8 BNA OSHC 2176, 2179 n.8, 1980 CCH OSHD ¶ 24,927 at p. 30,744 n.8 (No. 76-4988, 1980); Camden Drilling Co., 78 OSAHRC 33/A2, 6 BNA OSHC 1560, 1978 CCH OSHD ¶ 22,687 (No. 14306, 1978); Grossman Steel & Aluminum Corp., 76 OSAHRC 54/D9, 4 BNA OSHC 1185, 1975-76 CCH OSHD ¶ 20,691 (No. 12775, 1976). This statutory duty cannot be transferred, assigned, or contracted away. Central of Georgia R.R. Co. v. OSHRC, supra; Frohlick Crane Service, Inc. v. OSHRC, supra; Sam Hall & Sons, Inc., supra. "It

(continued on next page)

Secretary failed to establish Delta Field's knowledge of the violative condition.[6/] SO ORDERED.

FOR THE COMMISSION

Ray H. Darling Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: FEB 26 1982

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5/ (continued)

is no defense that someone else . . . agreed to look out for the employee's job safety." Bayside Pipe Coaters, Inc., 74 OSAHRC 67/B14, 2 BNA OSHC 1206, 1206-7, 1974-75 CCH OSHD ¶ 18,677 at p. 22,578 (No. 1953, 1974).

Delta Field had a regular maintenance crew working at the Tenneco refinery on a year-round basis. Both Delta Field superintendents on the Tower 103 job had prior experience working in vessels similar to Tower 103 and were accustomed to dealing with Tenneco's electricians, who were readily available for consultation. The provision of electric lighting was integral to the work Delta Field's employees were performing within the tower. Under these circumstances, the exercise of reasonable diligence would have required, at a minimum, that Delta Field inquire whether the electrical equipment supplied by Tenneco for use by Delta Field's employees in a hazardous location complied with the requirements of the Act.

6/ Delta Field has raised other objections to the judge's disposition of this item, but inasmuch as our ruling is dispositive of the case, we will not consider them here.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 400
ATLANTA, GEORGIA 30309

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|---|---|---|
| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 76-4153 |
| | ) | |
| DELTA FIELD ERECTION, INC., | ) | |
| | ) | |
| Respondent. | ) | |

## DECISION AND ORDER

APPEARANCES:

Harvey M. Shapan, Esquire, Office of the Solicitor, U. S. Department of Labor, Dallas, Texas, on behalf of complainant.

Horace A. Thompson, III, Esquire, Jones, Walker, Waechter, Poitevent, Carrere & Denegre, New Orleans, Louisiana, on behalf of respondent.

## STATEMENT OF CASE

Burroughs, Judge: This is a proceeding initiated pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq., 84 Stat. 1590 ("Act"). Respondent timely contested two serious citations issued to it by complainant on September 14, 1976, pursuant to section 9(a) of the Act. Review is also sought of the penalties proposed for the alleged violations.

Respondent is a corporation having a place of business and office at Baton Rouge, Louisiana. It is engaged in the construction business. The citations emanated from an investigation conducted during the period from August 13, 1976, to September 13, 1976, at the Chalmette, Louisiana, refinery of Tennessee Oil Company (Tenneco).

Serious citation number one alleges that respondent violated section 5(a)(2) of the Act by failing to comply with the safety standard published at 29 C.F.R. § 1926.401(j)(4). The citation described the alleged violation as follows:

> "Portable electric lighting used in hazardous location(s) was operated at more than 12 volts:
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> (a) in that the employer allowed electricity of 120 volts to be in the inside of the vessel."

A penalty of $600 was proposed for the alleged violation.

Serious citation number two alleges that respondent violated section (5)(a)(1) of the Act. The alleged violation was described as follows:

> "The employer did not furnish employment and a place of employment free from recognized hazards that caused or were likely to cause death or serious physical harm to his employees in that the employer did not allow employees exposed to dangerous concentrations of flammable vapors to leave the hazardous area immediately and remain clear of the area until tower A-103 had been determined safe for re-entry."

A penalty of $600 was proposed for the alleged 5(a)(1) violation.

Respondent timely contested the two serious citations, including the abatement dates and proposed penalties, by a letter dated September 24, 1976, from its counsel. A hearing was held in the case on March 3 and 4, 1977, in New Orleans, Louisiana. No additional parties desired to intervene in the proceeding.

After complainant had presented all of his evidence and rested, counsel for respondent moved to dismiss the citations. The motion to dismiss was granted as to the 5(a)(1) violation but was denied as to the serious violation of 29 C.F.R. § 1926.401(j)(4) (Tr. 255-264).

## JURISDICTION AND ISSUES

Respondent concedes that it is engaged in a business affecting commerce within the meaning of the Act and that the Commission has jurisdiction of the parties and of the subject matter presented in this proceeding (Paras. I, II, Complaint and Answer).

The following issues are presented to the Commission for determination:

1. Did respondent violate section 5(a)(2) of the Act by failing to comply with the safety standard set forth at 29 C.F.R. § 1926.401(j)(4)?
2. Did respondent violate section 5(a)(1) of the Act by failing to allow employees exposed to dangerous concentrations of flammable vapors to leave the area and remain clear until the area was safe for re-entry?
3. Were the violations, if they occurred, serious within the meaning of section 17(k) of the Act?
4. What penalties, if any, should be assessed for any violations determined to have occurred?

## FINDINGS OF FACT

The following facts are specifically determined in resolving the issues in dispute:

1. Respondent is a corporation having a place of business and office at Baton Rouge, Louisiana. It is engaged in the construction business (Para. II, Complaint and Answer).

2. On Wednesday, August 4, 1976, there was a buckling or bending of some of the trays in tower A-103 at the Tenneco refinery plant in Chalmette, Louisiana (Tr. 8 - Stipulated by parties).

3. The trays, which are used in a type of filtering process, had to be removed and straightened. Prior to commencing the work, ethylbenzene had to be purged from the tower. Steam was forced into the tower and removed. Nitrogen was put into the tower and then compressed air was put into the tower to remove the nitrogen. Once these steps were completed, the tower was considered safe for working and was tagged safe by the Tenneco safety department (Tr. 8-9, Stipulated by parties).

4. The Tenneco safety department placed a tag on the bottom manway of tower A-103 indicating that it was safe to work inside and inspected the tower each day for gas (Tr. 35, 36, 58). Every time an inspector checked the tower he placed the time and date on the tag (Tr. 57-58, 60).

5. On Friday, August 6, 1976, employees of Tenneco started at the top of the tower and began removing trays as they moved downward inside the tower. Delta Field Erection, Inc., was hired by Tenneco to perform the work in replacing the trays. As the Tenneco employees moved down the tower, employees of Delta Field Erection, Inc , were to move behind the Tenneco employees and replace the trays (Tr. 9 - Stipulated by the parties; Tr. 19, 272-273).

6. Employees of Delta Field Erection commenced the work of replacing the trays in tower A-103 on Monday, August 9, 1976. The job of replacing the trays was continued on August 10, 11 and 12, 1976 (Tr. 19-20, 71, 97-98, 132-133, 272). Respondent only employed boilermakers and laborers

for the job (Tr. 276).

7. Manways leading to the inside of tower A-103 were circular and had a diameter of approximately 20 inches (Tr. 58-59). The tower had eight levels and a manway was located on each level (Ex. 6; Tr. 59).

8. Scaffolds were constructed inside the tower at the manways to provide a working surface for employees (Tr. 9 - Stipulated by the parties; Tr. 178-179).

9. On August 9, 1976, Richard Sutton was a superintendent for Delta Field Erection, Inc., and was in charge of the night shift of employees working at the Tenneco refinery. The night shift commenced work at 4:30 p.m. (Tr. 18-19, 69). The only duty performed by the night shift was the replacement of the trays in tower A-103 (Tr. 20, 97-98,132-133).

10. On August 9, 1976, Sutton checked all the lines going into tower A-103 to insure there was no gas leaking into the tower (Tr. 35-36). Tenneco personnel had inserted plates in all the pipes to block off any flow of gas into the tower (Tr. 48-49).

11. On August 12, 1976, employees of Tenneco were removing trays on the first, second, third and fourth levels. Employees of Delta Field Erection were working on the fifth, sixth, seventh and eighth levels of the tower (Tr. 9 - Stipulated by the parties; Ex. 6; Tr. 71-72, 132, 289).

12. Sutton arrived at the Tenneco plant on August 12, 1976, around 4:00 p.m. Upon arrival, he coordinated matters with the day-shift superintendent, Jessie Jenkins. They discussed the progress of the job. Jenkins and Sutton went to tower A-103. Sutton looked inside the tower to see where the men were working, but he did not go inside the tower (Tr. 21-22, 44, 68).

13. On August 12, 1976, there was a tag on the bottom manway of tower A-103 indicating that it was safe for personnel to work inside. Sutton noticed the tag on August 12, 1976, but did not read it (Tr. 35, 44, 57).

14. On the evening of August 12, 1976, the wind was blowing sulfur fumes from the stacks of nearby heaters into the vicinity of tower A-103 (Tr. 45, 80, 95, 114). The fumes were quite strong and made it difficult to breath on the outside of the tower (Tr. 46, 59, 95, 127, 141).

15. Huey Cantrell was the night-shift boilermaker foreman. He proceeded to get the night-shift employees working when they arrived on the site (Tr. 22-23, 62). He was in charge of seeing that employees were doing the job. He had authority to assign work to employees and to move them from one place to another (Tr. 24, 62-63).

16. Huey Cantrell was not a permanent employee of respondent. Boilermakers are hired through the union hall and a foreman is usually sent with the men. Cantrell commenced work at the site on Wednesday, August 11, 1976. He was specifically requested to replace the foreman originally sent out by the union hall (Tr. 55, 62).

17. Between 6:00 p.m. and 6:30 p.m., Sutton went into tower A-103 to check the progress and stopped to talk to each employee. He detected no unusual odor while he was inside the tower. He left the tower around 7:00 p.m. and went to his office which was located approximately a half mile from the tower (Tr. 28-29, 37, 43-44).

18. On August 12, 1976, employees of respondent, Mike Cantrell, Larry Cantrell, Ralph Douglas, E. R. Smith and Carl Dagreport, were working on the fifth level inside tower A-103 on the night shift (Ex. 6; Tr. 97-98, 221).

19. When Mike Cantrell commenced work on August 12, 1976, the odor inside the tower was the same as the day before (Tr. 99).

20. Sometime around 7:00 p.m. on August 12, 1976, Mike Cantrell thought he detected an unusual odor in the tower. He and his co-workers discussed the possibility of an unusual odor. The co-workers indicated that they were somewhat lightheaded or dizzy but did not smell any unusual odor. Cantrell also felt some dizziness (Tr. 80, 100-102, 127-128, 135-136, 227, 237).

21. Mike Cantrell, Ralph Douglas, Larry Cantrell and Carl Dagreport got out of the tower onto the catwalk because they were getting dizzy. Smith was already on the catwalk outside the manway (Tr. 102-103, 127, 227).

22. Mike Cantrell decided to leave the tower and talk to the supervisors about the possibility of an unusual odor being present. As he descended the tower, he mentioned the odor to a Tenneco employee. The Tenneco employee informed him that the trays had been in the tower a long time and that vapors were caused by moving them around. He indicated that this was the possible source of the odor (Tr. 102-103, 105-106, 129-130, 136, 221).

23. Upon reaching the ground, Mike Cantrell went to get a drink of water and encountered Frank Davis, the union steward. Davis asked what was the matter. Mike Cantrell told him "we smelled fumes and got dizzy" and that he was on his way to tell his daddy (Huey Cantrell) and the supervisors (Tr. 106, 112, 121, 148, 157-158, 159-160, 161, 172-173).

24. At approximately the same time that Mike Cantrell was on the way to the ground, employees at the top of the tower called down to

Frank Davis and informed him that they smelled gas. Davis went into the Tenneco operator's office and informed them about the gas smell. He also went looking for Huey Cantrell. When Davis arrived back at his station, he ran into Mike Cantrell who was on the way to inform his father of the fumes (Tr. 156-157, 159, 166, 167-168, 169-172, 175).

25. Huey Cantrell and George Verger, superintendent for Tenneco, were standing a few feet from the water cooler. After talking to Frank Davis, Mike Cantrell approached his father and Verger. Davis followed him (Tr. 106-107, 148-149).

26. Mike Cantrell informed his father and the others in the group that "we smelled fumes" so bad that they could hardly breathe. He did not indicate to his father that he or any of his co-workers felt dizzy. The group with whom Mike Cantrell conversed included Frank Davis, Huey Cantrell and George Verger (Tr. 73-74, 76-79, 80, 84, 85, 107-109, 112, 114, 121, 124, 148-149). Davis also mentioned the complaint he had received from other employees complaining of smelling gas (Tr. 169, 172).

27. Mike Cantrell only informed Frank Davis that he and his co-workers were lightheaded or dizzy (Tr. 109, 112).

28. After Mike Cantrell made his statement concerning the fumes, Huey Cantrell and Frank Davis asked George Verger about the condition. Verger indicated that the employees were smelling sulfuric furnace fumes blowing into the area from the nearby heaters and that Tenneco personnel often had to work under those conditions. Verger stated that it was safe for the employees inside the tower and that the fumes would subside when the wind changed directions. According to Verger, there was no way gas could

get into the tower, and he suggested Mike Cantrell might put a blower inside the tower (Tr. 78-80, 107, 112, 114, 140, 151, 162).

29. Huey Cantrell was aware of the sulfuric fumes at the manways up and down the exterior of the tower (Tr. 84, 94). He surmised that anyone close to the manways might smell the sulfur fumes (Tr. 94-95).

30. Frank Davis asked Huey Cantrell whether he wanted to pull the men off the job. Cantrell accepted Verger's explanation and told them to go back to work. Mike Cantrell then turned and went back to the tower (Tr. 80, 107, 108, 114, 123, 161, 167). Tenneco did not check the tower for fumes at that time (Tr. 80-81).

31. When Mike Cantrell left the group, he tried to find a blower but could not find one with a proper fitting for an air hose. He decided to forget about the blower until lunch and returned to the tower to commence work. Within seconds after Mike Cantrell went inside the tower, an internal explosion occurred (Tr. 114, 123, 140-141, 143, 234). The explosion occurred some 15 to 20 minutes after he had talked to his father (Tr. 155).

32. Thirteen persons died as a result of the internal explosion in tower A-103 (Tr. 43).

33. Huey Cantrell had one son killed in the explosion and one son seriously injured (Tr. 85).

34. Eric Monette, a laborer employed by Tenneco, was working on the second level in tower A-103 on August 12, 1976 (Tr. 203).

35. About a half an hour to an hour prior to the explosion, Monette was instructed to hook up an air blower on the first level to keep the air

circulating in the tower (Tr. 204, 206-207).

36. There were three valves on the first level. One of them was to an air line. None of the valves were marked. Monette opened one of the valves and thought air came out. He surmised that he had the right line and connected the air blower to it (Tr. 204-205). The line to which the air blower was connected was a natural gas line (Ex. 5; Tr. 207-208, 209-210).

37. An investigation after the explosion disclosed that an air hose leading into the tower had been connected to a natural gas line (Tr. 49).

38. The natural gas had no odor (Tr. 252, 253).

39. Huey Cantrell went inside tower A-103 on three occasions on August 12, 1976, prior to the explosion (Tr. 65-68). He detected no unusual odors (Tr. 73).

40. Sutton detected the same odor in tower A-103 from the time the job commenced on August 9, 1976, to the time the explosion occurred on August 12, 1976 (Tr. 43).

41. A short time prior to the explosion, Sutton returned to the vicinity of tower A-103 to talk with Huey Cantrell. While Sutton was talking with Cantrell, Carl Dagreport walked up and informed him that he smelled gas in tower A-103 (Tr. 29-31). During the time Dagreport was talking with Sutton, the internal explosion occurred inside tower A-103 (Tr. 30-31, 42, 44). The explosion occurred around 7:30 p.m. (Tr. 44).

42. Prior to Dagreport informing Sutton that he smelled gas inside tower A-103, Sutton had received no complaints from employees about gas being inside the tower (Tr. 32).

43. There is a recognized hazard to employees working in a tower, such as tower A-103, with natural gas in it (Tr. 209 - Stipulated by parties).

44. Tenneco had safety personnel at the site and made the decision as to when it was safe for employees to work inside the tower (Tr. 33-34, 36, 275).

45. Tenneco did not permit employees of respondent to work within its plant facilities until its safety personnel checked to see that it was safe to work in the area (Tr. 34, 36, 275).

46. Respondent relied upon Tenneco and did not consider it necessary to hire a safety specialist to check behind Tenneco safety personnel to see if they were accurate in their job (Tr. 34).

47. Respondent had no safety director or personnel at the Tenneco site from August 9 through August 12, 1976 (Tr. 33). Sutton was responsible for the safety of respondent's employees at the site (Tr. 33-34).

48. Respondent had no equipment at the site to test for gas inside the tower (Tr. 81).

49. Respondent's superintendents were responsible to the Tenneco maintenance superintendent (Tr. 273).

50. A heavy sulfur smell was present on the morning of August 13, 1976, when the compliance officer commenced his investigation (Tr. 245).

51. Tenneco personnel installed all lighting systems used by respondent inside tower A-103. Respondent's superintendent requested the lights from the appropriate Tenneco official and that official sent personnel to install the lights (Tr. 25-26, 69, 183, 188, 275-276). Respondent employed no electricians at the site (Tr. 276) and had no authority to modify the

electrical system installed for it by Tenneco personnel (Tr. 279).

52. Tenneco used 32-volt transformers to supply the lighting for the inside of tower A-103 (Tr. 184, 185-186, 194, 195, 197).

53. Two drop cord lights were being used by respondent's employees inside the tower on August 12, 1976, at the fifth level (Tr. 125-126, 144, 180, 183, 188, 198). One of the drop cord lights on the fifth level was 110 volts (Tr. 189-191, 196, 200).

54. Sutton was aware of the type of lighting being used inside the tower. He assumed the lights were 12 volts. He did not look to see if the drop lights contained more than 12 volts (Tr. 26-27).

55. Respondent's day superintendent, Jesse Jenkins, went into tower A-103 on an average of two to three times a day but never undertook to ascertain the amount of voltage being used for the lights. The transformers were located outside the tower on the manways (Tr. 277, 281-283). He observed the transformers and assumed that there was some reduction in the voltage but never inquired about it (Tr. 296).

## OPINION

This case emanates from an explosion occurring on August 12, 1976, in a vessel known as tower A-103 at the Tenneco refinery located at Chalmette, Tennessee. The explosion occurred because a Tenneco employee inadvertently connected up an air hose to a natural gas line and then directed the flow of gas into the tower. He had been instructed to hook up an air blower in order to get more air circulation inside the tower.

Respondent had employees working at the four top levels within the tower and Tenneco employees were working the lower levels. Tenneco

employees were removing warped trays inside the tower, and respondent's employees were replacing the trays that had been removed. As a result of an investigation conducted of the explosion, respondent was issued two serious citations alleging violations of section 5(a)(1) and 5(a)(2) of the Act. The alleged 5(a)(2) violation resulted from the failure to comply with the safety standard published at 29 C.F.R. § 1926.401(j)(4).

I. Alleged Violation of Section 5(a)(1)

Complainant alleges that respondent violated section 5(a)(1)[1/] of the Act by not allowing employees exposed to dangerous concentrations of flammable vapors inside tower A-103 to leave the hazardous area immediately and remain clear until the tower had been determined to be safe for re-entry.

In order to establish a serious violation of section 5(a)(1) of the Act, complainant must prove: (1) that respondent failed to render its workplace free of a hazard; (2) the hazard was "recognized" and (3) it caused or was likely to cause death or serious physical harm. National Realty & Construction Co., Inc. v. O.S.H.R.C., 489 F.2d 1257, 1264 (D.C. Cir. 1973). See also American Smelting & Refining Co. v. O.S.H.R.C., 501 F.2d 504 (8th Cir. 1974); Brennan v. O.S.H.R.C. & Vy Lactos Lab, Inc., 494 F.2d 460 (8th

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1/ Section 5(a)(1) of the Act reads as follows:

> "Each employer—
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;"

Cir. 1974). Section 5(a)(1) only requires an employer to discover and exclude from the workplace preventable hazards. Getty Oil Company v. O.S.H.R.C. and Dept. of Labor, 530 F.2d 1143 (5th Cir. 1976).

The explosion and subsequent death of several employees are uncontroverted evidence that the workplace was not free of a hazard that was likely to cause death or serious physical harm. When these facts are construed with the stipulation of the parties that the natural gas in the tower was a recognized hazard, it would appear that a section 5(a)(1) violation has been established. However, it is clear that Congress did not intend to punish an employer for what he had no reason to know was a dangerous situation. Knowledge of the existence of a violation is an essential element of any violation determined under the Act. Mountain States Telephone & Telegraph Co., 73 OSAHRC 1/A9, 1 BNA OSHC 1077, 1971-1973 CCH OSHD ¶ 15,365 (1973). "Therefore, the evidence must establish that respondent knew or, with the exercise of reasonable diligence, should have known of the existence of the violation." North American Rockwell Corp., 75 OSAHRC 43/A6, 2 BNA OSHC 1710, 1974-1975 CCH OSHD ¶ 19,464 (1975), aff'd 540 F.2d 1283 (6th Cir. 1976).

Prior to employees of respondent entering tower A-103, employees of Tenneco's safety department had conducted tests for gas within the tower. The tests indicated the tower was safe to work within and a tag was placed at the bottom manway indicating that it was safe for employees. Tenneco's safety personnel made daily checks for the possibility of gas within the tower. These tests were made for the protection of its own employees as well as those of respondent since both of them had employees working within the tower.

Respondent was not permitted by Tenneco to work in any areas of its facilities until Tenneco safety personnel had checked to see that the area was safe. There is no evidence to indicate that Tenneco's safety personnel were not qualified to conduct the testing within the tower in a competent manner. There was no reason for respondent to duplicate the work of Tenneco's safety personnel since it had no reason to assume that Tenneco would expose its own employees in the tower to a hazard. Respondent was entitled to assume that the test results were accurate and was not abdicating its responsibililty to its employees by relying on Tenneco personnel. The fact that Tenneco safety personnel performed the testing is similiar to respondent employing a competent third party to perform testing before it permitted its employees to work within the tower. If a competent third party had been employed by respondent to do the testing, complainant certainly would not argue that respondent had abdicated its responsibility to its employees. Since no evidence was presented to show that Tenneco personnel were incompetent to make judgments as to the working conditions within the tower, respondent was entitled to rely upon the judgment of Tenneco personnel.

Respondent's employees commenced work inside the tower on August 9, 1976. Richard Sutton, respondent's night-shift foreman, checked all the lines going into the tower on August 9, 1976, to insure that there was no gas leaking into the tower. Sutton found that Tenneco personnel had inserted plates in all the pipes to block off any flow of gas into the tower. The inspection of the pipes by Sutton and the fact that the tower had been tagged safe were certainly sufficient for him to conclude that it was safe

for his personnel. One must also bear in mind that employees of Tenneco had commenced working in the tower on August 6, 1976, which was the Friday prior to respondent's employees commencing on the following Monday. Tenneco personnel had worked inside the tower at least one full day prior to respondent's employees commencing work. Respondent was obviously aware of this fact. Some trays had to be removed prior to respondent being able to accomplish the job for which it was hired.[2/]

No problems arose on the job on August 9, 10 and 11, 1976. Sometime around 7:00 p.m. on August 12, 1976, Mike Cantrell, an employee of respondent, thought he detected an unusual odor in the tower. He discussed the matter with his co-workers and discovered that they were all a little dizzy. They walked out of the tower onto the catwalk. Mike Cantrell then decided to leave his work station and go talk to his father about the condition. He descended the tower and sought out Huey Cantrell (his father), who was the night-shift boilermaker foreman. In the process of looking for his father, Mike Cantrell encountered Frank Davis, the union steward. He informed Davis that he and his co-workers smelled fumes inside the tower and had gotten dizzy. Just prior to encountering Cantrell, Davis had been advised by workers at the top of the tower that they smelled gas.[3/] At the time he encountered Mike Cantrell, Davis was also looking for Huey Cantrell to inform him of the existing conditions.

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2/ Respondent was hired to replace the trays as they were removed by Tenneco personnel.

3/ The record does not indicate who informed Davis that they smelled gas.

Mike Cantrell approached his father and Davis followed him. Huey Cantrell was talking with George Verger, superintendent for Tenneco, at the time his son approached him. There is some confusion as to exactly what Mike Cantrell told his father. In a statement given to the compliance officer on January 7, 1977 (Ex. 7), he stated he informed his father that he and the other employees had become dizzy. However, during the trial he testified that he informed his father that they smelled fumes and that he failed to mention the fact that they were dizzy. He testified that he had met Frank Davis, the union steward, prior to approaching his father and had informed him that he and his co-workers were lightheaded or dizzy. Davis confirms that he and Mike Cantrell met prior to Mike Cantrell reaching his father. The statement makes no reference to his having met and talked with Frank Davis.

The statement given by Mike Cantrell to the compliance officer indicates that he informed his father that he and his co-workers were dizzy; whereas he testified that he mentioned this fact to Frank Davis. It is obvious the statement is incorrect since it does not mention Frank Davis, and Davis confirms that he and Mike Cantrell had a conversation prior to Mike Cantrell talking with his father. Mike Cantrell was seriously injured in the explosion. He spent some 72 days in the hospital and underwent four operations (Tr. 131). It was obviously a painful experience to have to recall the events leading up to the explosion. This Judge was impressed with his demeanor and responses to the questions. His testimony is considered to be truthful and reliable.

Mike Cantrell informed his father that he and his co-workers smelled fumes so bad that they could hardly breathe. Davis informed Huey Cantrell and Verger that other employees had complained of smelling gas. Huey Cantrell and Davis asked Verger about the possible cause of the condition. Verger informed them that the employees were smelling the sulfuric furnace fumes blowing into the area from the nearby heaters and that this condition was not unusual. He informed Cantrell and Davis that there was no way gas could get inside the tower and that the tower was safe for the employees. Verger suggested that Mike Cantrell put another air blower inside the tower.

Huey Cantrell accepted Verger's explanation and told his son to go back to work. Mike Cantrell had no reason to question his father's judgment. The wind was blowing sulfur fumes into the vicinity of the tower and it was difficult to breathe on the outside of the tower. The employees were aware of the strong fumes.[4/] Huey Cantrell had also smelled the sulfuric fumes at the manways up and down the exterior of the tower and surmised that anyone close to the manways might smell the sulfur fumes inside the tower.

The explanation by Verger was also logical from his standpoint. The tower had been tagged as being safe. Plates had been inserted in all pipes to block off any flow of gas into the tower. In addition, the natural gas had no odor. Thus, employees could not have been smelling the natural gas. The

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4/ Mike Cantrell testified that when he returned to the tower the sulfur fumes outside on the catwalk were so strong that it parched his throat. His brother told him that he was going back into the tower because he couldn't stand it outside (Tr. 141).

sulfuric fumes were quite strong and employees were undoubtedly exposed to some of the fumes inside the tower. There is no competent evidence to indicate that Verger or Huey Cantrell were aware that the employees working inside the tower were becoming dizzy.

The explosion was caused by a totally unexpected and unforeseen occurrence. A Tenneco employee inadvertently connected an air blower to a natural gas line. This was not something that Huey Cantrell could have foreseen. He had no indication that there could be any gas in the tower. If he had had such information, it is certain that he would not have instructed his son to go back into the tower. Obviously, he would not have knowingly exposed his sons to such a hazard.[5/] His testimony makes this point quite clear. He testified (Tr. 85-86):

> "Q You might consider this speculative, but I think it is a pertinent question. What would you have done if your son had told you that he felt dizziness or anybody told you that he felt dizzy?
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> A I'd like to make a statement to this Court, since you asked this question, if you don't mind. Your Honor can I make this statement?
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> JUDGE BURROUGHS: Sure.
>
> THE WITNESS: You can believe me, if I had any inkling, anything would have been wrong on that job, I would have grabbed my two kids and got just as far away from it as I could. You can believe that because I have been through, I have got one dead over this and one buried and I have been seven months of living hell since it happened. You can believe, my friend, I would have gotten my boys out of there. I had no idea that there was gas, nowhere in the vicinity even that would cause this kind of disaster."

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5/ Huey Cantrell had one son killed and other son seriously injured as a result of the explosion.

It must also be kept in mind that Huey Cantrell went inside the tower on three occasions prior to the explosion and detected no unusual odors.

Richard Sutton, respondent's night-shift superintendent, was the other supervisory employee of respondent on duty at the time of the explosion. He was in charge of the night shift. He had personally checked the gas lines leading into the tower at the time his employees commenced on the job on August 9, 1976, and found that plates had been inserted in the pipes to block off any flow of gas. When Sutton reported for work on August 12, 1976, he coordinated matters with the day-shift superintendent. He did not go inside the tower at that time but looked inside it to see where the men were working. He noticed the tag on the bottom manway indicating it was safe for personnel to work.

Sometime between 6:00 p.m. and 6:30 p.m., Sutton went inside the tower to check on the progress of the employees. He stopped to talk with each employee and left the tower sometime around 7:00 p.m. He detected no unusual odor in the tower. A short time prior to the explosion, Sutton returned to the vicinity of the tower and conversed with Huey Cantrell. While Sutton was talking with Cantrell, Carl Dagreport walked up and said that he smelled gas in the tower. At about that time the internal explosion occurred. This was the first complaint that Sutton had received about smelling gas in the tower. He had no time in which to take action prior to the explosion.

Complainant alleges that respondent "did not allow employees exposed to dangerous concentrations of flammable vapors to leave the hazardous area immediately." The difficulty with the allegation is that there is no

evidence that anyone in a supervisory position was aware that there were flammable vapors inside the tower. The explosion emanated from a totally unexpected and inadvertent act of a Tenneco employee. The fact that sulfur fumes were blowing into the area and the knowledge that all gas pipes leading into the tower had been blocked undoubtedly led Verger to his conclusion that there was no danger to employees. The employees could not have been smelling gas since it had no odor.[6/] The motion to dismiss the allegation is granted.

II. Alleged Violation of 29 C.F.R. § 1926.401(j)(4)

Complainant alleges that respondent violated 29 C.F.R. § 1926.401(j)(4)[7/] by using portable lighting inside tower A-103 of 120 volts. The standard requires portable lighting inside such a tank or vessel be operated at a maximum of 12 volts. The evidence fully supports the violation.

All lighting inside the tower was installed by Tenneco personnel. Respondent's superintendent requested lights from the appropriate Tenneco official. There is no evidence that any official of respondent specified that the lighting used had to be operated at a maximum of 12 volts. Tenneco used

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6/ The fact that the natural gas had no odor undoubtedly led the Tenneco employee into thinking he was connecting the air blower to an air line. He testified that he opened up the line and air came out (Tr. 204-205).

7/ 29 C.F.R. § 1926.401(j)(4) states:

> "Portable electric lighting used in moist and/or other hazardous locations, as for example, drums, tanks, and vessels shall be operated at a maximum of 12 volts."

32-volt transformers to supply the lighting inside the tower. In addition, at least one drop cord light using 110 volts was being used by respondent's employees.

Respondent argues that it did not have control over the workplace and should not be held responsible for the violation. It relies upon the rationale of the Commission in Anning-Johnson Co., 4 BNA OSHC 1193, 1975-76 CCH OSHD ¶ 20,690 (nos. 3694 & 4409, 1976) and Grossman Steel & Aluminum Corp., 4 BNA OSHC 1185, 1975-75 CCH OSHD ¶ 20,691 (no. 12775, 1976). The difficulty with this argument is that respondent's day-and-night-shift superintendents never requested a 12-volt system and made no effort to ascertain what type of transformer was being used. Respondent's day superintendent, Jesse Jenkins, acknowledged that if he had been aware that the lighting system inside the tower exceeded 12 volts, he could have conversed with the proper Tenneco personnel to get the situation corrected (Tr. 277-278).

The violation has been established.

III. Nature of Violation of 29 C.F.R. § 1926.401(j)(4)

Complainant alleges that the violation of 29 C.F.R. § 1926.401(j)(4) was serious within the meaning of section 17(k) of the Act.[8/] The Commission

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8/ Section 17(k) of the Act states:

> "For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."

has held on numerous occasions that the occurrence of an accident because of an existing hazard in violation of the Act does not have to be substantially probable in order to be classified a serious violation. An accident must simply be possible. Serious and non-serious violations "are distinguished on the basis of the seriousness of injuries which experience has shown reasonably likely to occur." Natkin and Company, 73 OSAHRC 16/E3, 1 BNA OSHC 1204, 1971-1973 CCH OSHD ¶ 15,679 (1973). The probability of an accident occurring is relevant only to the gravity of the violation. See Emory H. Mixon, 73 OSAHRC 57/D11, 1 BNA OSHC 1500, 1973-1974 CCH OSHD ¶ 17,027 (1973).

Employees of respondent were for the most part using lights that operated off a 32-volt transformer. However, at least one drop cord light operated at 110 volts. While there is no evidence that there were moist conditions inside the tower, the use of a 110-volt drop cord light in the tower is considered to be a serious violation. There was danger of a severe electrical shock that could have resulted in death or serious physical injury. Respondent, with the exercise of reasonable diligence, could have discovered the violation.

## IV. PENALTY DETERMINATION

The Commission is the final arbiter of penalties in all contested cases. Secretary v. Occupational Safety and Health Review Commission and Interstate Glass Co., 487 F.2d 438 (8th Cir. 1973). Under section 17(j)[9/]

9/ Section 17(j) of the Act states:

> "The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations."

of the Act the Commission is required to find and give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer and the history of previous violations in determining the assessment of an appropriate penalty. The gravity of the offense is the principal factor to be considered. Nacirema Operating Company, Inc., 72 OSAHRC 1/B10, 1 BNA OSHC 1001, 1971-1973 CCH OSHD ¶ 15,032 (1972).

Respondent had several employees working inside the tower during both shifts. Most of them were apparently using lights operating off of the 32-volt transformers. Only one 110-volt drop cord light was known to be in use. A penalty of $300 is deemed appropriate for the violation.

## CONCLUSIONS OF LAW

1. Respondent, at all times material to this proceeding, was engaged in a business within the meaning of section 3(5) of the Act.

2. Respondent, at all times material to this proceeding, was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of the parties and of the subject matter herein.

3. On August 12, 1976, respondent had employees working in tower A-103 at the Tenneco refinery plant in Chalmette, Louisiana.

4. An internal explosion occurred in tower A-103 on August 12, 1976, as a result of a Tenneco employee inadvertently connecting an air blower to a natural gas line and directing the flow into the tower. Respondent was unaware that natural gas was inside the tower, and previous precautions had been taken to insure that no gas got inside the tower. Respondent was not in violation of section 5(a)(1) for failing to permit its employees to leave the

tower since it was unaware of dangerous concentrations of flammable vapors inside the tower.

5. On August 12, 1976, employees of respondent were utilizing lights operated above the maximum of 12 volts allowed by 29 C.F.R. § 1926.401(j)(4). The violation was serious. A penalty of $300 is assessed for the violation.

## ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, it is

ORDERED: (1) That the serious citation and proposed penalty issued to respondent on September 14, 1976, alleging a violation of section 5(a)(1) of the Act are vacated;

(2) That the serious citation issued to respondent on September 14, 1976, alleging a violation of 29 C.F.R. § 1926.401(j)(4) is affirmed; and

(3) That the penalty proposed for the serious violation of 29 C.F.R. § 1926.401(j)(4) is modified to assess a penalty of $300.

Dated this 21st day of September, 1977.

James D. Burroughs

JAMES D. BURROUGHS
Judge

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

FEB 26 1982

IN REFERENCE TO SECRETARY OF LABOR v.

SNYDER WELL SERVICING, INC.

OSHRC DOCKET NO. 77-1334

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR EMPLOYEES

-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>SNYDER WELL SERVICING, INC.,<br>Respondent. | OSHRC Docket No. 77-1334 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

This case arose when the Respondent, Snyder Well Servicing, Inc. ("Snyder"), contested two citations issued by the Secretary of Labor ("the Secretary"). The citations alleged that Snyder had violated the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), by failing to comply with certain construction safety and health standards in 29 C.F.R. Part 1926. One citation alleged two serious violations of the Act; the other alleged three other than serious violations. Snyder contested all five items. In his complaint, the Secretary amended four of these items to allege, in the alternative, noncompliance with general industry standards in 29 C.F.R. Part 1910.

Administrative Law Judge Harold O. Bullis held a hearing and concluded that the construction standards do not apply to oil well servicing. He applied the alternatively pleaded general industry standards and vacated both serious items and two of the other items. The Secretary petitioned for review of that decision. Commissioner Cottine directed review under section 12(j) of the Act, 29 U.S.C. § 661(i), on the issues raised by the petition, including:

1. Whether the Judge erred in concluding that the construction standards published at 29 C.F.R. Part 1926 are inapplicable to the oil well servicing industry.

2. Whether the Judge erred in vacating Serious Citation No. 1, item 1, because "the Secretary failed to prove the existence of conditions requiring respiratory equipment."

3. Whether the Judge erred in vacating Serious Citation No. 1, item 2 alleging noncompliance with 29 C.F.R. § 1926.251(c)(5).

4. Whether the Judge erred in vacating Citation No. 2, item 1, as amended, alleging noncompliance with 29 C.F.R. § 1926.50(c) or 29 C.F.R. § 1910.151(b) in the alternative.

5. Whether Citation No. 2, item 2, should be amended under Fed. R. Civ. P. 15(b) to allege noncompliance with 29 C.F.R. § 1910.157(a)(1).

I

A

The first issue to be resolved is whether the construction standards in Part 1926 have been shown to applv. We conclude that they have not.

The facts are generally undisputed. Four employees of Snyder were working near Pleasanton, Texas at the site of a newly-drilled oil well owned by Mercury Production Company ("Mercury"). Snyder had been engaged to swab the well. At the time of the inspection the well was not in production and completion operations were being performed.

Swabbing is a process by which materials clogging a well are removed. To accomplish this, a swab on the end of a wire line is dropped into the well bore and then pulled out. The swab has valves which open when it is descending and close when it is pulled upward, catching the materials to be removed above the swab when it is pulled up.

Before Snyder arrived at the site, drilling had been completed and the drilling derrick had been removed from the site. Snyder erected its own "service rig," a telescoping derrick mounted on a mobile base. When the service rig was

brought to the well, the base was blocked, guy wires were used to anchor the rig to the ground, and the derrick was telescoped upwards.

B

In his decision Judge Bullis relied on unreviewed decisions by other administrative law judges which held that the construction standards do not apply to the oil and gas drilling industry. The judge reasoned that if the construction standards do not apply to well drilling they are "clearly . . . not applicable to [the] well servicing industry." He therefore vacated the serious item for which there was no general industry standard alternatively pleaded and considered the remaining four items under the alternatively pleaded general industry standards.

The Secretary argues that the judge erred and that Snyder was engaged in "construction." The Secretary asserts that the drilling of an oil well is not a simple process but includes erecting a derrick, lining the hole with casing, excavating, welding, plumbing and other processes used in construction. The Secretary argues that these activities bring oil well drilling within the definition of construction work. The Secretary further argues that swabbing "is an integral part of the complicated process of constructing an oil well" and is therefore covered by the construction standards, too.

Snyder asserts that whether drilling an oil well may be classified as construction is not the issue because swabbing is completely different from drilling. Snyder claims that swabbing is done whenever the well becomes clogged and that this may occur at any time in the life of an oil well. Snyder argues that, even if drilling is considered to be construction, swabbing is no more part of the construction process than is cleaning the boiler in a factory. The fact that well servicing includes the use of derricks and occurs on temporary worksites does not make it construction work, Snyder asserts, because there are

general industry standards that cover derricks and many of the general industry standards in Part 1910 govern temporary work situations. Snyder also argues that the servicing derricks are not constructed at the well site but are telescoping, mobile units specially mounted on a truck-like chassis. No bolting, welding, or nailing is required to erect them, and they are simply lowered when the work is completed and driven away.

C

The burden of proving the applicability of the cited standards to worksite conditions is on the Secretary. United Geophysical Corp., 81 OSAHRC 77/D6, 9 BNA OSHC 2117, 2121, 1981 CCH OSHD ¶ 25,579, p. 31,906 (No. 78-6265, 1981); Belger Cartage Service, Inc., 79 OSAHRC 16/B14, 7 BNA OSHC 1233, 1235, 1979 CCH OSHD ¶ 24,412, p. 23,440 (No. 76-1480, 1979). We find here that the Secretary has failed to carry that burden. Under 29 C.F.R. §§ 1910.12(a) and (b) the construction standards in Part 1926 apply to "work for construction, alteration, and/or repair, including painting and decorating." We have construed these provisions to mean that Part 1926 applies only to employers who are actually engaged in construction work or who are engaged in operations that are an integral and necessary part of construction work. United Geophysical Corp., 9 BNA OSHC at 2121, 1981 CCH OSHD p. 31,905. We agree with Snyder that swabbing was not shown to be either construction work by itself or to be integrally related to oil well drilling. We therefore need not reach the more general question of whether oil well drilling is construction work.

We are not persuaded by the Secretary's argument that the erection of a derrick brings Snyder's swabbing activities within the definition of construction work. We are unconvinced that Part 1926 was intended to regulate the erection of this derrick. Moreover, that some derricks are governed by standards in Part 1926, 29 C.F.R. §§ 1926.550 and 1926.952(c), is of little weight,

since, as Snyder points out, there are also standards in Part 1910 governing derricks. See 29 C.F.R. § 1910.181.

We are also unconvinced that swabbing is itself construction work or that it is integrally related to oil well drilling. None of the standards in Part 1926 mentions swabbing; and Snyder credibly represents that swabbing may be done years after a well is drilled and has begun production. In this case, well drilling had been completed. That swabbing is performed at a remote, temporary location is significant, but it is not controlling. As Snyder points out, many of the standards in Part 1910 also govern such situations. We therefore conclude that Part 1926 has not been shown to apply here.

II

The judge vacated item 2 of citation 1, which alleged noncompliance with 29 C.F.R. § 1926.251(c)(5). No alternative general industry standard from Part 1910 was pleaded, and Judge Bullis vacated that item. Because we have held that the construction standards do not apply to Snyder's operations, we affirm the judge's vacation of that item. We shall examine the remaining items under the alternatively pleaded standards in Part 1910.

A

Item 1 of the serious citation alleged that Snyder did not have appropriate respiratory protective equipment at the well site for use in emergency situations. The Secretary alleges that Snyder thereby violated 29 C.F.R. §§ 1910.132(a) 2/

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2/ Section 1910.132(a) provides:

General requirements.

(a) Application. Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained

(Footnote cont'd)

and 1910.134(a)(2). 3/ It is the Secretary's view that the well was located in a geological area known to produce hydrogen sulfide gas ("$H_2S$"), which is toxic, and that the absence of respiratory equipment could be harmful to Snyder's employees if $H_2S$ were encountered during the swabbing.

The compliance officer who conducted the inspection had 33 years of experience in oil and gas production as an engineer for a major oil company. He had helped develop safety standards for oil well drilling operations, had worked in oil fields with $H_2S$ and had investigated accidents involving it. He testified that some wells in the geological formation where this well was located had been known to produce $H_2S$ and that there were numerous "Dangerous, Poisonous Gas" signs in the area. He testified that there was no $H_2S$ detector at the well site to warn the employees if $H_2S$ were encountered and that, in high concentrations, $H_2S$ can deaden the sense of smell.

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(Footnote 2 cont'd)

> in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

3/ Section 1910.134(a)(2) provides:

> Respiratory protection.
>
> (a) Permissible practice.
>
> * * *
>
> (2) Respirators shall be provided by the employer when such equipment is necessary to protect the health of the employee. The employer shall provide the respirators which are applicable and suitable for the purpose intended. The employer shall be responsible for the establishment and maintenance of a respiratory protective program which shall include the requirements outlined in paragraph (b) of this section.

The compliance officer predicated his opinion that respiratory protection was necessary on the danger that $H_2S$ would be released by the swabbing. Although he tested for $H_2S$ himself and found only trace amounts, he testified that his failure to find large concentrations of the gas did not mean that there was no $H_2S$ in the well. The compliance officer explained that the pressure caused by material in the bore would hold down $H_2S$ and that the removal of much of this material during swabbing could release $H_2S$. He opined that, because the well was located in an area known to produce $H_2S$, a prudent employer would have protective equipment available.

Mr. Melville, an employee of the Texas Railroad Commission, testified that Mercury had filed an application for a drilling permit with that Commission. In that application, Mercury indicated that it anticipated encountering $H_2S$ in quantities up to 25,000 parts per million. Mr. Melville testified that he personally knew that some wells in the area had produced $H_2S$ in excess of 25,000 parts per million and that such a concentration can be lethal. He expressed the opinion that respiratory protection should be at the site, based on the possibility that $H_2S$ could be encountered in such a concentration.

The safety director for Texas International Company, Snyder's parent company, Mr. Cullifer, testified that before one of his companies will work on a well it requires the owner of the well to determine from drilling records and tests whether protective equipment is necessary. Mr. Cullifer testified that Texas International received a report from Mercury that, in his words, stated that "the amount of hydrogen sulfide gas that they expected to be encountered at this location was nil."

The well had a casing head and a flow line to a holding pit to catch any oil or gas produced. On both there were valves that could be closed if any $H_2S$ were released. Mr. Cullifer testified that, in his opinion, these valves consti-

tuted adequate safety precautions, especially in view of the negative results of the earlier tests.

The compliance officer, on the other hand, testified that the valves were not adequate protection because the flow line could release $H_2S$ into the atmosphere. In order to shut the well down completely, he testified, the swab would have to be removed from the well or cut loose at the well head. He also stated that Snyder's employees could be exposed to the gas while they were putting on new swab rubbers. To perform that task they would have to open fittings at the top of the bore tubing; and gas in the bore could escape there. He also testified that back-up equipment should be available in case a valve was inadvertently opened or failed to shut, or a line failed.

A former employee of Mercury who had worked on the well testified that an $H_2S$ detection device was used during the drilling and never indicated the presence of any $H_2S$. He stated that it was normal procedure to notify the well servicing company if $H_2S$ was detected. Ten days before the inspection, Mercury had circulated gas and oil off the bottom of the well and no $H_2S$ had been found.

B

Judge Bullis vacated this item. He found that the Secretary had not proved that conditions existed requiring respiratory equipment because the evidence did not establish a hazard. He found that if $H_2S$ were encountered the engineering controls provided adequate protection because the valves could be closed. The judge stated that, unlike many safety standards, neither section 1910.132(a) nor section 1910.134(a)(2) presumes a hazard, so the Secretary must prove the existence of a hazard necessitating protective equipment. He found that, although the evidence showed that a hazardous condition might develop during the swabbing, it did not prove that a hazard existed.

The Secretary argues that the judge's conclusion that an actual hazard must be shown is contrary to the intent of both the standards and the Act: to prevent harm from occurring. The Secretary contends that the realistic possibility that a dangerous situation might occur establishes the existence of a potential hazard, triggering the need for protective equipment to be provided. He argues that an employer cannot be allowed to wait until his employees are actually exposed to poisonous gas before he provides protective equipment.

The Secretary further argues that the judge erred in finding that the engineering controls were adequate, because hydrogen sulfide is not likely to be detected in time, and, if it were detected, the valves could probably not be shut in time to prevent harmful exposure to the gas.

Snyder, on the other hand, argues that the valves provided adequate protection because the well could not release the gas directly into the air and the fluid raised by the swab would go directly to the disposal pit 30 to 60 feet from the bore. Snyder argues that the evidence does not prove that it was realistically possible for a hazardous situation to occur, and asserts that it would place an impossible burden on industry to require that protective equipment be provided any time there is any possibility of a hazard occurring, no matter how remote that possibility is.

Snyder argues that section 1910.132(a) does not apply because it sets out general requirements for personal protection, and that respiratory protection is governed by the more specifically applicable section 1910.134. Snyder argues that section 1910.134 must be read as a whole and that such a reading shows that engineering controls are the preferred means of protection. Snyder contends:

> Nowhere does the Standard mention emergency situations or situations in which the engineering controls might fail. This section was intended to cover operations in which employees were exposed to long-term, disease causing effects of air contaminates. By the language of this section, respirators are required only in situations where engineer-

> ing control of the contaminates is not feasible or while these controls are being installed. Neither situation is presented in this case.

Snyder argues that it was not in violation because effective engineering controls were in place on the well and could be operated within a second or two. Snyder also argues that it has no duty to provide respirators unless the Secretary shows exposure to concentrations of air contaminants above the threshold limit value ("TLV") specified for the substance in question. Finally, Snyder argues that its employees were not shown to have been exposed to any hazard and that such a showing is necessary in order to prove a violation of section 1910.134.

C

At the outset, we find that section 1910.134 is more specifically applicable to the facts of this case than is section 1910.132(a). Under section 1910.5(c), therefore, we consider the alleged violation under the more specifically applicable standard. See Granite Groves, A Joint Venture, 77 OSAHRC 28/B12, 5 BNA OSHC 1100, 1977-78 CCH OSHD ¶ 21,594 (No. 10677, 1977). We do not agree with the judge that the item should be vacated in its entirety, however. We reverse the judge and find noncompliance with section 1910.134(a)(2).

We do not agree with Snyder's argument that the duty to provide respirators arises only when the TLV for a dangerous substance is exceeded. If a sudden excursion above the TLV occurs, employees cannot be left unprotected, for section 1910.134(a)(2) requires that respirators be provided "when such equipment is necessary to protect the health of the employee." Moreover, other provisions of section 1910.134 indicate that sudden excursions are to be anticipated and that the standard imposes a duty to take precautions against emergencies even before a TLV is exceeded. See section 1910.134(b)(7) (respirators to be available "for emergency use"); section 1910.134(e)(3) (procedures required for use of respirators in emergencies). To adopt Snyder's argument would mean that no matter how

great the likelihood of an emergency, an employer is not required to take even elementary precautions until it is too late. That would be contrary to the purpose of section 1910.134 and to the preventive purpose of the Act.

Under the circumstances of this case, we find that respirators were necessary in order to protect the health of the employees. Hydrogen sulfide gas may be present but not detected. A large concentration could kill very quickly, and such concentrations had been found in the area. Mercury expected to encounter high levels of $H_2S$. The evidence shows that there was a risk that $H_2S$ would be released by or during the swabbing. If that occurred, it might be too late to send for respirators. The risk of encountering toxic gas at levels above the TLV makes respirators "necessary."

We disagree with the judge's finding that the engineering controls made respirators unnecessary. The $H_2S$ detector on the drilling rig had been removed when that rig was taken away. There was no means on the well site to detect $H_2S$ other than by smelling it. However $H_2S$ deadens the sense of smell, and the employees might therefore have insufficient warning of the presence of $H_2S$. The record shows that the employees must open the well head to change the rubbers on the swab; if $H_2S$ were present, it could then be released. The valve at the bore head is one of the two places where the gas might escape, so an employee trying to close that valve or to cut loose the swab in order to close down the well would have to work very close to the escaping $H_2S$.

We also reject the interpretation of section 1910.134 urged by Snyder, which would require protection only when employees are exposed to disease-causing air contaminants over an extended period of time. Section 1910.134 (a)(1) refers to "air contaminated with harmful . . . gases." $H_2S$ is a harmful gas that can kill in a short time. Although section 1910.134 does state that engineering controls to prevent atmospheric contamination are preferred, it also

requires that respirators be provided "when . . . necessary to protect the health of the employee." To the extent that engineering controls do not afford adequate protection or are not used, respirators must be used. See Todd Shipyards Corp., 81 OSAHRC _____, 9 BNA OSHC 2031, 1981 CCH OSHD ¶ 25,516 (No. 77-2545, 1981).

Accordingly, we find that Snyder's failure to provide this protection to its employees constitutes a violation of section 5(a)(2) of the Act. We also find that the violation was serious within the meaning of section 17(k) of the Act, 29 U.S.C. § 666(i), because death could result if employees who lacked respirators were exposed to $H_2S$.

III

A

Item 1 of citation 2 alleged that Snyder had failed to comply with section 1926.50(c), 4/ or, in the alternative, with section 1910.151(b). 5/ The general

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4/ Section 1926.50(c) provides:

Medical services and first aid.

* * *

(c) In the absence of an infirmary, clinic, hospital, or physician, that is reasonably accessible in terms of time and distance to the worksite, which is available for the treatment of injured employees, a person who has a valid certificate in first-aid training from the U.S. Bureau of Mines, the American Red Cross, or equivalent training that can be verified by documentary evidence, shall be available at the worksite to render first aid.

5/ Section 1910.151(b) provides:

Medical services and first aid.

* * *

(b) In the absence of an infirmary, clinic, or hospital in near proximity to the workplace which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid. First aid supplies approved by the consulting physician shall be readily available.

industry standard requires that someone on the site be "adequately trained to render first aid" if there is no medical treatment facility "in near proximity to the workplace." The construction standard requires that a person at the site have a certificate in first aid training.

The compliance officer inquired whether anyone on the site had a valid first aid training certificate. He determined that no Snyder employee had a certificate but that an employee of another company at the site had one. That individual left about four hours before Snyder finished work for the day, however. The compliance officer testified that he asked the rig operator, who was in charge of Snyder's crew at the time of the inspection, whether any Snyder employee was trained in first aid; the compliance officer testified that "I got no information that there was." The compliance officer later spoke with the tool pusher, who was the supervisor of Snyder's crew. He had not been present during the inspection. When the compliance officer described the conditions he had found, the tool pusher never indicated that any of Snyder's employees had had first aid training. Instead, he told the compliance officer that Snyder "would get one trained."

B

The judge vacated the citation. He found that the evidence showed that no Snyder employee had the certificate required by the standard in Part 1926, but that did not necessarily prove that no employee was "adequately trained to render first aid," which is all section 1910.151(b) requires.

Snyder argues that the judge was correct, that the compliance officer inquired only about a certificate, not first aid training, and that the Secretary failed to carry his burden of proving that there was no one on the site who had adequate training. The Secretary argues that the compliance officer's testimony is sufficient to establish a violation in the absence of any affirma-

tive evidence that one of the employees had had first aid training. The Secretary would have us draw an adverse inference from Snyder's failure to state that someone at the site had first aid training.

C

We agree with Judge Bullis that the Secretary has failed to carry his burden of demonstrating that nobody on the well site had been adequately trained in first aid. We agree with the judge that a finding that no Snyder employee was trained in first aid would be conjectural. The compliance officer testified that he usually questioned whether a certificated person was at the site, not merely whether an adequately trained person was at the site. While the silence of Snyder's employees is suggestive, it does not sufficiently support the inference that the Secretary would have the Commission draw. Therefore we affirm the judge's disposition.

IV

A

The final item on review is item 2 of citation 2. That item originally alleged noncompliance with 29 C.F.R. § 1926.150(c)(1)(viii). 6/ The complaint amended the citation to add the alternative allegation of noncompliance with

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6/ Section 1926.150(c)(1)(viii) provides:

> Fire protection.
>
> * * *
>
> (c) Portable firefighting equipment--
> (1) Fire extinguishers and small hose lines.
>
> * * *
>
> (viii) Portable fire extinguishers shall be inspected periodically and maintained in accordance with Maintenance and Use of Portable Fire Extinguishers, NFPA No. 10A-1970.

§§ 1910.157(d)(2) and (3) (1976), 7/ which require inspection of each extinguisher at least monthly and maintenance at least annually. In his petition for review, the Secretary abandoned the alternative section 1910.157(d)(2) and (3) allegations and moved to amend the pleadings under Federal Rule of Civil Procedure 15(b) 8/ to allege noncompliance with section 1910.157(a)(1) (1976). 9/ The issue directed for review was whether the citation should be so amended.

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7/ These provisions have subsequently been revised and recodified at 29 C.F.R. §§ 1910.157(e) (1981). See 45 Fed. Reg. 60704 (1980).

8/ Rule 15(b) provides:

> Amended and Supplemental Pleadings.
>
> * * *
>
> (b) AMENDMENTS TO CONFORM TO THE EVIDENCE. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

9/ This standard has subsequently been revised and recodified at 29 C.F.R. §§ 1910.157(c)(4) (1981). See 45 Fed. Reg. 60704 (1980). The standard in effect when the citation was issued provided:

> Portable fire extinguishers.
>
> (a) General requirements--(1) Operable condition. Portable extinguishers shall be maintained in a fully charged and operable condition, and kept in their designated places at all times when they are not being used.

The compliance officer testified that he observed a fire extinguisher whose safety pin had been pulled. When he investigated, he found that the gauge indicated that the extinguisher was not fully charged. He testified that Snyder's rig operator agreed to get a fully charged extinguisher on his next trip to the office. Mr. Cullifer testified on behalf of Snyder that the company's practice was to have one extinguisher ready for immediate use at all times and that pulling the pin is part of making the extinguisher "ready."

Judge Bullis vacated the citation. He found that the Secretary had not proved a violation of section 1910.157(d) because the Secretary had not established that Snyder did not inspect the extinguisher as required by that standard. From the evidence, the judge said, it was possible that the pin could have been removed and the extinguisher discharged after the extinguisher had had its monthly inspection.

The Secretary asserts that the evidence establishes that Snyder failed to maintain the extinguisher in a fully charged and operable condition as required by section 1910.157(a)(1). Snyder does not address the issue directed for review, whether the citation should be amended to allege noncompliance with section 1910.157(a)(1). Snyder instead argues that the judge correctly found that the Secretary had failed to prove a violation of section 1910.157(d).

B

Chairman Rowland votes to vacate this item. He would deny the motion to amend for the reasons stated in his separate opinion.

Commissioner Cleary also votes to vacate this item, but his reasons are different from Chairman Rowland's. In Mr. Cleary's view, even if the motion to

amend is granted, a violation has not been proven. The standard requires that portable fire extinguishers be maintained in a fully charged condition. Under Schundler Co., 78 OSAHRC 9/E14, 6 BNA OSHC 1343, 1978 CCH OSHD ¶ 22,508 (No. 15548, 1978), our inquiry is whether the employer's maintenance of the extinguishers was adequate. Mr. Cleary finds insufficient evidence that Snyder's maintenance efforts were deficient. He therefore votes to vacate this item. Accordingly, item 2 of citation 2 is vacated.

Commissioner Cottine would permit the amendment and find a violation. Accordingly, he dissents from the disposition of this item. Commissioner Cottine notes that: (1) the parties have tried all material facts; (2) Snyder makes no claim of prejudice; and (3) Snyder has not objected to the amendment even though the issue was specifically directed for review. Accordingly, the amendment is proper. See Mississippi Power & Light Co., 79 OSAHRC 109/D12, 7 BNA OSHC 2036, 1980 CCH OSHD ¶ 24,146 (No. 76-2044, 1979) and cases cited. Commissioner Cottine concludes that the Secretary has established a prima facie violation of section 1910.157(a)(1). The evidence establishes that the gauge showed less than a full charge. In the absence of evidence to the contrary, this is sufficient to establish that the extinguisher was not fully charged. Cf. Alpha Poster Service, Inc., 76 OSAHRC 141/B8, 4 BNA OSHC 1883, 1976-77 CCH OSHD ¶ 21,354 (No. 7869, 1976)(label on a container is presumed to identify contents accurately). Snyder has neither rebutted the Secretary's showing nor introduced any evidence to support its conjectural argument that the gauge might have been defective.

Furthermore, the term "maintained" in section 1910.157(a)(1) requires that portable fire extinguishers be continuously kept or preserved in a fully charged and operable condition. The term does not refer to an affirmative act of maintenance. The duty to perform maintenance on fire extinguishers is imposed by section 1910.157(d)(3) (recodified at 29 C.F.R. § 1910.157(e)(3), see note 7 supra) and is separate and distinct from the duties imposed by section 1910.157 (a)(1). Accordingly, Commissioner Cottine would overrule the erroneous interpretation of section 1910.157(a)(1) in Schundler Co., supra, and affirm the citation.

V

The Secretary proposed a penalty of $240 for the respirator violation. The compliance officer testified that Snyder employs about 150 people in all, that Snyder had an "average" safety program, that Snyder had no record of prior violations, and that Snyder officials were cooperative during the inspection. Snyder's safety program was described in detail by Mr. Cullifer and was evidenced by an exhibit Snyder introduced. We find the penalty proposed by the Secretary to be appropriate.

Accordingly, we affirm a serious violation of the Act for failure to comply with section 1910.134(a)(2) and assess a penalty of $240.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: FEB 26 1982

ROWLAND, Chairman, concurring in part and dissenting in part:

I concur in the majority's determination in Part I of the lead opinion that swabbing has not been shown to be "construction work," and in its disposition of the first aid item in Part III. While I join in the finding in Part II of the lead opinion that section 1910.134(a)(2) is more specifically applicable to the respirator item than section 1910.132(a), I dissent from the affirmance of the item. Finally, I concur with Commissioner Cleary only in the disposition of the fire extinguisher item; I would not reach the question of whether Snyder complied with section 1910.157(a)(1) because I would deny the Secretary's motion to amend to that standard.

I

Section 1910.134(a)(2) states that respirators are to be provided "when such equipment is necessary to protect the health of the employee." The majority finds that the Secretary has shown that respirators were "necessary" within the meaning of this standard. I disagree for the reasons that follow.

Section 1910.134(a)(2) provides no guidance to employers as to when a respirator "is necessary." Because the phrase "when such equipment is necessary to protect the health of the employee" in section 1910.134(a)(2) is no more specific than the similar phrase "whenever it is necessary by reason of hazards" in section 1910.132(a), I would require the Secretary to make the same showing under section 1910.134(a)(2) of when protection is "necessary" that he must make under section 1910.132(a). Under section 1910.132(a), the Commission's test of whether protection is "necessary" is "whether a reasonable person familiar with the circumstances surrounding an allegedly hazardous condition, including any facts unique to a particular industry, would recognize a hazard warranting the use of protective equipment." Owens-Corning Fiberglas Corp., 79 OSAHRC 26/D6, 7 BNA

OSHC 1291, 1295, 1979 CCH OSHD ¶ 23,509, p. 28,491 (No. 76-4990, 1979), aff'd on other grounds, 659 F.2d 1285 (5th Cir. 1981). This has not been shown here. 10/

Section 1910.134(a)(2) states that a respirator be provided only when it "is necessary" to protect an employee. At the time the alleged violation occurred, there were not excessive levels of hydrogen sulfide gas. While I share the majority's concern that employees be protected in advance of actual exposure to a hazardous concentration of a toxic substance, more substantial proof than a vague "risk" of excessive exposure is required to impose this obligation on an employer. A violation of section 1910.134(a)(2) cannot be premised solely upon unsubstantiated speculation that exposure to excessive levels of toxic gas was possible.

The majority makes no finding that a reasonable person familiar with the circumstances would have recognized that Snyder's employees were exposed to a hazard warranting the provision of respirators. Indeed, the record would not support such a finding. Although both the compliance officer and Mr. Melville both gave their opinions that it would have been prudent under the circumstances to have respirators available, these merely personal views are unsupported by the evidence.

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10/ The court of appeals decision in Owens-Corning held that to show that a reasonable person would have recognized the presence of a hazard making the use of protection necessary, the Secretary must show either that it is the custom and practice in the industry to provide protective equipment or that the employer has actual knowledge that the condition was hazardous. 659 F.2d at 1288. Assuming I were to apply the court's test for determining whether a hazard exists in this case, there is no evidence here that it is the practice of the well servicing industry to provide respirators at wells during the swabbing process where no significant amount of $H_2S$ has been encountered during drilling, nor does the record show that Snyder had either actual knowledge or reason to believe that there was $H_2S$ in the well in sufficient quantity to be dangerous. Indeed, the compliance officer agreed that the valves on the well were the type customarily used. However, inasmuch as I find that the Secretary failed to make the showing required by the Commission's Owens-Corning test, it is not necessary to consider here whether the Commission's test is correct.

Mr. Melville could testify only that the well owner filed a report for the field in which the well was located that showed that $H_2S$ may be encountered in concentrations of 25,300 parts per million in a cubic foot of gas, that this expectation was founded upon concentrations noted in two other producing wells in the field, and that the amount of $H_2S$ would normally be consistent throughout the field. Mr. Melville acknowledged, however, that some wells and some formations in the area do not emit $H_2S$ gas.

The Secretary's failure to establish the significance of the word "field" as used by Mr. Melville is crucial. For example, there is no evidence in the record to suggest that all wells drilled in this "field" were drilled into the same formations or to the same or similar depth. Yet, Mr. Melville acknowledged that whether respiratory protection was necessary depends on the depth of the drilling and varies with the formation the well is drilled into. Mr. Melville's testimony is further clouded by his frequent use of the inexact term "area," which he acknowledged to refer only to surface areas, rather than geological formations. In short, I cannot say from Mr. Melville's testimony that the actual conditions at this well were reliably correlated with those of other wells known to present $H_2S$ hazards.

The compliance officer conjectured that swabbing "could release any $H_2S$ in the well," but he merely assumed that there was a dangerous amount of $H_2S$ in the well. In fact, there is no evidence that there was ever more than a trace of $H_2S$ in the well. Thus, not only does the compliance officer's testimony fail to show that the well here could produce significant amounts of $H_2S$, Snyder also was specifically informed by the driller that no hazardous concentration of gas existed. There is no evidence that $H_2S$ had been encountered in the well during the drilling or during the circulation of oil and gas from the bottom of the well. Snyder came onto the site after drilling had been completed and the well

had been tested by Mercury Production, and Mercury Production had informed Snyder that the amount of $H_2S$ encountered would be nil. This information was consistent with the compliance officer's own tests of the well, which revealed only a trace amount of $H_2S$; indeed, he acknowledged that the well had shown unusually low amounts of the gas. His opinion that the well could nevertheless produce lethal amounts of $H_2S$ was based upon information that the well had been drilled into the buda geological formation, and that it was his "understanding" that the entire buda formation contained $H_2S$; yet he acknowledged that he did not have enough information to say whether some wells in the buda formation were sour and some were not. The compliance officer speculated that $H_2S$ gas could migrate from other areas and formations containing the gas, but he did not establish that such migration occurred in the specific area of this well. In fact, the compliance officer's information on this matter came entirely from general information from the Texas Railroad Commission and literature on the matter. The compliance officer's mere opinion that a dangerous quantity of gas could be released, unsupported by any specific evidence, is not a sufficient basis on which to find a violation. Air-Kare, 81 OSAHRC 98/A2, 10 BNA OSHC 1146, 1150, 1981 CCH OSHD ¶ 25,758, p. 32,178 (No. 77-1133, 1981)(dissenting opinion).

Finally, there is no other evidence to indicate that a reasonable person familiar with the circumstances would not have considered the trace amounts detected here to be representative of conditions likely to be encountered during swabbing. While the compliance officer stated that Snyder through the swabbing operation would be gradually reducing the pressure on the well, he never specified what pressure would ultimately be achieved, nor did he correlate any particular well pressure with the potential amount of $H_2S$ rising to the surface. Although the drilling log showed various pressures in the well after the inspection, the compliance officer never testified that $H_2S$ gas would be likely to be released at any of these pressures.

I therefore cannot say, on this record, that a reasonable employer would have recognized a hazard warranting the use of respirators, particularly where, as here, Snyder had been informed by Mercury Production that $H_2S$ would not be encountered in dangerous quantities. In the absence of such evidence, this citation should be vacated.

II

With respect to the fire extinguisher item, I would deny the Secretary's motion to amend the pleadings under Federal Rule of Civil Procedure 15(b) to allege noncompliance with section 1910.157(a)(1). I do not believe the parties understood at the hearing that they were trying the issues raised by that standard. A litigant has the right to fair notice of the issues to be tried, so that he can adequately prepare and present his case. Pleadings may therefore be amended under Rule 15(b) only when the parties recognize that they are trying unpleaded issues. "[I]t cannot be fairly said that there is any implied consent to try an issue where the parties do not squarely recognize it as an issue in the trial." 3 Moore's Federal Practice ¶ 15.13[2] at 992 (2d ed. 1974), quoted in Usery v. Marquette Cement Manufacturing Co., 568 F.2d 902, 907 (2d Cir. 1977). See Vicon Corp., 81 OSAHRC 98/C4, 10 BNA 1153, 1158, 1981 CCH OSHD ¶ 25,749, p. 32,160 (No. 78-2923, 1981) (concurring opinion), appeal filed, No. 81-2359 (8th Cir. December 10, 1981).

In my view, Snyder did not consent to trial of the issues raised by section 1910.157(a)(1). Both the citation and complaint alleged that Snyder had violated standards imposing requirements for the inspection and maintenance of fire extinguishers in that a particular extinguisher was not fully charged. While the parties clearly litigated the actual condition in terms of readiness for operation of the one extinguisher in question, they did so on the understanding that this evidence was relevant to Snyder's overall inspection and maintenance

program. In my opinion, Snyder cannot be said to have squarely recognized that the condition of this extinguisher was in issue as a separate and distinct ground for finding a violation. Indeed, had Snyder been aware at the hearing that a violation could be found based on the condition of the extinguisher apart from the nature and adequacy of the overall inspection program, it might very well have sought to limit the purpose for which the evidence could be used.

However, in my view it is unrealistic and unfair to expect an employer to anticipate every unpleaded charge which the Secretary might subsequently attempt to inject into the case. It is equally unfair to require the employer to attempt to limit the purpose for which evidence is adduced in order to avoid the implication of consent to try issues raised after the close of the hearing. Since it is the Secretary's theory on review that Snyder is in violation of section 1910.157(a)(1) solely on the basis of the actual condition of one particular extinguisher, whereas Snyder could not have understood that it was litigating the issue of a violation on that ground, the requested amendment is improper. Since the Secretary has abandoned the original allegation appearing in the complaint, I agree with Commissioner Cleary that this item of the citation must be vacated.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>SNYDER WELL SERVICING, INC.,<br><br>Respondent. | OSHRC DOCKET NO. 77-1334 |

Appearances: U. Sidney Cornelius, Jr.
Dallas, Texas

Attorney for the Complainant

George R. Carlton, Jr.
Fort Worth, Texas

Attorney for the Respondent

DECISION AND ORDER

BULLIS, Judge:

Snyder Well Servicing, Inc. (Snyder) was charged with two serious violations and three nonserious violations of the Occupational Safety and Health Act of 1970, (29 U.S.C. §651 et seq. (the Act). The alleged violations resulted from an inspection conducted by the Occupational Safety and Health Administration (OSHA) on March 30th and April 1st, 1977, at a newly drilled well of Mercury Production Co. located 11 miles east of Pleasanton, Texas. Snyder was

engaged in swabbing operations to complete the well.

The first serious violation alleged that Snyder violated the Act by not having appropriate respiratory protection devices available while conducting swabbing operations in a formation which could have sour hydrocarbons containing toxic hydrogen sulfide gas. The citation charged a failure to comply with 29 CFR 1926.103(a)(1), a construction standard. The subsequent Complaint amended the citation to allege in the alternative a failure to comply with 29 CFR 1910.132(a) or 1910.134(a)(2), general industry standards.[1]

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[1] 29 CFR 1926.103(a)(1) reads: "In emergencies, or when controls required by Subpart D of this part either fail or are inadequate to prevent harmful exposure to employees, appropriate respiratory protective devices shall be provided by the employer and shall be used."

29 CFR 1910.132(a) reads: "Application. Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any party of the body through absorption, inhalation or physical contact."

29 CFR 1910.134(a)(2) reads: "Respirators shall be provided by the employer when such equipment is necessary to protect the health of the employee. The employer shall provide the respirators which are applicable and suitable for the purpose intended. The employer shall be responsible for the establishment and maintenance of a respiratory protective program which shall include the requirements outlined in paragraph (b) of this section."

The second serious violation alleged that there was only one wire line clip on each of the four guy lines on Snyder's derrick, instead of the number required by 29 CFR 1926.251(c)(5).[2] No alternative general industry standard was cited in the Complaint for this violation.

The three other or nonserious violations charged in Citation No. 2 alleged a failure to comply with 29 CFR 1926.50(c) by not having a person with a valid first-aid certificate at the worksite; a failure to inspect and maintain a portable fire extinguisher as required by 29 CFR 1926.150(c)(1)(viii); and a failure to use an approved metal safety can for storing gasoline as required by 29 CFR 1926.152(a)(1). In his Complaint the Secretary alleged alternative general industry standards for each of the nonserious violations, 29 CFR 1910.151(b) for the first violation, 1910.157(d)(2) or 29 CFR 1910.157(d)(3) for the second violation, and 29 CFR 1910.106(d)(2) for the third violation.[3]

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[2] 29 CFR 1926.251(c)(5) reads: "When U-bolt wire rope clips are used to form eyes, Table H-20 shall be used to determine the number and spacing of clips."

[3] 29 CFR 1926.50(c) reads: "In the absence of an infirmary, clinic, hospital, or physician, that is reasonably accessible in terms of time and distance to the worksite, which is available for the treatment of injured employees, a person who has a valid certificate in first-aid training from the U.S. Bureau of Mines, the American Red Cross, or equivalent training that can be verified by documentary evidence, shall be available at the worksite to render first-aid."

[Footnote continued on following page]

[Footnote continued from preceding page]

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3

29 CFR 1910.151(b) reads: "In the absence of an infirmary, clinic, or hospital in near proximity to the workplace which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid. First aid supplies approved by the consulting physician shall be readily available."

29 CFR 1926.150(c)(1)(viii) reads: "Portable fire extinguishers shall be inspected periodically and maintained in accordance with Maintenance and Use of Portable Fire Extinguishers, NFPA No. 10A-1970."

29 CFR 1910.157(d)(2) reads: "(i) Extinguishers shall be inspected monthly, or at more frequent intervals when circumstances require, to insure they are in their designated places, to insure they have not been actuated or tampered with, and to detect any obvious physical damage, corrosion, or other impariments. (ii) Any extinguishers showing defects shall be given a complete maintenance check."

29 CFR 1910.157(d)(3) reads: "(i) At regular intervals, not more than 1 year apart, or when specifically indicated by an inspection, extinguishers shall be thoroughly examined and/or recharged or repaired to insure operability and safety; or replaced as needed. (ii) Extinguishers removed from the premises to be recharged shall be replaced by spare extinguishers during the period they are gone. (iii) Pails or drums of powder-extinguishing agents for scoop or shovel application to metal fires shall be kept full at all times. (iv) Each extinguisher shall have a durable tag securely attached to show the maintenance or recharge date and the initials or signature of the person who performs this service."

29 CFR 1926.152(a)(1) reads: "Only approved containers and portable tanks shall be used for storage and handling of flammable and combustible liquids. Approved metal safety cans shall be used for the handling and use of flammable liquids in quantities greater than one gallon, except that this shall not apply to those flammable liquid materials which are highly viscid (extremely hard to pour), which may be used and handled in original shipping containers. For quantities of one gallon or less, only the original container or approved metal safety cans shall be used for storage, use, and handling of flammable liquids."

[Footnote continued on following page]

In its Answer Snyder admitted jurisdiction. It denied, however, the existence of each of the violations charged and alleged that the construction standards cited by the Secretary do not apply to the oilwell servicing industry.

The matter was heard in San Antonio, Texas, on December 20, 1977. Both parties have filed post-hearing briefs.

There was no basic dispute in the evidence. The inspection was conducted by Roger Frazier, a compliance officer with OSHA. The area where the well was located was known to be an area that produced sour gas or hydrogen sulfide.

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[Footnote continued from preceding page]

3 29 CFR 1910.106(d)(2) reads: "(i) General. Only approved containers and portable tanks shall be used. Metal containers and portable tanks meeting the requirements of and containing products authorized by Chapter I, Title 49 of the Code of Federal Regulations (regulations issued by the Hazardous materials Regulations Board, Department of Transportation), shall be deemed to be acceptable. (ii) Emergency venting. Each portable tank shall be provided with one or more devices installed in the top with sufficient emergency venting capacity to limit internal pressure under fire exposure conditions to 10 p.s.i.g., or 30 percent of the bursting pressure of the tank, whichever is greater. The total venting capacity shall be not less than that specified in paragraphs (b)(2)(v)(c) or (e) of this section. At least one pressure-actuated vent having a minimum capacity of 6,000 cubic feet of free air (14.7 p.s.i.a. and 60° F) shall be used. It shall be set to open at not less than 4 p.s.i.g. If fusible vents are used, they shall be actuated by elements that operate at a temperature not exceeding 300° F."

There were numerous signs in the area warning of the presence of dangerous gases (Tr.10). During his walk-around inspection Frazier observed that Snyder had no respiratory protective equipment available for use by its employees in the event they encountered hydrogen sulfide. His position was that since hydrogen sulfide is extremely toxic and in concentrated quantities will kill almost immediately, the absence of protective equipment presented a hazardous situation to the four employees of Snyder who were present (Tr.10,36). While the tests he conducted showed only a trace of hydrogen sulfide, he stated that in high concentrations it deadens a person's sense of smell and is lethal in a very short period of time (Tr.10,37). He also testified that in the field where the well in question was located the Edwards formation was known to be sour and produce hydrogen sulfide (Tr.41,42). The Buda formation, the formation in which Snyder was swabbing the instant well, is shallower than the Edwards formation and while some wells in that formation had produced hydrogen sulfide, some nad not (Tr.17,42).

Before Snyder commenced its swabbing operations Dow Chemical Co. had acidized the well by pumping in hydrochloric acid. In conducting the swabbing operation a swab or pump was lowered into the well on the end of a wire line. The well was equipped with a casing head while these operations were performed and also had a flow line either 30 or 60 feet long to a pit into which any production of gas

or oil would flow while the well was being swabbed (Tr.90). Any flow of oil or gas could be cut off by valves at the casing head or on the flow line.

Mike Cullifer, corporate safety director for Texas International Company, the parent company of Snyder, testified concerning the safety program initiated by his company for all of its subsidiaries. Its "1977 accident prevention plan of action" was introduced as Exhibit R-2 and contains five pages dealing with hydrogen sulfide. Texas International has two hydrogen sulfide trailers fully equipped with fresh air masks and hoses for use at well sites where hydrogen sulfide is expected (Tr.78). In making a determination where these trailers are to be used, Texas International relies on information obtained from the drilling company. Cullifer testified that Texas International requires a producer to furnish information as to whether the well is in a hydrogen sulfide zone and whether a trailer is needed (Tr.80,81). Here, Mercury Production, Inc., the driller, advised that they did not expect to encounter hydrogen sulfide (Tr.81,85). Exhibit R-4 is a letter from Mercury, written December 14, 1977, affirming that a sour gas sniffer was in operation during the drilling of the well in question and gave no indication of sour gas. Cullifer further stated that his company will not swab or work on a well which does not have a well head and a flow line with engineering controls to shut down the well (Tr.80).

The compliance officer was not aware at the time of his inspection that the well had been tested for hydrogen sulfide by Mercury Production Co. That fact did not become known to him until after Snyder had contested the citation (Tr. 40,41). He testified, however, that the fact no hydrogen sulfide is encountered during the drilling operation does not mean that it won't be encountered during the swabbing operations (Tr.62,63).

Tom R. Melville, a field staff engineer with the Texas Railroad Commission, testified that he was familiar with the field in which the well in question was located and that some wells in the area produced hydrogen sulfide in excess of 25,000 parts per million (Tr.16). He stated that the Railroad Commission requires the driller to report any hydrogen sulfide encountered (Tr.19). Prior to drilling Mercury Production filed a report stating they expected to encounter hydrogen sulfide in excess of 25,000 parts per million. Nothing, however, was filed after production was commenced (Tr.20,21). Melville expressed the opinion that in a situation where 25,000 parts per million of hydrogen sulfide is expected respiratory equipment should be available (Tr.23). He also stated, however, that if the well were tested and found free of hydrogen sulfide, no equipment would be necessary (Tr.24).

During his inspection the compliance officer also noted that each of the four guy wires on Snyder's derrick were

fastened with but one wire clip rather than the minimun number of three or four each as required by the cited standard (Tr.25,26). Exhibits C-1 and C-2 depict two of the guy wires with but one clip each. The compliance officer viewed the violation as serious, stating that if the derrick should fall because of the lack of support from the guy wires it could be fatal to Snyder's employees (Tr.26).

With regard to the three nonserious violations alleged Frazier stated that during his walk-around he inquired if anyone at the location was trained in first aid with a valid certificate. He was advised that there was no one present after 2 p.m. when the Dow Chemical people left the scene (Tr.28). The nearest hospital or clinic was 11 or 12 miles away (Tr.28). Frazier also noted a fire extinguisher, shown in Exhibit C-3, with the pressure down on the guage and the safety pin pulled (Tr.29,30). In addition he noted a five-gallon can containing gasoline in Snyder's pickup truck. He determined that the gasoline in this can was used as a reserve supply when trips were made to remote locations (Tr.32). The can was not approved for the storage of gasoline, having no flame arrestor and no automatic or self-closing valve (Tr.33). On cross-examination he stated that he couldn't remember, when inquiring about first aid training, whether he asked for a certificate. He stated, however, that that was the usual inquiry he made (Tr. 50). In addition

he stated that he did not examine the inspection record on the fire extinguisher (Tr.59).

The citations issued charged violations of the Act for failure to comply with specific construction standards. The Complaint, in addition to alleging noncompliance with the construction standards, alleged similar general industry standards for each of the violations except the second serious violation dealing with the number of clips on the guy wires.

The Review Commission has not spoken on the applicability of construction standards to the oil and gas drilling industry or to those companies involved in servicing oil and gas wells.[4] Several Review Commission Judges, however have held that the general industry standards, not construction standards, are applicable to the oil and gas drilling industry. Ard Drilling Co., Inc. and Bahaney Drilling Co., Inc. 77 OSAHRC 109/B14, BNA 5 OSHC 1086, CCH 1976-77 OSHD ¶21,021 (Nos. 15854 and 15969, 1976),

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4 In a recent Review Commission decision, Secretary v. T.J. Service Co., BNA 6 OSHC 1509 (No. 14,991, March 17, 1978) violations of the Act for failure to comply with construction standards by an oil well servicing company was affirmed. However, the applicability of construction standards to the industry was not specifically addressed and presumably was not raised.

Fairbanks Well Service, Inc., 77 OSAHRC 134/D14, BNA 5 OSHC 1873, CCH 1977-78 ¶21,740 (No. 76-4297, 1977), MMD Drilling Corp., 77 OSAHRC 183/C5 BNA 5 OSHC 2083, CCH 1977-78 OSHD ¶22,289, (No.76-4149, 1977). The reasoning of Judge Burchmore in Ard and Bahaney appears sound and is adopted here. If the construction standards are not applicable to the oil drilling industry, clearly they are not applicable to well servicing industry. Therefore the general industry standards alleged by the Secretary will be applied.

The second serious violation alleged must therefore be vacated. No alternative general industry standard was alleged. Even if construction standards could be applied, it is questionable that the cited standard would fit the instant case. While the number of wire clips on the guy wires clearly did not meet the number required by 29 CFR 1926.251(c)(5), that standard pertains specifically to "rigging equipment for material handling." In Atlas Steel Erectors Co., Inc., 76 OSAHRC 11/D7, BNA 3 OSHC 1998, CCH 1975-76 OSHD ¶20,408, (No. 12577, 1975) a violation charged under that standard was dismissed where the equipment dealt with transporting personnel.

The first alleged serious violation must also be vacated. The Secretary failed to prove the violation alleged.

Neither the construction standard at 29 CFR 1926.103(a)(1) nor the two general industry standards, 29 CFR 1926.132(a)

and 29 CFR 1910.134(a)(2), unlike many of the safety standards promulgated, presume the existence of a hazard. The cited construction standard, even if applicable, requires respiratory equipment "in emergencies, or when controls required by subpart D of this part either fail or are inadequate to prevent harmful exposure to employees." The two general industry standards require respirators "when such equipment is necessary to protect the health of the employee", and protective equipment "wherever it is necessary by reason of hazards of processes or environment."

Here the Secretary failed to prove the existence of conditions requiring respiratory equipment. The evidence presented did not show the existence of a hazard. It showed only that a hazardous condition might develop during swabbing operations. But even if the highly toxic hydrogen sulfide were encountered during swabbing operations, engineering controls on the well provided adequate safeguards to protect Snyder's employees.

The drilling of the well had been completed and no hydrogen sulfide had been encountered. While this, according to the evidence, did not necessarily mean that hydrogen sulfide would not be produced when the well was swabbed for completion purposes, the well had been equipped with two valves that could shut down the well. One was on the casing head and the other was on the flow line from

which any oil or gas produced would exit into a pit some 30 or 60 feet distant. The presence of those engineering controls to shut off any flow of hydrogen sulfide that might have occurred was adequate to protect Snyder's employees.

The first two nonserious violations alleged in Citation No. 2 will also be vacated. While the evidence was sufficient to prove violations of the cited construction standards, it was not sufficient to sustain violations of the alternative general industry standards.

The significant difference between the construction standard and general industry standard requiring the availability of a person trained in first aid is that the construction standard also specifies that the person so trained have a valid certificate in first aid training. Here the compliance officer inquired if a person "trained in first aid with a valid certificate was on the job." No such person was available. Such evidence. however, does not necessarily prove that none of Snyder's employees present were trained in first aid. It proves only that none of them had a valid certificate. While it is likely that none of them were trained in first aid, such a finding would be conjectural. The alleged violation must, therefore, be vacated.

The construction standard cited dealing with portable

fire extinguishers requires that they be "inspected periodically and maintained." The general industry standards cited in the alternative require monthly inspection and recharging and repair if the inspection indicates the need. Here the compliance officer's testimony was only that his observation of the fire extinguisher indicated that the pin had been pulled and the pressure was down. He made no inquiry as to the inspection record of the fire extinguisher in question. While such evidence might prove a failure to maintain the fire extinguisher as required by the construction standard, it does not prove that Snyder failed to conduct the inspections required by the general industry standards or take the necessary steps to recharge or repair the extinguisher indicated by such inspections. The need for recharging could well have occurred after the latest inspection made in conformity with the standards.

The third nonserious violation will be affirmed. The essence of the compliance officer's testimony with regard to the five gallon gasoline can in the bed of Snyder's pickup was that it was not an approved container and that it contained gasoline and was used to haul gas to remote locations. His testimony was not contradicted and is sufficient to establish a violation of either the construction standard cited or the general industry standard.

No penalty was proposed for this violation and no need for the assessment of a penalty is indicated by the evidence. The gravity of the violation is low, Snyder was cooperative during the inspection and had no history of previous violations.

From the entire record the following Findings of Fact and Conclusions of Law are made.

## FINDINGS OF FACT

1. Snyder is an employer with employees engaged in a business affecting interstate commerce within the meaning of the Act.
2. On or about March 30, 1977, Snyder was engaged in swabbing an oil well for Mercury Production Co.
3. During its swabbing operations, Snyder did not have respiratory protective equipment available for its employees. The oil well was equipped, however, with adequate engineering controls to protect Snyder's employees from any hazard that may have been encountered from poisonous gases.
4. The four guy wires on Snyder's derrick were secured with but one wire clip each.
5. No person with a valid certificate in first aid training was present at Snyder's worksite

after 2 P.m. on March 30, 1977. The evidence did not prove that no person not trained in first aid was present.

6. A portable fire extinguisher with the pressure down and the safety pin pulled was present at Snyder's worksite on March 30, 1977. The evidence did not prove the fire extinguisher had not been inspected monthly or that such inspections indicated a need for recharging or repair.

7. A five gallon gasoline can in the bed of Snyder's pickup at its worksite on March 30, 1977, was not an approved container for gasoline and was not equipped with a flame arrestor or automatic or self-closing valve.

8. No penalty for the above violation is indicated.

## CONCLUSIONS OF LAW

1. The Review Commission has jurisdiction of the parties and subject matter of these proceedings.

2. Construction standards are not applicable to the oil and gas drilling industry or to the well servicing industry.

3. Snyder was not in violation of the Act for failing to comply with 29 CFR 1926.103(a)(1), 29 CFR 1910.132(a) or 29 CFR 1910.134(a)(2) on March 30, 1977.

4. Snyder was not in violation of the Act for failing to comply with 29 CFR 1926.251(c)(5) on March 30, 1977.

5. Snyder was not in violation of the Act for failing to comply with 29 CFR 1926.50(c) or 29 CFR 1910.151(e) on March 30, 1977.

6. Snyder was not in violation of the Act for failing to comply with 29 CFR 1926.150 (c)(i)(viii), 29 CFR 1910.157(d)(2) or 29 CFR 1910.157(d)(3) on March 30, 1977.

7. Snyder was in violation of the Act for failing to comply with 29 CFR 1910.106(d)(2) on March 30, 1977.

From the foregoing Findings of Fact and Conclusions of Law is is ORDERED:

1. Items 1 and 2 of Citation No. 1 alleging serious violations of the Act are vacated.

2. Items 1 and 2 of Citation No. 2 alleging nonserious violations of the Act are vacated.

3. Item 3 of Citation No. 2 is affirmed as a nonserious violation of the Act. No penalty is assessed.

HAROLD O. BULLIS
Administrative Law Judge

Date: July 3, 1978
Dallas, Texas

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| 78-5956 | CORNELL & COMPANY, INC. | 2/26/82 | 11/B13 |
| | (Judge's decision) | | 11/C6 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

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UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

February 26, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Cargill, Inc., Nutrena Feed Division

OSHRC DOCKET NO. 78-5707

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION AND REMAND

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR EMPLOYEES

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Alan M. Wienman, Judge
Occupational Safety & Health
Review Commission
1114 Market Street Room 608
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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 78-5707 |
| CARGILL, INC., NUTRENA FEED DIV., | : | |
| Respondent. | : | |
| | : | |

DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge Alan M. Wienman is before us for review pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Cargill, Inc., Nutrena Feed Division ("Cargill") was charged with two violations of section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1),[1/] the "general duty clause." Judge Wienman vacated both items on the ground that the Secretary of Labor had failed to carry his burden of proof. Commissioner Cottine granted the Secretary's petition for review and directed review of two issues:

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1/ Section 5(a)(1), 29 U.S.C. § 654(a)(1), provides:

> Sec. 5(a) Each employer —
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

1. Whether the ALJ erred in vacating the alleged violation of § 5(a)(1) on the grounds that the Secretary had failed to prove the existence of a recognized hazard and feasible means of abatement.

2. Whether the ALJ erred in vacating item 3(c) of the citation, alleging a violation of § 5(a)(1), on the ground that NFPA Standards "are not acceptable proof of industry recognition of a hazard."

For the reasons that follow we affirm the judge's decision as to one item and reverse and remand as to the other.

I

Cargill operates a grain elevator and feed mill where grain and commodities are processed into animal feed. The elevator was built in 1959, the feed mill in 1965, and both were acquired by Cargill in 1967. Both the grain elevator and the feed mill contain vertical conveyors called "legs," which consist of flexible belts equipped with buckets that pull grain and other materials from one level to another. The belts are enclosed in shafts composed partly of sheet metal and partly of concrete.

Grain and commodities are delivered to Cargill by truck and train and off-loaded into receiving pits which are covered by steel grates. The grates over the grain pits form openings of about two inches by twelve inches, and the grates over the commodity pits form openings of about two-and-one-half inches by nine inches. The grain and commodities are transported from the pits by screw conveyors which have a tolerance of about three-eighths of an inch.

In November 1978 this facility was cited for several violations of the Act, including the two items at issue here, item 3(b) and item 3(c). The gravamen of item 3(b) is that those legs which were used by Cargill to transport grain present hazards of secondary grain dust fire

and explosion because the legs are not equipped with explosion relief venting. As the Secretary explained at the hearing, the presence of explosion relief venting in the cited legs would not prevent a grain dust fire or explosion in the first instance, but it would prevent secondary fires and explosions. Secondary grain dust fires and explosions occur when an initial dust explosion in a confined space creates pressure waves which raise additional dust into suspension, leading to a series of explosions of increasing intensity. As a means of abatement, the Secretary suggested that Cargill extend the sheet metal casings at the top of the legs directly up through the roofs of the two buildings so that in the event of a grain dust explosion, the resulting pressure waves could move up and out of the leg without causing secondary explosions and fires.

Item 3(c) alleged that Cargill's receiving pits should have been equipped with permanent magnets, approved electromagnets, or specific gravity separators or screens capable of preventing entry of tramp metal into the processing system. "Tramp metal" is ferrous material which accidentally gets mixed in with the grain and commodities as they are transported from the farm to various processors. The gravamen of this charge is that the tramp metal can, as a result of frictional contact with Cargill's metal processing machinery, give off sparks. The Secretary alleges that these sparks could provide the ignition source for grain dust fires or explosions.

Judge Wienman vacated both items on the ground that the Secretary had failed to prove the existence of a recognized hazard or a feasible means of abatement. He also ruled that the National Fire Protection Association Standard 61B ("NFPA 61B"), "Grain Elevators Bulk Handling

Facilities," is not "acceptable proof" of industry recognition of a hazard.

II

The first question to be resolved with respect to item 3(b), "failure to provide explosion relief venting in grain transport legs," is whether the judge erred in ruling that the Secretary had failed to establish a recognized hazard. Recognition of the hazard, either by the employer or the employer's industry, is an element of the Secretary's prima facie case in proving a violation of the general duty clause. See Continental Oil Co. v. OSHRC, 630 F.2d 446 (6th Cir. 1980), cert. denied, 101 S.Ct. 1481 (1981); Beaird-Poulan, A Division of Emerson Electric Co., 79 OSAHRC 21/D11, 7 BNA OSHC 1225, 1979 CCH OSHD ¶ 23,493 (No. 12600, 1979); Empire Detroit Steel Division, Detroit Steel Corp. v. OSHRC, 579 F.2d 378 (6th Cir. 1978).

Judge Wienman defined the hazard in item 3(b) as the "absence of explosion relief venting." Based on that characterization of the hazard, he concluded that the record lacked sufficient evidence to show recognition of the hazard. However, we have held that a recognized hazard is not to be defined in terms of the absence of appropriate abatement measures. Beaird-Poulan, A Division of Emerson Electric Co., supra. The hazard identified by item 3(b) is the hazard of secondary grain dust explosions and fires in confined spaces such as elevator legs.

The record is replete with evidence both of Cargill's and of the grain handling industry's recognition of this hazard. To single out but some of this evidence, we take especial note that Cargill's own assistant manager testified that he is a member of the Static Metal Sparking Committee of the Explosion Research Council of the National Grain and

Feed Association and that one of the Committee's objectives is "to discover more about how a leg must be vented or how it can be vented safely." He described a number of experiments then being conducted regarding explosion relief for elevator legs and said he agreed with the Secretary's expert witness that the leg is the most hazardous area in a grain elevator and that adequate venting would substantially reduce the severity of grain dust explosions. In addition, the Secretary introduced into evidence a Literature Survey of Dust Explosions in Grain Handling Facilities: Causes and Preventions prepared by the Energy and Mineral Resources Researth Institute of Iowa State University. This survey states, in pertinent part,

> Usually the initial explosion is followed in close succession by one or more secondary explosions of much greater magnitude. The secondary explosions are presumably caused by suspension of dust, which has accumulated in other areas of the plant, by the initial or subsequent shock waves. . . . [T]here are areas during operation of a typical grain elevator where the formation of critical dust concentrations is almost inevitable. This is particularly true of the elevator legs which contain the bucket elevators which carry the grain to the head house at the top of the bins or silos.

The Secretary also entered into evidence a publication of the Farmland Insurance Company, which contains an article, "Explosion Vent Prevents Major Loss," describing an elevator leg grain dust explosion in which damage was minimized by an explosion relief vent.[2/] Accordingly,

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2/ It is to be noted that although much of this evidence focuses on the feasibility of explosion relief venting, as well as on the capacity of grain dust to burn and explode, it was received into evidence and is being considered here for the limited purpose of determining recognition of the hazard, and not for the purpose of determining feasibility of abatement.

we conclude that the Secretary has established both industry and employer recognition of the hazard.

The second question to be resolved with respect to item 3(b) is whether the Secretary established feasibility of abatement. "A violation of the general duty clause cannot be sustained unless the Secretary is able (1) to establish the type of employer conduct necessary to avoid citation under similar circumstances and (b) to demonstrate the feasibility and likely utility of such conduct." Williams Enterprises, Inc., 79 OSAHRC 24/A2, 4 BNA OSHC 1663, 1666, 1976-77 CCH OSHD ¶ 21,071 at 25,361 (No. 4533, 1976); see also National Realty and Construction Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973); Bomac Drilling, Division of TRG Drilling Corp., 81 OSAHRC 45/A2, 9 BNA OSHC 1681, 1981 CCH OSHD ¶ 25,363 (No. 76-450, 1981).

The Secretary suggested, through expert testimony, that Cargill abate the hazard by extending the sheet metal leg casings directly up through the grain elevator and feed mill roofs. The resultant roof-top vents should, according to the Secretary's expert, substantially reduce, if not eliminate, the number and intensity of secondary grain dust explosions in the event of an initial conflagration or deflagration.[3/]

In rebuttal, Cargill presented the uncontradicted testimony of its plant superintendent that it would be physically impossible to extend

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3/ The Commission has held that "[i]t is sufficient if [a] method [of abatement] materially reduces, even though it may not eliminate, the hazard." Whirlpool Corp., 79 OSAHRC 32/A14, 7 BNA OSHC 1356, 1360, 1979 CCH OSHD ¶ 23,552 at 28,535 (No. 9224, 1979); see also Royal Logging Co., 79 OSAHRC 84/A2, 7 BNA OSHC 1744, 1979 CCH OSHD ¶ 23,914 (No. 15169, 1979), aff'd, 645 F.2d 822 (9th Cir. 1981); Titanium Metals Corp. of America v. Usery, 579 F.2d 536 (9th Cir. 1978); National Realty, supra.

the leg casings through the two roofs without piercing structural beams which support the roofs. He stated that to sever these structural members would weaken the roofs.

We have stated that once the Secretary has specified a method of abatement which would reduce or eliminate the incidence of the hazard, the employer may rebut the feasibility of that method with evidence "showing or tending to show that use of the method or methods established by Complainant will cause consequences so adverse as to render their use infeasible." Royal Logging Co., supra note 3, 7 BNA OSHC at 1751, 1979 CCH OSHD at p. 28,997. Cargill's plant superintendent testified that to extend the leg casings in the manner suggested by the Secretary would seriously weaken the roofs in question because the casings would have to pierce overhead supporting structures. This testimony was neither challenged nor rebutted by the Secretary, and there is nothing in this record to cast his testimony into doubt.

The Secretary contends on review that this rebuttal testimony does not disprove the feasibility of the recommended abatement because Cargill did not show that the extensions could not be constructed so as to avoid the overhead beams. However, it was the Secretary who specified in the first instance a form of abatement that would require cutting holes in the roof directly over the legs and in the same size and shape as the cross sections of the legs. For the Secretary to suggest now that extensions could have been installed in some way other than that proposed by the Secretary's expert at the hearing raises questions of fact for the first time on review. It is axiomatic that a reviewing tribunal should not decide a case on evidence not in the record, particularly

where, as here the "facts" are by no means certain. See National Realty, supra; 4 AM. JUR. Appeal & Error § 491 (1962).

The Secretary also points out that the judge made no finding of fact with respect to the question of whether direct vertical extensions would, indeed, weaken the roofs. However, it is the Commission, not the administrative law judge, who is the ultimate trier of fact. Accu-Namics, Inc. v. OSHRC, 515 F.2d 828, 834 (5th Cir. 1975), cert. denied, 425 U.S. 903 (1976). We conclude, in the face of the Secretary's failure to offer any evidence to the contrary, that Cargill has proved that incisions into overhead supporting beams would seriously weaken if not cause the collapse of the roofs involved.

Accordingly, we affirm the judge's vacation of item 3(b) on the ground that Cargill proved infeasibility of the proposed means of abatement.

III

Whereas item 3(b) was directed at the hazards of fire and explosion which follow upon an initial deflagration or conflagration of grain dust in elevator legs, item 3(c), the tramp metal charge, was directed at the capacity of ferrous metal to provide the initial ignition source due to friction sparking. It was the Secretary's contention that tramp metal could act as the ignition source for fire and explosion by releasing friction sparks in its progress through the metallic grain handling equipment.

Judge Wienman vacated that item on the ground that the record lacked sufficent proof of recognition of the hazard or the utility of the means of abatement. However, Judge Wienman never actually defined

the "recognized hazard" at issue under the tramp metal charge. In consequence it is not clear whether his references both to "recognized hazard" and to "utility of abatement" are to be taken as alternative grounds for vacation, or whether they reflect the judge's view of the hazard as lack of the recommended means of abatement, namely magnets and grating of the type described in the citation.

The hazard with which item 3(c) is concerned is the initial grain dust fire or explosion caused by tramp metal sparking. The judge's decision does not contain a finding as to whether the record shows, by a preponderance of the evidence, that either the grain handling industry or Cargill recognizes such a hazard. Accordingly, we remand the case on item 3(c) to the judge for an assessment of the evidence regarding this element of a general duty clause violation. In the event the judge determines that industry recognition of the hazard has been shown, then a determination as to the remaining elements of a general duty clause violation must be made.

IV

Judge Wienman ruled that NFPA 61B, "Grain Elevators Bulk Handling Facilites," is not "acceptable proof" of industry recognition of a hazard. NFPA 61B is a voluntary industry standard which has never been adopted as an OSHA standard and hence has neither the force nor effect of law. Judge Wienman concluded that this standard could not be used to establish industry recognition of a hazard because it applies only to facilities erected in 1973 or later and which are undergoing major replacement or alteration. Cargill's grain elevator and feed mill were constructed prior to 1973 and were not undergoing major renovation or replacement.

It is well established that voluntary industry standards are admissible and probative evidence of industry recognition of hazards. Bethlehem Steel Corp. v. OSHRC, 607 F.2d 871 (3d Cir. 1979); H-30, Inc. v. Marshall, 597 F.2d 234 (10th Cir. 1979); Titanium Metals Corp. of America v. Usery, supra note 3; Beaird-Poulan, A Division of Emerson Electric Co., supra; The Boeing Co., Wichita Division, 77 OSAHRC 188/D13, 5 BNA OSHC 2014, 1977-78 CCH OSHD ¶ 22,266 (No. 12879, 1977); cf. Betten Processing Corp., 75 OSAHRC 43/E2, 2 BNA OSHC 1724, 1974-75 CCH OSHD ¶ 19,481 (No. 2648, 1975) (ANSI standard used to show industry recognition of the hazard had been incorporated by reference into OSHA construction standards but had not been adopted in the general industry standards applicable to the Respondent's industry). The fact that this particular voluntary standard applies to facilities erected in 1973 or later and undergoing major replacement or renovation has no bearing on its relevance to industry awareness of certain hazards associated with grain dust and grain handling equipment. Accordingly, Judge Wienman's ruling that it is unacceptable proof of recognition is error.

Judge Wienman's vacation of item 3(b) is affirmed, for the reasons stated above. His vacation of item 3(c) is reversed and that item is remanded for disposition consistent with this opinion. SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: FEB 26 1982

ROWLAND, Chairman, concurring in part and dissenting in part:

I concur with the majority's disposition of citation item 3(b), but I do not join in the majority's broad statement that a "hazard is not to be defined in terms of the absence of appropriate abatement measures." Concerning item 3(c), I dissent from the majority's decision to reverse the judge and remand the case. I would affirm the judge's decision to vacate citation item 3(c) on the grounds that the Secretary did not show recognition of the hazard or utility of the recommended means of abatement.

The majority correctly concludes with regard to item 3(b) that the Secretary established a recognized hazard of secondary grain dust explosions and fires in the confined spaces of the elevator legs at Cargill's facility. Insofar as the judge held to the contrary, he erred, but the error was harmless since, as the majority states, the judge correctly vacated the citation for failure of the Secretary to show a feasible method of abatement. In my view, it is sufficient to note that the judge committed harmless error, without reaching the issue of whether a hazard may be defined in terms of the absence of appropriate abatement.

As to item 3(c), Judge Wienman correctly described the hazard throughout his decision as "fires or explosions . . . attributed to tramp metal" and "tramp metal caus[ing] sparking and . . . an ignition source." The judge's description of the hazard is supported by the record and is indeed indistinguishable from the majority's own definition of the hazard. 4/

Consistent with the cases cited in the lead opinion, voluntary industry standards, such as NFPA 61B, are indicative of industry recognition of hazards

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4/ The majority defines the hazard as "the initial grain dust fire or explosion caused by tramp metal sparking."

but do not conclusively prove recognition absent other credible and probative evidence. See, e.g., Bethlehem Steel Corp. v. OSHRC, 607 F.2d 871 (3d Cir. 1979) (recognition shown by evidence of voluntary private standard, admission that voluntary standard represented industry consensus, and evidence that standard generally followed in industry). Although the judge erred to the extent that he suggested that voluntary industry standards should never be accorded any weight, his error was harmless. In addition to stating that NFPA 61B was not "acceptable proof" of recognition, Judge Wienman examined the evidence - independent of that relating to NFPA 61B - and concluded that the record was insufficient to show that the hazard was recognized. The judge's conclusion reflects his implicit credibility evaluation of the testimony and usually should not be disturbed on review. Kus-Tum Builders, Inc., 81 OSAHRC 97/B2, 10 BNA OSHC 1128, 1981 CCH OSHD ¶ 25,738 (No. 76-2644, 1981). Accepting the judge's credibility determination, I conclude that the judge correctly held that the Secretary failed to show the hazard was recognized. 5/ Accordingly, I would affirm the judge's vacation of item 3(c).

Moreover, I would not disturb the judge's conclusion that the Secretary did not establish the utility of the proposed abatement measures. Neither party disputes on review the judge's determination that the magnets and screens, the recommended means of abatement, would not be useful. Since the propriety of the judge's determination regarding utility of abatement was not contested by the Secretary in his review petition nor directed for review by the Commission, the judge's conclusions on this issue are final. See Commission Rule 92(c), 29 C.F.R. § 2200.92(c). Since a violation of section 5(a)(1) cannot be

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5/ The record does not establish that Cargill, as distinguished from the industry, recognized the hazard.

found unless the Secretary establishes the feasibility and utility of the recommended abatement, I dissent from the majority's decision to remand the case for further disposition.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant<br><br>v.<br><br>CARGILL, INC.,<br>NUTRENA FEED DIVISION,<br><br>Respondent | DECISION & ORDER<br>OSHRC DOCKET 78-5707 |

APPEARANCES: EUGENE F. DESHAZO, Esq., U.S. Department of Labor, Office of the Solicitor, Kansas City, Missouri, for the Complainant

ROBERT L. HOBBINS, Esq., Dorsey, Windhorst, Hannaford, Whitney & Halladay, Minneapolis, Minnesota, for the Respondent

Wienman, Judge, OSHRC:

## STATEMENT OF THE CASE

This is a proceeding wherein Respondent contests a Citation which charged multiple violations of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.) at a feed mill in McPherson, Kansas. The Citation alleged serious violations of specific OSHA regulations and Section 5(a)(1) of the Act, the so-called General Duty Clause. Penalties totalling $4,320 were proposed for the alleged violations. Respondent timely contested all items and penalties except item 4 for which a $630 penalty was

proposed. The cause was assigned to the undersigned Judge by an order of the Commission dated March 6, 1979, and a hearing was held in Wichita, Kansas, on June 28, 1979.

## THE ISSUES

No jurisdictional matters remain in issue. The parties pleaded facts sufficient to establish that Respondent is subject to the Act and that the Commission has jurisdiction of the parties and the subject matter.

Prior to the hearing the parties entered into an agreement terminating the contest with respect to all but two items. Remaining in dispute are items 3(b) and 3(c).

Item 3(b) alleged a violation of Section 5(a)(1), the General Duty Clause,[1/] as follows:

> The two pellet mill legs, the jack leg, the east and west elevator legs are not provided with explosion reliefs vents to the outside atmosphere exposing employee(s) to the hazards of fire and/ or explosion.

Item 3(c) alleged a violation of the General Duty Clause because three grain receiving pits were not provided with "permanent magnets, approved electromagnets, or specific gravity separators or screens of sufficient size to prevent entry of tramp metal into the

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1/ Section 5. (a) Each employer--

> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

system."

The chief issues for decision are whether Respondent violated the Act as alleged. Ancillary issues relate to the mode and extent of the Secretary's use of the General Duty Clause in connection with items 3(b) and 3(c).

## SUMMARY OF THE EVIDENCE AND DISCUSSION

### Item 3(b): Explosion Relief Vents

Raymond R. Rogers, the OSHA Compliance Officer who inspected the facility in September 1978, provided a physical description of the workplace. Additional detail was supplied by Thomas Smolen, Plant Superintendent. The record contains no significant dispute as to the physical facts which are summarized from the testimony of Rogers and Smolen.

The cited facility is a feed mill plant which receives grain (corn and milo) and certain other commodities and processes them into animal feed products. The facility consists of a reinforced concrete elevator, where grain and commodities are received and briefly stored, and a sheet metal mill building in which the ingredients are processed. The grain elevator was built in 1959, and the feed mill erected in 1965. Cargill acquired the plant in 1967. The chief grain handling equipment consists of two 180 foot vertical conveyors or "legs" located in the elevator. The grain processing equipment includes various mills and grinders mainly located in the mill building (T. 7-8, 98-100, 118).

Complainant cited five of six conveyor legs in the elevator and

mill as presenting fire and explosion hazards for want of relief venting to the outside atmosphere. The sixth, a "mixer leg," was equipped with 6" x 6" air relief vent (T. 136) and was not cited upon Rogers' recommendation (T. 12-13). During the hearing the Secretary elected to withdraw the allegations as to two pellet legs, conceding they were unlikely to contain an explosive concentration of dust (T. 132).

Bruce Carl Beelman, an OSHA supervisory safety specialist who currently serves on a National Academy of Science Committee studying grain elevator explosion and fires (T. 46), explained the theory and function of explosion relief venting. In the event of an initial explosion, relief vents serve to prevent propagation to other portions of the workplace (T. 57). This is particularly important because initial explosions in grain elevators do not cause the majority of the damage. Subsequent explosions increase in intensity as more dust is lifted and placed in suspension (T. 58). Beelman also testified that the highest dust concentrations were generally found within the elevator legs and that the leg was "the number one source" of elevator explosions whose causes were known (T. 60).

Beelman disclaimed any qualifications as an expert able to calculate the venting area necessary to provide explosion relief for a given structure (T. 79), but nevertheless asserted that relief venting of the cited legs could be accomplished by extending simple ducts directly through the roof above the legs (T. 84).

Respondent took sharp issue with Beelman's testimony relative

to feasibility. Under cross-examination Beelman was unable to name an authoritative source setting forth guidelines for venting an elevator leg (T. 81). He further conceded that NFPA No. 68, a source document he relied on, consisted entirely of "recommended practices" as opposed to industry "requirements" (T. 81). The National Academy of Science Committee he served on was considering recommending that elevator legs be provided with vents equal to the cross section of the leg, but no final recommendation had been made (T. 79).

As to industry practices, Beelman testified 60 to 70 percent of the facilities OSHA inspects have "some type of venting system" (T. 88), but the vents are not as large as cross-sectional areas of the legs (T. 89). What percentage of the inspected elevators are equipped with vents designed to relieve explosive pressures as opposed to simple breather pipes which merely prevent creation of vacuums inside the legs was not clear from Beelman's testimony.

John A. Johnston, assistant manager of Cargill's grain research laboratory, testified that he served as chairman of the Static and Metal Sparking Committee of the Explosion Research Council of the National Grain and Feed Association (T. 152). He regularly reviews technical information concerning grain elevator safety, and testified that Cargill was involved in a project to conduct venting and explosion suppression tests on elevator legs with the Explosion Research Council (T. 167).

Johnson testified that the formula for determining explosion

relief is most commonly expressed as a ratio of vent area to the cubic volume of the vessel but that a number of variables affected the formula: the shape of the vessel, the nature of the material, type of dust, temperature, pressure, etc. Also, unusually shaped containers, especially long, narrow ones, pose special problems, and no expert to date has established a formula for explosion venting relief of elevator legs (T. 160-161).

A review of the testimony reveals a number of shortcomings in Complainant's effort to establish a violation as alleged in item 3(b). However desirable it may be to provide elevator legs with explosion relief venting, the proof does not indicate (1) that this is a generally recognized practice within the industry and (2) that explosion relief venting of the cited legs was feasible by the means suggested by the OSHA representatives. The elements of proof in a General Duty Clause violation case were stated by Judge J. Skelly Wright in National Realty and Contruction Co., Inc., v. OSHRC and Secretary of Labor, 489 F.2d 1257 (D.C. Cir., 1973). Not only must the Secretary prove that the employer failed to render its workplace free of a recognized hazard causing or likely to cause death or serious physical harm, but "the Secretary must be constrained to specify the particular steps a cited employer should have taken to avoid citation, and to demonstrate the feasibility and likely utility of those measures." 489 F.2d 1257, 1268

Because the secretary failed to meet this burden, item 3(b) must be vacated.

Item 3(c): Tramp Metal

Acting upon an OSHA instruction that a General Duty Clause violation may be recommended on the basis of provisions found in NFPA No. 61B-1973,[2/] Compliance Officer Rogers cited Respondent for lack of adequate screens, magnets, or other devices to prevent entry of tramp metal into the system at the grain receiving pits. Rogers observed that Respondent's receiving pits were protected only by wide grates with openings approximating 2 1/2" x 12" (T. 10). Rogers, who had inspected approximately four similar facilities before September 1978, testified that the grates were typical of those that he had observed at other elevators (T. 24), but he nevertheless recommended the Citation. The hazard, he warned, was that tramp metal causes sparking and could prove an ignition source. He could identify no grain elevator explosion which had been reliably attributed to tramp metal (T. 15). He also admitted that prior to September 1978 he had never seen a magnetic separation device in use (T. 24).

Mr. Beelman came closer to attributing a grain elevator explosion to tramp metal, stating that OSHA investigators had concluded that tramp metal was the most likely cause of an elevator explosion which had occurred in Garvey, Kansas (T. 49-52).

As to feasible abatement means, Beelman testified that a number

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2/ A standard for the prevention of fire and dust explosions in grain elevators and bulk grain handling facilities adopted by the National Fire Protection Association at its 1973 annual meeting.

of studies had determined that grates with 1 1/2" openings did not affect production flow (T. 71). On cross-examination Beelman admitted that out of 1500 elevators in Kansas, he knew of only 5 which were equipped with 1 1/2" square mesh grates, and only about 20 to 25 percent had magnetic protection in their receiving pits (T. 72).

John Johnson, Respondent's chief rebuttal witness, countered by stating that all reliable studies indicated that metal sparks alone were not of sufficient energy to cause an explosion. He did concede that the friction of rubbing metal might initiate an explosion or fire (T. 153). Johnson contended that there was no reliable basis for asserting that tramp metal was a hazard in grain handling equipment and that no existing industry practice required special devices above and beyond the type of grating in place at the McPherson elevator (T. 154). He stated that he knew of no fires or explosions reliably attributed to tramp metal and that the combination of the grates and auger at the McPherson plant prevented the entry of any metal large enough to cause a fire or explosion by friction (T. 156).

There are a number of deficiencies in the Secretary's case, chief of which is the reliance upon NFPA No. 61B-1973 as the basis for allegations of a General Duty Clause violation. The Forward to NFPA No. 61B expressly states that the standard applies only to facilities erected subsequent to the date of the standard and is an advisory guide for owners or operators engaged in major replacement or renovation of existing facilities. Since both the elevator and

mill structures were erected in the 1960's, NFPA No. 61B-1973 has advisory application only to the McPherson facility. We have labored the point in other decisions, but it is suffice to repeat our conviction that advisory provisions of a private industry standard are not acceptable proof of industry recognition of a hazard. The Secretary seeks to impose new and disputed technology upon the industry as a means of reducing the incidence of grain elevator explosions. Time may prove the Secretary correct, but the record contains insufficient independent proof of a recognized hazard or the utility of the recommended technology to support the Citation. Item 3(c) must be vacated.

## FINDINGS OF FACT

1. A preponderance of the reliable, probative, and substantial evidence supports the findings of fact set forth in the Summary of Evidence and Discussion.

2. The parties entered into an agreement settling all but two disputed issues prior to trial. The terms of the agreement are set forth on transcript pages 4-6. No reason appears why the agreements contained therein should not be approved by the Commission.

## CONCLUSIONS OF LAW

1. At all material times Respondent was an employer within the meaning of Section 3 of the Occupational Safety and Health Act of 1970.

2. Jurisdiction of this proceedings is conferred upon the Occupational Safety and Health Review Commission by Section 10(c) of

the Act.

3. The mutual agreements set forth on pages 4-6 of the transcript are consistent with the purpose of the Act. In all instances where the Secretary has agreed to modify a Citation item or penalty proposal, and in all instances where the Respondent has agreed to withdraw its Notice of Contest to a Citation item, the parties are bound by their respective agreements. All Citation items thus settled by mutual agreement are amended to conform with the express terms of the agreement.

4. With respect to the remaining disputed items, namely, items 3(b) and 3(c), the evidence fails to establish the existence of violations of Section 5(a)(1) of the Occupational Safety and Health Act of 1970.

## ORDER

Based on the above Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation items subject to settlement by stipulation of the parties are modified, vacated, or affirmed according to the agreed terms, namely:

(a) Items 1 and 6 of Citation Number 1 issued to Respondent October 26, 1978, are vacated.

(b) Item 3(a) of said Citation is affirmed and a penalty in the sum of $100 assessed thereon.

(c) Item 5 of said Citation is affirmed and a penalty of $540 assessed thereon.

(d) Item 7 of said Citation is modified to allege a nonserious violation of Section 110-17(a) of the National Electrical Code, NFPA 70-1971, as adopted by 29 CFR 1910.309(a). Item 7, as modified, is affirmed without monetary penalty.

(e) Item 8 of said Citation is affirmed and a penalty in the sum of $500 assessed thereon.

2. The disputed serious violations, namely, items 3(b) and 3(c) of Citation Number 1 issued October 26, 1978, are vacated.

Date: November 8, 1979

Alan M. Wienman, Judge, OSHRC

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

February 26, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Cornell & Company, Inc.

OSHRC DOCKET NO. 78-5956

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR EMPLOYEES

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Judge's Office
Occupational Safety & Health
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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 78-5956 |
| CORNELL & COMPANY, INC., | : | |
| Respondent. | : | |
| | : | |

DECISION

Before, ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge Seymour Fier is before the Commission pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Judge Fier affirmed a citation alleging that Cornell & Company, Inc., violated section 5(a)(1)[1/] of the Act because "[e]mployees were allowed to work under a beam suspended above [their] heads . . . [while] installing [a] lower beam suspended from [the] same hook. . . ."

In response to Cornell's petition for discretionary review, former Commissioner Barnako directed review on the following issues:

> (1) Whether the judge erred in concluding that the provisions of the New Jersey Administrative Code, specifically subchapter 20.16.5(5) of the Construction Safety Code, establish recognition of a hazard within the meaning of 29 U.S.C. § 654(a)(1).

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1/ Section 5(a)(1), 29 U.S.C. § 654(a)(1), provides that "[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

> (2) Whether a violation of 29 U.S.C. § 654(a)(1) can be found in view of the provisions of 29 C.F.R. § 1926.550(b)(2).
>
> The parties are also requested to address the following question:
>
> Whether the provisions of ANSI standard B-30.5 noted in Respondent's Memorandum in Support of Petition for Review are not mandatory and, if those provisions do not impose mandatory requirements, whether such fact constitutes a determination by the Secretary of Labor that the work practices in issue are not hazardous, so that a citation alleging violation of 29 U.S.C. § 654(a)(1) is improper.

Because we conclude that 29 C.F.R. § 1926.550(b)(2) applies to the hazard cited by the Secretary of Labor, we vacate the citation under section 5(a)(1).[2/]

Section 1926.550(b)(2) provides that "[a]ll crawler, truck, or locomotive cranes in use shall meet the applicable requirements for design, inspection, construction, testing, maintenance and operation as prescribed in the ANSI B30.5-1968, Safety Code for Crawler, Locomotive and Truck Cranes." Section 5-3.2.4(b) of ANSI B30.5-1968 provides that "[n]o person should be permitted to stand or pass under a load on a hook." It appears that a truck crane was being used in this case.[3/] Also, because

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2/ Because we conclude that the citation to § 5(a)(1) was inappropriate, we do not reach the first directed issue, concerning the Secretary's proof of a recognized hazard under section 5(a)(1).

3/ Respondent's vice president testified that the facts in this case were similar to those in an earlier case in which Respondent was cited for violating section 5(a)(1). The citation, which Respondent placed in evidence (Exh. R-3), alleged that a truck crane was being used. Also, the judge's decision, which Respondent placed in evidence (Exh. R-1), indicates that the Secretary's evidence in that case was that Respondent was using a truck crane. The citation was vacated because the Secretary failed to establish a recognized hazard. When this evidence was presented at the hearing in this case, Respondent had already raised the possibility that a standard, § 1926.550(b)(2), applies. However, the Secretary offered no rebuttal to

(continued on next page)

the Secretary's concern was that Cornell's employees who were installing the lower of two beams suspended from the same hook were standing under the upper beam, the hazard brought under section 5(a)(1) is the same one covered by section 1926.550(b)(2) and ANSI section 5-3.2.4(b). Accordingly, there is a standard which applies to the hazard cited under section 5(a)(1) in this case.

Citation to section 5(a)(1) is inappropriate where a standard applies to the hazard in the case. Mississippi Power & Light Co., 79 OSAHRC 109/D12, 7 BNA OSHC 2036, 1980 CCH OSHD ¶ 24,146 (No. 76-2044, 1979), citing Brisk Waterproofing Co., 73 OSAHRC 30/E1, 1 BNA OSHC 1263, 1973-74 CCH OSHD ¶ 16,345 (No. 1046, 1973). Because ANSI section 5-3.2.4(b) applies to the hazard in this case, the standard incorporating this ANSI provision, section 1926.550(b)(2), preempts section 5(a)(1). See A. Prokosch & Sons Sheet Metal, Inc., 80 OSAHRC 96/A2, 8 BNA OSHC 2077, 1980 CCH OSHD ¶ 24,840 (No. 76-406, 1980). Accordingly, citation to section 5(a)(1) in this case was inappropriate and the citation must be vacated. SO ORDERED.

FOR THE COMMISSION

Ray H. Darling Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: FEB 26 1982

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3/ (continued)

the vice president's testimony and Respondent's exhibits. Moreover, the Secretary does not contend that the crane was not a type covered by § 1926.550(b)(2). Therefore, on the basis of Respondent's evidence, we find that the crane used in this case was a truck crane.

COTTINE, Commisioner, dissenting:

The majority decision is dependent on one critical fact - the type of crane used by Cornell at this worksite. Unless the crane is a crawler, locomotive or truck crane, 29 C.F.R. §1926.550(b)(2) does not apply.[1/] There is no evidence in the record that Cornell's crane is a truck crane, or a crawler or locomotive crane. My colleagues essentially acknowledge that there is no probative evidence on this point because they state, "It appears that a truck crane was being used in this case." Slip op. at 2 (emphasis added). Factual issues, however, must be decided on the basis of record evidence.

The majority's inference in this case is predicated on a prior citation issued to the Respondent for a section 5(a)(1) violation at a different construction worksite involving a truck crane. Based on the testimony of the Respondent's vice president that these cases are "similar", the majority concludes that the crane used at this worksite must be a truck crane because a truck crane was used at the other worksite. Reasonable inferences may be drawn from circumstantial evidence, i.e., "circumstances having been found by experience so associated with that fact that in the relation of cause and effect they lead to a satisfactory conclusion." 1 JONES ON EVIDENCE §1.3 at 4 (6th ed. 1972). However, in the absence of additional evidence linking the characteristics of the

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1/ §1926.550 Cranes and derricks.

* * *

(b) Crawler, locomotive, and truck cranes .

* * *

(2) All crawler, truck, or locomotive cranes in use shall meet the applicable requirements for design, inspection, construction, testing, maintenance and operation as prescribed in the ANSI B30.5-1968, Safety Code for Crawler, Locomotive and Truck Cranes.

cranes or the conditions of use together, the inference in this case bears no relation to fact or experience.[2/] There is no reasonable association between the type of crane used at one construction site and those used at another site without additional evidence. An illustrative example of circumstantial evidence is given in JONES ON EVIDENCE:

> [W]hen footprints are discovered subsequent to a recent snow, it is proper to infer that some animated being passed over the snow after it fell; and from the form and number of the footprints it can be determined whether they are those of a man, a bird or a quadruped.

Id. Regrettably, the crane in this case left no tracks in the snow or imprint on the record. The only "satisfactory conclusion" sought by the majority in this case is a factual basis to apply the Commission's precedent in A. Prokosch & Sons Sheet Metal, Inc., 80 OSAHRC 96/A2, 8 BNA OSHC 2077, 1980 CCH OSHD ¶24,840 (No. 76-406, 1980). Unfortunately, there is no evidentiary basis for my colleagues' conclusion that "there is a standard which applies to the hazard cited under section 5(a)(1) in this case."

The majority's legal conclusion is also untenable. The majority concludes that the Secretary will not be permitted to prove an allegation that Cornell exposed its employees to serious, recognized hazards prohibited by section 5(a)(1) of the Act, 29 U.S.C. §654(a)(1), because a specific standard covers the working conditions involved here. However, no such standard applies. An occupational safety and health standard is expressly defined under the Act as "a standard which requires conditions . . . reasonably necessary or appropriate to provide safe or healthful employment and places of employment." Section 3(8) of the Act, 29 U.S.C. §652(8). All that §1926.550(b)(2) does is to incorporate by reference certain

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2/ Moreover, the absence of any rebuttal by the Secretary to the Respondent's evidence regarding the previous citation does not affirmatively establish or support any inference concerning the identity of the crane.

applicable requirements in ANSI B30.5-1968. See note 1 supra. The ANSI provision said to be applicable by the majority, section 5-3.2.4(b), is not a requirement.[2/] It is merely advisory.[3/] Therefore it is not an applicable standard nor a requirement incorporated by reference in the OSHA standard. It does not preclude the Secretary from citing the alleged hazards under section 5(a)(1) of the Act. See A. Prokosch & Sons Sheet Metal, Inc., supra, 8 BNA OSHC at 2082, 1980 CCH OSHD ¶24,840, p. 30,630 (No. 76-406, 1980) (Cottine, Commissioner, dissenting).

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2/ Section 5-3.2.4(b) provides: "No person should be permitted to stand or pass under a load on the hook."

3/ ANSI B30.5-1968, Introduction, Section V, states:

> Mandatory rules of this Code are characterized by the use of the word "shall." If a rule is of an advisory nature it is indicated by the use of the word "should" or is stated as a recommendation.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>CORNELL & COMPANY, INC.,<br>Respondent. | OSHRC DOCKET<br>NO. 78-5956 |

Appearances:

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Attorneys for Respondent

## DECISION AND ORDER

FIER, JUDGE:

## PRELIMINARY STATEMENT

This is a proceeding pursuant to section 659 of the Occupational Safety and Health Act of 1970 (29 U.S.C. section 651 et seq., hereinafter called the Act), wherein Respondent contests the citation and penalty for one serious violation and one nonserious violation. The citations were dated

November 21, 1978 and were issued with the proposed penalty pursuant to sections 9(a) and 10(a) of the Act. The citations were based on an inspection conducted November 15, 1978.

Pursuant to section 10(c) of the Act, 29 U.S.C. section 659(c), Respondent, through a letter dated December 8, 1978, noted its timely contest to the citations and proposed penalty.

The standards which were violated are set forth as 29 U.S.C. 654 section 5(a)(1) with a proposed penalty totaling $720.00 and 29 CFR § 1926.450(a)(1) with no penalty proposed.

## I S S U E S

The following issues are pertinent to the disposition of this case:

1. Did the Respondent fail to provide a place of employment that was free from recognized hazards which were likely to cause death or serious physical harm to employees?

2. Did Respondent violate section 29 CFR 1926.450(a)(1)?

3. If the Respondent is found to have violated any or all of the above, what penalty or penalties, if any, should be assessed for any of the violations of the Act.

## STATEMENT OF THE EVIDENCE

The Respondent, Cornell & Company, Inc. (hereafter referred to as Cornell), by stipulation admits that it is

licensed to do business as a corporation in the State of New Jersey (Tr. 3).* The company is engaged in a business affecting commerce since the company uses equipment manufactured outside of the state and does work in other states (Tr. 3). There are approximately 150 employees of the Respondent (Tr. 3). The Respondent also acknowledges that it has a prior history before the Occupational Safety and Health Administration (Tr. 3).

On November 15, 1978, Harry Clugston, the Compliance Officer (hereafter referred to as C.O.), inspected Respondent's worksite (Tr. 4, 6). This was a multi-employer site in which Robert McDonald of Cornell was in charge at the time (Tr. 6). Respondent was erecting a steel frame on an existing building in Atlantic City, New Jersey (Tr. 7).

The C.O. issued a citation for a violation of section 5(a)(1) of the Occupational Safety and Health Act when he observed Cornell's employees transporting structural steel beams with a crane, in a tandem or "Christmas tree" fashion, to the third floor level (Tr. 7-8, 17). The C.O. testified that these steel beams swung over the heads of the workers in a dangerous manner specifically prohibited by the New Jersey State Safety Code since 1963. At the time of the violation, the steel was about 100 feet up with the beams separated about 7 to 8 feet above the employees' heads (Tr. 24). The length of a beam was about 16 feet and the weight was approximately 1,000 pounds or more (Tr 25-26). He further

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*Denotes transcript page.

commented that the "Christmas tree" practice, as it is known in the trade, has almost disappeared due to past State enforcement of the statute (Tr. 8). The enforcement of the New Jersey statute has been "turned over" to Federal jurisdiction (Tr. 9-10).

The C.O. testified that it was a routine practice on the the jobsite for two beams, one over one, to be installed simultaneously (Tr. 8). It was the C.O.'s opinion that the upper beam could be moved or tilted by a gust of wind, by mechanical failure of the crane, or some other difficulty possibly striking and killing an employee or employees (Tr. 9). The C.O. indicated that the Respondent should have picked up the beams one at a time or set the top beam first and then the bottom beam, so that the employees would not be endangered. According to testimony, Mr. McDonald's only comment to the C.O.'s suggestion at the time was that he had not thought of it.

The Respondent introduced into evidence a copy of a decision by Judge Henry McQuade dated March 30, 1979, Secretary v. Cornell and Co., CCH OSHD ¶ 23,577, (Docket No. 78-2723, 1979) dealing with identical issues and parties as in the instant case. The only purported difference between Judge McQuade's case and the instant case was one of location, with the former's site of violation being in Philadelphia, Pennsylvania (Tr. 14-15). The C.O. stated that had he observed the same

condition in Philadelphia, he would have issued a citation for the violation (Tr. 16). Other companies were cited for this violation in other areas, although to his personal knowledge, no worker had been hurt by the use of this practice (Tr. 18).

Since there was no specific standard covering this practice, the Respondent was cited under section 5(a)(1), relying on the New Jersey Code (Tr. 20-21) as a basis for the violation. The New Jersey standard was not incorporated under section 1926 of the Act or under the subpart for steel erection (Tr. 23-24). The New Jersey Safety Code is an extant state regulation, although it is not presently being enforced (Tr. 28-29).

Mr. Jack C. Sheppard, Vice-President of Cornell, testified that tandem lifting or "Christmas Treeing" is hazardous, but by taking certain risks, Cornell is minimizing other risks by reducing the number of times the boom must pass over the structure to install the steel (Tr. 54-55). Mr Sheppard further testified that if the New Jersey standard was enforced, no buildings would be erected (Tr. 61). He also pointed out that a National Steel Erection Code exists, entitled Construction of Structural Steel Building Frames, by Bill Rapp, (Tr. 63). On page 303, part 2.27, the book states that separate choked slings must always be used when picking up two pieces of steel at the same time and mentions tandem lifting (Tr. 64-65).

The witness stated that he was familiar with the New Jersey law, but had thought it was superseded by OSHA (Tr. 71). Although he recognized that it was part of the New Jersey safety code, he believed it was not strictly enforced (Tr. 72).

As to the nonserious violation of 29 CFR 1926.450(a)(1), the C.O. testified that he observed a Cornell employee, Mr. Jerry Johnston, climbing a column 10 feet up without using a ladder (Tr. 13). This violation was deemed nonserious because any resultant injury due to a fall from so low a height would not be serious, and thus, no penalty was proposed. The C.O. admitted however, that he was not sure whether any ladders were provided but he had observed none (Tr. 38).

## O P I N I O N

The question to be determined herein, is whether in the language of section 5(a)(1) of the Act, Respondent met the requirement that he furnish to each of his employees a place of employment which was free from "recognized" hazards, thst are causing or likely to cause death or serious injury to his employees. Complainant has charged Respondent with violating section 5(a)(1) because the employer allowed steel beams to be lifted in tandem above the employees, causing an overhead hazard. To establish a violation of section 5(a)(1), the Secretary must prove: (1) that the employer failed to

render its workplace "free" of a hazard which was (2) "recognized" and (3) causing or likely to cause death or serious physical harm to its employees. National Realty and Construction Co., Inc., v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973).

Respondent states that the Secretary has not carried his burden of proof with respect to the "Christmas Treeing" practice, as tandem lifting is known in the trade. Respondent's witness stated that "Christmas Treeing" has, to his knowledge, caused no injuries to any employee at Cornell or at any other company (Tr. 55-56). The C.O.'s testimony supports this contention (Tr. 18). However, one purpose of the Act is to prevent the first accident from occurring and a history of no injuries does not in itself prove that a practice is not a "recognized" hazard. Lee Way Motor Freight, Inc. v. Secretary, 511 F.2d 864, 1 OSHC 1689 (10th Cir. 1975).

In addition, to support its contention that "Christmas Treeing" is not a "recognized" hazard, Respondent testified that there was no specific OSHA standard, nor is there any collective bargaining agreement, prohibiting this practice (Tr. 62). The fact that there is no specific OSHA standard does not automatically lead to the conclusion that there is no "recognized" hazard. That is, indeed, the reason for this citation falling within the purview of the general duty clause provision. Furthermore, the National Steel

Erection Code, by S.A.E. entitled Construction of Structural Steel Building Frames, by Bill Rapp, which Respondent entered into evidence, does not prove that tandem lifting is not a recognized hazard. Page 303, part 2.27 which describes the manner in which tandem lifting should be accomplished, does not by its inclusion in the Code, prove that tandem lifting is recognized as a safe industry practice (Tr. 64-65).

Respondent also entered into evidence a copy of a decision dated March 30, 1979, in which Judge Henry McQuade held that Cornell did not violate the general duty clause because tandem lifting was not proven to be a "recognized" steel erection industry hazard in Philadelphia (Tr. 14-15). The Secretary was allowed, in that case, to elicit testimony to the effect that although "Christmas Treeing" was done in the Philadelphia area, it was not condoned because it was hazardous. Secretary v. Cornell and Company, CCH OSHD ¶ 23,577 (Docket No. 78-2723, 1979). In Philadelphia, the Secretary did not carry its burden of proof because there was no statute, as there is in New Jersey, proscribing tandem lifting. Thus, Judge McQuade had more latitude in determining what constitutes a "recognized" industry hazard than is possible in this case where there is a state law prohibiting the practice.

In Secretary v. Mid-Hudson Automatic Sprinkler Co., Inc., Docket No. 76-0576 (Oct. 12, 1976), this forum held that,

"A statute even though it has been repealed for various reasons, may still be received as part of the total evidence to identify an industry-wide practice and existing hazard." Since, in the instant case, the statute in question has not been repealed, further weight is given to the Secretary's allegation that the instant case should be distinguished from Judge McQuade's decision.

Respondent testified that the reason Cornell used "Christmas Treeing" was to reduce the number of times the boom must pass over the structure to install the steel and thus to eliminate some of the hazard (Tr. 54-55). Although Respondent contends that double stringing might minimize the risks of hoisting steel beams, he admitted that it is still a risky practice (Tr. 58-60). He also stated that Cornell did not utilize tandem lifting as a matter of course, but only under particular circumstances (Tr. 58).

Therefore, despite Respondent's arguments to the contrary, the Secretary has established the presence of a "recognized" hazardous condition. The Respondent's own statements to the effect that double stringing can be considered a hazardous practice and that it is the type of risk that men expect to take when they work in this field, establish actual knowledge of the hazardous nature of tandem lifting on the part of Cornell (Tr. 58).

Moreover, since 1973, Courts have recognized that a number of factors can be considered in determining whether a hazard is "recognized." Lack of industry reognition of a hazard does not suffice to prove that there is no recognized hazard. It may be fair to hold an employer to a higher standard of care than industry practice recommends. Cape and Vineyard Division v. OSAHRC, 512 F.2d 1148 (1st Cir. 1975), Secretary v. Southern Railway Co., 3 OSHC 1657 (R.C. 1975).

In the instant case, the New Jersey Administrative Code, Chapter 12.180-20.16.5(5) (Tr. 10) (Court Exhibit C-1) supports the Secretary's allegation that double stringing was a recognized hazard in the State of New Jersey since the early 1960's. Although standards may vary from state to state, the fact that New Jersey promulgated a statute prohibiting this practice is sufficient to establish a violation of section 5(a)(1) for the construction site in question. Secretary v. Puget Sound Power and Light Co., 10 OSAHRC 844, 1 BNA OSHC 1046, 1971-73 CCH OSHD ¶ 15,189 (Docket No. 15, September 28, 1972); Brennan v. OSAHRC, 494 F.2d 460 (8th Cir. 1974).

The Secretary has established the presence of a "recognized" hazardous condition. The question of actual knowledge is established by the admission of Respondent's witness that he knew of the New Jersey Act and has been with Respondent's New Jersey company since 1951 (Tr. 71, 82). Secretary of Labor v. Ford Motor Co., 5 OSHRC 1765, 5 BNA OSHC 1765, 1977-78 CCH OSHD ¶ 22,106 (Docket No. 13682, 1977). The evidence therefore,

goes further than required since once a practice is proven of a "recognized" hazard in the inudstry, the Secretary need not prove actual knowledge on the part of the employer. National Realty and Construction Co. v. OSAHRC, supra.

Therefore, the Secretary has carried its burden of proof with respect to the section 5(a)(1) violation and the citation is affirmed. The criteria for assessing the penalty included reductions of the $900.00 unadjusted penalty on the basis of size and good faith. No reduction was allowed for history, since Cornell has a previous history of violations of OSHA. The adjusted penalty of $720.00 is not disproportionate to the danger involved in this hazard, and is, therefore, affirmed, according to section 17 of the Act.

The second citation is concerned with a violation of section 1926.450(a)(1). The Secretary has met its burden of establishing a prima facie case in that the worker was observed by the C.O. climbing the column without using a ladder or stairs. If ladders were provided, it is a reasonable assumption that the employee would have used them. As it stands, no ladder was observed as being available at the site, much less being used by the employees. Even if ladders were available, the Respondent had a duty to see that his employees used them as a proper means of safe access (Tr. 41-42). Since there was little danger of serious injury, the affirmance of the violation without penalty is reasonable.

## FINDINGS OF FACT

The credible evidence and the record as a whole establishes preponderant proof of the following facts:

1. Respondent, Cornell and Company, Inc., is engaged in the erection of steel. It is engaged in a business crossing state lines and uses equipment manufactured outside the state. The materials used and effects on commerce establish that it is engaged in interstate commerce.

2. The practice known as tandem lifting or "Christmas Treeing" was a recognized hazard likely to cause death or other serious injury to Respondent's employees.

3. The hazard created by the steel beams swinging over the heads of employees were within the scope of Respondent's knowledge. Tandem lifting was known to Respondent for many years to be specifically prohibited because of the hazard involved.

4. Tandem lifting is specifically prohibited by New Jersey Adminstrative Code, Chapter 12.180-20.16.5(5).

5. Respondent did not have ladders provided at the work-site for employee use.

6. An employee of Res ondent was observed climbing a pole 10 feet high in violation of 29 CFR 1926.450(a)(1).

7. The Respondent did not prevent its employee from climbing the 10-foot column.

## CONCLUSIONS OF LAW

1. The Respondent is and was at all times herein, engaged in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970.

2. The Occupational Safety and Health Review Commission has jurisdiction over the subject matter and parties to this action.

3. The Respondent violated section 5(a)(1) by failing to provide its employees with a place of employment which was free from "recognized" hazards that are causing or likely to cause serious injury or death to its employees.

4. The Respondent violated section 1926.450(a)(1) by not providing safe access to all elevations.

## O R D E R

Upon the basis of the foregoing facts and conclusions of law, and upon the the entire record, it is hereby ORDERED that:

Citation number one, item one, is affirmed. A penalty of $720.00 is assessed.

Citation number two, item one, is affirmed with no penalty.

Seymour Fier

SEYMOUR FIER
JUDGE, OSHRC

Dated: August 14, 1979
New York, New York

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

February 26, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Cargill, Inc., Nutrena Feed Division

OSHRC DOCKET NO. 78-5707

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION AND REMAND

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR EMPLOYEES

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Alan M. Wienman, Judge
Occupational Safety & Health
Review Commission
1114 Market Street Room 608
St. Louis, Missouri 63101

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 78-5707 |
| CARGILL, INC., NUTRENA FEED DIV., | : | |
| Respondent. | : | |
| | : | |

DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge Alan M. Wienman is before us for review pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Cargill, Inc., Nutrena Feed Division ("Cargill") was charged with two violations of section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1),[1/] the "general duty clause." Judge Wienman vacated both items on the ground that the Secretary of Labor had failed to carry his burden of proof. Commissioner Cottine granted the Secretary's petition for review and directed review of two issues:

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1/ Section 5(a)(1), 29 U.S.C. § 654(a)(1), provides:

> Sec. 5(a) Each employer —
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

1. Whether the ALJ erred in vacating the alleged violation of § 5(a)(1) on the grounds that the Secretary had failed to prove the existence of a recognized hazard and feasible means of abatement.

2. Whether the ALJ erred in vacating item 3(c) of the citation, alleging a violation of § 5(a)(1), on the ground that NFPA Standards "are not acceptable proof of industry recognition of a hazard."

For the reasons that follow we affirm the judge's decision as to one item and reverse and remand as to the other.

I

Cargill operates a grain elevator and feed mill where grain and commodities are processed into animal feed. The elevator was built in 1959, the feed mill in 1965, and both were acquired by Cargill in 1967. Both the grain elevator and the feed mill contain vertical conveyors called "legs," which consist of flexible belts equipped with buckets that pull grain and other materials from one level to another. The belts are enclosed in shafts composed partly of sheet metal and partly of concrete.

Grain and commodities are delivered to Cargill by truck and train and off-loaded into receiving pits which are covered by steel grates. The grates over the grain pits form openings of about two inches by twelve inches, and the grates over the commodity pits form openings of about two-and-one-half inches by nine inches. The grain and commodities are transported from the pits by screw conveyors which have a tolerance of about three-eighths of an inch.

In November 1978 this facility was cited for several violations of the Act, including the two items at issue here, item 3(b) and item 3(c). The gravamen of item 3(b) is that those legs which were used by Cargill to transport grain present hazards of secondary grain dust fire

and explosion because the legs are not equipped with explosion relief venting. As the Secretary explained at the hearing, the presence of explosion relief venting in the cited legs would not prevent a grain dust fire or explosion in the first instance, but it would prevent secondary fires and explosions. Secondary grain dust fires and explosions occur when an initial dust explosion in a confined space creates pressure waves which raise additional dust into suspension, leading to a series of explosions of increasing intensity. As a means of abatement, the Secretary suggested that Cargill extend the sheet metal casings at the top of the legs directly up through the roofs of the two buildings so that in the event of a grain dust explosion, the resulting pressure waves could move up and out of the leg without causing secondary explosions and fires.

Item 3(c) alleged that Cargill's receiving pits should have been equipped with permanent magnets, approved electromagnets, or specific gravity separators or screens capable of preventing entry of tramp metal into the processing system. "Tramp metal" is ferrous material which accidentally gets mixed in with the grain and commodities as they are transported from the farm to various processors. The gravamen of this charge is that the tramp metal can, as a result of frictional contact with Cargill's metal processing machinery, give off sparks. The Secretary alleges that these sparks could provide the ignition source for grain dust fires or explosions.

Judge Wienman vacated both items on the ground that the Secretary had failed to prove the existence of a recognized hazard or a feasible means of abatement. He also ruled that the National Fire Protection Association Standard 61B ("NFPA 61B"), "Grain Elevators Bulk Handling

Facilities," is not "acceptable proof" of industry recognition of a hazard.

II

The first question to be resolved with respect to item 3(b), "failure to provide explosion relief venting in grain transport legs," is whether the judge erred in ruling that the Secretary had failed to establish a recognized hazard. Recognition of the hazard, either by the employer or the employer's industry, is an element of the Secretary's prima facie case in proving a violation of the general duty clause. See Continental Oil Co. v. OSHRC, 630 F.2d 446 (6th Cir. 1980), cert. denied, 101 S.Ct. 1481 (1981); Beaird-Poulan, A Division of Emerson Electric Co., 79 OSAHRC 21/D11, 7 BNA OSHC 1225, 1979 CCH OSHD ¶ 23,493 (No. 12600, 1979); Empire Detroit Steel Division, Detroit Steel Corp. v. OSHRC, 579 F.2d 378 (6th Cir. 1978).

Judge Wienman defined the hazard in item 3(b) as the "absence of explosion relief venting." Based on that characterization of the hazard, he concluded that the record lacked sufficient evidence to show recognition of the hazard. However, we have held that a recognized hazard is not to be defined in terms of the absence of appropriate abatement measures. Beaird-Poulan, A Division of Emerson Electric Co., supra. The hazard identified by item 3(b) is the hazard of secondary grain dust explosions and fires in confined spaces such as elevator legs.

The record is replete with evidence both of Cargill's and of the grain handling industry's recognition of this hazard. To single out but some of this evidence, we take especial note that Cargill's own assistant manager testified that he is a member of the Static Metal Sparking Committee of the Explosion Research Council of the National Grain and

Feed Association and that one of the Committee's objectives is "to discover more about how a leg must be vented or how it can be vented safely." He described a number of experiments then being conducted regarding explosion relief for elevator legs and said he agreed with the Secretary's expert witness that the leg is the most hazardous area in a grain elevator and that adequate venting would substantially reduce the severity of grain dust explosions. In addition, the Secretary introduced into evidence a Literature Survey of Dust Explosions in Grain Handling Facilities: Causes and Preventions prepared by the Energy and Mineral Resources Researth Institute of Iowa State University. This survey states, in pertinent part,

> Usually the initial explosion is followed in close succession by one or more secondary explosions of much greater magnitude. The secondary explosions are presumably caused by suspension of dust, which has accumulated in other areas of the plant, by the initial or subsequent shock waves. . . . [T]here are areas during operation of a typical grain elevator where the formation of critical dust concentrations is almost inevitable. This is particularly true of the elevator legs which contain the bucket elevators which carry the grain to the head house at the top of the bins or silos.

The Secretary also entered into evidence a publication of the Farmland Insurance Company, which contains an article, "Explosion Vent Prevents Major Loss," describing an elevator leg grain dust explosion in which damage was minimized by an explosion relief vent.[2/] Accordingly,

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2/ It is to be noted that although much of this evidence focuses on the feasibility of explosion relief venting, as well as on the capacity of grain dust to burn and explode, it was received into evidence and is being considered here for the limited purpose of determining recognition of the hazard, and not for the purpose of determining feasibility of abatement.

we conclude that the Secretary has established both industry and employer recognition of the hazard.

The second question to be resolved with respect to item 3(b) is whether the Secretary established feasibility of abatement. "A violation of the general duty clause cannot be sustained unless the Secretary is able (1) to establish the type of employer conduct necessary to avoid citation under similar circumstances and (b) to demonstrate the feasibility and likely utility of such conduct." Williams Enterprises, Inc., 79 OSAHRC 24/A2, 4 BNA OSHC 1663, 1666, 1976-77 CCH OSHD ¶ 21,071 at 25,361 (No. 4533, 1976); see also National Realty and Construction Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973); Bomac Drilling, Division of TRG Drilling Corp., 81 OSAHRC 45/A2, 9 BNA OSHC 1681, 1981 CCH OSHD ¶ 25,363 (No. 76-450, 1981).

The Secretary suggested, through expert testimony, that Cargill abate the hazard by extending the sheet metal leg casings directly up through the grain elevator and feed mill roofs. The resultant roof-top vents should, according to the Secretary's expert, substantially reduce, if not eliminate, the number and intensity of secondary grain dust explosions in the event of an initial conflagration or deflagration.[3/]

In rebuttal, Cargill presented the uncontradicted testimony of its plant superintendent that it would be physically impossible to extend

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3/ The Commission has held that "[i]t is sufficient if [a] method [of abatement] materially reduces, even though it may not eliminate, the hazard." Whirlpool Corp., 79 OSAHRC 32/A14, 7 BNA OSHC 1356, 1360, 1979 CCH OSHD ¶ 23,552 at 28,535 (No. 9224, 1979); see also Royal Logging Co., 79 OSAHRC 84/A2, 7 BNA OSHC 1744, 1979 CCH OSHD ¶ 23,914 (No. 15169, 1979), aff'd, 645 F.2d 822 (9th Cir. 1981); Titanium Metals Corp. of America v. Usery, 579 F.2d 536 (9th Cir. 1978); National Realty, supra.

the leg casings through the two roofs without piercing structural beams which support the roofs. He stated that to sever these structural members would weaken the roofs.

We have stated that once the Secretary has specified a method of abatement which would reduce or eliminate the incidence of the hazard, the employer may rebut the feasibility of that method with evidence "showing or tending to show that use of the method or methods established by Complainant will cause consequences so adverse as to render their use infeasible." Royal Logging Co., supra note 3, 7 BNA OSHC at 1751, 1979 CCH OSHD at p. 28,997. Cargill's plant superintendent testified that to extend the leg casings in the manner suggested by the Secretary would seriously weaken the roofs in question because the casings would have to pierce overhead supporting structures. This testimony was neither challenged nor rebutted by the Secretary, and there is nothing in this record to cast his testimony into doubt.

The Secretary contends on review that this rebuttal testimony does not disprove the feasibility of the recommended abatement because Cargill did not show that the extensions could not be constructed so as to avoid the overhead beams. However, it was the Secretary who specified in the first instance a form of abatement that would require cutting holes in the roof directly over the legs and in the same size and shape as the cross sections of the legs. For the Secretary to suggest now that extensions could have been installed in some way other than that proposed by the Secretary's expert at the hearing raises questions of fact for the first time on review. It is axiomatic that a reviewing tribunal should not decide a case on evidence not in the record, particularly

where, as here the "facts" are by no means certain. See National Realty, supra; 4 AM. JUR. Appeal & Error § 491 (1962).

The Secretary also points out that the judge made no finding of fact with respect to the question of whether direct vertical extensions would, indeed, weaken the roofs. However, it is the Commission, not the administrative law judge, who is the ultimate trier of fact. Accu-Namics, Inc. v. OSHRC, 515 F.2d 828, 834 (5th Cir. 1975), cert. denied, 425 U.S. 903 (1976). We conclude, in the face of the Secretary's failure to offer any evidence to the contrary, that Cargill has proved that incisions into overhead supporting beams would seriously weaken if not cause the collapse of the roofs involved.

Accordingly, we affirm the judge's vacation of item 3(b) on the ground that Cargill proved infeasibility of the proposed means of abatement.

III

Whereas item 3(b) was directed at the hazards of fire and explosion which follow upon an initial deflagration or conflagration of grain dust in elevator legs, item 3(c), the tramp metal charge, was directed at the capacity of ferrous metal to provide the initial ignition source due to friction sparking. It was the Secretary's contention that tramp metal could act as the ignition source for fire and explosion by releasing friction sparks in its progress through the metallic grain handling equipment.

Judge Wienman vacated that item on the ground that the record lacked sufficent proof of recognition of the hazard or the utility of the means of abatement. However, Judge Wienman never actually defined

the "recognized hazard" at issue under the tramp metal charge. In consequence it is not clear whether his references both to "recognized hazard" and to "utility of abatement" are to be taken as alternative grounds for vacation, or whether they reflect the judge's view of the hazard as lack of the recommended means of abatement, namely magnets and grating of the type described in the citation.

The hazard with which item 3(c) is concerned is the initial grain dust fire or explosion caused by tramp metal sparking. The judge's decision does not contain a finding as to whether the record shows, by a preponderance of the evidence, that either the grain handling industry or Cargill recognizes such a hazard. Accordingly, we remand the case on item 3(c) to the judge for an assessment of the evidence regarding this element of a general duty clause violation. In the event the judge determines that industry recognition of the hazard has been shown, then a determination as to the remaining elements of a general duty clause violation must be made.

IV

Judge Wienman ruled that NFPA 61B, "Grain Elevators Bulk Handling Facilites," is not "acceptable proof" of industry recognition of a hazard. NFPA 61B is a voluntary industry standard which has never been adopted as an OSHA standard and hence has neither the force nor effect of law. Judge Wienman concluded that this standard could not be used to establish industry recognition of a hazard because it applies only to facilities erected in 1973 or later and which are undergoing major replacement or alteration. Cargill's grain elevator and feed mill were constructed prior to 1973 and were not undergoing major renovation or replacement.

It is well established that voluntary industry standards are admissible and probative evidence of industry recognition of hazards. Bethlehem Steel Corp. v. OSHRC, 607 F.2d 871 (3d Cir. 1979); H-30, Inc. v. Marshall, 597 F.2d 234 (10th Cir. 1979); Titanium Metals Corp. of America v. Usery, supra note 3; Beaird-Poulan, A Division of Emerson Electric Co., supra; The Boeing Co., Wichita Division, 77 OSAHRC 188/D13, 5 BNA OSHC 2014, 1977-78 CCH OSHD ¶ 22,266 (No. 12879, 1977); cf. Betten Processing Corp., 75 OSAHRC 43/E2, 2 BNA OSHC 1724, 1974-75 CCH OSHD ¶ 19,481 (No. 2648, 1975) (ANSI standard used to show industry recognition of the hazard had been incorporated by reference into OSHA construction standards but had not been adopted in the general industry standards applicable to the Respondent's industry). The fact that this particular voluntary standard applies to facilities erected in 1973 or later and undergoing major replacement or renovation has no bearing on its relevance to industry awareness of certain hazards associated with grain dust and grain handling equipment. Accordingly, Judge Wienman's ruling that it is unacceptable proof of recognition is error.

Judge Wienman's vacation of item 3(b) is affirmed, for the reasons stated above. His vacation of item 3(c) is reversed and that item is remanded for disposition consistent with this opinion. SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: FEB 26 1982

ROWLAND, Chairman, concurring in part and dissenting in part:

I concur with the majority's disposition of citation item 3(b), but I do not join in the majority's broad statement that a "hazard is not to be defined in terms of the absence of appropriate abatement measures." Concerning item 3(c), I dissent from the majority's decision to reverse the judge and remand the case. I would affirm the judge's decision to vacate citation item 3(c) on the grounds that the Secretary did not show recognition of the hazard or utility of the recommended means of abatement.

The majority correctly concludes with regard to item 3(b) that the Secretary established a recognized hazard of secondary grain dust explosions and fires in the confined spaces of the elevator legs at Cargill's facility. Insofar as the judge held to the contrary, he erred, but the error was harmless since, as the majority states, the judge correctly vacated the citation for failure of the Secretary to show a feasible method of abatement. In my view, it is sufficient to note that the judge committed harmless error, without reaching the issue of whether a hazard may be defined in terms of the absence of appropriate abatement.

As to item 3(c), Judge Wienman correctly described the hazard throughout his decision as "fires or explosions . . . attributed to tramp metal" and "tramp metal caus[ing] sparking and . . . an ignition source." The judge's description of the hazard is supported by the record and is indeed indistinguishable from the majority's own definition of the hazard. 4/

Consistent with the cases cited in the lead opinion, voluntary industry standards, such as NFPA 61B, are indicative of industry recognition of hazards

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4/ The majority defines the hazard as "the initial grain dust fire or explosion caused by tramp metal sparking."

but do not conclusively prove recognition absent other credible and probative evidence. See, e.g., Bethlehem Steel Corp. v. OSHRC, 607 F.2d 871 (3d Cir. 1979) (recognition shown by evidence of voluntary private standard, admission that voluntary standard represented industry consensus, and evidence that standard generally followed in industry). Although the judge erred to the extent that he suggested that voluntary industry standards should never be accorded any weight, his error was harmless. In addition to stating that NFPA 61B was not "acceptable proof" of recognition, Judge Wienman examined the evidence - independent of that relating to NFPA 61B - and concluded that the record was insufficient to show that the hazard was recognized. The judge's conclusion reflects his implicit credibility evaluation of the testimony and usually should not be disturbed on review. Kus-Tum Builders, Inc., 81 OSAHRC 97/B2, 10 BNA OSHC 1128, 1981 CCH OSHD ¶ 25,738 (No. 76-2644, 1981). Accepting the judge's credibility determination, I conclude that the judge correctly held that the Secretary failed to show the hazard was recognized. 5/ Accordingly, I would affirm the judge's vacation of item 3(c).

Moreover, I would not disturb the judge's conclusion that the Secretary did not establish the utility of the proposed abatement measures. Neither party disputes on review the judge's determination that the magnets and screens, the recommended means of abatement, would not be useful. Since the propriety of the judge's determination regarding utility of abatement was not contested by the Secretary in his review petition nor directed for review by the Commission, the judge's conclusions on this issue are final. See Commission Rule 92(c), 29 C.F.R. § 2200.92(c). Since a violation of section 5(a)(1) cannot be

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5/ The record does not establish that Cargill, as distinguished from the industry, recognized the hazard.

found unless the Secretary establishes the feasibility and utility of the recommended abatement, I dissent from the majority's decision to remand the case for further disposition.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant<br><br>v.<br><br>CARGILL, INC.,<br>NUTRENA FEED DIVISION,<br><br>Respondent | DECISION & ORDER<br>OSHRC DOCKET 78-5707 |

APPEARANCES: EUGENE F. DESHAZO, Esq., U.S. Department of Labor, Office of the Solicitor, Kansas City, Missouri, for the Complainant

ROBERT L. HOBBINS, Esq., Dorsey, Windhorst, Hannaford, Whitney & Halladay, Minneapolis, Minnesota, for the Respondent

Wienman, Judge, OSHRC:

## STATEMENT OF THE CASE

This is a proceeding wherein Respondent contests a Citation which charged multiple violations of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.) at a feed mill in McPherson, Kansas. The Citation alleged serious violations of specific OSHA regulations and Section 5(a)(1) of the Act, the so-called General Duty Clause. Penalties totalling $4,320 were proposed for the alleged violations. Respondent timely contested all items and penalties except item 4 for which a $630 penalty was

proposed. The cause was assigned to the undersigned Judge by an order of the Commission dated March 6, 1979, and a hearing was held in Wichita, Kansas, on June 28, 1979.

## THE ISSUES

No jurisdictional matters remain in issue. The parties pleaded facts sufficient to establish that Respondent is subject to the Act and that the Commission has jurisdiction of the parties and the subject matter.

Prior to the hearing the parties entered into an agreement terminating the contest with respect to all but two items. Remaining in dispute are items 3(b) and 3(c).

Item 3(b) alleged a violation of Section 5(a)(1), the General Duty Clause,[1/] as follows:

> The two pellet mill legs, the jack leg, the east and west elevator legs are not provided with explosion reliefs vents to the outside atmosphere exposing employee(s) to the hazards of fire and/ or explosion.

Item 3(c) alleged a violation of the General Duty Clause because three grain receiving pits were not provided with "permanent magnets, approved electromagnets, or specific gravity separators or screens of sufficient size to prevent entry of tramp metal into the

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1/ Section 5. (a) Each employer--

> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

system."

The chief issues for decision are whether Respondent violated the Act as alleged. Ancillary issues relate to the mode and extent of the Secretary's use of the General Duty Clause in connection with items 3(b) and 3(c).

## SUMMARY OF THE EVIDENCE AND DISCUSSION

### Item 3(b): Explosion Relief Vents

Raymond R. Rogers, the OSHA Compliance Officer who inspected the facility in September 1978, provided a physical description of the workplace. Additional detail was supplied by Thomas Smolen, Plant Superintendent. The record contains no significant dispute as to the physical facts which are summarized from the testimony of Rogers and Smolen.

The cited facility is a feed mill plant which receives grain (corn and milo) and certain other commodities and processes them into animal feed products. The facility consists of a reinforced concrete elevator, where grain and commodities are received and briefly stored, and a sheet metal mill building in which the ingredients are processed. The grain elevator was built in 1959, and the feed mill erected in 1965. Cargill acquired the plant in 1967. The chief grain handling equipment consists of two 180 foot vertical conveyors or "legs" located in the elevator. The grain processing equipment includes various mills and grinders mainly located in the mill building (T. 7-8, 98-100, 118).

Complainant cited five of six conveyor legs in the elevator and

mill as presenting fire and explosion hazards for want of relief venting to the outside atmosphere. The sixth, a "mixer leg," was equipped with 6" x 6" air relief vent (T. 136) and was not cited upon Rogers' recommendation (T. 12-13). During the hearing the Secretary elected to withdraw the allegations as to two pellet legs, conceding they were unlikely to contain an explosive concentration of dust (T. 132).

Bruce Carl Beelman, an OSHA supervisory safety specialist who currently serves on a National Academy of Science Committee studying grain elevator explosion and fires (T. 46), explained the theory and function of explosion relief venting. In the event of an initial explosion, relief vents serve to prevent propagation to other portions of the workplace (T. 57). This is particularly important because initial explosions in grain elevators do not cause the majority of the damage. Subsequent explosions increase in intensity as more dust is lifted and placed in suspension (T. 58). Beelman also testified that the highest dust concentrations were generally found within the elevator legs and that the leg was "the number one source" of elevator explosions whose causes were known (T. 60).

Beelman disclaimed any qualifications as an expert able to calculate the venting area necessary to provide explosion relief for a given structure (T. 79), but nevertheless asserted that relief venting of the cited legs could be accomplished by extending simple ducts directly through the roof above the legs (T. 84).

Respondent took sharp issue with Beelman's testimony relative

to feasibility. Under cross-examination Beelman was unable to name an authoritative source setting forth guidelines for venting an elevator leg (T. 81). He further conceded that NFPA No. 68, a source document he relied on, consisted entirely of "recommended practices" as opposed to industry "requirements" (T. 81). The National Academy of Science Committee he served on was considering recommending that elevator legs be provided with vents equal to the cross section of the leg, but no final recommendation had been made (T. 79).

As to industry practices, Beelman testified 60 to 70 percent of the facilities OSHA inspects have "some type of venting system" (T. 88), but the vents are not as large as cross-sectional areas of the legs (T. 89). What percentage of the inspected elevators are equipped with vents designed to relieve explosive pressures as opposed to simple breather pipes which merely prevent creation of vacuums inside the legs was not clear from Beelman's testimony.

John A. Johnston, assistant manager of Cargill's grain research laboratory, testified that he served as chairman of the Static and Metal Sparking Committee of the Explosion Research Council of the National Grain and Feed Association (T. 152). He regularly reviews technical information concerning grain elevator safety, and testified that Cargill was involved in a project to conduct venting and explosion suppression tests on elevator legs with the Explosion Research Council (T. 167).

Johnson testified that the formula for determining explosion

relief is most commonly expressed as a ratio of vent area to the cubic volume of the vessel but that a number of variables affected the formula: the shape of the vessel, the nature of the material, type of dust, temperature, pressure, etc. Also, unusually shaped containers, especially long, narrow ones, pose special problems, and no expert to date has established a formula for explosion venting relief of elevator legs (T. 160-161).

A review of the testimony reveals a number of shortcomings in Complainant's effort to establish a violation as alleged in item 3(b). However desirable it may be to provide elevator legs with explosion relief venting, the proof does not indicate (1) that this is a generally recognized practice within the industry and (2) that explosion relief venting of the cited legs was feasible by the means suggested by the OSHA representatives. The elements of proof in a General Duty Clause violation case were stated by Judge J. Skelly Wright in National Realty and Contruction Co., Inc., v. OSHRC and Secretary of Labor, 489 F.2d 1257 (D.C. Cir., 1973). Not only must the Secretary prove that the employer failed to render its workplace free of a recognized hazard causing or likely to cause death or serious physical harm, but "the Secretary must be constrained to specify the particular steps a cited employer should have taken to avoid citation, and to demonstrate the feasibility and likely utility of those measures." 489 F.2d 1257, 1268

Because the secretary failed to meet this burden, item 3(b) must be vacated.

Item 3(c): Tramp Metal

Acting upon an OSHA instruction that a General Duty Clause violation may be recommended on the basis of provisions found in NFPA No. 61B-1973,[2/] Compliance Officer Rogers cited Respondent for lack of adequate screens, magnets, or other devices to prevent entry of tramp metal into the system at the grain receiving pits. Rogers observed that Respondent's receiving pits were protected only by wide grates with openings approximating 2 1/2" x 12" (T. 10). Rogers, who had inspected approximately four similar facilities before September 1978, testified that the grates were typical of those that he had observed at other elevators (T. 24), but he nevertheless recommended the Citation. The hazard, he warned, was that tramp metal causes sparking and could prove an ignition source. He could identify no grain elevator explosion which had been reliably attributed to tramp metal (T. 15). He also admitted that prior to September 1978 he had never seen a magnetic separation device in use (T. 24).

Mr. Beelman came closer to attributing a grain elevator explosion to tramp metal, stating that OSHA investigators had concluded that tramp metal was the most likely cause of an elevator explosion which had occurred in Garvey, Kansas (T. 49-52).

As to feasible abatement means, Beelman testified that a number

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2/ A standard for the prevention of fire and dust explosions in grain elevators and bulk grain handling facilities adopted by the National Fire Protection Association at its 1973 annual meeting.

of studies had determined that grates with 1 1/2" openings did not affect production flow (T. 71). On cross-examination Beelman admitted that out of 1500 elevators in Kansas, he knew of only 5 which were equipped with 1 1/2" square mesh grates, and only about 20 to 25 percent had magnetic protection in their receiving pits (T. 72).

John Johnson, Respondent's chief rebuttal witness, countered by stating that all reliable studies indicated that metal sparks alone were not of sufficient energy to cause an explosion. He did concede that the friction of rubbing metal might initiate an explosion or fire (T. 153). Johnson contended that there was no reliable basis for asserting that tramp metal was a hazard in grain handling equipment and that no existing industry practice required special devices above and beyond the type of grating in place at the McPherson elevator (T. 154). He stated that he knew of no fires or explosions reliably attributed to tramp metal and that the combination of the grates and auger at the McPherson plant prevented the entry of any metal large enough to cause a fire or explosion by friction (T. 156).

There are a number of deficiencies in the Secretary's case, chief of which is the reliance upon NFPA No. 61B-1973 as the basis for allegations of a General Duty Clause violation. The Forward to NFPA No. 61B expressly states that the standard applies only to facilities erected subsequent to the date of the standard and is an advisory guide for owners or operators engaged in major replacement or renovation of existing facilities. Since both the elevator and

mill structures were erected in the 1960's, NFPA No. 61B-1973 has advisory application only to the McPherson facility. We have labored the point in other decisions, but it is suffice to repeat our conviction that advisory provisions of a private industry standard are not acceptable proof of industry recognition of a hazard. The Secretary seeks to impose new and disputed technology upon the industry as a means of reducing the incidence of grain elevator explosions. Time may prove the Secretary correct, but the record contains insufficient independent proof of a recognized hazard or the utility of the recommended technology to support the Citation. Item 3(c) must be vacated.

## FINDINGS OF FACT

1. A preponderance of the reliable, probative, and substantial evidence supports the findings of fact set forth in the Summary of Evidence and Discussion.

2. The parties entered into an agreement settling all but two disputed issues prior to trial. The terms of the agreement are set forth on transcript pages 4-6. No reason appears why the agreements contained therein should not be approved by the Commission.

## CONCLUSIONS OF LAW

1. At all material times Respondent was an employer within the meaning of Section 3 of the Occupational Safety and Health Act of 1970.

2. Jurisdiction of this proceedings is conferred upon the Occupational Safety and Health Review Commission by Section 10(c) of

the Act.

3. The mutual agreements set forth on pages 4-6 of the transcript are consistent with the purpose of the Act. In all instances where the Secretary has agreed to modify a Citation item or penalty proposal, and in all instances where the Respondent has agreed to withdraw its Notice of Contest to a Citation item, the parties are bound by their respective agreements. All Citation items thus settled by mutual agreement are amended to conform with the express terms of the agreement.

4. With respect to the remaining disputed items, namely, items 3(b) and 3(c), the evidence fails to establish the existence of violations of Section 5(a)(1) of the Occupational Safety and Health Act of 1970.

## ORDER

Based on the above Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Citation items subject to settlement by stipulation of the parties are modified, vacated, or affirmed according to the agreed terms, namely:

(a) Items 1 and 6 of Citation Number 1 issued to Respondent October 26, 1978, are vacated.

(b) Item 3(a) of said Citation is affirmed and a penalty in the sum of $100 assessed thereon.

(c) Item 5 of said Citation is affirmed and a penalty of $540 assessed thereon.

(d) Item 7 of said Citation is modified to allege a nonserious violation of Section 110-17(a) of the National Electrical Code, NFPA 70-1971, as adopted by 29 CFR 1910.309(a). Item 7, as modified, is affirmed without monetary penalty.

(e) Item 8 of said Citation is affirmed and a penalty in the sum of $500 assessed thereon.

2. The disputed serious violations, namely, items 3(b) and 3(c) of Citation Number 1 issued October 26, 1978, are vacated.

Date: November 8, 1979

Alan M. Wienman, Judge, OSHRC

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

February 26, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Cornell & Company, Inc.

OSHRC DOCKET NO. 78-5956

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR EMPLOYEES

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Judge's Office
Occupational Safety & Health
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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 78-5956 |
| CORNELL & COMPANY, INC., | : | |
| Respondent. | : | |
| | : | |

DECISION

Before, ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge Seymour Fier is before the Commission pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Judge Fier affirmed a citation alleging that Cornell & Company, Inc., violated section 5(a)(1)[1/] of the Act because "[e]mployees were allowed to work under a beam suspended above [their] heads . . . [while] installing [a] lower beam suspended from [the] same hook. . . ."

In response to Cornell's petition for discretionary review, former Commissioner Barnako directed review on the following issues:

> (1) Whether the judge erred in concluding that the provisions of the New Jersey Administrative Code, specifically subchapter 20.16.5(5) of the Construction Safety Code, establish recognition of a hazard within the meaning of 29 U.S.C. § 654(a)(1).

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1/ Section 5(a)(1), 29 U.S.C. § 654(a)(1), provides that "[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

> (2) Whether a violation of 29 U.S.C. § 654(a)(1) can be found in view of the provisions of 29 C.F.R. § 1926.550(b)(2).
>
> The parties are also requested to address the following question:
>
> Whether the provisions of ANSI standard B-30.5 noted in Respondent's Memorandum in Support of Petition for Review are not mandatory and, if those provisions do not impose mandatory requirements, whether such fact constitutes a determination by the Secretary of Labor that the work practices in issue are not hazardous, so that a citation alleging violation of 29 U.S.C. § 654(a)(1) is improper.

Because we conclude that 29 C.F.R. § 1926.550(b)(2) applies to the hazard cited by the Secretary of Labor, we vacate the citation under section 5(a)(1).[2/]

Section 1926.550(b)(2) provides that "[a]ll crawler, truck, or locomotive cranes in use shall meet the applicable requirements for design, inspection, construction, testing, maintenance and operation as prescribed in the ANSI B30.5-1968, Safety Code for Crawler, Locomotive and Truck Cranes." Section 5-3.2.4(b) of ANSI B30.5-1968 provides that "[n]o person should be permitted to stand or pass under a load on a hook." It appears that a truck crane was being used in this case.[3/] Also, because

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2/ Because we conclude that the citation to § 5(a)(1) was inappropriate, we do not reach the first directed issue, concerning the Secretary's proof of a recognized hazard under section 5(a)(1).

3/ Respondent's vice president testified that the facts in this case were similar to those in an earlier case in which Respondent was cited for violating section 5(a)(1). The citation, which Respondent placed in evidence (Exh. R-3), alleged that a truck crane was being used. Also, the judge's decision, which Respondent placed in evidence (Exh. R-1), indicates that the Secretary's evidence in that case was that Respondent was using a truck crane. The citation was vacated because the Secretary failed to establish a recognized hazard. When this evidence was presented at the hearing in this case, Respondent had already raised the possibility that a standard, § 1926.550(b)(2), applies. However, the Secretary offered no rebuttal to

(continued on next page)

the Secretary's concern was that Cornell's employees who were installing the lower of two beams suspended from the same hook were standing under the upper beam, the hazard brought under section 5(a)(1) is the same one covered by section 1926.550(b)(2) and ANSI section 5-3.2.4(b). Accordingly, there is a standard which applies to the hazard cited under section 5(a)(1) in this case.

Citation to section 5(a)(1) is inappropriate where a standard applies to the hazard in the case. Mississippi Power & Light Co., 79 OSAHRC 109/D12, 7 BNA OSHC 2036, 1980 CCH OSHD ¶ 24,146 (No. 76-2044, 1979), citing Brisk Waterproofing Co., 73 OSAHRC 30/E1, 1 BNA OSHC 1263, 1973-74 CCH OSHD ¶ 16,345 (No. 1046, 1973). Because ANSI section 5-3.2.4(b) applies to the hazard in this case, the standard incorporating this ANSI provision, section 1926.550(b)(2), preempts section 5(a)(1). See A. Prokosch & Sons Sheet Metal, Inc., 80 OSAHRC 96/A2, 8 BNA OSHC 2077, 1980 CCH OSHD ¶ 24,840 (No. 76-406, 1980). Accordingly, citation to section 5(a)(1) in this case was inappropriate and the citation must be vacated. SO ORDERED.

FOR THE COMMISSION

Ray H. Darling Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: FEB 26 1982

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3/ (continued)

the vice president's testimony and Respondent's exhibits. Moreover, the Secretary does not contend that the crane was not a type covered by § 1926.550(b)(2). Therefore, on the basis of Respondent's evidence, we find that the crane used in this case was a truck crane.

COTTINE, Commisioner, dissenting:

The majority decision is dependent on one critical fact - the type of crane used by Cornell at this worksite. Unless the crane is a crawler, locomotive or truck crane, 29 C.F.R. §1926.550(b)(2) does not apply.[1/] There is no evidence in the record that Cornell's crane is a truck crane, or a crawler or locomotive crane. My colleagues essentially acknowledge that there is no probative evidence on this point because they state, "It appears that a truck crane was being used in this case." Slip op. at 2 (emphasis added). Factual issues, however, must be decided on the basis of record evidence.

The majority's inference in this case is predicated on a prior citation issued to the Respondent for a section 5(a)(1) violation at a different construction worksite involving a truck crane. Based on the testimony of the Respondent's vice president that these cases are "similar", the majority concludes that the crane used at this worksite must be a truck crane because a truck crane was used at the other worksite. Reasonable inferences may be drawn from circumstantial evidence, i.e., "circumstances having been found by experience so associated with that fact that in the relation of cause and effect they lead to a satisfactory conclusion." 1 JONES ON EVIDENCE §1.3 at 4 (6th ed. 1972). However, in the absence of additional evidence linking the characteristics of the

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1/ §1926.550 Cranes and derricks.

* * *

(b) Crawler, locomotive, and truck cranes .

* * *

(2) All crawler, truck, or locomotive cranes in use shall meet the applicable requirements for design, inspection, construction, testing, maintenance and operation as prescribed in the ANSI B30.5-1968, Safety Code for Crawler, Locomotive and Truck Cranes.

cranes or the conditions of use together, the inference in this case bears no relation to fact or experience.[2/] There is no reasonable association between the type of crane used at one construction site and those used at another site without additional evidence. An illustrative example of circumstantial evidence is given in JONES ON EVIDENCE:

> [W]hen footprints are discovered subsequent to a recent snow, it is proper to infer that some animated being passed over the snow after it fell; and from the form and number of the footprints it can be determined whether they are those of a man, a bird or a quadruped.

Id. Regrettably, the crane in this case left no tracks in the snow or imprint on the record. The only "satisfactory conclusion" sought by the majority in this case is a factual basis to apply the Commission's precedent in A. Prokosch & Sons Sheet Metal, Inc., 80 OSAHRC 96/A2, 8 BNA OSHC 2077, 1980 CCH OSHD ¶24,840 (No. 76-406, 1980). Unfortunately, there is no evidentiary basis for my colleagues' conclusion that "there is a standard which applies to the hazard cited under section 5(a)(1) in this case."

The majority's legal conclusion is also untenable. The majority concludes that the Secretary will not be permitted to prove an allegation that Cornell exposed its employees to serious, recognized hazards prohibited by section 5(a)(1) of the Act, 29 U.S.C. §654(a)(1), because a specific standard covers the working conditions involved here. However, no such standard applies. An occupational safety and health standard is expressly defined under the Act as "a standard which requires conditions . . . reasonably necessary or appropriate to provide safe or healthful employment and places of employment." Section 3(8) of the Act, 29 U.S.C. §652(8). All that §1926.550(b)(2) does is to incorporate by reference certain

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2/ Moreover, the absence of any rebuttal by the Secretary to the Respondent's evidence regarding the previous citation does not affirmatively establish or support any inference concerning the identity of the crane.

applicable requirements in ANSI B30.5-1968. See note 1 supra. The ANSI provision said to be applicable by the majority, section 5-3.2.4(b), is not a requirement.[2/] It is merely advisory.[3/] Therefore it is not an applicable standard nor a requirement incorporated by reference in the OSHA standard. It does not preclude the Secretary from citing the alleged hazards under section 5(a)(1) of the Act. See A. Prokosch & Sons Sheet Metal, Inc., supra, 8 BNA OSHC at 2082, 1980 CCH OSHD ¶24,840, p. 30,630 (No. 76-406, 1980) (Cottine, Commissioner, dissenting).

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2/ Section 5-3.2.4(b) provides: "No person should be permitted to stand or pass under a load on the hook."

3/ ANSI B30.5-1968, Introduction, Section V, states:

> Mandatory rules of this Code are characterized by the use of the word "shall." If a rule is of an advisory nature it is indicated by the use of the word "should" or is stated as a recommendation.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>CORNELL & COMPANY, INC.,<br>Respondent. | OSHRC DOCKET<br>NO. 78-5956 |

Appearances:

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Attorneys for Respondent

## DECISION AND ORDER

FIER, JUDGE:

## PRELIMINARY STATEMENT

This is a proceeding pursuant to section 659 of the Occupational Safety and Health Act of 1970 (29 U.S.C. section 651 et seq., hereinafter called the Act), wherein Respondent contests the citation and penalty for one serious violation and one nonserious violation. The citations were dated

November 21, 1978 and were issued with the proposed penalty pursuant to sections 9(a) and 10(a) of the Act. The citations were based on an inspection conducted November 15, 1978.

Pursuant to section 10(c) of the Act, 29 U.S.C. section 659(c), Respondent, through a letter dated December 8, 1978, noted its timely contest to the citations and proposed penalty.

The standards which were violated are set forth as 29 U.S.C. 654 section 5(a)(1) with a proposed penalty totaling $720.00 and 29 CFR § 1926.450(a)(1) with no penalty proposed.

## I S S U E S

The following issues are pertinent to the disposition of this case:

1. Did the Respondent fail to provide a place of employment that was free from recognized hazards which were likely to cause death or serious physical harm to employees?

2. Did Respondent violate section 29 CFR 1926.450(a)(1)?

3. If the Respondent is found to have violated any or all of the above, what penalty or penalties, if any, should be assessed for any of the violations of the Act.

## STATEMENT OF THE EVIDENCE

The Respondent, Cornell & Company, Inc. (hereafter referred to as Cornell), by stipulation admits that it is

licensed to do business as a corporation in the State of New Jersey (Tr. 3).* The company is engaged in a business affecting commerce since the company uses equipment manufactured outside of the state and does work in other states (Tr. 3). There are approximately 150 employees of the Respondent (Tr. 3). The Respondent also acknowledges that it has a prior history before the Occupational Safety and Health Administration (Tr. 3).

On November 15, 1978, Harry Clugston, the Compliance Officer (hereafter referred to as C.O.), inspected Respondent's worksite (Tr. 4, 6). This was a multi-employer site in which Robert McDonald of Cornell was in charge at the time (Tr. 6). Respondent was erecting a steel frame on an existing building in Atlantic City, New Jersey (Tr. 7).

The C.O. issued a citation for a violation of section 5(a)(1) of the Occupational Safety and Health Act when he observed Cornell's employees transporting structural steel beams with a crane, in a tandem or "Christmas tree" fashion, to the third floor level (Tr. 7-8, 17). The C.O. testified that these steel beams swung over the heads of the workers in a dangerous manner specifically prohibited by the New Jersey State Safety Code since 1963. At the time of the violation, the steel was about 100 feet up with the beams separated about 7 to 8 feet above the employees' heads (Tr. 24). The length of a beam was about 16 feet and the weight was approximately 1,000 pounds or more (Tr 25-26). He further

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*Denotes transcript page.

commented that the "Christmas tree" practice, as it is known in the trade, has almost disappeared due to past State enforcement of the statute (Tr. 8). The enforcement of the New Jersey statute has been "turned over" to Federal jurisdiction (Tr. 9-10).

The C.O. testified that it was a routine practice on the the jobsite for two beams, one over one, to be installed simultaneously (Tr. 8). It was the C.O.'s opinion that the upper beam could be moved or tilted by a gust of wind, by mechanical failure of the crane, or some other difficulty possibly striking and killing an employee or employees (Tr. 9). The C.O. indicated that the Respondent should have picked up the beams one at a time or set the top beam first and then the bottom beam, so that the employees would not be endangered. According to testimony, Mr. McDonald's only comment to the C.O.'s suggestion at the time was that he had not thought of it.

The Respondent introduced into evidence a copy of a decision by Judge Henry McQuade dated March 30, 1979, Secretary v. Cornell and Co., CCH OSHD ¶ 23,577, (Docket No. 78-2723, 1979) dealing with identical issues and parties as in the instant case. The only purported difference between Judge McQuade's case and the instant case was one of location, with the former's site of violation being in Philadelphia, Pennsylvania (Tr. 14-15). The C.O. stated that had he observed the same

condition in Philadelphia, he would have issued a citation for the violation (Tr. 16). Other companies were cited for this violation in other areas, although to his personal knowledge, no worker had been hurt by the use of this practice (Tr. 18).

Since there was no specific standard covering this practice, the Respondent was cited under section 5(a)(1), relying on the New Jersey Code (Tr. 20-21) as a basis for the violation. The New Jersey standard was not incorporated under section 1926 of the Act or under the subpart for steel erection (Tr. 23-24). The New Jersey Safety Code is an extant state regulation, although it is not presently being enforced (Tr. 28-29).

Mr. Jack C. Sheppard, Vice-President of Cornell, testified that tandem lifting or "Christmas Treeing" is hazardous, but by taking certain risks, Cornell is minimizing other risks by reducing the number of times the boom must pass over the structure to install the steel (Tr. 54-55). Mr Sheppard further testified that if the New Jersey standard was enforced, no buildings would be erected (Tr. 61). He also pointed out that a National Steel Erection Code exists, entitled Construction of Structural Steel Building Frames, by Bill Rapp, (Tr. 63). On page 303, part 2.27, the book states that separate choked slings must always be used when picking up two pieces of steel at the same time and mentions tandem lifting (Tr. 64-65).

The witness stated that he was familiar with the New Jersey law, but had thought it was superseded by OSHA (Tr. 71). Although he recognized that it was part of the New Jersey safety code, he believed it was not strictly enforced (Tr. 72).

As to the nonserious violation of 29 CFR 1926.450(a)(1), the C.O. testified that he observed a Cornell employee, Mr. Jerry Johnston, climbing a column 10 feet up without using a ladder (Tr. 13). This violation was deemed nonserious because any resultant injury due to a fall from so low a height would not be serious, and thus, no penalty was proposed. The C.O. admitted however, that he was not sure whether any ladders were provided but he had observed none (Tr. 38).

## O P I N I O N

The question to be determined herein, is whether in the language of section 5(a)(1) of the Act, Respondent met the requirement that he furnish to each of his employees a place of employment which was free from "recognized" hazards, thst are causing or likely to cause death or serious injury to his employees. Complainant has charged Respondent with violating section 5(a)(1) because the employer allowed steel beams to be lifted in tandem above the employees, causing an overhead hazard. To establish a violation of section 5(a)(1), the Secretary must prove: (1) that the employer failed to

render its workplace "free" of a hazard which was (2) "recognized" and (3) causing or likely to cause death or serious physical harm to its employees. National Realty and Construction Co., Inc., v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973).

Respondent states that the Secretary has not carried his burden of proof with respect to the "Christmas Treeing" practice, as tandem lifting is known in the trade. Respondent's witness stated that "Christmas Treeing" has, to his knowledge, caused no injuries to any employee at Cornell or at any other company (Tr. 55-56). The C.O.'s testimony supports this contention (Tr. 18). However, one purpose of the Act is to prevent the first accident from occurring and a history of no injuries does not in itself prove that a practice is not a "recognized" hazard. Lee Way Motor Freight, Inc. v. Secretary, 511 F.2d 864, 1 OSHC 1689 (10th Cir. 1975).

In addition, to support its contention that "Christmas Treeing" is not a "recognized" hazard, Respondent testified that there was no specific OSHA standard, nor is there any collective bargaining agreement, prohibiting this practice (Tr. 62). The fact that there is no specific OSHA standard does not automatically lead to the conclusion that there is no "recognized" hazard. That is, indeed, the reason for this citation falling within the purview of the general duty clause provision. Furthermore, the National Steel

Erection Code, by S.A.E. entitled Construction of Structural Steel Building Frames, by Bill Rapp, which Respondent entered into evidence, does not prove that tandem lifting is not a recognized hazard. Page 303, part 2.27 which describes the manner in which tandem lifting should be accomplished, does not by its inclusion in the Code, prove that tandem lifting is recognized as a safe industry practice (Tr. 64-65).

Respondent also entered into evidence a copy of a decision dated March 30, 1979, in which Judge Henry McQuade held that Cornell did not violate the general duty clause because tandem lifting was not proven to be a "recognized" steel erection industry hazard in Philadelphia (Tr. 14-15). The Secretary was allowed, in that case, to elicit testimony to the effect that although "Christmas Treeing" was done in the Philadelphia area, it was not condoned because it was hazardous. Secretary v. Cornell and Company, CCH OSHD ¶ 23,577 (Docket No. 78-2723, 1979). In Philadelphia, the Secretary did not carry its burden of proof because there was no statute, as there is in New Jersey, proscribing tandem lifting. Thus, Judge McQuade had more latitude in determining what constitutes a "recognized" industry hazard than is possible in this case where there is a state law prohibiting the practice.

In Secretary v. Mid-Hudson Automatic Sprinkler Co., Inc., Docket No. 76-0576 (Oct. 12, 1976), this forum held that,

"A statute even though it has been repealed for various reasons, may still be received as part of the total evidence to identify an industry-wide practice and existing hazard." Since, in the instant case, the statute in question has not been repealed, further weight is given to the Secretary's allegation that the instant case should be distinguished from Judge McQuade's decision.

Respondent testified that the reason Cornell used "Christmas Treeing" was to reduce the number of times the boom must pass over the structure to install the steel and thus to eliminate some of the hazard (Tr. 54-55). Although Respondent contends that double stringing might minimize the risks of hoisting steel beams, he admitted that it is still a risky practice (Tr. 58-60). He also stated that Cornell did not utilize tandem lifting as a matter of course, but only under particular circumstances (Tr. 58).

Therefore, despite Respondent's arguments to the contrary, the Secretary has established the presence of a "recognized" hazardous condition. The Respondent's own statements to the effect that double stringing can be considered a hazardous practice and that it is the type of risk that men expect to take when they work in this field, establish actual knowledge of the hazardous nature of tandem lifting on the part of Cornell (Tr. 58).

Moreover, since 1973, Courts have recognized that a number of factors can be considered in determining whether a hazard is "recognized." Lack of industry reognition of a hazard does not suffice to prove that there is no recognized hazard. It may be fair to hold an employer to a higher standard of care than industry practice recommends. Cape and Vineyard Division v. OSAHRC, 512 F.2d 1148 (1st Cir. 1975), Secretary v. Southern Railway Co., 3 OSHC 1657 (R.C. 1975).

In the instant case, the New Jersey Administrative Code, Chapter 12.180-20.16.5(5) (Tr. 10) (Court Exhibit C-1) supports the Secretary's allegation that double stringing was a recognized hazard in the State of New Jersey since the early 1960's. Although standards may vary from state to state, the fact that New Jersey promulgated a statute prohibiting this practice is sufficient to establish a violation of section 5(a)(1) for the construction site in question. Secretary v. Puget Sound Power and Light Co., 10 OSAHRC 844, 1 BNA OSHC 1046, 1971-73 CCH OSHD ¶ 15,189 (Docket No. 15, September 28, 1972); Brennan v. OSAHRC, 494 F.2d 460 (8th Cir. 1974).

The Secretary has established the presence of a "recognized" hazardous condition. The question of actual knowledge is established by the admission of Respondent's witness that he knew of the New Jersey Act and has been with Respondent's New Jersey company since 1951 (Tr. 71, 82). Secretary of Labor v. Ford Motor Co., 5 OSHRC 1765, 5 BNA OSHC 1765, 1977-78 CCH OSHD ¶ 22,106 (Docket No. 13682, 1977). The evidence therefore,

goes further than required since once a practice is proven of a "recognized" hazard in the inudstry, the Secretary need not prove actual knowledge on the part of the employer. National Realty and Construction Co. v. OSAHRC, supra.

Therefore, the Secretary has carried its burden of proof with respect to the section 5(a)(1) violation and the citation is affirmed. The criteria for assessing the penalty included reductions of the $900.00 unadjusted penalty on the basis of size and good faith. No reduction was allowed for history, since Cornell has a previous history of violations of OSHA. The adjusted penalty of $720.00 is not disproportionate to the danger involved in this hazard, and is, therefore, affirmed, according to section 17 of the Act.

The second citation is concerned with a violation of section 1926.450(a)(1). The Secretary has met its burden of establishing a prima facie case in that the worker was observed by the C.O. climbing the column without using a ladder or stairs. If ladders were provided, it is a reasonable assumption that the employee would have used them. As it stands, no ladder was observed as being available at the site, much less being used by the employees. Even if ladders were available, the Respondent had a duty to see that his employees used them as a proper means of safe access (Tr. 41-42). Since there was little danger of serious injury, the affirmance of the violation without penalty is reasonable.

## FINDINGS OF FACT

The credible evidence and the record as a whole establishes preponderant proof of the following facts:

1. Respondent, Cornell and Company, Inc., is engaged in the erection of steel. It is engaged in a business crossing state lines and uses equipment manufactured outside the state. The materials used and effects on commerce establish that it is engaged in interstate commerce.

2. The practice known as tandem lifting or "Christmas Treeing" was a recognized hazard likely to cause death or other serious injury to Respondent's employees.

3. The hazard created by the steel beams swinging over the heads of employees were within the scope of Respondent's knowledge. Tandem lifting was known to Respondent for many years to be specifically prohibited because of the hazard involved.

4. Tandem lifting is specifically prohibited by New Jersey Adminstrative Code, Chapter 12.180-20.16.5(5).

5. Respondent did not have ladders provided at the work-site for employee use.

6. An employee of Res ondent was observed climbing a pole 10 feet high in violation of 29 CFR 1926.450(a)(1).

7. The Respondent did not prevent its employee from climbing the 10-foot column.

## CONCLUSIONS OF LAW

1. The Respondent is and was at all times herein, engaged in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970.

2. The Occupational Safety and Health Review Commission has jurisdiction over the subject matter and parties to this action.

3. The Respondent violated section 5(a)(1) by failing to provide its employees with a place of employment which was free from "recognized" hazards that are causing or likely to cause serious injury or death to its employees.

4. The Respondent violated section 1926.450(a)(1) by not providing safe access to all elevations.

## O R D E R

Upon the basis of the foregoing facts and conclusions of law, and upon the the entire record, it is hereby ORDERED that:

Citation number one, item one, is affirmed. A penalty of $720.00 is assessed.

Citation number two, item one, is affirmed with no penalty.

Seymour Fier

SEYMOUR FIER
JUDGE, OSHRC

Dated: August 14, 1979
New York, New York

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

Secretary of Labor v. CARL NOSSER, d/b/a NOSSER CONSTRUCTION
OSHRC Docket No. 80-6646

1. Enclosed is a copy of my decision. It will be filed with the Commission on February 1, 1982, and will become the final order of the Commission on March 3, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is March 3, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

EABobrick

Edward A. Bobrick
Judge, OSHRC

Date: January 12, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 80-6646 |
| CARL NOSSER d/b/a NOSSER CONSTRUCTION, | : | |
| | : | |
| Respondent. | : | |

## DECISION AND ORDER

Appearance:

T. TIMOTHY RYAN, Esq., Solicitor of Labor
HERMAN GRANT, Esq., Regional Solicitor,
CYRUS A. ALEXANDER, Esq., Office of the Solicitor,
Chicago, Illinois, for Raymond J. Donovan, Secretary
of Labor, U.S. Department of Labor, Complainant.

CARL NOSSER, pro se, for Respondent.

BOBRICK, Judge

This proceeding was commenced pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, et seq., (hereinafter referred to as the Act), wherein Respondent, Carl Nosser, d/b/a Nosser Construction, contested the penalty provisions of certain Citations issued by Complainant, Raymond J. Donovan, Secretary of Labor, U.S. Department of Labor. The Citation charged Respondent with serious violations of the construction standards and proposed penalties for such violations as follows: Item 1, 29 C.F.R. 1926.28(a) - $200.00; Item 2(a)-(c),

29 C.F.R. 1926.400(a), Section 110-17(a), National Electrical Code, NFPA 70-1971, 29 C.F.R. 1926.400(h)(1) and 29 C.F.R. 1926.401(a)(1) - $200.00; Item 3, 29 C.F.R. 1926.450(a)(9) - $200.00; Items 4(a) and 4(b), 29 C.F.R. 1926.451(a)(4) and 29 C.F.R. 1926.451(a)(8) - $320.00.

Trial was held in this matter on October 22, 1981, at the completion of which a Decision and Order was announced.

The Secretary in its Citations has proposed the aggregate sum of $920.00 in penalties. While I find that the Secretary's rational and purpose in proposing that amount was fully justified and supportable in law (Tr. 13-18), a penalty in the aggregate of $300.00 appears more appropriate (Tr. 55). St. Joe Minerals Corp., d/b/a St. Joe Lead Co.-Smelting Division, CCH 1981 OSHD para. 25,644.

By reason of the size of the business of the employer, the gravity of the violation, the good faith of the employer and the history of previous violations, and considering the economic realities of times in which we live, the following penalties as set forth below are assessed (in which both Respondent and Complainant concur as being reasonable and appropriate (Tr. 55).

## ORDER

Based upon those reasons set out in my Decision and Order, and for good cause shown, it is ORDERED:

(1) A penalty of $50.00 is assessed for Item 1.

(2) A penalty of $50.00 is assessed for Item 2.

(3) A penalty of $100.00 is assessed for Item 3.

(4) A penalty of $100.00 is assessed for Item 4.

Edward A. Bobrick
Judge, OSHRC

Dated: February 1, 1982

Chicago, Illinois

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 240

ATLANTA, GEORGIA 30309

# NOTICE OF DECISION

Secretary v. B & W CONSTRUCTION COMPANY and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 301

OSHRC Docket No. 81-1272

1. Enclosed is a copy of my decision. It will be filed with the Commission on February 1, 1982, and will become the final order of the Commission on March 3, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N. W., Suite 601
   Washington, D. C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is March 3, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

James D. Burroughs

JAMES D. BURROUGHS
Judge

Date: January 12, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

| | | |
|---|---|---|
| SECRETARY OF LABOR, | ) | |
| Complainant, | ) | |
| v. | ) | OSHRC Docket No. 81-1272 |
| B & W CONSTRUCTION COMPANY, | ) | |
| Respondent, | ) | |
| and | ) | |
| INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 301, | ) | |
| Authorized Employee Representative. | ) | |

APPEARANCES:

John E. Richards, Esquire, Office of the Solicitor, U. S. Department of Labor, Dallas, Texas, on behalf of complainant

William C. Lucas, Esquire, New York, New York, on behalf of respondent

Mr. Billy C. Lewis, President, International Brotherhood of Electrical Workers, Local Union No. 301, Nash, Texas, on behalf of authorized employee representative

## DECISION AND ORDER

BURROUGHS, Judge: Respondent, B & W Construction Company, contests an alleged serious violation of 29 C.F.R. § 1926.451(a)(4) for failing to install standard guardrails on a platform erected approximately 41 feet above a concrete

floor. The serious citation was issued on April 9, 1981, and resulted from an investigation conducted at the Southwestern Electric Power Company's ("SWEPCO") plant at Cason, Texas, on March 30, 1981.

Respondent is one of the nation's largest companies engaged in the manufacture and construction of both nuclear and fossil-fueled power generation equipment. It had contracted with SWEPCO to perform certain repair work at SWEPCO's plant at Cason, Texas. One of the repair projects undertaken by respondent involved the removal of cables from a cable tray located near the plant's turbine room. The middle of three parallel cable trays had been damaged by fire and approximately one hundred cables had to be removed, new cable laid and terminated at two junction boxes.

The general description and location of the burned cable tray is undisputed. A flight of permanent stairs leads from the floor above to a permanent platform adjacent to the plant's turbine room door. The platform is approximately four feet by five feet and is midpoint to three tiers of cable trays. The three trays are located to the left of the permanent platform and run horizontally parallel to each other for approximately 45 to 50 feet (Tr. 107). The bottom cable tray makes two 45-degree angles at the platform area and then parallels the top two trays to the right of the permanent platform for another 45 feet (Tr. 107).

Each cable tray is supported by steel unistruts. The vertical distance between unistruts is approximately 12 inches from the bottom of one unistrut to the top of the above unistrut, or six inches when measured from the top of the lower unistrut to the bottom of the above unistrut (Exs. 1, 3, B; Tr. 34, 107, 131). The unistruts are supported by 5/8-inch vertical steel hanger rods (Exs. 1, 3, B; Tr. 19, 107). The hanger rods are suspended from a 24-inch I-beam that parallels the cable

trays and is attached to the ceiling (Ex. A; Tr. 107, 109, 131). The first unistrut was located 30 inches below the bottom of the I-beam (Ex. A; Tr. 107, 128-131).

There is no dispute over the fact that on March 16, 1981, Andy W. Jones, respondent's job superintendent, discussed the cable repair job with A. D. Donaldson, foreman of the electrical work, and instructed Donaldson to build a scaffold to facilitate the repairs. Seven electricians had reported to the site on that date to commence the job and Donaldson assigned three of them, Pate, Ellison and Terry, to construct the scaffold. It was agreed that the scaffold would be constructed with 2-inch by 12-inch boards secured to the unistruts located to the left of the permanent platform and that the bottom cable tray would provide an adequate runway to the right. The 2-inch by 12-inch boards were placed in position and secured to the unistruts. A dispute arises as to whether the boards were erected on top of the middle unistrut, as opposed to the bottom unistrut, and whether there was one or two guardrails.[1/] The determination of these factual questions involves an issue of credibility between Morris Pate and Andy Jones.

On March 16, 1981, a Monday, Morris Pate, Jr., a journeyman electrician, reported to work at SWEPCO's Cason, Texas, plant for purposes of repairing the damaged cables (Tr. 63). He was assigned to the job by A. D. Donaldson, and Donaldson explained to him what had to be done. Donaldson showed Pate the scaffolding materials and instructed him to construct a scaffold so the job could be accomplished (Tr. 64). According to Pate, Donaldson did not specify how he wanted the scaffold constructed but told him to make it as safe as he could (Tr. 64). Pate, with the assistance of two other electricians, constructed the scaffold. These facts are undisputed.

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1/ The adequacy of the bottom cable tray as a runway and the adequacy of the 2-inch by 12-inch boards are not in issue.

Pate testified that he constructed the scaffold on the bottom unistrut (Tr. 67, 85) and looped a 5/8-inch manila rope around the steel hanger rods above the top unistruts to serve as a guardrail (Tr. 68, 71, 94, 101). He stated that he tied only one rope around the scaffold (Tr. 69, 101). The top unistrut prevented the rope from slipping down the hanger rod (Tr. 71). Pate indicated that the rope around the scaffold could be pulled a distance of six to eight inches (Tr. 71, 95-96).

Respondent's job superintendent, Andy W. Jones, testified that on March 13, 1981, he discussed the cable tray repair job with A. D. Donaldson, foreman of the electrical work who was referred to the job by the union (Tr. 112). His next discussion with Donaldson took place on March 16, 1981. On that date, Jones took Donaldson to the area and discussed the building of a scaffold to accomplish the job. Jones instructed Donaldson to have the scaffold erected in a safe manner. He pointed out the boards available for use and told Donaldson to use a 5/8-inch manila rope for the guardrails (Tr. 112, 165). Donaldson and Jones concur in their recollection of the facts up to this point, but subsequent events are not remembered by Donaldson.

As the scaffold was being erected, Jones, according to his testimony, observed it from the ground and reminded Donaldson that it was not to be used until it was safe. He also asked that Donaldson inform him when the scaffold was completed so that he could inspect it (Tr. 113). According to Jones, on the morning of March 17, 1981, he and Donaldson went to the area and walked out on the permanent platform adjacent to the plant's turbine room door. Jones noticed that the scaffold had only one rope tied about six inches above the top unistrut. Jones testified that he informed Donaldson that he needed two guardrails and that he instructed Donaldson to place a second rope around the scaffold and to call him when it was erected (Tr. 113, 138-139). According to Jones, Donaldson later called

him to advise that both guardrails were in place and that they were tight (Tr. 114). Jones stated that later in the day he looked at the scaffold and observed that two guardrails had been erected and were tight.[2/] He reached out and grabbed the rope on the left side but only observed the rope on the right side (Tr. 122-123). According to him, the ropes did not deflect more than two inches (Tr. 115-116, 122, 139). He then told Donaldson to have the men go to work. Jones indicated that he continued to observe the scaffold from time to time while it was in place and that it always had two guardrails (Tr. 117-118).

Donaldson testified that Jones looked over the job with him and instructed him to build the scaffold. He remembers no discussion of guardrails but does remember that Jones told him to make the scaffold safe (Tr. 165). After the scaffold was constructed, Donaldson indicated that Jones came and talked with him about the scaffold and inquired if there was anything else the men needed to make the scaffold safe (Tr. 165-166). Donaldson says he informed Jones that the men had the scaffold like they wanted it (Tr. 166). Donaldson further testified that he did not see Jones go up to the platform and check the guardrails (Tr. 166). He could not remember if Jones ever told him that one guardrail was unsafe (Tr. 166). While Donaldson was able to testify precisely with regard to specific facts, the clarity of his answers seemed to dissipate when afforded an opportunity to directly confront testimony given by Jones.

Donaldson initially testified that there was only one rope used to provide one guardrail (Tr. 166). When asked if there could have been two ropes, he replied that he could not answer the question (Tr. 166). Later he indicated that he would not swear that there was not a second rope. He conceded that it was possible a second

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2/ Jones did not actually climb onto the scaffold but observed it from the permanent platform (Tr. 122).

rope was in place (Tr. 173). He testified that he made a visual check of the scaffold and seemed sure the rope had some sag in it over a period of time (Tr. 168-170). He later hedged his testimony by saying he truthfully could not recall if it was taut at times. He then indicated he could not remember one way or the other (Tr. 170). Donaldson conceded he made a visual check of the scaffold (Tr. 168) but did not seem to remember any facts that would place him in direct conflict with the testimony of Jones. Donaldson testified that he believed the scaffold was constructed on the bottom unistrut but conceded it could have been constructed on the second unistrut as contended by Jones (Tr. 168).

Billy Lewis reported to the work site on March 19, 1981, and was later named job steward for the union. The cable tray repair job had been in progress for three days when he reported to the work site (Tr. 40). While Lewis did not work on the cable tray, he testified that he passed by the cable trays two or three times a day (Tr. 40-41). He declined to categorically testify that there was only one guardrail. His responses to the questions concerning the number of guardrails were unusually vague. He testified (Tr. 41-42):

> Q. Did you observe whether there was a handrail or handrails on the scaffolding itself made out of five/eighths inch manila rope?
>
> A. I know there was a rope handrail.
>
> Q. How many handrails did you observe? How many handrails did you see?
>
> A. As far as saying for sure, I could not say. I know there was at least one.

Lewis later testified that he did not know OSHA standards and that the scaffold "could have or it could not have been an OSHA approved scaffolding" (Tr. 44). This statement seems incredulous since Lewis acknowledged that as union steward he had some responsibility for safety at the job (Tr. 42-43).

Lewis testified that he and A. D. Donaldson discussed the scaffold and that they both felt it was safe (Tr. 45, 56, 58). Donaldson further testified that it was emphasized "all down the line" to be sure the scaffold was safe and for no one to get on it until it was safe (Tr. 172). Pate acknowledges that Donaldson instructed him to make the scaffold as safe as he could (Tr. 64). Pate had knowledge of the requirements of scaffolds. He conceded that he had been a foreman on construction jobsites and had constructed approximately a dozen scaffolds in the last four years. He was aware that OSHA requirements necessitated a top rail and a midrail on scaffolds (Tr. 84, 99-100). He also acknowledged that whenever he observed a condition he believed to be unsafe, he tried to take steps to see that the condition was corrected (Tr. 84-85). According to him, he made the scaffold as safe as he could and that he considered it safe (Tr. 76).

The preponderance of the evidence mandates that the issues of credibility be resolved favorably to respondent. Jones explicitly testified that the scaffold was constructed on the middle unistrut and that two manila rope guardrails were erected around the scaffold. It is significant that Lewis and Donaldson, both members of the union and serving as job steward and electrical foreman for the job, failed to corroborate Pate's testimony on the essential facts in issue. Lewis and Donaldson had an opportunity to visually observe the scaffold several times a day but were unable or unwilling to testify that the scaffold had only one guardrail.

Pate's testimony that the platform was constructed on the bottom unistrut is inconsistent with his testimony of the distance from the platform to the ceiling. He testified that there was less than six feet from the platform to the ceiling. He indicated that he was six feet tall and had to turn his head to one side when he stood erect on the platform (Tr. 88). If the platform had been located on the bottom unistrut, the distance from the platform to the ceiling would have exceeded

six feet.[3/] The distance would have been less than six feet if the platform had been erected on the second unistrut as contended by Jones.

A decision in this matter adverse to respondent will result in a pecuniary benefit to Pate. This result arises from the fact that the union contract contained an unusual clause that provided for employees to be paid at one and a half times the hourly rate if employees worked on a scaffold at a height of over 40 feet and the scaffold did not comply with OSHA requirements (Tr. 43-44, 49-50). The question of whether the scaffold was constructed in conformity with OSHA standards did not arise until Lewis asked Pate whether he had been paid the "high time" rate for his work on the scaffold. The men working on the scaffold had been paid on Friday, March 20, 1981 (Tr. 54), and sometime thereafter Lewis asked Pate about the matter. According to Lewis, he raised the question because he wanted to agitate Pate. He further testified that when he raised the point, he had no opinion whatsoever at that time as to whether the scaffold was safe (Tr. 55). Once the issue was raised, he indicated that he discussed the matter with Donaldson and that both of them considered the scaffold to be safe (Tr. 45).

Since representatives of the company were of the opinion that the scaffold was safe, the union filed an employee complaint with OSHA in order to obtain a ruling as to whether the scaffold complied with OSHA standards. The sole motivation for filing the employee complaint was economic. It was initiated in an effort to obtain the 50 percent additional "high time" pay. There seems to have

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3/ A 24-inch I-beam attached to and supporting the ceiling ran parallel to the cable trays. There was a distance of 30 inches from the bottom of the I-beam to the top of the top unistrut. There was a distance of approximately 12 inches from the bottom of one unistrut to the top of the above unistrut. This means that there was approximately two feet from the bottom unistrut to the top of the top unistrut.

been little concern for safety since the complaint was not made until the scaffold was disassembled. When Compliance Officer Walter C. Hogan, Jr., conducted his investigation on March 30, 1981, he had to rely on representations made to him since he could not visually observe the scaffold.

There is considerable discussion in the record as to whether there was one or two platforms erected in the area of the cable trays. According to Jones and Lloyd Russell, the superintendent relieving Jones on Friday, March 20, 1981, the platform erected to repair the cable trays was removed from the unistruts on March 20, 1981[4/] (Tr. 118, 141-142, 144, 156). Russell testified that a smaller platform was erected to permit the electricians to attach a junction box onto a perpendicular I-beam above the cable trays (Tr. 142, 146). Russell indicates the second scaffold went up on Monday, March 23, 1981, and was taken down on Wednesday, March 25, 1981 (Tr. 146, 148). Pate testified that the one scaffold remained erected until Wednesday, March 25, 1981, and that there was no second scaffold (Tr. 71-72).

Whether there was a second platform has no direct relationship to the alleged violation of 29 C.F.R. § 1926.451(a)(4). The citation was issued with respect to the scaffold constructed on March 16, 1981, by Pate with the assistance of two other electricians. The second platform dispute crept into the record in an effort by both parties to buttress their argument as to the credibility of their witnesses. Jones and Russell testified there were two separate platforms while Pate testified that the one platform was used to repair the cable trays and to install the new junction box. The resolution of this particular conflict is not essential to the determination

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4/ Jones was assigned for a few days to another job because of his expertise in working with nuclear plants (Tr. 119). Russell testified that he was assigned to work at the SWEPCO plant in Cason, Texas, on March 20, 1981, and continued on the job through March 26, 1981 (Tr. 141). Jones returned to the SWEPCO plant on March 26, 1981 (Tr. 119).

of the issue in dispute. If the platform was not disassembled until March 25, 1981, as contended by Pate, then the delay in contacting OSHA served no purpose except to deny the compliance officer the opportunity to observe the scaffold.

All witnesses testifying in this matter expressed the opinion that the scaffold provided a safe work environment (Tr. 45, 56, 85-86, 165-166). Even Pate testified that the scaffold was safe (Tr. 76). Jones testified that no complaint was made to him concerning the safety of the scaffold (Tr. 119), and there is no evidence to contradict his testimony.

The citation alleges a failure on the part of respondent to comply with the provisions of 29 C.F.R. § 1926.451(a)(4),[5/] which requires guardrails and toeboards on all open sides more than ten feet above the ground or floor. Section 1926.451(a)(5)[6/] states that the guardrail shall be approximately 42 inches high with a midrail and specifies that guardrails shall be 2 inches by 4 inches "or the equivalent." The term "or the equivalent" has been interpreted by OSHA Program Directive #100-58 to include the use of synthetic, fiber or wire ropes as rails when

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5/ Section 1926.451(a)(4) provides:

> Guardrails and toeboards shall be installed on all open sides and ends of platforms more than 10 feet above the ground or floor, except needle beam scaffolds and floats . . . . Scaffolds 4 feet to 10 feet in height, having a minimum horizontal dimension in either direction off less than 45 inches, shall have standard guardrails installed on all open sides and ends of the platform.

6/ Section 1926.451(a)(5) states:

> Guardrails shall be 2- x 4-inches, or the equivalent, approximately 42 inches high, with a midrail, when required. Supports shall be at intervals not to exceed 8 feet. Toeboards shall be a minimum of 4 inches in height.

they meet certain guidelines.[7/] The new 5/8-inch manila rope[8/] used by Pate satisfies the equivalency requirement.

The bottom of the I-beam was located approximately 42 inches above the platform. This fact is undisputed (Tr. 89-90). The I-beam functioned as a top rail since the bottom of the I-beam was located at a height of 42 inches above the platform and extended to the ceiling. The rope located above the top unistrut functioned as a midrail. There is agreement among all witnesses that a rope was located above the top unistrut. Jones testified that the top rope was located approximately six inches above the top unistrut. The second rope was approximately four inches below the top unistrut (Tr. 115, 128). This means that the top rope was approximately 18 inches above the platform. The second rope would

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7/ OSHA Program Directive #100-58 provides, in pertinent part:

4. Action

a. The use of chain and synthetic, fiber, or wire ropes as top rails and intermediate rails of guardrails used on scaffolding meets the equivalent requirements of 1926.451(a)(5) when in compliance with the following guidelines.

(1) Rope or chain shall be secured to each support and taut at all times. It may be necessary to use a positive tensioning device to reduce the sag or catenary to a minimum.

(2) The rope or chain shall be free of sharp edges, burrs, or projections which may be a hazard.

(3) The maximum deflection of the top rail when a load of 200 pounds is applied in any direction at any point on the top rail shall not exceed 3 inches in one direction which includes the free hanging sag in the rope or chain.

8/ Pate testified that the 5/8-inch manila rope used as a guardrail was new.

have been just barely above the platform since there was only a distance of approximately 12 inches from the bottom of one unistrut to the top of the above unistrut. The cited standard did not necessitate a second rope being placed below the top unistrut; however, this does not mean that the second rope served no purpose. Pate testified that employees worked from a seating position (Tr. 96), and the second rope would have provided additional protection to employees. Whether there was a second rope below the top unistrut, as contended by Jones, is immaterial since the top rope functioned as a midrail.

There is also a dispute as to how taut the top rope was pulled around the scaffold. Jones testified that he checked the rope and found it to be taut. He also observed it each day and found it to be tightly drawn. While Pate indicated that the rope would on occasion give six to eight inches, he also testified that the electricians checked it at least daily and would retighten it (Tr. 71). Since daily checks were made on the tautness of the tope and it was retightened when necessary, there was compliance with the standard. The alleged violation is vacated.

## FINDINGS OF FACT

1. On March 30, 1981, Compliance Officer Walter C. Hogan, Jr., conducted an investigation of respondent's work site at the SWEPCO power plant near Cason, Texas. The investigation resulted from a complaint filed by the business agent of Local 301 of the International Brotherhood of Electrical Workers (Tr. 16-17). The complaint alleged an unsafe condition existed in regard to a scaffold erected at the site (Tr. 17).

2. The scaffold had been removed prior to Compliance Officer Hogan arriving at the work site on March 30, 1981 (Tr. 17, 24, 35).

3. Respondent had contracted to perform certain repair work at the SWEPCO plant at Cason, Texas (Tr. 105-106). One of the jobs involved the repair of a cable tray near the plant's turbine room. The middle of three parallel cable trays had been damaged by fire and approximately one hundred cables had to be removed, replaced and terminated at two junction boxes located on the floor above the trays (Tr. 106).

4. The cable trays are supported by steel unistruts. The vertical distance between the unistruts is approximately 12 inches from the bottom of one unistrut to the top of the above unistrut, or six inches when measured from the top of the lower unistrut to the bottom of the above unistrut. The unistruts are supported by 5/8-inch vertical steel hanger rods which are located approximately six feet apart. The hanger rods are suspended from a 24-inch I-beam that parallels the cable trays and is attached to the ceiling above the cable trays (Exs. 1, 3; Tr. 19, 34, 129-131).

5. In order to repair the damaged cables, it was necessary to erect a scaffold. A scaffold consisting of 2-inch by 12-inch boards was secured on top of the middle unistrut on March 16, 1981, by Morris Pate, Jr., and two other electricians. The boards were overlapped and tied together by number nine wire (Tr. 37, 64-65, 112, 114-115, 124, 131, 138).

6. The scaffold was constructed approximately 41 feet above a concrete floor (Tr. 17-18, 22).

7. Two guardrails consisting of 5/8-inch manila rope were erected completely around the scaffold. The top guardrail was placed around the hanger rods approximately six inches above the top unistrut. A second rope was placed around the hanger rods approximately four inches below the top unistruts (Tr. 68-69, 112-113, 115).

8. The ropes used as guardrails were tightly drawn to prevent sag (Tr. 116). The ropes were checked at least daily to insure that they were tightly drawn. The electricians retightened the ropes whenever any sag was observed (Tr. 71).

9. The 24-inch I-beam located parallel to the scaffold was approximately 42 inches above the platform (Tr. 89-90, 116).

10. The scaffold was removed from the unistruts on Friday, March 20, 1981 (Tr. 118).

## CONCLUSIONS OF LAW

1. Respondent, at all times material hereto, was engaged in a business affecting commerce within the meaning of section 3(5) of the Act.

2. Respondent, at all times material hereto, was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of the parties and of the subject matter herein.

3. Respondent did not violate 29 C.F.R. § 1926.451(a)(4) since the scaffold erected on March 16, 1981, at the SWEPCO plant located in Cason, Texas, complied with the requirements of sections 1926.451(a)(4) and (a)(5).

## ORDER

Based upon the foregoing findings of fact and conclusions of law, it is

ORDERED: That the serious citation issued to respondent on April 9, 1981, is vacated.

Dated this 1st day of February, 1982.

James D. Burroughs

JAMES D. BURROUGHS
Judge

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
ROOM 7B11, FEDERAL BUILDING
1100 COMMERCE
DALLAS, TEXAS 75242
FTS 729-5271
COM (214) 767-5271

## NOTICE OF DECISION

Secretary of Labor v. Bowman Handles, Inc.
OSHRC Docket NO. 81-2102

1. Enclosed is a copy of my decision. It will be filed with the Commission on February 1, 1982, and will become the final order of the Commission on March 3, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D. C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is March 3, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed portcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92 and 93.

Stanley M. Schwartz
Stanley M. Schwartz
Administrative Law Judge

Date: January 12, 1982

OSHRC Form 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>BOWMAN HANDLES, INC.,<br>Respondent. | OSHRC DOCKET NO. 81-2102 |
| JOHN L. FULCHER,<br>Authorized Employee Representative. | |

Appearances:

Ronnie A. Howell, Esq.
Dallas, Texas

For the Complainant.

Lynn Bowman
Batesville, Arkansas

For the Respondent.

John L. Fulcher
Batesville, Arkansas

Authorized Employee Representative

## DECISION AND ORDER

SCHWARTZ, Judge:

This is a proceeding brought before the Occupational Safety and Health Review Commission ("The Commission") by the Secretary of Labor ("The

Secretary"). Bowman Handles, Inc. ("The Respondent") contests several items of a serious citation and one item of a non-serious citation. A hearing was held on January 5, 1982, in Batesville, Arkansas. Mr. John L. Fulcher, representing the employees at Bowman Handles appeared on behalf of the employer. The Secretary withdrew item 4 of serious citation number 1 and deleted the proposed penalty of $200 for item 5 of the serious citation at the hearing. The remaining issues involve alleged saw guarding violations set forth at items 1, 2, and 3 of serious citation number 1 and item 3 of non-serious citation number 2.

I

DISCOVERY

Respondent requested an immediate hearing in this matter representing that the pending OSHA citations had caused its buyers to delay their semi-annual orders for fear Bowman Handles, Inc. would be out of business. This position was again advanced at the hearing. Congressman Bill Alexander also requested an expedited hearing on behalf of his constituent. Chief Judge Tenney indicated to Congressman Alexander that the Commission is sensitive to the fact Respondent is a small business and is appearing without counsel. Judge Tenney noted that the Respondent would receive a prompt hearing. The case was assigned to me on December 10, 1981.

In reviewing the file, I noted that the Secretary had requested to enter Bowman Handles for another inspection by outside experts. The date requested was January 5, 1982. I denied the request in an order dated December 15, 1981. My order is attached hereto as Appendix "A".

The Secretary has objected to the order. One objection concerns a conversation with my secretary about the setting of the case for January 5, 1982.

Labor indicates that it did not agree to this hearing date after it became known that its entry upon land would not be permitted. The undersigned finds this to be a minor point. However, I have no problem with amending my order to delete the second sentence in view of Labor's understanding of the conversation.

The Secretary's major objection is that it sought entry of its experts to properly prepare on the affirmative defense issues of impossibility of compliance and greater hazard. The Secretary contends that because he was denied entry he could not properly prepare for the hearing. I disagree. The date of January 5, 1982, was not selected at random. It was selected by me because the Secretary had chosen this date for his experts' reinspection of the workplace. Consequently I felt they would be available for the expedited hearing on that date. In fact, the Secretary presented his expert as a rebuttal witness. The witness had the opportunity to listen to the entire trial testimony, review all the exhibits and give his opinions at the hearing. In my view I protected the Secretary's rights by selecting the date of January 5, 1982, and allowing opinion testimony in the manner set forth above. My reasons for denying the Secretary's motion for entry upon land are reaffirmed and incorporated into this decision.

## INSPECTION

Respondent has raised, in layman's terms, the question of the legality of the Secretary's inspection. The Secretary takes the position that the question of the scope and method of the inspection is not relevant to the subject proceeding. He objected to the introduction and development of this area. The undersigned overruled his objections and developed the issue. First I had the Secretary and Respondent agree to the events leading up to the actual inspection. I also had documents such as the warrant, supporting affidavit, employee complaint, and

letters introduced as judge's exhibits in the case. The record reflects the following events up to and including the date of the inspection on July 16, 1981.

On January 29, 1981, OSHA made its first attempt to inspect Bowman Handles, Inc. It was a general schedule inspection. Entry was refused by Eldon Bowman, the brother of Mr. Lynn Bowman. Eldon Bowman is the plant superintendent and runs the place when Lynn Bowman is away (T. 222-223). The second contact with Bowman Handles was on February 24, 1981, when another attempt for a general schedule inspection was made by Compliance Officer Rogers. Mr. Lynn Bowman refused entry on that date (T. 223).

The Secretary indicated, without waiving his objection, that OSHA received a complaint letter from an employee of Bowman Handles. This letter was made a part of the record as Judge's exhibit number 4. It was received by the OSHA Little Rock, Arkansas office on June 16, 1981 (T. 224; Judge's Exh. 4). The record also reveals that a complaint form was filled out by the same employee and received by the Little Rock office on June 23, 1981 (Judge's Exh. 3).

The Secretary prepared an affidavit and applied for an inspection warrant pursuant to the Act. The affidavit indicated that the establishment was scheduled for a programmed safety inspection pursuant to a scheduling system based upon objective selection criteria (Judge's Exh. 2). A United States Magistrate issued an inspection warrant to enter the employer's workplace (T. 224; Judge's Exh. 1) The warrant was issued on July 7, 1981. On July 8, 1981, the Secretary's compliance officer served the inspection warrant on Mr. Lynn Bowman and was denied entry to the workplace (T. 225). On July 16, 1981, the compliance officer returned to the site and conducted the subject inspection (T. 255).

Mr. Bowman testified concerning his first encounter with Ms. Marcie Twyford a staff member of Congressman's Bill Alexander's Batesville staff. He indicated

that Ms. Twyford was brought into the matter after his employee Mr. Alvin Light went to her about keeping the plant open. Mr. Bowman was considering closing the plant after reading the numerous items contained in the employee complaint. The employee complaint was served at the same time Mr. Rogers presented the warrant. Ms. Twyford contacted him after the warrant had been served on him and the compliance officer was refused entry. Ms. Twyford asked why he felt that he would be in so much trouble if OSHA came in . He explained his feelings and Ms. Twyford called the OSHA Area Director in Little Rock. She then called Mr. Bowman back and asked if they could come in, make an inspection, and not fine him the first time through. Mr. Bowman had no problem with this procedure. Ms. Twyford then called back and told Mr. Bowman that OSHA agreed to this procedure on the telephone. The compliance officer, Mr. Rogers, came back at Respondent's request and the inspection was conducted. The subject citations and proposed penalties were then issued. Mr. Bowman called the Area Director and mentioned the understanding of no fines the first time through. The Area Director told him that he never made such a statement (T. 233-236).

Ms. Marcie Twyford appeared and testified on behalf of the employer. She indicated that she is a staff member of Congressman's Bill Alexander's Batesville Office. She testified that she had indeed relayed the no penalty inspection information to Mr. Bowman. It was her understanding, a verbal understanding, that OSHA would agree to come in without penalty on an inspection. She had a number of conversations with the Area Director. Normally her office does things by letter. However, she was trying to expedite things, move it along and get Mr. Bowman back into operation. It was her testimony that the Area Director told her if Mr. Bowman would agree to the entry, there would be no penalty. Her plea to the Area

Director was to let Mr. Bowman take the penalty money and apply it toward the safeguards that were being requested. She relayed the information that the inspection would be made without penalty to Mr. Bowman (T. 239-240).

The Secretary is essentially asserting that the Commission is precluded from reviewing a magistrate's probable cause determination or any aspect of the inspection conducted pursuant to the warrant issued by the magistrate in this case. I disagree. The Commission has set forth its authority, in no uncertain terms, to address inspection warrant issues. Chromalloy American Corp., 79 OSAHRC 55/D11, 7 BNA OSHC 1547, 1979 CCH OSHD ¶23,707 (No. 77-2788, 1979); Sarasota Concrete Company, 81 OSAHRC 48/A2, 1981 CCH OSHD ¶25,360 (No. 78-5264, 1981), Pet. For Review Filed, No. 81-5621 (5th Cir. June 23, 1981). The burden of proof is on the party seeking to suppress the evidence. The Respondent must show that the inspection failed to conform with fourth amendment requirements. The Commission has also held that that the exclusionary rule is applicable to its proceedings. This means that any illegally seized evidence must be excluded in hearings conducted under the Act. Sarasota Concrete, supra.

The facts in this case must be reviewed within the guidelines of these cases. Mr. Bowman has not used terms such as lack of consent, invalid inspection, deception, or exclusion of evidence. He is a small businessman and not a lawyer. Nevertheless his position became clear to the undersigned judge two-thirds of the way through the hearing. I realized that there was definitely a warrant problem in this case. Consequently, I began developing the record to insure a fair and complete picture of the events leading to the contested citations. I overruled the Secretary's objections that the issue was not relevant. The case law set forth above supports these rulings. Mr. Bowman's major contention concerning the

warrant inspection of his workplace is that he was misled into permitting the inspection by the Area Director. Stated another way, he consented to allow the compliance officer into the workplace because the Area Director, through Ms. Twyford, promised no penalty would be issued.

The record is clear that absent such a promise, Mr. Bowman intended to fight the warrant inspection. He refused entry on July 8, 1981, when the compliance officer presented the warrant and the employee complaint. He believed that the warrant was based on the employee complaint rather than the criteria set forth in the warrant. He based this belief on the fact that the scheduled inspections were in January and February 1981. The complaint was filed in late June and the Secretary first sought a warrant on July 7, 1981.

It is without question that Mr. Bowman had the absolute right to refuse entry when served with the warrant. He had the right to require the Secretary to institute contempt proceedings. He could then attempt to convince a Federal District Judge that the warrant for the inspection was illegal. He gave up this right and allowed the Secretary to inspect his workplace on July 16, 1981. The question to be resolved is whether he was misled by OSHA into giving up this basic procedural safeguard in warrant cases. The answer turns on the testimony of Ms. Twyford.

The testimony of Ms. Twyford is both unequivocal and unrebutted. I observed her at the hearing and find her entirely credible. She recalled clearly the Area Director's agreement that there would be no first instance penalty. The testimony is entirely consistent with Mr. Bowman's account of why he changed his mind and allowed the compliance officer to inspect. I find as fact that the Area Director misled the Respondent into waiving his right to refuse entry. Mr. Bowman did not

voluntarily consent to the inspection. Consequently, the evidence gleaned from the invalid inspection must be excluded. There is no independent evidence to support the alleged violations being contested by the employer. Therefore they must be vacated.

II

## MERITS OF THE CITATIONS

The undersigned believes that it is also important to address, briefly, the merits of the citations. A review of the record indicates that Respondent should prevail on this alternative basis also. A summary of the relevant evidence and my reasons are set forth below.

## EVIDENCE

The Secretary presented one witness during its case in chief. He called Mr. James E. Rogers, an OSHA Safety Specialist. He has been employed by OSHA since June 1975. He has attended OSHA courses on machine guarding, woodworking, and has inspected several woodworking facilities. He has also been a poultry inspector with the United States Department of Agriculture and was with the United States Navy in the field of electronics (T. 33-34). He has never been employed or worked for a handle factory assembly line. He also testified that he has never operated a bullsaw, trim saw, or equalizer saw (T. 129-130).

Mr. Rogers testified that the bullsaw cited in item 1 of the serious citation did not have an automatically adjusting hood as described by the standard at 29 CFR 1910.213(c)(1). Employees were using the saw to rip lengths of wood that were to be further processed at the bolting saw mentioned in item 1(b) of the citation. The bolting saws also did not have a hood as described by the standard. He observed the operation of the bullsaw during the inspection. The floor was

concrete around the saws and well kept. It was his opinion that there was a hazard of an employee being cut by coming in contact with the exposed blades (T. 37-38; 42; 43; 46; C's Exh 5-8)

Mr. Rogers also testified concerning the table saw used for trimming handle ends cited in item 2 of the serious citation. He indicated that this saw did not have a hood as described in 29 CFR 1910.213(d)(1). It had a guard which consisted of a partial enclosure on the side away from the operator. It did not fully enclose the blade. He observed the saw in operation. It was his opinion that when the end of a handle was being trimmed the employees hand would come within six to eight inches of the saw. The distance would vary depending on the handle's length. It could be 12"-36" during some operations. He felt a hazard existed (T. 50-51).

The compliance officer testified that he observed employees operating gaugers which were cited in item 3 of serious citation number 1. There was a partial enclosure built out of plywood which was pushed up to the back of the machines. It enclosed the back side of the gaugers. The front side was not fully enclosed. He felt the employee was exposed to the knives of the lathe when he first inserted the handle into the device and when he removed the handle from the feed device. He believed there was a hazard involved. Mr. Rogers indicated the hazard was relatively low due to the fact that the employee does not directly feed the material into the knives. He loads the material into the feed device and then pushes the feed device into the lathe knives. He felt the cutting heads could have been more enclosed than they were on the day of inspection (T. 53-54; 58-59).

The Secretary moved to vacate item 3(c) of non-serious citation 2 prior to the compliance officer's testimony. This motion was granted. Mr. Rogers testified that he observed the equalizer saws listed in items 3(a) & 3(b) of the non-serious

citation. They did not have a guard or an enclosure to prevent contact with the point of operation of the blade. The wood saw had an enclosure on the feed side of the blade where the employees fed the stock into the saw. He did not observe the operation of the two equalizer saws. (T. 68-70; C's Exhs. 12-14).

The compliance officer testified that at the time of the inspection he told Mr. Lynn Bowman that he went strictly by the book. At the hearing he indicated the intent of the standard was to protect the operator from coming into contact with the saw blade. The hood would not have to be self-adjusting as stated in the standard cited by the Secretary. Rather it could be a manually adjusted hood. It was his testimony that a compliance officer could pass a piece of equipment that meets the intent of the standard (T. 101-103; 130).

Mr. John Fulcher elected party status. He is the elected representative of Respondent's employees. They desired that he speak for them at the proceeding. He entered the case to advance the position of his employer Bowman Handles, Inc. (T. 25-27). He testified that he has been employed by Bowman Handles for ten years. He has operated the sanding belts, gauging machines, trimsaws and the bullsaws. He has made recommendations concerning safety hazards at the mill over the years. The company has always made adjustments whenever possible (T. 163-164).

Mr. Fulcher explained the history of the company. Ten years ago they had an old mill building that was in terrible shape. It was enclosed on one side. The floor was not concrete. Mr. Bowman took over in 1975. He has poured money back into the business. They now have several forklifts to operate. There is a modern new mill building that has doubled the length of the old one. The floors are concrete rather than dirt. It is insulated and has a heater. The building is closed for comfort. There is a new building which is modern and comfortable where the

handles are prepared for shipping in boxes. A shed has been built for unloading out of the weather. A new air duct has been installed to remove the dust and chips (T. 165-168).

Mr. Fulcher injured his hand while operating a table saw in April 1976. The injury was not due to the fact the saw was unguarded. It happened when he trimmed a handle and ran the saw completely through the wood. At this point of the operation there is no guard which can protect an employee (T. 168-169).

Mr. Fulcher also testified concerning the table saw listed in item number 2. He indicated the operator's hand should never be closer than 10"-12" to the blade because of the operation involved. He warns employees daily about safe operation of the table saw (T. 174; R's Exh. 9).

On December 23, 1981, Mr. Fulcher circulated a petition to Bowman Handles employees. It provided that the employees did not consider their employment to be hazardous and that they felt it was impossible to equip the machines with the guards recommended by OSHA. The employees indicated that they operated the machines and did not consider them hazardous. Nineteen employees between the ages of 19 and 58 signed the petition. These employees are presently working at the mill but were not at the hearing (T. 184; 186; R's Exh. 10). The petition was addressed to Congressman Bill Alexander. Mr. Fulcher indicated that he would not work at any place where he felt his life was in danger due to the employer not maintaining proper guards. He does not consider the saws to be hazardous at the mill. They are guarded as much as possible considering the actual operations conducted in manufacturing handles. He considers the saws to be safe (T. 195-196).

Mr. Orie Candler appeared and testified on behalf of the Respondent. He's worked for Bowman Handles a little over 15 years. He has never felt he was

running a hazardous machine. No pressure was ever put on him to come to the hearing or sign a petition. He has seen significant improvement in safety at the mill since Mr. Bowman purchased it in 1975. This includes the installation of machine guards and the purchase of new machines. The men have always been able to get safety requests complied with from Mr. Bowman. During the past five years a substantial amount of income has gone back into the business (T. 242-244).

Mr. David Candler appeared and testified. He's worked for Bowman Handles off and on for about 16 years. He has been back for the past year. He has noticed a lost of new improvements including the purchase of two automatic sanders. He believes the old sanders are well protected and that you could not get hurt on them. He stated the mill has had as much attention with respect to safeguarding as any of the other plants where he has worked (T. 246-249).

Mr. Eldon Bowman also appeared and testified. He has worked at Bowman Handles for six years. He has been in various handle factories and never seen a saw in any plant more safely guarded than their machines. He has operated every machine at the mill and he does not consider any of the machines to constitute a hazard. He testified that the gauger machine is guarded from the floor up over the gauger. He cannot envision any better guards on the saws (T. 251-256).

Mr. Lynn Bowman also testified. He indicated that he has spent money guarding machines to a point where he considers them safe. He gave the accident history of the company. In 1975 Bowman Handles had 0 accidents and 31 employees; 1976 1 accident and 17 employees; 1977 - 2 accidents and 33 employees; 1978 - 0 accidents and 42 employees; 1979 - 2 accidents and 44 employees; 1980 - 0 accidents and 68 employees; 1981 - 3 accidents and 81 employees, with one employee being hurt twice. There have been no accidents since 1979 requiring hospitalization.

This record was compiled with a workforce that had no experience in handle manufacturing. They train every man they hire for the job he performs. In the past year he has spent $105,000 in upgrading his machinery, improving working conditions, and building guards on machines. He believes that his safety guards are as good as those suggested by OSHA. He indicated that he has tried to run a safe business. He does not have any present orders from his largest companies because of the pending proceedings. He started out not caring whether he closed up or not. The men started the ball rolling and he went along. He believes they are still fighting this case harder than he (T. 263, 334-337).

The Secretary called as a rebuttal witness, Mr. Lawrence Albert Weaver III of Raleigh, North Carolina. Mr. Weaver is a safety engineer and operates a safety and health consulting firm. He has an undergraduate degree from Western Carolina University in experimental and physiological psychology. He has a master of science degree from North Carolina State. Mr. Weaver is a member of the ANSI Committee on woodworking and has done consulting work for members of the woodworking industry. Mr. Weaver has not actually worked in the industry or operated a bullsaw. He also testified that he could not saw handles at the Respondent's mill without training. He has designed guards for the industry but has never designed one for a machine used exclusively in making striking tool handles (T. 272-275; 289; 296-297).

Mr. Weaver was present at the hearing during the testimony concerning the factual circumstances surrounding the operation and guarding of the machines. He also reviewed the Secretary's exhibits 5-14 prior to the hearing. He reviewed each of the items of the citation and concluded that the machines were not guarded in accordance with the applicable OSHA standards. He also testified that the

machines were not guarded in accordance with the state of the art in the woodworking industry today. Mr. Weaver conceded that it is not practical or feasible to put a hood guard over a bullsaw. He indicated that deviations from the standards are acceptable. He also described guards for the machine which would comply with OSHA standards in his opinion. He felt that all the machines in the Secretary's exhibits could be guarded beyond the extent to which they are guarded in the pictures (T. 275-277; 280; 288).

## OPINION

The Secretary's compliance officer and expert witness conceded at the hearing the requirements of 29 CFR 1910.213(c)(1) and 1910.213(d)(1) could not be met by the woodworking industry. However, these witnesses testified the machines were in violation because in their opinion, they were not guarded in accordance with the "state of the art". Respondent contends the machines are adequately guarded considering their operation in manufacturing handles. The evidence on whether a hazardous guarding situation exists is conflicting. It consists of the opinions of Mr. Rogers and Mr. Weaver for the Secretary and the opinions of Mr. Lynn Bowman, Mr. John Fulcher, Mr. Eldon Bowman and several employees for the Respondent. It is well established that opinion testimony, even expert, need not be accepted even if it is uncontradicted. Indeed such testimony is not conclusive and it is up to the trier of fact to determine what weight, if any, will be given to the testimony. Connecticut Natural Gas Corporation, 78 OSAHRC 60/B3, 3 BNA OSHC 1796, 1978 CCH OSHD ¶ 22,874 (No. 13,946, 1978).

The undersigned has reviewed the testimony of the witnesses concerning the need for further guards on the saws at Bowman Handles. I believe that more weight must be accorded the opinions of the Respondent's witnesses Mr. Lynn

Bowman, Mr. John Fulcher, Mr. Orie Candler, Mr. David Candler, and Mr. Eldon Bowman. My reasons follow.

All witnesses in this case were forthright and candid. The parties clearly have a difference of opinion on the ultimate issue of whether the machines are guarded in accordance with the state of the art. This question is necessarily a matter of opinion. I conclude that Respondent's witnesses are more qualified to determine the state of the art in the handle manufacturing industry. The question is not one addressed to the woodworking industry as a whole. Rather it must be confined to the Respondent's saws which are used to manufacture a specific product, i.e. handles. Mr. Bowman and his employees have hands on experience in every phase of the operation. They have extensive experience with these machines. The Secretary's witnesses have good general experience. Mr. Weaver has experience in general woodworking problems. However I credit the opinions of Messrs Bowman, Fulcher, and the employees based on their personal knowledge and experience set forth above.

I have also been impressed by the genuine outpouring of support on behalf of Mr. Lynn Bowman. He is highly regarded as a safety conscious employer. The record supports the confidence his employees place in him. He has completely renovated the mill since 1975. In addition he has spent $105,000 in 1981 upgrading his machinery, improving working conditions and building guards on machines. He has a good safety record. For the above reasons I conclude that the Respondent's saws cited in items 1, 2, and 3 of the serious citation and item 3 of the non-serious citation are guarded in accordance with the state of the art. Consequently these items must also be vacated on this alternative basis.

## FINDINGS OF FACT

1. On January 29, 1981, OSHA attempted a general schedule inspection of Respondent's workplace. OSHA was refused entry.

2. A second attempt was made on Febraury 24, 1981, and Respondent again refused entry.

3. OSHA received a letter of complaint on June 16, 1981, from an employee of Bowman Handles, Inc. at the Little Rock, Arkansas Area Office.

4. An OSHA employee complaint form filled out by the same employee was received on June 23, 1981, by the Little Rock Area Office.

5. Thereafter .e Secretary applied for an inspection warrant indicating that Bowman Handles was scheduled for a programmed safety inspection pursuant to a scheduling system based on objective selection criteria.

6. A United States Magistrate issued an inspection warrant on July 7, 1981.

7. Respondent was served with the inspection warrant on July 8, 1981, and refused OSHA entry to the mill.

8. The Little Rock Area Director agreed to inspect Bowman Handles on a no penalty inspection basis if the employer would allow OSHA in the mill.

9. Bowman Handles allowed OSHA to inspect the mill on July 16, 1981, based on the statement of the Little Rock Area Director that it would be a no penalty inspection.

10. The inspection resulted in the subject citations and proposed penalties being issued to Bowman Handles, Inc.

11. The Little Rock Area Director misled the Respondent into waiving his right to refuse entry.

12. Respondent's saws are guarded in accordance with the state of the art as it exists today with respect to the manufacturing of handles.

## CONCLUSIONS OF LAW

1. Respondent, Bowman Handles, Inc. is engaged in a business affecting commerce and has employees within the meaning of Section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of these proceedings.

2. On July 16, 1981, Respondent was not in serious violation of 29 CFR 1910.213(c)(1), 1910,213(d)(1); 1910.213(o)(2); 1910.215(a)(1); and was not in violation of 1910.213(r)(4) of the non-serious citation.

## ORDER

On the basis of the foregoing Findings of Fact and Conclusions of Law it is ORDERED that:

1. Items 1(a) bullsaw; 1(b) bolting saws; (2) table saw; 3(a) & (b) gaugers; (4) abrasive wheel; of serious citation number 1 and the proposed penalties of $1,120 for items 1-5 are VACATED.

2. Items 3(a)(b) & (c) of non-serious citation number 2 which proposed no penalty are VACATED.

Stanley M. Schwartz
STANLEY M. SCHWARTZ
Administrative Law Judge

Dated: February 1, 1982.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>BOWMAN HANDLES, INC.,<br><br>Respondent. | OSHRC DOCKET NO. 81-2102 |

ORDER

SCHWARTZ, Judge:

The parties have been contacted concerning the setting of a hearing in this matter. They have agreed to a hearing on January 5, 1982, in Batesville, Arkansas. The hearing will commence at 10:00 a.m. in Room 206, of the United States Post Office and Federal Building, East Main & South 4th Street.

The case file indicates that a number of employees have expressed interest in this matter. These employees are David Candler, Eldon Bowman, Alvin L. Light, Orie Candler, Mike Fulcher, and John L. Fulcher. It appears these employees desire to participate as witnesses on behalf of the Respondent. A copy of this order is being sent to them. They should appear at 10:00 a.m. on January 5, 1982. Prior to the hearing I shall determine what status they desire and rule upon their individual requests.

One final point must be resolved. Complainant has filed a request for entry into Respondent's workplace. Complainant requests Respondent to permit

APPENDIX "A"

the entry of Robert J. Block, PHD, P.E. of Norman, Oklahoma and Albert Weaver, MSIE, CSP, of Raleigh, North Carolina, for the purpose of inspection and measuring, surveying, photographing, testing, and sampling from day to day until such inspection has been completed. Complainant desires to determine what engineering controls exist for Respondent to achieve compliance with the woodworking machinery guarding requirements of 29 CFR 1910.213. The specific machinery to be inspected corresponds with the equipment cited in the citations being contested.

Respondent has objected to Complainant's request. The objection is contained in a letter dated November 25, 1981, which has been treated as an answer by the Commission. The relevant documents are attached hereto since the undersigned Judge is not certain the Complainant has a copy of Respondent's letter of November 25, 1981.

There is no question that discovery inspections are ordinarily permissible where a violation of the noise standard is involved. Ralston Purina Company, 79 OSAHRC 81/E6, 7 BNA OSHC 1730, 1979 CCH OSHD ¶23,897 (No. 78-145, 1979). Where, as here, the case does not involve noise the Commission has set forth criteria to be followed by the trial Judge. Ralston Purina Company, supra, teaches that the decision whether to allow discovery is within the Judge's sound discretion. This sound discretion should be guided by the objective of providing a fair and prompt hearing to the parties. Moreover, the Judge is instructed to consider the need of the moving party for the information sought, any undue burden to the party from whom discovery is sought, and on balance, any undue delay in the proceeding that may occur.

I will now apply these criteria to the instant case. Chief Judge Tenney noted in his letter to Congressman Alexander that the Commission is sensitive

to the fact Respondent is a small business and is appearing without counsel. Judge Tenney noted the Respondent would receive a prompt hearing. I agree.

Complainant's need for the information has also been considered. I have had a number of saw-guarding cases. This is the first case where Complainant has sought reentry to determine what engineering controls exist to achieve compliance with the saw-guarding regulations. These cases are routinely tried without resort to Rule 34 motions for entry upon land. The Secretary, unlike a noise case, does not have an increased burden of proving the feasibility of engineering controls under the saw-guarding regulations.

Finally I have considered the question of undue burden to the Respondent. He operates a small business. The Complainant made an initial inspection and issued the subject citations. Respondent contests to the Commission. Complainant now seeks to conduct a day to day inspection of Respondent's workplace until its experts have made their findings. The second inspection could only upset Respondent's routine and burden him in his effort to conduct business. The employees would be observed by two new individuals while doing their work. This undue burden outweighs any need, real or imaginery, by the Secretary to conduct a second inspection as set forth above. Consequently, I conclude the Complainant's request to enter the workplace must be denied.

STANLEY M. SCHWARTZ
Administrative Law Judge

Date: December 15, 1981
Encls: a/s

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
ROOM 7B11, FEDERAL BUILDING
1100 COMMERCE
DALLAS, TEXAS 75242
FTS 729-5271
COM (214) 767-5271

# NOTICE OF DECISION

Secretary of Labor v. Murphey Well Service, Inc.
OSHRC Docket NO. 80-2983

1. Enclosed is a copy of my decision. It will be filed with the Commission on February 4, 1982, and will become the final order of the Commission on March 8, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D. C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is March 8, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed portcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92 and 93.

E. Carter Botkin
E. CARTER BOTKIN
Administrative Law Judge

Date: January 15, 1982

OSHRC Form 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>MURPHEY WELL SERVICE, INC.,<br><br>Respondent. | OSHRC DOCKET NO. 80-2983 |

DECISION AND ORDER

Appearances:

Thomas M. Tompkins, Esq., of Dallas, Texas for the Complainant.

Ronnie Murphey, of Alice, Texas, for the Respondent.

BOTKIN, Judge:

This is a proceeding brought before the Occupational Safety and Health Review Commission ("the Commission") pursuant to §10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq. ("the Act"), contesting the penalty portions of a citation issued by the complainant, the Secretary of Labor ("the Secretary"), to the respondent, Murphey Well Service, Inc. ("Murphey, Inc."), under authority vested in the Secretary by §9(a) of the Act.

As a result of an inspection conducted on April 22, 1980, of a workplace located at Hughes & Hughes Schulze No. 2 Well, Driscoll, Texas, two citations were issued to respondent on May 1, 1980, alleging violations of §5(a)(1) and §5(a)(2) of the Act. The citations charged the respondent with four serious and four nonserious violations. On May 9, 1980, both citations were amended.

As pertinent hereto, item 4 of citation no. 1 was deleted. Respondent timely filed a notice of contest on May 20, 1980, thus commencing this proceeding before the Commission under §10(c) of the Act. In said notice of contest and at other subsequent times, respondent made clear that it was contesting only the amount of penalties to be assessed by virtue of serious violations related to items 1, 2 and 3 of citation no. 1 (notice of contest dated May 20, 1980, letter dated September 24, 1980, Tr. 4, 5). A hearing was conducted in Corpus Christi, Texas on November 14, 1980. No affected employees or representatives of affected employees participated in the proceeding. The matter is now ripe for decision.

## ISSUES

1. The amount of the civil penalty to be assessed for serious violations of §5(a)(1), (items 1 and 2 of the citation), and §5(a)(2), (item 3 of the citation), of the Act.

## JURISDICTION

At the commencement of the hearing, an inquiry was made by the undersigned whether the parties had arrived at any stipulation of facts, including those related to jurisdiction (Tr. 4). Respondent stated that the only matter contraverted was the propriety of the proposed penalties (Tr. 4-5). Counsel for the Secretary stated that it was his understanding that an issue did not exist regarding jurisdiction (Tr. 8). The record in this case discloses that respondent did not suggest otherwise. Based thereon, I find that whether the Commission has jurisdiction of the parties and the subject matter of this proceeding is not at issue in this case.

Nevertheless, the record does establish that (i) respondent is engaged in the business of servicing (working over) oil and gas wells, (ii) the operations of workover and drilling rigs are similar, and (iii) there are approximately 4,000 to 4,500 rigs (rotary, drilling and workover) currently working in the United States on a daily basis (respondent's letter dated September 24, 1980, Tr. 12-13; Tr. 48; Tr. 72). Obviously, such work is one part of the total process involved in the production of oil and gas. It is well established that, by use of the phrase "affecting commerce" in §3(5) of the Act, Congress intended to exercise the full reach of its power under the commerce clause. Avalotis Painting Co., 9 BNA OSHC 1226, 1981 CCH OSHD ¶25,157(No. 76-4774, 1981). In cases where the statute requires only that the particular business "affects commerce," statutory jurisdiction exists if the business is in a class of activity that as a whole affects commerce. Usery v. Franklin R. Lacy, 628 F.2d 1226 (9th Cir. 1980). I find that it is patently clear that, in the aggregate, this type of business activity affects commerce. Therefore, its activities fall within the class of activities that Congress intended to regulate. Respondent is an employer engaging in a business affecting commerce who has employees, within the meaning of §3(5) of the Act.

## EVIDENCE

The evidence in this case consists of testimony by Roger Frazier ("Frazier"), the compliance officer, his worksheets related to the investigation (Exs. C-1 through C-3), and two photographs taken by him at the workplace (Exs. C-4 and C-5).

## PARTIAL RESOLUTION OF THE FACTS

Frazier's background as a compliance officer in safety matters includes over five years with the federal agency and three years with a state agency (Tr. 9-10). He has conducted approximately 470 inspections for OSHA which include nearly 100 inspections related to oil well operations (Tr. 12). The major portion of his work experience, 33 years, was spent as an employee of a major oil company. He commenced that career as a petroleum engineer, spending considerable time around actual drilling operations. In the early 1950's, he entered the operations and supervisory aspect of such work with pertroleum engineers reporting to him (Tr. 10-11). He has been involved in the drilling of between 500-1000 oil wells (Tr. 12).

On April 22, 1980, Frazier conducted an inspection of respondent's rig #2 at its workplace located at the Hughes & Hughes Schulze No. 2 Well, in Driscoll, Texas (Tr. 12, Exs. C-1, C-2 and C-3).

The drilling crew was composed of a four man crew and two tool pushers. A tool pusher is the supervisor of a crew and floorhands are the laborers (Tr. 27). Another person present is the driller who operates the rig. In this instance, a mobile workover rig was being used (Tr. 28, 48). While the operations of a workover rig and drilling rig are similar, the size of equipment on a workover rig is considerably smaller (Tr. 48). While he was there, they were drilling a cement plug. During this process, a fluid, consisting primarily of water with some mud additives, was being circulated through the system (Tr. 28). The dual purpose thereof was to cool the bit and to carry out cuttings as the hole was drilled (Tr. 29).

The rotary hose is a flexible hose extending approximately 30 or 40 feet from the swivel end thereof to its connection at the end of the standpipe, a steel pipe which extends up vertically in the derrick (Tr. 17). In this case the hose was 34 feet long and the distance to the top of the standpipe was 30 feet (Ex. C-1). When the bit is in operation, fluid or mud is pumped up through the standpipe, through the rotary hose, and down through the drilling string to the bit (Tr. 17-18). Pumping is performed at various pressures, depending on what is being drilled and whether there is a restriction in the bit. Usually the pressure is over 500 pounds per square inch ("psi"), unless pumping is being performed very slowly, and it can go as high as 2,000 psi (Tr. 18). In this operation, the pressure was normally between 400-500 psi (Ex. C-2). During this process, the hose vibrates. At times, rotary hoses work loose or simply break off from their connection to the standpipe or swivel (Tr. 18).

The ends of the rotary hose were not secured (end of the hose at the standpipe to the derrick and the swivel end to the swivel) (Ex. C-1). The dimension of the hose was two inches (Tr. 49). 1/ The hose is reinforced with metal wires. It is stiff and quite heavy (Tr. 18, 76). At the swivel, the union is formed between the metal connection at the end of the hose and an iron gooseneck on the swivel (Tr. 71). The compliance officer did not remember the

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1/ Although the rotary hose was described in Ex. C-1 as having a dimension of 2 3/8 inches, the compliance officer conceded that he had no basis to dispute that, in fact, it was a two inch hose (Ex. C-1, Tr. 49).

rating of the hose and was unaware that it was rated for 2,000 psi (Tr. 49). However, he subsequently adopted Ronnie Murphey's ("Murphey") statement that it was rated at that level (Tr. 59). 2/

A hazard exists that the hose may vibrate off or break off at one of the two connections and fall to the rig floor or surrounding area and strike (i) an employee, or (ii) another object such as a piece of pipe, causing the other object to hit an employee (Tr. 18-19, 71, Ex. C-1). The compliance officer had recently conducted an investigation where such an incident had resulted in a fatality (Tr. 19). In his total experience, he recalled approximately ten times where such incidents occurred in which the metal end on the hose struck a workman (Tr. 72). 3/ Even if the metal end separated from the hose, this would not significantly reduce the hazard of serious physical harm if a worker was struck, due to the weight and stiffness of the hose (Tr. 76-77). I find that the occurrence of such an incident was reasonably foreseeable. I further conclude that the likely result of such an incident would be death or serious physical harm (Tr. 18-19, 20, 76, Ex. C-1). The tool pusher was at the workplace practically all of the time and Murphey, vice president of the respondent, periodically visited that location (Ex. C-1). The violative condition was easily observable by sight if due diligence had been exercised.

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2/ Moreover, his earlier statement that pressure can go as high as 2,000 psi appears to be an indirect indication of his awareness thereof (Tr. 18).

3/ This modifies or at least defines his statement that such incidents are the cause of a ". . . common injury . . . on rigs . . ." (Tr. 72).

Therefore, the requisite knowledge was present. It is well established that a supervisor's knowledge is imputable to an employer.

There are approximately 4,000 to 4,500 rigs (rotary, drilling and work-over) currently in operation. The average work crew numbers four or five and the rigs are operated approximately 300 days a year (Tr. 72-75).

To prevent the hazard, safety chains are attached near each end of the rotary hose, to the swivel and to the top of the standpipe over the leg of the derrick. The safety chain catches the hose and prevents it from falling (i) if the hose separates (blows, breaks or comes off) at its connection with either the swivel or the standpipe, or (ii) if the metal portion on the end of the hose separates from the hose itself (Tr. 19-20, 75).

Any worker on the rig floor or in the proximity thereof during the pumping operation would be exposed to the hazard. For the most part, those exposed were the floorhands and driller. During the inspection, the tool pusher performed the drilling part of the time (Tr. 23-25, 53). Four workmen were exposed to the hazard on an intermittent basis (Tr. 26). 4/ At many times, there is no exposure to the hazard (Tr. 26). Floorhands are normally on the floor after pumping has ceased and there is no pressure on the hose (Tr. 53-54). However, that is not always true (Tr. 53). 5/ Occasionally, they may be cleaning up after making a connection, washing the floor, repairing a tool or getting a tool (during the

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4/ While the compliance officer originally stated that three workmen were exposed to the hazard, he apparently increased the number after recalling that the tool pusher also performed part of the drilling (Tr. 23-25, Ex. C-1).

5/ Conceded by Murphey during questioning (Tr. 53).

pumping operation) (Tr. 54). 6/ Moreover, the floorhands do not have to be on the floor to be exposed (Tr. 53). Ordinarily, the hose does not fall straight down, but goes flipping out where it could hit a floorhand on the ground (Tr. 52-53). While at his controls, the driller is in a much safer position on this particular rig (than usual), because the controls are set back of the derrick (Tr. 52). 7/ Exhibit C-4, a photograph taken during the inspection, reveals a floorhand standing on the ground in close proximity to the rig floor where he could be struck by a falling rotary hose (Tr. 65-68, Ex. C-4). Exhibit C-5, another photograph, reveals the operator of the rig at his controls without benefit of a hard hat (Tr. 68, Ex. C-5). 8/ Employee exposure existed two to three hours per day for approximately four or five days (Ex. C-1).

A positive displacement pump, Gardner Denver model PA8Y, which circulated fluid throughout the drilling system, did not have a relief valve on the discharge side of the pump (Tr. 21, 33, 58, Ex. C-2). Approximately three weeks earlier the safety valve had popped out and respondent had a new one on order (Ex. C-2). The pump forces the mud or fluid from the pump (i)

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6/ Conceded by Murphey during questioning (Tr. 54).

7/ The exact distance was not measured by the compliance officer (Tr. 51-52).

8/ I agree with respondent that this picture does not depict the true horizontal distance between the driller and the rotary hose (Tr. 68-69). Both pictures appear to be taken at angles that offer little assistance on the distance between the driller and the rotary hose (Exs. C-4 and C-5).

through the surface line, (ii) over to the rig (iii) up through the standpipe, (iv) through the rotary hose, and (v) down the drill string to the bottom of the well, where it is returned back up on the outside (Tr. 21, 33). All of the lines are steel except the rotary hose (Tr. 33-34). The action of the pistons raise the pressure by pumping fluid (Tr. 21). The pump was located approximately 30 to 50 feet from the well (Tr. 23). All lines (steel) and the pump had been tested for a capacity up to 10,000 psi (Tr. 32-33, Ex. C-2). The pump was usually operated at 400-500 psi and the relief valve was normally set at 1,000-1,500 psi for this operation (Ex. C-2). The pump did have a pressure gauge which was operational (Tr. 54).

Occasionally, the bit at the bottom of the well plugs up with debris. When that occurs or if a valve on the line is closed, pressure builds up throughout the system (Tr. 21-22). If a motor has adequate horsepower and something (the bit) plugs, the pressure will rise until some part of the system blows up (Tr. 56). The weakest portion of the system will be the first to give way (Tr. 59). The pump and connections on the lines may become fatigued and develop weak spots over a period of time due to vibration or pulsation (Tr. 34, 60). However, I find that, since the pump and all lines (steel) had a test capacity up to 10,000 psi, the weakest point in this system was the rotary hose which was rated for 2,000 psi (the psi of the hose was previously found to be at said level hereinabove).9/

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9/ A holding that there might be weaker points in the system due to fatigue would be rank speculation. Therefore, testimony and inspection notes related to ruptured pieces of metal (pump or steel lines) is simply irrelevant.

If excessive pressure did build up, a worker on the floor of the rig or in the vicinity thereof would be exposed to the hazard of being struck by the rotary hose or a high pressure leak from the rotary hose (Tr. 22, 33, 35, 53, 60). 10/ The force of fluid under high pressure can blow or blast a person, who is struck by it, into surrounding objects (Tr. 22-23, Exs. C-4 and C-5). Therefore, all of the facts heretofore set forth in regard to unsecured ends of the rotary hose (item 1), as they relate to (i) identity and number of workmen exposed to the hazard, (ii) the length of time of such exposure, (iii) such an incident being reasonably foreseeable, and (iv) the likely result of such an incident being death or serious physical harm, are hereby incorporated by reference. The tool pusher had actual knowledge of the missing relief valve, as a replacement had been ordered (Ex. C-2). His knowledge is imputed to respondent. In general, it was agreed that the hazard in this case was lessened when the operator of the motor was at his controls watching the pressure gauge (Tr. 58-59). During the inspection, there was an operator at the pump most of the time (Tr. 23, 55-56). The determining factor in regard to the rapidity of a build up in the level of pressure is whether the bit plugs up slowly or quickly (Tr. 57). The operator at the pump could shut it down if he happened to be right there and saw a rise in pressure quickly enough (Tr. 56).

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10/ Initially, the compliance officer had stated that the workman at the pump would be the worker most likely to be hurt and exposure to a threat of serious physical harm to anyone else was slight. However, after questioning by the respondent about various safety factors at the pump and the weakest area of the system (rotary hose), his testimony changed (Tr. 35-36, 54-55, 56-60).

To prevent the hazard, a relief valve is set on the pump within the allowable working pressure of the weakest component in the circulating system (Tr. 22, 34). As heretofore stated, there was no relief valve on this pump (Tr. 58, Ex. C-2).

A fixed ladder extends up the derrick to the tubing racking board, which is the area in which the derrickman works, and then extends up to the crown block (Tr. 36). Workers also go to the crown block of the derrick which is approximately 95 feet high (Tr. 39, 40, Ex. C-3). The tubing racking board is approximately 58 feet high (Tr. 36, 40, Ex. C-3). Although the ladder extends to the crown, it is primarily used for access to the tubing racking board (Tr. 36, 66-67, Ex. C-4). During the time the rig had been at this workplace, the ladder had been used a total of five days. It was used for two round trips on each of those days. Only two of said trips were made to the crown (Tr. 39, 40, Ex. C-3).

There was no ladder climbing device or safety device to prevent a fall (Tr. 36, Ex. C-3). Consequently, workmen who used the ladder were exposed to the hazard of falls of up to 58 feet or 95 feet (approximate distances), depending upon their destination, down to the floor of the rig where there is machinery and jagged parts (Tr. 40). There was a substantial probability that death or serious physical injury could result from respondent's failure to protect its employees from such falls (Tr. 40, Ex. C-3). The presence of respondent's supervisory officials at the workplace has been previously noted (Ex. C-3). They knew, or with the exercise of reasonable diligence, could have known of the hazard of falls from the fixed ladder. Said knowledge is imputed to respondent.

There are several kinds of safety devices used to prevent such falls. A worker wears a climbing belt to use any of the devices. One commonly used is a counterweight device. A safety line (wire line) is attached to the climbing belt. It extends up to the top of the derrick and then descends to the ground, at an approximate 45 degree angle, where it is secured to a stake in the ground. Weights, of an amount sufficient to counteract the weight of the workman, are placed in a box mounted on wheels. This counterweight rides up and down the wire line at said 45 degree angle (Tr. 36-38). Other devices include (i) one where the climbing belt is attached to a small trolley that runs on a safety line (wire line) which runs from the top to the bottom of the ladder, and (ii) another where the safety line is attached to the climbing belt and a device with pulleys therein. Said devices permit the worker to move slowly up or down. However, sudden moves, slight jolts or jerking movements cause the device to grab and lock onto the safety line; thereby catching the worker to stop a fall (Tr. 61-62).

## DISCUSSION AND OPINION

Item 1 of serious citation 1 charged respondent with a failure to secure the ends of the rotary hose to the derrick or mast and to the swivel to prevent the hose from falling and causing death or serious physical harm to employees in contravention of §5(a)(1) of the Act.11/ Item 2 of that citation also

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11/ Section 5(a)(1) provides that:

> Sec. 5.(a) Each employer--
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; . . .

charged a violation of §5(a)(1) of the Act. It involved respondent's failure to provide a relief valve on the discharge side of a positive displacement mud circulating pump to protect employees from hazards caused by excessive pressures resulting from plugging or unforeseen problems. Item 3 of the same citation charged respondent with a failure to provide a safe climbing device on a derrick ladder to protect employees from falls when going to and from the tubing racking board (up to approximately 58 feet) or the crown block (up to approximately 95 feet), contrary to 29 CFR 1910.27(d)(5).12/

As heretofore noted, the only aspect of the citation contraverted by respondent involved the propriety of the proposed penalties. At the hearing, Murphey stated that he did not totally understand the difference between serious and nonserious violations (Tr. 5). Although he questioned whether any employee was in danger or the company's knowledge of the situation, he reiterated that he did not want to contest their classification as serious (Tr. 6).

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12/ The cited standard provides:

(5) LADDER SAFETY DEVICES. Ladder safety devices may be used on tower, water tank, and chimney ladders over 20 feet in unbroken length in lieu of cage protection. No landing platform is required in these cases. All ladder safety devices such as those that incorporate lifebelts, friction brakes, and sliding attachments shall meet the design requirements of the ladders which they serve.

The definition of a serious violation is contained in §17(k) of the Act.13/ The Act does not contain a definition of a nonserious violation.14/ For a violation to be serious within the meaning of §17(k) of the Act, the record must establish that there is a substantial probability that death or serious physical harm could result if an accident occurred. The probability of the accident occurring is irrelevant, Niagara Mohawk Power Corp., 79 OSAHRC 36/A2, 7 BNA OSHC 1447, 1450, 1979 CCH OSHD ¶23,670 (No. 76-2414, 1979). The record must also establish that the employer knew, or with the exercise of reasonable diligence, could have known of the violation.15/ Based on the facts related thereto which are set forth under the section entitled PARTIAL RESOLUTION OF THE FACTS, I find that the above criteria is met and that serious violations of items 1, 2 and 3 of the citation were established.

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13/ Section 17(k) provides:

> (k) For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

14/ However, the Commission has held that such violations bear a direct and immediate relationship to employee safety and health, but not such a relationship that a resulting injury or illness would likely cause death or serious physical harm. Crescent Wharf and Warehouse Co., 2 OSAHRC 1318, 1 BNA OSHC 1219, 1971-73 CCH OSHD ¶15,687(No. 1, 1973).

15/ The Secretary has the burden of proving employer knowledge for both serious and nonserious violations of the Act. Prestressed Systems, Inc., 81 OSAHRC 43/D5, 9 BNA OSHC 1864, 1981 CCH OSHD ¶25,358 (No. 16147, 1981).

§17(j) of the Act requires the Commission, in assessing penalties, to consider the gravity of the violation and the employer's size, good faith and history of previous violations. These factors need not be accorded equal weight, but the gravity is usually of greater significance than the others. Colonial Craft Reproductions, 72 OSAHRC 11/B10, 1 BNA OSHC 1063, 1971-73 CCH OSHD ¶15,277 (No. 881, 1972). Elements to be considered in determining gravity include the number of employees exposed to the risk of injury, duration of the exposure, precautions against injury, and the degree of probability of occurrence of an injury. National Realty & Construction Co., Inc., 72 OSAHRC 9/A2, 1 BNA OSHC 1049, 1971-73 CCH OSHD ¶15,188 (No. 85, 1972), rev'd on other grounds, 489 F.2d 1257 (D.C. Cir., 1973).

Under these criteria, the gravity of each of the three violations is rather low. The number of employees exposed to the risk of injury was quite small. Furthermore, the frequency and length of time of such exposure was very limited. In regard to item 2, respondent had attempted to preclude an excessive build up of pressure in the circulating system by placing a pressure gauge on the pump where an operator could watch it. However, the operator was not always at that station. Moreover, his attention could be temporarily diverted elsewhere while at the pump. The probability that an incident or accident would occur is relatively low for each of the violations. Murphey, Inc.

is a small employer.16/ Moreover, the evidence does not establish a history of prior violations (Tr. 45-46). Finally, respondent must be graded high on the good faith aspects of this case. Without hesitation, all items in both citations were corrected. In fact, additional items not cited were corrected, together with all similar items on respondent's other rig (letters dated May 20, 1980 and September 24, 1980). While Murphey did not take the witness stand, his demeanor as the representative of the respondent in the hearing was impressive.

The penalties recommended by complainant have been fully considered. However, the Commission is not bound to follow complainant's recommendations. Nacirema Operating Co., 1 OSAHRC 33, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶15,032 (1972). Based on the foregoing, the appropriate penalties are found to be as follows: item 1, $25.00; item 2, $25.00; and item 3, $50.00.

## FINDINGS OF FACT

The evidence of record having been considered and evaluated in its entirety, the following facts are specifically found:

1. To avoid repetition, those facts set forth under the headings entitled JURISDICTION and PARTIAL RESOLUTION OF THE FACTS are hereby incorporated by reference to the extent that they are not set forth hereunder.

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16/ The compliance officer obviously was not certain as to the exact number of employees (Tr. 46-47). Murphey had earlier stated that the firm had ten employees. He might not have counted corporate officers as employees (letter dated September 24, 1980). At any rate, respondent is a small employer.

2. If an accident occurred as a result of respondent's (i) failure to secure the ends of the rotary hose, (ii) failure to provide a relief valve on the mud circulating pump, or (iii) failure to provide a safe climbing device on the derrick ladder, there was a substantial probability (in each instance) that death or serious physical harm could result therefrom.

3. Respondent's supervisory officials knew or, with the exercise of reasonable diligence, could have known of the violative conditions created by the work conditions described in finding of fact no. 2 hereof.

4. Respondent was in serious violation of §5(a)(1) of the Act (items 1 and 2 of citation 1) and 29 CFR 1910.27(d)(5) (item 3 of citation 1).

5. The gravity of each of the violations was rather low.

6. Respondent is a small employer.

7. There is no history of prior violations.

8. The evidence establishes good faith on the part of the respondent.

9. The appropriate penalties are (i) $25.00, item 1, (ii) $25.00, item 2, and (iii) $50.00, item 3.

## CONCLUSIONS OF LAW

1. At all times material hereto, respondent was an employer within the meaning of the Act, engaged in a business affecting commerce, and having employees.

2. The Commission has jurisdiction over the parties and the subject matter of the proceeding.

3. Respondent was in serious violation of §5(a)(1) of the Act (item 1 of citation 1).

4. Respondent was in serious violation of §5(a)(1) of the Act (item 2 of citation 1).

5. Respondent was in serious violation of 29 CFR 1910.27(d)(5) (item 3 of citation 1).

## ORDER

Upon the basis of the foregoing findings of fact, conclusions of law, and the record as a whole, it is ORDERED that:

1. Item 1 of citation 1, alleging a serious violation of §5(a)(1) of the Act, is AFFIRMED, and a civil penalty of $25.00 is ASSESSED.

2. Item 2 of citation 1, alleging a serious violation of §5(a)(1) of the Act, is AFFIRMED, and a civil penalty of $25.00 is ASSESSED.

3. Item 3 of citation 1, alleging a serious violation of 29 CFR 1910.27(d)(5), is AFFIRMED, and a civil penalty of $50.00 is ASSESSED.

E. Carter Botkin

E. CARTER BOTKIN
Administrative Law Judge

Date: February 4, 1982

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

420 U. S. Courthouse
Boston, Massachusetts 02109
617-223-3757

## NOTICE OF DECISION

Secretary of Labor v. FANTONI COMPANY, INC.
OSHRC Docket No. 80-6680

1. Enclosed is a copy of my decision. It will be filed with the Commission on February 8, 1982, and will become the final order of the Commission on March 10, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is March 10, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Barbara L. Hassenfeld

BARBARA L. HASSENFELD
JUDGE, OSHRC

Date: January 19, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant | : | |
| v. | : | OSHRC DOCKET NO. 80-6680 |
| FANTONI CO., INC., | : | |
| Respondent | : | |

- - - - - - - - - - - - - - - - - - - - -

Appearances: For Complainant,

Albert H. Ross, Regional Solicitor
U. S. Department of Labor
JFK Federal Bldg., Room 1803
Boston, Massachusetts 02203
Attn: David Snyder, Esq.

For Respondent,

Robert Calagione, Esq.
294 Washington Street, Suite 340
Boston, Massachusetts 02108

STATEMENT OF PROCEEDINGS:

A hearing was held in Boston on June 1, 1981, regarding Serious Citation No. 1 which was issued on October 8, 1980, with a proposed penalty of $420.00.

The regulation in issue at 29 CFR 1926.550(a)(15)(i) states:

> "Except where electrical distribution and transmission lines have been de-energized and visibly grounded at point of work, or where insulating barriers, not a part of or an attachment to the equipment or machinery, have been erected to prevent physical contact with the lines, equipment or machines shall be operated proximate to power lines only in accordance with the following: ...the lines rated 50 kv. or below, minimum clearance between the lines and any part of the crane shall be 10 feet."

The Secretary alleges that the Respondent violated that regulation on September 18, 1980, while operating an Insley H-300 backhoe in Waltham, Massachusetts, on Exchange Street next to the 195 School Street area.

EVIDENCE

Mr. Alexander Steel, Jr., a compliance officer for the Occupational Safety and Health Administration specializing in construction inspections (Tr. 14-15) testified that he inspected the Respondent's two worksites on Lexington Street in Waltham as well as the one in issue on Exchange Street (Tr. 17-18). At the latter location, he observed a trench in the street, a backhoe and some trucks. (Tr. 18) He stated that the backhoe was situated in approximately the middle of the street with its cab under the high-tension wire, and about five employees were working on the project, including the backhoe operator who was seated inside the cab of the machine. (Tr. 19) The witness noted electrical lines crossing Exchange Street (Tr. 20) consisting of three transmission lines on the cross bar plus one 110-240 electric line. (Tr. 21-22) When Mr. Steel arrived at the site, he observed the backhoe scraping the end wall of the trench with the bucket, and he opined that there was a hazard of electrical shock to two employees due to the backhoe operating about six feet from the high-power lines. (Tr. 23-25, 42) The part of the backhoe in close proximity to the wires was where the boom and arm meet (Tr. 25) (see Exhibit C-1 with identifying marks). No precautions were taken to prevent contact with the energized line. (Tr. 42)

According to the witness, he testified that one of Respondent's employees, Mr. LaBonne, stated that the three lines were alive, thus leading to Mr. Steel's informing the backhoe operator of said situation. (Tr. 26) The operator then

turned off the machine and climbed down, indicating he wouldn't resume until the lines were de-energized. (Tr. 26) Mr. LaBonne then called Boston Edison to shut the line down, and Mr. Steel testified that he observed an employee of the electric company go up in a bucket to de-energize the lines. (Tr. 27-28, 32) (Exhibit C-6)

On cross examination, Mr. Steel indicatd that he saw the backhoe scraping the back wall of the trench about 3 feet in the ground, but did not observe it dumping materials into the truck, and he only approximated the distance between the boom and the transmission lines. (Tr. 44-47, 64) (See exhibit C-4) He estimated that the lines were 28 feet high (Tr. 58) and the boom was 18-20 feet high (Tr. 51-52)

He testified that Mr. LaBonne, an employee of the Respondent and Mr. Gross of Boston Edison Company both indicated to him that the lines in issue were still energized (Tr. 59)

Mr. Richard LaBonne, a superintendent of the Respondent (Tr. 70) testified that he had contacted both Boston Edison Company and New England Telephone Company about one month prior to the inspection. (Tr. 71-72) He stated that an employee of the electric company indicated that two of the trhee lines through the transformer could be de-energized so the witness requested it be the two inside lines, one of which he called the hazard line. (Tr. 72-74, 84) He knew that the third line would remain alive but he believed that two had already been de-energized at the time Mr. Steel inspected the site. (Tr. 74, 77-78)

## DISCUSSION

No defense has been raised asserting that a backhoe was not the type of equipment covered by the requirements of the pertinent regulation; therefore, it is not an issue. Compare, Tri-City Construction Company 1980 CCH OSHD 24,557.

In the Complainant's Request for Admissions, Respondent's answer to number 11 admitted that each electrical line carried 2,400 volts and the testimony indicated that no barriers had been erected to prevent physical contact with the power lines.

As to the issue of whether or not the backhoe came within 10 feet of an energized electrical line while scraping the end of the trench wall, the evidence included the compliance officer's testimony that only approximated the electrical lines to be 28' high, and the backhoe's arm and bucket to be 18-20' high when extended upward. The witness did not take measurements. There was some confusion as to the exact location of the backhoe relative to the sidewalk and as to which of the lines were energized at the time of the inspection. Mr. Steel could not state with any consistent certainty which line or lines were being de-energized while he observed the Boston Edison employees at work. The Respondent's late defense and response to the Complainant's Request for Admission concerning the energized lines is viewed as weighing heavily against its credibility on this issue; however, the burden of proof is on the Complainant to show by the preponderance of the evidence that the measurements were within the distance considered to be in violation of the regulation.

Assuming arguendo that all the lines were energized or in the alternative that only the hazard line remained energized, the Complainant's only testimony on distances consisted of approximations, which by the witness' own account included a two-foot leeway on the length of the backhoe's arm. With distance being of the utmost importance in this case, it is imperative that more certainty on that issue be established than was presented here; thus, the citation must be vacated.

## FINDINGS OF FACT

1. Compliance officer Alexander Steel made a duly authorized and proper inspection of the Respondent on September 18, 1980, at its work site in Waltham, Massachusetts.

2. The Respondent is found to have been engaged in trench excavation at the time of the inspection.

3. The Respondent is found to have contested Serious citation 1 with its proposed penalty of $420.00.

## CONCLUSIONS OF LAW

1. At all times relevant herein, the Respondent has been engaged in a business affecting commerce within the meaning of Section 3 of the Occupational Safety and Health Act of 1970.

2. Respondent was, at all times relevant hereto, subject to the requirements of the Occupational Safety and Health Act and the standards promulgated.

3. The Commission, at all times relevant hereto, has had jurisdiction of the parties and of the subject matter herein.

4. Respondent did not fail to comply with 29 C.F.R. 1926.550(a)(15)(i).

## ORDER

Serious citation 1, with its proposed penalty is vacated.

Barbara L. Hassenfeld

BARBARA L. HASSENFELD
JUDGE, OSHRC

Dated: February 8, 1982
Boston, Massachusetts

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| | (See prior order at 81/15/F10) | | |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

March 15, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Kansas City Power & Light Company

OSHRC DOCKET NO. 76-5255

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION (REMAND)

To wit: See attached.

FOR THE SECRETARY OF LABOR

Counsel for Regional Litigation
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FOR EMPLOYEES

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Alan M. Wienman, Judge
Occupational Safety & Health
Review Commission
1114 Market Street, Room 608
St. Louis, Missouri 63101

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UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>KANSAS CITY POWER & LIGHT COMPANY, a corporation,<br><br>Respondent. | OSHRC Docket No. 76-5255 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge Alan M. Weinman is before the Commission under section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). In his decision, Judge Weinman vacated a citation alleging that Respondent, Kansas City Power & Light Company, committed a serious violation of the "general duty clause," section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1). 1/ In response, the Secretary of Labor ("the Secretary") filed a petition for discretionary review. Commissioner Cleary then directed review of all of the issues raised by the Secretary's petition, including the principal issue of whether the judge erred in concluding that the Secretary failed to establish that the cited conditions constituted a "recognized hazard" within the meaning of section 5(a)(1). For the reasons that follow, we reverse the judge's decision that the Secretary failed to sustain this burden of proof and remand the case for further proceedings.

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1/ Section 5(a)(1) of the Act provides that "[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

I

Respondent generates and sells electricity in Kansas City, Missouri. On October 19, 1976, an explosion in the "F" coal pulverizer area of boiler unit 5 at Respondent's Hawthorn Road power plant injured 15 employees. Occupational Safety and Health Administration ("OSHA") compliance officer Garvin Pyron investigated the accident on October 19 through 22, 1976. Consequently, the Secretary issued to Respondent a citation alleging a serious violation of the Act for failure to comply with section 5(a)(1) in that:

> the employer did install, or permit to be installed, tripping devices in the control circuits of the unit number 5 coal pulverizers in such a manner that it is possible for a failure of a raw fuel (coal) feeder to cause both a pulverizer and its associated exhaust to stop instantaneously without purging and while charged with heated partially pulverized coal, thereby increasing the chance of explosion.

To produce electricity at the cited facility, Respondent burns coal in a massive boiler to convert water to steam that is used to generate electricity. The process begins when raw coal is fed by six feeder belts to six pulverizers, where the raw coal is simultaneously heated at 600 to 800 degrees Fahrenheit and ground by rollers to a fine powder. Exhausters attached to each pulverizer carry the powdered coal to the boiler. The coal dust is then injected into the four corners of the boiler at six different levels in a tangential firing process. Control room operators monitor the feeders, the pulverizers, and the boiler with a computer, sensing instruments, and electrical circuits designed to sustain or stop operation under particular conditions.

In this operation, Respondent uses electrical circuitry designed and installed by Combustion Engineering, Inc. One feature of the circuitry, referred to at the hearing as the "adjacent mill trip," electrically interconnects each coal pulverizer and its feeder belt with the feeders that supply adjacent pul-

verizers. As a result of this interconnection, the adjacent mill trip will stop a loaded pulverizer abruptly under certain conditions without purging or exhausting the pulverizer of coal or volatiles. For example, if the feeder belt for F pulverizer trips or stops, the F pulverizer will stop automatically after a 3-second delay if the feeder belt for the adjacent E pulverizer drops to less than 50 percent of its operating speed. Moreover, when the F pulverizer stops under these circumstances, its exhauster also stops, thereby leaving any residual accumulations of partially pulverized coal dust confined within the pulverizer. Compliance officer Pyron, a former control operator at a coal-fired power plant, 2/ surmised that this sequence of events preceded the explosion at issue. In addition, a joint management-labor investigating committee concluded that the adjacent mill trip interlock caused the explosion.

Witnesses for both parties indicated that coal accumulations in pulverizers are subject to spontaneous combustion and explosion. For example, Pyron emphasized that pulverized coal is "at the very best dangerous," and that, even "under the very best of conditions and the closest control," there will be explosions.

Nevertheless, according to Pyron, the circuitry used by Respondent exacerbates the explosion hazard inherent in pulverizer shutdowns because the 3-second delay in the pulverizer trip does not allow sufficient time to exhaust coal dust and gases that accumulate in the pulverizer. Pyron stressed that a pulverizer should not be stopped if "there is any possibility of coal dust or volatile[s]

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2/ Pyron had worked with the Tennessee Valley Authority ("TVA") as a control room operator at coal-fired generating plants for 12 years, from 1957 until 1969. In addition, Pyron testified that he had experience with Combustion Engineering systems, including the type of pulverizers used by Respondent. However, he admitted he had no operator experience since 1969 and he had no mill circuitry design experience. Pyron also noted that he first heard about adjacent mill trip circuitry only during his investigation.

remaining in it until it has been cooled down except in the most extreme circumstances." 3/ Other control room operators who testified on behalf of the Secretary agreed that failing to exhaust a pulverizer before an automatic trip is a dangerous practice.

The Secretary also submitted evidence, in the form of a list supplied by Respondent, that from March 11, 1971, to March 23, 1977, 19 coal pulverizer explosions at Hawthorn unit 5 had caused external damage. According to this evidence five of these explosions occurred after the incident in question. Although the record does not indicate the cause of these pulverizer explosions, Herbert C. Temme, Respondent's consulting engineer, admitted that the list "indicates more explosions than we would like and maybe than we should expect."

Pyron suggested that Respondent could abate the hazard by removing the adjacent mill trip or by installing a time delay to assure purging of the pulverizers before stopping. In addition, after the explosion at issue, the investigating committee of management and employee representatives recommended removal of the adjacent mill trip. According to Norbert Kurle, a control operator for Respondent and a member of the investigating committee, although management officials had agreed to follow this recommendation, Respondent did not remove the trip.

Respondent's engineering witnesses, Temme and Richard E. Drake II of Combustion Engineering, both opposed removal of the adjacent mill trip on the ground that its purpose was to increase safety by reducing the hazard of boiler explosions. They urged that the interlock is designed to prevent accumulations of

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3/ Before the hearing, the Secretary stipulated that instantaneous pulverizer trips are appropriate under the following conditions: (1) boiler trips, (2) loss of unit DC power, (3) manual operator control trips, (4) electrical faults in pulverizer drive motors, (5) loss of AC power, and (6) exhauster discharge gate closed. However, in the Secretary's view, tripping a pulverizer under what he deems to be normal conditions, solely based on a reduction in adjacent feeder speed, is unnecessarily hazardous.

coal dust in a boiler that may lack "ignition energy" or flame to consume the coal. Such accumulations of powdered coal exhausted from a tripped pulverizer could lead to a boiler explosion, according to both Temme and Drake. Furthermore, Drake stressed that the Combustion Engineering equipment used by Respondent is specifically designed to comply with the National Fire Protection Association ("NFPA") provision at chapter 85-E, section 583, that in effect prohibits injection of coal into a boiler without flame.

Temme testified that Respondent normally exhausts and cools coal pulverizers as part of its shut down procedure. However, when activated by the tripping of one feeder and the reduced speed of an adjacent feeder, the adjacent mill trip will automatically stop a pulverizer to prevent injection of coal from that pulverizer into a boiler that may lack sufficient flame to consume the fuel, according to Temme.

The Secretary's witnesses disagreed with Temme's view that adjacent mill tripping is necessary because feeder speed somehow "proves" boiler ignition. Instead, they testified that feeder speed does not indicate the lack of boiler ignition or unstable flame and therefore does not warrant an instantaneous trip of a pulverizer and the concomitant risk of a pulverizer explosion. In addition, several operators testified that allowing a pulverizer with a failed feeder to operate until its coal is exhausted into the boiler does not endanger the pulverizer or the boiler. Furthermore, according to operator testimony, other instruments, aside from the feeder trip, are available to show boiler ignition. In addition, there was disagreement among the witnesses as to which alleged hazard, boiler explosions or pulverizer explosions, presented the greater danger to employees.

The Secretary's witnesses also indicated that the questioned circuitry interlock is not commonly used in the utility industry. Compliance officer

Pyron, who had 12 years of experience with the TVA as a control operator, testified generally that tripping a loaded pulverizer is not a common industry practice. William Green, with 26 years of TVA experience, explained that TVA practice is to allow a pulverizer to run until it is exhausted once a feeder trips. Plants under his control had never had a pulverizer explosion when the pulverizer was shut down that way. Earl Wayne Downs, a plant supervisor for South Mississippi Electric Power Association and a former test engineer with TVA experience, testified that, in every location where he had worked, a pulverizer had to be completely empty before it was shut off. For example, Downs explained that the South Mississippi facility uses an interlock that is the opposite of Respondent's circuitry because it is designed to assure that the pulverizer is cleared of charged material before it shuts down. Specifically, the circuitry prevents the pulverizer from being tripped manually for five minutes after its feeder stops. Downs saw no reason for an immediate trip on the pulverizer here within 3 seconds after the feeder stops because, he suggested, exhausting the coal and volatiles from a pulverizer causes no damage to the pulverizer or the boiler. In view of the pulverizer explosion danger, Downs testified that he would not want adjacent mill tripping "in my plant." In addition, both Pyron and Green had operated Combustion Engineering equipment that did not use an adjacent mill trip.

According to Respondent's consultant Temme, however, tripping a pulverizer without purging when a boiler lacks ignition is a common industry practice. Temme named several companies that use an interlock like the adjacent mill trip. In addition, Drake testified that adjacent mill tripping is common to the Combustion Engineering system. Drake also said that Combustion Engineering had installed 250 systems with adjacent mill trips, 150 of which were for coal-fired units. Emphasizing a trend toward automation and away from operator control, Drake

testified that the circuitry interlocks are used increasingly "to assist the operator so that he does not have to have the choice of making an incorrect decision." Drake also testified that the TVA had requested that Combustion Engineering submit a proposal for adjacent mill circuitry at a plant where two boiler explosions had occurred within a year.

In his post-hearing brief, the Secretary contended that stopping a pulverizer without exhausting coal and volatiles is a recognized hazard. The Secretary specifically argued that NFPA Code provisions indicate that the utility industry "for years has recognized the hazards of residual coal charges in pulverizers." In his brief, the Secretary cited NFPA sections on coal-fired boilers and pulverized fuel systems that warn of an explosion danger from heated, pulverized coal accumulations and also detail purging procedures. On the explosion hazard, the Secretary cited section 564, chapter 85-E, of the 1974 NFPA Code, which provides in pertinent part that:

> Pulverizers will, on tripping, have a residual charge distributed primarily in the pulverizer, but also in burner piping and nozzles. This accumulation in a hot pulverizer will generate volatiles that are combustible and explosive.

In addition, this hazard is also mentioned in section 4214, chapter 60, of the 1975 NFPA Code:

> Pulverizers tripped under load will have fuel remaining in the hot pulverizer, burner piping, and burners. These accumulations may cause spontaneous ignition of the fuel or an explosion.

Furthermore, the Secretary argued that purging of pulverizers is specifically required by sections 624 and 6243, chapter 60, 1975 NFPA Code, which provide:

> 624. <u>Clearing Procedures For Pulverizers Tripped Charged With Fuel</u>. In order to minimize hazards caused by accumulations within the pulverized fuel system equipment, as discussed in section 616 [dealing with accumulations at the time of initial start up], the following procedure shall be used to clear fuel from the system as soon as possible after it has been tripped while containing a charge of fuel.

* * *

6243. Continue to operate the pulverizers until empty and in normal condition for shutdown.

Finally, the Secretary emphasized that the NFPA Code contains no provision that approves or provides for either adjacent mill tripping or, except under emergency conditions, stopping a loaded pulverizer without exhausting.

II

Judge Weinman vacated the citation based on his conclusion that the Secretary failed to prove that Respondent's pulverizer control circuitry was a "recognized hazard" under section 5(a)(1) of the Act. In reaching this conclusion, the judge refused to consider the NFPA provisions advanced by the Secretary to support the citation because they were "advisory provisions of newly promulgated national consensus standards." The judge in effect reasoned that it would be inequitable to base a 5(a)(1) charge on the NFPA provisions when Respondent would have been exempt under a "grandfather clause" if the NFPA provisions had been adopted as OSHA standards. However, the judge noted that "[a]dmittedly, Respondent made no effort to clear the pulverizer as recommended [in the NFPA Code]." The judge also found that the engineering testimony of Respondent's witnesses on "other coal-fired generating plants that incorporate adjacent mill tripping in their circuitry" rebutted the Secretary's evidence on industry practice. The judge specifically relied on Drake's testimony that adjacent mill tripping is common to the Combustion Engineering system. He concluded that "neither the collective force of their [the Secretary's witnesses'] opinions nor the history of explosions and injuries . . . is sufficient to establish the existence of a recognized hazard on October 19, 1976, in the face of unrebutted testimony that the disputed circuitry logic was commonly used in the industry."

The Secretary maintains that he established a recognized hazard based on both industry recognition and employer knowledge of an explosion hazard created by tripping a loaded pulverizer.

According to the Secretary, industry recognition is established by the testimony of the compliance officer and operators that (1) a loaded pulverizer should be tripped only in extreme situations and, even then, only if purged, and (2) common TVA practice is to purge pulverizers before they are stopped. The Secretary further maintains that the 1974 and 1975 provisions of the NFPA Code, noted in his post-hearing brief, address the cited hazard and provide "unequivocal evidence" that an industry safety authority recognizes the hazard.

Furthermore, the Secretary contends that Respondent actually knew of the cited hazard. The Secretary notes that Respondent normally purges pulverizers before stopping them to avoid explosions. This "work rule," according to the Secretary, manifests Respondent's understanding of the hazard of allowing coal to remain in an inert pulverizer. In addition, the Secretary charges that Respondent had constructive knowledge of the cited hazard based on (1) evidence of nineteen explosions in six years at the cited facility, (2) testimony that each pulverizer had exploded at some time, and (3) the admission of Respondent's engineering consultant that "there were more pulverizer explosions than we would like." In the Secretary's view, its history at least provided Respondent with notice that its method of pulverizing coal was hazardous.

Respondent contends that the Secretary failed to sustain his burden of proving that the adjacent mill trip is a recognized hazard. Respondent agrees with the judge that the Secretary failed to prove that the use of the adjacent mill trip is against common industry practice. In this connection, it charges that the operator testimony, including the testimony of the compliance officer, is unrepresentative, unreliable and limited because, among other things, these opinions are out-of-date or irrelevant to Respondent's equipment. In contrast, Respondent urges the "wide" experience of its engineering witnesses who explained the circuitry logic and the dangers of not using a trip. Furthermore, Respon-

dent notes testimony on other facilities with similar circuitry interlocks and the industry trend toward plant automation.

Respondent also contends that the judge correctly refused to consider NFPA provisions as evidence of a recognized hazard. Respondent asserts that the Secretary may not rely on an advisory, nonretroactive industry standard not adopted by OSHA to establish a recognized hazard under section 5(a)(1). To decide otherwise violates due process, Respondent reasons, because an employer is entitled to "more notice, more particularity, and more specificity" if the Secretary seeks to prove a general duty clause violation. 4/ Respondent specifically urges that the Secretary must show that the provisions he relies on are actually directed to prevention of the cited hazard. According to Respondent, the provisions here are too ambiguous and general to establish a hazard. Furthermore, if the Commission permits the Secretary to rely on NFPA "advisory" provisions, Respondent urges that it should be allowed to submit evidence on the inapplicability of those standards to the cited facility. Finally, Respondent maintains that none of the Secretary's witnesses testified that it had violated any specific provisions. Respondent specifically notes that it objected to the Secretary's cross-examination on NFPA Code provisions on the ground that the Code was inapplicable to the advanced circuitry at the cited facility.

Respondent also denies actual knowledge that its adjacent mill trip was a recognized hazard. Respondent urges that the Secretary "failed to present any credible proof that <u>any</u> explosion, <u>including the one on October 19, 1976</u>,

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4/ Nevertheless, despite these assertions, Respondent concedes that "[i]ndustrial operating codes, if established to be widely accepted in the particular industry and applicable to the situation or condition in issue, can be indicative of commonly accepted safety standards." Indeed, it further notes that the parties "have agreed that the National Fire Protection Association Pulverized Fuel Systems Code sets generally recognized industrial guidelines for the area of pulverized fuel systems."

was caused by the adjacent mill trip device. . ." It argues that evidence of past explosions is irrelevant because the Secretary failed to show that the earlier explosions were caused by the trip. In addition, Respondent notes that, before the explosion at issue, no request or recommendation was made to remove the trip.

III

To establish a section 5(a)(1) violation, the Secretary must show, among other things, that the cited employer failed to render its workplace free of a "recognized hazard." A recognized hazard is a condition or practice in a workplace that is known to be hazardous by either the industry in general or the employer in particular. See, e.g., Beaird-Poulan, A Division of Emerson Electric Co., 79 OSAHRC 21/D11, 7 BNA OSHC 1225, 1979 CCH OSHD ¶ 23,493 (No. 12600, 1979). The hazard, not the specific incident resulting in injury, is the relevant consideration in determining the existence of a recognized hazard. See Brennan v. OSHRC (Vy Lactos Laboratories, Inc.), 494 F.2d 460 (8th Cir. 1974); Boeing Co., Wichita Division, 77 OSAHRC 188/D13, 5 BNA OSHC 2014, 1977-78 CCH OSHD ¶ 22,266 (No. 12879, 1977). Moreover, the recognition element of an employer's duty under the general duty clause refers to knowledge of the hazard, not recognition of the means of abatement. General Dynamics Corp., Quincy Shipbuilding Division v. OSHRC, 599 F.2d 453 (1st Cir. 1979). Required abatement is determined by feasibility and an abatement order may prescribe practices of a higher standard than those an industry presently considers to be reasonable. E.g., Williams Enterprises, Inc., 79 OSAHRC 24/A2, 7 BNA OSHC 1247, 1979 CCH OSHD ¶ 23,478 (No. 4533, 1979), aff'd, No. 79-1559 (D.C. Cir. June 9, 1980).

Applying these principles to the case before us, we conclude that the hazard was defined too narrowly when it was formulated in terms of whether use of the adjacent mill trip mechanism was recognized as a hazard. Indeed, both the

judge and Respondent improperly define the hazard at issue in terms of the asserted cause of the specific incident that led to injury and/or the suggested method of abatement, i.e., in terms of the use or nonuse of the adjacent mill trip. We conclude that the hazard here is the danger of pulverizer explosions resulting from accumulations of heated, pulverized coal. Removal or alteration of the adjacent mill trip device to prevent such accumulations is the suggested means of materially reducing this hazard. See Beaird-Poulan, a Division of Emerson Electric Co., supra. Accordingly, the judge erred in deciding that a recognized hazard finding is precluded in this case by Respondent's evidence that the disputed circuitry was "common" to Combustion Engineering equipment and to the utility industry.

Furthermore, we conclude that the judge erred in refusing to consider NFPA Code provisions as evidence of industry recognition of this explosion hazard. Indeed, the courts and the Commission have looked to industry standards in determining industry recognition of a hazard. E.g., Bethlehem Steel Corp. v. OSHRC & Marshall, 607 F.2d 871 (3d Cir. 1979) (Respondent's safety officer admitted that advisory ANSI standard represented industry consensus); Titanium Metals Corp. of America v. Usery, 579 F.2d 536 (9th Cir. 1978) (recognition established by NFPA standard that Respondent helped draft); Betten Processing Corp., 75 OSAHRC 43/E2, 2 BNA OSHC 1724, 1974-75 CCH OSHD ¶ 19,481 (No. 2648, 1975) (judge erred in failing to consider ANSI standard as evidence of recognized hazard). To the extent industry consensus standards reflect an industry's recognition of a hazard, they are relevant, probative evidence of a recognized hazard. 5/ Consequently, the NFPA standards relied on by the Secretary are acceptable proof of industry recognition. These provisions, as set forth above,

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5/ The due process concerns of Respondent and the judge are based on a misconception of the role of advisory industry standards in section 5(a)(1) cases. The Secretary does not seek in this case to use the NFPA provisions

caution that heated coal that is not exhausted from a pulverizer may explode and they recommend procedures for clearing loaded pulverizers to prevent such explosions. We conclude therefore that these industry standards establish industry recognition of an explosion hazard in pulverizers resulting from heated, pulverized coal accumulations. 6/

In view of this evidence of industry recognition of the explosion hazard that allegedly existed at Respondent's worksite, we reverse the judge's conclusion that the Secretary failed to sustain his burden of proving the recognition element ("recognized hazard") of a section 5(a)(1) violation. Because the judge made no findings or conclusions on the remaining elements of the alleged violation and because the record contains sharply conflicting testimony on certain elements, it is necessary to remand the case for further proceedings.

For these reasons, we reverse the judge's decision and remand the case to the judge for findings and conclusions on the remaining elements of the alleged section 5(a)(1) violation.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: MAR 15 1982

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(Footnote 5 cont'd)

to define required or prohibited conduct under the general duty clause. Instead, the Secretary properly submits the provisions as evidence of the utility industry's awareness or recognition of the hazard.

6/ We reject Respondent's argument that the NFPA Code does not apply to its facility. Indeed, Respondent concedes that the Code applies generally to pulverized fuel systems and its engineering consultant admitted that the Code contains "a discussion of boilers in general and the order in which trips should work."

ROWLAND, Chairman, Dissenting:

I dissent from the majority's decision to remand this case for further proceedings on the elements of proof of a violation of 29 U.S.C. § 654(a)(1). In my view, Judge Wienman properly held that the Secretary had failed to demonstrate the existence of a recognized hazard in Respondent's worksite. 7/ However, while I would affirm the judge's decision to vacate the citation, I do not fully agree with the judge's reasoning in support of his conclusion that a recognized hazard was not shown. Specifically, I share the majority's view that the judge did not properly define the recognized hazard at issue in this case, but I would apply a different definition of the hazard than does the majority. I also do not agree with the majority that the judge erred in his treatment of the National Fire Protection Association (NFPA) codes.

As explained in more detail below, the basic question in this case is whether Respondent is justified in its belief that the inherent and unavoidable hazard of a pulverizer explosion is preferable to an explosion in the boiler or furnace which potentially can have far more serious consequences. While no one disputes that it is desirable where possible to purge pulverizers prior to stopping them, this procedure cannot be adopted in certain limited situations where in Respondent's considered judgement it cannot be certain that a safe level of ignition exists in the furnace.

Before proceeding to the merits of this case, however, I must address a preliminary matter regarding the proper definition of the recognized hazard to be applied.

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7/ Since the existence of a recognized hazard is the first element of proof in establishing a violation of section 654(a)(1), it is unnecessary to consider the remaining elements, such as proof of feasible abatement methods, when, as here, the Secretary has not shown that the employer failed to keep its workplace free from a recognized hazard. BASF Wyandotte Corp., 81 OSAHRC , 10 BNA OSHC 1250, 1982 CCH OSHD ¶ 25,831 (No. 78-2316, 1981).

I.

As the majority correctly observes, the judge adopted an extremely narrow definition in that he required the Secretary to prove that Respondent's pulverizer trip circuitry mechanisms are understood as hazardous either by Respondent or by its industry. The majority rejects this definition in favor of an extremely broad definition which characterizes the hazard in generic terms as the hazard of explosion caused by the accumulation of coal in a heated pulverizer. As the majority itself notes, however, the Secretary alleged in his citation and argues in his brief yet a third formulation of the hazard--an increased likelihood of explosion resulting from Respondent's practice, in certain situations, of allowing a pulverizer to stop before it has been exhausted of coal and volatile gases. For the reasons that follow, I conclude that the definition presented by the Secretary is the appropriate formulation of the hazard in the circumstances of this case.

The requirement stated in 29 U.S.C. § 654(a)(1) that an employer provide employment and a place of employment "free from recognized hazards" imposes a broad obligation on the employer which is analogous to that imposed by the Secretary's standards regarding personal protective equipment, which also require the employer to protect against "hazards." In order to avoid the problem of fair notice inherent in such broadly-worded standards, it is well settled that they must be defined and limited by objective criteria sufficient to apprise an employer of his obligations. E.g., Ryder Truck Lines v. Brennan, 497 F.2d 230 (5th Cir. 1974); Voegele Co., 79 OSAHRC 76/A2, 7 BNA OSHC 1713, 1979 CCH OSHD ¶ 23,860 (No. 76-2199, 1979), aff'd, 625 F.2d 1075 (3d Cir. 1980); Owens-Corning Fiberglas Corp., 79 OSAHRC 26/D6, 7 BNA OSHC 1291, 1979 CCH OSHD

¶ 23,509 (No. 76-4990, 1979), aff'd, 659 F.2d 1285 (5th Cir. 1981). Similarly, with respect to 29 U.S.C. § 654(a)(1) the court in National Realty & Construction Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973) held that Congress intended to impose an "achievable" duty by which employers would be required to eliminate only those hazards which experts familiar with the industry would consider preventable. See Frank Briscoe Co., 76 OSAHRC 129/A2, 4 BNA OSHC 1729, 1976-77 CCH OSHD ¶ 21,162 (No. 7792, 1976).

In my view, to afford an employer adequate notice of the scope of its obligation under section 654(a)(1) to keep the workplace "free from recognized hazards," the alleged hazard should be defined in terms of work practices or processes involved in the workplace in question over which the employer can reasonably be expected to exercise control. Otherwise, it cannot be said that the hazard would be preventable in the ordinary course so as to render the employer's duty the achievable one intended by Congress. While the degree of specificity required will depend upon the circumstances of each individual case, here the majority's broad, generic definition of the hazard--coal dust explosions in pulverizers--does not direct Respondent's attention to a hazard which it could reasonably consider to be preventable.

In this case, it is obvious that pulverizers are understood both by Respondent and by the electric utility industry to present the hazard of explosion due to accumulated coal dust. Indeed, the provisions of the NFPA codes demonstrate that the hazard of an explosion caused by accumulated coal dust within a pulverizer is understood by the industry to be a normal incident of operations. Nothing in the provisions cited by the majority gives any indication that such accumulations are not normally anticipated to occur or that

explosions from such accumulations are not to be expected. 8/

Accordingly, the majority's definition of the hazard as an explosion from accumulated coal dust within a heated pulverizer is inadequate under 29 U.S.C. § 654(a)(1), because Respondent would not regard the duty imposed upon it by this definition to be achievable. Plainly, the reasonable employer in Respondent's industry would not consider the hazard of an

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8/ Although as the majority notes, Respondent's engineer Temme testified to the effect that the explosions which had previously occurred in the facility exceeded in frequency what he would "like" and "maybe should expect," this opinion was only tentative. Temme was responding to a question from the judge as to whether in his judgment "that record [the prior explosions] indicate that there is either some design or operating problem with respect to the No. 5 unit?" He prefaced his answer with the explanation that the question was "probably unfair" because he had not "had a chance to evaluate the operation of that unit in detail." There is also evidence that none of the other explosions had resulted in any injury to employees. The record, therefore, is not sufficient to establish that Temme was on notice from the occurrence of other explosions of any deficiency in Respondent's operating procedures, or in the design and construction of its facility, nor does it demonstrate that any employer in Respondent's industry would consider these prior incidents to be excessive either in frequency or severity.

Indeed, section 5311 of NFPA No. 60, the Standard for Installation and Operation of Pulverized Fuel Systems, emphasizes that pulverizers are designed with the expectation that explosions will occur: "All equipment of the pulverized fuel system which may contain pulverized fuel laden air . . . shall be designed . . . for containment of a possible internal explosion . . . ." This code also prescribes specific strength requirements for the construction of various parts of the pulverizer, but not including ductwork. See section 53112. The record shows that the explosion which resulted in the inspection in this case as well as the other explosions caused damage to ductwork but not to the pulverizers themselves.

explosion in a pulverizer to be preventable. 9/

In this case as the majority notes the citation alleged, and the compliance officer testified to, a hazard predicated on a particular operating practice of Respondent--that under certain conditions a heated pulverizer containing accumulated coal could be stopped without being purged. Furthermore, the citation allegation, which is reiterated in the Secretary's complaint, makes it clear that the Secretary's concern is not the inherent possibility of explosion in pulverizer operations, but rather a hazard which would be considered preventable because it is created by a particular operating procedure. I would accept the Secretary's definition of the hazard as sufficient to give Respondent

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9/ In a case analogous to this, the Second Circuit held that the Commission erred in defining the hazard presented by a facility used for the storage of both acids and cyanides as the formation of hydrogen cyanide (HCN), a lethal gas. Pratt & Whitney Aircraft v. Secretary of Labor, 649 F.2d 96 (2d Cir. 1981). Noting that there is no dispute that uncontrolled formation of HCN at a place of employment would be recognized as a hazard, but further observing that no evidence showed that HCN had ever been formed at the employer's facility, the court held that the hazard could not properly be defined as uncontrolled formation of HCN, but rather "must have been a condition that might result in the generation of that lethal gas." Specifically, the court concluded that the Secretary was required to demonstrate that the manner in which Pratt & Whitney stored its chemicals was known as hazardous. The court found such proof based on the undisputed evidence that the industry generally stored acids and cyanides separately with separate drains so as to protect against the formation of HCN in storage areas. 649 F.2d at 101.

This case is distinguishable from Pratt & Whitney in that coal dust explosions do occur whereas in Pratt & Whitney the hazard alleged by the Secretary and found by the Commission--formation of a lethal gas--had not been known to have occurred previously in the employer's facility. Nevertheless, Pratt & Whitney does stand for the proposition that the hazard must be defined in sufficiently specific terms to give the employer notice of its obligations under 29 U.S.C. § 654(a)(1).

notice of its duty in the circumstances of this case. 10/

II.

As the majority properly observes, a hazard alleged to be recognized under 29 U.S.C. § 654(a)(1) must be known as hazardous by either the industry in general or the employer in particular. In my view, the Secretary failed to establish that either Respondent or the industry as a whole recognize that it is hazardous to stop a heated, charged pulverizer under the conditions at issue in this case.

The Secretary presented the testimony of a number of employees as well as the compliance officer to the effect that pulverizers should not be stopped under such conditions. However, neither the compliance officer nor the employee witnesses had any experience or training in the design or engineering of coal-fired boiler systems, and in particular in the design of pulverizer circuitry. As the majority notes, compliance officer Pyron also had no operator experience

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10/ Although the majority acknowledges that the Secretary described the hazard - in both his brief before the judge and his brief before the Commission - in terms of stopping a pulverizer before it is purged, the majority states no reason for adopting a different formulation other than its belief that it is improper to define the recognized hazard in terms of the means of abatement sought by the Secretary. The majority does not even give consideration to the Secretary's definition of the hazard despite the fact that the Secretary's definition is not addressed to a specific abatement method. Although the citations and complaint refer to Respondent's tripping mechanisms, it is clear that the gravamen of the Secretary's charge is the failure to purge heated, charged pulverizers prior to stopping them.

Since I find the Secretary's formulation adequate, I need not consider at this time whether it is improper to define the hazard in terms of the specific abatement method. Furthermore, since, as discussed infra, I would vacate for failure of the Secretary to prove his allegation, I need not now consider whether the majority is correct in its additional conclusion that in entering an abatement order for a violation of 29 U.S.C. § 654(a)(1) the Commission can require an employer to institute measures which exceed those presently understood as reasonable in the employer's industry.

since 1969. According to Drake, who had been employed for 12 years as a systems engineer for Combustion Engineering, the manufacturer of Respondent's boiler control system, the design of these systems has become far more sophisticated since the 1960's, consistent with a trend in the utility industry to automate the control operations as much as possible. Drake specifically testified that Pyron had not worked at any facility having the type of burner control system which Combustion Engineering had installed at Respondent's plant. According to Drake, it is a basic principle of operation of coal-fired furnaces to insure that boilers contain a sufficient level of ignition to maintain combustion of the amount of fuel, in this instance coal, being introduced into the boiler. He indicated that this principle is embodied in the NFPA codes, 11/ and he gave his opinion that discharging a pulverizer into the boiler without establishing an adequate level of ignition would not comply with the NFPA code.

Temme, Respondent's consulting engineer with 26 years experience in the design, construction, and operation of electric utilities, gave similar testimony. In his view, it is essential to insure that the furnace has sufficient ignition energy to consume immediately the fuel being injected

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11/ He referred to section 573 of NFPA No. 85E, which is entitled "Standard for Prevention of Furnace Explosions in Pulverized Coal-Fired Multiple Burner Boiler-Furnaces." This section provides in pertinent part,

> A common emergency may arise due to a raw coal hangup or threatened unstable flame conditions due to wet coal or change in coal quality. . . . . If coal feed to an offending pulverizer subsystem can be restored or adequate ignition energy can be supplied before main burner ignition is lost, the subsystem may be continued in service provided the flame is stable. However, if the main burner flame on any burner of any pulverizer subsystem is extinguished . . . then that burner or subsystem shall be shut down in a way that will prevent coal being reintroduced to the furnace in a random manner.

into it in order to avoid an explosion caused by accumulation of raw fuel. He considered a furnace explosion to have far more serious consequences than an explosion in a pulverizer. When asked whether, as the Secretary's witnesses contended, it is improper to shut down a pulverizer on the basis of a certain feeder speed before the pulverizer is purged of its fuel and volatile gases, Temme replied candidly that "there are real, honest differences of opinion on how best to handle the mill [pulverizer] under that circumstance." He expressed his opinion that "there is nothing wrong and probably very good judgment" to stop the pulverizer "when we get in a situation that we do not have ignition energy proved." He based this opinion on his belief and on his observations that when an operator is losing or has lost fuel output from a pulverizer, the operator is more concerned with bringing other pulverizers on line to sustain ignition in the furnace than with the status of the pulverizer which has lost output, and consequently the operator may not have time to shut down that pulverizer through the normal purging procedure. While acknowledging that other opinions may exist and that the recommended practices may vary among manufacturers, Temme concluded that the procedure he described, and which Respondent instituted, "is a commonly used technique."

In evaluating the weight to be given to opinion testimony, the Commission must consider a number of factors, including the knowledge and experience of the witness in the subject matter of his testimony and the reasoning with which his opinion is supported. Air-Kare Corp., 81 OSAHRC , 10 BNA OSHC 1146, 1981 CCH OSHD ¶ 25,758 (No. 77-1133, 1981) (dissenting opinion). In this case, Respondent's witnesses are more qualified to testify with respect to the design of Respondent's facility and in particular with respect to the philosophy and logic on which the mill trip in question here is based.

Furthermore, both Temme and Drake specified in some detail the basis for their opinions in terms of their observations and the factors which they indicated were taken into consideration in the circuitry design. On the other hand, the opinions of the Secretary's employee witnesses were not based on any assessment of design philosophy, nor did the employees state any basis for their opinion other than their unsubstantiated belief that the speed of an adjacent feeder is not as reliable an indicator of the level of ignition in the furnace as is an operator's judgement. Temme, who as indicated has greater familiarity with matters of design, testified without rebuttal that the control system incorporates a signal which indicates whether there is weight on the feeder belt and that the feeder cannot operate at a 50 percent speed unless it has a load on the belt. On this basis, Temme stated that the correlation between a feeder speed of 50 percent or better and any actual coal feed of the same magnitude is "very high." This opinion was corroborated by Drake, who said that in Combustion Engineering's design the operation of an adjacent pulverizer feeder is a reliable indication of the level of ignition in the furnace. Accordingly, the Secretary has not shown by a preponderance of the evidence that Respondent had actual knowledge that under the circumstances presented in its operation a shutdown of a pulverizer prior to purge is hazardous. 12/

Nor does the record show that the industry as a whole recognizes that it is hazardous to stop a pulverizer prior to purging. At best, the testimony is conflicting regarding industry custom and practice. Although Pyron

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12/ The history of prior explosions does not show the contrary. An unspecified number of these explosions had occurred while pulverizers were being purged in the manner advocated by the Secretary, that is, before the pulverizers were shut down.

possessed operating experience with other facilities using Combustion Engineering equipment which did not apply an immediate pulverizer trip, his operating experience was limited to a period of time prior to the fundamental change in the theory of boiler control circuitry design on which the shutdown without purge is based. While witness Green did have current operating (but not design) experience with Combustion Engineering equipment at TVA, his testimony regarding the practice in TVA facilities is not persuasive in view of Drake's unrebutted statement that in 1976 one TVA facility, Widow's Creek, requested that Combustion Engineering install a burner control system similar to that of Respondent's plant after two explosions in the furnace had occurred. As the majority indicates, Combustion Engineering has installed 250 such control systems, most of which are used in coal-fired units. The widespread use of control circuitry of the type installed in Respondent's facility represents at least some consensus in the industry that the circuitry design is capable of properly detecting an inadequate ignition level and that it is acceptable to stop a pulverizer prior to purging when an inadequate ignition level in the furnace does not exist.

Nor do the provisions of the NFPA standards require an opposite conclusion. The cases cited by the majority support the proposition that proprietary standards of private organizations, such as the NFPA, are relevant but not dispositive on the question of industry recognition. For example, in Bethlehem Steel Corp. v. OSHRC, 607 F.2d 871 (3d Cir. 1979), the court noted both the employer's concession that the standard represented an industry consensus and the compliance officer's testimony regarding the practices of other employers. In Titanium Metals Corp. of America v. Usery, 579 F.2d 536 (9th Cir. 1978) the totality of the evidence consisted of the employer's own experience, employee complaints, and adoption of a safety program as well as the provisions of the NFPA code.

Furthermore, in this case the NFPA provisions indicate that the industry as a whole does not regard Respondent's practice as hazardous. In particular, section 624 of NFPA No. 60, quoted in part in the majority opinion, on its face assumes that pulverizers will be tripped under a load condition in normal operations. Additional provisions of the clearance procedure, which the majority fails to quote, indicate that the requirement that the pulverizer remain in operation contemplates a restart of the pulverizer after it has been tripped, rather than, as the majority erroneously suggests, that the pulverizer cannot be tripped until it is purged. Also, no time period is prescribed for the clearance procedure other than a provision that the fuel load be cleared "as soon as possible." Section 565 of NFPA No. 85E imposes an essentially similar sequence of clearance steps, 13/ but does not contain the "as soon as possible"

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13/ These provisions provide in full as follows:

NFPA No. 60-1973

624. Clearing Procedures for Pulverizers Tripped Charged with Fuel. In order to minimize hazards caused by accumulations within the pulverized fuel system equipment, as discussed in Section 616, the following procedure shall be used to clear fuel from the system as soon as possible after it has been tripped while containing a charge of fuel.

6241. Isolate all shutdown or tripped pulverizers as recommended by manufacturer.

6242. Start up one pulverizer in accordance with the principles and sequences listed in Section 621 (a) through (f).

6243. Continue to operate the pulverizer until empty, and in normal condition for shutdown. When the operating pulverizer is empty of fuel, proceed to another pulverizer and repeat the procedure until all are cleared of fuel.

(Continued)

requirement. 14/

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13/ (Continued)

NFPA No. 85E-1974

565. Clearing Procedure for Pulverizers and Fuel Burning Equipment

In order to minimize hazards caused by accumulations within the pulverizer, as discussed in 564, the following procedure shall be used to clear coal from the pulverizing and fuel burning equipment after a master fuel trip or a trip of individual pulverizers.

(a) Isolate all non-operating or tripped pulverizers from the furnace.

(b) Purge the furnace and start up in accordance with 522 (a) through (i) following a boiler fuel trip.

(c) Light the igniters on all burners of the pulverizer to be cleared. After making sure that the igniters are lighted and are providing appropriate ignition energy for the main burner, start the pulverizing equipment following the equipment manufacturer's recommendation.

(d) Continue to operate the pulverizer until empty, and in a normal condition for shutdown. If boiler conditions will permit a firing rate greater than the capacity of one pulverizer operating within its normal operating range, the first pulverizer should be kept in operation in accordance with 564. If the first pulverizer cannot be left in service, shut it down in the prescribed manner leaving it cool and as free of coal as practical.

(e) Repeat the procedure for all other pulverizers that had been tripped charged with coal. The procedure and operating principles outlined in Section 55 and 564 should be followed.

(Emphasis added.)

14/ In his brief the Secretary argues that section 624 of what he identifies as the "1975" edition of NFPA No. 60 contains the same provisions as the 1974 edition of NFPA No. 85E. I have not been able to locate an edition of NFPA No. 60 dated 1975. There is, however, an edition dated 1973, the provisions of which are identical to those quoted by the Secretary. I will assume that the Secretary while referring to NFPA No. 60-1973 inadvertently misidentified that code as a 1975 edition. Contrary to the Secretary's assertion, the provisions of the two codes, NFPA No. 60 and NFPA No. 85E, are not the same in that the phrase "as soon as possible" appears in the 1973 edition of NFPA No. 60 but not in the later, 1974, edition of NFPA No. 85E. The deletion of this language suggests that the industry no longer makes any recommendation regarding the period of time for restarting a pulverizer which has been tripped while containing an

(Continued)

In any event, as Judge Wienman properly determined, the NFPA codes are advisory insofar as they exempt pre-existing installations such as Respondent's. Under Commission precedent, therefore, the NFPA codes cannot be used to establish recognition of a hazard under 29 U.S.C. § 654(a)(1). A. Prokosch & Sons Sheet Metal, Inc., 80 OSAHRC 96/A2, 8 BNA OSHC 2077, 1980 CCH OSHD ¶ 24,840 (No. 76-406, 1980). 15/

For these reasons, I would affirm the judge's decision to vacate the citation.

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14/ (Continued)

accumulation of heated coal. This significant change in the requirements of the NFPA codes over a short period of time further supports the conclusion that the NFPA standards should not be used as dispositive proof of industry recognition of a hazard. Indeed, both codes expressly caution that their requirements must be tailored to both changes in technology and the particular circumstances of individual plants. Section 12 of NFPA No. 60 states:

> No standard can be promulgated which will guarantee the elimination of pulverized fuel system explosions. Technology in this area is under constant development which will be reflected in revisions to this Standard. The user of this Standard must recognize the complexity of pulverized coal firing as to the types of equipment and the characteristics of the fuel. Implementation of this Standard depends upon the judgment of the designer and the operator to suit the specific conditions under his responsibility (emphasis added).

The foreword to NFPA No. 85E contains similar language with respect to furnace explosions.

15/ Contrary to footnote 5 of the lead opinion, the advisory nature of the NFPA standards extends to the conduct at issue in this case because, as I have explained, the hazard of which recognition must be shown involves a specific work practice of the employer. Since the majority errs in its definition of the hazard in broad, generic terms, its conclusion that the NFPA codes can be used for showing recognition of this hazard is misplaced.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant<br><br>v.<br><br>KANSAS CITY POWER & LIGHT COMPANY,<br>A CORPORATION,<br><br>Respondent | DECISION & ORDER<br>OSHRC DOCKET 76-5255 |

APPEARANCES: JOHN WEISS, Esq., and KATHLEEN MCCARTHY, Esq., Office of the Solicitor, U.S. Department of Labor, Kansas City, Missouri, for the Complainant

PAT SHANNON, Esq., and LYNN M. SNELGROVE, Esq., Law Department, Kansas City Power & Light Company, Kansas City, Missouri, for the Respondent

Wienman, Judge, OSHRC:

## STATEMENT OF THE CASE

This is a proceeding pursuant to section 10 of the Occupational Safety and Health Act of 1970 (29 USC 651 *et seq.*, hereafter called the Act) contesting a citation for serious violation issued to Respondent November 24, 1976, under the authority vested in Complainant by section 9(a) of that Act. The citation resulted from an inspection of Respondent's generating plant at 8700 Hawthorne Road, Kansas City, Missouri, subsequent to a coal

grinding mill (pulverizer) explosion which occurred on October 19, 1976.

The citation alleged a serious violation of section 5(a)(1)[1/] of the Act, the so-called "general duty clause," described as follows:

> "1. Public Law 91-596, Section 5(a)(1): The employer did not provide his employees at the Hawthorne Power Plant employment and a place of employment which was free from the recognized hazards that were causing or likely to cause death or serious physical harm to his employees in that the employer did install, or permit to be installed, tripping devices in the control circuits of the unit number 5 coal pulverizers in such a manner that it is possible for a failure of a raw fuel (coal) feeder to cause both a pulverizer and its associated exhaust to stop instantaneously without purging and while charged with heated partially pulverized coal, thereby increasing the chance of explosion.
>
> a) Unit number 5."

The Secretary proposed an $800 penalty and abatement of the alleged violative conditions by December 24, 1976.

Respondent timely contested the alleged violation, and a hearing was held in Kansas City, Missouri, on May 19 and 20, 1977, with both parties present and participating.

Subsequent to the initial hearing, the undersigned Judge informed the parties that he was unable to ascertain from the transcript, as reported, the physical factors necessary to actuate

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1/ Section 5. (a) Each employer--

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; 29 USC 654(a)(1)

the control circuitry interlock device referred to as an "adjacent mill trip." The parties were requested to confer and submit an agreed written description of the trip mechanism (J-32). When the parties reported disagreement on this point, a supplemental hearing was conducted on November 11, 1977, at Kansas City, Missouri, for the limited purpose of receiving testimony relative to the interlock and correcting transcript errors. Both parties appeared by counsel; each presented one witness. At the conclusion of the testimony counsel read an agreed list of transcript corrections (T. 425-437).

## THE ISSUES

No jurisdictional issues are in question, the parties having pleaded facts sufficient to establish that the Respondent is subject to the Act, and that the Commission has jurisdiction of the parties and the subject matter. The general issues are whether the Respondent violated section 5(a)(1), the general duty clause of the Act, and if so, what penalty is appropriate therefor. A determination of the general issues depends on findings resolving a technological dispute, the nature of which is described in the following paragraphs.

Complainant's investigation of an explosion at Respondent's Hawthorne Unit Number 5 generating facility in Kansas City was conducted by Garvin Pyron, an OSHA Compliance Officer. Mr. Pyron, whose work experience prior to joining the Department of Labor included 12 years as a unit operator in a coal-fired Tennessee

Valley Authority generating plant, reached two conclusions which resulted in OSHA citations.

Noting that both the physical damage and eyewitness reports indicated that a coal pulverizer explosion on the morning of October 19, 1976, blew up metal duct work and ignited secondary explosions which injured 15 employees, Pyron posited:

1. The initial explosion was caused by an unnecessary and dangerous control circuitry interlock which abruptly tripped or stopped a loaded pulverizer without purging its volatile contents. This was the premise of Citation Number 1 which is disputed in this proceedings.

2. The secondary explosions were fueled by heavy accumulations of coal dust in and near the "coal alley" of Hawthorne Unit Number 5. This was the premise of Citation Number 2 which alleged a repeat violation of regulation 29 CFR 1910.22(a)(1). Respondent did not contest this citation, but paid an $1800 penalty and instituted abatement efforts to correct the coal dust problem (T. 339).

The critical issue for resolution herein is: Did the pulverizer control circuitry at Hawthorne Unit 5 constitute a "recognized hazard" within the meaning of section 5(a)(1) of the Act?

## SUMMARY OF THE EVIDENCE AND DISCUSSION

The parties presented 11 witnesses, all of whom boasted some experience in operation or design of coal-fired generating plants. Complainant's witnesses were men who had served as unit control

operators, and they tended to denounce the interlock device as unnecessary and dangerous. Respondent countered with the testimony of two engineers, Herbert C. Temme and Richard E. Drake, II, who defended the pulverizer trip as an important element of the design logic for prevention of boiler explosions.

The sharp division in opinion not only encompassed the physical function and rationale of the circuitry but extended to the nomenclature witnesses employed to describe the interlock. Mr. Pyron and other witnesses for Complainant referred to the disputed device as an "adjacent mill trip," a phrase Mr. Temme objected to because he preferred to describe the circuitry in terms of conditions necessary to sustain, rather than to stop or trip operations (T. 380). The phrase, however, is useful as a shorthand reference to the disputed circuitry and is employed for convenience sake in the following summary of the pertinent physical facts.

In generating electric power at Unit Number 5 of its Hawthorne plant, Respondent burns coal in a massive furnace or boiler which converts water into steam to operate a power generating turbine. Before entering the boiler the coal is fed by rotating belts into one of six pulverizers or mills where it is simultaneously heated to a temperature of 600 to 800 degrees and ground by rollers to the consistency of fine face powder (T. 29, 31, 34, 37-38, 288).

Hawthorne Unit 5 is equipped with six mills (denominated A, B, C, D, E, and F), each fed by separate belt from coal stored at an upper level. Each mill has separate piping feeding the pulverized

coal to the furnace where it is injected at different levels.

The feeders, mills, and furnace are monitored by unit operators who are aided by sensing instruments, a computer, and complex electrical circuits designed to sustain or trip operations, in whole or part, under various conditions.

One feature of the circuitry, the disputed "adjacent mill trip," is an interlock which functions only after three minutes of stable operations. Each pulverizer and its supply feeders are electrically interconnected with the feeders which supply adjacent pulverizers. If the feeder for one of the two end pulverizers ("A" and "F") trips or stops, the pulverizer itself will automatically trip or stop after a three second delay if the adjacent pulverizer feeder is operating at a speed of less than 50 percent.

Example: The feeder to "A" pulverizer trips while the feeder to "B" pulverizer is operating below 50 percent. Pulverizer "A" automatically trips three seconds later. Similarly, if the feeder to "F" pulverizer trips while "E" feeder is operating below 50 percent, pulverizer "F" trips after three seconds.

The circuitry is somewhat different for pulverizers "B," "C," "D," and "E." Each of these pulverizers is sustained by the operation of two adjacent feeders. For example, "C" pulverizer is interlocked with "B" and "D" feeders. Therefore, if "C" feeder stops, "C" pulverizer will not trip automatically unless both "B"

and "D" feeders are operating below 50 percent.[2/]

The history of Hawthorne Number 5 lends some support to Complainant's claim that the disputed trip is prone to cause explosions. The computer printout on October 19, 1976, indicated that "F" coal feeder had tripped at the approximate time of the explosion (T. 14), and an investigating committee later concluded that the adjacent mill trip was the cause of the explosion. Among its recommendations the investigating committee listed removal of the adjacent mill trip (T. 148).

During a six year period from March 1971 to March 1977 there had been 19 pulverizer explosions at Hawthorne Number 5 which resulted in external damage (T. 294-295). Although the record does

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[2/] The above skeletal description of "adjacent mill tripping" purposefully ignores the unit load in the furnace as a factor affecting the disputed trip. Mr. Temme, who delivered a prolix explanation of the control circuitry which at one point stretched unbroken through 18 pages of transcript (T. 238-256), introduced an element of confusion by testifying that ". . . the adjacent mill trip opoperates only if the adjacent feeder is below 50 percent and the unit load is below 30 percent" (T. 363). However, he later agreed that "adjacent mill tripping does work when the unit boiler load . . . is above 30 percent" (T. 389). A unit load above 30 percent apparently is necessary to sustain combustion as the overall circuitry is designed, but a pulverizer may be subject to an "adjacent mill trip" while the unit load is above 30 percent.

Ironically, Mr. Temme's initial emphasis on unit load as a factor in "adjacent mill trip" logic trapped counsel for Respondent into submitting the following argument: "Counsel for Complainant and Mr. Pyron's understanding of adjacent mill tripping (T. 39) is inaccurate and misrepresentative in that they completely discount or forget that the entire unit must be at a unit load of below 30 percent" (Respondent's Exceptions to Findings of Fact Proposed by Complainant, 1).

Needless to add, this episode would not have been weighed as a plus for Respondent had credibility determinations been critical to the decision.

not indicate if these explosions occurred in mill trip situations, Mr. Temme, the consulting engineer who is working on "major modifications" of Hawthorne Number 5, candidly stated "that indicates more explosions than we would like and maybe that we should expect" (T. 295).

Complainant links this history of explosions with the unit operators' testimony that an abrupt mill trip without purging is dangerous in an effort to establish a "recognized hazard" under section 5(a)(1). But the difficulty with the Complainant's case is that it rests largely on opinion, and there is contrary opinion--not as persuasive perhaps, but bona fide and also rooted in safety considerations.

The logic of the adjacent mill trip was defended by both engineers, Temme and Drake, as a safety interlock designed to prevent the buildup of fuel in a boiler where there may be inadequate ignition energy, a condition which conceivably could lead to a boiler explosion. Since boiler explosions are rare events,[3/] the wisdom of the interlock, when viewed with the benefit of our hindsight, is now open to serious question. But a judgment to condemn the circuitry logic after unsatisfactory experience, even though that experience includes serious injuries to numerous employees, is not tantamount to proof that the circuitry was known to constitute

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3/ See, Combustion Engineering, A Reference Book on Fuel Burning and Steam Generation, p. 17-15, attached to Complainant's Memorandum in Support of Proposed Findings as "Appendix F."

a recognized hazard prior to the October 19, 1976, explosion.

In an ultimate effort to establish this key element of a section 5(a)(1) charge, Complainant, in its brief, calls our attention to certain provisions in National Fire Code No. 85E, the 1975 Standard for Prevention of Furnace Explosions in Pulverized Coal-Fired Multiple Burner Boiler-Furnaces.

Specifically, Complainant first cites provisions which warn that tripping pulverizers under load may cause explosions because the accummulated fuel will generate volatiles and then quotes section 624 of NFC No. 85E, a section which sets forth clearing procedures for pulverizers tripped while charged with fuel. Admittedly, Respondent made no effort to clear the pulverizer as recommended.

The National Fire Code, Complainant suggests, "affirms Pyron's conclusion that tripping a loaded pulverizer is a recognized hazard."

Not quite so, but the very argument points up the difficulty of resolving a dispute concerning the safety of technology employed in a pulverized coal-fired generating plant.

No. 85E of the National Fire Code itself illustrates the problem. Although promulgated as a "Tentative Standard" in May 1918, it was not officially adopted as an NFC standard until 1971, approximately two years after the installation of Unit No. 5 (T. 159). The clearing procedures quoted by Complainant appeared in 1973 amendments which included new sections on Purging After an

Emergency Trip, and specifically apply only to units placed in operation subsequent to June 1, 1974.

The Foreword to No. 85E to this day reflects a continuing disposition on the part of its authors to stress the tentative nature of its proposals:

> " * * *
> No standard can be promulgated which will guarantee the elimination of furnace explosions. Technology in this area is under constant development which will be reflected in the revisions to the standard. The users of this Standard must recognize the complexity of fuel firing, both as to types of equipment and the characteristics of the fuel. Implementation of this Standard depends upon the judgment of the designer and the operator to suit the specific conditions under his responsibility."

Section 13 of No. 85E exempts existing installations but encourages adoption of "those features of this Standard which are considered applicable and reasonable for existing installations." Complainant's argument, thus based on the National Fire Code, raises interesting questions.

Can Respondent be charged with an OSHA violation by flaunting "advisory" provisions of the National Fire Code? Did Respondent have a responsibility to implement "advisory" standards by prompt adoption of the recommended technology as part of its general duty to provide employees with a safe workplace?

The case would present no difficulty if the Secretary had by section 6(a) rule promulgated as an OSHA standard the pulverizer clearing provisions of NFC No. 85E. In such circumstances

Commission precedent holds that a citation for a violation of section 5(a)(1) is invalid and will not lie where a duly promulgated occupational safety and health standard is applicable to the condition or practice that is alleged to constitute a violation of the Act. See, Secretary v. Brisk Waterproofing Company, Inc., BNA 1 OSHC 1263, CCH OSHD 1973-1974, para. 16,345 (No. 1046, 1973). Adoption of NFC No. 85E as an OSHA standard would have provided Respondent with a defense to an enforcement action brought under either section 5(a)(1) or 5(a)(2) for not only would a specific standard apply to the cited condition, but the express terms of the standard would have exempted a 1969 installation.

What then should be the rule where a national consensus standard which has only advisory application to the cited condition and has not been adopted as a specific OSHA standard is violated? May the employer be properly cited for a "general duty" violation for failing to modify an existing facility or practice in accordance with the advisory provisions? Does adoption of a newly promulgated national consensus standard by an industry committee create general duties under section 5(a)(1) for all employers in the industry irrespective of the committee's intent?

We think not. There are some obvious difficulties in framing a general rule, but we believe the better course would be to make advisory provisions of newly promulgated national consensus standards unavailable as proof of a general duty violation. And we would make their advisory classification unavailable as a defense

to a section 5(a)(1) action where the evidence indicates the employer had actual knowledge from other facts and circumstances that the practices or conditions were indeed hazardous.

This conclusion obviates the necessity of burdening this decision with a detailed summary of the witnesses' sharply conflicting opinions about the explosion hazard related to abrupt tripping of loaded pulverizers. Again Messrs. Temme and Drake defended the Respondent's practice in a field where Complainant's lesser educated troops appeared to have preempted the higher and more commanding ground.

This observation reflects a layman's judgment in a purely technological area and is, to some degree, colored by the knowledge that neither of Respondent's expert witnesses was totally devoid of self interest. Mr. Temme, as noted, is a member of an engineering firm employed by Respondent, while Mr. Drake is a control system engineer employed by Combustion Engineering, manufacturer of the boiler-furnace equipment. Respondent occupied a position as client or customer in both instances, and the testimony of the two engineers must be scrutinized with this fact in mind.

Nevertheless, while frankly skeptical of much of the engineering testimony, we note that in one most vital area neither Temme nor Drake was rebutted. Both testified that other coal-fired generating plants incorporate adjacent mill tripping in their circuitry (T. 283-284, 325). Complainant failed to demonstrate

that this testimony was false or inaccurate,[4/] and it impacted heavily on the "recognized hazard" allegation.

Complainant assumed the burden of proof of a complex and technical proposition. His witnesses, testifying in restrained terms from modest experience, impressed with their credibility and disinterest. But neither the collective force of their opinions nor the history of explosions and injuries which precipitated the OSHA inspection, is sufficient to establish the existence of a recognized hazard on October 19, 1976, in the face of unrebutted testimony that the disputed circuitry logic was commonly used in the industry.

Ironically, the fact that the investigating committee which recommended removal of the adjacent mill trip may have rightly focused on the cause of the explosion, is immaterial to the decision. However evident the danger may have later appeared to investigators, the proof herein failed to prove that the hazard was "recognized" within the meaning of section 5(a)(1) and the Citation must be vacated.

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[4/] Pyron testified that tripping a loaded pulverizer is not a common practice, except in emergency conditions (T. 61). William Green and Earl Wayne Downs, two other witnesses with TVA experience, testified that TVA generating plants did not use an adjacent mill trip (T. 191, 210). However, no witness took issue with Drake's testimony that adjacent mill tripping is common to the Combustion Engineering standard system (T. 325).

## FINDINGS OF FACT

Having held a hearing and considered the entire record herein, it is concluded that a preponderance of the reliable, probative, and substantial evidence supports the findings of fact set forth in the foregoing summary of evidence.

## CONCLUSIONS OF LAW

1. At all times material hereto Respondent was an employer within the meaning of section 3 of the Occupational Safety and Health Act of 1970.

2. Jurisdiction of this proceedings is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act.

3. On or before October 19, 1976, Respondent did not violate section 5(a)(1) of the Act at its power generating plant worksite at 8700 Hawthorne Road, Kansas City, Missouri, as alleged in Item 1 of the Citation for serious violation issued to Respondent November 24, 1976, the evidence having failed to establish that tripping devices in the control circuits of the Unit No. 5 coal pulverizer which caused both the pulverizer and its associated exhaust to stop without purging and while charged with heated air and coal constituted a recognized hazard within the meaning of section 5(a)(1) of the Act.

## ORDER

Based on the above findings of fact and conclusions of law, it is ORDERED that the Citation for serious violation issued to Respondent

November 24, 1976, is hereby vacated.

Date: March 31, 1978

Alan M. Wienman

Alan M. Wienman, Judge, OSHRC

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

Secretary of Labor v. William B. Hopke Company, Inc.
OSHRC Docket No. 81-206

1. Enclosed is a copy of my decision. It will be filed with the Commission on February 16, 1982, and will become the final order of the Commission on March 18, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is March 18, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Date: January 27, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR<br>Complainant<br>v.<br>WILLIAM B. HOPKE COMPANY, INC.<br>Respondent | DOCKET NUMBER 81-206 |

Appearances:

Janine C. Gismondi, Esq.
U.S. Department of Labor
For the Complainant

Vorys, Sater, Seymour and Pease, Esqs.
by Robert D. Moran, Esq.
For the Respondent

## DECISION AND ORDER

Sommer, Judge

On December 22, 1980, Respondent was issued serious Citation Number 1 alleging violation of 29 CFR 1926.201(a)(2)[1/] (wording later amended), willful Citation Number 2 alleging violation of 29 CFR 1926.652(k) (later amended to allege violations of 29 CFR 1926.652(k) and 1926.652(d))[2/] and nonserious

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1/ Section 1926.201 Signaling provides:
(a) Flagmen (2) Signaling directions by flagmen shall conform to American National Standards Institute D 6.1-1971, Manual on Uniform Traffic Control Devices for Streets and Highways.

2/ Section 1926.652(k) Specific trenching requirements provides:
(k) Portable trench boxes or sliding trench shields may be used for the protection of personnel in lieu of a shoring system or sloping. Where such trench boxes or shields are used, they shall be designed, constructed, and maintained in a manner which will provide protection equal to or greater than the sheeting or shoring required for the trench.
Section 1926.652(d) provides:
(d) Materials used for sheeting and sheet piling, bracing, shoring, and underpinning, shall be in good serviceable condition, and timbers used shall be designed and installed so as to be effective to the bottom of the excavation.

Citation Number 3 for alleged violation of 29 CFR 1903.2(a)(1).[3/] A penalty of $10,000 was proposed for the willful citation, $400 for the serious citation, and no penalty for the nonserious citation, all of which are contested.

Hearings were held in Washington, D.C. Both parties were represented by counsel, who filed briefs at the conclusion of the case.

No jurisdictional issues are in dispute, the parties having pleaded sufficient facts to establish the Respondent is subject to the Act and the Commission has jurisdiction of the parties and of the subject matter.

The general issue to be determined is whether the Respondent violated the safety regulations as alleged in the citations and, if so, what penalty, if any, is appropriate.

## SUMMARY OF THE EVIDENCE

The Respondent corporation is engaged in the underground excavation business with its principle place of business being located in Alexandria, Virginia. It was engaged in installing a sanitary sewer system at the place of the alleged violations.

### Testimony on behalf of Complainant

The worksite was inspected by Clyde Farrar, Jr., the Secretary's Compliance Officer (C.O.), on December 12 and 15, 1980 (T. 29). There were nine employees working at the site. The C.O. spoke to the foreman, Norman Shaw, and then proceeded

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3/ Section 1903.2 Posting of notice; availability of the Act, regulations and applicable standards provides:
(a)(1) Each employer shall post and keep posted a notice or notices, to be furnished by the Occupational Safety and Health Administration, U.S. Department of Labor, informing employees of the protections and obligations provided for in the Act, and that for assistance and information, including copies of the Act and of specific safety and health standards, employees should contact the employer or the nearest office of the Department of Labor. Such notice or notices shall be posted by the employer in each establishment in a conspicuous place or places where notices to employees are customarily posted. Each employer shall take steps to insure that such notices are not altered, defaced or covered by other material.

to the inspection. He noted an open trench about 35 feet long, with two trench boxes (also called trench shields) therein (T. 31, 32) each of which measure 8 feet in depth and 16 feet in length (T. 44), adjacent to each other. Both of them were estimated, when inserted in the trench, approximately 6 feet above the trench bottom (T. 44). Work was being done in both boxes (T. 33). The C.O. informed Mr. Shaw that additional protection to the bottom of the trench was needed, necessitating that the boxes extend to the bottom (T. 34, 35). Thereafter, Shaw had the backhoe push one of the trench boxes down further into the trench, with it finally resting approximately 3 feet 5 inches to 3 feet 10 inches above the bottom (T. 40). Pursuant to the C.O.'s request, Shaw had one of the employees working in the trench take a soil sample which the C.O. described as being very moist, reddish brown, with some white streaks. The sample was taken to the C.O.'s office and kept in a sealed plastic bag until August 13, 1981, when it was sent to the Bureau of Standards for analysis (T. 45, 46, 50). Referring to Table P-2 of the regulations (1926.652), and based on his visual and physical inspection of the soil, the C.O. characterized it as likely to crack (T. 51). He felt that additional protection could have been provided by using an additional trench box, sloping or shoring (T. 56, 57). At the closing conference held on December 15, 1980, a number of documents were obtained from the Respondent (C-8 through and including C-11 in evidence) relative to trenching procedures and standards issued by the Heavy Construction Contractors Association (T. 66). According to Farrar, the hazard presented was that men working in the trench could be killed or seriously hurt by a collapse of the unprotected bank (T. 70, 71).

He further recommended that a citation be issued because the flagman was using improper signalling procedures in that he was trying to stop traffic by waving the flag up and down or cracking it, instead or holding it in a stationary

position as is required. The C.O. saw construction trucks pulling out in front of traffic to stop it, and also observed the flagman attempting to stop the traffic similarly (T. 79-81). The hazard presented to both the flagman and other workers is injury on being struck by a vehicle under the circumstances (T. 82).

He recommended a citation be issued because of a violation of 1903.2(a)(1) because there were no OSHA notice posters posted as required at either the main office of the Respondent or at the worksite (T. 85-88).

Wade M. Keener, a public utilities inspector for the Fairfax County Department of Environmental Protection, first visited the Respondent's worksite on November 14, 1980 at which time a bore pit was in the process of being dug (T. 351). The pit was approximately 15 feet deep and for the three week period during which time he visited the site daily two trench shields, one on the top of the other were in place, and the lower shield went to the bottom of the excavation (T. 352). On either December 9 or 10, 1980, he became concerned about trench protection inasmuch as only one trench shield was being used leaving four to five feet unprotected at the bottom of the trench (T. 356-357). He spoke to Mr. Shaw to either lower the trench shield or add other protection at the bottom, and was told some corrective measures would be taken. However, none were taken on the following day. Keener called Wassell, the superintendent, and said there was a dangerous condition that should be checked. Thereafter he stated both Shaw and Wassell told him they felt that they were entitled to an area of five feet below the shield (T. 359-361). They thought it was a safe operation (T. 373). On cross examination Keener indicated his estimate of approximately four feet unprotected could be off six inches to a foot (T. 385). Keener indicated he had called OSHA to report his findings since he and the Respondent's superintendent disagreed as to the required depth of the shield (T. 394).

Felix Yokel, an employee of the National Bureau of Standards, a leader of the Geotechnical Engineering Group doing research in soil and foundations testified. Yokel has a PhD degree in structural engineering with a major in soil mechanics. Yokel examined the soil sample sent to him by Farrar and described it as a disturbed sample (taken crumbled) of clay silt with an average plasticity index. As it was a disturbed sample he was unable to get information on the sheer strength of the soil but only the particle size distribution (T. 429). Sheer strength was defined as its resistance to sliding (T. 429). Under Table P-2 of Section 1926.652 the condition of earth would be classified as "likely to crack" (T. 430). He was of the opinion that a trench box 3 feet 5 inches to 3 feet 10 inches above the ground is not as effective as shoring installed according to Table P-2 (T. 439). He stated that his group has recommended that if the regulations are revised, a two to three foot clearance be allowed in using trench boxes in any type of soil (T. 441).

Eugene L. Ellison, a compliance officer with the Virginia Department of Labor and Industry, testified that his department enforces the occupational safety and health regulations, and that they conform to the federal regulations, specifically they have adopted Section 1926 (T. 563). He conducted an inspection of a site where the Hopke Company was installing a sewer line on November 6, 1979, in response to information that an accident had occurred therein, which resulted in the death of one person from a trench cave-in (T. 570-574). One willful citation was issued against the Respondent because of alleged violation of Section 1926.652(a) due to improper sloping and no shoring (T. 578-579). A final order has not been issued as yet, but the Fairfax County Court has apparently characterized the citation as a serious one. At the time he made his inspection,

Paul Wassell, Joe Hopkins and later, Mr. Hopke were at the worksite (T. 574). Ellison has seen the Hopke Company use trench boxes effective to the bottom of the trench on three occasions at company worksites which complied with the standards (T. 609). His office accepts either a state or federal poster being posted as complying with the poster requirements, and that a review of the reports indicates they so complied in the past (C-23 in evidence, T. 600-601).

Gilbert L. Esparza, the Area Director for the Washington, D.C. area office of the Occupational Safety and Health Administration, testified that after discussing the matter with Farrar, the compliance officer, and with the information gotten from Keener, the Fairfax County employee who referred this matter, he concluded that a willful citation be issued herein (T. 620-621). The decision was based on such information, and that the Respondent "knew what the regulations were, that they knew what they should be doing to prevent cave-ins, at least they had been instructed to do so, and failed to do so" (T. 622).

William B. Hopke, Jr., the president of the Respondent, called as a government witness testified that the company has been in business 20 years (T. 624). He indicated that the company had purchased four trench boxes in 1979 or earlier (T. 632). He stated the company belongs to the National Utilities Contractors Association, and received documents from them relating to safety which were used (T. 626-627). Counsel for the Respondent stipulated that the Respondent was aware of the regulation involving trench boxes before the case began (T. 627). Hopke testified the soil at the worksite would be classified as moist soil (T. 635).

Norman Shaw, the Respondent's foreman testified there were nine employees on the site (T. 648-649). In looking at exhibit C-4 he testified the workman in the trench as Daniel Carter who he estimated was 5 feet 6 inches tall (T. 650-651). Shaw stated that the trench box was in the process of being lifted out and the dirt put in at the time the photograph (C-4) was taken.

Testimony on behalf of Respondent

Charles J. Kupper, Jr., a consulting engineer for thirty years testified that he consults for municipalities in doing the design as well as the construction management for utility work (T. 660). He is familiar with the installation of sewer lines, and has done design work therefore, been a resident engineer on such projects and inspected same (T. 663). He opined that "the bottom of the trench box never gets to the bottom of the trench" (T. 665), and is kept "two to three feet above the bottom of the trench at all times" (T. 665). This is so because of the configuration of the trench as it is excavated. He stated a trench box installed two to three feet above the bottom of a trench is effective to the bottom of the trench (T. 671).

Paul Wassell, the general superintendent for the Respondent, testified that after Keener called him he went and looked at the trench with Shaw, and both felt there were no unsafe conditions present. He thereafter told Keener the same thing. Keener felt the box should be to the bottom of the trench, and Wassell disagreed (T. 679-680). Wassell also spoke to Farrar, and was told that they could seek a variance to keep the trench box off the bottom (T. 681). He further stated Farrar did not discuss the flagman with him (T. 681-682).

Norman Shaw, the foreman, testified Farrar was present while pipe was being laid and the men were in the trench and did not indicate any violation present. He said Farrar had told him to go ahead and lay the pipe so that he could observe it (T. 704). Shaw was of the opinion that the operation was 100% safe (T. 726). Based on his experience he opined that trench boxes are more effective than shoring (T. 779). Other than telling him he'd rather have stop and slow signs instead of flags, Shaw stated Farrar did not say anything about the manner of their use (T. 779-780).

During his rebuttal testimony Yokel indicated there is a greater risk of cave-in where the trench box is 3 feet 9 inches from the bottom as opposed to 3 feet (T. 827).

Alleged Violation of 29 C.F.R. § 1926.652(k) and 29 C.F.R. § 1926.652(d) - Item Number 1, Citation Number 2

The gravamen of the violation under these sections is that the trench boxes (or shields) used by the Respondent were more than three feet above the trench bottom, and as such were ineffective to the bottom of the trench.

The Secretary contends that the trench boxes must be effective to the bottom of the trench, and interprets this as no more than two to three feet above the trench bottom.

The testimony of the government expert witness was that a trench box at such distance would be considered so effective, or to describe it further, would provide protection equal to or greater than the shoring required for the trench. The ultimate question which presents itself is whether the Secretary has sustained the burden of proof that the trench boxes were not within three feet of the bottom of the trench. The Secretary must do so by a preponderance of the evidence.[4/]

Applying this standard, the evidence as a whole demonstrates that the Secretary has not carried his burden. Granting the efficacy of the three foot rule as gleaned from the testimony of the Secretary's expert (Yokel), and the Respondent's expert (Kupper), the testimony of the witnesses for the Secretary which is of cardinal importance on this question of fact present a pattern of vagaries, inconsistencies and mere surmise which seriously challenge the credibility of the alleged findings.

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4/ Section 7(c) of the Administrative Procedure Act establishes prepondrance of the evidence as the standard of proof. Steadman v. Securities and Exchange Commission, 101 S. Ct. 999 (February 25, 1981); Armor Elevator Company, Inc., 5 OSAHRC 260; 1 BNA 1409, 1973-4 CCH OSHD ¶ 16,958 (Nos. 425 & 426, 1973).

Farrar, the compliance officer and main government witness issued the citation herein on a theory wholly foreign to the purported position of the Secretary. He opined that effective to the bottom of the trench meant that the trench box had to go to the very bottom, and consistent with this erroneous conclusion issued such citation. Under this theory he did not bother to measure the distance from the bottom of the trench box at any time, but used either a visual measurement (at best a guess) or relied on someone else to give him a measurement (employee of Respondent). However, where he relied on another, he did not check the measurement, nor frankly know the capacity of the measurer's ability. It is noted that the government at no time called the party who allegedly did the measuring as a witness to verify his technique or his findings. Thusly, Farrar testified that when he visited the construction site on December 12, 1980, he found two trench boxes were six feet above the trench bottom, and that box #2 was pushed down by the Respondent to where it was approximately 3 feet 5 inches to 3 feet 10 inches from the bottom. As to box #1 and box #2 his initial finding of 6 feet was a mere estimate, or one could say speculation. However, his findings are contradicted by Shaw, the Respondent foreman who states the distance estimated by Farrar is erroneous and that trench box #1 was at the time reported being lifted out of the trench and was lower previously. Shaw is corrobrated in his statement by Keener, the Farifax County public utilities inspector who visited the construction site on the 12th of December and first estimated the trench box was approximately four feet from the bottom. (Indicating it was being raised as Shaw testified, and which Farrar was skeptical about.) Furthermore, to add to the confusing and contradicting statements, Keener opined that his four foot estimate could be incorrect by six to twelve inches plus or minus.

As to trench box #2, Farrar relies on the measurement taken by an employee of the Respondent. He did not verify it himself, and there is no way of knowing whether the measurement taken was from the very bottom of the trench box since the testimony reveals that a portion of the lower part of the box is embedded in the soil and cannot be seen. Hereto, although Farrar states he received a 3 feet 5 inches to 3 feet 10 inches measurement from the employee, he changes the purported finding during his testimony to "about three feet" above the bottom. In short, the testimony of Farrar as to the height of the trench boxes in relation to the bottom of the trench is far from convincing. We are faced with measurements of six feet, three feet ten inches, three feet five inches, and three feet. Surrounding all these estimations is their reliability as set forth previously. The violation of 29 C.F.R. § 1926.652(d) & (k) herein cannot be based on the shifting sands of the trench. The Secretary's reliance on mere conjecture is insufficient to prove a violation. Secretary v. Franklin Lumber Co., 2 OSAHRC 1078. As Judge Learned Hand stated in N.L.R.B. v. Remington Rand, 94 F.2d 862, 873 (2d Cir. 1938), cert. denied, 304 U.S. 576 (1938), 58 S. Ct. 1046, we must rely in making findings upon "the kind of evidence on which responsible persons are accustomed to rely in serious affairs." Such reliable testimony is lacking herein. The testimony presented by the Secretary is not sufficient to support a finding that Respondent violated the Act in that the trench boxes being used in the excavation herein were ineffective to the bottom of the trench. Upon review of the record and the circumstances embodied therein, I conclude that the violations charged of 29 C.F.R. 1926.652 (d) & (k) has not been established.[5/]

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5/ In view of this holding it is unnecessary to decide the significance of counsel for Respondent's objection to the amendment of Citation Number 2 under the Federal Rules of Civil Procedure.

Alleged Violation of 29 C.F.R. 1926.201(a)(2) - Item Number 1, Citation Number 1

The Respondent was cited for a serious violation of 29 C.F.R. 1926.201(a)(2) in that it failed to conform to proper signaling directions as set forth in the American National Standards Institute D 6.1-1971, Manual on Uniform Traffic Control Devices for Streets and Highways. It is alleged that the flagman waved the flag in an up and down cracking manner instead of extending it horizontally in a stationary position.

Paragram 6E-4 Flagging Procedures which deals with methods of signalling is prefaced with the following: "The following methods of signaling with a flag should be used" (underlining added). Section 1A-4 meanings of "shall", "should" and "may" which is part of the Manual on Uniform Traffic Control Devices states "should" is an advisory condition, and where used "it is considered to be advisable usage, recommended but not mandatory." The Commission has ruled that standards adopted from advisory source standards are advisory under the Act. Brown & Root, Power Plant Division, 80 OSAHRC ____, 9 BNA OSHC 1027, 1029, 1980 CCH OSHD ¶ 24,958 at p. 30,795 (No. 76-2938). The cited standard being advisory, noncompliance cannot be the basis for finding a violation. General Electric Company, 9 BNA OSHC 1185, 1186 (1980). Accordingly, the citation alleging a serious violation of the Act for failure to comply with 29 C.F.R. 1926.201(a)(2) is vacated.

Alleged Violation of 29 C.F.R. 1903.2(a)(1) - Item Number 1, Citation Number 3

This concerns an alleged violation of the regulation at 29 C.F.R. 1903.2(a)(1) for Respondent's failure to post an OSHA notice at the job location herein. The uncontested evidence demonstrates that the Respondent did not exhibit the required poster at either its main office or at the location of the trench excavation.

It defends by alleging that it was never furnished such poster by the Occupational Safety and Health Administration as required. However, this allegation is contrary to the evidence. Exhibit C-24 in evidence are reports of the Virginia Department of Labor and Industry, Occupational Safety and Health which indicate that on previous occupational safety and health examinations the Respondent was found to be complying with the posting requirement. On five such previous examinations the question, "Does employer comply with posting requirements?" was answered "Yes". The state of Virginia carries out and complies with similar requirements of the Occupational Safety and Health Act. It is apparent that the Respondent knew of such posting requirement, and had in fact previously been in possession thereof, since it posted same. Accordingly, this violation is affirmed. No penalty is assessed.

## Findings of Fact

1. William B. Hopke Company, Inc. is a corporation with a principle place of business located in Alexandria, Virginia. The Respondent was engaged in the business of installing a sanitary sewer system at the place of the alleged violation.

2. On December 12 and December 15, 1980, a compliance officer of the Occupational Safety and Health Administration, inspected the Respondent's workplace located at Ravensworth Road and Kalorama Road in Annandale, Virginia.

3. The Respondent acknowledges it is engaged in interstate commerce.

4. The evidence of record is insufficient to support a finding that any of the trench boxes or trench shields used by the Respondent in the excavation at the site mentioned were ineffective to the bottom of the trench at the site of the excavation in this matter.

5. The Respondent was cited for violating 29 C.F.R. 1926.201(a)(2) in that it failed to use proper signaling directions.

6. Said regulation is derived from the American National Standards Institute D 6.1-1971, Manual on Uniform Control Devices for Streets and Highways.

7. Said described manual instructions regarding signaling are advisory in character.

8. Noncompliance with that provision cannot be the basis for finding a violation of Section 5(a)(2) of the Act.

9. 29 C.F.R. 1903.2(a)(1) requires the Respondent to post an Occupational Safety and Health Administration notice at the job location herein.

10. The Respondent did not post such notice as required, although it knew of such requirement, having done such posting previously.

## Conclusions of Law

1. The Respondent was at all times herein in a business affecting interstate commerce within the meaning of Section 3(5) of the Occupational Safety and Health Act of 1970.

2. The Occupational Safety and Health Review Commission has jurisdiction over the subject matter and parties to this action.

3. Respondent was not in violation of 29 C.F.R. 1926.652(d) and 29 C.F.R. 1926.652(k).

4. Respondent was not in violation of 29 C.F.R. 1926.201(a)(2).

5. Respondent violated 29 U.S.C. 654(a)(2) by failing to comply with 29 C.F.R. 1903.2(a)(1).

## ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record, it is ORDERED that

1. Item 1 of serious Citation Number 1 is vacated.

2. Item 1 of willful Citation Number 2 is vacated.

3. Item 1 of other than serious Citation Number 3 is affirmed, and no penalty is assessed.

IRVING SOMMER
Judge, OSHRC

Dated: February 16, 1982
Washington, D.C.

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1515 Broadway
New York, New York 10036

NOTICE OF DECISION

Secretary of Labor v. Thomas A. Armbruster, Inc.
OSHRC Docket No. 81-1907

1. Enclosed is a copy of my decision. It will be filed with the Commission on February 16, 1982, and will become the final order of the Commission on March 18, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is March 18, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Seymour Fier
SEYMOUR FIER
JUDGE, OSHRC

Date: January 27, 1982
New York, New York

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR<br><br>Complainant,<br><br>v.<br><br>THOMAS A. ARMBRUSTER, INC.<br><br>Respondent. | OSHRC DOCKET<br><br>NO. 81-1907 |

Appearances:

Marshall H. Harris, Regional Solicitor
United States Department of Labor
14480 Gateway Building
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Attorney for Complainant
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Attorneys for Respondent
by Michael Prokup, Esq., of Counsel

## DECISION AND ORDER

Fier, Judge:

## PRELIMINARY STATEMENT

This is a proceeding pursuant to section 659 of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 *et seq.*), hereinafter called the Act, wherein the Respondent contests the citation and penalty for one serious violation and

one other violation. The citation dated July 21, 1981, was based on an inspection conducted June 24, 1981 through June 26, 1981. The citations and proposed penalties were issued pursuant to sections 9(a) and 10(a) of the Act.

Pursuant to section 10(c) of the Act (29 U.S.C. § 659(c)) Respondent, through a letter received August 5 , 1981 noted its timely contest of the violations and proposed penalties.

## I S S U E S

1. Whether the Respondent violated the Occupational Safety and Health Act as alleged.

2. Whether the Respondent failed to comply with 29 CFR 1926.652(c) listed as a serious violation and 29 CFR 1926. 500(e)(1)(iii) a non serious violation; if so, did it violate 29 CFR U.S.C. § 654(a) of the Act.

3. If the Respondent is shown to have violated the Act as alleged, what if any penalties, are appropriate.

The standards said to have been violated allege:

Serious Violation:

> 29 CFR 1926.652(c): The side(s) of the trench(es) in hard or compact soil, including embankment(s), were not shored or otherwise supported when the trench was 5 feet or more in depth and 8 feet or more in length:
>
> (a) A trench from 6 feet to 7 feet deep running north and south at the west end of the north wing of the Laboratory was not shored, benched or sloped to protect 2 employees from cave-in, June 25, 1981.

A penalty of $360.00 was proposed.

Other Violation:

29 CFR 1926.500(e)(1)(iii): One stair railing not provided on each side of stairway(s) less than 44 inches wide, having both sides open:

(a) The 40 inch wide 6 riser access stairs to a storage trailer in the Job Trailer Lot on the east side of the Administration Building were not equipped with a stair railing on the right side ascending to protect against a fall of 54 inches June 25, 1981.

No penalty was proposed.

SUMMARY OF EVIDENCE AND STIPULATION

Prior to the commencement of the trial, the parties stipulated that citation number 2 in the Kospiah case, docket number 81-2000, and citation number 2 in the Armbruster case, docket number 81-1907, were not to be contested and will not be tried in this matter. Accordingly, they will be affirmed as stated in the citations. The admissions submitted by the Respondent to the Secretary were received into evidence by stipulation. The parties stipulated that there would be one trial combining both cases, but there would be separate decisions*(T-47).

The summary of testimony shows that the compliance officer, Leon A. Robertson, has been a compliance officer for eight years (T-10). He has made 550 inspections, 60% of which were construction sites(T-10). On June 25, 1981, he made an inspection of the sites in issue. The compliance officer observed that on arriving at the worksite, he saw a man in a trench, the height of which

* Denotes transcript page number.

was well above the man's head(T-11). Exhibit C-1 shows that the depth measured was larger than the standard permitted(T-12). He noted that the employee was using a jackhammer(T-13). The trench was six to seven feet deep, approximately eight feet wide at the top and four feet at the bottom. It was also approximately twenty feet long(T-12).

Mr. Race, the other compliance officer, made the measurements. Exhibit C-1 was marked with an "x" where measurements were taken, indicating that the depth of the trench was seven feet(T-12). This constituted a violation of the standard set forth in the citation, according to the compliance officer, and as such, a citation was issued. He also observed no shoring on the east wall and noted that it was not sloped. The soil was described as being compact clay-stone and was described as being "hard and compact"(T-14). The compliance officer stated that with regard to direction, he asked someone which direction was north and relying on the answer that was given to him, he then used the descriptions set forth in Exhibit C-3 and also in his testimony(T-39). The compliance officer testified that Leon Wagner, an employee of Kospiah was breaking rock in the trench with the use of the jackhammer(T-14). Mr. Kospiah was with the compliance officer at the time of the inspection. They met at the trench. The compliance officer told the Respondent that the trench should be shored, benched, or sloped (T-16). Mr. Kospiah said he would do this immediately and the compliance officer noted that the abatement started before they left the scene of the excavation(T-16). The hazard was serious

because the vibration of the jackhammer could cause a cave-in (T-16). It was also noted that the soil bank in Exhibit C-1 by the initials SB, also showed a hazard(T-17). The tractor, while not running at the time of the inspection, was said to be a contributor to the hazard of a cave-in(T-18). The injuries, in the event of a cave-in, could be serious or result in death (T-18). Other employees were observed in the trench at the north end(T-18). This is described in the sketch marked as Exhibit C-3. The sketch was prepared at the site in a rough manner and was completed when the compliance officer returned to the office(T-19). Respondent alleges that the sketch is not to scale(T-21).

The Armbruster employees were in the trench in the northwest corner and were using a ruler to take certain measurements (T-25). It is stated that they were preparing to build forms. The compliance officer indicated that he spoke to Mr. Shueck after he came out of the trench who said he was an Armbruster employee(T-25). The width at the bottom was said to be four feet and the depth of the trench was said to be seven feet(T26). The area where the depth was measured is indicated in Exhibit C-2 by a circle with an "x". It is stated that the depth was described as being seven feet deep(T-26). The length of the trench was given as twenty feet. The banks in the southeast area of the sketch were sloped back and benched. A letter U was marked on the photograph to show where undercutting was observed(T-28). The soil was similar to other soil in the

trench described as compact(T-28). The same hazards were observed, mainly a cave-in which could result in serious injury or death. With regard to the penalties in the Kospiah case, the citation recommendation was reduced by using the field operation manual adjustment factors, namely, size being approximately twenty employees, resulted in a reduction of 30%. Good faith resulted in a reduction of 20% because the Respondent was described as very cooperative and abated immediately. History was adjusted by 10% because the Respondent was a new employer with less than one year in business. This resulted in a total reduction of 60% from the unadjusted proposed penalty(T-30).

As to Armbruster, the same basic rules were observed, except that the Respondent had 100 employees at the time, resulting in a 10% reduction for size. Good faith initiated a reduction of 20%. A reduction of 10% was granted for history, resulting in a total 40% reduction(T-31,32).

On cross-examination, counsel for the Respondent showed that in the bottom of the photo (Exhibit C-1) and in the middle of the photo, there is a "bench" not shown on the diagram (Exhibit C-3). It is stated that the diagram shows "benching" on the east side(T-33). The attorney brought out that the orientation of the sketch was incorrect. The width of the trench in Exhibit C-1 was described as four feet, and the tools in Exhibit C-1 show that the shovel was resting against a wall with no bench (T-37). It is stated that there is a bench on the opposite side. The line at the base of C-1 indicates approximately a four-foot

width. Mr. Witczak was with the compliance officer at the time of the inspection. An X with a circle around it (Exhibit C-2) indicates the depth of the trench as being seven feet from the mark of the X in the circle to the shoe of the man in the T-shirt (T-40). The compliance officer testified there was no sloping in the trench(T-40). The man in the blue shirt, of Exhibit C-2, was an Armbruster employee and identified as such(T-41). On the day of the inspection, the compliance officer said there was a rain shower prior to the inspection, but it did not result in much dampening of the soil(T-41). The white or gray color in C-1 is described as stone dust(T-45,46). Mr. Race made the measurement to the bottom of the trench by extending his arm out fully,and dropping the steel tape beyond the bench, resulting in a seven-foot measurement(T-41,42,46).

Mr. Eugene Kospiah testified that he has been in the excavation business since January 17, 1981(T-49). He is president of the corporation and he does utility and excavation work(T-49). On June 25, 1981, he was doing excavation work and described the soil as virgin soil. Exhibit C-1 shows a Kospiah employee, Leon Wagner. Exhibit C-2 is described as showing Armbruster employees (T-52). Exhibit C-3, the witness testified, is incorrect because the orientation should be corrected to show that north is actually west, south is actually north and west is actually south(T-53). In Exhibit C-1, the X measured by Mr. Race is said to be incorrect (T-54). The correct place where the measurement was taken is said to be where the shovel is shown in the photograph. The manner

used in taking the measurement is also said to be an incorrect measurement(T-55). As to Exhibit C-1, the soil pile, the condition of the soil on the prior day indicated that the trench had a full "bench"(T-57). On the morning of the inspection, the jackhammer was brought into operation to remove some rock. At the time of the removal of the rock, the depth was actually five foot nine inches, according to scale noted in Exhibit R-3 (R-3). When the rock was removed, the excavation did not go below grade. The witness did concede that the rock was large.

Exhibit R-1 is a plan showing the trench mark with a zero(T-59). The "f.e." is used to describe the finished elevation as 419 feet. "C.E."is described as the concrete elevation (T-62). It is stated that prior to the inspection, the witness checked the excavation and noted that they conformed to the plan, Exhibit R-1. The measurements were confirmed by Mr. Witczak and the Air Products Corporation representative. The witness has been in the excavation business for more than 28 years. He does not believe that there was any safety hazard. He believes there was no danger of collapse. The Respondent has a safety program which includes weekly meetings because it is a requirement of Turner Construction(T-72). Since the Respondent is an excavator, most meetings are concerned with safety. Immediately after the picture was taken by the compliance officer, the employees were removed from the trench and trenching and sloping were increased. As to Exhibit C-1, the depth where the employee was working was

said to be five foot nine inches. The photograph is deceptive causing the depth to appear much deeper than it actually is. Exhibit C-2, marking (circle with an X), testimony alleges that the measurement was not taken at the marking but was actually taken from the same side where the photo was taken, namely the bottom of the photo. Exhibit C-3, the depth was stated to be five foot nine inches; this would also apply to Exhibit C-2 where an X is marked on the photo. The soil was dry that day, minimizing the danger of a cave-in. On cross-examination, the witness testified that Mr. Wagner is five foot nine inches tall (T-68). In Exhibit C-2 the employees are Armbruster employees. The Respondent did not make any measurements but observed Mr. Race. The Respondent did not take issue with the announced measurements, which were called out by Mr. Race to Mr. Robertson. The five foot nine inches depth is said to be the depth when the excavation is finished but it is alleged that the excavation was below grade. This was said to be necessary because the rock which was said to be a large rock which could not be removed by the back hoe because it was too big.

Mr. James Witczak, an Armbruster employee, states that he has been a construction superintendent for 12 years(T-73). His duties include safety. On the date of the inspection, June 25, 1981, he was at the site within one-half hour before the inspection(T-74). He did not see any change in the configuration at the time or after the inspection(T-75). The trench had a slope

and conformed with the angle required. The Respondent's witness submitted Exhibit R-2, which is a copy of table P-1, showing the angle of repose required by the standard(T-75). The excavation slopes shown in Exhibits C-1 and C-2 were tapered just a little bit less than 50 degrees in comparison to the 63 degrees in the table(T-76). In Exhibit C-2, Richard Moore, a carpenter steward, had the responsibility for safety compliance(T-77). The Respondent has a safey program and holds regular meetings(T-78). The employees attend the safety meetings(T-78). The Respondent was on the work-site approximately three weeks prior to the time of inspection. Prior to the date of inspection, the employees did not work in this particular trench. Mr. Shueck is said to be six feet tall (the man in the white T-shirt in Exhibit C-2)(T-79). Employees are instructed to take measurements to verify the excavations to comply with the specifications noted in R-1. The witness did not take any measurements on the day of inspection. The slope is said to be an estimate. Some trench areas sloped more, and some less, than 60 degrees.

In the closing statement, the Secretary alleges that the trench was more than five feet deep and that it was actually six to seven feet deep. The Respondent took no measurements but relied on the chart for the exact angle, although the measurement was not taken on the day of the inspection(T-81). The inspection shows that the trench is deeper than five feet and that the angle of repose is less than required by the standard. When a trench is finished, it is conceded that it

would be five feet nine inches. However, when the trench was inspected on June 25, 1981, the Respondent did not measure it. The compliance officer said he did. The Respondent asserts that the pictures speak for themselves. It conflicts with Exhibit R-1. The site plan is said to be better evidence than the photographs. The directions given on the sketch were said to be incorrect and therefore are inaccurate. It is also alleged that if a comparison is made of C-3 and R-2, the discrepencies will be evident.

## O P I N I O N

There is one remaining issue in this case. The issue is concerned with 29 CFR 1926.652(c); this relates to the depth of a trench which was inspected by the compliance officer and which is alleged to be deeper than permitted by the standard without shoring or a sufficient angle of repose. The issue is a question of fact and based on the evidence submitted, it would appear that reliance is given to the testimony of the compliance officer who allegedly took measurements which showed that the depth of the trench was between 6 and 7 feet. The compliance officer also offered 2 photographs which appeared to show that the depth of the trench exceeded that which is above the height of the 2 workers who are described as being 5'9" and approximately 6'(T-68,79). The Respondent offered no proof as to measurements taken but merely surmised the depth of the trench from a view of the photographs (Exhibits C-1,C-2) and by also relying on the chart which was offered as showing the elevations in the foundation

plan (Exhibit R-1).

The Secretary alleges that the offer of proof in its case is based on measurements which were specifically taken to show that the depth of the trench exceeded that permitted by the standard. However, the compliance officer stated he did not take the measurements and did not see the tape measure touch the bottom of the trench(T-41,42). While it is not questioned that the depth of the trench may have exceeded the amount specified in the standard, nevertheless Exhibit C-1 does show that there is a bench in the trench and on the right side of the photograph there is evidence that there is an angle of repose which could easily have exceeded that required by the standard. The trench measured four feet at the base and eight feet at the top(T-12). The slope is said to be 50 to 63 degrees(T-80). Accordingly, from the evidence and the testimony, it is necessary to conclude that while the trench did not have shoring, there is evidence that the trench was benched, and was also sufficiently widened as the elevation of the trench rose to the top so that the angle of repose was sufficient to provide a safe working area for the workers involved. The Secretary has failed to carry its burden of proof. Accordingly, the violations in the Armbruster case and in the Kospiah case should be vacated.

## FINDINGS OF FACT

1. The credible evidence and the record as a whole, establishes preponderant proof of the following facts:

1. The Respondent, Thomas A. Armbruster, Inc., maintains and is involved in a business that uses materials and equipment which are within the jurisdiction of the Act.

2. The trench excavation, which is the basis for the citation, had a depth of 6 to 7 feet.

3. The evidence shows that the excavation also had a bench with a width of sufficient proportions to obviate the necessity for shoring.

4. The evidence of record shows that the right side of the trench, as shown in Exhibits C-1, C-2 and R-1, contained a sufficient angle of repose to provide a margin of safety to the workers in the excavation.

## CONCLUSIONS OF LAW

1. The Respondent is and was at all times engaged in a business affecting commerce within the meaning of Section 3(5) of the Occupational Safety and Health Act of 1970.

2. The Occupational Safety and Health Review Commission has jurisdiction over the subject matter and parties to this action.

3. The Respondent did not violate 29 CFR U.S.C. 654(a)(1) by failing to provide shoring in a trench excavation inasmuch as the trench did not contain benching and also a sufficient angle of repose.

## O R D E R

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record, it is hereby ORDERED that:

1. Citation No. 1 is vacated.

2. Citation No. 2 concerning 29 CFR 1926.500(e)(1)(iii) which was not contested and stipulated is affirmed. No penalty is assessed.

Seymour Fier

SEYMOUR FIER
JUDGE, OSHRC

Dated: February 16, 1982
New York, New York

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1515 Broadway
Room 3800

New York, N.Y.
10036

## NOTICE OF DECISION

Secretary of Labor v. Kospiah Excavating, Inc.
OSHRC Docket No. 81-2000

1. Enclosed is a copy of my decision. It will be filed with the Commission on February 16, 1982, and will become the final order of the Commission on March 18, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is March 18, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Seymour Fier
SEYMOUR FIER
JUDGE, OSHRC

Date: January 27, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>KOSPIAN EXCAVATING, INC.,<br><br>Respondent. | OSHRC DOCKET<br><br>NO. 81-2000 |

Appearances:

Marshall H. Harris, Regional Solicitor
United States Department of Labor
14480 Gateway Building
3535 Market Street
Philadelphia, Pennsylvania 19104
Attorney for Complainant
by Thomas Hurd, Esq., of Counsel

Efron, Blac, Epstein, Prokup & McCarthy
502 Turner Street
Allentown, Pennsylvania 19102
Attorneys for Respondent
by Michael Prokup, Esq., of Counsel

DECISION AND ORDER

Fier, Judge:

## PRELIMINARY STATEMENT

This is a proceeding pursuant to section 659 of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 et seq.), hereinafter called the Act, wherein the Respondent contests the citation and penalty for one serious violation and one other violation. The citation dated July 21, 1981, was based on an inspection conducted June 24, 1981 through June 26, 1981. The citations and proposed penalties were issued pursuant to sections 9(a) and 10(a) of the Act.

Pursuant to section 10(c) of the Act (29 U.S.C. § 659(c)), Respondent, through a letter received August 11, 1981, noted its timely contest of the violations and proposed penalties.

## ISSUES

1. Whether the Respondent violated the Occupational Safety and Health Act as alleged.

2. Whether the Respondent failed to comply with 29 CFR 1926.652(c), listed as a serious violation, and 29 CFR 1926.28(a), a nonserious violation; and if so, did it violate 29 U.S.C. § 654(a) of the Act.

3. If the Respondent is shown to have violated the Act as alleged, what if any penalties, are appropriate.

The standards said to have been violated allege:

SERIOUS VIOLATION

29 CFR 1926.652(c): The side(s) of the trench(es) in hard or compact soil, including embankment(s), were not shored or otherwise supported when the trench was 5 feet or more in depth and 8 feet or more in length:

> (a) A trench from 6 feet to 7 feet running north and south at the west end of the north wing of the Laboratory was not shored, benched or sloped to protect against cave-in, June 25, 1981.

A penalty of $240.00 was proposed.

OTHER VIOLATION

29 CFR 1926.28(a): Appropriate personal protective equipment was not worn by employee(s) in all operations where there was exposure to hazardous conditions:

> (a) An employee operating a Wacker Earth Tamper (Model GUP150Y, Serial Number 233403566) at the center of the west wing of the Laboratory was not wearing foot protection to protect against foot injury, June 25, 1981.

No penalty was proposed.

SUMMARY OF EVIDENCE AND STIPULATION

Prior to the commencement of the trial, the parties stipulated that citation number 2 in the Kospiah case, docket number 81-2000, and citation number 2 in the Armbruster case, docket number 81-1907, were not to be contested and will not be tried in this matter. Accordingly, they will be affirmed as stated in the citations.
The admissions submitted by the Respondent to the Secretary were received into evidence by stipulation. The parties stipulated that there would be one trial combining both cases, but there would be separate decisions *(T-4-7).

The summary of testimony shows that the Compliance Officer, Leon A. Robertson, has been a compliance officer for eight years (T-10). He has made 550 inspections, 60% of which were construction sites (T-10). On June 25, 1981, he made an inspection of the site in issue. The CO observed that on arriving at the worksite, he saw a man in a trench, the height of which was well above the man's head (T-11). Exhibit C-1 shows that the depth measured was larger than the standard permitted (T-12). He noted that the employee was using a jackhammer (T-13). The trench was six to seven feet deep, approximately eight feet wide at the top and four feet at the bottom. It was also approximately twenty feet long (T-12).

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*Denotes transcript page number

Mr. Race, the other Compliance Officer, made the measurements. Exhibit C-1 was marked with an "x" where measurements were taken, indicating that the depth of the trench was seven feet (T-12). This constituted a violation of the standard set forth in the citation, according to the compliance officer, and as such, a citation was issued. He also observed no shoring on the east wall and noted that it was not sloped. The soil was described as being compact clay-stone and was described as being "hard and compact" (T-14). The CO stated that with regard to direction, he asked someone which direction was north and relying on the answer that was given to him, he then used the descriptions set forth in exhibit C-3 and also in his testimony (T-39). The CO testified that Leon Wagner, an employee of Kospiah was breaking rock in the trench with the use of the jack-hammer (T-14). Mr. Kospiah was with the CO at the time of the inspection. They met at the trench. The CO told the Respondent that the trench should be shored, benched, or sloped (T-16). Mr. Kospiah said he would do this immediately and the CO noted that the abatement started before they left the scene of the excavation (T-16). The hazard was serious because the vibration of the jackhammer could cause a cave-in (T-16). It was also noted that the soil bank in exhibit C-1 by the initials SB, also showed a hazard (T-17).

The tractor, while not running at the time of the inspection, was said to be a contributor to the hazard of a cave-in (T-18). The injuries, in the event of a cave-in, could be serious or result in death (T-18). Other employees were observed in the trench at the north end (T-18). This is described in the sketch marked as exhibit C-3. The sketch was prepared at the site in a rough manner and was completed when the CO returned to the office (T-19). Respondent alleges that the sketch is not to scale (T-21).

The Armbruster employees were in the trench in the northwest corner and were using a ruler to take certain measurements (T-25). It is stated that they were preparing to build forms. The CO indicated that he spoke to Mr. Shueck after he came out of the trench, who said he was an Armbruster employee (T-25). The width at the bottom was said to be four feet and the depth of the trench was said to be seven feet (T-26). The area where the depth was measured is indicated in exhibit C-2 by a circle with an "x". It is stated that the depth was described as being seven feet deep (T-26). The length of the trench was given as twenty-feet. The banks in the southeast area of the sketch were sloped back and benched. A letter U was marked on the photograph to show where undercutting was observed (T-28). The soil was

similar to other soil in the trench described as compact (T-28). The same hazards were observed, mainly a cave-in which could result in serious injury or death. With regard to the penalties in the Kospiah case, the citation recommendation was reduced by using the field operation manual adjustment factors, namely, size being approximately twenty employees, resulted in a reduction of 30%. Good faith resulted in a reduction of 20% because the Respondent was described as very cooperative and abated immediately. History was adjusted by 10% because the Respondent was a new employer with less than one year in business. This resulted in a total reduction of 60% from the unadjusted proposed penalty (T-30).

As to Armbruster, the same basic rules were observed, except that the Respondent had 100 employees at the time, resulting in a 10% reduction for size. Good faith initiated a reduction of 20%. A reduction of 10% was granted for history, resulting in a total 40% reduction (T-31,32).

On cross-examination, counsel for the Respondent showed that in the bottom of the photo (Exhibit C-1) and in the middle of the photo, there is a "bench" not shown on the diagram (Exhibit C-3). It is stated that the diagram shows "benching" on the east side (T-33). The attorney brought out that the orientation of the sketch

was incorrect. The width of the trench in exhibit C-1 was described as four feet, and the tools in exhibit C-1 show that the shovel was resting against a wall with no bench (T-37). It is stated that there is a bench on the opposite side. The line at the base of C-1 indicates approximately a four-foot width. Mr. Witczak was with the CO at the time of the inspection. An "x" with a circle around it (Exhibit C-2), indicates the depth of the trench as being seven feet from the mark of the "x" in the circle to the shoe of the man in the T-shirt (T-40). The CO testified there was no sloping in the trench (T-40). The man in the blue shirt, in exhibit C-2, was an Armbruster employee and identified as such (T-41). On the day of the inspection, the CO said there was a rain shower prior to the inspection, but it did not result in much dampening of the soil (T-41). The white or gray color in C-1 is described as stone dust (T-45-46). Mr. Race made the measurement to the bottom of the trench by extending his arm out fully and dropping the steel tape beyond the bench, resulting in a seven-foot measurement (T-41-42,46).

Mr. Eugene Kospiah testified that he has been in the excavation business since January 17, 1981 (T-49). He is the President of the corporation and he does utility and excavation work (T-49). On June 25, 1981, he was doing excavation work and described the soil as virgin soil.

Exhibit C-1 shows a Kospiah employee, Leon Wagner. Exhibit C-2 is described as showing Armbruster employees (T-52). Exhibit C-3, the witness testified, is incorrect because the orientation should be corrected to show that north is actually west, south is actually east, east is actually north and west is actually south (T-53). In exhibit C-1, the "x" measured by Mr. Race is said to be incorrect (T-54). The correct place where the measurement was taken is said to be where the shovel is shown in the photograph. The manner used in taking the measurement is also said to be an incorrect measurement (T-55). As to C-1, the soil pile, the condition of the soil on the prior day indicated that the trench had a full "bench" (T-57). On the morning of the day of inspection, the jackhammer was brought into operation to remove some rock. At the time of the removal of the rock, the depth was actually five foot nine inches, according to scale noted in exhibit R-3 (T-58). When the rock was removed, the excavation did not go below grade. The witness did concede that the rock was large. Exhibit R-1 is a plan showing the trench mark with a zero (T-59). The "f.e." is used to describe the finished elevation as 419 feet. "C.E." is described as the concrete elevation (T-62). It is stated that prior to the inspection, the witness checked the excavation and noted that they conformed to the plan (Exhibit R-1). The

measurements were confirmed by Mr. Witczak and the Air Products Corporation representative. The witness has been in the excavation business for more than 28 years. He does not believe that there was any safety hazard. He believes there was no danger of collapse. The Respondent has a safety program which includes weekly meetings because it is a requirement of Turner construction (T-72). Since the Respondent is an excavator, most meetings are concerned with safety. Immediately after the picture was taken by the CO, the employees were removed from the trench and trenching and sloping were increased. As to exhibit C-1, the depth where the employee was working was said to be five feet nine inches. The photograph is deceptive, causing the depth to appear much deeper than it actually is. Exhibit C-2, marking (circle with an "x"), testimony alleges that the measurement was not taken at the marking but was actually taken from the same side where the photo was taken, namely the bottom of the photo. Exhibit C-3, the depth was stated to be five foot nine inches; this would also apply to C-2 where an "x" is marked on the photo. The soil was dry that day, minimizing the danger of a cave-in. On cross-examination, the witness testified that Mr. Wagner is five foot nine inches tall (T-68). In exhibit C-2

the employees are Armbruster employees. The Respondent did not make any measurements but observed Mr. Race. The Respondent did not take issue with the announced measurements, which were called out by Mr. Race to Mr. Robertson. The five foot nine inches depth is said to be the depth when the excavation is finished but it is alleged that the excavation was below grade. This was said to be necessary because the rock which was said to be a large rock which could not be removed by the backhoe because it was too big.

Mr. James Witczak, an Armbruster employee, states that he has been a construction superintendent for 12 years (T-73). His duties include safety. On the date of inspection, June 25, 1981, he was at the site within one-half hour before the inspection (T-74). He did not see any change in the configuration at the time or after the inspection (T-75). The trench had a slope and conformed with the angle required. The Respondent's witness submitted exhibit R-2, which is a copy of table P-1, showing the angle of repose required by the standard (T-75). The excavation slopes shown in exhibits C-1 and C-2 were tapered just a little bit less than 50 degrees in comparison to the 63 degrees in the table (T-76). In exhibit C-2, Richard Moore, a carpenter steward, had the responsibility for safety compliance (T-77). The

Respondent has a safety program and holds regular meetings (T-78). The employees attend the safety meetings (T-78). The Respondent was on the worksite approximately three weeks prior to the time of inspection. Prior to the date of inspection, the employees did not work in this particular trench. Mr. Shueck is said to be six feet tall (the man in the white T-shirt in Exhibit C-2 (T-79). Employees are instructed to take measurements to verify the excavations to comply with the specifications noted in R-1. The witness did not take any measurements on the day of inspection. The slope is said to be an estimate. Some trench areas sloped more, and some less, than 60 degrees.

In the closing statement, the Secretary alleges that the trench was more than five feet deep and that it was actually six to seven feet deep. The Respondent took no measurements but relied on the chart for the exact angle, although the measurement was not taken on the day of the inspection (T-81). The inspection shows that the trench is deeper than five feet and that the angle of repose is less than required by the standard. When a trench is finished, it is conceded that it would be five feet nine inches. However, when the trench was inspected on June 25, 1981, the Respondent admittedly did not measure it. The CO said he did. The Respondent

asserts that the pictures speak for themselves. It conflicts with exhibit R-1. The site plan is said to be better evidence than the photographs. The directions given on the sketch were said to be incorrect and therefore are inaccurate. It is also alleged that if a comparison is made of C-3 and R-2, the discrepencies will be evident.

OPINION

There is one remaining issue in this case. The issue is concerned with 29 CFR 1926.652(c); this relates to the depth of a trench which was inspected by the CO* and which is alleged to be deeper than permitted by the standard without shoring or a sufficient angle of repose. The issue is a question of fact and based on the evidence submitted, it would appear that reliance is given to the testimony of the CO who allegedly took measurements which showed that the depth of the trench was between six and seven feet. The CO also offered two photographs which appeared to show that the depth of the trench exceeded that which is above the height of the two workers who are described as being 5'9" and approximately 6' (Tr. 68,79). The Respondent offered no proof as to measurements taken but merely surmised the depth of the trench from a view of the photographs and also by relying on the chart which was offered as showing the elevations in the foundation plan (Exh. R-1).

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*Denotes Compliance Officer

The Secretary alleges that the offer of proof in its case is based on measurements which were specifically taken to show that the depth of the trench exceeded that permitted by the standard. However, the CO stated he did not take the measurements and did not see the tape measure touch the bottom of the trench (T-41,42). While it is not questioned that the depth of the trench may have exceeded the amount specified in the standard, nevertheless exhibit C-1 does show that there is a bench in the trench and on the right side of the photograph there is evidence that there is an angle of repose which could easily have exceeded that required by the standard. The trench measured four feet at the base and eight feet at the top (T-12). The slope is said to be 50 to 63 degrees (T-80). Accordingly, from the evidence and the testimony, it is necessary to conclude that while the trench did not have shoring, there is evidence that the trench was benched, and also was sufficiently widened as the elevation of the trench rose to the top so that the angle of repose was sufficient to provide a safe working area for the workers involved. The Secretary has failed to carry its burden of proof. Accordingly, the violations in the Armbruster case and in the Kospiah case should be vacated.

## FINDINGS OF FACT

The credible evidence and the record as a whole, establishes preponderant proof of the following facts.

1. The Respondent, Kospiah Excavating, Inc., maintains and is involved in the excavating business and uses materials and equipment which are within the jurisdiction of the Act.

2. The excavation, which is the basis for the citation, had a depth of six to seven feet.

3. The evidence shows that the excavation also had a bench with a width of sufficient proportions to obviate the necessity for shoring.

4. The evidence of record shows that the right side of the trench, as shown in exhibit C-1, contained a sufficient angle of repose to provide a margin of safety to the workers in the excavation.

## CONCLUSIONS OF LAW

1. The Respondent is and was at all times engaged in a business affecting commerce within the meaning of Section 3(5) of the Occupational Safety and Health Act of 1970.

2. The Occupational Safety and Health Review Commission has jurisdiction over the subject matter and parties to this action.

3. The Respondent did not violate 29 CFR U.S.C. 654(a)(1) by failing to provide shoring in a trench excavation inasmuch as the trench did contain benching and also a sufficient angle of repose.

ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record, it is hereby ORDERED that:

1. Citation No. 1 is vacated.

2. Citation No. 2 concerning 29 CFR 1926.28(a) which was not contested and stipulated is affirmed. No penalty is assessed.

Seymour Fier

SEYMOUR FIER
JUDGE, OSHRC

Dated: February 16, 1982
New York, New York

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

NOTICE OF DECISION

Secretary v. R. C. Diving Co., Inc.
OSHRC Docket No. 77-4487

Enclosed is a copy of my decision in the above-entitled case. This decision constitutes my final disposition of the proceeding pursuant to 29 U.S.C. §661(i) and 5 U.S.C. §557. I have this date mailed the original decision together with the Commission's file, transcript of testimony, and all exhibits to Richard Shiffmann, Chief Review Counsel, at the Commission's Office in Washington, D.C.

I am required to advise you as follows:

(1) The decision will be filed with the Commission on February 17, 1982 and will become the final order of the Commission on March 19, 1982 unless a member of the Commission directs that it be reviewed. Parties will not receive any further communications from the Commission unless the decision is directed for review. (See paragraphs 4, 5, and 6 below.)

(2) You may petition for discretionary review of this decision by the Commission. An original and three copies of such a petition must be submitted in accordance with 29 CFR 2200.91. The last day the Commission may consider your petition is March 19, 1982, the final order date. This final order date is set by law and cannot be extended.

(3) Petitions for review should be mailed to:

Richard Shiffmann, Chief Review Counsel
Occupational Safety & Health Review Commission
1825 K Street, N.W.
Washington, D.C. 20006

(4) Should review be ordered, each party will be notified and given opportunity to submit a brief.

(5) Please complete and mail the enclosed postcard, indicating whether you presently intend to seek review of this decision. Your response on the card does not bind you in any way, but assists the Commission in scheduling future workload.

(6) For further details on the review process, see Commission Rules 90, 91, 92, 93, 94, and 95.

DATED: January 28, 1982

Erwin L. Stuller

ERWIN L. STULLER
Judge

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>R.C. DIVING CO., INC.,<br>Respondent. | DECISION AND ORDER ON REMAND<br><br>Docket No. 77-4487 |

APPEARANCES:

WILLIAM W. KATES, Esquire
Office of the Solicitor
U.S. Department of Labor
8003 Federal Office Building
Seattle, Washington 98174

Attorney for Complainant

MARK E. FORTIER, Esquire
Kargianis & Austin
2120 Pacific Building
Seattle, Washington 98104

Attorney for Respondent

## DECISION

The Decision in this case was filed on June 15, 1978. On February 25, 1981, the Commission entered its decision remanding the case for further proceedings "consistent with this decision.". A second hearing in this case was held on May 5, 1981.

The Commission Decision held in part that an employment relationship existed and that Rod Carew was the employer. However, the Commission appeared to condition this conclusion on my finding concerning the compliance officer's credibility. After hearing his testimony and witnessing his demeanor while testifying, I find that the compliance officer's testimony was highly credible. Therefore, I must conclude that an employment relationship existed and that Rod Carew was the employer and the Respondent in this case.

The only evidence received in this case was the testimony of the compliance officer. This has already been held to be credible. Therefore, all facts stated in this testimony are found to be facts in this case.

On November 3, 1977, the compliance officer and Mr. Earl Lawrence, a diving consultant, inspected the Respondent's vessel "Sea Otter 75" which was anchored near Indian Head Point near Port Townsend, Washington. At the time the Respondent's employees were engaged in harvesting Geoducks, which are large clams. As a result of the inspection, on November 15, 1977 the Secretary issued two citations charging the Respondent

with five violations of the commercial diving operation's safety standards of the Occupational Safety and Health Act.[1/] The Respondent has denied the charges.[2/]

The Respondent has denied jurisdiction. However, the evidence establishes that the Respondent was an employer with employees engaged in a business that affects commerce within the meaning of the Act. Therefore, jurisdiction has been established.

At the time of the inspection, three of the Respondent's employees were aboard the vessel; two divers and a tender. The vessel operated as a platform from which surface supplied air was pumped down to the divers through two hundred feet of air line. The divers searched the bottom of Puget Sound seeking Geoducks buried in the sand. The divers did not have a two-way voice communication system. Nor was each diver continuously tended while in the water.

During the course of the trial, the Respondent admitted the violative conditions concerned in Citation 1, Item 1 and all of the items in Citation 2. In addition it was admitted that the Respondent had knowledge of these violative conditions and that employees had access to the hazards.[3/]

## OPINION

The inspection was fair. The Respondent's employee in charge did not object to the inspection and therefore waived any right to require a search warrant. The evidence

established each of the violations as alleged. In each instance the employer had knowledge of these conditions and that employees were exposed to the areas of danger. There was a substantial probability that the violative conditions alleged in Citation No. 1 could result in serious physical harm or the death of one or more of the employees. Therefore, these citations will be affirmed as alleged.

The evidence indicates that the Respondent had a small business and no previous history of violations. There was no indication of bad faith on its part. Therefore, after considering this and the gravity of the violations it is concluded that the proposed penalties are appropriate.

## ORDER

The citations, as amended, and the proposed penalties are AFFIRMED. Total penalties of $240 are ASSESSED.

ERWIN L. STULLER
Judge

DATED: February 17, 1982

## FOOTNOTES

1/ After the original citations were issued, an amendment to the Complaint and Citation 1, Item 1 was allowed. A description of the alleged violations, the proposed penalties, and the safety standards concerned, as amended, are as follows:

Citation 1, Item 1 (Serious)

> An operating two-way voice communication system was not used between dive team member on board "Sea Otter 75" (dive location) and diver at bottom in approximately 20 feet salt water off Indian Head Point, opposite Port Tonwsend. Surface supplied air diving operation harvesting geoducks.

in violation of 29 CFR 1910.422(c)(1)(i)

Penalty Proposed: $140

29 CFR 1910.422(c)(1)(i) provides:

> An operational two-way voice communication system shall be used between each surface-supplied air or mixed-gas diver and a dive team member at the dive location or bell (when provided or required).

Citation 1, Item 2 (Serious)

> A surface supplied air diver was not being continuously tended in that the tender aboard dive location "Sea Otter 75" off Indian Head Point, Port Townsend, was not keeping the slack out of the lines in order to feel the pull signals on the air hose/ lifeline from the diver. The tender was not maintaining a proper tension by hand at all times on the air hose/airline.

in violation of 29 CFR 1910.425(c)(1)

Penalty Proposed: $100

29 CFR 1910.425(c)(1) provides:

> Each diver shall be continuously tended while in the water.

Citation 2, Item 1 (Other)

> An emergency aid list was not kept at the dive location, "Sea Otter 75" with the telephone on-call numbers of the following: (a) an operational compression chamber, (b) accessible hospitals, (c) available physicians, (d) available means of transportation or (e) U.S. Coast Guard Reserve Coordination Center.

in violation of 29 CFR 1910.421(b)

Penalty Proposed: none

29 CFR 1910.421(b) provides:

> A list shall be kept at the dive location of the telephone or call numbers of the following: (1) an operational decompression chamber (if not at the dive location); (2) accessible hospitals; (3) available physicians; (4) available means of transportation; and (5) the nearest U.S. Coast Guard Rescue Coordination Center.

Citation 2, Item 2 (Other)

> The employer did not maintain a Safe Practices Manual and the Manual was not available at the dive location to each dive team member.

in violation of 29 CFR 1910.420(a)

Penalty Proposed: none

29 CFR 1910.420(a) provides:

> The employer shall develop and maintain a safe practices manual which shall be made available at the dive location to each dive team member.

Citation 2, Item 3 (Other)

> The records of dive information including: date, time, location, dive team members/person in charge, diving modes, general nature of work performed, approximate underwater and surface conditions and a maximum depth bottom for each diver was not available and properly maintained aboard "Sea Otter 75" on date of inspection.

in violation of 29 CFR 1910.423(d)(1)(i)

Penalty Proposed: none

29 CFR 1910.423(d)(1) provides:

> The following information shall be recorded and maintained for each diving operation: Names of dive team members including designated person-in-charge; date, time, and location; diving modes used; general nature of work performed; approximate underwater and surface conditions (visibility, water temperature and current); and maximum depth and bottom time for each diver.

2/ The violations were alleged to have taken place at the time of the inspection on November 3, 1977. The citations charge that the Respondent failed to comply with commercial diving operation's safety regulations in violation of Section 654(a)(2) of the Occupational Safety and Health Act (29 U.S.C. 651 et seq.). Citation No. 1 charges two serious violations of the Act. Citation No. 2 charges three nonserious violations of the Act. The Respondent filed a timely notice of contest. At that point the Commission acquired jurisdiction over the subject matter under Section 659 of the Act.

3/ Tr. 16 and 17

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

March 23, 1982

**IN REFERENCE TO SECRETARY OF LABOR v.**

HERMITAGE CONCRETE PIPE COMPANY

OSHRC DOCKET NO. 4678

**NOTICE IS HEREBY GIVEN TO THE FOLLOWING:**

**FOR THE SECRETARY OF LABOR**

OF COMMISSION DECISION

- **Counsel for Regional Litigation**
  **Office of the Solicitor, USDOL**
  **200 Constitution Ave., NW. - Rm. S-4014**
  **Washington, D.C. 20210**

To wit: See attached.

- Marvin Tincher, Esq.
  Reg. Sol., USDOL
  280 U. S. Courthouse
  801 Broadway
  Nashville, TN 37203

**FOR EMPLOYER**

- R. Robert Kassem, Esq.
  Suite 609, Burwell Building
  602 Gay St.
  Knoxville, TN 37902

**FOR EMPLOYEES**

-

**FOR THE COMMISSION**

Ray H. Darling, Jr.

**RAY H. DARLING, JR.**
**EXECUTIVE SECRETARY**

- Office of the Judges
  1365 Peachtree Street
  Room 240
  Atlanta, GA 30309

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>HERMITAGE CONCRETE PIPE COMPANY,<br><br>Respondent. | OSHRC Docket No. 4678 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

In a prior decision, 1/ a divided Commission concluded that although Respondent, Hermitage Concrete Pipe Co. ("Hermitage"), had violated the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), by failing to comply with the health standard at 29 C.F.R. § 1910.1000(c), 2/ the violation was not "serious" within the meaning of section 17(k) of the Act, 29 U.S.C. § 666(j). The case is now before the Commission on remand by the United States Court of Appeals for the Sixth Circuit. Usery v. Hermitage Concrete Pipe Co., 584 F.2d

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1/ Hermitage Concrete Pipe Co., 76 OSAHRC 2/C1, 3 BNA OSHC 1920, 1975-76 CCH OSHD ¶ 20,298 (No. 4678, 1976).

2/ After the judge's decision in this case was issued, the cited standard, 29 C.F.R. § 1910.93(c), was recodified at 29 C.F.R. § 1910.1000(c). 40 Fed. Reg. 23072 (1975). Because the recodification consisted only of renumbering the standard, the new number will be used.

29 C.F.R. § 1910.1000(c) provides:

> Table Z-3: An employee's exposure to any material listed in Table Z-3, in any 8-hour work shift of a 40-hour work week, shall not exceed the 8-hour time weighted average limit given for that material in the table.

127 (6th Cir. 1978). In that decision, the Sixth Circuit rejected a Commission majority's conclusion that the violation was not "serious" because the Secretary of Labor ("the Secretary") had failed to prove that death or serious harm "would" result from exposure to the levels of respirable silica dust in Hermitage's workplace. The court held that the proper test to be applied in determining whether a violation of the Act is serious under section 17(k) of the Act [3/] is whether death or serious physical harm "could" result from the violative condition. 584 F.2d at 131-132. The court remanded the case for the Commission to re-examine whether the violation was serious.

Most of the facts are not in dispute. The Secretary's industrial hygienist took air samples at Hermitage's plant, and the samples indicated that Hermitage's employees were exposed to respirable silica dust in excess of the threshold limit values (TLV) set out at 29 C.F.R. § 1910.1000(c), Table Z-1. The samples showed concentrations of up to 7 times the permitted levels. Hermitage conceded the existence of levels in excess of the TLV. It also conceded that silicosis was a serious disease and that silica dust is dangerous to health. However, Hermitage contended that it did not know or have any reason to know of the presence of silica dust in its workplace. In his decision, the Review Commission's administrative law judge found that the Secretary had failed to show that Hermitage had knowledge of

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3/ Section 17(k), 29 U.S.C. § 666(j), provides:

> (k) For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

the presence of silica dust. He therefore characterized the alleged violation as other than serious before vacating the citation on other grounds.

On review, a Commission majority (Commissioner Cleary dissenting) found that the Secretary had failed to introduce evidence to establish that the levels of silica dust to which Hermitage's employees were exposed "would" cause death or serious physical harm. The Commission affirmed the violation as other than serious and did not reach the issue of knowledge.

On remand, we are charged with determining whether the Secretary has proven that the violation by Hermitage was serious. In order to establish a serious violation of the Act, the Secretary must establish that (1) death or serious physical harm could result if the standard is violated, and (2) that the employer has actual or constructive knowledge of the violative condition. 4/ See Niagara Mohawk Power Corp., 76 OSAHRC 36/A2, 7 BNA OSHC 1447, 1979 CCH OSHD ¶ 23,670 (No. 76-2414, 1979).

On review, Hermitage had argued that the Secretary had not shown that it had "knowledge or imputed knowledge" that its employees were exposed to silica dust. Hermitage's superintendent and general manager, who had a combined total of thirty-six years experience in the manufacture of conduit pipe, testified at the hearing that they had never encountered a problem with silica dust.

On review, the Secretary had contended that various exhibits that he had attempted to introduce at the hearing would have demonstrated that "there was sufficient material . . . available to [Hermitage], so that it knew, or with the exercise of reasonable diligence could have known of the presence of the violation."

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4/ In his brief on remand, the Secretary does not address the knowledge issue. Hermitage did not submit a brief on remand. Both parties did, however, address the knowledge issue both before the judge and on review before the Commission.

Citing to American Smelting and Refining Co. v. Brennan, 501 F.2d 504 (8th Cir. 1974), the Secretary had contended that Hermitage could not rely on self-serving declarations that it did not know of the violative levels, when it was clear that Hermitage had a duty to discover the hazard and protect its employees from it.

We conclude that Hermitage could have known of the presence of respirable silica dust with the exercise of reasonable diligence. Both of the operations cited in this case involve the discharge of sand into the atmosphere. In the batch area, sand and cement were poured into pipe and conduit casting machines. In the finishing area, dried conduit was chipped, ground, and cleaned using compressed air. Even if these operations had not raised visible clouds of dust, they did send particles of sand or cement into the air. An employer has a duty under the Act to anticipate the hazards to which its employees may be exposed and to take the steps necessary to prevent such exposure. Automatic Sprinkler Corp. of America, 79 OSAHRC 102/A2, 7 BNA OSHC 1957, 1979 CCH OSHD ¶ 24,077 (No. 76-5271, 1979). It is our judgment that a reasonably diligent employer who knows that his employees chip, grind and blow particles of sand and cement from pipe into the air would conduct tests to discover what substances its employees are exposed to, whether the particles are respirable, and in what concentrations they are present. Had Hermitage been reasonably diligent it would have discovered what the Secretary's industrial hygienist discovered, even if it had no idea that any particular disease or substance might be associated with its operations.

In its brief on remand to the Commission, the Secretary argues that exposure to the levels of silica dust in Hermitage's plant could cause death or serious physical harm. The Secretary contends that in order to establish that a violation is serious he need only show an exposure or exposures to excessive

levels of respirable silica dust that if continually experienced could cause death or serious physical harm. The Secretary relies on the industrial hygienist's "unrebutted expert testimony that regular exposure to free silica at the levels Hermitage employees inhaled daily could result in contraction of silicosis." He also points out that the TLV for respirable silica dust is consistent with the epidemiological data demonstrating the upper limits of exposure for studied employees who did not contract silicosis. He cites from the concluding statement in the publication of the American Conference of Governmental Industrial Hygienists (ACGIH), which contains the documentation for the TLV:

> The margin of safety of the quartz [free silica] TLVs is not known. In the documented examples of virtual silicosis elimination, concentrations have averaged well below the TLV. It is suggested that quartz concentrations be maintained as far below the TLV as current practices will permit.

ACGIH, Documentation of the Threshold Limit Values for Substances in Workroom Air, 230 (3d ed. 1971). 5/

The Secretary also contends that the precise causal link between levels and durations of exposure and the contraction of the disease is a question on the frontiers of scientific knowledge and is incapable of precise scientific proof. To require proof of a causal link in addition to proof that the required levels and durations existed would, in his view, limit serious citations to situations in which the possibility of contracting a disease is shown by its actual occurrence. The Secretary argues that the violation in this case is serious because Hermitage's employees were exposed to a toxic substance at levels that, assuming

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5/ The text the Secretary relies on was published in 1971. The TLV for respirable silica dust was derived from a recommended limit proposed by the American Conference of Governmental Hygienists ("ACGIH") in 1968. This TLV was adopted by the Secretary as a standard under the Walsh-Healey Public Contracts Act, 41 U.S.C. § 35-45, and was codified at 41 C.F.R. § 50-204.50 34 Fed. Reg. 788-96 (1969). The Walsh-Healey standard was subsequently adopted as an established Federal standard under § 6(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 655(a), and was codified origi-

(footnote cont'd)

chronic exposure, could cause a disease from which a substantial probability of death or serious harm arises. The Secretary claims that he is not arguing that every violation of a TLV is automatically a serious violation; he acknowledges that serious physical harm is possible only at "sufficiently high levels" of many regulated substances. He directs us to the OSHA Substance Toxicity Table, in Chapter II of the Industrial Hygiene Field Operations Manual, at II-31 (OSHA Instruction CPL 2-2.20). That table recommends to the Secretary's enforcement personnel that a violation of the TLV for silica be classified as serious.

In sum, the Secretary argues that (1) regular exposure to free silica at levels proven to exist on at least one occasion could result in the contraction of silicosis and (2) the readings taken at Hermitage's plant can be taken as representative of conditions there in the absence of a showing by Hermitage that they were exceptional.

There is no evidence here that the overexposures measured by the Secretary's industrial hygienist were typical of the exposure of Hermitage's employees. The Secretary also does not claim that the measured overexposures, by themselves, could have caused death or serious physical harm. The Secretary, and the supporting ACGIH documents, focus instead on the effects of long-term exposure to silica dust. This case, therefore, is unlike those in which a single exposure could cause death or serious physical harm, e.g., a single exposure to cyanide gas or an unshored trench. Accordingly, we must consider whether a serious

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(footnote 5 cont'd)

nally at 29 C.F.R. § 1910.93, Table G-1 (recodified at 29 C.F.R. § 1910.1000(c), Table Z-1). 36 Fed. Reg. 10466 (1971); 36 Fed. Reg. 15101 (1971). Because the 1971 ACGIH recommended limit was identical to the 1968 version, we think it reasonable to conclude, in the absence of evidence to the contrary, that the basis for the recommendation in 1971 was the same as it was in 1968. See Anaconda Aluminum Co., 81 OSAHRC 27A/A2, 9 BNA CSHC 1460, 1471 n.28, 1981 CCH OSHD ¶ 25,300, p. 31,344 n.28 (No. 13102, 1981).

violation can be found in these circumstances. In particular, we must consider whether to presume that the measured overexposures were representative of long-term exposures.

In some cases, the evidence clearly will demonstrate that the exposures measured during the inspection of a workplace are representative of the usual exposures in that workplace. In other cases, such as this one, whether the exposures were representative may not be apparent from the evidence. The Secretary, whose presence in a workplace is necessarily occasional, is usually not in a position to chronicle long-term exposure to a toxic substance at a worksite. The Secretary is also unlikely to be able to obtain information on this point through discovery if, as here, the employer has not kept records of employee exposures. Yet, where, as here, the same objects are manufactured regularly, a realistic estimate of the probabilities suggests that workplace conditions tend to remain the same. See generally McCormick, Law of Evidence, § 337 at 787-789 (2d Ed. 1972). It is also evident that the employer is in the most favorable position to show that normal exposure differs from the exposure measured by the Secretary. See Trinity Industries, Inc., 81 OSAHRC 30/A2, 9 BNA OSHC 1515, 1981 CCH OSHD ¶ 25,297 (No. 77-3009, 1981). Finally, the presumption is not so far-reaching as to unfairly burden employers. Because we are dealing only with the characterization of a violation, the only consequence of the presumption to employers is to make it somewhat more likely that the Commission will be required to assess a penalty of up to $1,000; for nonserious violations, the assessment of a penalty of up to $1,000 is discretionary. Compare section 17(b) of the Act, 29 U.S.C. §§ 666(b), with section 17(c), 29 U.S.C. § 666(c). We therefore presume that the exposures measured by the Secretary are, for the purpose of determining seriousness, representative of typical exposures. An employer may rebut this evidentiary presumption by showing that the exposures or work condi-

tions on the day of the measured exposure were not representative of normal exposures or work conditions.

Here, Hermitage has not argued that the exposures or work conditions on the day of the inspection were in any way unrepresentative, nor did it present rebuttal evidence on the issue. However, because Hermitage has not had an opportunity to meet or rebut the presumption, we will afford Hermitage an opportunity to present evidence challenging the representative nature of the exposures. We will therefore presume that the readings taken by the Secretary accurately reflect the amounts of respirable silica dust to which Hermitage's employees are usually exposed unless Hermitage requests within ten days an opportunity to present evidence on the representative nature of the exposures.

A serious violation of the Act is not necessarily established by proof that workers are exposed to a concentration of a toxic material in excess of the levels set out in 29 C.F.R. § 1910.1000(c). However, in Anaconda Aluminum Co., 81 OSAHRC 27A/A2, 9 BNA OSHC 1460, 1477, 1981 CCH OSHD ¶ 25,300, p. 31,349 (No. 13102, 1981), a case involving exposure to coal tar pitch volatiles, the Commission held that if the purpose in limiting exposure to a particular substance is to protect against contraction of a life-threatening disease, then an employer's failure to reduce employee exposure to that substance to within the limits specified by the standard is a serious violation. It is undisputed in this case that Hermitage's employees were exposed to levels of respirable silica dust in excess of the permissible limit. The documentation for the selection of the recommended limit reveals that the possibility of contracting silicosis was the central factor in setting the TLV. 6/ ACGIH, Documentation of the Threshold Limit Values, at 227-30. In short, the limit was set with the intention of preventing

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6/ In this case, the unrebutted testimony of the industrial hygienist establishes that Hermitage's employees were exposed to dangerous levels of silica dust -- exposures which could result in the contraction of silicosis.

the contraction of silicosis, a life-threatening disease. [7/] See Urie v. Thompson, 337 U.S. 163, 180 (1948). Accordingly, we find Hermitage to be in serious violation of the Act for failing to comply with 29 C.F.R. § 1910.1000(c).

In our previous decision, we found Hermitage in other-than-serious violation of the Act for failing to comply with 29 C.F.R. § 1910.1000(c). We assessed a penalty of $100. Although we now find the violation to be serious, we conclude that $100 is still an appropriate penalty.

Accordingly, we affirm a serious violation of section 5(a)(2) of the Act, 29 U.S.C. § 654(a)(2), for Hermitage's failure to comply with the standard at 29 C.F.R. § 1910.1000(c) and assess a $100 penalty unless within ten days of this decision Hermitage requests an opportunity to present evidence on the representative nature of the exposures.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: MAR 23 1982

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7/ A review of the Act's legislative history reveals a congressional recognition of the seriousness of silicosis. In discussing what he described as the "silent killers in the form of . . . debilitating dust particles that have become commonplace ingredients of the manufacturing process," Congressman Udall noted that "[s]ilicosis is another major crippling and deadly respiratory disease common to industry." Remarks of Congressman Udall, SEN. COMM. ON LABOR & PUBLIC WELFARE, 92d CONG., 1st SESS., LEGISLATIVE HISTORY OF THE OCCUPATONAL SAFETY AND HEALTH ACT OF 1970, at 1044-5 (1971).

ROWLAND, Chairman, dissenting:

I dissent from the majority's characterization of the violation as "serious" and from the assessment of a $100 penalty.

In my view, the Secretary has failed to show that Hermitage's employees were exposed to levels of silica dust that could cause death or serious physical harm. The majority, relying on Anaconda Aluminum Co., 81 OSAHRC 27A/A2, 9 BNA OSHC 1460, 1981 CCH OSHD ¶ 25,300 (No. 13102, 1981), holds that exposure to levels of silica dust above the threshold limit value (TLV) constituted a serious violation of the Act because the TLV for silica dust was set with the intention of preventing the contraction of silicosis, a life-threatening disease.

It is not necessary for me to decide here whether the Anaconda approach is correct, for although it is probably the most expansive interpretation of section 17(k) that could be adopted, the evidence relied on by the majority does not satisfy it. In concluding that the TLV for silica dust was set to prevent silicosis, the majority relies on the documentation that evidently supported the selection of the TLV, American Conference of Government Industrial Hygienists ("ACGIH"), Documentation of the Threshold Limit Values for Substances in Workroom Air (3d ed. 1971). The ACGIH states there that the margin of safety of exposure to silica dust is unknown and that when concentrations of silica dust have averaged well below the TLV, silicosis has been virtually eliminated. However, the documentation does not show levels at which employees could contract silicosis, nor does it show that the ACGIH set the TLV to prevent silicosis, rather than to prevent less severe health effects. Moreover, in the preface to the ACGIH publication that was the source for the TLV for silica dust and other substances, the reader is cautioned against absolute reliance on the TLV's. See ACGIH, Threshold Limit Values of Airborne Contaminants for 1968 (1968). There the ACGIH notes that the TLV's represent levels under which it is believed that nearly all workers may

be repeatedly exposed day after day without adverse effect. Id. at 1. It emphasizes that TLV's "should be used as guides in the control of health hazards and should not be regarded as fine lines between safe and dangerous concentrations." Id. The ACGIH further notes that "[t]he basis on which the values are established may differ from substance to substance; protection against impairment of health may be the guiding factor for some, whereas reasonable freedom from irritation, narcosis, nuisance or other forms of stress may dominate the basis for others." Id. Although the ACGIH states that in its opinion "limits based on physical irritation should be considered no less binding than those based on physical impairment," it states that these limits "are not intended for use, or for modification for use . . . as a relative index of toxicity, . . . in estimating the toxic potential of continuous uninterrupted exposures, . . . [or] as proof or disproof of an existing disease or physical condition." Id. at 2. Nevertheless, the majority has found the TLV to be just such a dividing line. Although Hermitage's employees were exposed to silica dust up to 7 times the permissible level, the ACGIH documents caution against using the TLV as a basis for estimating safe and dangerous concentrations. I am therefore unable to say that silicosis could result from such exposures. For this reason, I conclude that a serious violation of the Act has not been shown.

Although it is not clear that exposures to respirable silica dust in excess of the TLV could lead to death or serious physical harm, the Secretary nevertheless argues that it would be preferable to err on the side of greater rather than less caution. See Titanium Metals Corp. v. Usery, 579 F.2d 536 (9th Cir. 1978). However, a conclusion that an employer did not commit a serious violation of the Act would not leave his employees without protection. If an employer violates the Act by exposing his employees to levels of a toxic substance above the TLV, he is required to abate those excessive levels in the same manner he would have had to abate them had the violation been characterized as serious.

Because I do not find that the Secretary has shown that conditions at Hermitage's plant could cause death or serious physical harm, it is unnecessary for me to determine whether Hermitage knew or, with the exercise of reasonable diligence, could have known of the presence of excessive levels of respirable silica dust at its workplace. I do note, however, that my approach to knowledge in such cases has differed from that of the majority. See Mahone Grain Corp., 81 OSAHRC _____, 10 BNA OSHC 1275, 1982 CCH OSHD ¶ 25,836 (No. 77-3041, 1981)(Rowland, Chairman, dissenting). While knowledge is also a part of the Secretary's burden of proof as to nonserious violations of the Act, Hermitage did not file a petition for review of the previously-affirmed citation with the Court of Appeals. Thus, whether a violation occurred is not before us on remand. The Commission is limited to determining whether the violation was serious.

Finally, I have considered the evidence on the appropriate penalty. See 3 BNA OSHC at 1922, 1975-76 CCH OSHD at p. 24,201 (lead opinion). In view of Hermitage's good faith, lack of a history of previous violations, medium size, and the low gravity of the violation, I would assess no penalty.

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

March 23, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Stacey Manufacturing, Inc.

OSHRC DOCKET NO. 76-1656

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

- Counsel for Regional Litigation
  Office of the Solicitor, USDOL
  200 Constitution Ave., NW. - Rm. S-4014
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- William S. Kloepfer, Esq.
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  Cleveland, Ohio 44199

FOR EMPLOYER

- J. E. McArdle, Operation Mgr.
  The Stacey Manufacturing Co.
  259 Township Ave.
  Cincinnati, Ohio 45216

FOR EMPLOYEES

-

Judge Louis G. LaVecchia
OSHRC
Room 7B11
Federal Building
1100 Commerce St.
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-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>THE STACEY MANUFACTURING COMPANY,<br>Respondent. | OSHRC Docket No. 76-1656 |

DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE Commissioners.

BY THE COMMISSION:

A decision of Review Commission Judge Louis G. LaVecchia is before the Commission for review under 29 U.S.C. § 661(i), section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651-678 ("the Act"). Judge LaVecchia affirmed two items of a citation issued by the Secretary of Labor ("Secretary") alleging that Respondent, Stacey Manufacturing Company ("Stacey"), violated section 5(a)(2) of the Act by failing to comply with the machine guarding standards at 29 C.F.R. §§ 1910.212(a)(1) and 1910.212(a)(3)(ii). The judge characterized the two violations as serious and assessed penalties of $60 and $30. For the reasons that follow, we vacate item 5 of the citation, alleging noncompliance with 29 C.F.R. § 1910.212(a)(1), but affirm item 11 of the citation alleging noncompliance with 29 C.F.R. § 1910.212(a)(3)(ii).

I

Stacey is a manufacturer of steel products, including pressure vessels. It has no regular line of products but custom-makes its products to the purchaser's

requirements. Item 5 of the citation alleges a violation of 29 C.F.R. § 1910.212 (a)(1) 1/ in that Stacey failed to provide guarding on a Cincinnati shear that would prevent the operator's hand from accidental contact with the blades and the material hold-downs.

The shear is used to cut steel plate to the required size. A horizontal pipe and two parallel bars running the length of the bed of the shear separate the operator of the machine from the cutting blade. The distance between the surface on which the steel plates are positioned and the pipe is 1 inch. The distance between the pipe and middle bar is 1-3/8 inches, and between the middle and upper bars is 1-5/8 inches. Between the pipe and bars and the blade is a vertically-moving hold-down device, part of which consists of a round metal pad three inches in diameter that descends to hold the steel plates in position for cutting. The distance between the pipe and the hold-down device is 1-5/8 inches. Between the pipe and the blade, the distance is 5 1/4 inches. To operate the shear, the operator places a steel plate on the bed and slides it under the pipe and metal bars. The pipe moves upwards a little to let the steel plate pass underneath. By depressing a pedal, the operator activates the machine. First, the hold-down devices descend to hold the steel plate in place; then the blade descends and cuts the steel plate.

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1/ The standard states:

> General Requirements for all machines
>
> (a) Machine guarding-(1) Types of guarding. One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are-barrier guards, two-hand tripping devices, electronic safety devices, etc.

The compliance officer testified that despite the presence of the pipe and bars, it was possible for the operator to insert his hand or fingers into the spaces between the bars and between the bars and the pipe, where they could be crushed or severed by the descending hold-downs or blades. There was no evidence that any work operation required an employee to put any part of his body under or between the bars, nor is there a history of injuries on the cited shear.

The compliance officer also testified that the point of operation on the shear could be guarded with a piece of plexiglass or hardware cloth (wire screen) at minimal cost. Stacey's operation manager did not deny that plexiglass or hardware cloth could be used to guard the point of operation, but he testified that the use of plexiglass would impair the operator's vision because of dust accumulation. He also testified that the plexiglass would constantly have to be replaced because the steel plates, which are up to twelve feet square and may weigh over a ton, would bang the plexiglass and cause it to break. The plates must be lifted with a crane, and it is impossible to keep them from swinging and smashing a plexiglass guard.

Item 11 of the citation alleged a violation of 29 C.F.R. § 1910.212 (a)(3)(ii) 2/ in that Stacey failed to guard the point of operation of a hole punch machine. A penalty of $30 was proposed by the Secretary. The punch had two dies, one above the other, and stationary hold-down devices to hold in place

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2/ Section 1910.212(a)(3)(ii) provides:

> The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

the material to be punched. The lower die had a 1/2 inch opening, which could be adjusted to 1-1/4 inches. The upper die would travel 1-1/4 inches downward to punch the metal resting on the lower die. During the normal operation of the hole punch, the operator would position both hands on the material to be punched and hold it in place before he stepped on the treadle. During this operation, the operator's hands would be located inches from the point of operation.

Stacey's shop steward admitted that the operator could punch his hand or finger while the punch traveled downward to punch the metal, although he expressed the opinion that the likelihood of such an accident was small. The compliance officer testified that the point of operation on the hole punch could be guarded by a piece of plexiglass or hardware cloth at minimal cost.

The judge found Stacey in violation of both standards. He concluded that neither machine was properly guarded, and that the operators of both machines were exposed to injury.

In its brief on review, Stacey advances three reasons for the reversal of the judge's decision. First, it maintains that the pipe and bars, known in the industry as "awareness guarding," properly guarded the shear because awareness guarding is a "method of machine guarding" within the meaning of section 1910.212 (a)(1). It also claims that it satisfied the requirements of ANSI B11.4-1973, Requirements for the Construction, Care, and Use of Shears, a standard published by the American National Standards Institute (ANSI). 3/ Stacey contends that ANSI standards provide acceptable methods of complying because 41 C.F.R. § 50-204. 2(a), a regulation issued under the Walsh-Healey Public Contracts Act, 41 U.S.C. §§ 35-45, provided:

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3/ At the hearing Stacey's safety manager stated that its shear should have been cited under 29 C.F.R. § 1910.212(a)(3)(ii) and that ANSI B11.4(1973) was, under the terms of that section, an "appropriate standard therefor."

> Every contractor shall protect the safety and health of his employees with the applicable standards, specifications and codes developed and published by the following organizations: . . . American National Standards, Inc.

This provision was amended on May 29, 1971. 36 Fed. Reg. 9868 (1971).

Second, Stacey contends that the evidence does not sustain a violation of section 1910.212(a)(3)(ii) as to the hole punch because the compliance officer never saw the hole punch in operation and there was no employee near the machine during the inspection. Stacey argues that in the absence of first-hand testimony from the compliance officer as to how the machine worked and the manner in which employees were exposed to injury, no accurate determination of whether the operator was exposed to injury can be made.

Third, Stacey contends that the Secretary's post-hearing brief was not timely filed with the judge. It contends that this failure to comply with Commission Rule 76, 29 C.F.R. § 2200.76, 4/ provides sufficient grounds for vacation of the items in issue.

II

Stacey's reliance on ANSI B11.4-1973 raised the issue of whether the phrase "any appropriate standard therefor" in section 1910.212(a)(3)(ii) refers to ANSI standards, especially ANSI standards such as B11.4-1973, that were issued after

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4/ The rule provides:

> Rule 76 Filing of briefs and proposed findings with the Judge; oral argument at the hearing.
>
> Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. Any party shall be entitled, upon request made before the close of the hearing, to file a brief, proposed findings of fact and conclusions of law, or both, with the Judge. The Judge may fix a reasonable period of time for such filing, but such initial period may not exceed 20 days from the receipt by the party of the transcript at the hearing.

the promulgation of section 1910.212. In order to allow the parties an opportunity to address that issue, and other collateral issues, the Commission issued an order requesting briefs on those issues.

In response to the briefing order, the Secretary contends that ANSI standards are not incorporated by reference in section 1910.212. He claims that the terms, "appropriate standards" and "applicable specific standards," used in section 1910.212(a)(3)(ii) are synonomous. He cites Kroehler Mfg. Co., 78 OSAHRC 88/B9, 6 BNA OSHC 2045, 1978 CCH OSHD ¶ 23,110 (No. 76-2120, 1978). However, the Secretary also noted that because section 1910.212 is a performance standard, ANSI standards could serve as possible guarding guidelines. The Secretary stated that "OSHA will treat violations of certain standards as de minimus if the employer has complied with an updated material consensus standard which provides safety and health protection equal to or greater than the protection provided by the OSHA standard."

The Secretary suggests that 41 C.F.R. § 50-204.5(c)(2), which is the source of 29 C.F.R. § 1910.212(a)(3)(ii), indicates that the only standards of private organizations incorporated by reference into Part 1910 were specific national consensus standards either published in Part 1910 or explicitly incorporated by reference there. He argues that ANSI B11.4-1973 was not issued by ANSI until after the expiration of the two year period during which the Secretary was empowered to promulgate standards under section 6(a) of the Act and thus he could not have promulgated it as an OSHA standard unless the rulemaking requirements of section 6(b) were met. Stacey did not reply to the briefing order.

III

We first examine Stacey's claim that by complying with ANSI B11.4-1973, it provided "[o]ne or more methods of machine guarding . . . to protect the operator . . . from [machine] hazards . . ." within the meaning of section 1910.212(a)(1).

Section 1910.212 is to be read as a whole and its provisions, particularly sections 1910.212(a)(1) and (a)(3)(ii), are to be construed together. Hughes Brothers, Inc., 78 OSAHRC 65/A2, 6 BNA OSHC 1830, 1833, 1978 CCH OSHD ¶ 22,909, p. 27,717 (No. 12523, 1978). See also Consolidated Aluminum Corp., 80 OSAHRC 125/A2, 9 BNA OSHC 1144, 1156, 1981 CCH OSHD ¶ 25,069, p. 30,976 (No. 77-1091, 1980), appeal filed, No. 81-3079 (6th Cir. February 16, 1981). Thus, although Stacey is alleged to have violated the more general, introductory requirement of section 1910.212(a)(1) rather than section 1910.212(a)(3)(ii), we will analogize to the latter provision in evaluating Stacey's argument.

Section 1910.212(a)(3)(ii) permits employers to comply with "any appropriate standards therefor" instead of providing point-of-operation guarding in conformance with that section's performance criterion. We have recently held that an "appropriate standard" within the meaning of section 1910.212(a)(3)(ii) means standards either published or incorporated by reference in 29 C.F.R. Part 1910. George Christopher & Sons, Inc., OSHRC Docket No. 76-647 (February 26, 1982). Inasmuch as sections 1910.212(a)(1) and (a)(3)(ii) are to be construed similarly, it follows that a "method of machine guarding" permitted by section 1910.212(a)(1) must be a method permitted by one of the standards published or incorporated by reference in 29 C.F.R. Part 1910, including the performance criteria of sections 1910.212(a)(1) and 1910,212(a)(3)(ii). Inasmuch as ANSI B11.4-1973 is neither published nor incorporated by reference in 29 C.F.R. Part 1910, we cannot conclude that providing guarding in accordance with ANSI B11.4-1973 necessarily means that one has provided "one or more methods of machine guarding . . . to protect the operator . . . from [machine] hazards . . . ."

In order to establish a violation of 29 C.F.R. § 1910.212(a)(1), the Secretary must first prove the existence of a hazard. A.E. Burgess Leather Co., 77

OSAHRC 25/D6, 5 BNA OSHC 1096, 1977-78 CCH OSHD ¶ 21,573 (No. 12501, 1977), aff'd, 576 F.2d 948 (1st Cir. 1978). We conclude that the Secretary has failed to do so.

Stacey's employees could be injured by the hold downs and blade on the shear only if they put their hands under the bottom bar or through the other openings. That it is not impossible for an employee to put his hand under the hold-down or blade does not demonstrate that the employee was exposed to injury. See Rockwell International Corp., 81 OSAHRC 118/A2, 9 BNA OSHC 1092, 1097, 1980 CCH OSHD ¶ 24,979, p. 30,846 (No. 12470, 1980). Whether a machine presents a hazard must be determined by how the machine functions and how it is operated by the employees. See id. Here, the material to be cut is not hand-held, the employees have no reason to put their hands under the blade or the hold-downs, and their ability to inadvertently reach the blades and the hold-downs is greatly restricted by the pipe and the horizontal bars. Under these circumstances, we conclude that no hazard requiring further guarding under section 1910.212(a)(1) has been shown with respect to the shear. Item 5 is therefore vacated.

With respect to the hole punch, we reject Stacey's contention that the failure of the compliance officer to see the machine in operation or operated by one of Stacey's employees is fatal to the Secretary's case. The cited standard, section 1910.212(a)(3)(ii), requires that the point of operation of a machine be guarded if the operator is exposed to injury, and that the guarding device be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle. Stacey's hole punch machine has no point of operation guard. The upper die descends during the operating cycle 1 1/4 inches to the lower die and there is nothing to prevent the operator's hands from entering the point of operation during the operating cycle. The operator's hands were inches from the point of operation and Stacey's shop

steward testified that the operator could punch his hand or finger. There is abundant evidence to establish that employees were exposed to a point of operation hazard and that the point of operation was unguarded. 5/

Finally, Stacey contends that the two items in issue should be vacated because the Secretary failed to timely file his post-hearing brief. Stacey did not raise this issue before Judge LaVecchia. The issue is not jurisdictional. The Commission will generally not consider nonjurisdictional issues that have not been raised before the administrative law judge. Gulf Stevedore Corporation, 77 OSAHRC 135/E11, 5 BNA OSHC 1625, 1977-78 CCH OSHD ¶21,975 (No. 76-826, 1977). Moreover, Commission Rule 92(d), 29 C.F.R. § 2200.92(d), states that "except in extraordinary circumstances, the Commission's power to review is limited to issues of law or fact raised by the parties in the proceedings below." There are no extraordinary circumstances here. In addition, we note that Stacey did not file a petition for review raising this issue.

IV

Stacey employs between 150 and 180 people, does not have a history of violations and has demonstrated good faith in attempting to guard its machines. With respect to the gravity of the violation, we note that one employee was exposed to the violation, and that the consequence of an accident would have been severe. We conclude that under section 17(j) of the Act, 29 U.S.C. § 661(i), the judge's assessment of $30 was appropriate.

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5/ To the extent that Stacey's argument encompasses more an objection to the reliability of the compliance officer's testimony, we observe that it is not necessary for the compliance officer to observe employee exposure to a hazard. It is sufficient to establish that employees have been or will be exposed, Circle Industries Corp., 76 OSAHRC 121/F4, 4 BNA OSHC 1724, 1976-77 CCH OSHD ¶ 21,119 (No. 4356, 1976); see General Electric Co., 80 OSAHRC 9/B9, 7 BNA OSHC 2183, 2185 n.6, 1980 CCH OSHD ¶ 24,268, p. 29,552 n.6 (No. 15037, 1980), or that the machine is available for use in a defective condition. Harold Christiansen and Harold W. Christiansen d/b/a Palmer Christiansen Co., 76 OSAHRC 39/D10, 4 BNA OSHC 1020, 1975-76 CCH OSHD ¶ 20,517 (No. 3108, 1976).

Accordingly, the judge's decision is reversed in part and affirmed in part. Item 5 of the citation, as it pertains to the Cincinnati shear, is vacated. Item 11 of the citation, alleging a failure to guard the hole punch, is affirmed. A penalty of $30 is assessed for item 11.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: MAR 23 1982

ROWLAND, Chairman, concurring in part and dissenting in part:

I agree with the majority that the Secretary has not shown that the point of operation of the shear presents a hazard and that item 5 of the citation should therefore be vacated. For this reason, it is unnecessary to consider at this time whether guarding that accords with ANSI B11.4-1973 is a "method . . . of machine guarding" within the meaning of 29 C.F.R. § 1910.212(a)(1), and whether sections 1910.212(a)(1) and (a)(3)(ii) should be read together. Accordingly, I do not join in the majority's discussion and resolution of those issues.

With respect to the punch press at issue in item 11, I disagree with the majority's holding that Stacey failed to comply with section 1910.212(a)(3)(ii). The evidence does not demonstrate that the operator was exposed to injury within the meaning of that standard. The compliance officer speculated that there was a possibility of accidental operation when the dies on the punch were at their maximum separation. But there was no evidence to suggest that any work process on the hole punch would require an employee to put his hand or finger into the point of operation; nor was there testimony as to how close the operator's hand came to the point of operation. Although one of the exhibits shows the operator holding the stock with his hand near the point of operation, the operator stands to the side of the point of operation, grips the stock with both hands, and feeds it into the point of operation. The material hold-downs are between the operator and the point of operation at all times. Therefore, the operator is protected from the dies by the hold-downs and his placement of both hands on the stock. The majority relies on the testimony of Mr. Grout, Stacey's shop steward, to support the proposition that an operator could be injured. However, Mr. Grout's testimony was wholly conjectural. Mr. Grout was responding to a hypothetical question that assumed that the operator would have his hands in the point of

operation; [1/] yet, this assumption is, as I have said, unsupported by the record. Indeed, Mr. Grout testified that in normal operation the machine was not hazardous.

The Commission has held that the way a machine functions and the manner in which it is operated by employees must be considered in determining whether it presents a hazard. See Rockwell International Corp., 81 OSAHRC 118/A2, 9 BNA OSHC 1092, 1097, 1980 CCH OSHD ¶ 24,979, p. 30,846 (No. 12470, 1980). There is nothing in the record to indicate that either the manner in which the machine functioned or the way it was operated exposed the operator to injury within the meaning of section 1910.212(a)(3)(ii). Accordingly, I would vacate item 11.

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1/ The witness testified as follows:

> Q. Mr. Grout, if one accidentally placed his hand under the punch before the material were inserted and also accidentally mashed the pedal, could one get his hand punched under that machine, his finger?
> A. It's a possibility, but it seems very doubtful to me.
> Q. But it can happen, can't it?
> A. Anything can happen. I mean --
> Q. Anything can happen?
> A. -- on anything, I suppose.
> Q. Let me go into that. But it can conceivably happen, can't it?
> A. It's possible, yes.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, Complainant, | : | |
| v. | : | DOCKET NUMBER 76-1656 |
| THE STACEY MANUFACTURING COMPANY, Respondent. | : | |

APPEARANCES:

Ronald J. Arrington, Esq., of Cleveland, Ohio for the Complainant.

J. G. McArdle, of Cincinnati, Ohio (Non-Attorney) for the Respondent.

Milton Grout (Non-Attorney), Union Representative

DECISION AND ORDER

LaVecchia, Judge, OSHRC:

This proceeding arises under Section 10 of the Occupational Safety and Health Act of 1970 (29 U.S.C. §651, et seq.), hereafter referred to as "the Act."

By citation issued March 17, 1976 complainant alleged that respondent violated Section 5(a)(2) of the Act through a failure to comply with safety standards published at 29 C.F.R. 1910.212(a)(1) and

29 C.F.R. 1910.212(a)(3)(ii), more specifically described below. A formal notice of contest was filed to the merits of the charges, and to the proposed penalties of $60 and $30 respectively on these standards, cited as violations under Items 5 and 11 of the citation.

The citation was issued as a result of an inspection of respondent's factory in Cincinnati, Ohio, on March 8, 1976. The hearing was held on August 4, 1976 in Cincinnati. Post-hearing briefs were filed by the parties.

THE VIOLATIONS CHARGED

The alleged violation of 29 C.F.R. 1910.212(a)(1) was described in the citation as follows:

> "Failure to provide machine guarding to protect the operator and other employees in the area from hazards such as those created by point of operation, ingoing nip points, rotating parts, and flying chips and sparks. e.g. Cincinnati shear in building #2 did not have point of operation guarded in that openings in the guard and under the guard permitted access to the shearing blades and material hold downs. * * *

This safety standard provides:

> "(a) Machine guarding - (1) Types of guarding. One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are--barrier guards, two-hand tripping devices, electronic safety devices, etc."

The alleged violation of 29 C.F.R. 1910.212(a)(3)(ii) was described in the citation as follows:

> "Failure to guard the point of operation of machines whose operation exposes an employee to injury. The guard shall conform with appropriate standards, or be

constructed so as to prevent the operator from having any part of his body in the danger zone during operating cycle. e.g. Point of operation on Long and Allstatter hole punch #U508 in building 2-A was not guarded from operator contact."

This safety standard provides:

"(a) [Same as above] (3)(ii) The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle."

THE ISSUES

With respect to 29 C.F.R. 1910.212(a)(1) two questions arise: (1) Did respondent provide a guard for the Cincinnati Shear which was adequate to prevent an employee from cutting his hand or fingers, or suffering the amputation thereof, by the shear blade? (2) Did respondent provide a guard for the Cincinnati Shear which was adequate to prevent an employee from pinching, or otherwise injuring his hands or fingers on the hold-down devices?

With respect to 29 C.F.R. 1910.212(a)(3)(ii) the question is whether respondent provided a guard for the Allstatter Hole Punch which was adequate to prevent an employee from pinching or otherwise injuring his hands or fingers. Secondarily, does the material itself form a guard for the operator, as insisted by respondent?

It is my opinion that all of these questions must be answered adversely to the contentions of respondent.

## SUMMARY OF RELEVANT EVIDENCE

Respondent has a plant in Cincinnati, Ohio. It is a custom manufacturer of pressure vessels and other equipment used principally in the manufacture of steel. Its products are fabricated from steel plates, and it ships and receives products and materials in interstate commerce. (Tr. 39,40). It does not have a product line, but performs a job-shop operation. (Tr. 55,56). Its gross revenues in 1975 were about $6 million. (Tr. 44).

Respondent uses a Cincinnati Shear in its operations for cutting steel plates to the required size. The shear has a 12-foot bed. (Tr. 8). (Exhs. C-1,2,3). The steel plating fed into the shear ranges from flat bar to wide plate 12 feet in width. Heavy items are handled by overhead crane. (Tr. 41). Respondent designed and manufactured a guard for the machine after consulting with manufacturers of shear machines. (Tr. 47). The guard utilized by respondent at the time of the inspection runs the length of the shear, resembling a grid or grate, consisting of horizontal tubes or bars connected at about one-foot intervals to vertical bars. The bottom bar floats free to a small degree in order to permit passage of different thicknesses of steel plate beneath it. Steel plate normally does not exceed 3/4" in thickness, but aluminum sheets up to 1-1/2" thick can be fed under the floating bottom bar. (Tr. 54). The opening between the bottom bar and the next higher bar is 1-3/8" high, and the corresponding distance between the middle bar and the upper bar is 1-5/8". The shearing blade is behind the bars, approximately 5-1/4" from the center line of the bars. Directly behind the bars are hold-down devices, in the form of

pedestals, which descend to hold the steel plate in place while the cutting operations are performed. These are located at about one-foot intervals, corresponding with the vertical bars. They are 1-5/8" behind the horizontal bars, and measure approximately 3" in diameter at the holding foot. (Stipulations - Tr. 9-17).

In operating the shear, the machine operator feeds the steel plate into the opening between the lower bar and the bed of the shear. He then steps on a treadle, which activates first the hold-down devices, descending to hold the plate, and then the shear blade for the actual cutting of the metal. (Tr. 18). Crane-assisted feeds ultimately result in the final guidance by the machine operator of the material into the machine. Because of the weight of some of the steel plates being cut, some bumping of material against the guard is inevitable. (Tr. 45,46).

Respondent also utilizes a Long and Allstatter hole punch in its operations. (Tr. 23). It punches holes in metal, and the bed can be lowered to a point where there is an opening of 1-1/2 inches between the male and female dies. (Tr. 26). No guard whatsoever was being used by respondent at the time of the inspection. The material fed into this machine varies from flat metal bars to angles, in various sizes. Sometimes a crane must be used to assist in feeding the material into the machine. It is foot-pedal operated, with the operator normally using both hands for positioning the material before striking the foot-pedal. (Tr. 61-67). (Exh. R-2).

## DISCUSSION AND CONCLUSIONS

It appears clear to me that respondent violated both of the considered standards in accordance with the charges contained in the citation. The guard it was using for protecting employees from the hazard presented by the shear machine was simply not adequate to prevent the accidental insertion of fingers, hands, or other parts of the body into the danger zones presented not only by the cutting blade of the shear, but the hold-down devices up forward of the blade. There is a difference in the hazards presented by the two, with the cutting blade being the far more dangerous, i.e., the high risk of amputation, but the crushing hazard presented by the hold-down pedestals is formidable in itself. Respondent contends that plexiglass coverings or curtains installed in front of the guard would be subject to scratch and other type injuries from the crane-fed plates, thus obscuring the vision of the machine operator with respect to the cut-line on the material. And it suggests that plexiglass is difficult to keep clean in a boiler shop, because of the generation of substantial dust. These are legitimate observations, but there appear to be other alternatives which have not been investigated fully by respondent, e.g., mesh wire, electronic trips, two-hand actuating buttons, etc. Economic feasibility has been over-emphasized by respondent, in my opinion, to the disadvantage of the safety factor. In any contest between the two, in the circumstances here shown, the latter must prevail. Largely the same reasoning applies to the hazard presented by the hole punch. Here, the violation is more patent, in that no guard of any kind was being utilized to prevent the operator from

accidentally inserting his finger between the two dies and suffering a pinching or crushing type of injury. Respondent contends that the material being fed into the hole punch machine fills the gap to such an extent that it effectively guards against any such injury. This may be true under certain circumstances, but there is no doubt in my mind that the machine operator is exposed to the hazard of an accidental injury at the point of operation before, during, and after the feeding of material into the machine. This contention must be rejected.

In view of all of the evidence of record, the material facts being essentially undisputed, it is specifically found that respondent was, on the cited date, in violation of the two safety standards here considered.

I further conclude that the violations were properly categorized as "serious" within the meaning of Section 17(k) of the Act (29 U.S.C. §666(j)).[1/] A finding of "seriousness" is not to be predicated upon the likelihood that an accident will occur, but upon the probability of serious harm should one occur.[2/] The probability of serious injury is clearly evident in the situations presented here.

The matter of the proposed penalties has been reviewed in the light of the four factors to be weighed under Section 17(j) of the Act (29 U.S.C. §666(i)), i.e., respondent's size, good faith, history of violations, and cooperativeness. The proposed penalties of $60 and $30 on Items 5 and 11 respectively are found to be proper in the circumstances shown.

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1/ 29 U.S.C. §666(j) provides that a serious violation shall be deemed to exist if there is a substantial probability that death or serious physical harm could result from a condition, unless the employer did not, or could not, with the exercise of reasonable diligence, know of the presence of the violation.

2/ See Secretary v. Standard Glass & Supply Co. 2 OSAHRC 1488 (1973).

## CONCLUSIONS OF LAW

Upon the entire record, and consistent with the foregoing discussion and findings found therein, I conclude:

1. That the Review Commission has jurisdiction to hear and decide this cause.

2. That on March 8, 1976 respondent was in violation of the safety standard set forth at 29 C.F.R. 1910.212(a)(1), as charged under Item 5 of the citation issued on March 17, 1976.

3. That on the same date respondent was in violation of the safety standard set forth at 29 C.F.R. 1910.212(a)(3)(ii), as charged under Item 11 of the same citation.

4. That in both instances the violations found were "serious" within the meaning of 29 U.S.C. §666(k).

5. That, due consideration having been given the criteria set forth at 29 U.S.C. §666(i), civil penalties of $60 on Item 5, and $30 on Item 11 are reasonable and appropriate for the specified violations.

## ORDER

1. Items 5 and 11 of the citation are affirmed.

2. Civil penalties of $60 and $30, totaling $90, are hereby assessed against the respective violations.

So ORDERED.

Louis G. LaVecchia
Judge, OSHRC

Dated: February 15, 1977

Chicago, Illinois.

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

March 24, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Wenczel Tile Company, Respondent.
R. T. Vanderbilt Company, Intervenor.

OSHRC
DOCKET NO. 77-2039

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

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FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | |
| WENCZEL TILE COMPANY, | : | OSHRC Docket No. 77-2039 |
| Respondent. | : | |
| R. T. VANDERBILT COMPANY, | : | |
| Intervenor. | : | |
| | : | |

DECISION

Before: ROWLAND, Chairman; CLEARY, Commissioner.[1/]

BY THE COMMISSION:

The Secretary of Labor alleges that Wenczel Tile Company ("Wenczel") violated several provisions of the asbestos standard at 29 C.F.R. § 1910.1001. The Secretary contends that an industrial talc, NYTAL 99, produced by the Intervenor, R. T. Vanderbilt Company, and used by Wenczel, contains asbestos fibers and that Wenczel was therefore required to affix caution labels to containers of NYTAL 99, monitor its workplace for asbestos fibers, and provide medical examinations for its employees exposed to airborne asbestos fibers. Administrative Law Judge Paul L. Brady found that NYTAL 99 contains asbestos fibers, but he vacated the citation upon finding that Wenczel did not and could not, with reasonable

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*/ Commissioner Cottine took no part in the consideration or decision of this case.

diligence, have known of the presence of asbestos fibers in its workplace. The judge also found that the Secretary had not proven that Wenczel failed to monitor its workplace for asbestos fibers.

We adopt the judge's finding that asbestos fibers were present in the NYTAL 99 used by Wenczel. The judge properly weighed the evidence on this issue and his finding is supported by the preponderance of the evidence. We also conclude that the judge correctly found that Wenczel did not and could not, with reasonable diligence, know of the presence of asbestos in its workplace. We adopt the judge's reasoning on this issue.[1/] We note that, since the judge issued his decision, the Commission has reaffirmed its precedents holding that a citation cannot be affirmed absent proof that the employer did not and could not, with reasonable diligence, know of a violation. Prestressed Systems, Inc., 81 OSAHRC 43/D5, 9 BNA OSHC 1864, 1981 CCH OSHD ¶ 25,358 (No. 16147, 1981); General Electric Co., 81 OSAHRC 42/A2, 9 BNA OSHC 1722, 1981 CCH OSHD ¶ 25,345 (No. 13732, 1981).

We do not rule on the Secretary's contention that the principle of collateral estoppel cannot justify the vacation of the citation. The

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1/ One year before the alleged violations in this case occurred, Wenczel had received citations alleging violations of the asbestos standard in another area of its plant. The earlier citations also arose out of Wenczel's use of NYTAL 99. The earlier citations were resolved in a settlement agreement, in which the Secretary agreed to delete all allegations that Wenczel violated the asbestos standard and Wenczel agreed to an amendment of the citation to allege that it had violated a standard regulating "fibrous talc." There is no indication in the record, and the Secretary does not suggest, that anything in the settlement negotiations or anything that transpired between the settlement agreement and the alleged violations in this case put Wenczel on notice that the Secretary continued to believe that NYTAL 99 contained asbestos despite his agreement to delete the asbestos standard allegations in the earlier citations. Judge Brady concluded that Wenczel was justified in relying on the settlement agreement and could not be found to have actual or constructive knowledge that asbestos was present in its plant.

judge did not rely on collateral estoppel, and the judge's basis for his disposition - that Wenczel did not and could not, with reasonable diligence, know of the presence of asbestos fibers - is factually correct and legally sufficient to support the judge's disposition. Additionally, because the citation is properly vacated on the knowledge issue, we need not decide whether the Secretary's evidence that Wenczel failed to monitor for asbestos fibers is sufficient.

Accordingly, the judge's decision is affirmed. SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: MAR 24 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 400

ATLANTA, GEORGIA 30309

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| SECRETARY OF LABOR, | ) | |
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| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 77-2039 |
| | ) | |
| WENCZEL TILE COMPANY OF FLORIDA, INC., | ) | |
| | ) | |
| Respondent, | ) | |
| | ) | |
| R. T. VANDERBILT CORPORATION, | ) | |
| | ) | |
| Intervenor. | ) | |

DECISION AND ORDER

APPEARANCES: Allen J. Rapoport, Esquire
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BRADY, Judge: This proceeding is brought pursuant to section 10 of the Occupational Safety and Health Act of 1970 (Act) to contest a citation and notification of proposed penalty issued June 10, 1977. It is alleged that as a result of an inspection of respondent's workplace located at 6608 South Westshore Boulevard, Tampa, Florida, respondent violated section 5(a)(2) of the Act by failing to comply with specific occupational safety and health standards promulgated by the Secretary pursuant to section 6 thereof.

The inspection on April 13-18, 1977, gave rise to issuance of the citation alleging violation of certain provisions under 29 C.F.R. 1910.1001 (the asbestos standard). Respondent is charged with failure to monitor its workplace to determine employee exposure to asbestos fibers, failure to affix caution labels on materials containing asbestos fibers, and failure to provide employees with medical examinations relative to asbestos exposure.

Due to the nature of the alleged violations it is first necessary to resolve the basic issue of whether asbestos was actually present in the workplace. Complainant maintains that bulk powder and filter membrane samples taken during inspection of the tile manufacturing facility, revealed the presence of asbestos fibers as defined by the standard. Respondent contends that through the methods and criteria employed, complainant has failed to accurately identify asbestos fibers for the purposes of this case.

A review of the evidence in this regard is therefore warranted. The record shows that during the inspection air samples were collected

through the use of a pump device which drew air over a filter membrane. Particles remaining on the membrane were subsequently analyzed. It is also shown that small quantities of raw materials gathered by the inspecting officer constituted the bulk powder samples.

The samples were analyzed by microscopic methods consisting of phase contrast microscopy, dispersion staining and transmission electron microscopy, including the application of selected area diffraction patterns, and x-ray dispersive analysis (Tr. 111-120, 281-284, Exhs. C-8 and C-11).

Phase contrast microscopy is the standard method of analysis for asbestos fibers. It is described as a form of of optical light microscopy which enables an analysist to ascertain the shape of fine particles including fibers. Used in combination with polarized light and first-order red retardation plates, a type of fiber can be further determined (Tr. 114-115).

Dispersion staining is an optical microscopic technique through which a mineral can be determined by suspending it in an immersion media that has a known index of light refraction, and observing the color that the substance emits (Tr. 115-117, 283-284 and Exh. C-11). Transmission electron microscopy uses a beam of electrons which highly magnifies a particle under examination and produces a selected area diffraction pattern. This can be used to determine the distance between planes of atoms which are characteristic of a particular material (Tr. 118-120, 281-282, 361, 363, Exh. C-11). The evidence

indicates x-ray dispersive analysis is used as an adjunct to the electron microscope. It results in the production of wave lengths or energy characteristic of the element present, and will in that capacity conclusively identify the mineral under examination (Tr. 118-120, 281-282, Exh. C-11).

Mr. Willard Dixon, an expert in optical microscopy, analyzed bulk samples using the dispersion staining method and determined that fibers of tremolite and anthophyllite were present in samples identified as A3805, A3806, A3807 (Tr. 132-144, Exh. C-8). Mr. Dixon also analyzed filter samples using the phase contrast method and found the presence of asbestos fibers on filter sample nos. A3751-A3778 (Tr. 130-132, 145, 149, Exh. C-9). His analysis of the filter samples confirmed the presence of fibers as found by another analyist (Tr. 130-132, 158-159, Exhs. C-7 and C-9).

Mr. Ian Stewart, an expert in the field of electron and optical microscopy, also analyzed both types of samples (Tr. 161-162, 290, Exh. C-11). Through electron microscopy with selected area diffraction and x-ray dispersive analysis he found asbestos fibers present on bulk samples A3805 and A3807 (Tr. 236, 239, Exh. C-11). This same method performed on filter samples A3754 and A3753, also revealed the presence of asbestos fibers (Tr. 354, 358, Exh. C-11). Dispersion staining performed on bulk samples A3805-A3807, and on the filter samples A3761 and A3776 resulted in Mr. Stewart finding asbestos fibers (Tr. 324, 326, 334, 339, Exh. C-11).

In spite of respondent's contention of unreliable analyses, and questionable results, complainant's two expert witnesses testified that analyses conclusively showed the presence of anthophyllite and tremolite asbestos fibers, within the meaning of the asbestos standard (Tr. 268, 326-327, 345-346). Therefore, it is argued by complainant that between April 13 and April 18, airborne asbestos fibers were present at respondent's workplace.

Respondent's primary thrust was directed toward establishing complainant's failure to adequately determine whether the samples in question contained asbestos fibers or talc fibers within properly defined terms. The record clearly reflects the problems associated with analyzing samples for asbestos, and the difficulty in distinguishing asbestos fibers from talc fibers due to great similarities.

Witness Dixon admitted that fibers counted on the membrane included both talc and asbestos, and the percentage figure captioned "asbestos" on the filter paper contained talc (Tr. 246-248). It was also admitted that with use of dispersion staining the mineral wollastonite would stain the same color as tremolite. Also, the x-ray diffraction technique was not performed which could have revealed whether wollastonite was present. In his expert opinion, however, the witness did not believe wollastonite was identified as anthophyllite (Tr. 252-253).

Witness Stewart admitted that with the amphibole identification used, the mineral cummingtonite could have been reflected in the

testing, but further analysis convinced him of the presence of anthophyllite (Tr. 358, 363).

Respondent points out that the dispersion staining analysis performed by Dixon found the presence of tremolite asbestos in samples A3805 and A3807, while Stewart testified that using electron microscopy he found anthophyllite but was not conclusively able to find tremolite fibers in the samples (Tr. 326). It is therefore argued that either or both findings are faulty and lacking in credibility.

The record in this case attests to the considerable effort expended by the parties in attempting to establish the presence of asbestos fibers on one hand, and denying the fibers present were actually asbestos on the other. In addition, respondent attacks the asbestos standard and the definitions used thereunder.

"The standard does not state a method for determining the mineralogical composition of fibers found in a sample." Also, the type methods used by the Secretary in analyzing the samples for asbestos fibers have been held acceptable by the Commission. The Commission has also noted that its function does not include reviewing the wisdom of a standard wherein certain minerals are regulated as asbestos. See Secretary v. Borg Warner, Docket No. 10757, 78/18/A2 (February 22, 1978).

The aspect of this case relating to the presence of asbestos is resolved by the testimony of the Secretary's two expert witnesses.

They found, through acceptable methods of analyses that the samples contained asbestos fibers within the definition of the standard. The unrebutted conclusions of the experts must prevail, in spite of respondent's strenuous efforts to impune the methods employed in arriving at such conclusions.

While most of the evidence and discussion concerning analyses of samples used to determined the presence of asbestos fibers, it must be noted that respondent was not charged with exposing employees to excessive levels thereof. The violations alleged pertain to other sections of the asbestos standard.

ALLEGED VIOLATION OF 29 C.F.R. 1910.1001(f)(1)

The standard, which pertains to initial determination of asbestos fibers, provides in pertinent part as follows:

> Within 6 months of the publication of this section, every employer shall cause every place of employment where asbestos fibers are released to be monitored in such a way as to determine whether every employee's exposure to asbestos fibers is below the limits prescribed . . .

It is alleged in the citation that initial monitoring was not conducted in the tile press, and tile inspecting areas at the plant.

The evidence of the violation was based on the inspecting officer's testimony that he was not made aware of any monitoring by the employer, although he did request such information (Tr. 92).

It must necessarily be held that this testimony standing alone is insufficient to prove that no monitoring took place in violation of the clear provisions of the standard. Complainant,

therefore, failed to carry its burden in proving no monitoring occurred, as the burden in no way shifts to respondent to prove otherwise.

The clear language of the standard presupposes that asbestos fibers are released in the workplace. The question, therefore, arises as to what constitutes sufficient notice to an employer that his place of employment comes within the scope of the standard, and thus should undertake the required monitoring. In this regard another point must be considered in the decision of this case.

A citation was previously issued respondent on April 14, 1976, alleging certain violations under the asbestos standard including those that are the subject of this proceeding (Exh. R-9). Subsequently, the parties entered into a settlement agreement which provided for deletion of all allegations respondent violated any provisions of the asbestos standard at its workplace, and substituted therefor was respondent's failure to reduce ceiling limits of fibrous talc to permissible levels, in violation of 29 C.F.R. 1910.1000 (Exh. R-10). Respondent withdrew its notice of contest under the terms of the agreement and was allowed a period of one year from the date of the final order to achieve compliance with the standard.

The testimony in the instant case reveals that subsequent to the settlement agreement, the Occupational Safety and Health Administration (OSHA) changed its policy, and inspecting officers were directed to sample materials such as talc, under certain conditions,

for asbestos. The directive indicated it was temporary in nature and part of an on-going study (Exh. R-2, Tr. 77 and 93).

Although it is contended the present inspection was conducted at a different part of the plant, the inspection concerned the talc ingredient of respondent's tile manufacturing process. Clearly at the time of the inspection the same raw materials and work practices were employed at the workplace.

Complainant therefore charged respondent under the same standard on two different occasions, arbitrarily subjecting respondent to varying interpretations of its standards. The facts involved are not unlike those where the doctrine of equitable estoppel should apply. Based upon the previous contractual dealings between the parties, respondent relied upon the complainant (to its detriment in withdrawing the notice of contest), and now complainant proceeds to hold it responsible for compliance under the same standard that respondent was previously led to believe did not apply.

There is no evidence that respondent had knowledge of the alleged violative conditions prior to the inspection, or with the exercise of reasonable diligence should have known. Knowledge of the existence of a violation, either actual or constructive, is an essential element of any violation of the Act. Secretary v. Mountain States Telephone & Telegraph Co., 2 OSAHRC 168 (1972), Dunlop v. Rockwell International, 54 F.2d 283 (6th Cir. 1976).

The stated purpose of the Act is to provide working men and women safe and healthful working conditions "so far as possible".

Section 5(a)(2) thereof requires that each employer "shall comply with occupational safety and health standards promulgated under this Act". Respondent herein has been in compliance with the standard it had been led to believe was controlling pursuant to agreement of the parties. Further, employees were required to use respirators for their protection during the interim period of compliance, which was in effect at the time of the second inspection.

In reference to an employer's duties under the Act, the Court in Rockwell, supra, 1291-1292, stated as follows:

> Employers are to be stimulated to institute new safety programs and improve such existing programs. The Act envisions cooperative efforts between employers, employees, researchers, and federal and state safety officials. Voluminous regulations have been prolumgated or adopted pursuant to the Act. An employer's task in attempting to comply with these regulations is formidable. It seems clear that the Act was meant to compel employers to thoroughly scrutinize their places of employment in an effort to locate and remedy hazardous conditions. . . . The employer's task is difficult enough without adding responsibility for potentially hazardous circumstances of which the employer is unaware and could not discover with the exercise of reasonable diligence. . . . The Act asks employers to make a reasonable and a diligent effort to comply with safety standards, neither the Secretary, the Commission, nor this Court can hold an employer to a higher standard.

In view of the foregoing, that part of the citation alleging violation must be vacated.

ALLEGED VIOLATION OF 29 C.F.R. 1910.1001(g)(2)(1)

The standard, which applies to caution labels, states in pertinent part as follows:

> Caution labels should be affixed to all raw materials, mixtures, scrap, waste, debris, and other products containing asbestos fibers. . .

It is alleged in the citation that caution labels as required by the standard were not affixed in the bag-pallet storage area and on portable waste bins in the tile press area. The complainant asserts that this standard becomes operative when fibers of asbestos are present in the materials which are used and handled in the work process. The testimony of the inspecting officer indicated the labeling provision of the asbestos standard was violated because there was no asbestos type labels placed on the raw materials.

Again, prior to the inspection respondent was without knowledge of the presence of asbestos in the workplace. In addition, the previous settlement agreement was in effect, which pertained to the same work practices and involved the same raw materials. Therefore, it cannot be held that with the exercise of reasonable diligence respondent should have known of the alleged violative conditions.

ALLEGED VIOLATION OF 29 C.F.R.
1910.1001(j)(2), (j)(3) AND (j)(4)

The pertinent parts of the above standards are set forth as follows:

> (2) Preplacement. The employer shall provide or make available to each of his employees, within 30 calendar days following his first employment in an occupation exposed to airborne concentrations of asbestos fibers, a comprehensive medical examination. . .

(3) Annual examinations. On or before January 31, 1973, and at least annually thereafter, every employer shall provide, or make available, comprehensive medical examinations to each of his employees engaged in occupations exposed to airborne concentrations of asbestos fibers. . .

(4) Termination of employment. The employer shall provide, or make available within 30 calendar days before or after the termination of employment of any employee engaged in an occupation exposed to airborne concentrations of asbestos fibers, a comprehensive medical examination. . .

It is alleged in the citation that the above standards were violated in the tile press area, and tile inspecting area involving tile press operators, floor clean-up men, and tile inspectors. The record is lacking in evidence upon which the violations can be sustained. The foregoing discussion with reference to this employer's knowledge of alleged violative conditions is likewise applicable here. Also it must be held that complainant has failed to prove the essential elements to establish the violations alleged.

The citation must therefor be vacated.

On June 30, 1978, respondent filed a motion to reopen the record on the basis of newly discovered evidence, and a motion to dismiss certain items of the citation.

The basis of the motion to reopen is a document captioned "Asbestos Fibers in the Air, Occupational Safety and Health Administration, Analytical Method" which is indicated as being newly discovered, and contains a different definition of asbestos from the definition contained in 29 C.F.R. 1910.1001. The document, issued May 5, 1977,

reflects on its face that it is a draft -- subject to revision, and not to be quoted or cited.

In addition to the document, and attached to the motion is a copy of a deposition for use in another case. The deponent, Director of the Analytical Laboratory in Salt Lake City, stated the purpose of the document is to provide wirtten direction for phase contrast analysis of asbestos fibers in air, and agreed that the definition of asbestos contained therein differed from the one in the Federal Register. Also, he indicated that within the laboratory, Mr. Willard Dixon has the overall responsibility for analyzing asbestos.

Respondent contends that the exhibits in support of its motion reinforces its view that the asbestos standard is unconstitutionally vague.

The documents upon which respondent's motion is based further points up the various changes in guidelines and interpretations employed by complainant in the analysis of asbestos fibers.

Certainly from a regulatory standpoint, employers are entitled to more precisely know at any given time, what is being regulated, and how it is being regulated, within the purview of a standard. However, the matters raised in the motion are not sufficient to warrant reopening the record.

It is noted that the document in question did not change any practices or policies at the laboratory prior to May 18, 1977. Further, Mr. Willard Dixon, testified in the instant case as to his

conclusive findings within the context of the asbestos standard as written.

Having read and considered respondent's motions, it must be held that the matters raised would not materially affect a decision on the issues, and are therefore denied.

FINDINGS OF FACT

1. Wenczel Tile Company of Florida, Inc., is a corporation having a place of business and doing business at 6608 South Westshore Boulevard, Tampa, Florida, where at all times hereinafter mentioned it is engaged in the manufacture of tiles and it receives goods and materials manufactured outside the State of Florida.

2. On April 14-18, 1977, authorized representatives of the Secretary conducted an inspection of respondent's workplace. As a result of the inspection, a citation was issued June 10, 1977, with notice of proposed penalties.

3. On February 17 and 18, 1976, duly authorized representatives of the Secretary conducted an inspection of respondent's aforesaid workplace, which resulted in the issuance of a citation alleging violation of the same standards as in the instant case.

4. On September 15, 1976, the parties entered into a settlement agreement, which was approved by the Commission, wherein all allegations of violations under the asbestos standard were withdrawn.

5. Subsequent to the agreement, and while it was in effect, the Secretary initiated a change of procedure regarding inspections for asbestos.

6. The inspection commencing April 14, 1977, revealed the presence of tremolite and anthophyllite asbestos in materials used in respondent's workplace, even through the type of raw materials and work practices had not changed between February 18, 1976, and April 18, 1977.

7. Respondent was without notice that materials used in the workplace contained asbestos fibers.

CONCLUSIONS OF LAW

1. Wenczel Tile Company of Florida, Inc., at all times pertinent hereto, was an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, and the Commission has jurisdiction of the parties and subject matter herein, pursuant to section 10(c) of the Act.

2. Respondent is and at all times pertinent hereto, required to comply with safety and health regulations promulgated by the Secretary pursuant to section 6(a) of the Act.

3. On April 14-18, 1977, respondent was not in violation of the standards at 29 C.F.R. 1910.1001(f)(1), 1910.1001(g)(2)(1), 1910.1001(j)(2), 1910.1001(j)(3) and 1910.1001(j)(4).

Upon the basis of the foregoing findings of fact and conclusions of law, and the entire record, it is

ORDERED: That the citation and proposed penalty are hereby vacated.

Dated this 14th day of August, 1978.

Paul L. Brady

PAUL L. BRADY
Judge

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

March 24, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

PITTSBURGH FORGINGS COMPANY

OSHRC DOCKET NO. 78-1361

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>PITTSBURGH FORGINGS COMPANY,<br><br>Respondent,<br><br>UNITED STEELWORKERS OF AMERICA, Local No. 1979,<br><br>Affected Employee Representative. | OSHRC Docket No. 78-1361 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

This case is before the Commission for review under 29 U.S.C. § 661(i), section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). The Secretary of Labor ("the Secretary") issued citations to the Respondent, Pittsburgh Forgings Company ("Pittsburgh"), alleging violations of the Act. Administrative Law Judge William E. Brennan vacated several items of the citations because the Secretary failed to comply with the judge's order to produce documents. The issue on review is whether the judge abused his discretion in resorting to the sanction of vacation under the circumstances here.

I

On May 5, 1978, Pittsburgh filed a motion for a more definite statement under Federal Rule of Civil Procedure 12(e) and Commission Rule 33(a)(2), 29

C.F.R. § 2200.33(a)(2); it also filed a broad request for the production of documents under Federal Rule of Civil Procedure 34. 1/ The judge granted the motion for a more definite statement. 2/ After more than three weeks elapsed without the filing of a more definite statement by the Secretary, Pittsburgh moved to strike items 1 and 2 of citation 1 under Federal Rule of Civil Procedure 12(e). The Secretary responded that his failure to file a more definite statement was "inadvertent and due to an inordinarily heavy workload." The response was accompanied by the Secretary's more definite statement. The judge denied Pittsburgh's motion to strike. The judge accepted the Secretary's reasons for his late filing but admonished the Secretary that "future failures to comply with Review Commission orders will not be tolerated."

As to the request for the production of documents, the Secretary had 30 days in which to respond under Federal Rule 34. When there was no response within 30 days, Pittsburgh's counsel contacted the Secretary's counsel to ascertain when the Secretary would respond. Pittsburgh's counsel represented to Judge Brennan that the Secretary's counsel said that he would reply to the request during the following week. The Secretary's counsel stated that he told Pittsburgh's counsel that he would respond to the request; it is unclear whether the Secretary's counsel indicated a date by which he would respond. When the Secretary's response was three weeks overdue, Pittsburgh filed a motion to compel production. The judge concluded that Pittsburgh had shown good cause

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1/ Commission Rule 2(b), 29 C.F.R. § 2200.2(b), states that "[i]n the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Proceudre." See also section 12(g) of the Act, 29 U.S.C. § 661(f).

2/ The judge did not mention how long the Secretary had to respond to the motion, but under Fed. R. Civ. P. 12(e) the Secretary must respond within 10 days unless the judge states otherwise.

and ordered the Secretary to mail the requested documents to Pittsburgh no later than July 19, 1978.

On July 17, 1978, the Secretary responded to the judge's order by providing to Pittsburgh OSHA Form 1, OSHA Form 1A, OSHA Form 1(B) (inspection forms and worksheets), several pages of the National Safety Council, Accident Prevention Manual for Industrial Operations, and three photographs taken by the compliance officer during the inspection.

On July 21, 1978, Pittsburgh filed a motion for sanctions against the Secretary on the ground that the Secretary's submissions were incomplete; the motion was made under Commission Rule of Procedure 54, 29 C.F.R. § 2200.54, and Federal Rule 37(b). 3/ In particular, Pittsburgh noted that the Secretary, without explanation, did not submit the following requested documents:

> [T]he compliance officer's field notes, contemporaneous drawings, relevant memoranda, statements of third parties, documents, photographs and memoranda connected with the 1975 citation which gave rise to the alleged repeat citation, and other documents which might be within any of the seven numbered paragraphs of [Pittsburgh's] Request but which are unknown to [Pittsburgh] due to [the Secretary's] failure to tender a proper formal response.

Pittsburgh proposed that the judge vacate all citations or, in the alternative, vacate those items that Pittsburgh had abated.

At a hearing on the motion for sanctions, Pittsburgh presented testimony that some items had been abated. The compliance officer testified that he

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3/ Commission Rule 54 provides:

> Rule 54 Failure to comply with orders for discovery.
>
> If any party or intervenor fails to comply with an order of the Commission or the Judge to permit discovery in accordance with the provisions of these rules, the Commission or the Judge may issue appropriate orders.

Federal Rule 37(b) permits a judge to impose sanctions, including dismissal of all or part of an action, when a party does not obey a discovery order.

destroyed his field notes after he copied them verbatim onto OSHA worksheets, and that only three of five photographs taken during the inspection came out. The Secretary's counsel also presented to Pittsburgh the original employee complaint and an inspection report relating to a prior citation.

In the judge's decision, he stated that the Secretary had been warned in the judge's order compelling the production of documents that "future failures to comply with Review Commission orders will not be tolerated." Yet, when the Secretary filed its documentary submissions, the Secretary did not "explain why certain of the requested items had not been provided." The judge noted that because the Secretary did not comply with Pittsburgh's requests, Pittsburgh was harmed because it had to bear the expenses of filing motions to compel discovery. The judge stated that the Secretary's "[failure] to properly deny possession of documents" prejudiced Pittsburgh because it substantially hindered Pittsburgh's trial preparation. The judge concluded that a partial sanction vacating abated items was proper because it furthered orderly administrative proceedings and protected a party's rights to full discovery.

On review, the Secretary argues that the judge's sanction is inappropriate. He maintains that the judge erred in finding that the late submission of documents prejudiced Pittsburgh's preparation of its case. The Secretary cites Rollins Outdoor Advertising, Inc., 77 OSAHRC 24/C1, 5 BNA OSHC 1041, 1976-77 CCH OSHD ¶ 21,311 (No. 12528, 1977), for the proposition that an employer must have been prejudiced for a judge to impose the extreme sanction of vacation.

Pittsburgh argues first that it was prejudiced because the Secretary's derelictions "severely hampered" its trial preparation. It claims that resources it would have devoted to trial preparation were instead diverted to obtaining withheld documents. It also points to the expense it bore in attempting to enforce its discovery rights.

Pittsburgh argues that even if it had not been prejudiced, the judge properly exercised his discretionary power "to protect the integrity of Commission orders." Pittsburgh notes that despite the judge's admonition that he would not tolerate further failures to comply with his orders, the Secretary without explanation took eleven weeks to respond to the request for production of documents, failed to include documents associated with the 1975 citation, failed to produce the complaint that gave rise to the inspection, and failed to supply the compliance officer's original field notes.

Pittsburgh argues that the judge properly used the sanction of dismissal to deter future flouting of court orders. Pittsburgh also maintains that the Secretary's argument that the judge imposed the most severe sanction is overstated because Judge Brennan vacated only those items that had been abated.

II

The issue here is not whether we agree with the judge's action, but whether the judge abused his discretion in vacating the items under the circumstances in this case. See Duquesne Light Co., 81 OSAHRC 71/E7, 8 BNA OSHC 1218, 1221, 1980 CCH OSHD ¶ 24,384, p. 29,718 (Nos. 78-5034, 78-5112 & 78-5303, 1980) (enforcement of pre-hearing order). In Duquesne, the Commission held that because vacation of a citation is an extreme sanction that frustrates the remedial purpose of the Act, it should generally not be imposed unless prejudice or contumacious conduct is found. Duquesne is not controlling here, however. There was no showing in Duquesne that the allegedly violative conditons had been abated; indeed, the Commission and the judge assumed that the cited conditions continued to exist. See 8 BNA OSHC at 1219, 1220, 1980 CCH OSHD at pp. 29,716, 29,717. It was largely for that reason that the Commission was of the view in Duquesne that vacation "would frustrate the remedial purposes of the Act." 8 BNA OSHC at 1222, 1980 CCH OSHD at p. 29,719. Here, however, Pittsburgh has shown that some cited

conditions have been abated and the judge vacated only the corresponding items of the citations. This is a less severe sanction than that considered in Duquesne.

We are unconvinced that Judge Brennan abused his discretion. The Secretary's conduct disrupted the discovery process. After the Secretary made a late response to a motion for a more definite statement, the judge excused his behavior, but also placed the Secretary on notice that the judge would not tolerate further failures to comply with his orders. Yet, the Secretary did not comply with a subsequent request for the production of documents, thereby making it necessary for the judge to issue an order compelling their production. Even then, the Secretary without explanation failed to provide all requested documents in a timely manner.

Judge Brennan acted to preserve the integrity of Commission orders as well as to deter future misconduct by the Secretary. The judge's concerns were proper. See National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 642-643 (1976). There are public interests in adjudicating cases on their merits, in issuing binding abatement orders and in assessing penalties to deter future violations of the Act. However, there is also a substantial public interest in orderly procedure. See Consolidated Freightways, 81 OSAHRC 46/E9, 9 BNA OSHC 1822, 1827, 1981 CCH OSHD ¶ 25,369, p. 31,573 (No. 79-3136, 1981). We cannot say that the balance Judge Brennan struck between those interests fell outside the range of his discretion.

Accordingly, the judge's decision is affirmed.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: MAR 24 1982

COTTINE, Commissioner, dissenting:

This case demonstrates once again that poor practice invites precipitous judgment. See TRG Drilling Corp., 10 BNA OSHC 1268, 1982 CCH OSHD ¶25,837 (No. 80-6008, 1981) (Cottine, Commissioner, dissenting). I do not condone the poor practice by the Secretary's counsel in this case. However, Commission precedent is clear: "We have held that dismissal is too harsh a sanction for failure to comply with a discovery order unless the record shows contumacious conduct by the noncomplying party or prejudice to the party seeking discovery." Noranda Aluminum, Inc., 80 OSAHRC 128/B2, 9 BNA OSHC 1187, 1189, 1981 CCH OSHD ¶25,085, p. 30,988 (No. 79-1059, 1980), appeal dismissed, 650 F.2d 934 (8th Cir. 1981), citing Duquesne Light Co., 80 OSAHRC 32/B7, 8 BNA OSHC 1218, 1980 CCH OSHD ¶24,384 (No. 78-5034, 1980). Also Newport News Shipbuilding and Drydock Co., 80 OSAHRC 119/A2, 9 BNA OSHC 1085, 1980 CCH OSHD ¶25,003 (No. 76-171, 1980); TRG Drilling Corp., supra. Yet, in this case the majority upholds dismissal without even mentioning contumacious conduct or prejudice.

I

Without explanation the majority has restruck the balance forged in the Duquesne line of cases between the Commission's interest in orderly proceedings and the public's interest in a final decision on the hazardousness of the cited working conditions. Moreover, in affirming a judge's ad hoc exception to Commission precedent, the majority broadly authorizes the ad hoc balancing of interests whenever dismissal is urged as a sanction for one party's failure to comply with procedural rules or discovery orders. As a consequence, unqualified discretion has been delegated because no rule of law guides its exercise.

The silent abandonment of precedent in this case is unfortunate because the Duquesne line of cases weighed the competing interests in the manner most consistent with the remedial purposes of the Act. See Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980); Southern Pacific Transportation Co. v. Usery, 539 F.2d 386 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977); Brennan v. Southern Contractors Service, 492 F.2d 498 (5th Cir. 1974); Brennan v. OSHRC (Gerosa, Inc.), 491 F.2d 1340 (2d Cir. 1974). A decision on the merits of a citation, including a determination of the proper abatement requirements and appropriate penalties, directly serves the basic purposes of the Act in achieving the abatement and prevention of hazardous working conditions. See 29 U.S.C. §§651(b), 659(c). Certainly, orderly procedure is important to the efficient administration of the Act. However, the Act's remedial purposes necessarily require the balance to favor a decision on the merits of a citation in fairness to employers and employees alike.

The Respondent's representation that the items involved have been abated provides an insubstantial basis to distinguish this case from our precedent. The Act's central objective is to prevent workplace hazards, not simply to obtain abatement of existing hazards. See Farmers Export Co., 80 OSAHRC 66/A2, 8 BNA OSHC 1655, 1980 CCH OSHD ¶24,569 (No. 78-1708, 1980)(Cottine, Commissioner, dissenting). The prevention of hazards and the promotion of future compliance is served by an order disposing of alleged violations on their merits, including appropriate penalties and the statutory characterization of the violations, e.g., willful, repeated, serious, or nonserious. Denying the Secretary the opportunity to pursue these basic aspects of enforcement merely because the conditions have been abated is inconsistent with the statute and Commission case law. See, e.g., P.A.F. Equipment Co., 79 OSAHRC 18/A2, 7 BNA OSHC 1209, 1979 CCH OSHD ¶23,421 (No. 14315, 1979), aff'd, No. 79-1398 (10th Cir. Dec. 2, 1980).

II

The majority has not attempted to justify its affirmance of the judge's decision on any grounds of contumacious conduct by the Secretary's counsel or prejudice suffered by the Respondent.[1/] Although the judge found prejudice, that finding was not properly supported. The noncompliance with discovery requirements by the Secretary's counsel certainly was unjustified and regrettable.[2/] However, the record fails to sustain the judge's finding that the Secretary's noncompliance "substantially hindered Respondent in the preparation of its case."[3/]

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1/ The Respondent has not expressly argued that the conduct of the Secretary's counsel was contumacious and the record does not support such a finding. In particular, the Respondent has not substantiated its claim that the representations of the Secretary's counsel as to the field notes were intentionally misleading.

2/ There are lesser sanctions than dismissal available and these have not been shown to be inadequate here. For example, the judge could have prohibited the introduction of evidence based on certain documents. See Fed.R.Civ.P. 37(b)(2). A stay of the proceedings or a continuance would cure any surprise from late disclosure. See Id.

3/ To the extent that the judge may have relied on "the expense and inconvenience of filing motions to compel disclosure" as a ground for dismissal, these considerations alone do not constitute legal prejudice in this context. Legal prejudice resulting from an opponent's noncompliance with rules or orders arises when a party is denied a fair hearing on the merits. Accu-Namics, Inc., 74 OSAHRC 35/A2, 1 BNA OSHC 1751, 1974-74 CCH OSHD ¶17,936 (No. 477, 1974), aff'd, 515 F.2d 828 (5th Cir. 1975).

The Respondent's reliance on Hoerner Waldorf Corp., 76 OSAHRC 135/D12, 4 BNA OSHC 1836, 1976-77 CCH OSHD ¶21,215 (No. 12713, 1976), is misplaced. Assuming that the Commission majority's one-sentence affirmance of the judge's decision in that case can be read to adopt his rationale, the judge based his dismissal on a finding of prejudice from surprise testimony, not merely expense or inconvenience to the Respondent. Furthermore, Fed.R.Civ.P. 37 does not establish that the expense and inconvenience of filing motions to compel discovery constitutes legal prejudice. Cf. 8 Wright & Miller, Federal Practice and Procedure §2293 (1970).

In support of its argument that it was prejudiced, the Respondent points to four categories of documents that the Secretary's counsel failed to either disclose or explain his nondisclosure prior to the hearing on the sanctions motion. These were: (1) the original employee complaint on which the inspection was based; (2) the file on a previous citation that was the basis of the repeat citation; (3) two photographs that the compliance officer testified did not develop; and (4) the compliance officer's original field notes. As to the first three categories, the Respondent did not satisfy its burden of proof regarding actual prejudice.

First, the transcribed version of the original employee complaint had been disclosed to the Respondent during the inspection though the employee's name had been deleted as permitted under 29 U.S.C. §657(f)(1). The Secretary's counsel represented that the employee had not waived confidentiality until the morning of the sanctions hearing. The Respondent has made no showing that earlier disclosure of the employee's name should have been required. See Massman-Johnson (Luling), 80 OSAHRC 44/B8, 8 BNA OSHC 1369, 1980 CCH OSHD ¶24,436 (No. 76-1484, 1980).

Second, the repeat citation was vacated on the merits. Therefore, no prejudice results from late disclosure of the file on the earlier violation.

Third, there is no dispute that the two photographs in question did not develop. No prejudice results from their nondisclosure.

As to the final documents, the compliance officer testified that he transcribed his original field notes onto standard worksheets (OSHA Form No. 1B) that had been disclosed to the Respondent. In addition, the compliance officer testified that his notes were in a "dirty, greasy" condition

and that they were destroyed when they were transcribed onto the worksheets. He further testified that the transcribed version was essentially the same as the field notes with the exception of punctuation and editorial changes to make the notes more readable. He stated that among the changes there was "nothing that would affect the case." The Respondent submitted no evidence questioning the credibility of the compliance officer's testimony. In addition, there is no evidence that the compliance officer negligently transferred the data or acted in bad faith. Thus, the Respondent has not affirmatively shown any prejudice to its case from the destruction of the field notes.

As in this case, the compliance officer is frequently the only witness for the Secretary and in most other cases the compliance officer is the principal witness for the Secretary. The purpose of disclosure on request at the hearing of all statements in the government's possession relating to the direct testimony of the Secretary's witnesses is to provide the Respondent with "an opportunity for full and effective cross-examination of each witness. This includes an opportunity to test the veracity and accuracy of a witness's testimony against prior statements by that witness on the same subject." Massman-Johnson, supra, 8 BNA OSHC at 1376, 1980 CCH OSHD at p. 29,808. This opportunity should extend to all notes relating to the subject matter of the direct testimony of any witness for the Secretary when the notes have been in the government's possession at any time. This includes rough or initial notes of a compliance officer who testifies.

Moreover, sanctions for nondisclosure based on loss of evidence should be imposed in the future unless the government can show that it has promulgated, enforced and attempted in good faith to follow rigorous

and systematic procedures designed to preserve all documentary material related to the Secretary's witnesses. See United States v. Harrison, 524 F.2d 421, 422 n. 1 (D.C. Cir. 1975), quoting United States v. Bryant, 439 F.2d 642, 652 (D.C. Cir. 1971).[4/] However, the Secretary and the compliance officer were not on notice that sanctions were in order for failure to retain rough field notes of an OSHA inspection after they were faithfully transcribed onto OSHA worksheets.[5/]

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4/ In criminal prosecutions, the courts are divided on whether sanctions are appropriate when government agents destroy rough notes from which witness statements or reports are prepared. Compare, e.g., United States v. Hurst, 510 F.2d 1035, 1036 (6th Cir. 1975), and U.S. v. Lieberman, 608 F.2d 889, 895-96 & n. 13 (1st Cir. 1979), with United States v. Carrasco, 537 F.2d 372, 376-79 (9th Cir. 1976), and United States v. Harrison, supra. In Killian v. United States, 368 U.S. 231, 242 (1961), the Supreme Court held that no sanctions were appropriate where an FBI agent destroyed rough notes of certain oral reports of expenses by a paid informant after transferring the information onto receipts that subsequently were signed by the informant. The case was distinguished in Harrison: "We cannot accept the notion that in focusing on such an unimportant category of evidence as this, the Supreme Court was announcing doctrine meant to cover even notes of substantive statements given by important witnesses." United States v. Harrison 524 F.2d at 432, n. 33. The Harrison court also stated that in Killian the important fact relevant to the informant's credibility was already established by the existing evidence -- that he was a well-paid government informant.

5/ The Respondent asserts that the compliance officer was on notice that failure to retain the field notes could result in sanctions. However, the Commission has not ruled specifically on the extent of the Secretary's duty to retain preliminary field notes of its compliance officers. In our earlier cases we have ruled only that where the compliance officer testifies at the hearing on the merits, the Secretary generally is required to disclose on request the compliance officer's notes and memoranda that are in the government's possession. E.g., Massman-Johnson, supra; Frazee Construction Co., 73 OSAHRC 34/B5, 1 BNA OSHC 1270, 1973-74 CCH OSHD ¶16,409 (No. 1343, 1974). Thus, the Secretary and his representatives have not previously been on notice that there is an affirmative duty to preserve preliminary OSHA field notes for possible civil litigation after they were faithfully transcribed onto worksheets. Accordingly, there is no burden on the Secretary in this case to show that no prejudice resulted from destruction of the field notes.

In the absence of an affirmative duty in the investigation and preparation of this case to preserve the original field notes, the balancing test of United States v. Harrison is properly applied to determine whether sanctions are appropriate. The Commission "should weigh the degree of negligence or bad faith involved, the importance of the evidence lost, and the evidence of [violations] adduced at trial in order to come to a determination that will serve the ends of justice." 524 F.2d at 434, quoting United States v. Bryant, 439 F.2d at 653. Certainly, the compliance officer's testimony is crucial to this case. However, there is no evidence of any negligence or bad faith. Moreover, there is the unrebutted testimony of the compliance officer that there were no differences between the field notes and the OSHA worksheets disclosed to the Respondent "that would affect the case." The compliance officer has not been found to lack credibility in any respect. Furthermore, there is no evidence regarding the alleged violations to consider in determining the appropriateness of sanctions because no hearing was held. On balance, no sanctions are appropriate and the judge abused his discretion in granting the motion to dismiss.[6/] As a consequence, I would reverse his decision and remand the case for a determination of the merits.

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6/ In choosing among sanctions, the judge is to select a lesser sanction than dismissal if it will remedy the noncompliance. See Duquesne Light Co., supra; Massman-Johnson, supra, 8 BNA OSHC at 1380 & n. 14, 1980 CCH OSHD at p. 29,809-10 & n. 14. See generally Commission Rule 54, 29 C.F.R. §2200.54.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR | : | |
| Complainant | : | |
| v. | : | OSHRC Docket Nos. 78-1361 and 78-2041 (Consolidated) |
| PITTSBURGH FORGINGS COMPANY | : | |
| Respondent | : | |
| and | : | DECISION AND ORDER |
| UNITED STEELWORKERS OF AMERICA LOCAL NO. 1779 | : | |
| Affected Employee Representative | : | |

APPEARANCES

FOR THE SECRETARY OF LABOR

Marshall H. Harris, Regional Solicitor
Joseph T. Crawford, Esq.
U. S. Department of Labor

FOR THE RESPONDENT

Reed Smith Shaw & McClay
W. Scott Railton, Esq.
Scott J. Wenner, Esq.

Brennan, W. E., A.L.J.

STATEMENT OF THE CASE

This case arises under Section 10(c)[1] of the Occupational Safety and Health Act (the Act).[2] Involved are various citations issued pursuant to Section 9(a)[3] of the Act by the Secretary of Labor through the Area Director of the Occupational Safety and Health Administration for Philadelphia, Pennsylvania (Complainant) to Pittsburgh Forgings Company (Respondent) at Respondent's plant in Coraopolis, Pennsylvania. Remaining at issue are three Items of a Nonserious Citation and a single Repeat Citation.[4] A Nonserious Citation (OSHRC Docket No. 78-2041) issued after a second inspection of Respondent's plant was consolidated for hearing by order of June 30, 1978 (R.p. J-4).[5] Complainant proposed penalties totalling $980 for the alleged violations.[6]

1/ 29 U.S.C. 659(c).

2/ 29 U.S.C. 651 et seq.

3/ 29 U.S.C. 658(a).

4/ Originally, a three-Itemed Serious Citation, a single-Itemed Repeat Citation and a nine-Itemed Nonserious Citation were issued. At the hearing, partial sanctions were imposed under which Items 2 and 3 of the Serious Citation and Items 2, 3, 5, 6, 8 and 9 of the Nonserious Citation as well as the proposed penalties were vacated (see p. 3, note 8 infra). At the close of Complainant's case in chief, Item 1 of the Serious Citation was dismissed because Complainant failed to establish a prima facie case that a "recognized hazard" existed (see P. 5, note 9 infra).

5/ References herein translate as follows:

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| R.p. 3 | The third numbered document in the official Docket File prior to assignment to the undersigned. |
| R.p. J-3 | The third numbered document in the official Docket File after assignment to the undersigned. |
| Tr. 3 | Page 3 of the hearing transcript. |
| Exh. C-1 | Complainant's Exhibit 1 in evidence. |
| Exh. R-1 | Respondent's Exhibit 1 in evidence. |

6/ 29 U.S.C. 659(a).

After the filing of a Notice of Contest for all alleged violations the parties exchanged a series of motions and appropriate rulings were made.[7/] The case was heard in Pittsburgh, Pennsylvania. The United Steelworkers of America claimed party status as employee representatives but did not appear at the hearing.

Prior to Complainant's case in chief, argument was heard on Respondent's Motion for Sanctions, filed July 21, 1978. Upon consideration of the evidence, partial sanctions were imposed with the result that Items 2 and 3 of the Serious Citation and Items 2, 3, 5, 6, 8 and 9 of the Nonserious Citation were vacated as well as their associated penalties (Tr. 44–46). This sanction was imposed because

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7/ On May 8, 1978, Respondent filed a Motion for More Definite Statement and a Request for Production of Documents (R.p. 7). On May 31, 1978, the Motion for More Definite Statement was granted (R.p. J–1). Complainant failed to respond to this Order within the period allotted under Fed. R. Civ. P. 12(e). Complainant also failed to respond to Respondent's Request for Documents in the time provided under Fed. R. Civ. P. 34. Thereupon, on July 5, 1978, Respondent filed a Motion to Strike and a Motion to Compel Documents (R.p. J–5). By Order of July 14, 1978 (R.p. J–9), Complainant's failure to file a timely More Definite Statement was excused, good cause being shown and Respondent's Motion to Strike was thus denied. Respondent's Motion to Compel Documents was granted. At this time, Complainant was put on notice that ". . . future failures to comply with Review Commission orders will not be tolerated." (R.p. J–9 at 2).

of Complainant's failure to comply with Review Commission Orders, especially a July 14, 1978 Order to Compel the Production of Documents (R.p. J-9),[8] as well as Respondent's good faith showing of abatement.

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8/ On July 19, 1978, Complainant filed its documentary submission (R.p. J-11) in compliance with the July 14, 1978 Order to Compel Documents. This submission complied in part with Respondent's request, however, Complainant did not identify which of the submitted documents corresponded with Respondent's original itemized request nor did Complainant explain why certain of the requested items had not been provided. This former shortcoming inconvenienced the Respondent but did not prejudice it in the preparation of its case. The later shortcoming, however, did cause prejudice. Having failed to properly deny possession of documents that might reasonably be presumed to exist, the Complainant substantially hindered Respondent in the preparation of its case. Because of Complainant's defective discovery responses, Respondent was put to the expense and incovenience of filing motions to compel disclosure. At the hearing, Complainant established that it did not possess many of the documents requested by Respondent (Tr. 28-32). At this time, Complainant also supplied an additional document which should have been supplied with its prior submission (Tr. 38). Such explanations and such submissions, even when provided in good faith, are provided too late when provided on the day of hearing. In this case, Complainant was informed that, because of past failure to fully comply with Review Commission Orders and procedures, future failures would not be tolerated (see Note 7 supra). Consequently, upon Respondent's good faith showing of abatement, partial sanctions were imposed pursuant to Fed. R. Civ. P. 37:

> The administration of the rules lies necessarily within the province of the trial court with power to fashion such orders as may be deemed proper to vouchsafe full discovery for the just, speedy and inexpensive determination of the lawsuit. (Robison v. Transamerica Insurance Company, 368 F.2d 37, 39 (10th Cir. 1966)).

The March 7, 1978 inspection, conducted by Compliance Officer (CO) Frank E. Librich resulted in the following Repeat Citation.

Item 1 - Repeated Citation

> 29 C.F.R. 1910.176(b): Material stored in tiers was not stacked, blocked, interlocked or limited in height so that it was stable and secure against sliding and collapse:
>
> (a) Steel Yard: Wooden blocks cracked and broken causing steel stock to collapse.

The prior violation upon which this Repeated Citation is based was issued on February 2, 1975.

After granting of Respondent's Motion for Sanction and after dismissal of Item 1 of the Serious Citation at the conclusion of Complainant's case in chief,[9] the following Nonserious Items arising from the March 7, 1978 inspection remained at issue.

Item 1 - Nonserious Citation

> 29 C.F.R. 1910.22(b)(1): Aisle(s) or passageway(s) were not kept clear and in good repair where mechanical handling equipment was used:
>
> (a) Forge Shop: Loose floor grating in front of Number 40 Upsetter.
> (b) Die Storage: Floor cracked and uneven.

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[9] This dismissal was based on Complainant's failure to sustain its burden of proof that the hazard associated with the alleged violation was "recognized" within the meaning of the Act. (Tr. 226-228). See National Realty & Construction Co., Inc. v. OSHRC 489 F.2d 1257, 1265 (D.C. Cir. 1973).

Item 4 - Nonserious Citation

29 C.F.R. 1910.219(b)(1): Flywheel(s) with parts seven feet or less above floor(s) or platform(s) were not guarded in accordance with the requirements specified in 29 CFR 1910.219(b)(1)(i) through (b)(1)(vi):

(a) Cold Process Department - Flywheels on mechanical power presses 1491 and 2601.

Item 7 - Nonserious Citation

29 C.F.R. 1910.219(f)(1): Gear(s) were not guarded by a complete enclosure or by one of the methods specified in 29 CFR 1910.219(f)(1)(ii) and (f)(1)(iii):

(a) Steel Yard - exposed gears on the 3313 Shear.

The April 5, 1978 inspection of Respondent's plant resulted in the following Nonserious Citation:

Item 1 - Nonserious Citation

29 C.F.R. 1910.22(a)(1): Place(s) of employment were not kept clean and orderly, or in a sanitary condition:

(a) Forge Shop, in back of Number 7 Trim Press, steel floor plates bent up on corners creating a tripping hazard to the drag-out operator.

The Repeated violation was ordered abated by March 23, 1978. The Nonserious violations from the first inspection were to be abated by April 18, 1978. The consolidated Nonserious violation from the later inspection was to be abated by April 21, 1978.

The cited Occupational Safety and Health Standards provide as follows:

29 C.F.R. 1910.176(b): Item 1 - Repeated Citation

Secure storage.

Storage of material shall not create a hazard. Bags, containers, bundles, etc., stored in tiers shall be stacked, blocked, interlocked and limited in height so that they are stable and secure against sliding or collapse.

29 C.F.R. 1910.22(b)(1): Item 1 - Nonserious Citation

Aisles and passageways.

Where mechanical handling equipment is used, sufficient safe clearances shall be allowed for aisles, at loading docks, through doorways and wherever turns or passage must be made. Aisles and passageways shall be kept clear and in good repairs, with no obstruction across or in aisles that could create a hazard.

29 C.F.R. 1910.219(b)(1): Item 4 - Nonserious Citation

Prime-mover guards.

Flywheels. Flywheels located so that any part is seven (7) feet or less above floor or platform shall be guarded in accordance with the requirements of this subparagraph:

(i) With an enclosure of sheet, perforated, or expanded metal, or woven wire;

(ii) With guard rails placed not less than fifteen (15) inches nor more than twenty (20) inches from rim. When flywheel extends into pit or is within 12 inches of floor, a standard toeboard shall also be provided;

(iii) When the upper rim of flywheel protrudes through a working floor, it shall be entirely enclosed or surrounded by a guardrail and toeboard.

(iv) For flywheels with smooth rims five (5) feet or less in diameter, where the preceding methods cannot be applied, the following may be used: A disk attached to the flywheel in such manner as to cover the spokes of the wheel on the exposed side and present a smooth surface and edge, at the same time providing means for periodic inspection. An open space, not exceeding four (4) inches in width, may be left between the outside edge of the disk and the rim of the wheel if desired, to facilitate turning the wheel over. Where a disk is used, the keys or other dangerous projections not covered by disk shall be cut off or covered. This subdivision does not apply to flywheels with solid web centers.

(v) Adjustable guard to be used for starting engine or for running adjustment may be provided at the flywheel of gas or oil engines. A slot opening for jack bar will be permitted.

(vi) Wherever flywheels are above working areas, guards shall be installed having sufficient strength to hold the weight of the flywheel in the event of a shaft or wheel mounting failure.

29 C.F.R. 1910.219(f)(1): Item 7 - Nonserious Citation

Gears, sprockets, and chains.

Gears. Gears shall be guarded in accordance with one of the following methods:

(i) By a complete enclosure; or

(ii) By a standard guard as described in paragrph (o) of this section, at least seven (7) feet high extending six (6) inches above the mesh point of the gears; or

(iii) By a band guard covering the face of gear and having flanges extended inward beyond the root of the teeth on the exposed side or sides. Where any portion of the train of gears guarded by a band guard is less than six (6) feet from the floor a disk guard or a complete enclosure to the height of six (6) feet shall be required.

The standard cited in the consolidated Citation is:

29 C.F.R. 1910.22(a)(1): Item 1 - Nonserious Citation

Housekeeping.

All places of employment, passageways, storerooms, and service rooms shall be kept clean and orderly and in a sanitary condition.

ISSUES

1. Was Respondent in violation of Section 5(a)(2) of the Act[10/] on March 7, 1978 and April 5, 1978, for its failure to comply with the cited Standards?

2. If in violation, what, if any, penalty is appropriate?

10/ 29 U.S.C. 654(a)(2) provides that;
Each employer -
(2) shall comply with occupational safety and health standards promulgated under this Act.

With respect to Item 1(b) and Item 7 of the Nonserious Citation, Issue 1 is answered affirmatively and an appropriate penalty under Section 17(j) of the Act[11/] is assessed. With respect to Item 1 of the consolidated Nonserious Citation, Issue 1 is answered affirmatively. No penalty is assessed.

With respect to the Repeated Citation and Items 1(a) and 4 of the Nonserious Citation, Issue 1 is answered negatively and thus no penalty is appropriate.

STIPULATIONS

Respondent's full and accurate legal name is Pittsburgh Forgings Company, Incorporated. It is incorporated in the State of Delaware, with its principal place of business in "Pennsylvania". At the time of the inspection, Respondent conceded that it was engaged in business affecting commerce. There were no injuries at the time of the alleged violation. Respondent owned or controlled all equipment and machinery referred to in the Citations. Respondent is a medium size corporation that has a 1.5 percent share of a total market of $1.8 billion. The average daily number of employees is 650. With regard to prior history of violations, Respondent was issued two previous citations in 1975.

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11/ Section 17(j) of the Act provides:

> The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

## EVIDENCE

### Item 1 - Repeat Violation

The Respondent's steelyard was the location of this alleged violation which involved inadequate blocking within stacks of banded and unbanded steel rods. The prior Citation on which the Repeated Citation was based was issued on February 24, 1975, and stated as follows:

> 29 C.F.R. 1910.176(b) Material, in the following area(s), was not stacked, blocked, interlocked, or limited in height so that it was stable and secure against sliding or collapse: (a) Material stacked in the outside steel yard (some top lifts and south end of center row)

This prior Nonserious Citation was not contested and became a final Order of the Commission pursuant to Section 10(a) of the Act.[12/] At the close of Complainant's case in chief, Respondent moved to dismiss the Repeated Citation (Tr. 228). Thereafter, upon argument from the parties, it was ordered that the Repeated Citation be modified to a Serious Citation (Tr. 237).

Since the conclusion of the hearing, the Commission has clarified the definition of a Repeated violation under the Act. Potlatch Corporation, ___ OSAHRC ___, Docket No. 16183, (January 22, 1979); Belger Cartage Service, ___ OSAHRC ___, Docket No. 76-1480, (March 12, 1979). The Commission stated in Belger at p. 10 that:

> . . . in order to establish a prima facie showing that a violation is repeated under section 17(a) of the Act, the Secretary must show by a preponderance of the evidence that

12/ 29 U.S.C. 659(a).

> the cited employer had been issued a prior citation for failing to comply with the same standard. He must also prove that at least one such previous citation has become a final order of the Commission before the date of the occurrence of the alleged repeat violation. As rebuttal, the cited employer can prove that the factual circumstances of the immediate violation are so disparate from those of the previous violation that no reasonable relationship exists between them. We also stated in Potlatch Corp. that we will not follow the repeated test employed by the United States Court of Appeals for the Third Circuit in Bethlehem Steel Corp., supra, . . . [Footnote omitted; emphasis supplied]

Potlatch stressed the requirement that any repeated violation must be "substantially similar" to the previous violation which had become a final Order of the Commission.

In light of this clarification by the Commission, it is hereby determined that the violation at issue, modified at the hearing from a Repeat to Serious, must now be reinstated to a Repeat. It is clear that the same standard was cited and that the Citation became a final Order of the Commission. Both Citations involved the improper stacking of material in Respondent's steelyard, both Citations were directed to the same hazard, i.e., the danger of a stack collapsing. The Citations are therefore determined to be "substantially similar" (Potlatch). It is also determined that, in view of the ultimate resolution of this issue, the Respondent has not been prejudiced by the foregoing determination.[13/]

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13/ At the hearing, the parties were not enlightened by the Belger and Potlatch decisions. Consequently, most of the argument focused on whether a Repeated violation existed under Bethlehem Steel. A small amount of argument was introduced relating to the "disparity" of the two Citations (Tr. 228-229), which under Belger is now considered a crucial component of Respondent's rebuttal.

Having determined that the Secretary's denomination of the alleged violation was proper, it must now be determined whether a violation existed. In relation to the Citation on which the Repeated violation is premised, Respondent has argued under Section 9(a)[14] that since the Citation did not describe the violation with particularity, it was "utterly useless in functioning as a statutorily mandated notice-giving device." (R.p. J-18 at 6). Citing Marshall v. B. W. Harrison Lumber Co., 569 F.2d 1303 (5th Cir. 1978) and Secretary of Labor v. Union Camp Corp., 5 OSAHRC 514 (1973), Respondent contended that the Citation's failure to specify which of the more than 200 stacks of steel violated the standard deprived it of the opportunity to determine for itself the facts of the alleged hazard. Consequently, it was argued that Citation No. 2 and the proposed penalty should be vacated.

The notice requirements of Section 9(a) of the Act are not to be strictly read but rather read reasonably as requiring fair, rather than perfect, notice. National Realty and Construction Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973). The notice given by the Citation at issue is adequate and exceeds that quantum judged to be deficient in Harrison and Union Camp Corp. Having been presented with Citation No. 2, and its representatives having accompanied the CO on his inspection of the yard, Respondent could reasonably be expected to

[14] Section 9(a) provides, in pertinent part, that;

> [e]ach citation shall be in writing and shall describe with particularity the nature of the violation. . . (29 U.S.C. 658(a))

have known or readily ascertained by asking the CO during the inspection what stacks, in the CO's opinion, presented a hazard of collapse. It is therefore determined that Citation No. 2 is not fatally lacking in particularity.

The next question to determine is, did the Respondent violate 29 C.F.R. 1910.176(b) on March 7, 1978? Anning-Johnson Co., ___OSAHRC___, Docket Nos. 3694 and 4409 (1976) has held that in order to prove a violation of 5(a)(2) of the Act, the Secretary must establish that a particular standard applies to the facts, that the cited employer failed to comply with the standard and that the cited employer's employees had access to the hazard. The applicability of the standard to the facts herein is not contested. Complainant has also established that Respondent's employee, a "hookup man" was exposed to the hazard of collapsing stacks while passing between stacks during the stacking process (Tr. 92). The remaining issue is whether Complainant proved by a preponderance of the evidence that Respondent failed to comply with the standard?

CO Frank Librich testified that during his inspection of the steelyard, he pointed out a number of cracked and broken blocks within certain stacks which were leaning (Tr. 90). Because of this condition, the stacks were "up at one end," and thus unstable. On cross-examination the CO conceded that the stacks were not in imminent danger of collapse and that a cracked block within a stack would not automatically result in the stack's collapse (Tr. 179). Edward Poola, Respondent's employee and a Grievance Committeeman as

well as a member of the Respondent's Safety Committee, testified that he observed cracked and broken blocks in the yard during the March 7, 1978 inspection (Tr. 205) and that the stacks were consequently resting on an angle (Tr. 207). Mr. Poola also described an injury which allegedly resulted from the collapse of one of these stacks (Tr. 208). However, on cross-examination, he stated that the existence of cracked blocks did not "automatically" cause a stack to collapse and that, although he normally reported any incident of unstable stacking to Respondent's supervisory personnel, he made no report on the day of the inspection (Tr. 210-211). According to Mr. Poola, all complaints were acted upon expeditiously (Tr. 214).

Willaim Pesce, head of Respondent's Safety Committee, and Michael Volpe, Safety Coordinator, both testified that during the course of the inspection the CO did not point out any hazard in the steelyard and that he did not point out any leaning stacks or any broken blocks. Both witnesses testified that the CO did point out a few cracked blocks (Tr. 241 [Pesce], 268, 277-278 [Volpe]). Mr. Volpe testified that, during the course of his employment with Respondent (approximately seven months), there had been no problems with blocking or with leaning stacks of steel (Tr. 278).

Kenneth Craig, foreman of Respondent's steelyard for five and one half years, testified that although he was normally informed of the existence of unstable stacks in the steelyard, he was not informed of any hazardous conditions on March 7, 1978 (Tr. 286-287). Mr. Craig testified that on the day of the inspection none of the

stacks were leaning or in danger of collapse (Tr. 287) and that, during his supervisory tenure, none of the stacks had ever collapsed (Tr. 294). According to Mr. Craig, Respondent had experienced problems with broken blocks within the stacks but that this problem had occured two years prior to this inspection (Tr. 289). Mr. Craig also testified that there had been accidents in the vicinity of the steelyard but that none of these accidents were caused by collapsing stacks (Tr. 292).

Having reviewed the evidence in its entirety, only one fact is observed to stand beyond dispute, i.e., that on March 7, 1978, certain blocks within Respondent's stacked steel were cracked. The evidence otherwise conflicts as to whether a hazard existed in the steelyard, whether the stacks were leaning or collapsed, whether the blocks within the stacks were broken, and whether any injury resulted from a collapsing stack. Foreman Craig's testimony that none of the stacks were leaning or had <u>ever</u> fallen conflicts directly with the CO's and Mr. Poola's testimony that certain stacks were leaning on the day of the inspection.

With respect to the existing cracked blocks, both of Complainant's witnesses conceded that such a deficiency would not automatically result in the collapse of a stack. The casual connection between this single, admittedly existing condition, and the alleged hazard is thus considered tenuous:

> Where all the facts and circumstances in evidence are conducive to speculation and conjecture and do not admit of a rational inference of the truth of the fact in issue there has been a failure by the proponent to meet his burden by substantial, reliable and probative evidence. Secretary of Labor v. Manuel Maes Construction Co., Inc., No. 73-1464 (10th Cir., March 28, 1974).

The evidence is almost wholly in conflict with respect to conditions existing at the time of the alleged violation. Having reviewed notes compiled at this hearing, no reason can be found to discredit the testimony of either party. Focusing on the single established fact, i.e., that cracked blocks existed, it still cannot be determined without resort to speculation and conjecture that a violation was proven and that a hazard (i.e., the danger of falling stacks) existed. Complainant having failed to sustain its burden of proof by a preponderance of the evidence, it is determined the citation must be vacated.

Item 1 - Nonserious Citation

Respondent was charged with failing to maintain aisles and passageways free from obstructions and in good repair in both the Forge Shop and the Die Storage area. In the Forge Shop, the CO determined that a loose floor grating presented a hazard to mechanical handling equipment in the aisleway in front of the No. 40 Upsetter. In the Die Storage area, a 20 to 30 foot long crack in the center of the concrete floor presented a similar hazard to such equipment.

A threshold determination in establishing a violation under 29 C.F.R. 1910.22(b)(1) is whether mechanical handling equipment is used in the area in which the violation is alleged. With respect to 1(a), CO Librich equivocated when asked if mechanical handling equipment was used in the vicinity of the No. 40 Upsetter (Tr. 179-180). The Complainant introduced no additional evidence on this Item. On the other hand, Respondent affirmatively asserted that mechanical handling equipment was not used in the No. 40 Upsetter environs (Tr. 247). In light of Respondent's statement to the contrary, the CO's inability to conclusively assert that mechanical handling equipment was used in this area is fatal to the Complainant's shouldering of its burden on Item 1(a).

With respect to Item 1(b) the CO testified that during the inspection, an employee informed him that while guiding a mechanical hand truck, he had sprained an ankle after the hand truck upset while passing over the crack (Tr. 185). Witness for the Respondent conceded that the floor was cracked and that mechanical handling equipment - mostly hand trucks, ocassionally, a fork truck - were used in the area (Tr. 252). Respondent argued that the crack could not be permanently repaired because of the prevailing weather conditions and the instability of the ground beneath the floor. However, Daniel Viscount, Plant Engineer and Maintenance Superintendent, testified that the crack could be patched on a semi-annual basis, eliminating the hazard, for a cost of $250 (Tr. 302-305).

In view of the fact that mechanical handling equipment was used in the vicinity of the crack; that Respondent knew of the cracks existence; and, that Respondent could repair the hazardous condition, it is determined that the violation set forth in Item 1(b) was established.

Item 4 - Nonserious Citation

The violations underlying Item 4 involved inadequate guarding on the flywheels on power presses 1491 and 2601 in Respondent's Cold Process Department. The CO testified that the existing guard did not extend up to the 7-foot level and that it would not adequately contain any parts which might break off the flywheel (Tr. 100-105). The CO's recollection of the conditions underlying this alleged violation was hazy, e.g., when asked on cross-examination whether the press was in fact equipped with a flywheel - an essential element to the establishment of a violation under the cited standard, 29 C.F.R. 1910.219(b)(1) - the CO could not respond with any degree of certainty (Tr. 202).

Respondent's witnesses, Mr. Volpe and Mr. Viscount, testified that, according to their measurements, the flywheels were guarded up to the 7-foot statutory minimum height (Tr. 273 [Volpe], 301 [Viscount]). Respondent also introduced Exhibit R-6, a photograph of the 1491 press, which persuasively supports Respondent's contention that the existing guard enclosed the flywheel below the 7-foot level. Mr. Volpe testified that the guard photographed in this Exhibit, had not been altered after the inspection (Tr. 279).

With respect to the CO's allegation that the existing guard was not enclosed so that it would contain fragments which might break off the flywheel, it must be borne in mind that the cited standard requires only that a flywheel be enclosed up to the 7-foot level. The standard is silent on precautions which are to be taken to contain flywheel fragments. As stated previously, the Respondent has clearly established that the guard conformed to the requirements of the standard in that it enclosed the flywheel up to the required level. In the absence of more specific guidance from the standard, it can not be concluded that the guards existing on the 1491 and 2601 presses did not conform to the cited standard because they would not adequately contain flywheel breakage.[15/]

In sum, the testimony of Respondent's witnesses and supportive evidence introduced conflicts directly with the testimony of the CO. In view of the CO's inability to confirm that a flywheel even existed on this punch press, his testimony on this Item must be accorded little weight. Respondent's Exhibit R-6 was found particularly convincing. Consequently, it is determined that the Complainant has failed to establish this alleged violation. Item 4 of the Nonserious Citation must be vacated.

Item 7 -- Nonserious Citation

Item 7 of this Citation involved Respondent's failure to adequately guard a gear on the 3313 shear in the steelyard. Both

15/ On this issue, Mr. Viscount, Respondent's Plant Engineer and Maintenance Superintendant, testified that the existing guard would adequately contain breakage and that he, in fact, had observed broken flywheel teeth laying in the guard (Tr. 310).

parties agreed that the distance from the top of the gear to the ground was less than 7 feet (approximately 6 feet) (Tr. 178, 274). Respondent states in its post-trial brief (R.p. J-18) at page 25 that:

> The parties also agree that the gear wheel on the shear was equipped with a band guard (Tr. 107, 275).

If this were true, under 29 C.F.R. 1910.219(f)(1)(iii) the gear would only have to be guarded up to 6 feet, instead of the normally required height of 7 feet, and Respondent would be in compliance with the standard.

Respondent's contention that the parties agreed that a band guard existed on the 3313 shear is inaccurate. A review of the entire record, with special attention to pages cited by Respondent, indicates that agreement does not exist on this point but rather that the existing guard was a "face guard" (Tr. 275). Respondent's contention that a band guard conforming to the standard existed on March 7, 1978, is belied by the fact that, after the inspection, the existing guard was extended to a height of 7 feet and perforated screening was added to the bottom of the guard (Tr. 275).

Having failed to establish that the existing guard was a band guard and having failed to dispute the CO's contention that this guard was less than 7 feet high and that a hazard thus existed, Respondent's arguments that compliance was achieved is not persuasive and Item 7 of the Nonserious Citation is affirmed.

Item 1 - Nonserious Citation (No. 78-2041, Consolidated)

The parties stipulated that a floor plate in front of the No. 7 trim press in the Forge Shop was bent or dog-eared and that, as a result of this condition, a tripping hazard existed (Tr. 58-59). Respondent pointed out that after the inspection this condition was remedied. Respondent contends however that the citation should be vacated as a matter of law since 29 C.F.R. 1910.22(a)(1) does not apply to a dog-eared plate. Specifically, Respondent argued in its brief at page 28:

> The condition at issue does not in any fashion whatsoever involve the clutter and debris customarily associated with lack of order, nor does it involve the dirt or infestation commonly connected with unclean or unsanitary conditions.

The thrust of Respondent's argument would seem to be that the cited standard was promulgated by the Secretary of Labor in the interest of preserving cleanliness and order for cleanliness' and order's sake. Doubtless, the Secretary concurs with the idiomatic placement of cleanliness next to the diety; however, the ultimate concern of the standard is with hazards which normally underlie disorder and filth. One can trip over a dog-eared plate just as easily as a pile of debris. The hazards are identical:

> A housekeeping standard must be worded with some degree of flexibility and generality. No standard, especially housekeeping, can anticipate all of the possible ways in which violative or hazardous conditions could develop. [Footnote omitted] Secretary of Labor v. Plessey-Burton, Inc., 12 OSAHRC 577, 580 (1974) [hereinafter cited as Plessey-Burton].

As pointed out in Plessey-Burton, surpa at 581, "[t]he words clean and orderly have a common and customary meaning . . ." The plain meanings of these words must be reasonably applied to the existing condition to determine whether a violation exists. The first definition of "orderly" encountered in the unabridged edition of the Random House Dictionary of the English Language (1973) is:

> 1. arranged or disposed in a neat tidy manner or in a regular sequence; an orderly desk.

A reasonable application of this definition to the facts of the present case compels the conclusion that the "irregular" surface caused by a dog-eared plate is "disorderly."

In light of the flexible interpretation which is to be accorded the housekeeping standard under Plessey-Burton and in the absence of a more applicable standard, it is hereby determined that 29 C.F.R. 1910.22(a)(1) is applicable to the dog-eared plate in the Forge Shop and that Item 1 of the Nonserious Citation must be affirmed.

PENALTY

The proposed penalty for Item 1 of the Nonserious Citation was $70. As evaluated by the CO, both violations, Items 1(a) and 1(b), were of relatively low gravity. In determining this penalty, the CO also considered Respondent's good faith efforts to provide a safety program as well as Respondent's past history of violations (Tr. 119). Since Item 1(a) has been vacated, a penalty of $35 for Item 1(b) is appropriate.

Item 4 of the Nonserious Citation and Item 1 of the consolidated Nonserious Citation are also affirmed herein. The CO determined that no penalty was appropriate for these violations. In view of the Respondent's rapid abatement of the conditions underlying these violations and the statutorily mandated factors set out in Section 17(j) of the Act,[16] the CO's evaluation is credited and no penalty is assessed.

CONCLUSION

The jurisdiction of the Review Commission in this case is not contested and is established by the pleadings and stipulated facts, pursuant to Sections 3(4), (5) and 10(c) of the Act.[17]

Based upon the foregoing which constitute the findings of fact and conclusions of law herein, and pursuant to Sections 10(c) and 12(j) of the Act,[18] it is hereby,

ORDERED:

1. (a) That Item 1(b) of the Citation for Nonserious Violation of 29 U.S.C. 654(a)(2) for failure to comply with the Occupational Safety and Health Standard set forth at 29 C.F.R. 1910.22(b)(1) is AFFIRMED; (b) A $35 penalty is assessed.

2. (a) That Item 7 of the Citation for Nonserious Violation of 29 U.S.C. 654(a)(2) for failure to comply with the Occupational Safety and Health Standard set forth at 29 C.F.R. 1910.219(f)(1) is AFFIRMED; (b) No penalty is assessed.

16/ See Note 11, supra.

17/ 29 U.S.C. 652(4), 652(5), and 29 U.S.C. 659(c).

18/ 29 U.S.C. 659(c) and 29 U.S.C. 661(i).

3. (a) That Item 1 of the consolidated Citation, OSHRC Docket No. 78-2041, for Nonserious Violation of 29 U.S.C. 654(a)(2) for failure to comply with the Occupational Safety and Health Standard set forth at 29 C.F.R. 1910.22(a)(1) is AFFIRMED; (b) No penalty is assessed.

4. That the single-Itemed Citation for Repeat Violation of 29 U.S.C. 654(a)(2) for failure to comply with the Occupational Safety and Health Standard set forth at 29 C.F.R. 1910.176(b) is VACATED.

5. That Item 1(a) of the Citation for Nonserious Violation of 29 U.S.C. 654(a)(2) for failure to comply with the Occupational Safety and Health Standard set forth at 29 C.F.R. 1910.22(b)(1) is VACATED.

6. That Item 4 of the Citation for Nonserious Violation of 29 U.S.C. 654(a)(2) for failure to comply with the Occupational Safety and Health Standard set forth at 29 C.F.R. 1910.219(b)(1) is VACATED.

William E. Brennan
WILLIAM E. BRENNAN
Adm. Law Judge, OSHRC

Dated: June 18, 1979
Hyattsville, Maryland

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

March 24, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Pinkston-Hollar, Inc.

OSHRC DOCKET NO. 79-5359

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

FOR THE SECRETARY OF LABOR

OF ORDER

Counsel for Regional Litigation
Office of the Solicitor, USDOL
200 Constitution Ave., NW. - Rm. S-4014
Washington, D.C. 20210

To wit: See attached.

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FOR EMPLOYER

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FOR EMPLOYEES

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Stanley M Schwartz
Judge, OSHRC
Federal Building, Room 7B11
1100 Commerce Street
Dallas, Texas 75242

Rev. 10/1/78

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| Secretary of Labor | : | |
| Complainant, | : | |
| v. | : | OSHRC DOCKET NO. 79-5359 |
| Pinkston-Hollar, Inc. | : | |
| Respondent. | : | |

ORDER

Since the Commission now has jurisdiction in this case, the Commission grants the Secretary's Motion to Withdraw Citations.

For the Commission

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

Date: MAR 24 1982

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| 81-1478 | H. TILLMAN & SONS, INC. | 3/24/82 | 15/B7 |
| 81-1530 & 81-1531 | NEW YORK TELEPHONE COMPANY | 3/24/82 | 15/C3 |
| 80-2281 & 80-2282 | UNITED STATES STEEL CORPORATION | 3/25/82 | 15/C11 |
| 81-1977 | STRUCTURAL STEEL, INC. | 3/25/82 | 15/D2 |
| 81-694 | CENTRAL HARDWARE COMPANY | 3/26/82 | 15/E7 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
|---|---|---|---|---|

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

NOTICE OF DECISION

Secretary v. Jackson Marine Companies
OSHRC Docket No. 81-635

Enclosed is a copy of my decision in the above-entitled case. This decision constitutes my final disposition of the proceeding pursuant to 29 U.S.C. §661(i) and 5 U.S.C. §557. I have this date mailed the original decision together with the Commission's file, transcript of testimony, and all exhibits to Richard Shiffmann, Chief Review Counsel, at the Commission's Office in Washington, D.C.

I am required to advise you as follows:

(1) The decision will be filed with the Commission on February 22, 1982 and will become the final order of the Commission on March 24, 1982 unless a member of the Commission directs that it be reviewed. Parties will not receive any further communications from the Commission unless the decision is directed for review. (See paragraphs 4, 5, and 6 below.)

(2) You may petition for discretionary review of this decision by the Commission. An original and three copies of such a petition must be submitted in accordance with 29 CFR 2200.91. The last day the Commission may consider your petition is March 24, 1982, the final order date. This final order date is set by law and cannot be extended.

(3) Petitions for review should be mailed to:

Richard Shiffmann, Chief Review Counsel
Occupational Safety & Health Review Commission
1825 K Street, N.W.
Washington, D.C. 20006

(4) Should review be ordered, each party will be notified and given opportunity to submit a brief.

(5) Please complete and mail the enclosed postcard, indicating whether you presently intend to seek review of this decision. Your response on the card does not bind you in any way, but assists the Commission in scheduling future workload.

(6) For further details on the review process, see Commission Rules 90, 91, 92, 93, 94, and 95.

DATED: February 2, 1982

Erwin L. Stuller

ERWIN L. STULLER
Judge

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>JACKSON MARINE COMPANIES,<br>Respondent. | DECISION AND ORDER<br>Docket No. 81-635 |

APPEARANCES:

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Attorney for Respondent

## DECISION

The Portland, Oregon worksite of Jackson Marine Companies was inspected by the Secretary's Safety and Health Specialist on January 29, 1981. Thereafter, two citations and notices of proposed penalty were issued by the Secretary charging Jackson Marine Companies with four safety violations of the Act.[1/] Jackson has denied the charges but has admitted jurisdiction.[2/]

## THE INSPECTION

The principle issue in this case concerns the validity of the warrantless inspection. Jackson alleges that its foreman, Dan Wamsley, refused the inspector entry aboard the barge, SIOUXON. However, after the inspector assured Mr. Wamsley that he would not conduct an inspection, he was allowed to board the vessel.[3/] Jackson argues that once the employer's representative has refused the inspector the right to enter the workplace, the inspector must obtain a search warrant prior to entry or else the inspection is invald. MARSHAL v. BARLOW'S INC., 436 U.S. 307, 98 S.Ct. 1816 (1978). The inspector testified that he had identified himself and presented his credentials to the foreman. He stated that he informed the foreman of the nature, purpose and scope of the inspection and held an opening conference with him prior to gaining access to the work barge. After the conference, the foreman directed the crane operator to transport the inspector to the barge. The inspector entered a cage that was on the pier. The crane then lifted the cage to the barge.[4/]

The issue is reduced to the conflict in testimony between that of the inspector and the foreman. After observing both witness while testifying and considering their demeanor, I conclude that the inspector's testimony was far more credible than that of the foreman. Indeed, I give little weight to the foreman's testimony. The foreman had had his position for only six months prior to the inspection. He admitted that there was a company policy that requires him to refuse entry to any non-employee until after he contacts his supervisors and obtains their permission to allow the person to enter the worksite. The foreman didn't do this. He is a working foreman and was busy at the time of the inspection. There had been some commotion in the area due to a smokey tire fire near the pillars of a loading pier. After listening to the foreman's testimony and viewing his demeanor I conclude that the foreman's testimony regarding the event was not credible. He appeared to be attempting to safeguard his job by blaming the inspector for the violation of Jackson's procedures. Consequently, I conclude that the compliance officer was not denied entry; did not use subterfuge to obtain entry; that the foreman waived the employer's rights to a search warrant and, therefore, the inspection was valid.

## BUOYANT VEST

The serious violation alleged in Citation 1, Item 1 charges that one employee was welding a beam within twelve feet of an

unguarded deck of the barge without the protection of a buoyant vest.[5/]

Findings of Fact

The work barge was afloat and anchored in the waterway, the Willamette River. The vessel was 100 feet long and 50 feet wide. One employee was welding two beams within twelve feet of the unguarded edge of the barge. He was wearing a welding helmet. He did not have a U.S. Coast Guard approved work vest or buoyant vest. He had no safeguard to keep him from falling off the edge of the barge or to keep him afloat in the water. The water was approximately 35 feet deep at that point. The deck was strewn with pieces of steel, welding leads, wooden blocks, and other items on which he could trip. Had he fallen into the water without the floatation devices there was a substantial probability that he would have drown.

Opinion

The inspection was fair and impartial. In regard to this alleged violation, the employer has not denied violative conditions but instead claims that this was an isolated incident of employee misconduct.

The evidence establishes the violation as alleged. The violative conditions were serious. With the exercise of reasonable diligence, the foreman could have known of the conditions. Therefore, the item will be affirmed as alleged.

As to the argument in defense, nothing was shown indicating that the employee's conduct in any way limited the employer's ability to recognize the violative condition or abate it. Therefore, the employer will be held responsible.

## PORTABLE FIRE EXTINGUISHERS

Item 1 of Citation 2 charges the employer with failing to periodically inspect a multi-purpose dry chemical fire extinguisher.[6/]

### Findings of Fact

The fire extinguisher concerned was located near the engine area of the crane and adjacent to a permanently affixed stairway on the barge. The gauge on the extinguisher indicated that it was inoperable and needed recharging. It had last been inspected in July of 1979.

The fire extinguisher was located in a work area. Hot work was being done nearby. There were occasional fires such as the tire fire. Therefore, employees had access to the zone of danger. With the exercise of reasonable diligence, the employer could have become aware of the existence of the hazard. The hazard was the possibility of burns resulting from a fire that could have been stopped by a fully charged fire extinguisher.

### Opinion

The facts alleged establish the violation as charged. The employer does not deny the violative condition but claims that the Commission has previously ruled that portable fire extinguishers

are exempt from annual inspections. They cite GEORGE J. IGEL & CO., INC. 78 OSAHRC 44-C2, 6 BNA OSHC 1642, 1978 CCH OSHD 22,769 (No. 76-1087, 1978).

In the present case as in IGEL, stored-pressure extinguishers with pressure gauges are concerned. In each case, the gauge indicated that the extinguisher was in other than fully operable condition. In each case, the employer was charged with failing to periodically inspect inoperable fire extinguishers. Obviously in this case, the gauge which was in plain sight had not been inspected; otherwise it would have been recharged. Therefore, the employer violated the standard as alleged.

## LIFESAVING SKIFF

Citation 2, Item 2 charges that the employer did not have a lifesaving skiff immediately availble.[7/]

### Findings of Fact

A steel boat approximately twenty feet long was stowed and secured to the barge. It was not in the water. It did not have oars or other means of propelling it. The motor was detached from the boat after it had broken down. There was no other lifeboat aboard the barge or in the water next to the barge.

### Opinion

The credible evidence presented establishes the violation as alleged. The Respondent does not deny that the twenty foot

long boat was not available to rescue an employee in the water. Instead, it claims that there was another skiff available. Again, there is a conflict in testimony, the resolution of which decides the issue. As the inspector's testimony is found to be more credible than that of the foreman, the item will be affirmed as alleged.

## RING BUOYS

Citation 2, Item 3 concerns the absence of a ring buoy with a line at least ninety feet long.[8/]

### Findings of Fact

A life ring on the barge had a line attached that was only thirty feet long. There were not other life rings available on the barge. Had someone fallen in the water, due to the short length of line, there was a possibility that the ring would not reach the employee.

### Opinion

The credible evidence establishes the violation as alleged. Again, there is a conflict of testimony. The foreman stated that there was another ring with ninety feet of line that was inside the crane shack. The conflict is again resolved in the Complainant's favor, and therefore the item will be affirmed as alleged.

## PENALTY

The evidence presented regarding the employer's gross annual income and the number of its employees establishes that it has a small business. After considering this, the gravity of the violations, the lack of previous history and the good faith of the employer, it is concluded that the penalty proposed is appropriate.

## ORDER

The citations herein and the notices of proposed penalty are AFFIRMED. A total penalty of $180 is ASSESSED.

Erwin L. Stuller

ERWIN L. STULLER
Judge

DATED: February 22, 1982

## FOOTNOTES

1/ The violations were alleged to have taken place at the time of the inspection on January 29, 1981. The citations were issued on February 13, 1981. They charge that Jackson Marine Companies failed to comply with safety regulations in violation of Section 654(a)(2) of the Occupational Safety and Health Act (29 U.S.C. 651 et seq.). Citation No. 1 charges one Serious violation of the Act. Citation No. 2 charges three nonserious violations of the Act.

2/ Jackson filed a timely notice of contest. At that point the Commission acquired jurisdiction over the subject matter under Section 659 of the Act. Jackson admitted jurisdiction in its answer. It is consequently concluded that Jackson is an employer with employees engaged in a business affecting commerce within the meaning of Section 3 of the Act.

3/ Respondent's Brief page 3, Tr. pp. 87-94.

4/ Tr. pp. 18-21

5/ A description of the violation alleged, the proposed penalty, and the safety standard concerned are as follows:

Citation No. 1, Item 1 (Serious)

> One employee was observed welding a beam within twelve feet of the unguarded deck of the work barge and was not protected with a U.S. Coast Guard approved work vest or buoyant vest.

In violation of 29 CFR 1926.605(d)(3)

Proposed Penalty: $180

29 CFR 1926.605(d)(3) provides:

> Employees walking or working on the unguarded decks of barges shall be protected with U.S. Coast Guard-approved work vests or buoyant vests.

6/ A description of the violation alleged, the proposed penalty, and the safety standard concerned are as follows:

Citation No. 2, Item 1 (Other)

> Portable fire extinguishers were not inspected periodically in accordance with maintenance and use of portable fire extinguishers, N.F.P.A. No. 10A-1970:

In that the multi-purpose dry chemical extinguisher located on the barge SIOUXON had not been examined and tested since July 1979.

In violation of 29 CFR 1926.150(c)(1)(viii).

Proposed Penalty: $0

29 CFR 1926150(d)(1)(viii) provides:

> Portable fire extinguishers shall be inspected periodically and maintained in accordance with Maintenance and Use of Portable Fire Extinguishers, NFPA No. 10-A-1970.

7/ A description of the violation alleged, the propose penalty, and the safety standard concerned are as follows:

Citation No. 2, Item 2 (Other)

> A lifesaving skiff was not immediately available at locations where employees were working over or adjacent to water:
>
> > In that the 20-foot long boat being stowed on the deck of the barge SIOUXON had no motor attached in the event it was needed to rescue employees in water.

In violation of 29 CFR 1926.106(d).

Proposed Penalty: $0

29 CFR 1926.106(d) provides;

> At least one lifesaving skiff shall be immediately available at locations where employees are working over or adjacent to water.

8/ A description of the violation alleged, the proposed penalty, and the safety standard concerned are as follows:

Citation No. 2, Item 3 (Other)

> Ring buoys with at least 90 feet of line were not provided and readily available for emergency rescue operations:

In that life ring on the barge SIOUXON at the aft end of the crane had only 30 feet of line attached to same.

In violation of 29 CFR 1926.106(c).

Proposed Penatly: $0

29 CFR 1926.106(c) provides:

> Ring buoys with at least 90 feet of line shall be provided and readily available for emergency rescue operations. Distance between ring buoys shall not exceed 200 feet.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

NOTICE OF DECISION

Secretary v. Combustion Engineering
OSHRC Docket No. 81-920

Enclosed is a copy of my decision in the above-entitled case. This decision constitutes my final disposition of the proceeding pursuant to 29 U.S.C. §661(i) and 5 U.S.C. §557. I have this date mailed the original decision together with the Commission's file, transcript of testimony, and all exhibits to Richard Shiffmann, Chief Review Counsel, at the Commission's Office in Washington, D.C.

I am required to advise you as follows:

(1) The decision will be filed with the Commission on February 22, 1982 and will become the final order of the Commission on March 24, 1982 unless a member of the Commission directs that it be reviewed. Parties will not receive any further communications from the Commission unless the decision is directed for review. (See paragraphs 4, 5, and 6 below.)

(2) You may petition for discretionary review of this decision by the Commission. An original and three copies of such a petition must be submitted in accordance with 29 CFR 2200.91. The last day the Commission may consider your petition is March 24, 1982, the final order date. This final order date is set by law and cannot be extended.

(3) Petitions for review should be mailed to:

Richard Shiffmann, Chief Review Counsel
Occupational Safety & Health Review Commission
1825 K Street, N.W.
Washington, D.C. 20006

(4) Should review be ordered, each party will be notified and given opportunity to submit a brief.

(5) Please complete and mail the enclosed postcard, indicating whether you presently intend to seek review of this decision. Your response on the card does not bind you in any way, but assists the Commission in scheduling future workload.

(6) For further details on the review process, see Commission Rules 90, 91, 92, 93, 94, and 95.

DATED: February 2, 1982

Erwin L. Stuller

ERWIN L. STULLER
Judge

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>COMBUSTION ENGINEERING, INC.,<br>Respondent. | DECISION AND ORDER<br>Docket No. 81-920 |

APPEARANCES:

JERRY R. ATENCIO, Esquire
Office of the Solicitor
1585 Federal Building
1961 Stout Street
Denver, Colorado 80294

Attorney for Complainant

MICHAEL T. NOBLE, Esquire
Combustion Engineering, Inc.
1000 Prospect Hill Road
Windsor, Connecticut 06095

Attorney for Respondent

## DECISION

The Colstrip, Montana worksite of Combustion Engineering had an industrial accident on March 5, 1981. Thereafter the site was inspected by the Secretary's compliance officer on March 9, 1981. A citation and notice of proposed penalty were then issued by the Secretary charging C. E. with a serious violation of the Act. C. E. has denied the charge.[1/]

C. E. has been charged with failing to secure and properly balance a load in a sling or lifting device before it was lifted more than a few inches.[2/] C. E. contends that the load was properly secured and balanced but that after the load was lifted and lashed to the crane, the crane operator overloaded the tie-off line by booming out too far and too quickly causing the tie-off line to part which allowed the load to swing out from the crane.

## Findings of Fact

On March 5, 1981 C. E. was engaged as a subcontractor erecting two units for Montana Power Company at Colstrip, Montana. The units were part of a coal-fired, fossil-powered energy generation plant.

Two of its employees, who are boilermakers, had selected a riser tube about sixty feet in length to be attached to the unit that was some distance away. The employees had rigged the riser with a single wrap and a steel choker. After the crane lifted the riser, the riser was attached to the body of the crane

with a tie-off rope. The load was secured and properly balanced. The mobile crane was to carry the load three hundred yards away where it was to be installed.

After the riser was tied off, the crane boomed up making the tie line taut. The boilermakers started to walk away. They heard a popping sound. Two of the three strands of the tie line had parted. The rigging came loose, shifted and became unbalanced. Part of the riser swung out and struck one of the employees, Mr. Luloff, breaking his leg.

Four days later the compliance officer, Mr. Woodford, inspected the site but did not see the tie-off line. He assumed that it was intact, although Mr. Thomas, the other boilermaker, had informed him that before the riser slipped the crane was booming up and he heard a popping sound.

It was the compliance officer's opinion that the accident resulted because there was only a single wrap of the riser. In his opinion, a double wrap would have reduced slippage.

H. D. Luloff, William Thomas, and Monte Cassidy, the boilermakers' Business Agent, believed that a single wrap was standard practice in the industry. In some cases double wrap is used. Messrs. Luloff and Thomas believe that at the time the crane lifted the riser, it had been well secured and properly balanced.

## Opinion

The complaint charges that the load was not well secured and properly balanced in the lifting device before it was lifted

more than a few inches. The only evidence going to this point was the testimony of the two boilermakers who had lashed the load. They stated that the load was secure and well balanced after it was lifted and tied off. The testimony of these employees was highly credible. As there is no evidence contradicting this, the citation will be vacated.

The Complainant contends that the load would have been better secured had a double wrap been used and had the choker been nylon rather than steel. However, the standard is vague as to the specific techniques of securing this type of load. The two boilermakers and their Union Business Agent, Mr. Cassidy, testified that the single wrap method of securing the load was accepted industry practice. There was no evidence to the contrary. Therefore, the use of an accepted industry practice complies with the safety standard if the standard, such as the one concerned here, is broadly worded and generally vague. CAPE & VINEYARD DIV. v. O.S.H.R.C., 512 F.2nd 1148 (1st Cir. 1975).

The Complainant implies that the accident resulted from the method used to rig the load. But this ignores the evidence that the accident occurred after the rigging had been completed and due to an error of the crane operator in booming out too quickly. The Complainant's contention is based entirely upon the opinion of the compliance officer. The compliance officer's testimony is given little credibility and his opinions are given no credibility. The compliance officer was not at the

site at the time of the incident. He ignored statements made to him by the two boilermakers who were occurrence witnesses. He did not see the broken tie-off rope, but assummed that it hadn't broken. His opinion as to how the accident occurred runs contrary to the opinions of the occurrence witnesses. This is in spite of the fact that the compliance officer had virtually no experience in the specific type of activity being conducted by the boilermakers, whereas the boilermakers had done this paticular task thousands of times over many years. All conflicts between the compliance officer's testimony and the testimony of the two occurrence witnesses are resolved in favor of the two occurrence witnesses. It appears here that the load was well secured and properly balanced in the lifting device and that it was lifted several inches and then tied off. The accident occurred at a slightly later point in time due to an error of the crane operator in booming out. It follows then that the Respondent did not violate the standard as alleged.

## ORDER

The citation and notification of proposed penalty are VACATED.

Erwin L. Stuller

ERWIN L. STULLER
Judge

DATED: February 22, 1982

## FOOTNOTES

1/ The violation was alleged to have taken place on March 5, 1981. The citation was issued on March 20, 1981. It charges that C. E. failed to comply with safety regulations in violation of Section 654(a)(2) of the Occupational Safety and Health Act (29 U.S.C. 651 et seq.). C. E. filed a timely notice of contest. At that point the Commission acquired jurisdiction over the subject matter under Section 659 of the Act. In its answer C. E. admitted jurisdiction.

2/ The complaint amends the citation. A description of the alleged violation, as amended, the proposed penalty, and the safety standard concerned are as follows:

Citation 5, Item 1 (Serious)

> Crawler, truck, or locomotive cranes in use did not meet the applicable requirements for operation as prescribed in the ANSI B 30.5-1968 Safety Code for Crawler, Locomotive and Truck Cranes:
>
> > ANSI B 30.5-1968 Section 5-3.2.3(a)(2): The load was not well secured and properly balanced in the sling or lifting device before it was lifted more than a few inches.

in violation of 29 CFR 1926.550(b)(2)

Penalty Proposed: $700

29 CFR 1926.550(b)(2) provides:

> All crawler, truck, or locomotive cranes in use shall meet the applicable requirements for design, inspection, construction, testing, maintenance and operation as prescribed in the ANSI B 30.5-1968, Safety Code for Crawler, Locomotive and Truck Cranes.

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1515 Broadway
Room 3800

New York, N.Y.
10036

## NOTICE OF DECISION

Secretary of Labor v. H. Tillman & Sons, Inc.
OSHRC Docket No. 81-1478

1. Enclosed is a copy of my decision. It will be filed with the Commission on February 22, 1982, and will become the final order of the Commission on March 24, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is March 24, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Seymour Fier

SEYMOUR FIER
JUDGE, OSHRC

Date: February 2, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>H. TILLMAN & SONS, INC.,<br><br>Respondent. | OSHRC DOCKET<br><br>NO. 81-1478 |

Appearances:

Francis V. LaRuffa, Regional Solicitor
U. S. Department of Labor
1515 Broadway, Room 3555
New York, New York 10036
by Barnett Silverstein, Esq., of counsel

Erwin Popkin, P. C.
55 Mineola Boulevard
Mineola, New York 11501
by Gerald V. Dandeneau, Esq. and Michael Salgo, Esq., of Counsel

## DECISION AND ORDER

Fier, Judge:

## PRELIMINARY STATEMENT

This is a proceeding pursuant to section 659 of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651, et seq., hereinafter called the Act), wherein Respondent contests the citation and penalty for one serious violation.

The citation dated May 15, 1981, was based on an inspection conducted during the period April 21, 1981 to April 30, 1981. The citation and proposed penalty was issued pursuant to Section 9(a) and 10(a) of the Act.

In accordance with section 10(c) of the Act, 29 U.S.C. § 659(c), Respondent through a letter dated June 2, 1981, noted its timely contest of the citation.

The citation for the alleged violations set forth the following:

Serious Citation No. 1, Item 1, Standard 29 CFR 1926.28(a):

Appropriate personal protective equipment was not worn by employee(s) in all operations where there was exposure to hazardous conditions:

> Roof Top (pitched work areas) at 164-27 85th Avenue, Howard Beach. Employee observed installing shingles without safety belt and lines or other means of fall protection.

A penalty of $240.00 was proposed.

## ISSUES

1. Whether the Respondent violated the Occupational Safety and Health Act as alleged.

2. Whether the Respondent failed to comply with section 29 CFR 1926.28(a); if so, did the Respondent violate 29 U.S.C. 654(a)(2) of the Act.

3. If the Respondent is found to have violated the above, what penalty or penalties, if any, should be assessed.

## EVIDENCE

### SUMMARY OF TESTIMONY

Henry Piencinski, a Compliance Officer for the United States Department of Labor, for a period of three years, conducted an inspection on April 21, 1981. The construction site consisted of three buildings. They were described as mother-daughter type buildings with a plywood roof. There were three buildings in the same stage of construction at the worksite (Tr. 6, 7).*

April 21, 1981, was described as a rainy day. However, in the afternoon the C.O.** stated that he met with the Respondents. He had a previous opening conference with the General Contractor and was now meeting with the Respondents (Tr. 9).

---

*Denotes transcript page number.
**Denotes Compliance Officer.

There were no employees working on the date of inspection. He only discussed the inspection with H. Tillman, the President, and Leonard Tillman, the Vice-President (Tr. 10).

The Respondents stated that they were not working that day but were only bringing materials to the site. The C.O. said that he would be back on a day that the employees were working. The employees were not unionized. At the time of inspection there were two employees and the Tillmans (Tr. 14).

The C.O. next returned to the site on April 28, 1981, with the General Contractor accompanying them, he saw two employees. One worker was on the sixteen-foot level and the other was on the edge of the roof (Exhibit C-1, C-2). The employees had no protective equipment (Tr. 19). The C.O. asserted that the employees violated section 29 CFR 1926.28(a), which is a serious violation (Tr. 24). There was no safety equipment to protect them from a fall. He took a picture and then tried to get the employees names, but the employees refused (Tr. 19, 20). The General Contractor then responded that they were employees of Respondent, Tillman (Tr. 21). The C.O. then measured the fall distance to be sixteen feet (Tr. 21). They were standing within three feet from the edge (Tr. 22). He later checked the dimensions with the plans and verified the measurements (Tr. 22). There were no lanyards, safety belts, or other protective equipment. A lifeline could have been tied to a chicken ladder on the

other side of the building or even the skylight (Tr. 25, 26). He saw the employees bringing a skylight up the ladder to be assembled in the center of the roof. The observation made, indicated that the condition was hazardous (Tr. 28).

Exhibit C-2, is a picture taken April 28, 1981, at the worksite (Tr. 28). The picture shows two employees, one on the roof and one on the ladder, pushing up the skylight. Mr. Nerrie was on the 16-1/2-foot level about two feet from the edge of the roof (Tr. 30). The eave was 16 feet from the ground.

The C.O. evaluated the extent of the violation and determined that the $600.00 unadjusted proposed penalty should be reduced by 40 percent for size because it is a small business and 20 percent because there were no previous violations. The unadjusted proposed penalty was therefore reduced by 60 percent to an adjusted proposed penalty of $240.00 (Tr. 35).

The C.O. stated that the names of the employees whom he observed in Exhibit C-2 were given to him by Leonard Tillman (Tr. 36). The C.O. said that he had a closing conference on April 30, 1981, at which time he told Mr. Tillman that he observed the employees working on the roof without safety belts and it was at that time that the names of the employees were given to him (Tr. 37).

The C.O. stated that after the photo was taken, he made his measurements. The skylight was to be installed on the roof. The C.O. indicated that safety belts or lifelines could have been used. The inside of the building was not completed. A lifeline could have been attached to the other side of the roof under the eave (Tr. 51). If working on the peak, it would be tied off on both sides to prevent a fall. The C.O. stated that the employees were in an area of danger for one to two minutes.

The Respondent's Exhibit 1, consisting of the citation, refers to the fact that the citation alleges that shingles were being installed without a safety belt (Tr. 66). The Respondent indicates that shingles were not being installed. The Respondent also indicates that the testimony of the C.O. does not form to paragraph 5 of the complaint and refers to a skylight, not as to installation of a roof. Further, the allegations in the complaint and the testimony are said to be inconsistent.

The Respondent called no witnesses.

## OPINION

The Secretary has presented evidence which alleges that the Respondent's employees failed to use personal protective equipment when observed by the C.O. The Respondent offered no evidence other than the citation (Exhibit R-1). The evidence is therefore adopted as to the fact that the

workers were not wearing personal protective equipment when they were exposed to a fall hazard while working on the roof at the worksite.

The issue raised by the Respondent asserts that the citation says the employee was "observed installing shingles" (Exhibit R-1).

The citation states; "Appropriate personal protective equipment was not worn by employee(s) in all operations (emphasis added) where there was exposure to hazardous conditions:" (Exhibit R-1). A plain reading of the above leaves little doubt that personal protective equipment was required in all phases of the roofing operation. A fall hazard of approximately 16 feet is sufficient to establish the seriousness of a fall. Therefore, as noted in Exhibit C-2, it is clear that the lifting of the skylight is part of the roofing operation and hazardous without personal protective equipment. Accordingly, the Respondent's argument that the evidence was not related to the citation must fail.

The Respondent's argument that the Secretary failed to amend the pleadings to conform to the proof also lacks merit.

The evidence presented sufficiently established the violation by the testimony and the photograph. Accordingly, the Secretary has carried its burden of proof.

Finally, the Respondent alleges that the evidence failed to establish the identity of the workers as being those of the Respondent. I disagree, (Tr. 14, Exhibit C-1, question 12 and answer). There is clear and convincing unrebutted evidence that the employees were identified as those of the Respondent (Exhibit C-1). All motions not previously or herewith disposed of are denied.

In considering the proposed penalty, the criteria set forth in the statute have been considered in light of the evidence herein. I find that the proposed adjusted penalty is fair and proper and should be affirmed.

## FINDINGS OF FACT

The credible evidence and the record as a whole establishes preponderant proof of the following facts:

1. Respondent. H. Tillman & Sons, Inc., is engaged in the roofing business. The materials used, and effects on commerce, establishes that it is engaged in interstate commerce.

2. The Respondent's employees were observed exposed to a fall hazard by failing to wear personal protective equipment while engaged in roofing operations, thus failing to meet the requirements of the standard 29 CFR 1926.28(a).

## CONCLUSIONS OF LAW

1. The Respondent is and was at all times herein, in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970.

2. The Occupational Safety and Health Review Commission has jurisdiction over the subject matter and parties to this action.

3. Respondent violated 29 U.S.C. 654(a)(2) by failing to comply with 29 CFR 1926.28(a).

## ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record, it is hereby ORDERED that:

Citation number one, item one, is affirmed.

Seymour Fier

SEYMOUR FIER
JUDGE, OSHRC

Dated:
New York, New York

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1515 Broadway, Room 3800
New York, New York 10036

NOTICE OF DECISION

Secretary of Labor v. NEW YORK TELEPHONE COMPANY
OSHRC Docket No. 81-1530 & 81-1531 (CONSOLIDATED)

1. Enclosed is a copy of my decision. It will be filed with the Commission on February 22, 1982, and will become the final order of the Commission on March 24, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is March 24, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Edward V. Alfieri
EDWARD V. ALFIERI
JUDGE, OSHRC

Date: February 2, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>NEW YORK TELEPHONE COMPANY,<br>Respondent. | OSHRC DOCKET<br>NO. 81-1530<br>81-1531<br>(Consolidated) |

Appearances:

Francis V. LaRuffa, Regional Solicitor
United States Department of Labor
1515 Broadway, Room 3555
New York, New York 10036
Attorney for Complainant
by Alan Kammerman, Esq.

Roger Karlebach, Esq.
Legal Department
New York Telephone Company
1095 Avenue of the Americas
New York, New York 10036
Attorney for Respondent

DECISION AND ORDER

Edward V. Alfieri, Judge.

These cases, brought under Section 10(c) of the Occupational Safety and Health Act (29 U.S.C. 651, et seq.), involve citations arising from two separate inspections conducted by the Secretary of Labor at the New York Telephone Company's facilities at 88-11 165th Street, Jamaica, New York. An order of consolidation was issued on October 26, 1981.

At the opening of the hearing, Respondent moved to withdraw its notice contesting item 3 of the serious citation issued in case 80-1531. The item alleged Respondent failed to comply with 29 CFR 1910.304(f)(4). The Secretary moved to reduce the proposed penalty for the item to $200.00 from $400.00. The motions were granted.

Also in case 81-1531, the Secretary moved to withdraw items 1(a) and 1(b) and item 2 of nonserious citation 2. The items alleged Respondent failed to comply with 29 CFR 1910.38(a)(1), 29 CFR 1910.38(b)(1) and 29 CFR 1910.156(b)(1). The motion was granted.

During the course of the sixth day of hearing, the parties placed into the record the terms of a settlement agreement (Joint Exh. 1) which amicably resolved all of the issues except one. That is, whether or not Respondent's admitted failure to comply with safety standard 29 CFR 1910.22(a)(1)[1] by maintaining tripping hazards[2] on the ninth and tenth floors is properly

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1. The standard reads: (a) Housekeeping. (1) All places of employment, passageways, storerooms, and service rooms shall be kept clean and orderly in a sanitary condition.

2. The hazards are described as:

   9th floor was not kept orderly to eliminate tripping hazards of the following conditions and at the following locations. Conditions - inside wiring cables were not secured out of aisle ways, work areas, under desks and at desk locations. . .

   10th floor: Tripping hazards in the following areas. 1, 3 and 5 - Electrical and telephone boxes in aisles, between aisles, at desks. Inside wiring cables hanging from ceiling, creating tripping hazards. Loose boxes not secured in place. Work areas not kept in an orderly condition, because of inside wiring cables running along floor in work areas.

classified as a serious violation within the meaning of Section 17(k) of the Act[3] (29 U.S.C. 666(j)).

Accordingly, the settled portions of the case are hereby severed from the remaining issue and will be disposed of by separate order to be issued simultaneously with this decision.

## THE EVIDENCE

The Secretary offered the testimony of his Compliance Officer Everett Hall and Respondent's employees Karen Johnson and Carolyn Blocker. Johnson and Blocker are also union[4] stewards.

Hall testified that the violative conditions, in his opinion, were serious.

He based that on his observations of conditions on the ninth and tenth floors; oral statements made to him by Respondent's employees that others sustained fall injuries and his examination of Respondent's occupational injury and illness list[5] (Exh. C-1). That document shows two employees sustained

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3. Section 17(k) provides:

> For purposes of this section a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

4. United Telephone Workers.

5. OSHA Form 200.

ankle and knee sprains when they tripped (Tr. 52).

He foresaw the probability of an employee sustaining a broken toe or foot (Tr. 56), a head or knee injury (Tr. 412) when falling and striking a desk or other equipment (Tr. 413).

Karen Johnson testified that an employee (Linda Cook) tripped and struck her head on a desk and was taken to the hospital (Tr. 433). Stitches were applied to her wound and she lost work time (Tr. 462). She did not witness the accident (Tr. 602). The New York State Workmans Compensation Board decision (Exh. C-26) introduced through Johnson refers to Cook's injuries as "Laceration of Scalp - Contusion of Head. No serious Facial Disfigurement." The time loss was eight weeks.

Carolyn Blocker testified that she recalled an employee[6] tripping but not sustaining any injuries (Tr. 501, 502) and that Miss Cook fell and struck her head (Tr. 506).

Called by the Respondent, Norman Wood testified that he is a member of the corporate safety staff. Among his duties is the inspection of Respondent's workplaces to insure safe conditions and correct those that are not (Tr. 589-594).

In his opinion, an employee tripping and falling in either the ninth or tenth floor areas would probably sustain bruises, cuts or lacerations and not a sprain or pulled muscle. It was more probable that no injury would occur. He could not conceive of a person in either area sustaining serious injury or death (Tr. 594-596).

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6. Lucy Smolich (Tr. 509).

On cross-examination, he expressed the opinion that it was unlikely that a person would hit his or her head on a desk when tripping (Tr. 598).

## DISCUSSION

Whether a violation is serious under Section 17k of the Act depends on the "substantial probability" that death or serious harm will result from an accident, and not on the probability that an accident will occur. Secretary v. Niagara Mohawk Power Corp., 7 BNA OSHC 1447, 1450, 1979 CCH OSHD ¶ 23,670 at p. 28703 (No. 76-2414).

"Substantial" is a relative not an exact word, the meaning of which is to be gauged by all the circumstances surrounding the admitted violative conditions. It imports a greater probability of a serious injury or death occurring in opposition to that which is small or infrequent.

What is "substantial probability" of a serious injury or death occurring must be determined by facts as developed in each case. Thus, the term "substantial probability" is susceptible to different meanings according to the circumstances.

The Secretary's opinion that Respondent's violation of 29 CFR 1910.22(a)(1) constitutes a serious violation may not be rejected unless such opinion is plainly erroneous or inconsistent with the Act's wording. Considered within the framework of this case the Secretary's contention is flawed.

He construes a past isolated incident, that was not the basis for the citation, as proof of a substantial probability that similar incidents will occur with frequency under the same conditions. That conclusion has no support in the record. The immutable fact is that numerous other tripping incidents have occurred under the same conditions resulting in either no injury or only minor sprains.

Both parties cite Review Commission and Court opinions in support of their argument that a decision for each should be rendered. It would seem idle to distinguish these cases from the instant case, or even to discuss them, for the reason that those cases involve either conditions at construction sites or machinery at industrial plants. They are hardly analogous to conditions in a fully carpeted business office.

## FINDINGS OF FACT

All of the facts stated in the stipulation are adopted as findings of fact.

## CONCLUSIONS OF LAW

1. Respondent is, and at all times material hereto was, engaged in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970.

2. Respondent is, and at all times material hereto, was subject to the requirements of the Occupational Safety and Health Act and the standards promulgated thereunder and the Commission has jurisdiction of the parties and of the subject matter herein.

3. Respondent violated section 5(a)(2) of the Act (29 U.S.C. 654(a)(2)) in that it failed to comply with 29 CFR 1910.22(a)(1).

4. The violation for failure to comply with 29 CFR 1910.22(a)(1) is not serious within the meaning of the Act.

5. Respondent violated section 5(a)(2) of the Act (29 U.S.C. 654(a)(2) in that it failed to comply with 29 CFR 1910.304(f)(4).

O R D E R

The citation for failure to comply with 29 CFR 1910.22(a)(1) is affirmed as nonserious.

No penalty is assessed.

Items 1(a), 1(b) and 2 of nonserious citation 2, (in case 81-1531) are vacated.

A penalty of $200.00 is assessed for failure to comply with 29 CFR 1910.304(f)(4).

Those parts of the case that are the subject of the stipulation are severed from this ruling.

Edward V. Alfieri

EDWARD V. ALFIERI
JUDGE, OSHRC

Dated: February 22, 1982
New York, New York

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 80-2281 and 80-2282 |
| UNITED STATES STEEL CORPORATION, | : | |
| Respondent. | : | |

JUDGE'S DECISION FEB 25 '82 FINAL ORDER ON MAR 25 '82 RECEIVED

## ORDER OF DISMISSAL

These are companion cases resulting from OSHA inspections of the respondent's "Southworks" plant in Chicago.

The cases were set for trial to commence August 10, 1981. The complainant's attorney appeared at the scheduled time and announced he would offer no evidence in support of the allegations in the complaints. He filed a "Statement of Position" declaring that the Commission lacked jurisdiction to hear the matters because the respondent's notice of contest in each case had been untimely filed.

The respondent thereupon moved to dismiss the proceedings upon grounds that complainant had failed to prosecute, and had failed to meet his burden of proof.

For reasons that follow, the motion for dismissal will be granted.

It has consistently been the position of the complainant that the notices of contest herein were filed too late and that such tardy filing excised respondent's right to a hearing upon the merits. According to complainant, the Commission is without jurisdiction or discretion in the matter and must perform the ministerial act of affirming the alleged violations exactly as charged in the citations, and approving the penalties proposed by the complainant in the total sum of $21,400.

Complainant asserts that respondent's notice of contest was one day late in one case (80-2281) and two days late in the other (80-2282).

The applicable law requires a notice of contest to be filed "within fifteen working days" from receipt of a citation. Sec. 10(a) Occupational Safety and Health Act of 1970.

The respondent presented evidence by affidavit that it received the citations in Chicago on April 1, 1980. According to the affidavit of the employee whose duties included handling incoming mail, all mail is duly time stamped as soon as it is received. The citations in both cases were time stamped April 1, 1980.

The citations were forwarded to respondent's legal department in Pittsburgh. Relying on the time stamp on the citations, the legal department filed the notices of contest on April 22, which was the 15th working day after April 1st.

The complainant, however, claims the citations were received by the respondent earlier than April 1st. In Docket No. 80-2281, complainant relies on a certified mail return receipt indicating delivery on March 31, and a return receipt in No. 80-2282 indicating delivery on March 28. According to complainant, this would make the notices of contest one and two working days late, respectively.

When issue was joined by the filing of an answer, complainant filed a motion in each case to strike the answer and to dismiss the notice of contest alleging as grounds the late filing. The motions were denied. The complainant moved for reconsideration. This was denied. A request for certification of an interlocutory appeal was likewise denied.

The complainant then petitioned for an interlocutory appeal under Commission Rule 75(c). That petition was unanimously denied by the Commission.

Thereafter the complainant filed a motion for summary judgment. Again the grounds asserted related to the alleged untimely filing of the notices of contest.

The question was briefed, and I thereafter ruled as follows:

> I find there is sufficient basis to conclude that respondent timely contested the citations within the 15 day working day period. See Newport News Shipbuilding & Drydock Co., 9 OSHC 1085 (1980). This conclusion not only finds support in the record, but is consistent with a Commission policy "in favor of deciding cases on their merits." Duquense Light Co., 8 OSHC 1218 (1980); Asarco, Inc., 8 OSHC 2156 (1980).

No reason or argument has since been advanced that would cause me to alter my position. In fact, that position is implicitly reinforced by several recent commission cases involving late filed notices of contest. In Branciforte Builders, Inc., 9 OSHC 2113, the Commission announced that "section 10(a) does not in all cases present an impenetrable barrier to Commission jurisdiction over a citation when the notice of contest is untimely." That case went on to authorize use of Rule 60(b) FRCP to relieve a party from strict compliance with the 15 day working day requirement. Commission policy now allows relief when it can be satisfactorily shown that tardy filing is due to "mistake, inadvertance surprise, or excusable neglect" or for "any other reason justifying relief." (See also J. I. Hass Co., Inc., 9 OSHC 2160; P & A Construction Company, Inc., 10 OSHC 1185).

## ORDER

The complainant having duly appeared at the time and place set for hearing of the above designated cases, and having declined to proceed with proof of the allegations in the citations and complaints herein, electing instead to stand or fall on the correctness of his

opinion that the Commission had no jurisdiction to proceed with a hearing; and the respondent having thereupon moved for dismissal upon grounds of complainant's failure to prosecute and failure to meet his burden of proof; and for good cause appearing, it is now

ORDERED that all proceedings in Docket No. 80-2281, including the complaint, citations and notices of penalty be, are the same are hereby in all things dismissed.

FURTHER ORDERED that all proceedings in Docket No. 80-2282, including the complaint, citations and notices of penalty be, and the same are hereby in all things dismissed.

Ralph B. Maxwell
Judge, OSHRC

DATED: February 23, 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 240

ATLANTA, GEORGIA 30309

# NOTICE OF DECISION

Secretary v. STRUCTURAL STEEL, INC., and IRONWORKERS UNION, LOCAL UNION 55

OSHRC Docket No. 81-1977

1. Enclosed is a copy of my decision. It will be filed with the Commission on February 23, 1982, and will become the final order of the Commission on March 25, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N. W., Suite 601
   Washington, D. C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is March 25, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

James D. Burroughs

JAMES D. BURROUGHS
Judge

Date: February 3, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309
(404) 881-4197

| | | |
|---|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>STRUCTURAL STEEL, INC.,<br><br>Respondent,<br><br>and<br><br>IRONWORKERS UNION, LOCAL UNION 55,<br><br>Authorized Employee Representative. | ) | OSHRC Docket No. 81-1977 |

APPEARANCES:

Sandra B. Kramer, Attorney, Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, on behalf of complainant

B. Gary McBride, Esquire, Toledo, Ohio, on behalf of respondent

Mr. Harvey Takacs, President, Ironworkers Union, Local Union 55, Toledo, Ohio, on behalf of authorized employee representative

## DECISION AND ORDER

BURROUGHS, Judge: Respondent, Structural Steel, Inc., contests an alleged serious violation of 29 C.F.R. § 1926.21(b)(2) for failure to instruct employees in the recognition and avoidance of unsafe conditions in the repair of a warehouse roof

and alleged nonserious violations of 29 C.F.R. § 1904.8, for failing to report a fatality, and 29 C.F.R. § 1926.100(a), for failure to require employees to wear protective helmets where a danger existed from falling objects. The alleged violations were set forth in a serious citation and "other" citation issued to respondent on August 3, 1981, after an investigation was conducted of a fatality occurring on July 10, 1981.

On July 1, 1981, respondent commenced the repair of a portion of the roof of the Ace Hardware warehouse located in Perrysburg, Ohio. A fire had damaged the roof, and respondent had been contracted to repair the damage. The warehouse was approximately 500 feet wide and 800 feet long. The roof of the building was approximately 50 to 60 feet above the floor of the warehouse.

On July 10, 1981, two employees, Tom Kralovic and Jack Juhasz, were laying corrugated steel decking on the bar joists. Two welders were following behind and tacking the decking. At the time of the accident, small sections of decking were being laid and tacked on both sides of an expansion joist that ran across the roof. The small sections of decking had been specially cut to fit the openings on both sides of the expansion joist. The decking sheets were approximately 5 feet 5 inches in length on one side of the expansion joist and 6 feet 4 inches on the other side of the joist. The decking was 30 inches wide.

Kralovic and Juhasz were laying the decking to cover the openings on each side of the expansion joist. The end of the sheets of decking located away from the expansion joist overlapped the existing decking by approximately six inches. The tongue and groove part of the decking interlocked with the existing decking at the points of overlap. The end of the sheet at the expansion joist was placed on the

bearing at the expansion joist. The bearing along the expansion joist varied from three quarters of an inch to an inch and a half.[1/]

The two welders were working seven to eight sheets behind Kralovic and Juhasz. Immediately prior to the accident, Kralovic and Juhasz had placed seven or eight sections of the decking on one side of the expansion joist and were in the process of shifting to lay out sheets on the other side of the joist. Kralovic straddled the expansion joist. A sheet of decking on which he was standing kicked or slid out from the bearing at the expansion joist. As the decking slid off the bearing, it tilted at the corner and Kralovic fell to his death through the opening. The sheet of decking did not fall through the opening.

## Alleged Violation of 29 C.F.R. § 1926.21(b)(2)

Complainant alleges respondent violated 29 C.F.R. § 1926.21(b)(2)[2/] by failing to conduct a pre-job meeting or conference to inform the employees of the hazards

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1/ This dimension is disputed. One of the welders tacking the decking, Peter Kunz, testified that the width of the bearing along the expansion joist varied from three quarters of an inch to an inch and a half (Tr. 34). Respondent's ironworker foreman, John Shuboy, testified that there was a bearing of four and a half inches at the expansion joist on which the decking was placed (Tr. 104, 109). Shuboy's observation of the bearing at the expansion joist was limited. He indicated that "at times" he observed the laying of the decking (Tr. 103), but there is no indication that he personally observed the bearing along the expansion joist in question. There were also other expansion joists on the roof. Shuboy was the nonworking general foreman for the job (Tr. 101). The photograph introduced as Exhibit 1 reflects the bearing along the expansion joist. The expansion joist was composed of 2 x 12-inch pieces of lumber. The boards and the bearing along the expansion joist appear to be approximately the same width. In view of the photographic evidence and the fact that Kunz was involved in welding the decking to the bearing, his testimony as to the width is considered more credible.

2/ Section 1926.21(b)(2) provides:

> The employer shall instruct each employee in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury.

of working with short, lightweight pieces of roof decking suspended on only two joists with little bearing surface on one side. Complainant contends special precaution was necessary on this particular job because it involved the repair of fire damage. A fire repair job is generally considered more dangerous because of damage done to existing steel structure by the heat. The damaged steel has to be removed before the repair commences, and a danger arises from the cutting loose and removal of the damaged steel (Tr. 105-106, 110-111). At the time of the accident, the supporting structure had been repaired. Employees were laying and welding decking on the roof joists. There was nothing unusual about this aspect of the job except for the size and weight of the decking being used and the amount of bearing at the expansion joist.

Roof decking comes in lengths of 20 feet and will generally cover several bar joists when it is laid. In this case, the decking had been cut to lengths of approximately 5 feet 5 inches and 6 feet 4 inches. As a result of the short length, the sheets rested on only two joists. One end of each sheet rested on a bearing at the expansion joist that varied from only three quarters of an inch to one and one-half inches. The other end of each sheet overlapped existing decking by approximately six inches. The reduced size and weight of the decking sheets created a greater possibility that the sheets could slip off the bearing at the expansion joist.

The employees laying the decking were generally seven to eight sheets ahead of the welders. After the sheets were positioned in place on the joists, they remained loose until tacked down by the welders. Kralovic apparently stepped on one of these loose sheets during the course of his duties; the sheet slid and he fell through the created opening. The roof had been hosed down with water because of

the intense heat and to prevent sparks from the welding causing a fire. The water increased the slipperiness of the pieces of decking being secured to the roof.

The standard allegedly violated requires employers to instruct employees in the recognition and avoidance of unsafe conditions arising in their work environment. Complainant argues that a violation existed due to the lack of training as to a proper procedure to be followed in laying the decking. Although the employees engaged in laying and tacking down the decking had from ten to over twenty years' experience working on roofs, complainant submits that instructions were necessary because of the reduced size and weight of the sheets.

Shuboy and Kenneth Hintz, president of Northeast Erectors, both testified that the use of short lengths of decking is frequently required on a new roof job as well as a fire repair (Tr. 107, 111, 116). The use of short lengths on new roofs occurs because it is necessary to work around openings in the roof and the roof frame (Tr. 111-112, 116). Hintz did testify that where short lengths were being laid, he would instruct his welders to weld closer to where the decking was being laid (Tr. 117, 120). No such instruction was given to employees by respondent.

The amount of bearing on which the end of decking rests can also present a hazard. The bearing in this case has been determined to have varied from three quarters of an inch to an inch and a half. Hintz indicated that such a small bearing was unsafe. He testified (Tr. 121-122):

> Q. Would you say that having a piece of decking resting on one side with only an inch and a half of bearing is unusual?
>
> A. An inch and a half of bearing?
>
> Q. Yes.
>
> A. Yes, I would say that's unusual.
>
> Q. What hazard would you say that would present?

A. An inch and a half of bearing?

Q. Yes.

A. Well, I would say that that is not good.

Q. In what respect?

A. Well, it's not safe. I would say an inch and half of bearing would not be safe. I think the manual calls for something like two inches of bearing.

Hintz further stated that wet pieces of decking could have a tendency to slip. He testified (Tr. 122):

Q. If a roof was — when you are going through a decking procedure, if the roof was wet, what effect could that have on the conditions?

A. It's hazardous. You have got to be more careful.

Q. How does it increase the hazard?

A. The decks sometimes would get slippery. It's like walking on different types of ground. One is rough, one is smooth, the different types of concrete. Decking would be the same.

Q. The decking would be more like to slip or move?

A. Chances are in certain situations, yes, you would have a tendency to slip.

There is no dispute over the fact that the job could have been performed in a manner that would have increased employee safety. Employees could have been instructed as to the increased dangers resulting from the use of small lengths of decking and the fact there was a short bearing at the expansion joist on which one end of the decking was to be placed. Employees could also have been instructed to tack the sheets of decking as they were laid so there would at no time be any loose sheets of decking on which employees might have accidentally stepped (Tr. 16-17, 36, 48).

Respondent held no safety meetings with employees to discuss how the decking was to be laid. It hired the employees out of the local union hall and

simply assumed they knew how to do the job in a safe manner. Shuboy gave only general instructions for them to be careful, take their time and do a good job (Tr. 103). The laying of large numbers of small sheets of decking was unusual for a roof job,[3/] and the small bearing at the expansion joist was also unusual. The potential for an accident was increased by the fact that the roof had to be wet down because of the heat and danger from welding sparks that could cause a fire inside the warehouse. A safety meeting should have been held to discuss the job and insure that the employees were aware of the safest method to accomplish the job. The violation has been established.

Complainant alleges that the violation of 29 C.F.R. § 1926.21(b)(2) was serious within the meaning of section 17(k) of the Act.[4/] To establish a serious violation, the Secretary need only show that there is a substantial probability that death or serious physical harm could result from the violative condition and that the employer knew or, with the exercise of reasonable diligence, could have known of the presence of the violation. Wisconsin Electric Power Company, 76 OSAHRC 134/B2, 4 BNA OSHC 1783, 1976-77 CCH OSHD ¶ 21,234 (No. 5209, 1976). The

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3/ The laying of small lengths around openings in a roof would not normally necessitate large numbers of small sheets being used. The small sheets in this case were being laid on both sides of an expansion joist for a long distance across the roof. The procedure followed by employees left more loose sheets than would normally be expected around an opening. Employees might also be more careful in laying small lengths around an opening since they can readily see they are exposed to a possible fall through the opening.

4/ Section 17(k) of the Act states:

> For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Secretary need not prove that an accident is probable. It is sufficient if an accident is possible and its probable result would be serious injury or death. Brown & Root, Inc., Power Plant Division, 80 OSAHRC 17/B8, 8 BNA OSHC 1055, 1980 CCH OSHD ¶ 24,275 (No. 76-3942, 1980).

Respondent was familiar with the working conditions on the roof. The roof was located 50 to 60 feet above the floor of the warehouse. The probable consequences of a fall from this height is death or serious physical injury. The violation was serious.

The Commission is the final arbiter of penalties in all contested cases. Secretary v. Occupational Safety and Health Review Commission and Interstate Glass Co., 487 F.2d 438 (8th Cir. 1973). Under section 17(j)[5/] of the Act, the Commission is required to find and give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the assessment of an appropriate penalty. The gravity of the offense is the principal factor to be considered. Nacirema Operating Company, Inc., 72 OSAHRC 1/B10, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶ 15,032 (No. 4, 1972).

Two employees were laying the short lengths of decking along the expansion joist. They were working several sheets of decking ahead of the welders and were exposed to the hazardous conditions. The welders would have had little or no

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5/ Section 17(j) of the Act states:

> The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of the previous violations.

exposure since they were tacking down the sheets of decking as they proceeded along the expansion joist. There is no evidence of previous history, and the gravity of the violation is not considered unusually high for the roofing industry. A penalty of $200 is assessed for the violation.

## Alleged Violation of 29 C.F.R. § 1904.8

Employee Tom Kralovic was killed on the job on July 10, 1981. The Occupational Safety and Health Administration received no report of the fatality from any employee of respondent. The fatality was reported to OSHA on July 10, 1981, by a representative of Ace Hardware. There is no dispute over these facts, and complainant contends the failure to report the fatality by respondent was a violation of 29 C.F.R. § 1904.8. Respondent argues that the reporting of the fatality by Ace Hardware should inure to its benefit.

Section 1904.8[6/] requires the employer of any employee killed from an employment accident to report the accident orally or in writing to the nearest office of the Area Director of OSHA within 48 hours after the occurrence. The duty to report the fatality is specifically imposed upon the employer. The report must relate the circumstances of the accident, the number of fatalities and the

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6/ Section 1904.8 provides:

> Within 48 hours after the occurrence of an employment accident which is fatal to one or more employees or which results in hospitalization of five or more employees, the employer of any employees so injured or killed shall report the accident either orally or in writing to the nearest office of the Area Director of the Occupational Safety and Health Administration, U. S. Department of Labor. The reporting may be by telephone or telegraph. The report shall relate the circumstances of the accident, the number of fatalities, and the extent of any injuries. The Area Director may require such additional reports, in writing or otherwise, as he deems necessary, concerning the accident.

extent of any injuries. These facts are generally within the knowledge of the employer since he has control over the working environment.

Respondent submits that OSHA was timely notified on behalf of respondent by a representative of Ace Hardware. Respondent's brief states that Joseph Turnello, vice-president of respondent, specifically requested the Ace Hardware representative to make the communication to OSHA on behalf of respondent. While this may be respondent's interpretation of Joseph Turnello's testimony, his actual testimony was as follows:

> Q. Did you have any discussions with any parties other than your own employees at the jobsite regarding the accident?
>
> A. Yes, I talked to management from Ace Hardware.
>
> Q. And what discussions did you have with them?
>
> A. Well, we told them that we were going to be shutting — I told them — I said the men will actually not go back to work. That is something that we do in our trade, and I said we had — I asked the man and I asked my foreman, John Shuboy, I said has everybody been notified and he said yes.
>
> I said did you call the union hall and he said yes, and I said did you call the police and he said yes, and I said who else is there that you have called. We can't think of anybody else.
>
> I went back and talked to Ace Hardware and I told them who we had contacted and I said now, if there are any others, please contact them for us. And the employment comp we contacted from Michigan.

Turnello's testimony indicates that his foreman told him that everyone had been notified. The impression is left that neither one of them were aware of the requirement to report the fatality to OSHA. The conversation between Turnello and Ace Hardware representatives made no reference to the OSHA requirement.

There is no evidence that the employee of Ace Hardware reporting the fatality held any official position with the respondent or was officially delegated by

respondent to act on behalf of respondent in reporting the fatality to the Area Director of OSHA. Turnello's request to representatives of Ace Hardware to contact anyone else that had to be contacted made no specific reference to the OSHA requirement (Tr. 93). Ace Hardware was under no duty to report the fatality. The fact that it reported the fatality did not relieve respondent of its responsibility. The duty to report a fatality is imposed upon the employer. Since respondent did not report the death of Kralovic, the violation has been established.

Alleged Violation of 29 C.F.R. § 1926.100(a)

The warehouse was operational during the time respondent's employees were engaged in repairing the roof. Since welders were working on the roof, respondent stationed at least one employee inside the warehouse to be on the alert for the possibility of fires being started inside the warehouse. Complainant alleges that employees inside the warehouse were exposed to falling objects and were not wearing protective helmets as required by 29 C.F.R. § 1926.100(a).

Section 1926.100(a)[7/] requires employees working in areas where there is a danger of head injury from impact or from falling or flying objects to wear protective helmets. The alleged violation is based on the testimony of Lawrence E. LaBeau. He testified that on the day of the fatality he was working as a fire watchman in the warehouse below the area where work was being performed on the roof (Tr. 82-83). He stated that he wore a protective helmet only one day on the

---

7/ Section 1926.100(a) of 29 C.F.R. provides:

> Employees working in areas where there is a possible danger of head injury from impact, or from falling or flying objects, or from electrical shock and burns, shall be protected by protective helmets.

job and that the company did not furnish protective helmets. The helmet he wore on the one day was owned by Ace Hardware. There was a possibility of objects falling from overhead (Tr. 83-84, 86, 88).

LaBeau was the union steward on the job (Tr. 86). He testified that he was aware that employees were not wearing protective helmets but stated that he did not bring it to the attention of the supervisors because "it was too hot to wear a hard hat" (Tr. 87). There is no evidence that supervisory personnel acquiesced in the employee conduct. Shuboy testified that he was the nonworking general foreman for the job. He had two foremen under him that were provided by the local union (Tr. 100-101). According to Shuboy, employees working inside the warehouse had protective helmets and generally carried the helmets with them (Tr. 102). On a couple of occasions he observed employees working in the warehouse without wearing their protective helmets. He instructed them to wear the helmets, and the employees complied with his request (Tr. 102-103).

Respondent argues that it should not be held accountable for the failure of LaBeau to wear a helmet since it had done all that could reasonably be expected to prevent the violation. Where the existence of a violative condition has been shown, an employer may affirmatively defend by showing that the employee's behavior was a deviation from a uniformly and effectively enforced work rule. A. J. McNulty & Company, Inc., 76 OSAHRC 46/D2, 4 BNA OSHC 1097, 1975-76 CCH OSHD ¶ 20,600, (No. 2295, 1976). In order to establish such a defense, an employer must show that the employee's noncompliance with a standard was a departure from a work rule which the employer had uniformly and effectively enforced and the employer had neither actual nor constructive knowledge of the violation. B-G Maintenance Management, Inc., 76 OSAHRC 60/A2, 4 BNA OSHC 1282, 1976-77

CCH OSHD ¶ 20,744 (No. 4713, 1976); H. B. Zachry Company, 80 OSAHRC 9/D8, 7 BNA OSHC 2202, 1980 CCH OSHD ¶ 24,196 (No. 76-1393, 1980); aff'd 638 F.2d 812 (5th Cir. 1981).

An employer must show that it had an effective safety program designed to prevent the violation, including adequate safety instructions effectively communicated to employees, means of discovering violations of these instructions, and enforcement of safety rules when violations are discovered. Ocean Electric Corp., 75 OSAHRC 6 /C14, 3 BNA OSHC 1705, 1975-76 CCH OSHD ¶ 20,167 (No. 5811, 1975). Respondent's vice-president, Joseph Turnello, testified that respondent had a written safety program and that an employee is designated to look after OSHA matters (Tr. 95). There is no direct evidence that respondent had a work rule that required the wearing of protective helmets. The assumption can be made that such a rule was in existence since Shuboy testified that he instructed employees in the warehouse to wear helmets whenever he noticed they were working without wearing helmets. The mere establishment of work rules, however, is not sufficient to avoid responsibility for a violation. There must also be effective communication and enforcement of the work rule.

There is no evidence as to how respondent communicated the protective helmet requirement or any other of its safety rules to employees. The evidence indicates that all employees, with the exception of Shuboy, on this job were hired out of the union hall. There is no evidence to indicate that safety rules were discussed with employees when they first reported to work or at anytime during their employment on this job. Employees Peter Kunz and Jack Juhasz testified that no safety meetings were held with employees (Tr. 35, 67-68). Employee Lawrence LaBeau testified that the only safety meeting consisted of briefing

employees on how to hook on and unhook materials to and from a helicopter used to lift the materials to the roof (Tr. 84).

The evidence is lacking in details as to how safety rules were enforced. Shuboy apparently looked for violations whenever he inspected a job, but there is no direct evidence of respondent's enforcement scheme. Shuboy was a nonworking foreman who had two foremen under him. There is no evidence as to their authority for safety matters and no indication of whether they made an attempt to enforce safety rules. An effective enforcement program includes providing supervision adequate to detect violations of company work rules and the taking of disciplinary measures sufficient to discourage noncomplying conduct.

The record does not establish effective communication and enforcement of a work rule requiring the wearing of a protective helmet. Even after a liberal interpretation of the evidence that a work rule existed, the evidence concerning the implementation and enforcement of the rule is deficient. The violation has been established.

## FINDINGS OF FACT

1. On July 1, 1981, respondent commenced a roof deck repair job at the Ace Hardware warehouse located in Perrysburg, Ohio. The job was completed on July 12, 1981 (Tr. 91).

2. The warehouse was 500 feet wide and 800 feet long (Tr. 97). The roof of the warehouse was approximately 50 to 60 feet above the floor (Tr. 20).

3. The warehouse had an extensive roof fire sometime prior to July 1, 1981, and parts of the roof had to be replaced (Tr. 31).

4. Respondent had been contracted to repair that part of the roof that had been damaged by fire (Tr. 79).

5. On July 10, 1981, employee Tom Kralovic fell through the roof and was killed (Tr. 92).

6. The fatality was reported to the Area Director for OSHA on July 10, 1981, by an employee of Ace Hardware (Tr. 21, 93).

7. During the period from July 14, 1981, to July 16, 1981, Compliance Officer Thomas Buchele conducted an accident investigation at the warehouse (Tr. 8-10, 31). Respondent had completed its job at the time of inspection (Tr. 15, 20, 23).

8. At the time of the accident, decking was being laid on each side of an expansion joist which ran across the building. The decking had been cut to lengths of approximately 5 feet 5 inches and approximately 6 feet 4 inches to cover the openings on each side of the expansion joist (Exs. 1, 2; Tr. 34, 47, 69, 104). The decking was 30 inches wide (Tr. 104).

9. The expansion joist had been replaced by respondent (Tr. 97, 107).

10. A piece of steel had been welded underneath the expansion joist to obtain a bearing so that the decking could be welded to the expansion joist (Ex. 1; Tr. 60, 104).

11. The decking had to be placed on the bearing up to the expansion joist. There was no overlap of the decking at the expansion joist (Ex. 1; Tr. 44-45).

12. The bearing along the expansion joist on which one end of the decking was placed varied from three quarters of an inch to an inch and a half (Ex. 1; Tr. 34).

13. The end of the decking from the expansion joist was placed so that it overlapped the existing decking by approximately six inches (Exs. 1, 2; Tr. 42, 54, 64, 105). The tongue and groove part of the decking interlocked with the existing decking at the points of overlap (Ex. 2; Tr. 54-56).

14. On July 10, 1981, two employees, Tom Kralovic and Jack Juhasz, were laying the decking and two employees were following behind and tacking (Tr. 33,

68). The welders were generally working seven to eight sheets behind the employees laying the decking (Tr. 36, 41).

15. Immediately prior to the accident, Kralovic and Juhasz had laid out seven or eight sheets of decking on one side of the expansion joist and were in the process of shifting to position sheets on the other side of the joist. Kralovic straddled the expansion joist. A sheet of decking on which he was standing kicked or slid out from the bearing at the expansion joist, tilted at the corner and Kralovic fell through the opening (Tr. 42, 47, 59, 69-70, 73-74).

16. The decking was cut to the proper lengths on the roof. The area where the cutting was performed was wet down to avoid fires on the roof (Tr. 62, 70, 80).

17. Employees engaged in laying the decking and tacking it down were experienced ironworkers and had from ten to over twenty years' experience working on roofs (Tr. 19, 33, 67, 102).

18. When the accident occurred, all fire damage materials had been removed and discarded (Tr. 95).

19. Roof decking normally comes in lengths of 20 feet and covers several bar joists when placed on the roof (Tr. 68, 72).

20. The warehouse was in operation during the repair job. Materials were located in racks in the warehouse (Tr. 75).

21. An employee of respondent was working in the warehouse below the area where the decking was being welded. He was watching for fires that might be started from sparks emitted by the welding process. He wore a protective helmet on only one occasion while he worked in the warehouse (Tr. 82-83).

22. No safety meeting was held with employees, and no safety instructions were given to them prior to their commencing to lay the metal decking for the roof

(Tr. 10, 35, 67-68, 70). A briefing was given concerning the use of a helicopter to lift materials to the roof (Tr. 84).

## CONCLUSIONS OF LAW

1. Respondent, at all times material hereto, was engaged in a business affecting commerce within the meaning of section 3(5) of the Act.

2. Respondent, at all times material hereto, was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of the parties and of the subject matter.

3. Respondent was in violation of 29 C.F.R. § 1926.21(b)(2) for failing to instruct each employee working on the roof of the Ace Hardware warehouse during the period from July 1, 1981, to July 12, 1981, in the recognition and avoidance of unsafe conditions created by the use of short lengths of decking and the existence of a small bearing along an expansion joist. The violation was serious. A penalty of $200 is assessed for the violation.

4. Respondent was in violation of 29 C.F.R. § 1904.8 for failing to make an oral or written report to the Area Director of OSHA of the accident resulting in the death of employee Tom Kralovic on July 10, 1981.

5. Respondent was in violation of 29 C.F.R. § 1926.100(a) for failing to require and enforce the wearing of protective helmets by its employees stationed in the warehouse and below the workers on the roof to watch for the possibility of fires starting from sparks created by the welding equipment.

## ORDER

Based upon the foregoing findings of fact and conclusions of law, it is

ORDERED: (1) That the serious citation issued to respondent on August 3, 1981, is affirmed and a penalty of $200 is assessed for the violation; and

(2) That items one and two of the "other" citation issued to respondent on August 3, 1981, is affirmed.

Dated this 23rd day of February, 1982.

James D. Burroughs
JAMES D. BURROUGHS
Judge

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1114 MARKET STREET, ROOM 608
ST. LOUIS, MISSOURI 63101
(314) 425-5071

# NOTICE OF DECISION

Secretary of Labor v. Central Hardware Company,

OSHRC Docket No. 81-694

1. Enclosed is a copy of my decision. It will be filed with the Commission on February 24, 1982, and will become the final order of the Commission on March 26, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is March 26, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

F. Daley Abels

Date: February 4, 1982

F. Daley Abels, Judge, OSHRC

Enclosures

OSHRC FORM NO. 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR,<br><br>Complainant<br><br>v.<br><br>CENTRAL HARDWARE COMPANY,<br><br>Respondent | ) | OSHRC Docket No. 81-694 |

APPERANCES: KEITHLEY F. T. LAKE, Esquire, U. S. Department of Labor, Office of the Solicitor, 911 Walnut Street, Kansas City, Missouri
For the Complainant

RICHARD B. LINDENBERGER, Esquire, Ten Broadway, St. Louis, Missouri
For the Respondent

DECISION

In January and February 1981 Mark J. Banden, a compliance officer for the Occupational Safety and Health Administration (OSHA), inspected a hardware store owned and operated by respondent in St. Louis County, Missouri. Subsequently, OSHA issued citations 1 and 2 to respondent charging that respondent had violated several occupational safety and health standards promulgated by complainant under the provisions of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et seq., (the Act). Respondent contested the alleged violations and complainant then filed his complaint before the Commission seeking affirmance of the charged violations. Citation 1 alleges that respondent seriously violated three occupational safety and health standards, and citation 2

alleges that respondent violated one occupational safety and health standard. The citations propose no penalties for three of the four alleged violations. The complaint likewise proposes no penalties for these same three alleged violations.

In its answer and by stipulation at the hearing respondent admits that it is engaged in a business affecting commerce, is an employer under the Act, and that the Commission has jurisdiction over this matter.

Respondent opened the hardware store in question in October 1980. In the store stockroom there is a certain DeWalt radial arm saw, which is the subject of the three alleged violations in citation 1. Also in the stockroom is a certain table saw which, along with the radial arm saw and other saws are the subject of the violation alleged in citation 2.

On the days that Mr. Banden inspected the saws in question there was no blade guard on one side of the lower half of the DeWalt radial arm saw. He determined, by conversation with employees who used the saw, that this portion of the blade guard had never been on the saw since the store opened in October 1980. Employees Robert Powell and Robert J. Slinger, who were lumber cutters at the store and used the saw intermittently on a daily basis, had seen a guard on only one side of the saw at all times that it had been in use since the store opened.

Charles Tipton, respondent's store manager, stated that when the saw was installed in October 1980 it had all of the factory installed guards on it, that no management or supervisory personnel had ever authorized removal of any guarding device, and that no employee had ever complained to him of the saw being unguarded. He never knew the guard was missing until informed of that fact by Mr. Banden on the day of the

inspection. In the regular course of his duties he would be in the area where the saw was located ten to fifteen times a day, would pass within five or ten feet of the location where the saw was being operated, and stated that the guard in question would be easily visible if he looked at the saw. His concept of being a store manager would require that he inspect equipment in use, such as the saw in question, to be sure that it is kept in an approved or safe manner.

In item 1A of citation 1 complainant charges respondent with a violation of 29 CFR 1910.213(h)(1) in that the DeWalt radial arm saw had the guard removed from the west side of the saw blade. The standard provides in substance and in pertinent part that the sides of the lower exposed portion of the blade of a radial saw shall be guarded to the full diameter of the blade by a device that will automatically adjust itself to the thickness of the stock and remain in contact with stock being cut to give maximum protection possible for the operation being performed.

There is no factual dispute as to the absence of a guard on the lower right half of the saw blade. The compliance officer testified that the absence of this portion of the guard presented a hazard to an employee using the saw in that if a portion of the employee's body came into contact with the unguarded blade it could result in laceration or amputation. Respondent contends that even though the guard is missing, protection is afforded the operator by means of guarding by location. Respondent states that since the right hand of the operator is on the handle while the saw is in operation there is very little, if any, possibility of encountering any hazard from the unguarded right side of

the saw blade. This contention assumes that in all instances an operator of the saw will use the right hand to activate the saw and the left hand to steady the work on which the saw is being used. There is no evidence that the saw cannot be operated with the right hand steadying the material and the left hand on the handle. In such a situation there would be no guarding by location as envisioned by respondent. Without the guard in question prevention of injury by means of the unguarded blade is based solely on respondent's reliance that its employees will operate the saw at all times in the manner envisioned by it. With the blade in its unguarded position, it is possible for an employee to have a hand or finger come into contact with the blade while the saw is in operation. Although the hazard may be remote, it does exist. In such a situation the standard has been violated. H. B. Zachry Company, 80 OSAHRC 69/A2, 8 BNA OSHC 1669, 1980 CCH OSHD ¶24,588 (No. 76-2617, 1980).

Item 1B of citation 1 charges that the same radial saw was not provided with an adjustable stop to prevent the forward travel of the blade beyond the position necessary to complete the cut in repetitive operations, in violation of 29 CFR 1910.213(h)(3). The charge incorporates the language of the standard.

The compliance officer and the two stockroom employees who used the saw all testified that the saw was not equipped with an adjustable stop, and therefore the saw was allowed to come forward when in use so that the edge of the saw blade was at or slightly past the edge of the table on which the saw was mounted. Respondent did not actually contradict this testimony. The store manager simply stated that he was unaware

that there was no such stop on the saw. According to the compliance officer, the hazard to employees consisted of the saw coming into close proximity to the operator because of the absence of the stop.

The evidence definitely establishes that there was no adjustable stop on the saw in question. Respondent contends that even though there was no stop the standard was not violated because, by its terms, it applies only "in repetitive operations". Respondent states that in order for the standard to be applicable a situation must exist such as that which might be found in a manufacturing facility where a number of pieces of lumber is being cut all to the same size on a continuous basis. Respondent arrives at this conclusion by adopting definitions contained in Websters New World Dictionary, Second College Edition, 1972. Therein the word repetitive is defined as "of or characterized by repetition", and repetition is defined as "the act of repeating; a doing again, or again and again". Respondent states that there is no testimony in this record that any cutting was performed on a continuous again and again basis within the meaning of the phrase "in repetitive operations".

In advancing this contention respondent overlooks the testimony of its lumber cutter, Robert Powell, who stated that at the time in question he would be using the saw three-quarters of the time during the day. Respondent also overlooks the testimony of its other lumber cutter, Robert J. Slinger, who stated that he used the saw three to six times per hour. Finally, respondent's store manager, Charles Tipton, testified that although the saw was used to cut different sizes of lumber, the motion of cutting would be the same and that a person who

had to do the same motion time and time again would be engaged in repetitive activity.

Given the purpose of the Act (to assure as far as possible safe and healthful working conditions for employees), the testimony of the employees as to the frequency of use of the saw and the admission of respondent's managerial employee that such use would be repetitive in nature belie respondent's contention, and a violation of the standard must be found by reason of the absence of the adjustable stop.

Item 1C of citation 1 charges respondent with a violation of 29 CFR 1910.213(h)(4) in that the radial saw in question was not installed in a manner so as to cause the cutting head to return gently to the starting position when released by the operator. The standard provides in pertinent part that installation of a radial saw shall be in such a manner that the front end of the unit will be slightly higher than the rear so as to cause the cutting edge to return gently to the starting position when released by the operator. Witnesses Banden, Powell, and Slinger all testified that the saw would not return to its starting position when released by the operator. Witness Tipton was not aware of this defect in the saw until the inspection was made by Mr. Banden. Banden further stated that the outer edge of the saw arm could be elevated in such a way that by gravity the head would return to the starting position or, as with this saw, there was an adjustable spring tension return which would accomplish the same thing. However, the spring tension device on this saw was not operable.

The gist of Banden's testimony is that if the tension spring device were operable the saw would not be in violation of the standard. The

standard, however, does not provide for the use of a spring tension device to return the head to the starting position. It very clearly and specifically requires that the saw be installed with the front end slightly higher than the rear so as to cause the return of the head. Banden did not make any measurements as to the height of the front end of the unit as compared to the rear end. He offered no testimony as to whether or not the front end of the saw was slightly higher than the the rear end, and there is no other evidence as to the manner of installation and as to whether or not the saw was installed with the front end slightly higher than the rear. Complainant has the burden of proving all of the necessary elements, and there is simply a lack of proof with regard to the height of the front end of the saw as compared to the rear. Accordingly, complainant has not sustained his burden and a violation has not been established.

Item 1 of citation 2 charges respondent with not requiring the lumber cutters in the stockroom to wear protective eye equipment where there was a reasonable probability of injury from flying particles generated by the table and radial arm saws when such injury could be prevented by the use of such equipment. Complainant alleges that this is a violation of 29 CFR 1910.133(a)(1). The standard provides in substance and as here pertinent that protective eye equipment shall be required where there is a reasonable probability of injury that can be prevented by such equipment. It enjoins employers to make conveniently available a type of protector suitable for the work to be performed and enjoins employees to use such protectors. It further provides that suitable eye protectors shall be provided where machines or operations

present the hazards of flying objects.

On the day of the inspection, Mr. Banden noted that the employees working in the stockroom at the saws were not wearing eye goggles or safety glasses. The DeWalt radial arm saw and a table saw were throwing particulates into the air with use. Neither of the saws was provided with any type of local exhaust ventilation to capture particulates during the cutting of materials. Powell testified that goggles were available in the storeroom, and that whenever an employee needed to use goggles he could go to the storeroom and get them and they were readily available. He was aware of no management rule that goggles had to be worn on certain saws or for certain types of operations. The wearing of goggles or not was left to the employee's discretion. Powell sometimes used goggles when operating the radial saw and used them most of the time when operating the table saw. According to Slinger there was no requirement that eye equipment be worn while using either the radial saw or the table saw. He had never been instructed by any management personnel to wear eye equipment during cutting operations. He was not aware of any safety goggles present in the work location that he could use during the cutting operation at any time before the inspection.

Store manager Tipton testified that on occasion he would see employees working in the area of the saws who were not wearing safety glasses or eye goggles. He took no disciplinary action against any employee for not wearing eye protection. Goggles were available for use by the employees.

Complainant contends that failure of respondent to compel the employees to wear safety glasses or eye goggles while using the saw is a

violation of the standard in question. There is no doubt from the testimony that the saws did discharge dust and particulates into the atmosphere. During a cut by employee Slinger, the compliance officer stood directly behind him taking an air sample and was struck in his safety glasses by particulates coming from the saw. Use of the saws without appropriate eye protective equipment definitely creates a hazard insofar as the employees are concerned. Respondent tacitly concedes a violation, since it directs no part of the argument in its brief toward this charge. Apparently it relies on the proposition that goggles were available to the employees for use at their discretion. Respondent's failure to take affirmative action to compel use of the protective equipment by the employees is a dereliction of its duty under the standard and constitutes a violation of the standard.

Complainant charges that the established violations under items 1A and 1B of citation 1 are serious violations under the Act. Complainant proposes a $630.00 penalty for the item 1A violation and proposes no penalty for the item 1B violation. Under section 17(k) of the Act, a serious violation exists if there is a substantial probability that death or serious physical harm could result from the violative condition unless the employer did not and could not with the exercise of diligence know of the presence of the violation. With respect to items 1A and 1B the testimony of witness Tipton as to his daily presence in the stockroom and his observance of the radial saw establishes the fact that respondent should have known of the presence of the violative condition. Banden's testimony as to the injuries that could result from the violative conditions establishes that there is a substantial probability

that serious physical harm could result therefrom. The record establishes therefore that these violations are serious within the meaning of the Act.

Section 17(b) of the Act provides that a civil penalty of up to $1,000.00 shall be assessed for each serious violation. Section 17(j) directs me in assessing the civil penalties for these violations to give due consideration to the appropriateness of the penalty with respect to the size of the business of the employer, the gravity of the violation, the good faith of the employer, and the history of previous violations.

As to the size of respondent's business, it is alleged in paragraph 2 of the complaint that respondent employs approximately 1,000 employees in its various business activities and approximately 100 employees at the hardware store in question. This allegation is denied by respondent in its answer, and there is no evidence as to the size of respondent's business.

Absent any unusual circumstances the gravity of the violations ordinarily deserves to be given more weight than the other factors. As to gravity, elements to be considered include 1) the number of employees subjected to the hazard, 2) the duration of exposure, 3) the precautions taken against injury and 4) the degree of probability that an injury would occur. Morrison-Knudsen and Associates, 80 OSAHRC 108/A2, 8 BNA OSHC 2231, 1980 CCH OSHD, ¶24,953 (No. 76-1992, 1980). Two employees were subjected to the hazard for up to 75 percent of the work day, no precautions were taken against injury, and the degree of probability that an injury would occur was very slight because of the long experience of these employees.

Respondent evidenced some degree of good faith by correcting these violations although the corrections were not made as soon after the inspection as they could have been. There is no history of previous violations.

Since the gravity of the violations is moderate, there is some evidence of good faith, and no evidence as to the size of respondent's business or a history of previous violations, a civil penalty of $200.00 for each of these violations is appropriate after giving due consideration to all of the relevant factors. It should be noted that although no penalty is proposed by complainant for item 1B it is mandatory under section 17(b) that a penalty be assessed.

With regard to item 1 of citation 2, complainant proposes no penalty and a consideration of all of the relevant factors leads to the conclusion that no penalty should be assessed for this violation.

A careful and considerable evaluation of the pleadings, the evidence adduced, the briefs of the parties and the applicable law leads to the following findings of fact and conclusions of law:

## FINDINGS OF FACT

1. It has been admitted that the Commission has jurisdiction in this matter.

2. Respondent owns and operates a certain hardware store in St. Louis, County, Missouri, having operated the store since October 1980.

3. In January and February 1981, in the stockroom of said hardware store, respondent's employees operated a DeWalt radial arm saw, a table saw, and other radial arm saws owned and supplied by respondent.

4. The DeWalt radial arm saw was used by respondent's employees

since October 1980 through January and February 1981, when respondent's premises were inspected by a representative of the Occupational Safety and Health Administration.

5. At the time of the inspection, there was no blade guard on one side of the lower half of the DeWalt radial arm saw, nor was there an adjustable stop on said saw to prevent the forward travel of the blade beyond the position necessary to complete a cut in repetitive operations.

6. Because of the absence of an adjustable stop, the saw was allowed to come forward when in use so that the edge of the saw blade was at or slightly past the edge of the table on which the saw was mounted.

7. The absence of a portion of the guard and the absence of the adjustable stop presented a hazard to an employee using the saw in that a portion of the employees body could come into contact with the unguarded blade resulting in laceration or amputation.

8. In the regular course of his duties, respondent's store manager would be in the area where the DeWalt saw was located ten to fifteen times a day, would pass within five or ten feet of the location where the saw was being operated, and could easily see the saw guard if he looked at the saw.

9. The DeWalt radial arm saw was used by one of respondent's lumber cutters three-quarters of the time during a working day and by another lumber cutter three to six times per hour during a working day.

10. Respondent's store manager was of the opinion that although said saw was used to cut different sizes of lumber the motion of cutting would be the same, and a person who had to do the same motion time and

time again would be engaged in repetitive activity.

11. There is no evidence as to the manner of installation of the DeWalt radial arm saw, and no evidence as to whether or not the front end of the saw was slightly higher than the rear end.

12. Use of the DeWalt radial arm saw, the table saw, and other radial arm saws in respondent's stockroom caused dust and particulates to be discharged into the atmosphere in the stockroom.

13. Eye goggles were available in the storeroom for employee use, but the use of eye goggles was left to employee discretion.

14. There was no management requirement that employees use eye goggles when operating the radial saws or the table saw, and the lumber cutters had never been instructed by any management personnel to wear eye equipment during cutting operations.

15. On occasion the store manager had seen employees working in the area of the saws who were not wearing safety glasses or eye goggles but had never taken any disciplinary action against any such employee.

16. With respect to items 1A and 1B of citation 1, several employees were exposed to the hazard of serious physical injury by reason of the violative conditions contained in said items.

17. Complainant does not seek imposition of a civil penalty for item 1B of citation 1.

## CONCLUSIONS OF LAW

1. At all times relevant herein, respondent was an employer engaged in a business affecting commerce within the meaning of the Act, and the Commission has jurisdiction over the subject matter and the parties.

2. Respondent violated 29 CFR 1910.213(h)(1) by not guarding the lower exposed portion of the DeWalt radial arm saw to the full diameter of the blade.

3. Respondent violated 29 CFR 1910.213(h)(3) by not providing the DeWalt radial arm saw with an adjustable stop to prevent the forward travel of the blade beyond the position necessary to complete the cut in repetitive operations.

4. The previously mentioned violations are serious in nature in that there was a substantial probability that serious physical harm could result therefrom.

5. Respondent violated 29 CFR 1910.133(a)(1) in that it did not require protective eye equipment where there was a reasonable probability of injury that could be prevented by the use of such equipment.

6. Respondent did not violate 29 CFR 1910.213(h)(4).

7. Since the violation contained in item 1B of citation one is a serious violation within the meaning of the Act, a penalty must be imposed even though complainant has prayed no penalty for such violation.

## ORDER

Based upon the foregoing findings of fact and conclusions of law, it is hereby ORDERED:

1. Citation 1, item 1A, is affirmed and a civil penalty in the amount of $200.00 is assessed thereon.

2. Citation 1, item 1B, is affirmed and a civil penalty in the amount of $200.00 is assessed thereon.

3. Citation 1, item 1C, is vacated.

4. Citation 2, item 1, is affirmed and no penalty is assessed

thereon.

Date: February 24, 1982

F. Daley Abels

F. DALEY ABELS, Judge, OSHRC

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| 80-2767 | AMERICAN CYANAMID COMPANY | 3/29/82 | 16/B13 |
| 80-2984 | MOORE PETROLEUM SERVICE, INC. | 3/29/82 | 16/E12 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

March 29, 1982

**IN REFERENCE TO SECRETARY OF LABOR v.**

Crawford Construction Co.

OSHRC DOCKET NO. 79-928

**NOTICE IS HEREBY GIVEN TO THE FOLLOWING:**

**FOR THE SECRETARY OF LABOR**

- **Counsel for Regional Litigation**
  **Office of the Solicitor, USDOL**
  **200 Constitution Ave., NW. - Rm. S-4014**
  **Washington, D.C. 20210**

- William S. Kloepfer, Esq.
  Associate Regional Solicitor, USDOL
  Federal Office Bldg. -RM 881
  1240 East 9th Street
  Cleveland, Ohio 44199

OF COMMISSION DECISION

To wit: See attached.

**FOR EMPLOYER**

- Roger L. Sabo, Esq.
  Kneeper, White, Arter & Hadden
  180 East Broad St.
  Fourth FL
  Columbus, Ohio 43215

**FOR EMPLOYEES**

-

Office of the Judge
OSHRC
1365 Peachtree St.
RM 240
Atlanta, GA 30309

-

**FOR THE COMMISSION**

Ray H. Darling, Jr.

**RAY H. DARLING, JR.**
**EXECUTIVE SECRETARY**

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>CRAWFORD CONSTRUCTION COMPANY, INC.,<br><br>Respondent. | OSHRC Docket No. 79-928 |

DECISION

Before: ROWLAND, Chairman; CLEARY AND COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge John S. Patton is before the Commission for review under 29 U.S.C. § 661(i), section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). The Secretary of Labor ("the Secretary") issued a citation to the Respondent, Crawford Construction Company, Inc. ("Crawford"), alleging a willful violation of section 5(a)(2) of the Act, 29 U.S.C. § 654(a)(2), for failure to comply with the construction safety standard at 29 C.F.R. § 1926.652(b). Crawford timely contested the citation and a hearing was held before Judge Patton. In his post-hearing brief, the Secretary moved to amend the citation under Rule 15(b) of the Federal Rules of Civil Procedure to allege noncompliance with 29 C.F.R. § 1926.652(c) instead of section 1926.652(b). 1/ In his decision Judge Patton denied the Secretary's

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1/ Sections 1926.652(b) and (c) provide:

> (b) Sides of trenches in unstable or soft material, 5 feet or more in depth, shall be shored, sheeted, braced, sloped,

(Footnote cont'd)

motion to amend and vacated the citation. The Secretary petitioned for review of the judge's decision and Commissioner Cleary directed review on the following issues:

> (1) Whether the administrative law judge erred in denying the Secretary's motion to amend the complaint to allege a violation of 29 CFR §1926.652(c); and
>
> (2) Whether [Crawford] would be prejudiced if the amendment of the complaint is allowed.

I

Crawford was laying a sewer line near Galion, Ohio, in February, 1979, when its worksite was inspected by a compliance officer of the Occupational Safety and Health Administration ("OSHA"). When the compliance officer arrived, Crawford was reopening a portion of the trench that had been filled a few days earlier. The pipe in the trench was off grade and had to be relaid. The open portion of the trench was dug across a state highway.

Crawford had begun reopening the trench that morning and had finished excavating about an hour before the compliance officer arrived. After Crawford completed excavating, but before the compliance officer arrived, Crawford had shored a portion of the walls of the trench, regraded part of the trench floor, and relaid some of the sewer pipe. When the compliance officer arrived, the

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(Footnote 1 cont'd)

> or otherwise supported by means of sufficient strength to protect the employees working within them. See Tables P-1, P-2 (following paragraph (g) of this section).
>
> (c) Sides of trenches in hard or compact soil, including embankments, shall be shored or otherwise supported when the trench is more than 5 feet in depth and 8 feet or more in length. In lieu of shoring, the sides of the trench above the 5-foot level may be sloped to preclude collapse, but shall not be steeper than a 1-foot rise to each 1/2-foot horizontal. When the outside diameter of a pipe is greater than 6 feet, a length of 4-foot minimum shall be provided at the toe of the sloped portion.

employees were gathering plywood to put in more shoring along the walls of the trench.

The trench was approximately 32 feet long, 10 feet 3 inches deep, and 3 feet 4 inches wide. It had vertical walls. There was about a foot of blacktop and macadam base at the top of the trench walls. Below that was 20 to 24 inches of frozen soil, so the trench was frozen to approximately 3 feet below ground level. When the trench was dug, Crawford had cut through a storm sewer that was discharging water into one end of the trench. That end was shored, and a sump pump in the trench kept the water from accumulating. The weather was cold and windy. Snow had fallen earlier in the day, but the sun had come out by the time of the inspection. Although the temperature was still below freezing, the sun was melting the snow.

The compliance officer looked at the walls of the trench and the material that had been removed from the trench. He attempted to take a soil sample from the trench walls but could not get one because the earth within his reach was frozen hard.

The compliance officer observed an employee attempting to shore the walls. The employee was having difficulty because the bottom of the trench was wet and slippery. When the compliance officer suggested to the employee in charge, Mr. Sand, that it would be easier to protect employees if a nearby trench box was used instead of shoring, Mr. Sand immediately had the trench box brought to the trench and fit into the portion of the trench where the employees were working.

At the hearing before Judge Patton, the compliance officer expressed the opinion that the soil in the walls of the trench was "sandy." He testified that he had told Mr. Sand that a trench more than five feet deep must be shored or sloped. The compliance officer stated that he asked Mr. Sand why the walls were

not shored or sloped, and that Mr. Sand replied that the employees were not expected to be in the trench very long.

Three Crawford employees, Mr. Sand and two workmen who were at the site during the inspection, testified. All three stated that they had been familiar with OSHA's trenching standards before the inspection. They all testified that the soil in the walls of the trench was hard blue clay and was frozen to a depth of about three feet. They testified that they had discussed whether it was necessary to use the trench box and had decided that, under the conditions at that time and place, it was not necessary.

Mr. Sand testified that they had been using the trench box all along except for the portion of the trench across the road. He testified that the frozen earth at the top of the trench walls would be just as hard as stone or concrete. When asked whether he believed that the trench complied with OSHA's trenching requirements, Mr. Sand testified that he "thought it was safe." He stated that the employees had been shoring the trench walls that day but had relaid the pipe up to the end of that shoring when the compliance officer arrived, and that the employees were getting more plywood to extend the shoring.

Mr. Sand testified that the earth originally removed from the trench had been taken away and that a sandy fill had been brought in from somewhere else. He testified that some of the sandy fill might have been frozen to the walls of the trench when the trench was reopened. The material that had been removed from the trench that day was fill, not the original soil.

The other two Crawford employees who testified agreed that the temperature was still below freezing at the time of the inspection. They both testified that the water in the trench was snow melted by the sun and that it had come in through the broken storm sewer. They stated that the pump was preventing the water from accumulating. They stated that some of the difficulty the compliance

officer observed with the shoring occurred because some of the bracing was knocked out by the pipe when it was relaid.

Crawford also presented as an expert witness an engineer who specializes in soil mechanics and engineering geology. He testified that frozen soil does not have the same properties as soil that is not frozen, and that freezing bonds the soil, affording greater stability. He testified that freezing the soil is a common and accepted practice to make the walls of excavations more stable and that frozen soil may be considered "cemented." He testified that, in his opinion, the walls of the trench in question could be vertical because of the frozen soil.

II

After the hearing, the Secretary moved in his post-hearing brief to amend the pleadings under Rule 15(b) of the Federal Rules of Civil Procedure 2/ to

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2/ Rule 15(b) of the Federal Rules of Civil Procedure is made applicable to Commission proceedings by section 12(g) of the Act, 29 U.S.C. § 661(f), and Rule 2(b) of the Commission's Rules of Procedure, 29 C.F.R. § 2200.2(b). It provides:

> Rule 15. Amended and Supplemental Pleadings.
>
> * * *
>
> (b) AMENDMENTS TO CONFORM TO THE EVIDENCE. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

conform to the evidence. The Secretary moved to allege noncompliance with 29 C.F.R. § 1926.652(c) instead of section 1926.652(b), the originally cited standard. The citation as it was proposed to be amended would have alleged that the soil was hard or compact rather than soft or unstable.

In his decision, Judge Patton denied the motion to amend and vacated the citation. The judge found that the soil was hard or compact, not soft or unstable as alleged, and that the citation must therefore be vacated. Judge Patton denied the motion to amend because he found that Crawford had not consented to try the issue of whether failure to shore or slope a trench dug in hard soil was a violation. The judge reasoned that because the evidence proving noncompliance with the uncited standard also went to the issue of noncompliance with the cited standard, Crawford's failure to object to the evidence of the nature of the soil could not be construed as consent to try the unpleaded issue. He therefore found that the amendment requested by the Secretary was not permitted by Federal Rule 15(b) and vacated the citation.

III

The Secretary petitioned for review of the judge's decision, arguing that amendment to conform the pleadings to the evidence is proper when the factual questions tried by the parties are material to both legal theories. The Secretary asserts that the change in legal theory here is minor.

The Secretary argues that Crawford not only consented to try the question of whether the soil was hard, but it based its defense on the fact that the soil was hard. Since no shoring or sloping was used in the cited portion of the trench, the Secretary asserts, the facts establish that Crawford failed to comply with either standard. Therefore the Secretary argues that Crawford's defense that the soil was hard would not justify its failure to take protective measures for its employees working in the trench, and Crawford cannot claim that

it would be prejudiced by granting the amendment to allege noncompliance with section 1926.652(c).

Crawford asserts that the record must clearly show that the parties understood that they were trying an unpleaded issue in order for a post-trial amendment to be permitted under Rule 15(b), and that consent cannot be inferred from the introduction of or failure to object to evidence relevant to both the pleaded and unpleaded issues. Even if the amendment is permitted, Crawford argues, it was in compliance with section 1926.652(c) because the frozen earth did not need to be shored or sloped. Crawford asserts that the record establishes that frozen soil is of equal stability as cemented soil, which need not be shored or sloped under the tables accompanying section 1926.652.

IV

It is well established that administrative pleadings are liberally construed and easily amended. Usery v. Marquette Cement Mfg. Co., 568 F.2d 902 (2d Cir. 1977); National Realty & Construction Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973). Under Rule 15(b) the pleadings are to be amended if an unpleaded issue has been tried with either the express or implied consent of the parties. Consent will be implied where the party opposing amendment has introduced or failed to object to evidence relevant to the unpleaded issue and that party would not be prejudiced by the amendment; that the evidence introduced is relevant to both the pleaded and unpleaded issues is not controlling as long as the amendment is not prejudicial. See Vicon Corp., 81 OSAHRC 98/C4, 10 BNA OSHC 1153, 1157, 1981 CCH OSHD ¶ 25,749, p. 32,159 (No. 78-2923, 1981), appeal filed, No. 81-2359 (8th Cir. December 10, 1981); Bill C. Carroll Co., 79 OSAHRC 87/C13, 7 BNA OSHC 1806, 1809, 1979 CCH OSHD ¶ 23,940, p. 29,032 (No. 76-2748, 1979); Mississippi Power & Light Co., 79 OSAHRC 109/D12, 7 BNA OSHC 2036, 2040, 1980 CCH OSHD ¶ 24,146, p. 29,341 (No. 76-2044, 1979); Mineral Industries & Heavy Construction Group, 639 F.2d 1289, 1293 (5th Cir. 1981).

Applying these principles to the case before us, we find that the amendment sought by the Secretary would introduce a new legal theory; it would not raise any new questions of fact. The parties tried the factual issues relevant to the unpleaded allegation--the nature of the soil and whether the trench walls were supported. Mr. Sand and the two workmen, Crawford's own witnesses, testified that the soil was hard, blue clay that was frozen to a depth of about three feet; and its expert testified that the frozen soil could be considered "cemented" within the meaning of the tables accompanying section 1926.652. We therefore conclude that the amendment should be permitted unless Crawford would be prejudiced by the amendment.

We find that Crawford's ability to prepare and present its case was not impaired by the change in legal theory. As we have said, the nature of the soil was fully litigated. Although the question of prejudice was specifically directed for review, and Crawford opposes the amendment in its brief, it does not make any claim of prejudice. Crawford has not asserted that there is any additional evidence that it would have presented if the amendment had been made before the hearing. Indeed, Crawford argues that if the amendment is permitted the evidence shows that it was not in violation under the amended allegations. We are therefore unable to find that Crawford will suffer prejudice from the amendment. The motion to amend is granted.

Although we have resolved the issues specified in the direction for review, it is still necessary to determine whether Crawford was in compliance with section 1926.652(c), as it claims. In the interests of adjudicative efficiency, the Commission will make the necessary determinations itself instead of remanding the case to the administrative law judge. The record before us is complete and the Commission has the ultimate authority to make findings of fact. Franklin R. Lacy, 81 OSAHRC 7/A2, 9 BNA OSHC 1253, 1981 CCH OSHD ¶ 25,170 (No. 3701, 1981), citing Accu-Namics, Inc. v. OSHRC, 515 F.2d 828, 834 (5th Cir. 1975), cert. denied, 425 U.S. 903 (1976).

V

Section 1926.652(c) requires that the walls of trenches more than 8 feet long and 5 feet deep that are dug in hard or compact soil be shored or, if shoring is not used, the portion of the walls greater than five feet from the bottom of the trench be sloped. Horowitz Brothers, Inc., 75 OSAHRC 54/E5, 3 BNA OSHC 1131, 1974-75 CCH OSHD ¶ 19,596 (No. 3004, 1975). It is undisputed that the walls of the trench were vertical and that Crawford employees were working in a part of the trench where the walls were unshored. The judge found that the soil in the walls of the trench were frozen to a depth of two to three feet, and that below the frozen soil the sides were composed of blue clay, which is hard and compact soil. These findings, which are supported by a preponderance of the evidence, establish a prima facie showing of noncompliance with that standard. CCI, Inc., 80 OSAHRC 127/D4, 9 BNA OSHC 1169, 1981 CCH OSHD ¶ 25,091 (No. 76-1228, 1980), appeal filed, No. 81-1218 (10th Cir. Feb. 25, 1981). The Secretary's prima facie showing may be rebutted by showing that the trench in question was excavated entirely in solid rock, shale, or cemented sand or gravel, which, under the tables accompanying section 1926.652, are not required to be sloped or shored. Id. We find that the Secretary's showing has not been rebutted.

Crawford claims that because the soil was frozen, it was as stable as "cemented sand" and that it therefore required no shoring or sloping. Even if we were to share Crawford's assumption that frozen soil need not be sloped or shored, the fact remains that the soil was frozen only to a depth of three feet. The remainder was composed of unfrozen clay, which was hard or compact soil. The Commission has held that trenches must comply with section 1926.652(c) if a significant portion of the trench walls are hard or compact soil. See CCI, Inc., 9 BNA OSHC at 1173, 1981 CCH OSHD at 30,994; cf. W.N. Couch Construction Co., 76

OSAHRC 44/A2, 4 BNA OSHC 1054, 1056, 1975-76 CCH OSHD ¶ 20,574, p. 24,592 (No. 7370, 1976) (§ 1926.652(b) applies if there is a significant amount of soft or unstable soil). We consider seven feet of hard soil to be a significant amount. We therefore find that Crawford was not in compliance with section 1926.652(c).

VI

The Secretary alleged that the violation was willful. A violation is willful if it was committed with either an intentional disregard of the requirements of the Act or a plain indifference to them. Mel Jarvis Construction Co., 81 OSAHRC ____, 10 BNA OSHC 1052, 1981 CCH OSHD ¶ 25,713 (No. 77-2100, 1981). The record here does not demonstrate that Crawford acted with either intentional disregard of or plain indifference to the requirements of the Act.

Crawford had used the trench box throughout the job except when it reopened the trench across the road. It is evident from his testimony that Mr. Sand reasonably and in good faith believed that the frozen soil added stability to the trench walls. Even so, Crawford generally used shoring. The portion of the trench where water entered through the broken storm sewer was shored, and the employees were preparing to extend the shoring when the compliance officer arrived. Under these circumstances, we do not construe the statements of Mr. Sand to the compliance officer or the testimony of Crawford's employees as demonstrating that they knew they were in violation but did not care.

VII

A willful violation was alleged. Where a violation is alleged to be willful but is not proved to be so, an other than serious violation may be affirmed; a serious violation may not be found unless the parties have expressly or impliedly consented to try the issue of whether the violation was serious. Toler Excavating Co., 75 OSAHRC 76/C8, 3 BNA OSHC 1420, 1975-76 CCH OSHD ¶ 19,875 (No. 2637,

1975). Here, the compliance officer testified without objection that there was a high probability of fatality if a cave-in occurred. Although that testimony was presented for the purpose of describing the gravity of the violation, the parties tried all the factual issues relevant to a serious violation. We therefore amend the pleadings to allege a serious violation.

We find that the violation was serious within the meaning of section 17(k) of the Act, 29 U.S.C. § 666(j), which states that a violation shall be deemed serious "if there is a substantial probability that death or serious physical harm could result . . . . " The trench was over ten feet deep, well above the head of any employee working in the bottom of the trench. The compliance officer testified that if the walls should collapse there was a high probability of a fatality. The record is clear that Crawford had knowledge of the violative condition. This evidence shows that the violation was serious.

In assessing a penalty, we must consider the factors set forth in section 17(j) of the Act, 29 U.S.C. § 666(i): the gravity of the violation, the employer's size, good faith, and history of previous violations.

Crawford is a small company, with only 20 employees. It has no history of previous violations. It generally used a trench box to protect the employees working in the trench, and the employees were also shoring the trench. When the compliance officer suggested that it would be more effective to use the trench box than to shore, Crawford quickly brought the trench box. These facts indicate a high degree of good faith on Crawford's part.

We find that the gravity of this violation was moderate. Trench cave-ins frequently result in fatalities, and we have therefore normally considered trenching violations to have a high degree of gravity. The frozen soil here, however, increased the stability of the walls. We cannot determine exactly how

long any employee worked in the unshored portion of the trench. It does not appear to have been long, however, and Crawford was about to extend the shoring. On balance, we deem a penalty of $100 to be appropriate.

Accordingly, the judge's decision is reversed. The citation is amended to allege noncompliance with 29 C.F.R. § 1926.652(c); a serious violation of the Act is found and the citation as amended is affirmed. A penalty of $100 is assessed.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: MAR 29 1982

ROWLAND, Chairman, dissenting:

I dissent from the majority's decision to amend the citation. In my view, the parties did not impliedly consent to try an alleged violation of section 1926.652(c). Accordingly, I would affirm Judge Patton, who denied the amendment and vacated the citation.

An amendment of the pleadings under Rule 15(b) may not be based on implied consent unless the parties squarely recognized at trial that they were trying an unpleaded issue. International Harvester Credit Corp. v. East Coast Truck, 547 F.2d 888 (5th Cir. 1977); 3 Moore's Federal Practice ¶15.13[2] at 15-171, 15-172 (1980). See Vicon Corp., 81 OSAHRC 98/C4, 10 BNA OSHC 1153, 1981 CCH OSHD ¶ 25,749 (No. 78-2923, 1981) (concurring opinion), appeal filed, No. 81-2359 (8th Cir. Dec. 10, 1981).

Here, the citation, the complaint and the hearing were directed toward an alleged violation of section 1926.652(b). The Secretary was given full opportunity to amend, and indeed amended the description of the cited condition once before trial; however, the Secretary nevertheless persisted in the section 1926.652(b) charge throughout the hearing. I therefore conclude that the parties did not squarely recognize that an alleged violation of section 1926.652(c) was being tried.

The majority reasons that Crawford elicited testimony on the composition of the soil. However, the fact that Crawford elicited such testimony, and indeed defended on the ground that the soil was not soft as alleged, does not show implied consent. The evidence concerning the nature of the soil was relevant to both sections 1926.652(b) and (c). Consent cannot be implied from the introduction of evidence relevant to both a pleaded and unpleaded charge. International Harvester Credit Corp., supra. See McLean-Behm Steel Erectors Inc. v. OSHRC, 608 F.2d 580 (5th Cir. 1979). Since all of the proof related to the violation

originally charged, I disagree with the majority's conclusion that Crawford impliedly consented to try an alleged violation of the unpleaded standard.

Therefore, I conclude that Judge Patton correctly denied the Secretary's post-trial motion to amend the pleadings. Inasmuch as the record shows that the Secretary did not establish that the soil was soft or unstable, I also conclude that the judge was correct in vacating the citation for section 1926.652(b). Accordingly, I would affirm Judge Patton's decision.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 400

ATLANTA, GEORGIA 30309

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|---|---|---|
| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 79-928 |
| | ) | |
| CRAWFORD CONSTRUCTION COMPANY, INC., | ) | |
| | ) | |
| | ) | |
| Respondent. | ) | |

## DECISION AND ORDER

APPEARANCES

Mark D. Katz, Esquire, and Gary A. Boncella, Esquire, Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, on behalf of complainant

Roger L. Sabo, Esquire, Columbus, Ohio, on behalf of respondent

## STATEMENT OF THE CASE

PATTON, Judge: The complaint in this case alleged that the respondent violated standard 29 C.F.R. 1926.652(b) of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651, et seq., 84 Stat. 1590, hereinafter referred to as the Act). The complaint was based upon a citation making similar allegations.

The case was heard on May 21, 1979, in Columbus, Ohio. The complainant and the respondent appeared and presented evidence. There was no motion to intervene. Both parties have submitted briefs.

## LAW AND ISSUES IN THE CASE

It was alleged that a trench was neither properly sloped or braced. The case was tried on the issue of whether a trench was soft or hard soil. Subsequent to the hearing, the complainant, in his post hearing brief, moved to amend the citation and complaint so as to allege a violation of standard 29 C.F.R. 1926.652(c). The complaint alleges that the respondent was guilty of a willful violation. In the event a violation is found, it is necessary to determine whether the violation was willful.

## EVIDENCE AND EVALUATION OF THE CASE

The answer of the respondent admitted that respondent is engaged in the business of installation, maintainance, and repair of sewer lines and water lines, and respondent is engaged in a business affecting interstate commerce within the meaning of section 3(5) of the Act.

It was further admitted that at the time of inspection the respondent was engaged in work on a worksite on State Route 61 North of Hossford Road in Galion, Ohio, on or about February 7, 1979, and at said site, respondent was engaged in the business of excavation, contracting, and installation of a sewer line.

Mr. Paul Thomas Brown, who made the inspection for complainant, testified that respondent was constructing a trench right across the highway, which highway was closed to traffic (Tr. 9). The trench ran east and west across the highway, completely crossing the road. The trench was ten feet, three inches deep, thirty-two feet long, and forty inches wide (Tr. 9-10). There was no support for the walls of the trench, except at the extreme end where there were braces along some pipes (Tr. 9-10). There was an employee working at the bottom of the trench near the middle of it (Tr. 10). The soil was sandy with some veins of clay in the walls. There was a substantial amount of water running into the trench from the top of the ground because some snow was melting at the time. Some water was also oozing into the sides below the top of the ground level (Tr. 10-11). One piece of machinery was operating at the trench and an Insley backhoe was at the west end of the trench (Tr. 11). A pump with a hose was pumping the water out of the trench (Tr. 15). The man in charge of the operation at the site, Mr. Sands, told the compliance officer that the trench had vertical walls without bracing because they did not expect to be in the trench long. He stated he knew it should be shored or braced or some other means of protection (Tr. 15). It was estimated that the

employee would be working in the trench two or three hours (Tr. 15). While the compliance officer was present, they attempted to put two-by-eight feet sheets of plywood in the wooden braces to help support the sides of the trench, but it was wet and slippery, and the employees kept losing them. At the suggestion of the compliance officer, a trench box or trench shield that could be used for the protection of employees was inserted in the trench. It was found to be too wide, and it was necessary to further excavate the trench another two or three inches (Tr. 16-17). The compliance officer testified that the banks could cave in at any time, and that the walls were high over the heads of the employees (Tr. 21).

It was admitted that the top of the soil was blacktop for the road, and that under the blacktop was at least two feet of frost (Tr. 25). There was also some rock and gravel under the pavement (Tr. 25). The frost was far enough down that he was unable to get any of the dirt out (Tr. 29). He could tell it was sand by looking at it and took no tests (Tr. 29-30). He did not witness any falling off of the soil banks and the banks appeared to be staying up very well at that time (Tr. 32).

There was some gravel at the bottom of the trench (Tr. 36). The intent was to fill the trench with gravel to the level where they could get the proper grade to rest the pipe (Tr. 36). The pump ran continuously (Tr. 42).

Mr. Sand, on behalf of the respondent, testified that at the top there were approximately five inches of blacktop and possibly another eight inches of macadam base and then frozen material. The blacktop and frozen material constituted an approximately three-feet depth, then there was dark blue clay (Tr. 50). He stated he did not see any sand (Tr. 50). He defined the soil as hard (Tr. 52). He had thought about using a trench box and had discussed it, but did not use it because he thought the trench was safe (Tr. 53). He was in the trench the day of inspection and helped the employee a couple of times (Tr. 54). Water was

running down the curb line and running down into the trench and also cut into a 12-inch storm sewer, and there was water running out of that (Tr. 56). He had a two-inch pump and pumped it out with a pump (Tr. 56). There was no water coming out of the sides (Tr. 56). It had snowed some, but the sun had come out enough that it had warmed the snow lying on the side of the road, and the snow was melting. It was very chilly (Tr. 56-57). There was no fall off of material anywhere (Tr. 57). He admitted he was pretty familiar with OSHA requirements before the inspection. He admitted that there is a slide effect of clay when it gets wet (Tr. 60).

He testified that the State requires for highway jobs that compaction be 100 percent (Tr. 66). If compaction is not done it is necessary to dig it back up and redo it (Tr. 68). He stated that the frozen ground is like concrete or stone and asphalt also affected compaction (Tr. 68-69). He thought it was safe (Tr. 69). He testified that when it would start to thaw compaction would be affected. It was still, however, frozen (Tr. 70).

Equipment Operator Robert Garverick testified that the digging was in hard blue clay. He stated it would not come out of the bucket without jerking, and that experience has taught when this results, the ground is hard (Tr. 75). The side was not sloped because he did not want to take up more roadway, which would have had to be repaved (Tr. 81).

Mr. Neil Shinaberry, who is a laborer working for respondent, also described the walls as blue clay with gravel at the bottom and confirmed there was blacktop at the top and the soil was frozen about three feet deep.

Consulting Engineer Robert Dunbar testified that the only way to be certain as to composition of the soil is to run a test and to perform calculations (Tr. 91). He considered this trench as stable (Tr. 95-96). He stated frozen ground causes greater stability, and that the freezing of ground is common and accepted practice

for creating additional stability to vertical walls (Tr. 95-97). He stated, however, that it is possible to have hard soil and still have a lack of stability. Looking at Exhibit 1 he found no evidence of water seepage or other type problems coming from the sides of the trench. It appeared to him to be stable (Tr. 100). It is true that moisture content generally reduces the shearing strength (Tr. 102). The backhoe would apply additional force to the wall, but not necessarily create instability (Tr. 103). The backhoe was at the end of the trench, and therefore would have little affect upon the stability of the walls (Tr. 108). He did not feel that water running from the top would have an affect if the ground was frozen at the top (Tr. 109). If the trench had been open for weeks and filled with water, it would affect stability, if only open a day, and the volume of water was small in the bottom of the trench, he would not be concerned about instability (Tr. 110-111). He had heard of trenches caving in in hard or compact soil (Tr. 113). Frost action would act as a cementing agent to take the angle of repose up to 90 degrees (Tr. 113-114). The vertical walls are permitted by OSHA in rock-types such as limestone or shale or in cemented materials, and in his opinion, this would qualify for vertical walls (Tr. 115). If thawing, however, it would make a difference, but so long as frost is not changing or increasing, the stability will be maintained (Tr. 115-116).

Although there is a factual issue between the parties as to the composition of the walls of the trench and whether it was composed of soft or hard soil, the greater weight of the evidence would appear to sustain the position of the respondent that the trench was hard soil. It is not disputed that it was hard at the top with the paving of the street and anywhere from two to three feet of solidly frozen soil. It is not disputed that solidly frozen soil is extremely hard soil. The dispute between the parties is as to the nature of the soil beneath the level of the frozen soil. The complainant described it as sandy soil with some clay, whereas

several witnesses of the respondent described the soil as blue clay, which was hard and compact. In view of the differences between the witnesses as to composition of the soil, the scales are tipped in favor of the respondent by the fact that the bucket would jerk, and the evidence is to the effect that this was always evidence of hard soil.

It will further be noted that the burden of proof is on the complainant to establish the composition of the soil. The compliance officer merely looked at the soil and concluded that it was sandy and unstable. He did not take any samples or perform any tests. He tried to scrap a little off the sides, but in view of the frozen nature of the top of the soil, he was unable to secure any. Therefore, it would appear at best that the complainant has a guess from one of its witnesses as to the nature of the soil with no actual test made and no concrete proof as to the composition of the soil. It cannot be left to mere speculation, and a case is not made out by guessing and speculation. This is particularly true in view of the substantial evidence of the respondent to the effect that the soil from top to bottom was of a hard nature.

The issue therefore arises as to whether the motion to amend so as to allege a violation of the standard dealing with trenches in hard soil should be granted. The evidence introduced would appear to establish that the respondent did not conform to the requirements of the standard dealing with hard soil, anymore than he conformed to the standard dealing with soft soil. It is the position of the respondent, however, that respondent would be prejudiced by the complainant adopting an entirely new theory after all of the evidence is in and after the record is closed.

The complainant seeks to amend on the basis of the liberal provisions for amendment in the United States District Court's Rules of Civil Procedure. The

Rules of the Occupational Safety and Health Review Commission provide that where there is no specific Commission Rule, the Rules of Civil Procedure for the United States District Court shall be applicable. There is no specific rule of the Commission, and therefore it is necessary to look to the Federal Rules of Civil Procedure to determine whether or not the amendment should be granted.

Rule 15(b) of the Rules of Civil Procedure is as follows:

> "Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence."

Although the above rule provides for very liberal amendments of pleadings, even after judgment, it will be noted that the first condition for such amendment is as follows:

> "When issues not raised by the pleadings <u>are tried by express or implied consent</u> of the parties, they shall be treated in all respects as if they had been raised in the pleadings. . . ." (Emphasis supplied)

It cannot be said that a trial based upon an allegation that a violation has occurred in hard and compact ground was consented to by the respondent either expressly or by implication. On the contrary, the entire hearing was a contest over whether the soil was soft and unstable, and the respondent's defense and entire position was based on the contention that the soil was of a hard and compact nature. Not even when the evidence developed, as above set forth, and substantial evidence was introduced to the effect that the soil was hard and compact, was any

request made at the hearing for an amendment of the pleadings so as to allege a violation of the standard relating to hard and compact soil.

Although the evidence introduced in the case could certainly be related to a standard relating to hard and compact soil, it was equally related to the issues as alleged in the pleadings and as to whether or not the violation was a violation of the standard relating to soft and unstable soil.

In the trial of the issue as to whether a violation of the standard relating to soft soil had resulted, it was essential that the depth and general size of the trench be established and whether there was any bracing or sloping of the trench be proven. The respondent could not very well object to such evidence as outside of the initial pleadings in the case. The fact that the same evidence could be applied to a different theory and a different standard does not mean that the respondent had waived its position that the case should be tried on the pleadings as alleged. It will be noted that Rule 15(b) concludes with the the statement, "The court may grant a continuance to enable the objecting party to meet such evidence." Such opportunity was denied by complainant waiting until after the hearing was closed to request said amendment.

No reason is given as to why a request to amend was not made before the hearing was closed. None of the provisions of Rule 15(b) allowing for liberal amendment can be applied unless the initial condition is meet and that is that issues not raised by the pleadings are tried by expressed or implied consent. To grant the motion to amend would be to expand Rule 15(b) so as to authorize an amendment, even in those instances in which there is no express or implied consent. This Judge does not have the authority to amend the Rules of Civil Procedure, even though it might be argued that to do so would work justice in this case. Respondent in this case never consented, either expressly or by implication to try the issue of whether there had been a violation by failing to shore in hard and compact soil. In

the case of Croom Construction Co., 77 OSAHRC 33/A2, 5 BNA OSHC 1145, 1977-78 CCH OSHD ¶ 21,628 (No. 12686, 1977), the Review Commission held (5 BNA OSHC 1145, 1146-47):

> "Although this Commission has seen fit at times to invoke Rule 15(b) of the Federal Rules of Civil Procedure, which provides for liberal amendment of pleadings, it has permitted such amendments only when the new issues have been tried by the express or implied consent of the parties and no undue prejudice would result therefrom. See Secretary v. Isaacson Structural Steel Company, 17 OSAHRC 496 [3 OSHC 1203] (1975); Secretary v. Park Construction Company, 17 OSAHRC 343 [3 OSHC 1120] (1975); Secretary v. Brisk Waterproofing Co., Inc., 3 OSAHRC 1132 [1 OSHC 1263] (1973).
>
> * * * *
>
> "Under Rule 15(b), implied consent will only be found when the party against whom the amendment is sought was fairly apprised that the unpleaded charge was in issue Niedland v. United States, 338 F.2d 254, 258 (3rd Cir. 1964); Kuhn v. Civil Aeronautics Board, 183 F.2d 839, 842 (D.C. Dir. 1950). If both parties introduce evidence relevant to the amended charge, or if such evidence is introduced without objection, this may indicate that the parties consented to trial of the issue. Peterson v. Klos, 426 F.2d 199, 202-203 (5th Cir. 1970); Arkla Exploration Co. v. Boren, 411 F.2d 879, 883 (8th Cir. 1969); Niedland v. United States, supra. However, it must appear that the parties understood that such evidence went to the amended charge and was not introduced solely because it was relevant to another issue being tried. Freitag v. The Strand of Atlantic City, 205 F.2d 778, 781 (3rd Cir. 1953); Simms v. Andrews, 118 F.2d 803, 807 (10 Cir. 1941)."

It therefore appears that the motion to amend must be denied, and that the complaint has not been sustained.

## FINDINGS OF FACT

1. Respondent maintained a worksite on State Route 61, North of Hossford Road in Galion, Ohio, and on or about February 7, 1979, was engaged at the worksite in the business of excavation contracting and installation of a sewer line.

2. In engaging in said work, the respondent, on said date, permitted its employees to work in a trench which was 10 feet, 3 inches deep, 32 feet long, and 40 inches wide.

3. The top of the trench was paving for a highway under which was compacted gravel and two to three feet of frozen dirt. Under the frozen area, the sides of the trench were blue clay, which was hard and compact soil.

4. The walls of the trench were vertical.

5. No bracing of the walls of the trench had been done in the area in which the employee of the respondent was working on the day of inspection.

## CONCLUSIONS OF LAW

1. Respondent is engaged in a business affecting interstate commerce and is within the jurisdiction of the Occupational Safety and Health Act.

2. An amendment alleging a different standard and changing the theory on which the case is tried can be granted after the conclusion of the hearing of the case only in the event the parties expressly or by implication consented to the trial of such issues.

3. The parties not having expressly or by implication consented to the trial of the issues raised by the amendment, the request to amend should be denied.

4. The complainant has not established that the employees of the respondent were working in soft and unstable soil, and therefore the allegations of violation should be dismissed.

## ORDER

It is therefore ORDERED that:

The motion of complainant to amend the complaint so as to allege a violation of standard 29 C.F.R. 1926.652(c) is denied.

The respondent was not, on February 7, 1979, in violation of standard 29 C.F.R. 1926.652(b).

The complaint and citation are therefore dismissed.

Dated this 12th day of September 1979.

John S. Patton

JOHN S. PATTON
Judge

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 240

ATLANTA, GEORGIA 30309

# NOTICE OF DECISION

Secretary of Labor v. American Cyanamid Company

OSHRC Docket No. 80-2767

1. Enclosed is a copy of my decision. It will be filed with the Commission on February 25, 1982, and will become the final order of the Commission on March 29, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N. W., Suite 601
   Washington, D. C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is March 29, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Jess D. Ewing

JESS D. EWING
Judge

Date: February 5, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 230
ATLANTA, GEORGIA 30309
(404) 881-4197

| | | |
|---|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>AMERICAN CYANAMID COMPANY,<br><br>Respondent,<br><br>and<br><br>OIL, CHEMICAL AND ATOMIC WORKERS' INTERNATIONAL UNION, and its LOCAL 4-208,<br><br>Authorized Employee Representative. | ) | OSHRC Docket No. 80-2767 |

## DECISION AND ORDER

APPEARANCES:

Thomas M. Tompkins, Esquire, Office of the Solicitor, U. S. Department of Labor, Dallas, Texas, on behalf of the complainant

George R. Carlton, Jr., Esquire, and James S. Maxwell, Esquire, Dallas, Texas, on behalf of the respondent

Steven Wodka, International Representative, Washington, D. C., on behalf of the union

Gary Weatherbey, International Representative, Belton, Texas, on behalf of the union

EWING, Judge:

## STATEMENT OF THE CASE

This is a proceeding brought before the Occupational Safety and Health Review Commission ("The Commission") pursuant to § 10 of the Occupational Safety and Health Act of 1970 ("The Act"), 29 U.S.C. § 651, et seq., contesting a serious citation issued by complainant to respondent pursuant to § 9 of the Act.

Respondent, American Cyanamid Company, a corporation, is engaged in the business of manufacturing chemicals.

An inspection was conducted at respondent's workplace at 600 North Jones Street in Ft. Worth, Texas, on March 7-11, 1980, and as a result, a serious and a nonserious citation were issued on April 14, 1980. The nonserious citation was deleted and the serious citation was amended.[1/] The serious citation, as amended, alleges a violation of § 5(a)(1) of the Act and, in the alternative, a violation of § 5(a)(2) of the Act in that respondent failed to comply with safety standard at 29 C.F.R. § 1910.134(a)(2).[2/]

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1/ The nonserious citation alleging a violation of 29 C.F.R. § 1910.134(a)(2) under two items, was deleted on May 5, 1980.

The serious citation originally alleged a three item violation of § 5(a)(1) of the Act. On May 5, 1980, items 1b and 1c were deleted and in the alternative, a violation of 29 C.F.R. § 1910.134(a)(2) was alleged.

2/ Section 5(a) Each employer-

(1) Shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

Respondent filed a timely notice of contest.

An answer to the citation was filed and later a complaint was filed.

A hearing was held in this matter on November 17, 1980, and December 17, 1980, in Dallas, Texas.

The O.C.A.W.I.U. and its Local Union 4-208, authorized bargaining agent for affected employees, were admitted to party status.

The respondent elected to file a post-hearing brief.

## JURISDICTION

The jurisdictional allegations set out in Part II of the Secretary's complaint were not denied by respondent in any answer filed subsequent thereto.

The respondent maintained a corporate office in the State of New Jersey (address of citation). Respondent owned plants in states in the United States other than Texas (Tr. 322-323).

## ISSUES

The issues are:

1. Whether § 5(a)(1) of the Act is applicable to the facts of this case.

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2/ continued

§ 1910.134 Respiratory protection.

(a) Permissible practice.

* * *

(2) Respirators shall be provided by the employer when such equipment is necessary to protect the health of the employee. The employer shall provide the respirators which are applicable and suitable for the purpose intended. The employer shall be responsible for the establishment and maintenance of a respiratory protective program which shall include the requirements outlined in paragraph (b) of this section.

2. If so, whether the respondent was in serious violation of § 5(a)(1) of the Act.

3. Whether the respondent was in serious violation of 29 C.F.R. § 1910.134(a)(2).

4. Appropriate penalty for any violation found.

## GENERAL DUTY CLAUSE
## § 5(a)(1), ITEM 1 OF AMENDED CITATION

The allegations in support of the alleged § 5(a)(1) violation are:

> In areas where employees may be exposed to excess concentrations of oxide of nitrogen, emergency and escape type respirators were not provided and signs warning of the possible presence of oxide of nitrogen were not posted in the wet end, cobalt fines digestion process xerogel. Also information as to the hazards of oxides of nitrogen was not kept on file and made accessible to employees. Employees were not adequately informed of hazards, exposure symptoms and emergency procedures associated with working in areas where exposure to oxides of nitrogen may occur such as in and around the xerogel wet end area.

If for any reason the above alleged violation does not apply, the following is cited in the alternative.

## 29 C.F.R. § 1910.134(a)(2), ITEM 1 (ALTERNATIVE)

The allegations in support of the alleged violation of § 1910.132(a)(2) are: "Xerogel wet end, cobalt fines digestion process; emergency and escape respirators were not provided and maintained in the area."

## SUMMARY OF THE FACTS

Compliance Officer Henry R. Slagle testified on behalf of complainant. He had been an OSHA compliance officer for five years. He had conducted about 400 inspections as compliance officer, about 40 of which were health inspections (Tr. 10).

He worked for the State of Texas Health Department as a safety engineer from 1970 to 1975, where he dealt with the OSHA 1910 Standards, which were adopted by Texas in 1973 (Tr. 10). He attended all of the basic training courses offered by the OSHA institute (Tr. 12). He holds a Bachelor's Degree in Mechanical Engineering and a Master's Degree in Nuclear Engineering (Tr. 12). He took the normal college level chemistry and bio-chemistry courses (Tr. 12-13).

On March 7-11, 1980, Mr. Slagle conducted an inspection of respondent's workplace at Ft. Worth, Texas (Tr. 13, 17, 19).

He indicated the inspection was in response to a complaint that respondent's employees were exposed to Nitric Acid fumes in the Xero Gel area (Tr. 14-19) and no suitable respirators were available to protect them from the fumes (Tr. 20).

Mr. Slagle testified he (Tr.20-21), interviewed employees working in the Xero Gel area (Tr. 34, 49, 40, 41, 47) and questioned management concerning the operations in that area (Tr. 55, 58-59, 60, 108, 119-121).

He indicated respondent produced Cobalt Nitrate (Tr. 20-21) in a huge open-spaced building (Tr. 51) at its workplace (Tr. 19-20) in the Xero Gel area (Tr. 19).

He testified the Cobalt metal dissolver was a tank about seven feet in diameter and seven feet deep with a flap-type hinged lid, on top (Tr. 150-151). The tank is referred to as the "Cooker" or "Cobalt Tank" (Tr. 180, 345-346).

The cooker had a vent that removed fumes and gases off the top of the material in the tank and vented them out of the building (Tr. 33-34). The top of the cooker extended about eight inches above the surface of a work floor. (Tr. 21).

The cooker was located on the south end of a row of tanks (Tr. 155; Exh. R-3) and that an operator's desk and control panel were located about 10 to 15 feet south

of the cooker (Tr. 149). The operator faced the cooker while working at his desk (Tr. 154; Exh. R-3).

He indicated that there is only one person on duty for each shift; this operator was responsible for the operations in the Xero Gel area (Tr. 157). Materials other than Cobalt Nitrate are generated in the area (Tr. 22).

Mr. Slagle testified that Cobalt Nitrate was produced by reacting a Batch Formula (Exh. C-1) of water and 551 pounds of Cobalt fines (ground Cobalt). It took about six hours for the formula to react (Tr. 26-30). This was not a day-to-day process. The cooker may be used two or three days in a row, then left idle for several days (Tr. 22).

Mr. Slagle testified that the reaction between Nitric Acid and Cobalt causes what is termed an "exothermic reaction," which means considerable heat is liberated from the reaction itself (Tr. 30).

He testified he arrived at a balancing formula (Tr. 31-33, 47-49; Exh. C-2) which shows that when the materials in the Batch Formula (exh. C-1) are reacted, there would be a yield of three parts of Cobalt Nitrate, plus two parts of oxides of Nitrogen, plus four parts of water, plus the heat of the reaction (Tr. 32). Oxides of Nitrogen is a combination of Nitric Oxide and Nitrogen Dioxide (Tr. 33.).

He indicated the chemical symbol for Nitric Oxide is NO and that for Nitrogen Dioxide is $NO_2$ (Tr. 33).

Mr. Slagle indicated that Nitrogen Dioxide is one of the materials listed in Table Z-1 of 29 C.F.R. § 1910.1000. It has a ceiling value of five parts per million (Tr. 46-47).

Nitric Oxide is listed in Table Z-1, and it has a TWA limits of 25 parts per million.

The cooker operators told Slagle that they had seen the cooker boil over one out of every 10 to 12 times it was operated (Tr. 39) and that a lot of liquid would boil out of the tank (Tr. 40-41, 47), and a lot of brownish-yellow smoke was always present when the boilover occurred (Tr. 41, 47).

Mr. Slagle had never seen the cooker process in operation (Tr. 34, 107).

He did not take any air sampling in the cooker area to determine exposure levels of oxides of Nitrogen Tr. 34, 107).

He was of the opinion that the boiled out material contained oxides of Nitrogen; he opined the generated oxides of Nitrogen are released through the surfacing bubbles (Tr. 42), and "that any liquid that would boil out would have this gas entrained in it in some volume" (Tr. 42-43, 49-50), and when the liquid spilled over it would have bubbles of Nitric Oxide and Nitrogen Dioxide in it and when it spread out, these gases would evolve in the atomosphere (Tr. 42).

He indicated that Nitrogen Dioxide vapors are relatively easy to detect because they are brown or brownish-yellow in color and they look like brown smoke (Tr. 38).

Mr. Slagle indicated that Nitric Acid molecules in gas form are basically colorless, but when they hit the free air, they immediately converts to Nitric Oxide and Nitrogen Dioxide (Tr. 38). That when these gases form in the free air after a boilover, there is danger of employee overexposure (Tr. 38).

Mr. Slagle indicated that a prior ambient air test made in 1977 by OSHA (Tr. 54-55) in the cooker area, in a normal non-boilover run, showed the level of Nitric Acid fumes was below the permissible limits or basically non-existent (Tr. 38-39).

He indicated the only time the employees in the cooker area need to wear appropriate self-contained respirators to protect them from overexposure to Nitrogen Oxides was when a boilover occurred (Tr. 38-39).

He testified that the cooker operators he interviewed indicated that when a cooker boilover occurred, they were required to turn off the steam, stand by and run a water hose on the cooker to cool it down (Tr. 59, 144, 152-153).

Mr. Slagle indicated the total digestion of 550 pounds of Cobalt over a 6-hour period would generate 1880 cubic feet of oxides of Nitrogen (Tr. 48). He calculated the average per minute generation was 5.22 cubic feet (Tr. 49).

He testified that if only a cubic foot of Nitrogen Oxide were to be released in a 20 x 30 x 8 foot space, immediately the exposure level would be about 200 parts per million (Tr. 47-48, 52).

He indicated oxides of Nitrogen that are liberated would have a tendency to settle toward the floor, since it is slightly heavier than air (Tr. 53).

Mr. Slagle indicated he made a determination that the employee's exposure to Nitrogen Dioxide in a boilover situation could easily exceed 5 parts per million (Tr. 46-47).

He indicated that oxides of Nitrogen concentrations of 100 to 150 ppm are dangerous for short exposure of 30 to 60 minutes (Exh. C-3; Tr. 74).

Mr. Slagle indicated that an employee can inhale a lethal amount of oxides of Nitrogen in a short period of time without any immediate reaction (Tr.33, 36, 65). The severe symptoms or death occurs 8 to 24 hours later (Tr. 33-36, 65; Exh. C-3).

He testified oxides of Nitrogen do not have adequate warning signs or produce adequate respiratory reactions when initially inhaled, to apprise an employee of its concentration and his exposure (Tr. 33, 36, 65).

He indicated that there were no warning signs posted in the cooker area notifying employees of the dangers of oxides of Nitrogen (Tr. 37-38).

Mr. Slagle testified that no respirators suitable for emergency employee protection against oxides of Nitrogen were provided in the cooker building (Tr. 57, 58, 59).

He indicated respondent had suitable emergency respirators stored in the maintenance shop, two buildings away, several hundred feet from the Cooker area (Tr. 57-60).

He was of the opinion that respirators were needed in the cooker area for employees to use to either work in or for escape when a boilover occurs (Tr. 53).

He was of the definite opinion that a potential for employee overexposure to oxides of Nitrogen existed when a boilover occurs (Tr. 53-54).

He testified that § 1910.134(a)(2) does not indicate the employee should know what he is exposed to, because the employer is supposed to take care of telling the employee when to wear it and when not to wear it (Tr. 37).

He testified that due to the lack of warning signs and lack of knowledge on the part of the employees, he felt that § 1910.134(a)(2) was not completely adequate to relay the significance of the severity of the situation (Tr. 37).

Mr. Slagle was of the opinion that respondent was in violation of section 5(a)(1) of the Act for failure to provide emergency escape-type respirators and post warning signs and to have on file and accessible to the employees information apprising them of the hazards of oxides of Nitrogen (Tr. 37-38).

He was also of the opinion that respondent was in noncompliance with § 1910.134(a)(2) for its failure to provide appropriate respirators for employees use for either escape or to work in the area when a boilover occurred (Tr. 53-54).

Mr. Slagle testified only one employee per shift would be exposed to the hazard (Tr. 76).

The respondent had a respirator program (Exhs. C-4, C-5) which it did not follow or enforce (Tr. 76-85).

He indicated respondent had knowledgeable chemists on its staff at the workplace who were aware that oxides of Nitrogen did exist in the cooker process (Tr. 84), and respondent's own safety program recognized that boilover occurred (Tr. 84; Exh. C-5, page 3).

Mr. Slagle indicated respondent had tried to correct the boilovers by installing an orifice in the acid line to control the flow of acid into the cookers (Tr. 108).

He indicated that an on-the-spot air sampling while a boilover was in progess would establish what the levels of oxides of Nitrogen really were (Tr. 109-110), and would be more reliable than the theoretical chemical calculations he made (Tr. 110-111).

He indicated that both items of the alleged violations in the contested citation are based on the same set of facts (Tr. 104-105).

Mr. Slagle suggested that an appropriate respirator should be located about 20 feet away from the cooker tank, near the stairs southwest of the operator's desk (Tr. 152; see Exh. R-3).

Joe Zbieronek was called as a witness by complainant. He had been employed by respondent at the inspection site for about 11 years (Tr. 162).

In March of 1980, he worked in the Xero Gel area, where three different processes were run (Tr. 163).

He testified he had run more than 100 batches of Cobalt Nitrate (Tr. 164).

The formula most regularly used is the formula set out in complainant's Exhibit 1 (Tr. 167).

He testified a boilover will occur in less than five minutes (Tr. 168). The last boilover he had was on July 4 (year not stated), which occurred at the end of a three hour input of acid (Tr. 169). He hosed the tank down with water (Tr. 169).

He indicated he had three or four boilovers and had seen 10 to 12 boilovers while working for respondent. (Tr. 169).

He testified he tried to prevent boilovers by having the water hose running and ready to wet the tank down when it starts (Tr. 170).

He indicated liquid and orange smoke comes out of the tank when a boilover occurs (Tr. 170) and the liquid drops to the floor below (Tr. 170).

He testified that in April or May, 1980, the respondent instructed the employees to get out of the area when a boilover occurred (Tr. 171). Prior to this time, the operators were required to cool down the tank with a hose and clean up the spill (Tr. 171-172).

He indicated there were no remote controls used to shut the tank down when it boiled over (Tr. 172).

He indicated no respirators were provided in the cooker area to use for fumes (Tr. 173).

He testified he was not told by respondent of the possible hazards of breathing oxides of Nitrogen (Tr. 174). No study material on oxides of Nitrogen were furnished employees by respondent (Tr. 174).

He indicated that before March of 1980, he was not told to stay and hose the tank down when a boilover occurred, but he was trained to do that (Tr. 179-180).

He testified a boilover was rare before they started using Cobalt fines in January, 1980 (Tr. 183, 188-189).

Mrs. Sharon Itaya, a qualified physician with Board Certification in Internal Medicine, was called to testify as a witness by the authorized employee representative with party status.

She indicated nitrous oxide fumes inhaled by a person in sufficient volume is a serious health hazard and it can cause death or serious physical injury (Tr. 193, 198).

She testified that in July, 1980, she interviewed six workers that had formerly worked at respondent's Ft. Worth, Texas, plant for the purpose of doing health studies on them (Tr. 202). Two of these workers had a history of being exposed to nitrous oxide fumes and had suffered health effects from such exposure (Tr. 202-203). The medical records of all six employees interviewed had diagnosis of chronic bronchitis and respiratory problems that their physicians felt were the result of chemical exposures of various sorts (Tr. 203, 211-212).

Dr. Itaya opined that there had been instances of employee overexposure to nitrous oxide fumes in the past at the cited workplace (Tr. 212).

The doctor indicated the latest instance of overexposure to nitrous oxide fumes at the respondent's workplace was in September, 1978 (Tr. 206-210).

Jon Villaume was called as a witness for respondent. He holds a B. S. degree in Chemistry and a Ph.D. in Organic Chemistry (Tr. 230-233).

He indicated that in May of 1980 (Tr. 233-243-244), he and respondent's manager of Corporate Industrial Hygiene visited the cited facility and reviewed the process of cooking Cobalt, the physical layout and the escape areas in the building (Tr. 233).

He testified the cooker area is relatively open; there are at least two means of escape from the area. The distance from the Cooker to an outside door is no more than 50 to 100 feet (Tr. 234).

He indicated they considered installing an escape respirator in the cooker area and rejected it because there would be a time delay in actually putting on the respirator, this would require an employee to make a decision and he concluded an employee's natural decision would be to leave the area (Tr. 234-235). Also, an employee could possibly get exposed while trying to put on a respirator (Tr. 264-265).

He testified it was concluded that the most appropriate procedure, should there be a boilover, would be for the employees to immediately leave the area (Tr. 234).

He was of the opinion that the concentration of oxides of Nitrogen would not reach too high a level in a boilover situation (Tr. 235).

He testified that by comparing the Batch Formula (Exh. C-1) and Mr. Slagle's balancing equation (Exh. C-2), he could not come up with any kind of reasonable determination of what the parts per million of oxides of Nitrogen would be in the air around the cooker (Tr. 236, 244-245). You do not have an equilibrium situation. There is constant exhaust ventilation. The exhaust ventilation over the cooker draws off air and oxides of Nitrogen that are formed (Tr. 237), there are also room exhaust fans.

He indicated that if the acid used in the formula was a 100 percent acid, the gas formed would be all $NO_2$ (Nitrogen Dioxide). Whereas, if a diluted acid was used, the reaction would be more vigorous and would form some NO (Nitric Oxide), which in the presence of air converts to $NO_2$ (Nitrogen Dioxide) (Tr. 237-238).

He indicated the formula was written general enough to include 100 percent acid (Tr. 238).

Doctor Villaume testified that the only way to determine the oxides of Nitrogen parts per million in the air in the cooker area is to run air sample tests (Tr. 239). He recommended in May, 1980, that samplings be done in a boilover since none had been done in the past (Tr. 242-243), to make sure that area was safe.

He testified steam is blanketed around the cooker tank, not injected into it (Tr. 248). Steam is a source of heat to start the reaction (Tr. 248). The reaction is caused by mixing Cobalt with Nitric Acid (Tr. 248).

Dr. Villaume indicated that when the material overflows and hits the floor, it will not continue to react because the Cobalt is in the bottom part of the Cooker (Tr. 249), but steam and any oxides of Nitrogen already generated would come off along with brown smoke (Tr. 250-251, 262).

Whether you get NO (Nitric Oxide) or whether you get $NO_2$ (Nitrogen Dioxide) depends on the concentration of the acid (Tr. 266).

He testified the generation of oxides of Nitrogen is inherent in the Cobalt cooking process (Tr. 242, 267-268) and you cannot rule out the possibility of a boilover emitting into the air oxides of Nitrogen in excess of the ceiling limits without air sampling (Tr. 268).

He testified the NIOSH-OSHA Pocket Guide (Tr. 271; Exh. R-2) to Chemical Hazards states that one can breath up to 50 parts per million of Nitrogen Dioxide and still have the ability to escape from the area and not be hindered in that nor produce any long term effects (Tr. 217, 280; Exh. R-2).

Charles Thomas DeLong was called by respondent as a witness. He had been employed by respondent as an Industrial Hygienist since March, 1979. He holds a B. S. degree in Safety and Health and a M. S. degree in Public Health (Tr. 272).

He visited the cited workplace in about April, 1979, and in November, 1980 (Tr. 274).

He testified that in November, 1980, he conducted air sample testing of a planned boilover of the cooker in question (Tr. 274-275).

A regular experience operator created the boilover (Tr. 274).

He indicated air sample measurements were taken at various places in the cooker area for the presence and concentrations of nitrous oxide plus Nitrogen Dioxide vapors (Tr. 275).

About a minute after the beginning of the boilover, two readings taken between eight and ten feet from the cooker, during the worst stage of the boilover, showed readings of 20 and 30 parts per million of Nitric Oxide (NO) plus Nitrogen Dioxide ($NO_2$) (Tr. 277).

Another reading taken at a point about 20 feet from the cooker, showed 10 parts per million of Nitric Oxide plus Nitrogen Dioxide (Tr. 277).

The next reading was taken down on the first floor level which showed less than one part per million of Nitric Oxide (NO) plus Nitrogen Dioxide ($NO_2$) (Tr. 277).

Between five and ten minutes after the boilover, another reading was taken on the first floor which showed one to two parts per million of Nitric Oxide (NO) plus Nitrogen Dioxide ($NO_2$) (Tr. 277).

He testified a long term tube sampling was done on the operator, which began when the operator started adding acid to the cooker and ended when he left for the

day, this sampling was over a two and a half hour period. When the boilover started the operator adjusted some controls, then walked 50 to 75 feet away on the work floor and later returned to the cooker to clean up. The reading on the operator's sampling was between zero and four parts per million of Nitric Oxide plus Nitrogen Dioxide (Tr. 278-279).

He indicated the boilover lasted about a minute (Tr. 293).

He testified escape respirators are recommended when a certain length of time is needed to get out of an area (Tr. 281-282).

He indicated the needed time is not an element in this case. By merely walking to the exit platform the operator would be out of the exposure area (Tr. 282-284).

He was of the opinion that it would be safer for the employees to leave the cooker area when a boilover starts, rather than take the time to put on a respirator (Tr. 281).

He testified the south stairs are out of the exposure area (Tr. 309). Exhibit R-1 depicts the south stairs (Tr. 287).

Gilbert Loudermilk, respondent's Safety Director of Industrial Hygiene, was called as a witness. He had been safety director for about one and a half years (Tr. 313).

He indicated that boilover problems started in December, 1979, and January of 1980, when chunk Cobalt could not be purchased and the plant began using Cobalt "fines" and powder (Tr. 313).

He characterized the boilovers as being of a few months duration caused by technical problems that were solved at the time of the hearing (Tr. 314).

He indicated he felt respirators were not needed because of the time factor to put them on, an employee could reach safety in less time than it would take to put on a respirator (Tr. 315).

He indicated he instructed the employees to turn on the water, turn off the steam and leave the area (Tr. 315).

The water hose was pointed at the cooker, when turned on the water ran on the outside of the cooker (Tr. 315).

He testified he was present when the test boilover occurred (Tr. 316).

The formula or recipe used in the test boilover was the same as that in complainant's Exhibit No. 1 (Tr. 316).

The boilover lasted a minute or a little over (Tr. 313). No attempt was made to stop the boilover (Tr. 319).

He testified that prior to January of 1980, the employees working on the Cobalt cooker were instructed to get out of the area the moment fumes started in the area or something went wrong (Tr. 321).

He indicated about 50 gallons of material boiled over (Tr. 337).

At the time the boilover began, the operator turned the water hose on; the steam was cut off earlier when the tank reached 150 degrees (Tr. 337-338).

Frank J. Strider, who had been general foreman of respondent's cited plant for 15 years, was called as a witness for respondent (Tr. 341).

He indicated respondent's Exhibit No. 3 depicts the mezzanine floor of the Xero Gel building (Tr. 342).

He kept records of each batch of Cobalt cooked (Tr. 344).

From the first of January, 1980, approximately 165 batches of Cobalt was cooked (Tr. 344).

Since January 1, 1980, 16 boilovers were reported (Tr. 344).

He indicated the safest way is for the men to leave the area when a boilover occurs (Tr. 345).

He was a Cobalt cooker operator for about eight years (Tr. 346). 350).

About half of the 16 boilovers occurred before March 7, 1980 (Tr. 351).

He testified a boilover occurs generally at temperatures of 200 degrees F. or greater (Tr. 352).

He indicated that by using the formula in Exhibit C-1, it would take an hour and a half to reach a boilover point of 200 degrees F. or better (Tr. 353).

He stated a boilover is not a continuous overflowing of material from the tank. It is intermittent. It is short-lived, and it lasts for about two minutes (Tr. 356).

He indicated the only preventative measures to try to stop a boilover are to cut off the steam and put water on the steam jacket to cool it down (Tr. 356). There is nothing else you can do (Tr. 356).

He stated respondent no longer uses the formula set out in Exhibit C-1 (Tr. 363).

He stated he was told that in the planned boilover that the formula in Exhibit C-1 was used, but they kicked up the steam (Tr. 364-365).

He indicated the steam could be cut off at the door (Tr. 366).

It takes only a matter of seconds to leave the area (Tr. 366).

He indicated the water valve and the steam valve are about three feet apart (Tr. 367). The steam valve is controlled by an electrical switch (Tr. 369). You simply flip a switch. It takes a matter of seconds to turn off the steam and turn on the water (Tr. 367).

He stated the tank is a 745 gallon capacity (Tr. 369).

With a 24 inch outage, the tank holds about 460 to 465 gallons (Tr. 369).

He stated there is one Scott Air Pack stored in the shop, a half a city block from the Cobalt cooker (Tr. 370-371), and there are spares in the storeroom next door to the shop (Tr. 372), but the storeroom is kept locked and employees in the Xero Gel building do not have a key to it (Tr. 372-373).

## OPINION

## RESPONDENT'S MOTION TO DISMISS

Respondent made a motion to dismiss the citation and complaint on grounds that the Secretary failed to prove a prima facie case. This motion was made at the close of the Secretary's proof in chief. A ruling was deferred.

The Commission treats a motion to dismiss as a motion for involuntary dismissal under Rule 41(b) of the Federal Rules of Civil Procedure. The Commission has held that a Rule 41(b) motion should be granted only if the evidence preponderates against the Secretary. Williams Enterprises, Inc., 79 OSAHRC 24/B5, 4 BNA OSHC 1663, 1976-77 CCH OSHD ¶ 21,071 (No. 4533, 1976); Harrington Construction Corporation, 77 OSAHRC 7/B3, 4 BNA OSHC 1471, 1976-77 CCH OSHD ¶ 20,913 (No. 9808, 1976).

The compliance officer testified that one batch run would generate 1880 cubic feet of oxides of Nitrogen (Tr. 48), and the average per minute generation was 5.22 cubic feet (Tr. 49). He indicated that if only a cubic foot of oxides of Nitrogen were to be released in a 20 x 30 x 8 foot space, the exposure level would be about 200 parts per million (Tr. 51). The respondent's cooker operators indicated to the compliance officer the cooker boiled over one out of every 10 to 12 times it was

used (Tr. 39) and a lot of brownish-yellow smoke escaped from the cooker (Tr. 40-41, 47) every time it boiled over. The release of brownish-yellow smoke indicated the release of Nitrogen Dioxide (Tr. 38, 42-43, 49-50). The compliance officer indicated he made a determination that the employee's exposure to Nitrogen Dioxide in a boilover situation could easily exceed 5 parts per million (Tr. 46-47) and that the employees were not provided with appropriate respirators in the cooker area. There were no warning signs posted, and no literature available to apprise employees of the dangers of oxides of Nitrogen (Tr. 33, 36-38, 65). The cooker operators were required to stand by and run a water hose on the cooker to cool it down when a boilover started (Tr. 59). The compliance officer indicated that an employee can inhale enough oxides of Nitrogen in a matter of seconds to kill him 16 hours later (Tr. 65, 74). He indicated respondent had chemists on its staff at the workplace who knew oxides of Nitrogen were released when a boilover occurred and the hazard posed thereby (Tr. 76-85)..

I conclude the evidence does not preponderate against the Secretary, therefore, respondent's motion is denied.

## GENERAL DUTY CLAUSE, WHETHER INAPPROPRIATE

Respondent argues that a citation alleging a violation of § 5(a)(1) of the Act is inappropriate when a specific standard applies to the facts. It correctly points out that the alleged violation of § 5(a)(1) of the Act and of § 1910.134(a)(2) are both based on the same set of facts (Tr. 103).

Respondent contends that § 1910.134(a)(2) is applicable to the facts in this case and, therefore, the alleged violation of § 5(a)(1) of the Act is inappropriate.

The Secretary's position is that oxides of Nitrogen do not have adequate warning signs or produce adequate respiratory reactions when initially inhaled, to

apprise an employee of its concentration and his exposure (Tr. 33, 36, 65). That an employee can inhale a lethal amount of oxides of Nitrogen in a short period of time without any immediate reaction (Tr. 33, 36, 65). That § 1910.134(a)(2) does not indicate the employee should know what he is exposed to, because the employer is supposed to take care of telling the employee when to wear a respirator and when not to wear a respirator (Tr. 37). Concentrations of oxides of Nitrogen of 100 to 150 ppm are dangerous for short exposures of 30 to 60 minutes (Tr. 74; Exh. C-3). The severe symptoms or death occurs 8 to 24 hours later (Tr. 33-36, 65; Exh. C-3).

The Secretary contends that due to the lack of warning signs and lack of employee knowledge, § 1910.134(a)(2) was not completely adequate to relay the significance of the severity of the situation (Tr. 37) and, therefore, § 5(a)(1) of the Act is appropriate.

Aside from referring to Table Z-1 of § 1910.1000 to establish the ceiling value of Nitrogen Dioxide, neither party registered any comment on the applicability of the Air Contaminant Standard to the facts in this case.

Under the Act, a citation alleging a violation of § 5(a)(1) is inappropriate when a specific standard applies to the facts. Mississippi Power & Light Co., 79 OSAHRC 109/D2, 7 BNA OSHC 2036, 1980 CCH OSHD ¶ 24,146 (No. 76-2044, 1979); Claude Neon Federal Co., 77 OSAHRC 104/A2, 5 BNA OSHC 1546, 1977-78 CCH OSHD ¶ 21,887 (No. 13810, 1977). A citation under § 5(a)(1) will not be vacated, however, where the hazards presented are interrelated and not entirely covered by any single standard. Crescent Erection Co., 77 OSAHRC 145/B12, 5 BNA OSHC 1711, 1976-77 CCH OSHD ¶ 20,955 (No. 2159, 1977), or where a specific standard does not address the particular hazard for which the employer has been cited. Armstrong Cork Co., 80 OSAHRC 16/D4, 8 BNA OSHC 1070, 1980 CCH OSHD ¶ 24,273 (No.

76-2777, 1980), aff'd No. 80-1580 [9 OSHC 1416] (3d Cir. Nov. 3, 1980; U. S. Pipe & Foundry Co., 78 OSAHRC 8/D6, 6 BNA OSHC 1332, 1978 CCH OSHD ¶ 22,514 (No. 11739, 1978).

Here, the alleged hazard is excess concentrations of oxides of Nitrogen in the cooker work area, when boilovers occur.

The compliance officer was of the opinion that the need for the posting of warning signs and education of cooker operators, apprising them of the hazards of oxides of Nitrogen, was more important than having respirators available (Tr. 36). I disagree. These measures, warning and education, in and of themselves, will not prevent overexposure of employees that are required to work in the cooker area, when boilovers occur. The well warned and educated operator would still be exposed to the same hazard the uninformed operator would be exposed. The warning and education suggested is directed at apprising cooker operators of the results of overexposure, not protection from overexposure, or abatement of the hazard. There is no proof in the record that the cooker operators could be trained, per force of education and warning, to determine the concentration of oxides of Nitrogen present when a boilover occurs, i.e., whether the concentration exceeds or is within permissible limits.

The proof establishes that the presence of oxides of Nitrogen in the free air are always accompanied by a highly visible cloud of brownish-yellow smoke, and are readily detectible. The cooker operators thought the brownish-yellow smoke indicated the presence of Nitric Acid fumes. They were partially right, as indicated below. The NIOSH-OSHA Pocket Guide to Chemical Hazards indicates Nitrogen Dioxide has a pungent acrid odor (Exh. R-2). Cooker operator Zbieronek described the fumes in the work area around the cooker during a boilover: "(I)t gets

kind of potent up there. You can't stand it." The proof establishes that Nitrogen Oxides consist of a combination of Nitric oxide and Nitrogen Dioxide (Tr. 33). That when Nitric Acid is converted to gas form, it is basically colorless, but when it hits the free air, it immediately converts to Nitric Oxide and Nitrogen Dioxide (Tr. 38); Nitrogen Dioxide in the presence of air slowly converts to Nitrogen Dioxide (Tr. 237-238). These gases were a by-product of the Cobalt Nitrate reaction process used by respondent, and they were liberated into the air surrounding the cooker when a boilover occurred. Eight boilovers occurred between January 1, 1980, and March 7, 1980.

Nitrogen Oxides' component gases, i.e., Nitric Oxide and Nitrogen Dioxide, are listed in Table Z-1 of § 1910.1000. The ceiling value of Nitrogen Dioxide is set at 5 parts per million. Nitric Oxide has a TWA limit of 25 parts per million.

In November, 1980, during a planned boilover situation, two air sample tests taken by respondent at between eight and ten feet from the cooker showed a reading of 20 and 30 parts per million of Nitric Oxide plus Nitrogen Dioxide (Tr. 277). These tests were taken about a minute after the boilover started. There is no showing why the concentration of each of these gases was not determined separately. These tests do not facially indicate what percentage of the 20 and 30 parts per million was Nitric Oxide and what percentage was Nitrogen Dioxide. Brownish-yellow smoke was present during the planned boilover (Tr. 297-298) which indicated the presence of Nitrogen Dioxide. It can be concluded that the test readings of 20 and 30 parts per million contained Nitrogen Dioxide. The question is what percentage. The batch formula used to generate Cobalt Nitrate was written general enough to include 100 percent Nitric Acid (Tr. 238; Exh. C-1). Respondent's

witness, Dr. Villaume, indicated that if the acid used in the formula was a 100 percent acid, the gas formed would be all Nitrogen Dioxide (Tr. 237-238). Thus, if the Nitric Acid used in the planned boilover was a 100 percent acid, the 20 and 30 parts per million test reading would be all Nitrogen Dioxide (Tr. 237-238), greatly in excess of the 5 parts per million ceiling limit set by Table Z-1. Moreover, if a diluted Nitric Acid was used in the planned boilover, the gas formed and liberated would be Nitrogen Dioxide with some Nitric Oxide, with the Nitric Oxide slowly converting to Nitrogen Dioxide when it hits the free air (Tr. 237-238), thus the liberated gas formed from either a 100 percent or diluted concentration of Nitric Acid, the final results is all Nitrogen Dioxide gas. A boilover lasts for about two minutes (Tr. 356). I find from the compliance officer's testimony, the air sample tests, and from the record as a whole, that from January 1, 1980, to the date of the inspection, the cooker operators were exposed to concentrations of Nitrogen Dioxide substantially in excess of 5 ppm on the eight occasions when they were required to work around the cooker during boilovers.

The proof fails to establish that the operators were exposed to excess concentrations of Nitric Oxide on these occasions.

As indicated earlier, the hazard alleged is the presence of excess concentrations of oxides of Nitrogen when a boilover occurs. The proof establishes that excess concentrations of Nitrogen Dioxide were present when a cooker boilover occurred. Thus, there is only one hazard involved. This hazard is entirely covered by a single standard, § 1910.1000. Moreover, the protective measures that the citation alleges the respondent failed to use — emergency and escape respirators, signs and literature warning employees of the presence and dangers of oxides of Nitrogen — come within the perimeter of the provisions of paragraph (c) of § 1910.1000.

The Air Contaminants Standard at 29 C.F.R. § 1910.1000 in pertinent part provides:

> "An employee's exposure to any material listed in Table Z-1. . .of this section shall be limited in accordance with the requirements of the following paragraph of this section.
>
> (a) Table Z-1:
>
> (1) Material with names preceded by 'C' - ceiling values. . .
>
> (2) Other materials - 8-hour time weighted averages. . .
>
> "(e) To achieve compliance with paragraph (a) through (d) of this section, administrative or engineering controls must first be determined and implemented whenever feasible. When such controls are not feasible to achieve full compliance, protective equipment or any other protective measures shall be used to keep the exposure of employees to air contaminants within the limits prescribed in this section. Any equipment and/or technical measures used for this purpose must be approved for each particular use by a competent industrial hygienist or other technically qualified person. Whenever respirators are used, their use shall comply with § 1910.134." (Emphasis supplied).

Although oxides of nitrogen are not listed in the Air Contaminant Standard tables as an entity, its two component gases are.

The compliance officer testified that respondent's providing a respirator in the cooker area for employee use to either work in or for escape when a boilover occurred (Tr. 53-54), the posting of signs and providing literature warning employees of the dangers of oxides of Nitrogen, would be appropriate protective measures (Tr. 37-38).

It is concluded that a specific standard, § 1910.1000, does address the particular hazard for which the respondent has been cited, and it also addresses the protective measures respondent is charged with failing to use, therefore, item 1 of serious citation 1 alleging a violation of § 5(a)(1) of the Act, is inappropriate and is vacated.

## AMENDMENT TO CONFORM TO THE EVIDENCE

The Secretary's proof was directed at respondent's alleged failure to use protective measures to keep employees from being overexposed to oxides of Nitrogen Oxides. The issue of hazard abatement per se was not litigated. The Secretary introduced no proof on hazard abatement by use of engineering or administrative controls or the feasibility of such controls. The language of § 1910.1000(e) indicates the protective measures the Secretary sought to have used in this case are something other than administrative controls.

The Secretary has not moved for a F.R.C.P. 15(b) amendment to add in the alternative, or otherwise, an allegation of respondent's violation of § 1910.1000. I feel it would be prejudicial to the respondent for the writer to order such an amendment.

I am aware that in the ordinary case where a motion for a Rule 15(b) amendment has been made, the Commission has held:

> "Amendments of pleadings pursuant to Rule 15(b) of the Federal Rules of Civil Procedure is required when an unpleaded charge has been tried with the express or implied consent of the parties. Southwestern Bell Telephone Co., 78 OSAHRC 100/D8, 6 BNA OSHC 2130, 1978 CCH OSHD ¶ 23,187 (No. 14761, 1978). When a party opposing amendment introduces evidence relevant to an unpleaded charge or fails to object to the introduction of such evidence, then that party implicitly consents to try the unpleaded charge. Bill C. Carroll Co., ___ OSAHRC ___, 1 BNA OSHC 1806, 1979 CCH OSHD ¶ ___ (No. 76-2748, 1979). Additionally, if an amendment would charge only the legal theory from that alleged in the pleading, then consent to the amendment will be implied when the party opposing amendment has not objected to the introduction of evidence relevant to the unpleaded charge, provided that it is not prejudiced by the amendment. McLean-Behm Steel Erectors, Inc., 78 OSAHRC 93/A9, 6 BNA OSHC 2081, 1978 CCH OSHD ¶ 23,139 (No. 15582, 1978), rev'd, 608 F.2d 580, No. 79-1073 [7 OSHC 2002] (5th Cir. Dec. 17, 1979)."

I conclude that the threshold issues raised by § 1910.1000 have not been tried by the express or implied consent of the parties. An amendment would be inappropriate.

I have considered Dr. Itaya's testimony. She indicated the latest instances of overexposure to nitrous oxide fumes was in September, 1978 (Tr. 206-210). This was more than six months prior to the issuance of the citation. I conclude that the alleged employee overexposure testified to by Dr. Itaya has no probative value. Her statement that inhalation of excess concentrations of oxides of Nitrogen, can cause serious physical injury, has been considered as probative evidence (Tr. 193).

A conflict exists in the testimony as to whether the cooker operators were required to stand by when a boilover started and manually run a general purpose waterhose on the cooker steam jacket to cool it down and try to stop the boilover. The compliance officer and operator Zbieronek testified the cooker operators were required to stand by and run the hose. Respondent's Safety Director, Loudermilk, testified that prior to January 1980, the cooker operators were told to leave the area the moment a boilover started. Mr. Strider, respondent's foreman, testified it would only take a matter of seconds to turn off the steam and turn on the water, he was very vague on the point of how the operators were to apply water to the steam jacket with the all purpose steam hose.

I believe more weight must be accorded the testimony of the compliance officer and Mr. Zbieronek than that of Mr. Loudermilk and Mr. Strider.

Respondent contends that neither the original citation nor the amended citation were issued with reasonable promptness. The Commission has held that unless the employer establishes prejudice, a citation will not be vacated for the Secretary's alleged failure to issue it with reasonable promptness. Laclede Gas Co., 79 OSAHRC 94/E13, 7 BNA OSHC 1874, 1979 CCH OSHD ¶ 24,007 (No. 76-3241, 1979). This contention of respondent is rejected. I find that respondent has

made no showing that it was prejudiced by the approximate 60-day delay before the amended citation was issued.

Respondent contends § 1910.134(a)(2) is unenforceably vague. This contention is without merit and is rejected. The standard must be considered not only in terms of the standard on its face but also in light of the conduct to which it is applied. ". . .so long as the mandate affords a reasonable warning of the prescribed conduct in light of common understanding and practices, it will pass. . . muster." Ryder Truck Lines v. Brennan, 497 F.2d 230, 233 (5th Cir. 1974).

Section 1910.134(a)(2) is a validly promulgated standard. Deering Milliken, Inc., Unity Plant, 78 OSAHRC 101/A2, 6 BNA OSHC 2143, 1978 CCH OSHD ¶ 23,191 (No. 12597, 1978), aff'd (5th Cir., November 19, 1980, Docket No. 79-1212), 9 BNA OSHC 1001, 1980 CCH OSHD ¶ 24,991.

Respondent also contends that § 1910.132(a) et. seq. was invalidly promulgated. This contention is misplaced. This standard is not involved in this case. This contention is rejected.

Respondent raises affirmative defenses under the United States Constitution in its answer to the citation. These defenses are not mentioned in respondent's brief. The specific defenses are:

1. The Act provides for unreasonable search of respondent's premises in violation of the Fourth Amendment of the U. S. Constitution. The entry and the inspection in this case was made with the consent of respondent.

In Marshall v. Barlow, (U. S. Supreme Court, No. 76-1143, May 23, 1978 (6 BNA OSHC 1571), the Court found no constitutional objections to the Secretary making entry and inspections with the employer's consent, without a warrant.

2. Section 5 of the Act is so vague and ambiguous that no adequate notice of the conduct prohibited is given to respondent, in violation of the due process clause of the Fifth Amendment. The Court in Bethlehem Steel Corporation v. OSAHRC, 607 F.2d 871, held the general duty clause § 5(a)(1) of the Act is not unconstitutional. "The 'recognized hazard' standard, in our view, gives industrial employers fair notice of the conduct they must avoid."

3. That the standards promulgated by the Secretary pursuant to § 6 of the Act violate the due process clause of the Fifth Amendment because they do not convey adequate notice of the conduct prohibited.

4. The Act delegated both legislative and judicial power to the Secretary to set mandatory standards, to find violations and assess arbitrary penalties, unless respondent contests the violation, in violation of Articles 1 and 3 of the Fifth Amendment of the U. S. Constitution.

5. The Secretary is granted unbridled discretion to investigate, judicially find violations and assess penalties therefor, in violations of Article 3 and the due process clause of the Fifth Amendment of the Constitution.

6. The Act has a chilling effect on the right of respondent to seek appellate review because it has no provision for the stay of abatement, the assessment of penalties for non-abatement during the time period of appellate review, and because the penalty assessed may be increased against respondent if it appeals. These shortcomings violate the due process clause of the Fifth Amendment.

7. Respondent is denied the right to confront its accusers in violation of the Sixth Amendment.

8. That § 10 of the Act clothes the Review Commission, an agency of the executive branch of government, with judicial powers in violation of Articles 1 and 3 of the Constitution.

9. Respondent is denied the right to trial by jury in violation of its rights under the Fifth, Sixth and Seventh Amendment and by Articles 1 and 3 of the Constitution.

10. Respondent is not afforded a hearing by any Court, in violation of the Fifth Amendment.

I reject all of respondent's affirmative defenses under the United States Constitution on the ground that neither the Commission nor its Judges have the authority to rule on them. McGowan v. Marshall, 604 F.2d 885 (5th Cir. 1979). The McGowan Court held the Act is a constitutional exercise of the commerce power. See Godwin v. OSAHRC, 540 F.2d 1013 (9th Cir. 1979). "Furthermore, its enforcement provisions do not deprive the right to jury trial provided by the Sixth or Seventh Amendments." (Citations omitted).

In Atlas Roofing Co., Inc., 430 U. S. 442 (1977), "the United States Supreme Court held that the provisions of the Act permitting the Commission to assess civil penalties without the aid of a jury trial are not inconsistent with the Seventh Amendment to the United States Constitution." In footnote 15 of this decision, the Court noted that, even if the penalties at issue had been criminal fines instead of civil fines, "(t)he Sixth Amendment would then govern the employer's right to a jury and under our prior cases, no jury trial would be required. "Muniz v. Hoffman, 422 U. S. 454, 95 S. Ct. 2178, 45 L. Ed. 2d 319 (1975)" 430 U. S. at 460. Accordingly, the respondent's contentions have no merit. The challenge that OSHA is

unconstitutional has been repeatedly rejected. Noblecraft Industries, Inc. v. Secretary of Labor, CA 9, 1980, 614 F. 2d 199 at page 206.

Respondent contends the authorized representative of affected employees and Joe Zbieronek were not entitled to party status. I reject this contention. It has no merit. Mr. Joe Zbieronek was not granted party status.

ALLEGED VIOLATION OF § 1910.134(a)(2)

Respondent concedes that § 1910.134(a)(2) is applicable to the facts of this case. See Respondent's post-hearing brief at page 5. See Todd Shipyard Corporation, 81 OSAHRC 69/A2, 9 BNA OSHC 2031, 1980 CCH OSHD ¶ 25,516 (No. 77-2545, June, 1981).

The compliance officer testified that the only time the employees in the cooker area need to wear appropriate respirators to protect them from over-exposure to Nitrogen Oxides was when a boilover occurred (Tr. 38-39); that such respirators were needed for the operator's use to either work in or for escape purposes in a boilover situation (Tr. 53).

The cooker operators were required to stand by when a boilover occurred and turn off the steam and run a water hose on the cooker steam jacket, to cool it down (Tr. 59, 152-153, 356).

As indicated earlier, 165 batches of Cobalt Nitrate were run during the period from January 1, 1980, and November 18, 1980, and there were 16 boilovers during this period, 8 of which boilovers occurred prior to the inspection in this case. A little more than 9% of the 165 batch runs resulted in boilovers.

The internal temperature of the cooker material was registered on a temperature gauge located on a nearby control panel. The boilovers occurred

generally when the material in the cooker reached a temperature of 200 degrees F. or better (Tr. 353).

The batch formula used specified the temperature is to be maintained at 150 degrees F. during Nitric Acid addition, and at the end of which, it directed the temperature is to be raised to 180 degrees F., by increased volume of steam, and maintained at that level until the reaction was completed. These desired temperature levels were difficult to maintain because the exothermic reaction in the cooker would on occasions cause the temperature of the material to rise rapidly from the desired level to 200 degrees F. or better and result in a boilover.

An operator with the temperature gauge in his sight would be forewarned that a boilover was likely when the temperature began rising rapidly above either the initial 150 degree setting or the 180 degree setting, and he would have time to don an appropriate gas mask and return to cut off the steam and apply water to the cooker steam jacket without overexposure. When the operator is away from his cooker station attending to his other duties and he detects a boilover is occurring, he could don an appropriate respirator kept out of the contaminate area and safely go into the cooker work area, turn off the steam and cool down the steam jacket with a hose without being overexposed.

I have found that concentrations of Nitrogen Dioxide substantially in excess of 5 ppm was present when a boilover occurred prior to the inspection in this case. Respondent contends it would be safer for an operator to leave the area rather than put on a respirator, then leave. I reject this contention. This contention ignores the fact that prior to the inspection, the operators were trained to stand by when a boilover started, turn off the steam, the acid, if still flowing, turn on the water

hose and apply water to the cooker steam jacket, to cool it down. Thus, the cooker operators were required to perform duties within 15 feet of the cooker where excess concentrations of Nitrogen Dioxide gas was present. The respondent did not object to the introduction of this proof. The charge is failure to furnish respirators for both work and escape. Brevity of exposure does not negate the finding of a violation. American Bechtel, Inc., 77 OSAHRC 214/A2, 6 BNA OSHC 1246, 1977-78 CCH OSHD ¶ 22,466 (No. 11340, 1977). Rather, duration of exposure is a factor to be considered in determining the gravity of the violation for the purpose of penalty assessment. Id.

The Secretary has proven a prima facie case of respondent's noncompliance with § 1910.134(a)(2), which respondent has failed to rebut.

SERIOUS V. NONSERIOUS

Serious and nonserious violations are differentiated on the basis of the degree of probable injury. See Standard Glass and Supply Company, 73 OSAHRC 16/F5, 1 BNA OSHC 1223, 1973 CCH OSHD ¶15,689 (No. 585, 1973). Under § 17(k) of the Act, a serious violation exists, "if there is a substantial probability that death or serious physical harm could result" therefrom. "Probability" refers not to the likelihood of an accident, but to the likelihood of serious injury or death if an accident does occur. National Realty & Construction Co., Inc., v. OSHRC, 489 F2d 1257, 1265 N. (D.C. Cir. 1973).

The Commission has recently examined whether there was a substantial probability that death or serious physical harm could result in the context of a respirator protection violation in Anaconda Aluminum Co., 81 OSAHRC 81 OSAHRC 27/A1, 9 BNA OSHC 1460, 1981 CCH OSHD ¶ 25,300 (No. 13102, 1981). There the

Commission held that it had to look to the nature of the hazard against which the standard was intended to protect. The Commisison determined that 29 C.F.R. § 1910.1000, which limits exposure to CTPV, a carcinogen,was intended to protect employees from contracitng a life-threatening disease, and found the violation to be serious.

Here the hazard aginst which the standard was intended to protect its exposure of employees to Nitrogen Dioxide fumes in excess of 5 parts per million.

Here the proof establishes that the maximum concentration of Nitrogen Dioxide the cooker operators would be exposed to would not be in excess of 30 parts per million over a time period of about 2 minutes. The proof in the record establishes that the Immediately Dangerous to Life or Health (IDLH) level of Nitrogen Dioxide is 50 parts per million. This concentration represents a maximum level from which one could escape within 30 minutes without any escape impairing symptoms or any irreversible health effects (Tr. 217, 271, 280; Exh. R-2). I conclude that serious injury or death could not result from an operators exposure to concentrations of Nitrogen Dioxide of 30 parts per million over a period of about 2 minutes. Thus, I find the violation to be nonserious.

## FINDINGS OF FACT

1. Respondent is a corporation that was engaged in the manufacturing of chemicals in its plant in Ft. Worth, Texas (Tr. 13, 17, 19, 21).

2. Respondent maintains plants and offices in states of the United States other than Texas (Tr. 322-323; citation's address). Respondent did not deny the jurisdictional allegations in Part II of the complaint.

3. On March 7-11, 1980, compliance officer Henry R. Slagle conducted a complaint inspection of the Cobalt Nitrate facility of respondent's workplace in Ft. Worth, Texas (Tr. 13-21).

4. Respondent produced Cobalt Nitrate in a tank known as the "Cooker" in its Ft. Worth, Texas, facility (Tr. 20-22, 345-346).

5. Cobalt Nitrate was produced from a formula of water, Nitric Acid and ground Cobalt, placed in the cooker tank (Exh. C-1; Tr. 26-30). The process took about six hours (Tr. 26-30).

6. Oxides of Nitrogen were a by-product of the Cobalt Nitrate reacting process (Exh. C-2; Tr. 32-33).

7. Oxides of Nitrogen are a combination of Nitric Oxide and Nitrogen Dioxide (Tr. 33). The chemical symbol for Nitric Oxide is NO and for Nitrogen Dioxide is $NO_2$ (Tr. 33).

8. The component gases of oxides of Nitrogen are listed in Table Z-1 of 29 C.F.R. § 1910.1000.

9. Nitric Oxide has a TWA of 25 parts per million (Table Z-1 of § 1910.1000).

10. Nitrogen Dioxide has a ceiling value of 5 parts per million (Table Z-1 of § 1910.1000).

11. The reaction between Nitric Acid and Cobalt produced an exothermic reaction (Tr. 30).

12. Cobalt Nitrate was one of three different processes run in the building in which it was located (Tr. 163).

13. There was only one person on duty for each shift to see after the three different processes in the building (Tr. 157).

14. The employee on duty is known as an "operator" or "cooker operator."

15. The Cobalt cooker was located near the south end of a row of tanks (Tr. 149).

16. An elevated work floor extended along the row of tanks; stairs on either end provide access to the work floor (Exh. R-3).

17. The Cobalt cooker operators' work station is at a desk and a control panel board located about 10 to 15 feet south of the cooker (Tr. 149). The desk faces the cooker (Tr. 154).

18. A formula provided the cooker operator specified the temperature levels that were to be maintained in the cooker (Exh. C-1).

19. Steam injected into a jacket around the cooker was used as a source of heat to start the reaction (Tr. 248).

20. The temperature of the material was to be maintained at 150 degrees F. during the addition of acid (Exh. C-1).

21. After acid addition, the temperature was to be raised to and maintained at 180 degrees F. (Exh. C-1).

22. The temperature of the cooker material is shown on a control panel gauge.

23. The heat from the exothermic reaction would on occasions cause the temperature of the material in the cooker to rise to 200 degrees F. or better, expand and boil out (Tr. 30).

24. Boilovers occurred generally when the temperature of the material in the tank rose to 200 degrees F. or better (Tr. 352).

25. Eight cooker boilovers occurred between January 1, 1980, and March 7, 1980 (Tr. 351).

26. During the period from January 1, 1980, to March 7, 1980, the cooker operators were required to stand by when a cooker boilover started, turn off the steam, acid, and run a water hose on the cooker steam jacket to cool it down and try to keep the boilover from continuing (Tr. 59-144, 153, 171-172, 179-180).

27. A boilover is not a continuous overflowing of material from the tank. It is intermittent. The entire series of material overflow lasts for about two minutes (Tr. 356).

28. Oxides of Nitrogen gases are generated in the solution in the tank and are released through surfacing bubbles, and are liberated from the tank through the flap lid into the air around the cooker when it boils over (Tr. 38-42, 250-251, 262).

29. Each time the cooker boiled over, a lot of liquid would spill out and a lot of brownish-yellow smoke would form in the cooker area (Tr. 40-41, 47, 170).

30. Nitrogen Dioxide vapors form a brownish-yellow smoke (Tr. 38).

31. Nitric Acid molecules in gas form are essentially colorless (Tr. 38).

32. When Nitric Acid gas hits the free air, it immediately converts to Nitric Oxide (Tr. 38).

33. Nitric Oxide in the free air converts to Nitrogen Dioxide (Tr. 237-238).

34. The use of a 100% concentration of Nitric Acid in the formula (Exh. C-1) would result in the by-product gas being all Nitrogen Dioxide (¶ 37-238). The formula was written general enough to include 100% Nitric acid (Tr. 238).

35. The use of a diluted concentration of Nitric Acid in the formula (Exh. C-1) would result in the by-product gas being Nitric Oxide and Nitrogen Dioxide; with the Nitric Oxide converting to Nitrogen Dioxide when it hits the free air (Tr. 237-238).

36. Concentrations of Nitrogen Dioxide substantially in excess of the ceiling limit of five parts per million were present in the cooker work area when the boilovers occurred during the period from January 1, 1980, to March 7, 1980.

37. During the period form January 1, 1980, and March 7, 1980, the cooker operators on duty were exposed to concentrations of Nitrogen Dioxide in excess of five parts per million when the cooker boilovers occurred.

38. Respondent failed to provide appropriate respirators in the Cobalt Cooker area for the operators to use to work in and for escape purposes (Tr. 57-60, 173).

39. Respondent failed to post warning signs and have available litature apprising its employees of the hazards of oxides of Nitrogen (Tr. 33, 36-38, 174).

40. The general duty clause, § 5(a)(1), of the Act is not applicable to the facts of this case.

41. There was not a substantial probability that death or serious physical injury could result from respondent's failure to protect its employees from the hazard of breathing Nitrogen Dioxide (Tr. 46-49, 65, 193; Exh. C-3).

42. The respondent knew or, could with the exercise of reasonable diligence, have known of the existence of excess concentrations of Nitrogen Dioxide when the cooker boilovers in question occurred (Tr. 76-85; Exh. C-5, page 3, 108, 234-242, 267-268).

43. The respondent was in noncompliance with 29 C.F.R. § 1910.134(a)(2).

## PENALTY DETERMINATION

Under § 17(j) of the Act, the Commission is required to give "due consideration" to the size of the employer's business, the gravity of the violation,

the good faith of the employer, and the history of previous violations in determining the assessments of an appropriate penalty. The gravity of the offense is the principal factor. These criteria have been duly considered by the undersigned. The respondent has demonstrated good faith efforts to reduce the hazard by installing an orifice in the tank acid line. Only one employee per shift is exposed to the hazard. The gravity of the violation is considered to be in the low range. The proposed penalty of $360.00 for Item 1 (alternate) of amended serious citation 1, § 1910.134(a)(2), on balance, is found to be appropriate. The violation is amended from that of serious to nonserious citation.

## CONCLUSIONS OF LAW

1. Respondent, American Cyanamid Company, is a corporation engaged in a business affecting commerce and has employees within the meaning of § 3(5) of the Act. The Commission has jurisdiction of the parties and the subject matter of this proceeding.

2. Respondent was in nonserious violation of 29 C.F.R. § 1910.134(a)(2).

3. The general duty clause, § 5(a)(1) of the act, is inappropriate under the facts of this case and it is vacated.

## ORDER

Based upon the findings of fact and conclusions of law, it is ORDERED that:

1. Item 1 of amended serious citation no. 1 is VACATED.

2. Item 1 (alternative) of amended serious citation no. 1 is AFFIRMED as a nonserious violation and a penalty of $360.00 is ASSESSED.

3. The cited hazard in Item 1 (alternative) of amended citation no. 1 shall be abated immediately.

Dated this 25th day of February, 1982.

Jess D. Ewing

JESS D. EWING
Judge

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

# NOTICE OF DECISION

Secretary v. Moore Petroleum Service, Inc.

OSHRC Docket No. 80-2984

1. Enclosed is a copy of my decision. It will be filed with the Commission on February 25, 1982, and will become the final order of the Commission on March 29, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N. W., Suite 601
   Washington, D. C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is March 29, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Jess D. Ewing
JESS D. EWING
Judge

Date: February 5, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
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| | | |
|---|---|---|
| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 80-2984 |
| | ) | |
| MOORE PETROLEUM SERVICE, INC., | ) | |
| | ) | |
| Respondent. | ) | |

APPEARANCES:

Donald Hill, Esquire, Office of the Solicitor, U. S. Department of Labor, Dallas, Texas, on behalf of the complainant.

George Carlton, Esquire, Maxwell, Bennett, Thomas, Carlton and Maxwell, Dallas, Texas, on behalf of respondent.

## DECISION AND ORDER

EWING, Judge:

## STATEMENT OF THE CASE

This is a proceeding brought before the Occupational Safety and Health Review Commission ("The Commission") pursuant to § 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq., ("The Act"), contesting a three-item serious citation issued by the Secretary to respondent pursuant to § 9 of the Act.

Respondent, Moore Petroleum Service, Inc., a corporation, is engaged in servicing oil wells in old depleted fields.

An inspection was conducted at respondent's workplace at oil well rig number seven on Cecil Brown Bl Lease, Hastings Field, Friendswood, Texas, on May 6-8, 1980, and as a result, a serious citation was issued to respondent on May 9, 1980, alleging in item one and item two that it violated § 5(a)(1)[1/] of the Act, alleging in item three that it violated § 5(a)(2) of the Act in that it failed to comply with the standard at 29 C.F.R. § 1910.27(d)(5), and by complaint amendment § 1910.27(d)(5) was deleted, and in its stead noncompliance with the standard at 29 C.F.R. § 1910.132(a) was alleged.[2/]

Respondent filed a timely notice of contest. A complaint and answer were filed.

A scheduled hearing was held in this matter on Febuary 25, 1981, in Houston, Texas. No additional persons desired to intervene in this proceeding.

Item one of serious citation one alleges the conditions that brought about the violation of the general duty clause of the Act were:

---

1/

"Sec. 5, (a) Each employer--

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;"

2/

"§ 1910.132 General requirements.

"(a) Application. Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact."

"The derrick was improperly guyed and posed the danger of falling. Guy lines on Rig #7 were not secured with clips at the 'dead-man' area; should be installed in accordance with the 'Accident Prevention in Oil Well Servicing Operations' book published by AOSC. Rig #7 on Cecil Brown Lease B1 had clips on guy lines as listed:

(a) NE guy had only one clip on wire rope at base.

(b) NW guy to monkey board had one clip, guy to top of mast ahd (sic) two clips but dead end had loose slack between clips. Turnbuckle for lower guy connected into upper guy lower clip.

(c) SW guy to top of mast had only two clips, but had a turnbuckle fastened between clips. The turnbuckle other end had guy to monkey board fastened with only two clips.

(d) SE guy had only two clips."

A penalty of $720 was proposed.

Item two of serious citation one alleges the conditions that brought about the violation of the general duty clause of the Act were:

"(a) The hazard of entrapment in the derrick in case of blowout or other emergency posed by only one means of egress (should have had a 'geronimo' line and mechanical slide equipped with a brake ready for immediate use), on Rig #7, Cecil Brown Lease B1 where they were fishing for section tubing that had broken off."

A penalty of $630 was proposed.

Item three of the serious citation, as amended, alleges the conditions that brought about the violation of § 1910.132(a) were:

". . . [T]he employer did not require the use of a ladder safety climbing device to protect against falls in excess of 50 feet while ascending and descending the ladder on the derrick of work over rig #7 on Cecil Brown Lease B1."

A penalty of $630 was proposed.

## JURISDICTION

The parties stipulated the Review Commission has jurisdiction of the parties and the subject matter of this proceeding (Tr. 132, lines 14-16).

## ISSUES

1. Whether respondent was in serious violation of § 5(a)(1) of the Act.

2. Whether respondent was in violation of 29 C.F.R. § 1910.132(a).

3. Appropriate penalty for any violation found.

## SUMMARY OF THE FACTS

At the time of the inspection, the respondent had a contract with Exxon Corporation to service an oil well in an old depleted field (Tr. 21) located in Hastings Field, near Friendswood, Texas (Tr. 27).

Respondent was fishing for tubes lost in the well hole when the inspection started.

The well in question was located on Cecil Brown Bl Lease. The well has no pressure in it (Tr. 42-43).

There was no danger of a fire or a blowup in the field where the well in question was located (Tr. 42-43).

All gas and oil taken from the well in question and other wells in the field had to be artifically lifted (Tr. 42-43).

Respondent had moved its rig number seven to the inspection site either early on the date of inspection or later in the day before the inspection(Tr. 59).

On May 6, 1980, the rig was in operating position.

It is uncontroverted that on the date of inspection, May 6, 1980, the rig was not equipped with a "Geronimo" line and a ladder safety climbing device (Tr. 65, 72-75).

On May 6, 1980, Compliance Officer Cecil A. Martin commenced an inspection of rig number seven at respondent's workplace (Tr. 89-92). During the inspection, Mr. Martin observed six rig supporting guy wires at the ground anchor end. He found that the dead end of the cables looped back to form the anchor eye were secured to

the guy stran with two Crosby clips, in two instances, and with one Crosby clip, in four instances (Ex. P-3, P-10 through P-13; Tr. 96-98, 102, 105-107).

During the inspection, Mr. Martin noticed that a guy wire running off the main rig mast was secured with two Crosby clamps. He also observed that the rig was not provided with a "Geronimo" line and a ladder safety climbing device (Ex. P-4, P-5, P-6, P-7; Tr. 110, 111-112).

He testified that there were several pieces of tubing in the derrick (Ex. P-8, P-9; Tr. 112).

Mr. Martin indicated that the placing of the tubing in the derrick required the presence of a worker on the tubing board to place them in appropriate position (Tr. 113).

Respondent adopted as its safety rules a 1976 edition of a handbook prepared by the Safety Committee of the Association of Oilwell Servicing Contractors (AOSC), entitled "Accident Prevention in Oil Well Servicing Operations" (AOSC Handbook) (Ex. P-2; Tr. 5-7, 134-136). The record is confusing, but the sense of it is, the 1976 handbook was revised in November 1980, after the citation was issued in May of 1980, and it was renamed "Recommended Safe Procedures and Guidelines for Oil and Gas Well Servicing (Ex. P-2; Tr. 7-8).

Respondent's safety director, Ronald Moore, was on the AOSC Safety Committee and helped write the 1976 edition handbook, which respondent adopted as its safety rules, and was using on May 6, 1980 (Tr. 7-8).

The foreword in the AOSC handbook in pertinent part states:

> "The purpose of this handbook is to assist the oilwell servicing industry in the prevention of accidents.
>
> * * *

"The recommendations in this handbook should be used only when applicable and with modifications as necessary due to operating conditions, type of equipment, etc. Nothing herein shall be deemed to constitute the setting up of minimum or maximum standards for oilwell servicing operations or to replace local, state or federal regulations."

ITEM ONE, § 5(a)(1) VIOLATION

The compliance officer testified that he relied on the AOSC handbook in making his determination whether a hazard existed at respondent's workplace (Tr. 99-122).

He indicated the 1976 edition of the AOSC handbook, at page 26 and 27, requires a minimum of three clips on 5/8-inch guy wires; that three Crosby clips give the wire 80 percent load strength at the connection (Ex. P-2; Tr. 103-104).

Mr. Martin stated he would not hazard a guess as to the load strength of the cables he observed with one and two clamps.

The heading of the illustrations Mr. Martin was referring to on page 27 of the AOSC handbook, 1976 edition (Ex. P-2), is captioned: "Efficiency of Connections as Compared to Recommended Load on Wire Rope."

He was of the opinion that respondent's failure to use three Crosby clips on the guy wires in question reduced the weight bearing capacity of wires and created the hazard of "... the derrick falling over due to overload of pipe or strong wind, something like this. They would be putting too much on the rig" (Tr. 105).

On cross-examination Mr. Martin indicated he observed the derrick had four strength guy wires attached to it, to keep the rig from turning over (Tr. 118-120). He indicated all of these strength guy wires had three clips, except one, and it had two clips at the top end (Ex. P-4; Tr. 118-119). He indicated the other guy wires were wind guys (Tr. 117-119).

Mr. Martin, on cross-exxamination, indicated two clips or even one clip may, under certain circumstances, leave the guy wires with sufficient strength to keep the derrick stable (Tr. 122). He indicated he could not say whether the wind lines with one clip and two clips and the strength line with two clips still left the guy lines with sufficient strength for the circumstances of this case (Tr. 123).

Witness Ronald Moore, respondent's operations and safety director and an experienced oil rig operator (Tr. 3, 7), testified the rig had two different types of guy lines, i.e., load lines and wind lines, and each type served a different function (Tr. 136).

He indicated the foundation and the load lines keep the derrick from blowing over, not the wind lines (Tr. 136-137).

Mr. Moore testified the wind lines take a lot of movement out of the derrick but would not prevent it from falling over (Tr. 137-139).

He was of the opinion the guy wires were safely rigged under the circumstances (Tr. 137-138, 149-151).

## OPINION

The Secretary did not establish the load strength of the 5/8-inch cables used to guy the derrick. Neither did the Secretary establish the necessary load strength that would be exerted on the load guy wires to properly secure the derrick and eliminate any danger of it falling over. Moreover, the Secretary did not show that two clips on the one load guy wire reduced the strength of the guy wire to less than that needed to properly secure the derrick under the circumstances. Similarly, the Secretay failed to show that the wind lines with one and two clips reduced the strength of those lines to less than that needed to sufficiently eliminate the wind movement of the derrick under the circumstances.

The compliance officer, Cecil Martin, testified he had inspected 28 to 30 oil rigs since coming with OSHA and inspected 8 or 10 while working for the State of Texas. It is not shown whether any of these inspections involved oil well rig guy wires. I was not impressed with Mr. Martin's knowledge of oil well rig guy wires. He testified he based his testimony concerning the guy wires on the AOSC handbook, 1976 edition, which is a private advisory standard. There is no proof in the record that the use of less than three Crosby clips on a load or wind guy wire is a recognized hazard in the oil well servicing industry that is causing or likely to cause death or serious physical harm to employees. I conclude that the Secretary failed to qualify Mr. Martin as an expert on oil well rig guy wires, and industry recognition, or that the use of less than three clips is a hazard recognized by the oil well servicing industry.

The Secretary advances the AOSC handbook, 1976 edition, as an independent basis for a violation and as evidence of the "industry recognition" element of a general duty clause violation. This is rejected. The Commission has held that the Secretary cannot make a private advisory standard mandatory by adopting it as one of his own, moreoever, he cannot make it mandatory by declaring it as a minimum level of employer conduct under the general duty clause. Cargill, Inc. (Conrad, Montana), 80 OSAHRC 52/A2, 8 BNA OSHC 1745, 1980 CCH OSHD ¶ 24,516 (Nos. 78-4482 and 78-5229, May 27, 1980). Accordingly, item one of serious citation one for violating section 5(a)(1) of the Act for failure to have three Crosby clips on the rig guy lines and properly rigging the guy lines, is vacated.

ITEM TWO, § 5(a)(1)—"GERONIMO" LINE VIOLATION

The proof establishes that the derrick escape device is designed for employee escape from the derrick tubing board in case of a blowout, fire, explosion or the derrick falling over (Tr. 23, 24, 25, 26).

It was respondent's company policy that every rig be provided with a derrick escape device, i.e., a "Geronimo" line (Tr. 26, 27). It was common practice for respondent to provide the rig with a "Geronimo" line (Tr. 64).

I find the respondent recognized the existence of the hazard of the rig being blown over and the use of "Geronimo" lines as a feasible means of substantially abating this hazard (Tr. 36-41, 47).

The proof establishes the derrick was not equipped with a "Geronimo" line on the date of the inspection (Tr. 65, 72, 75).

Respondent contends that "Geronimo" lines are not necessary if no employee is in or on the derrick (Tr. 41-42, 65).

Mr. Moore indicated the rig number seven crew told him that no employees were in the derrick on the day of the inspection or prior thereto (Tr. 49-50).

Derrick hand, Allen Baldree, testified some of his duties on the rig were on the tubing board. He was asked, and he testified, as follows (Tr. 57):

"Q What exactly does a derrick hand do?

"A He works — normally he works above the ground.

* * *

"Q Above the ground. Doing what kinds of things above the ground?

"A Standing tubing back in the derrick.

"Q Okay. What do you mean by standing tubing back in the derrick?

"A Well, if you were to pull pipe out of a hole you would have to have somebody 55 feet up to lay the pipe back where you can pull another pipe out.

"Q What do you mean by pull the pipe back?

"A Well, when you stand pipe back in the derrick, what you are actually doing is it is sitting on the ground and it's tilted. It is leaning to where it can't fall forward, can't fall to the side and can't fall back."

Mr. Baldree testified that no one was in the derrick on the date of the inspection. He did not indicate whether any employee was in the derrick on the day prior to the inspection (Tr. 77).

There is a conflict between the testimony of Compliance Officer Martin and that of Mr. Moore and Mr. Baldree on the issue of whether an employee of respondent was in the derrick on the day prior to the inspection laying the tubing back that is shown in Secretary's exhibits P-8 and P-9. Mr. Baldree's quoted testimony tends to corroborate the compliance officer's testimony that the presence of a derrick hand on the tubing board is required to stand pipe back in the derrick as is shown in exhibits P-8 and P-9. I believe more weight must be accorded the compliance officer's testimony and exhibits P-8 and P-9 than that of Mr. Moore and Mr. Baldree on this point. I find that one of respondent's employees did work on the rig tubing board at the workplace in question either earlier on the day of inspection or on the previous day.

In order to establish a section 5(a)(1) violation, the Secretary must show that an employer failed to render its workplace free from a hazard that is recognized, the occurrence of an incident was reasonably foreseeable, and the likely consequence in the event of an incident was death or serious physical harm to its employees. Pratt & Whitney Aircraft, Division of United Technologies Corp., 80 OSAHRC 38/A2, 8 BNA OSHC 1329, 1980 CCH OSHD ¶ 24,447 (No. 13591, 1980), aff'd in pertinent part, No. 80-4102 [9 OSHC 1554] (2d Cir. April 20, 1981). The Secretary must also demonstrate that there were feasible means available to abate the hazard. National Realty & Construction Co. v. OSHRC, 489 F.2d 1257 [1 OSHC 1422] (D.C. Cir. 1973).

I conclude the Secretary has established the elements of a general duty clause violation of the Act. Accordingly item two of serious citation one for violation of

section 5(a)(1) of the Act for failing to provide the oil well drilling rig with a "Geronimo" line is affirmed.

## FINDINGS OF FACT

1. Respondent is a corporation that was engaged in servicing old depleted oil and gas wells on May 6-8, 1980 (Tr. 21, 27, 42-43).

2. On May 6-8, 1980, Compliance Officer Cecil Martin conducted an inspection of respondent's oil well rig number seven at its work site in Hastings Field, near Friendswood, Texas (Tr. 27), and as a result issued a serious citation to respondent on May 9, 1980. (See file.)

3. On May 6, 1980, respondent's oil well rig number seven was in operation (Tr. 89-91).

4. Rig number seven was equipped with a tubing board which was attached to the derrick 55 feet above the ground level (Tr. 93-94, 11-12).

5. One of respondent's employees, known as a derrick hand, worked off the derrick tubing board either on the day prior to the inspection or early in the morning of the day of the inspection (Tr. 57, 93, 113).

6. The derrick was not provided with a derrick escape device ("Geronimo" line) on May 6-8, 1980 (Tr. 65, 72, 75, 112).

7. The "Geronimo" line was used by respondent as a means of employee escape from the derrick tubing board in case of the derrick falling over or being blown over (Tr. 23, 26).

8. There was no fire, explosion or blowout hazard existing on May 6-8, 1980, at the rig number seven site (Tr. 42-43).

9. Respondent recognized the hazard of the derrick falling over or being blown over, and the occurrence of such an incident was reasonably foreseeable, and

the likely consequence of such an event would be death or serious physical harm to its employees (Tr. 26, 27).

10. There was a substantial probability that death or serious physical injury would result from respondent's failure to provide a "Geronimo" line as a means of employee escape from the tubing board.

11. It was respondent's company policy that all its derricks be provided with "Geronimo" lines when employees worked on the tubing board (Tr. 64).

## PENALTY DETERMINATION

Under section 17(j) of the Act, the Commission is required to give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer and the history of previous violations in determining the assessment of an appropriate penalty. The gravity of the offense is the principal factor. These criteria have been duly considered by the undersigned. There is only one derrick hand for each rig. Respondent has had no previous citations that have been affirmed. Respondent has approximately 100 employees. Respondent has made a good faith effort to protect its employees from the cited hazard. The probability of an accident occurring is considered to be in the low range. The proposed penalty of $630 for item number two (§ 5(a)(1)) is excessive. I conclude, on balance, that a penalty of $250 is appropriate for item number two. The penalty is accordingly amended.

## ITEM NUMBER THREE, § 1910.132(a)
## LADDER SAFETY CLIMBING DEVICE

I have found from the compliance officer's testimony and from photographic exhibits P-8 and P-9 that there was tubing standing in the derrick tubing board rack and that this tubing was placed into position by a derrick hand working off the derrick tubing board either on the day of inspection or the previous day.

It is uncontradicted that the derrick ladder was not provided with a safety climbing device

Respondent's operations and safety director indicated respondent recognized that ladder safety climbing devices provided its employees fall protection while climbing the rig and it is a company safety rule that all rigs be equipped with safety climbing devices (Tr. 22, 23).

Mr. Moore indicated that if a derrickman fell from a height of 55 feet while climbing the derrick ladder, death or serious physical harm could result (Tr. 19).

## FINDINGS OF FACT

1. On May 6-8, 1980, the derrick ladder in question was not provided with a ladder safety climbing device.

2. Either on May 5, 1980, or the early part of the day on May 6, 1980, one of respondent's employees used the derrick ladder without the safety climbing device to gain access to the derrick tubing board and perform work there.

3. The respondent knew or, could with the exercise of reasonable diligence, have known of the lack of the ladder safety climbing device on the derrick ladder.

4. There was a substantial probability that death or serious physical injury could result from a fall from the derrick ladder (Tr. 19).

5. The respondent was in noncompliance with 29 C.F.R. § 1910.132(a).

## PENALTY DETERMINATION

The penalty criteria set out under § 17(j) of the Act have been given "due consideration" by the undersigned. The gravity of the offense is the principal factor. Respondent had about 100 employees. There is only one derrick hand on each rig. The gravity of the violation is considered to be in the mid range. The respondent has had no previous citations that were affirmed. Respondent has demonstrated good

faith. The proposed penalty of $630 for item number three (§ 1910.132(a)) is excessive. I conclude, on balance, that a penalty of $300 is appropriate. The proposed penalty is accordingly amended.

## CONCLUSIONS OF LAW

1. Respondent, Moore Petroleum Service, Inc., is a corporation engaged in a business affecting commerce and has employees within the meaning of § 3(5) of the Act. The Commission has jurisdiction of the parties and the subject matter of this proceeding.

2. Respondent was not in violation of the general duty clause, § 5(a)(1) of the Act, under the allegations set out in item number one of serious citation number one.

3. Respondent was in violation of the general duty clause, § 5(a)(1) of the Act, under the allegations set out in item number two of serious citation number one.

4. The respondent was in serious violation of 29 C.F.R. § 1910.132(a) under the allegations set out in item number three of citation number one, as amended by the complaint.

## ORDER

Based upon the findings of fact and conclusions of law, it is ORDERED that:

1. Item number one of serious citation number one is VACATED.

2. Item number two of serious citation number one is AFFIRMED and an amended penalty of $250 is ASSESSED.

3. Item number three, as amended, of serious citation number one is AFFIRMED and an amended penalty of $300 is ASSESSED.

4. The hazards in items number two and number three, as amended, of serious citation number one shall be abated immediately.

Dated this 25th day of February, 1982.

Jess D. Ewing

JESS D. EWING
Judge

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| 77-2115 | BORTON, INC. | 3/31/82 | 17/E13 |
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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

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UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

Secretary v. Tacoma Boatbuilding Co.
OSHRC Docket No. 81-231

Enclosed is a copy of my decision in the above-entitled case. This decision constitutes my final disposition of the proceeding pursuant to 29 U.S.C. §661(i) and 5 U.S.C. §557. I have this date mailed the original decision together with the Commission's file, transcript of testimony, and all exhibits to Richard Shiffmann, Chief Review Counsel, at the Commission's Office in Washington, D.C.

I am required to advise you as follows:

(1) The decision will be filed with the Commission on February 25, 1982 and will become the final order of the Commission on March 29, 1982 unless a member of the Commission directs that it be reviewed. Parties will not receive any further communications from the Commission unless the decision is directed for review. (See paragraphs 4, 5, and 6 below.)

(2) You may petition for discretionary review of this decision by the Commission. An original and three copies of such a petition must be submitted in accordance with 29 CFR 2200.91. The last day the Commission may consider your petition is March 29, 1982, the final order date. This final order date is set by law and cannot be extended.

(3) Petitions for review should be mailed to:

Richard Shiffmann, Chief Review Counsel
Occupational Safety & Health Review Commission
1825 K Street, N.W.
Washington, D.C. 20006

(4) Should review be ordered, each party will be notified and given opportunity to submit a brief.

(5) Please complete and mail the enclosed postcard, indicating whether you presently intend to seek review of this decision. Your response on the card does not bind you in any way, but assists the Commission in scheduling future workload.

(6) For further details on the review process, see Commission Rules 90, 91, 92, 93, 94, and 95.

DATED: February 5, 1982

Erwin L. Stuller

ERWIN L. STULLER
Judge

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>TACOMA BOATBUILDING CO., INC.,<br><br>Respondent. | DECISION AND ORDER<br><br>Docket No. 81-231 |

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## DECISION *

From September 30, 1980 to October 17, 1980, the Secretary's compliance officer inspected the boat yard of Tacoma Boatbuilding Company. Thereafter, T.B.C. received two citations and notices of proposed penalty charging ten health and safety violations of the Act.[1/] T.B.C. has denied the charges but has admitted jurisdiction.[2/]

## FINDINGS OF FACT

At the time of the inspection T.B.C. was in the business of shipbuilding and ship repair at its Tacoma, Washington work site. The inspection here took place aboard the Alaska State Ferry TAKU. The ship was being repaired and remodeled. This involved the cutting out of metal panels. The inspection resulted from a complaint concerning possible asbestos exposure aboard the TAKU. Samples were taken testing noise exposure from grinding and chipping, paint spraying and welding. Tests were also taken for employee exposure to airborne contaminents. The tests indicated that T.B.C.'s employees had been exposed to excessive levels of noise, iron oxide fumes, zinc oxide fumes, lead oxide fumes, and copper fumes.

Two employees exposed to excessive noise levels were not wearing hearing protection devices. However, new employees were given safety indoctrinations and advised of the availability

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* One of the competing interests here was to complete the decision before the February 1982 retirement of the judge.

of protective equipment including earplugs and earmuffs. They were also told under what circumstances they were to wear this equipment. They were invited to advise T.B.C.'s safety department if they had any questions regarding these matters. From time to time T.B.C. took tests to determine noise volume. They also had a disciplinary system for dealing with employees who repeatedly refused to comply with T.B.C.'s standards for health and safety.

This construction was different from the new construction that was usually done by the employer. T.B.C. did not know what substances would be involved in the renovation. In regard to the airborne contaminants, samples were taken for four men who were cutting painted panels using a burning technique. The smoke was sampled and the contaminants were found.

In regard to the ventilation equipment, it was on order at the time the inspection was initiated and it was delivered during the inspection.

Four employees were not wearing respirators. T.B.C. had a safety policy and a respiratory program. Respirators were available in the tool rooms. Notices were posted throughout the shipyard and in every tool room regarding the wearing of respirators. Employees were instructed at some point in the use of respirators as were the supervisors. Tool room personnel were instructed on the maintenance, repair and fitting of respirators.

## OPINION

The inspection was fair and impartial. The evidence establishing the violative conditions is uncontested. The testimony of the Secretary's industrial hygenists is highly credible. The testimony of T.B.C.'s witness was far less credible. The credibility determination was based on listening to the testimony of the witnesses and judging their demeanor while they testified. The evidence clearly establishes each of the violations as alleged. Except for the violation concerning copper fumes, each of the violations indicated that there was a reasonable probability that serious bodily harm or death could result from the violative conditions. All of the violations were done in the open. Therefore, with the exercise of reasonable diligence, the employer could have known of the existence of the violative conditions. Therefore, each of the items will be affirmed as alleged.

In regard to the noise violations, T.B.C. argues that the employees were breaching company standards by not wearing earplugs or earmuffs. It claims that there was no evidence indicating that it was aware of the violation. However, there is evidence indicating that the violation was done in the open and with reasonable diligence, thus the employer could have and should have been aware of the condition. Therefore, this argument is rejected. The fact that earplugs are available in the tool room does not establish an adequate hearing protection policy. What the policy lacks is enforcement of company rules

by company supervisors. This case again indicates an employer who has purchased the trappings of safety and health experts and equipment but omits to adequately use the equipment or the expertise in fear that it would limit the efficiency of the company's operation. T.B.C. here appears to be attempting to shift the burden of responsibility to the errant employees. The Act places the burden on the employer absent a showing that the employee's conduct limited the employer's ability to recognize the violative conditions or to abate them. That showing was not made here. Consequently, the employer remains responsible.

In regard to the air contaminants, T.B.C. argues surprise and failure of the vendors to supply the ventilation equipment. The surprise concerned the fact that the employer did not know what contaminants were present because the work was new to this shipyard. It's obvious that the employer was adequately staffed to determine this information but failed to do so. It appears that this resulted from the employer's eagerness to expedite the work. As a result, the employees suffered.

Similarly, the ventilation equipment was ordered but not installed before the employees were exposed to the hazards. The employer chose to expose the employees in an effort to expedite the work rather than wait for the equipment. Consequently the employer must be held responsible for the exposure.

The arguments concerning the respirators were similar to the arguments concerning the earplugs and earmuffs. For similar reasons they are rejected.

The monitoring and measurement program conducted by the employer was less than adequate. The employer admits this. Therefore, this item (Citation 1 Item 6) will be affirmed as amended.

## PENALTIES

After considering the evidence presented concerning the size of the employer's business, its lack of previous history of violations, its good faith, and the gravity of the violations, it is concluded that the penalties are excessive.

## ORDER

Items 1, 3, 4, 5, and 6 of Citation 1, as amended, and Item 1 of Citation 2 are AFFIRMED. Item 2 of Citation 1 and Items 2 and 3 of Citation 2 are VACATED. The proposed penalties for Items 2, 6 and 7 of Citation 1 are VACATED. The Following amended penalties are AFFIRMED:

| Violation | Penalty |
|---|---|
| Citation 1 Item 1 | $ 500 |
| Item 3 | 400 |
| Item 4 | 400 |
| Item 5 | 400 |
| Citation 2 Item 1 | 0 |

Total penalties of $1,700 are ASSESSED.

Erwin L. Stuller

ERWIN L. STULLER
Judge

DATED: February 25, 1982

## FOOTNOTES

1/ The violations were alleged to have taken place at the time of the inspection, September 30, 1980 through October 17, 1980. The citations were issued on December 22, 1980. They charge Tacoma failed to comply with safety and health regulations in violation of Section 654(a)(2) of the Occupational Safety and Health Act (29 USC 651 et seq.). Citation 1 charges seven serious violations of the Act. Citation 2 charges three nonserious violations of the Act. However, at the hearing, the citation and complaint were amended, Citation 1 Item 2 and the related proposed penalty were vacated, Citation 1 Item 6 was amended from Serious to Nonserious, and the related proposed penalty of $540 was vacated. In Citation 1 Item 7, subitem 7(a) was amended to read subitem 5(c), subitem 7(b) was amended to read subitem 5(d), subitem 7(c) was amended to read subitem 5(e), and the related proposed penalty for Item 7 was vacated. However, the proposed penalty of $540 for Item 5 remains the same. Items 2 and 3 of Citation 2 were vacated.

The items remaining in issue are Citation 1 Item 1 subitems (a) and (b); Citation 1 Item 3 subitems (a) and (b); Citation 1 Item 4 subitems (a) and (b); Citation 1 Item 5 subitems (a), (b), (c), (d) and (e); and Citation 2 Item 1. A description of the alleged violations remaining in issue, the proposed penalties and the safety standards concerned are as follows:

Citation 1, Item 1(a) (Serious)

> Protection against the effects of noise was not provided for employee(s) exposed to sound levels which exceeded those listed in Table G-16 of subpart G of 29 CFR 1910:
>
> (a) Hearing protection was not being worn by a shipfitter exposed to 6.4 times the permissible noise exposure including noise levels above the maximum 115 dBA limit while chipping and grinding aluminum T-bars in the galley on board the ship.
>
> (b) Hearing protection was not being worn by a shipfitter exposed to 6.4 times the permissible noise exposure including noise levels above the maximum 115 dBA limit while grinding aluminum T-bars in the laundry room aft bulkhead of the main deck on board the ship.

In violation of 29 CFR 1910.95(a)

Section 29 CFR 1910.95(a) provides:

> Protection against the effects of noise exposure shall be provided when the sound levels exceed those shown in Table G-16 when measured on the A scale of a standard sound level meter at slow response. When

noise levels are determined by octave band analysis, the equivalent A-weighted sound level may be determined as follows:

Table G-16--Permissible 'Noise Exposures'

| Duration per day, hours | Sound level dBA slow response |
|---|---|
| 8 | 90 |
| 6 | 92 |
| 4 | 95 |
| 3 | 97 |
| 2 | 100 |
| 1-1/2 | 102 |
| 1 | 105 |
| 1/2 | 110 |
| 1/4 or less | 115 |

Citation 1, Item 1(b) (Serious)

Sound levels exceeded the values in Table G-16 of Subpart G of 29 CFR 1910 and a continuing, effective hearing conservation program was not administered:

(a) For the shipfitter exposed to 6.4 times the permissible noise exposure incluidng noise levels above the maximum 115 dBA limit while chipping and grinding aluminum T-bars in the galley on board the ship.

(b) For the shipfitter exposed to 2.2 times the permissible noise exposure including noise levels above the maximum 115 dBA limit while grinding aluminum T-bars in the laundry room aft bulkhead of the main deck onboard the ship.

In violation of 29 CFR 1910.95(b)(3)

Section 29 CFR 1910.95(b)(3) provides:

(3) In all cases where the sound levels exceed the values shown herein, a continuing, effective hearing conservation program shall be administered.

Penalty Proposed for Item 1: $720

Citation 1, Item 3(a) (Serious)

Employee(s) were exposed to material(s) in excess of the 8-hour time weighted average limit(s) listed for the particular material(s) in Table Z-1 of subpart Z of 29 CFR part 1910:

(a) At Tacoma Boat Yard #4, the welder air arcing painted metal panels for removal from the third deck of the TAKU was exposed to 3.7 times the permissible exposure limit for iron oxide fumes.

(b) At Tacoma Boat Yard #4, the Boilermakers apprentice on fire watch for the welder burning painted metal panels for removal from the third deck stateroom of the TAKU was exposed to 1.8 times the permissible exposure limit for iron oxide fumes.

(c) At the Tacoma Boat Yard #4 aboard the TAKU, the welder burning painted metal bulkhead panels for removal from the third deck stateroom was exposed to 2.5 times the permissible exposure limit for iron oxide fumes.

In violation of 29 CFR 1910.1000(a)(2)

Section 29 CFR 1910.1000(a)(2) provides:

(2) Other materials--8-hour time weighted averages. An employee's exposure to any material in table Z-1, the name of which is not preceded by "C", in any 8-hour work shift of a 40-hour work week, shall not exceed the 8-hour time weighted average given for that material in the table.

| | |
|---|---|
| Iron oxide fume | 10 mg./$M^3$ |

Citation 1, Item 3(b) (Serious)

Feasible administrative or engineering controls were not determined and implemented to reduce employee exposure(s):

(a) At Tacoma Boat Yard #4, the welder air arcing painted metal panels for removal from the third deck of the TAKU was exposed to 3.7 times the permissible exposure limit for iron oxide fumes.

(b) At Tacoma Boat Yard #4, the Boilermakers apprentice on fire watch for the welder burning painted metal panels for removal from the third deck stateroom of the TAKU was exposed to 1.8 times the permissible exposure limit for iron oxide fumes.

(c) At the Tacoma Boat Yard #4 aboard the TAKU, the welder burning painted metal bulkhead panels for removal from the third deck stateroom was exposed to 2.5 times the permissible exposure limit for iron oxide fumes.

In violation of 29 CFR 1910.1000(e)

Penalty Proposed for Item 3: $540

Citation 1, Item 4(a) (Serious)

Employee(s) were exposed to material(s) in excess of the 8-hour time weighted average limit(s) listed for the particular material(s) in Table Z-1 of subpart Z of 29 CFR part 1910:

(a) At Tacoma Boat Yard #4, the welder air arcing painted metal panels for removal from the third deck of the TAKU was exposed to 1.8 times the permissible exposure limit for zinc oxide fumes.

(b) At Tacoma Boat Yard #4 aboard the TAKU, the welder cutting and burning painted metal shower stalls for removal from deck #2 shower room was exposed to 1.1 times the permissible exposure limit for zinc oxide fumes.

In violation of 29 CFR 1910.1000(a)(2)

Section 29 CFR 1910.1000(a)(2) provides:

(2) Other materials--8-hour time weighted averages. An employee's exposure to any material in table Z-1, the name of which is not preceded by "C", in any 8-hour work shift of a 40-hour work week, shall not exceed the 8 hour time weighted average given for that material in the table.

| | |
|---|---|
| Zinc oxide fume | 5 mg./$M^3$ |

Citation 1, Item 4(b) (Serious)

Welding, cutting, or heating involving metal(s) identified below was performed in an enclosed space aboard vessel(s) without either general mechanical or local exhaust ventilation meeting the requirements of paragraph 29 CFR 1915.31(a):

(a) At Tacoma Boat Yard #4, the welder air arcing painted metal panels for removal from the third deck of the TAKU was exposed to 1.8 times the permissible exposure limit for zinc oxide fumes.

(b) At Tacoma Boat Yard #4 aboard the TAKU, the welder cutting and burning painted metal shower stalls for removal from second deck shower room was exposed to 1.1 times the permissible exposure limit for zinc oxide fumes.

In violation of 29 CFR 1915.31(c)(1)

Penalty Proposed for Item 4: $ 540

Citation 1, Item 5(a) (Serious)

Employees were exposed to lead at concentrations greater than fifty micrograms per cubic meter of air (50 mg/M3) averaged over an 8-hour period.

(a) At Tacoma Boat Yard #4, the welder air arcing painted metal panels for removal from the third deck of the TAKU was exposed to 1.4 times the permissible exposure limit for oxide fumes.

(b) At Tacoma Boat Yard #4 aboard the TAKU, the welder cutting and burning painted metal shower stalls for removal from the second deck shower room was exposed to 2.4 times the permissible exposure limit for lead oxide fumes.

(c) At Tacoma Boat Yard #4 aboard the TAKU, the welder burning painted metal bulkhead panels for removal from the third deck stateroom was exposed to 1.4 times the permissible exposure limit for lead oxide fumes.

In violation of 29 1910.1025(c)(1)

29 CFR 1910.1025(c)(1) provides:

(1) The employer shall assure that no employee is exposed to lead at concentrations greater than fifty micrograms per cubic meter of air (50 mg/M3) averaged over an 8-hour period.

Citation 1, Item 5(b) (Serious)

Welding, cutting, or heating involving metal(s) identified below was performed in an enclosed space aboard vessel(s) without local exhaust ventilation in accordance with the requirement of 29 CFR 1915.31(a)

(a) At Tacoma Boat Yard #4, the welder air arcing painted metal panels for removal from the third deck of the TAKU, was exposed to 1.4 times the permissible exposure limit for lead oxide fumes.

(b) At Tacoma Boat Yard #4 aboard the TAKU, the welder cutting and burning painted metal shower stalls for removal from the second deck shower room was exposed to 2.4 times the permissible exposure limit for lead oxide fumes.

(c) At Tacoma Boat Yard #4 aboard the TAKU, the welder burning painted metal bulkhead panels for removal from the third deck stateroom was exposed to 1.4 times the permissible exposure limit for lead oxide fumes.

In violation of 29 CFR 1915.31(c)(2)

Section 29 CFR 1915.31(c)(2) provides:

(2) Welding, cutting or heating in any enclosed spaces aboard the vessel involving the metals specified in this subparagraph shall be performed with local exhaust venitilation in accordance with the requirements of paragraph (a) of this section or employees shall be protected by air line respirators in accordance with the requirement of 1915.82(a).

Citation 1, Item 5(c) (Serious)

Respirators were not provided by the employer when such equipment was necessary to protect the health of the employees.

(a) At Tacoma Boat Yard #4, the welder air arcing painted metal panels for removal from the third deck of the TAKU was exposed to 1.4 times the permissible exposure limit for lead oxide fumes.

(b) At Tacoma Boat Yard #4 aboard the TAKU, the welder cutting and burning painted metal shower stalls for removal from the second deck shower room was exposed to 2.4 times the permissible exposure limit for lead oxide fumes.

(c) At Tacoma Boat Yard #4 aboard the TAKU, the welder burning painted metal bulkhead panels for removal from the third deck stateroom was exposed to 1.4 times the permissible exposure limit for lead oxide fumes.

In violation of 29 CFR 1910.1025(f)(1)

Section 29 CFR 1910.1025(f)(1) provides:

(1) General. Where the use of respirators is required under this section, the employer shall provide, at no cost to the employee, and assure the use of respirators which comply with the requirements of this paragraph.

Citation 1, Item 5(d) (Serious)

The employer did not perform quantitative face fit tests at the time of initial fitting for each employee wearing negative pressure respirators.

(a) At Tacoma Boat Yard #4, the welder air arcing painted metal panels for removal from the third deck of the TAKU was exposed to 1.4 times the permissible exposure limit for lead oxide fumes.

(b) At Tacoma Boat Yard #4 aboard the TAKU, the welder cutting and burning painted metal shower stalls for removal from the second deck shower room was exposed to 2.4 times the permissible exposure limit for lead oxide fumes.

(c) At Tacoma Boat Yard #4 aboard the TAKU, the welder burning painted metal bulkhead panels for removal from the third deck stateroom was exposed to 1.4 times the permissible exposure limit for lead oxide fumes.

In violation of 29 CFR 1910.1025(f)(3)(ii)

Section 29 CFR 1910.1025(f)(3)(ii) provides:

(ii) Employers shall perform quantitative face fit tests at the time of initial fitting and at least semiannually thereafter for each employee wearing negative pressure respirators. The test shall be used to select facepieces that provide the required protection as prescribed in table II.

Citation 1, Item 5(e) (Serious)

The employer did not establish and maintain a respiratory protection program which included the requirements outlined in 1910.134(b) & (d) & (e) & (f).

(a) At Tacoma Boat Yard #4, the welder air arcing painted metal panels for removal from the third deck of the TAKU was exposed to 1.4 times the permissible exposure limit for lead oxide fumes.

(b) At Tacoma Boat Yard #4 aboard the TAKU, the welder cutting and burning painted metal shower stalls for removal from the second deck shower room was exposed to 2.4 times the permissible exposure limit for lead oxide fumes.

(c) At Tacoma Boat Yard #4 aboard the TAKU, the welder burning painted metal bulkhead panels for removal from the third deck stateroom was exposed to 1.4 times the permissible exposure limit for lead oxide fumes.

In violation of 29 CFR 1910.1025(f)(4)(i)

Section 29 CFR 1910.1025(f)(4)(i) provides:

(i) The employer shall institute a respiratory protection program in accordance with 29 CFR 1910.134(b),(d),(e) and (f).

Penalty Proposed for Item 5: $ 540

Citation 1, Item 6 (Non-Serious)

An initial monitoring and measurement program was not undertaken to determine if any employee was exposed to airborne lead in excess of the action level:

(a) At Tacoma Boat Yard #4, the welder air arcing painted metal panels for removal from the third deck of the TAKU was exposed to 1.4 times the permissible exposure limit for lead oxide fumes.

(b) At Tacoma Boat Yard #4 aboard the TAKU, the welder cutting and burning painted metal shower stalls for removal from the second deck shower room was exposed to 2.4 times the permissible exposure limit for lead oxide fumes.

(c) At Tacoma Boat Yard #4 aboard the TAKU, the welder burning painted metal bulkhead panels for removal from the third deck stateroom was exposed to 1.4 times the permissible exposure limit for lead oxide fumes.

In violation of 29 CFR 1910.1025(d)(2)

Section 29 CFR 1910.1025(d)(2) provides:

(2) Initial determination. Each employer who has a workplace or work operation covered by this standard shall determine if any employee may be exposed to lead at or above the action level.

Penalty Proposed for Item 6: None

Citation 2, Item 1 (Non-Serious)

Employee(s) were exposed to material(s) in excess of the 8-hour time weighted average limit(s) listed for the particular material(s) in Table Z-1 of subpart Z of 29 CFR part 1910:

(a) On board the TAKU at Tacoma Boat Yard #4, the welder air arcing painted metal panels for removal from the third deck was exposed to 4.1 times the permissible exposure limit for copper fumes.

(b) Aboard the TAKU at Tacoma Boat Yard #4, the welder cutting and burning painted metal shower stalls for removal from the second deck shower room was exposed to 1.1 times the permissible exposure limit for copper fumes.

(c) On board the TAKU at the Tacoma Boat Yard #4, the Boilermaker apprentice on fire watch for the welder burning painted metal panels for removal from the third deck stateroom was exposed to 2.7 times the permissible exposure limit for copper fumes.

(d) At the Tacoma Boat Yard #4, the welder burning painted metal bulkhead panels for removal from the third deck stateroom was exposed to 2.4 times the permissible exposure limit for copper fumes.

In violation of 29 CFR 1910.1000(a)(2)

Section 29 CFR 1910.1000(a)(2) provides:

(2) Other materials--8-hour time weighted averages. An employee's exposure to any material in table Z-1, the name of which is not preceded by "C:, in any 8-hour work shift of a 40-hour work week, shall not exceed the 8-hour time weighted average given for that material in the table.

Copper fume 0.1 mg./$M^3$

Penalty Proposed for Citation 2, Item 1: None

2/ T.B.C. filed a timely notice of contest. At that point the Commission acquired jurisdiction over the subject matter under Section 659 of the Act. T.B.C. admitted jurisdiction in its answer. It is consequently concluded that T.B.C. is an employer with employees engaged in a business affecting commerce within the meaning of Section 3 of the Act.

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

MAR 30 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Copperweld Steel Company

OSHRC DOCKET NO. 79-2600

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF ORDER

To wit: See attached.

FOR THE SECRETARY OF LABOR

- Counsel for Regional Litigation
  Office of the Solicitor, USDOL
  200 Constitution Ave., NW. - Rm. S-4014
  Washington, D.C. 20210

- William S. Kloepfer, Esq.
  Associate Regional Solicitor, USDOL
  Federal Office Bldg. - RM 881
  1240 East 9th Street
  Cleveland, Ohio 44199

FOR EMPLOYER

- R. Henry Moore, Esq.
  Rose, Schmidt, Dixon & Hasley
  900 Oliver Bldg.
  Pittsburgh, PA 15222

FOR EMPLOYEES

- John R. Molovich, Technician
  Safety & Health Dept.
  USWA - Five Gateway Center
  Pittsburgh, PA 15222

  Robert Villa, Staff Rep.
  USWA - District 26
  189 E. Market St.
  Warren, Ohio 44481

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC DOCKET NO. 79-2600 |
| COPPERWELD STEEL COMPANY, | : | |
| Respondent. | : | |

ORDER

The Secretary's motion to withdraw Petition for Discretionary Review and Citation is Granted.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: MAR 30 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 240

ATLANTA, GEORGIA 30309

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|---|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>COPPERWELD STEEL COMPANY,<br><br>Respondent,<br><br>and<br><br>UNITED STEELWORKERS OF AMERICA, LOCAL 2243,<br><br>Authorized Employee Representative. | ) | OSHRC Docket No. 79-2600 |

APPEARANCES: Saundra Robinson, Esquire, Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, on behalf of complainant.

Anthony J. Polito, Esquire, and R. Henry Moore, Esquire, Rose, Schmidt, Dixon, Hasley, Whyte and Hardesty, Pittsburgh, Pennsylvania, on behalf of respondent.

John K. Molovich, Staff Representative, United Steelworkers of America, Pittsburgh, Pennsylvania, on behalf of intervenor.

## DECISION AND ORDER

Burroughs, Judge: Respondent, an employer engaged in the manufacture of steel, contests an alleged willful violation of section 5(a)(1) of the Occupational Safety and Health Act of 1970 ("Act") for failing to remove moisture or water from its tapping pits prior to tapping or pouring of molten metal from its furnaces. The alleged violation results from an explosion occurring at approximately 3:30 a.m. on

April 17, 1979, at the end of a tap of a heat of steel at furnace number eight in the melt shop on the midnight shift.[1/]

Respondent's melt shop contains five 90-ton electric arc furnaces. The furnaces are at ground level, and tapping pits are located underneath the furnaces. The pits are 35 feet deep, 22 feet wide, 24 feet long and constructed of reinforced concrete three to five feet thick. The furnaces are "tapped" at the end of a heat of steel into 90-ton "bottom pour" ladles which are positioned in the tapping pits prior to the tap. The ladle is positioned close to the bottom of the pit. There is approximately two feet of clearance between the sides of the ladle and the pit when the ladle is positioned for a tap. During a tap, the furnace is tilted forward and empties molten metal out of a tap hole, along a "runner" and into the ladle.

On April 16 and 17, 1979, melter Frank Richards was working on furnace numbers six and eight during the 11:00 p.m. to 7:00 a.m. shift (Tr. 194). At approximately 3:30 a.m. on April 17, 1979, at the end of the second tap of a heat of steel on furnace number eight, slag overflowed all sides of the ladle, covered water in the middle of the pit and caused an explosion (Tr. 194, 196, 201). The water formed a puddle two and a half to three feet in diameter and was approximately three inches deep in the center of the uneven bottom of the pit (Tr. 198, 211). The overflow occurred as a result of unusual circumstances, i.e., a fast tap and an unusual slag reaction.

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1/ The case originally involved three citations issued to respondent on May 8, 1979. Prior to hearing, the parties reached a settlement of all the alleged violations with the exception of item one of the willful citation (designated as citation number two). A stipulation and settlement agreement was filed on October 3, 1979, with regard to the items that had been settled. The terms of the settlement have been incorporated in the order entered in this case.

As a result of the explosion, the third helper on the furnace sustained minor burns on the back of his neck. Prior to going to the plant hospital, he took approximately 30 minutes to complete certain tasks around the furnace. After being treated, he returned to complete his shift. Except for the short period of time he was in the plant hospital for treatment, he missed no time from work (Tr. 54, 194-195, 201-202, 282). No other employees incurred any type of injuries.

Prior to the second tap of the shift for furnace number eight, Richards was aware of water being in the middle of the tapping pit and so informed his crew. While he was aware of the presence of the water, he was of the opinion that the quantity of water present was insufficient for a portable pump to be effective in removing it (Tr. 195, 198, 275-276, 294-295). He did not consider the quantity of water in the pit to be sufficient to present a danger to the employees (Tr. 196, 199).

Prior to April 17, 1979, respondent's procedure for controlling water in the pits involved pumping out all water possible prior to tapping (Tr. 351). This procedure had been followed for several years without incident. Respondent did not tap when there was a substantial amount of water in the pits. Richards testified that when there was a break in a water line or any other incident sufficient to cause a large accumulation of water in the tapping pits, the water would be pumped or the spare furnace started[2/] (Tr. 199, 212, 218). While he did not consider three inches of water in the pit to be a large volume of water, he expressed the opinion that a large volume of water would present a hazard[3/] (Tr. 209, 212). For this reason, any

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2/ Richards emphasized that a break in a water hose presented a different type of situation that required immediate attention. If a water hose had been broken, he indicated that he would not have tapped the heat (Tr. 199, 200).

3/ According to Richards, six inches of water in the pit would present a hazard during a tap (Tr. 214).

accumulation of water large enough to be pumped was pumped on a priority basis. No more than three inches of water was ever in the pits after pumping (Tr. 197, 294, 316-317, 321-323, 351). Thus, prior to and on April 17, 1979, furnaces were tapped with a limited amount of water in the pits.

Respondent has been charged with a violation of section 5(a)(1)[4/] of the Act. In order to establish a violation of the general duty clause, complainant has the burden of proving that (1) the employer failed to render its workplace free of a hazard which was (2) recognized, and (3) causing or likely to cause death or serious physical harm. National Realty and Construction Company v. OSHRC, 489 F.2d 1257 (D. C. Cir. 1973). The complainant also must show the feasibility and likely utility of a means to eliminate or materially reduce the alleged hazard. Whirlpool Corp., 79 OSAHRC 32/A14, 7 BNA OSHC 1356, 1979 CCH OSHD ¶ 23,552 (No. 9224, 1979), appeal filed, No. 79-1692 (D. C. Cir., July 3, 1979). The phrase "likely to cause" found in section 5(a)(1) refers to the probability that the accident will result in death or serious physical harm and not the probability of an accident occurring. R. L. Sanders Roofing Company, __ OSHRAC __, 7 BNA OSHC 1566, 1979 CCH OSHC ¶ 23,756 (No. 76-2690, 1979), appeal filed, No. 79-2958 (5th Cir., August 15, 1979).

Respondent does not dispute the finding that there was a small amount of water in the pit. While the exact amount of water is unknown, there is no credible evidence to dispute the testimony of Frank Richards that the water in the pit was

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4/ Section 5(a)(1) provides:

(a) Each employer—
(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

of such a small quantity that it could not be removed by a portable pump (Tr. 195, 197-198). While both parties are in agreement that an explosion will occur when molten metal covers water, respondent submits that tapping a furnace with water or dampness, in the limited amounts present on April 17, in a deep, well-constructed tapping pit, was not a hazard recognized by it or the industry.

Complainant argues that "the potential for injury from molten steel dripping into a pit containing moisture or liquid is great, that is, that the hazard is, at the least, likely to cause death or serious physical harm." This sweeping generalization simply bears no relation to the facts of this case. It does not differentiate or recognize that the degree of injury, if any, might depend upon the volume of water in the pit. The argument also fails to recognize that the amount of molten steel to overflow a ladle might also have a bearing on the intensity of any explosion. It further fails to take into account the depth and width of the pit, the type of construction and the fact that the ladle is positioned in the pit prior to any possible danger from an overflow.

The parties agree that an explosion will occur whenever molten metal covers and entraps water. Richards and the members of his crew were aware of the water in the pit prior to the tap. They were also aware of the likely consequences of the molten metal overflowing the ladle and falling into the water in the center of the pit. This conclusion is easily supported by the fact that the employees moved back from the pit when they saw the ladle overflowing[5/] (Tr. 215-216, 282). Thus,

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5/ The employees were simply following advice given to them by supervisory personnel. Whenever a tap was made with a small amount of water in a pit, respondent's supervisory personnel advised the employees to stand back from the pit or take protective cover in the event the ladle overflowed (Tr. 198, 215-216, 329, 354). Respondent's general supervisor of melting, Victor Alberini, testified that

respondent recognized a hazard since it was aware of the water in the pit and knew an explosion would occur if the ladle overflowed and the molten metal entrapped the water in the pit. However, respondent did not believe that an explosion would ever result in a serious injury. This opinion is supported by the fact that it had never had an employee seriously injured during the tapping process (Tr. 214, 352).

While it is concluded that employees were exposed to a recognized hazard, a determination must be made as to whether the record justifies a conclusion that the hazard was causing or likely to cause them death or serious physical harm. In this regard, the minor burns suffered by the third helper are not determinative of the issue. The existence of an accident, taken by itself, is not definitive proof of a violation of the Act. See National Realty & Construction Company, supra. In determining the degree of injury, if any, likely to have occurred, consideration must be given to the amount of water in the pit, the amount of molten metal likely to overflow and the unusual design of respondent's melt shop.

Complainant cites the case of Babcock & Wilcox Co., __ OSAHRC __, 7 BNA OSHC 1194, 1979 CCH OSHD ¶ 23,352 (No. 77-3575-A, 1979), appeal filed, No. 79-1371 (3rd Cir., March 26, 1979), wherein Judge Tenney determined a willful violation of section 5(a)(1) to have occurred where water in a sizeable quantity was located on the floor of the "T" melt furnace. The hazard in Babcock & Wilcox existed on an open floor where there was nothing to absorb or lessen the intensity of the explosion. The melt shop in Babcock & Wilcox did not have a tapping below ground level and employees were in the direct line of an explosion. There was no type of

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employees were told to take protective cover in the event of an explosion because of dust coming from the rafters (Tr. 354). He considered a tap with some water in the pit to be a safe procedure because of the size of the pit and the fact the ladle left little room for anything to escape from the pit (Tr. 317-318, 320).

impediment to protect the employee, and the quantity of water present was much greater than that existing in the pit to the number eight furnace.

Respondent's melt shop is unusual within the steel industry. It is referred to as a "one level" melt shop since the furnaces are located on ground level. Most melt shops are two-level shops where the ladle is located in the open at ground level and the furnace is on a platform above the ladle. The melt shop in Babcock & Wilcox, supra, was a two-level melt shop and employees were in the direct line of any explosion that might occur. Complainant's arguments fail to recognize the physical difference between "one level" and "two level" melt shops, and the rationale of Babcock & Wilcox is clearly distinguishable.

The water present in the tapping pit on April 17 formed a puddle two and a half to three feet in diameter and was perhaps three inches deep in the center of the pit. The intensity of any explosion would by necessity be limited by the amount of water in the pit. Moreover, any reaction would occur at least 35 feet (depth of the pit) from any employee and no employees would be in the direct line of the explosion. Any molten metal not absorbed by the walls of the pit and the ladle would be directed straight upward in the narrow space along the sides of the ladle. The only potential for injury would occur after the molten metal had expended all its upward force and was returning to earth by force of gravity.

Dr. J. Gerin Sylvia testified on behalf of complainant that there was no safe quantity of water or dampness[6/] in a tapping pit (Tr. 260). However, he conceded that the force of energy resulting from an explosion is going to be the strongest at the point of the explosion and will weaken as it tends to go out (Tr. 249).

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6/ Dampness was defined as water that is not collected (Tr. 252).

According to him, some of the energy force from an explosion resulting from molten metal covering water would go outward and against the walls of the pit and some would go upward (Tr. 262). He would expect the largest amount of any molten metal from an explosion to hit the bottom of the ladle (Tr. 267). According to him, the danger from an explosion in a pit would occur from the fallout (Tr. 247-248). However, his testimony borders on the theoretical since he has never seen respondent's tapping pits nor has he ever witnessed a reaction of molten metal and water in a tapping pit of the type used by respondent (Tr. 248).

The design of respondent's melt shop eliminated the potential for any serious physical harm or death whenever a tap was made with a small quantity of water in a pit. A substantial portion of the force of the explosion would never be directed upward since it would be absorbed by the walls of the pit and the 90-ton ladle positioned in the pit (Tr. 262, 270, 328). Since the ladle covers a substantial portion of the pit, it would absorb most of the force and deflect molten metal from its upward path back to the bottom of the pit (Tr. 270).

Complainant offered no evidence of any past injuries except for the minor injury incurred by the third helper on April 17, 1979. He received minor burns that required no hospitalization. The burns suffered by him were of such little consequence that he continued to work for approximately 30 minutes prior to going to the plant hospital. The evidence indicates that employees have never suffered any serious injuries during the tapping process (Tr. 214, 318, 352). This record undoubtedly resulted from the design of the pits and the fact that taps were not permitted with large amounts of water in the pits.

Respondent had determined that it could tap with limited amounts of water in the pits without exposing employees to serious physical harm or death. The unique construction of the pits and the positioning of the ladles in the pits prior to a tap

eliminated the potential for serious physical harm or death. The wisdom of this judgment is amply supported by the facts of record. The hazard to which employees were exposed was not likely to cause death or serious physical harm. In view of this determination, the alleged section 5(a)(1) violation is vacated.

Item one of the willful citation stated as follows:

> On or prior to 4-25-79, electric furnaces in the melt shop were being tapped when dampness or a liquid was present in the tapping pit(s) which did and could have resulted in the entrapment of the liquid or dampness by molten steel creating an explosion.

Complainant's evidence was directed to events that occurred on April 17 and April 25, 1979. At the close of complainant's case, respondent moved to have the case dismissed. The motion was granted with respect to any allegation that a violation occurred on April 25, 1979 (Tr. 342-344).

Compliance Officer Rene Ritz testified that during the inspection on April 25, 1979, she noticed water or some type of liquid in the bottom of the pit to number nine furnace. The liquid appeared to her to be water. However, she further testified that the furnace was not being charged at the time of the inspection. The furnace had been used earlier during the day of the inspection (Tr. 21-22, 37, 41-42, 46, 90, 100-101). She did not observe any water in the pits of the four furnaces in use at the time of her inspection (Tr. 37). Compliance Officer James Szakovits testified that he observed an accumulation of some type of liquid in the bottom of the pit for furnace number nine (Tr. 97, 121-122). However, he also acknowledged that the furnace was not in operation (Tr. 98).

While respondent considered its operating procedure prior to April 17, 1979, to be safe, improved procedures for controlling water in the tapping pits were given to all supervisory personnel in the melt shop on April 23, 1979, and relayed to the other employees in safety meetings. The new procedures required that water which

could not be pumped from the pit be covered with sand and a clam bucket used to hoist up the wet sand prior to tapping. Since the furnace was not in operation, there was no necessity to remove the water in the pit. No employees were exposed to any hazard on April 25, 1979.

## FINDINGS OF FACT

The following facts are specifically determined in resolving the issues in dispute:

1. Respondent is engaged in business as a manufacturer of steel and maintains its principal place of business at 4000 Mahoning Avenue, Warren, Ohio (Para. I, Complaint and Answer).

2. During the afternoon of April 25, 1979, Compliance Officers Rene Ritz and James Szakovits conducted an inspection at respondent's melt shop (Tr. 18-20, 35, 89, 94-95, 97).

3. The inspection resulted from a complaint alleging water in the pits located in the melt shop (Tr. 19-20). During the inspection, the compliance officers discussed an accident that occurred on April 17, 1979 (Tr. 25).

4. Respondent's melt shop contains five 90-ton electric arc furnaces (Tr. 21, 34, 74, 97, 163, 320-321, 346-347). The furnaces are located on the ground level (Exs. 1, C; Tr. 31-32).

5. The furnaces are "tapped" at the end of a heat of steel into 90-ton "bottom pour" ladles which are placed, prior to the tap, in concrete tapping pits located below ground level (Exs. C, D; Tr. 34, 85, 96-97, 210, 346-349).

6. The tapping pits in which the ladles are positioned are 35 feet deep, 22 feet wide, 24 feet long and constructed of reinforced concrete three to five feet thick (Tr. 147-148, 317, 347, 352). The pit is tapered (Tr. 208, 212).

7. The ladle is positioned as close to the bottom of the pit as possible. There is approximately two feet of clearance between the walls and the sides of the ladle when it is in position in the tapping pit (Ex. D; Tr. 347).

8. During a tap, the furnace is tilted forward and empties molten metal out a tap hole, along a "runner" and into the ladle (Ex. D; Tr.147-148, 281, 347, 352).

9. Respondent's melt shop is unusual in that most melt shops are "two level" shops where the ladle is located in the open at ground level and the furnace is on a platform above the ladle (Tr. 31-33, 96-97, 117-118, 348-349).

10. At the beginning of the midnight shift on April 16, 1979,[7/] the melter, Frank Richards, and the employees assigned to furnace number eight observed water in the pit (Tr. 198, 207, 275-276, 290). The water formed a puddle two and a half to three feet in diameter and was approximately three inches deep in the center of the pit (Tr. 198, 211). It had been in the pit since Sunday night (April 15) (Tr. 207).

11. On occasion ground water will seep into a pit (Tr. 108-109, 199). There is a sump pump located in each tapping pit to control or eliminate the seepage (Tr. 110, 198-199). The sump pump normally eliminates the seepage (Tr. 200).

12. On April 17, 1979, the sump pump in the pit for furnace number eight was not working (Tr. 198-199, 325-326). The water in the pit to number eight furnace had accumulated through seepage (Tr. 199).

13. Prior to April 17, 1979, respondent's procedure for controlling water in the pits was to pump as much of the water from the pits as was possible prior to a

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7/ Tom Gasper, a floor laborer, testified that his shift commenced at 10:30 p.m. Since an explosion occurred at 3:30 a.m. on April 17, the employees actually commenced work on April 16 (Tr. 274).

tap (Tr. 197-198, 317, 321). The water that could not be pumped out remained during a tap (Tr. 317).

14. The melter or shift superintendent generally made the decision as to whether there was enough water in the pit to require pumping (Tr. 323).

15. On the midnight shift commencing on April 16, 1979, the melter decided that the water was of such a small quantity that it could not be removed by a portable pump and no effort was made to remove the water prior to tapping the furnace (Tr. 197-198).

16. The tapping of the first heat of the shift for number eight furnace was accomplished without incident (Tr. 276).

17. The second tap on number eight furnace was a fast tap, which is an unusual tap. Slag erupted, went over all sides of the ladle, covered the water in the pit and an explosion occurred (Tr. 205, 276-277, 282, 292, 303).

18. The employees had no warning in advance of the beginning of the tap that it would be a fast tap (Tr. 281).

19. When overflow occurs during a tap, it normally flows in the direction of the runner since the ladle is usually tipped four to five inches to the front (Tr. 206).

20. As a result of the explosion, the third helper on the furnace sustained minor burns on the back of his neck (Tr. 54, 202, 277, 282, 303). After the incident, the third helper completed certain tasks around the furnace before he went to the plant hospital approximately a half hour later (Tr. 201-202, 282). After being treated at the plant hospital, he returned to complete his shift and did not miss any time from work (Tr. 54, 201-202, 282). He did not return to the plant hospital for further treatment (Tr. 286-287). None of the other employees received any kind of injury (Tr. 202).

21. An explosion will occur when molten metal covers water (Tr. 195, 218, 225).

22. Prior to and on April 17, 1979, whenever a tap occurred with any water in a pit, employees were advised to stand back from the pit or take protective cover whenever a ladle overflowed (Tr. 198, 215-216, 276, 279, 329, 354).

23. A crew of four employees, including the melter, tends two furnaces (Tr. 91). The other employees are the first, second and third melter (Tr. 170). All four of the employees were in the area when the explosion occurred on April 17, 1979 (Tr. 278).

24. On April 18, 1979, representatives of management met with representatives of the union safety committee to discuss the procedures for controlling water in the pits. A further meeting was held on April 20 (Ex. B; Tr. 203, 297, 300).

25. On April 23 copies of new procedures for controlling water in the tapping pits were given to all supervisory personnel in the melt shop and relayed to the other employees in safety meetings (Tr. 203-204, 209-210, 282-283). All melters were told not to tap if there was water in the pits (Tr. 204-205).

26. Subsequent to the April 17 explosion, respondent's new procedures required that water which could not be pumped from the pit be covered with sand and a clam bucket used to hoist up the wet sand prior to tapping (Tr. 208).

27. Prior to April 17, 1979, Victor Alberini, respondent's general supervisor of melting, was unaware of any burns suffered by any employees as a result of explosions occurring from molten metal covering water in the pits (Tr. 316, 318).

28. Prior to April 17, 1979, Alberini had received no complaints from employees concerning water in the pits (Tr. 322).

29. Respondent has a nationally recognized safety record and has had a declining injury rate since 1965. For the first six months of 1979, its injury rate was less than half of any comparable company in the industry (Exs. F, G: Tr. 364-366).

## CONCLUSIONS OF LAW

1. Respondent, at all times material to this proceeding, was engaged in a business affecting commerce within the meaning of the Act.

2. Respondent, at all times material to this proceeding, was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction over the parties and over the subject matter herein.

3. Respondent was not in violation of section 5(a)(1) on April 17, 1979, for tapping the number eight furnace while water was in the pit. Any resulting explosion was not likely to cause death or serious physical harm due to the design of the tapping pit and the small quantity of water in the pit.

4. Respondent was not in violation of section 5(a)(1) on April 25, 1979, because water was in the pit. The furnace was not charged, and there was no employee exposure to any hazard.

## ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, it is

ORDERED: 1. That item one of the willful citation issued to respondent on May 8, 1979, and the penalty proposed for the alleged violation are vacated;

2. That the stipulation and settlement agreement filed by the parties at the commencement of the hearing is approved and incorporated as a part of this order; and

3. That the serious citation, willful citation and repeated citation issued to respondent on May 8, 1979, and the penalties proposed for the

alleged violations are affirmed, modified and vacated in accordance with the terms of the settlement agreement.

Dated this 24th day of April, 1980.

James D. Burroughs

JAMES D. BURROUGHS
Judge

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

MAR 30 1982

IN REFERENCE TO SECRETARY OF LABOR v.

HUBER, HUNT (&) NICHOLS, INC.

OSHRC DOCKET NO. 81-1366

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

FOR THE SECRETARY OF LABOR

OF ORDER

- Counsel for Regional Litigation
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  200 Constitution Ave., NW. - Rm. S-4014
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To wit: See Attached.

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FOR EMPLOYER

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FOR EMPLOYEES

-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

- Dee C. Blythe
  Judge, OSHRC
  Federal Building, Room 7B11
  1100 Commerce Street
  Dallas, Texas 75202

Rev. 10/1/78

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>HUBER, HUNT (&) NICHOLS, INC.,<br><br>Respondent. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | OSHRC Docket No. 81-1366 |

ORDER

The Parties' Stipulation and Settlement Agreement is Approved.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Dated: MAR 30 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|---|
| RAYMOND J. DONOVAN, SECRETARY OF LABOR, Complainant, | : | OSHRC DOCKET NO. 81-1366S |
| v. | : | |
| HUBER, HUNT & NICHOLS, INC., Respondent. | : | |

STIPULATION AND SETTLEMENT AGREEMENT

I

The parties have reached agreement on a full and complete settlement of the instant matter which is presently pending before the Commission upon direction of review of the judge's decision.

II

The parties stipulate as follows:

(A) The Occupational Safety and Health Review Commission has jurisdiction over this matter pursuant to section 10(c) of the Act.

(B) Respondent, Huber, Hunt & Nichols, Inc., is a corporation engaged in construction and has its principal office and place of business at P.O. Box 128, Indianapolis, Indiana. Respondent is and, was on April 29, 1981 an employer subject to the Act.

(C) As a result of an inspection conducted on April 29, 1981 at a construction worksite in Albuquerque, New Mexico, respondent was issued one citation alleging two serious violations of the Act on May 4, 1981. A notification of proposed penalty was issued the same day.

(D) By letter dated May 22, 1981 and received in the Albuquerque, New Mexico OSHA office on May 26, 1981, respondent served notice of its intent of contest the citation and proposed penalty.

(E) A Commission Judge affirmed the citations and the penalty proposed by the Secretary. Respondent thereupon filed a petition for review of the judge's decision, which was directed by Commission Chairman Rowland on December 9, 1981.

(F) The conditions alleged to have been violations of the Act in the citation and complaint no longer exist.

(G) A citation alleging the identical violations was also issued to a subcontractor on the site who was the only employer whose employees were exposed to the alleged violations. The subcontractor did not contest the citation issued to it.

III

Complainant hereby withdraws the citation and proposed penalty in the instant matter for the following reasons:

(A) The alleged violations no longer exist.

(B) Another employer, a subcontractor who was the only employer with employees exposed to the violations, received a citation identical to that received by respondent and did not contest said citation.

(C) Complainant believes that as a matter of policy further litigation of this particular case is inappropriate.

IV

Respondent has no objection to the withdrawal of the citations and proposed penalties herein and agrees that it will pay its own attorney's fees in this matter.

V

Respondent will post the instant Stipulation and Settlement Agreement in accordance with the Rules of Procedure of the Commission.

WHEREFORE, the parties agree to the withdrawal of the citation herein which is currently pending before the Commission.

FOR COMPLAINANT

Anthony J. Chadal (sig)
FOR RESPONDENT

Dated this 28th day of December, 1981.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>HUBER, HUNT & NICHOLS, INC.,<br><br>Respondent. | OSHRC DOCKET NO. 81-1366S |

DECISION AND ORDER

Appearances: Richard L. Collier, Esq., of Dallas, Texas, for the complainant.

Carl E. Clubb, safety director, of Indianapolis, Indiana, for the Respondent.

BLYTHE, Judge:

STATEMENT OF THE CASE

The sole issue in this case is whether the respondent, Huber, Hunt & Nichols, Inc., a general contractor, can be held responsible for a subcontractor's safety violations in view of the stipulated fact that none of respondent's employees was exposed to the hazards. This issue subsumes the question of whether the Secretary of Labor ("the Secretary") is bound by a Field Operations Manual provision against issuing citations to employers whose employees are not exposed.

After an inspection of respondent's workplace at 9201 Pan American Freeway, N.E., Albuquerque, New Mexico, on April 29, 1981, by a compliance officer

of the Occupational Safety and Health Administration ("OSHA"), one citation was issued to respondent May 4, 1981, alleging serious violations of §5(a)(2) of the Occupational Safety and Health Act of 1970 ("the Act") and safety standards for scaffolds codified at 29 CFR 1926 §§500(e)(1)(ii) and 451(c)(2). The citation was amended May 18, 1981, to allege a serious violation of 29 CFR 1926.451(a)(4) instead of 29 CFR 1926.500(e)(1)(ii). The respondent timely filed notice of contest May 22, 1981, thus initiating this proceeding before the Occupational Safety and Health Review Commission ("the Commission") under §10(c) of the Act. Thereafter respondent filed a request for simplified proceedings [1] which the Secretary did not oppose.

The case came on regularly for hearing in Albuquerque on September 4, 1981. No affected employee or authorized representative of affected employees participated. Respondent submitted a posthearing brief; the Secretary did not.

## DISCUSSION AND OPINION

At the workplace here involved, respondent, as general contractor, was constructing a large building on a 65-acre site for the Signetics Corporation. One of its subcontractors was Bob Davis Masonry, Inc. ("Davis"), which erected and used the two scaffolds which are the subject of the citation. Item 1a, as amended, alleges that "[h]andrails were not provided for the open ends and areas" of one of a 15-foot-high scaffold, in violation of 29 CFR 1926.

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1 See Rules 200-211 of the Commission's Rules of Procedure.

451(a)(4) [2], and item 1b alleges a violation of 29 CFR 1926.451(c)(12)[3] in that a scaffold 15 feet high and 48 feet long was not secured to the building.

In its posthearing brief, respondent does not contend that the violations did not exist. Rather, it contends, as previously stated, that it should not have been cited because its employees were not exposed to hazards created by its subcontractor.

The answer to this contention is found in Perini Corp., 78 OSAHRC 41/C5, 6 BNA OSHC 1609, 1978 CCH OSHD ¶22,772 (No. 13029, 1978), where the Commission held a general contractor responsible for safety violations it could prevent or abate by reason of its supervisory authority over a multi-employer workplace, regardless of whether it created the hazard or whether its own employees were exposed thereto.

Respondent points out that the Secretary's Field Operations Manual, CH. X(F)(1)(b)(1), provides:

> Citations under the general duty clause and under standards will be issued only against employers where their own employees are exposed or are potentially exposed to unsafe or unhealthful conditions.

(Emphasis supplied). The case law is well settled that the Field Operations Manual provides only guidelines for compliance officers and does not confer substantive rights on employers. Combustion Engineering, 77 OSAHRC 182/A2, 5 BNA OSHC 1943, 1979-78 CCH OSHD ¶22,241 (No. 76-2210, 1977).

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[2] This standard provides:

> Guardrails and toeboards shall be installed on all open sides and ends of platforms more than 10 feet above the ground or floor...[with exceptions not here pertinent].

[3] This standard provides, with regard to tube and coupler scaffolds:

> To prevent movement, the scaffold shall be secured to the building or structure at intervals not to exceed 30 feet horizontally and 26 feet vertically.

Respondent further contends that "the violative conditions were not obvious to the casual observer, and would require almost moment-to-moment observation if they were to be discovered." (Brief, P.5). The scaffold on which guardrails were absent was about 100 feet directly in front of respondent's office and had been in use by Davis' bricklayers two days (Tr.14-15). The scaffold involved in item 1b adjoined the other on one end but was around a corner of the building and had also been used two days by Davis' employees (Tr.32).

Compliance Officer Ambrose Claus testified that the scaffold in item 1a was in plain view (Tr.16) and that the lack of a tie to the building on the scaffold in item 1b could be detected from a distance of 20 or 25 feet by looking between the scaffold and the building (Tr.35).

In Knutson Construction Co., 76 OSAHRC 131/F3, 4 BNA OSHC 1759, 1976-77 CCH OSHD ¶21,185 (No. 765,1976), aff'd., 566 F.2d 596 (8th Cir. 1977), the Commission held a general contractor responsible for detecting the lack of guardrails on a scaffold but not for a hidden crack which caused a scaffold to collapse but which the respondent could not reasonably be expected to detect or prevent.

It is clear that under Knutson the respondent here should have been able to detect the absence of guardrails. The absence of a tie-in to the building on the other scaffold is a closer question because it was not so obvious. However, I find that it was not unreasonable to expect respondent to detect the lack of a tie to the building.

Respondent's general superintendent and safety officer, Dan Holmberg, made daily tours of the project and weekly safety inspections (Tr.92,100). He had

never noticed any safety violations on the scaffolds here involved but if he had he would have required Davis to correct them, he testified (Tr.102). However, he said he just looked for obvious violations (Tr.102). This is not sufficient.

Respondent points out (Brief, P.2) that Davis' subcontract (Exhibit R-1) required Davis to furnish all scaffolding and supervision in connection with the masonry work. The contract also required Davis to comply with OSHA regulations and made it "responsible for any costs, damages or penalties that Huber, Hunt & Nichols, Inc., may suffer or incur as a result of any violation of such regulations by the subcontractor, his agents or employees". However, it is well settled that an employer cannot by contract absolve itself of its responsibilities under the Act. Bill C. Carroll Co., Inc., 79 OSAHRC_____, 7 BNA OSHC 1806, 1979 CCH OSHD ¶23,940 (No. 76-2748, 1979).

I find the respondent in violation of both standards as charged and that these violations were serious. The compliance officer testified without contradiction that the likely result of a 15-foot fall from these scaffolds would be serious fractures (Tr.21).

There remains the assessment of an appropriate penalty, the Secretary having proposed an aggregate penalty of $360.

Section 17(j) of the Act requires the Commission, in assessing penalties, to consider the gravity of the violation and the employer's size, good faith and history of previous violations. These factors need not be accorded equal weight, but the gravity is usually of greater significance than the others. Colonial Craft Reproductions, 72 OSAHRC 11/B10, 1 BNA OSHC 1063, 1971-73 CCH OSHD ¶15,277 (No. 881,1972). Elements to be considered in determining gravity include the number of employees exposed to the risk of injury,

duration of the exposure, precautions taken against injury, and the degree of probability of occurrence of an injury. National Realty & Construction Co.,Inc., 72 OSAHRC 9/A2, 1 BNA OSHC 1049, 1971-73 CCH OSHD ¶15,188 (No. 85, 1972) rev'd on other grounds, 489 F.2d 1257 (D.C. Cir., 1973).

After considering these criteria, I find the proposed penalty of $360 appropriate.

## FINDINGS OF FACT

1. The respondent, Huber, Hunt & Nichols, Inc., is a large construction company which on April 29, 1981, was a general contractor engaged in the construction of a large building for Signetics Corporation at Albuquerque, New Mexico. It was engaged in a business affecting commerce and had employees within the meaning of §3(5) of the Act.

2. Two 15-foot-high tube and coupler scaffolds on this workplace erected and used by a subcontractor, Bob Davis Masonry, Inc., were in violation of 29 CFR 1926 §§451(a)(4) and 451(c)(12) in that one lacked guardrails on the open ends and at places left open for offloading materials and the other, which was 48 feet long, was not tied to the building.

3. It was reasonable to expect the respondent, in its supervisory capacity as general contractor, to detect these violative conditions and require them to be corrected. These conditions had existed two days prior to the inspection. The lack of guardrails was readily apparent, and the lack of a tie to the building could have been detected by a reasonably thorough safety inspection.

4. There was a substantial probability that death or serious physical injury could result from these vioaltions.

5. A penalty of $360 is appropriate.

## CONCLUSIONS OF LAW

1. The Commission has jurisdiction of the parties and of the subject matter of this proceeding.

2. On April 29, 1981, the respondent was in serious vioaltion of 29 CFR 1926 §§451(a)(4) and 451(c)(12).

## ORDER

It is ORDERED that:

1. Item 1a of citation 1, for serious violation of 29 CFR 1926.451(a)(4), is AFFIRMED.

2. Item 1b of citation 1, for serious violation of 29 CFR 1926.451(c)(12), is AFFIRMED.

3. An aggregate penalty of $360 is ASSESSED.

DEE C. BLYTHE
Administrative Law Judge

Date: November 9, 1981

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

March 31, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

BJ-HUGHES INC.

OSHRC DOCKET NO. 76-2165

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION "AND REMAND."

To wit: See attached.

FOR THE SECRETARY OF LABOR

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-

FOR THE COMMISSION

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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 76-2165 |
| BJ-HUGHES, INC., | : | |
| Respondent. | : | |
| | : | |

DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge Louis G. LaVecchia is before the Commission for review pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act" or "the OSH Act"). Judge LaVecchia affirmed a citation issued by the Secretary of Labor to Respondent, BJ-Hughes, Inc. ("Hughes"), for its failure to require an employee to use a safety belt while exposed to a falling hazard during offshore oil drilling operations. The Secretary alleged noncompliance with the construction safety standard at 29 C.F.R. § 1926.28(a).1/

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1/ The standard provides:

> § 1926.28 Personal protective equipment.
>
> (a) The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

On review, Hughes argues that the construction industry standards found in Part 1926 of 29 C.F.R. do not apply to oil drilling operations. Hughes also, for the first time, moves to dismiss for lack of subject matter jurisdiction. Hughes argues that the Coast Guard has exercised authority over safety conditions on offshore drilling rigs and that section 4(b)(1) of the Act[2/] therefore precludes the Secretary from regulating safety conditions on these drilling rigs. Hughes states that the Coast Guard has exercised authority granted by the Outer Continental Shelf Lands Act of 1953, 43 U.S.C. §§ 1331 et seq., by issuing regulations, found at 33 C.F.R. Parts 140-147, concerning safety conditions on offshore drilling rigs. The Secretary contends that Hughes was engaged in construction work but, alternatively, moves to amend the citation to allege that Hughes failed to comply with the general industry standard at 29 C.F.R. § 1910.132(a)[3/] or section 5(a)(1) of

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2/ Section 4(b)(1) of the Act, 29 U.S.C. § 653(b)(1), provides, in pertinent part:

> Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

3/ 29 C.F.R. § 1910.132(a) concerns personal protective equipment and provides:

> § 1910.132 General requirements.
>
> (a) Application. Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical

(continued on next page)

the Act[4/] in the event section 1926.28(a) is found not to apply.

We agree with Hughes that the construction industry standards do not apply to oil drilling operations. Accordingly, section 1926.28(a) is inapplicable and the parties' motions remain to be considered. We remand the case to the judge for him to consider the motions.

I

Hughes is a corporation providing cement service work to oil drilling companies.[5/] On March 20, 1976, Hughes was cementing pipe at the Nicklos Drilling Rig 30 located about twenty-five miles southeast of Galveston, Texas. An employee, the service engineer, was hoisted by an air hoist cable[6/] to the top of the casing surrounding the pipe. The

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3/ (continued)

> hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

4/ Section 5(a)(1), 29 U.S.C. § 654(a)(1), provides:

> Sec. 5(a) Each employer —
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees[.]

5/ The casings of wells are cemented to isolate the oil zone from possible contamination by water or gas. In this process, concrete is pumped down the inside and up around the outside of the casing and allowed to set. After it sets, some of the concrete is left inside the pipe until the drilling company drills the residue out as the company either completes or continues to deepen the well.

6/ The air hoist is similar to a winch in that it is bolted to the derrick floor and the cable is routed through a pulley up in the derrick. The cable is secured to a riding belt fastened by the employee around his waist and under his hips.

casing was supported by an "elevator" around which ran a one-foot wide ledge. The service engineer disengaged himself from the air hoist cable and stepped onto the ledge. He then proceeded to guide the top cementing plug into the casing while he was not secured by any line, rope, safety belt or other protective device. Shortly thereafter, pressure in the casing propelled the plug out of the casing. The plug struck the service engineer and knocked him off the ledge to the drilling rig floor fifty feet below. He died from the injuries received in this accident.

On March 24, 1976, the worksite was inspected by a United States Department of Labor compliance officer. On April 15, 1976, the Secretary issued a citation alleging that Hughes failed to comply with section 1926.28(a). Judge LaVecchia affirmed the citation.[7/] The judge concluded that section 1926.28(a) applies to oil drilling operations. He further concluded that the facts surrounding the fatal accident demonstrated that Hughes violated the cited standard.

II

Hughes filed a petition for discretionary review, which was granted by former Commissioner Barnako. In its petition, Hughes argued that section 1926.28(a) does not apply to oil drilling operations and that, if it does, the standard is not violated. Hughes further argued that

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7/ In prior proceedings in this case, Administrative Law Judge Robert N. Burchmore granted a motion by Hughes to dismiss for lack of proper service. On June 29, 1979, the Commission reversed Judge Burchmore's decision vacating the citation and remanded the case for findings of fact and conclusions of law on the merits. B.J. Hughes, Inc., 79 OSAHRC 49/E6, 7 BNA OSHC 1471, 1979 CCH OSHD ¶ 21,515 (1979). Because Judge Burchmore was no longer with the Commission, the case was assigned to Judge LaVecchia.

the only possibly applicable standard was section 1910.132(a), the general industry standard on personal protective equipment. However, Hughes argued that a violation of this standard was never charged and was not tried by consent at the hearing.

On review, the Secretary argues that section 1926.28(a) applies because Hughes' cementing work for oil drilling is construction work within the meaning of the definition of "construction work" at 29 C.F.R. § 1910.12(b).[8/] The Secretary argues that construction work is fabrication or putting parts together to form a complete and integrated object. He concludes that Hughes' cementing process is construction work since it involves the construction of a wall in the hole. The Secretary also points out that Hughes' employees work with pumps, derricks, concrete pouring equipment, and material handling equipment. Since Hughes' work involves equipment typically used in construction work, the Secretary argues that the construction standards apply.

The Secretary also argues that, if section 1926.28(a) does not apply, then section 1910.132(a) applies and requires Hughes to use safety belts to protect employees from fall hazards. The Secretary alternatively argues that he has established a violation of section 5(a)(1) of the Act.

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8/ 29 C.F.R. § 1910.12(b) provides:

> § 1910.12 Construction work.
>
> * * *
>
> (b) Definition. For purposes of this section, "construction work" means work for construction, alteration, and/or repair, including painting and decorating. . . .

The Secretary accordingly moves to amend the citation to allege violations of these provisions.[9/]

III

We have previously stated that the construction standards only apply to actual construction work or to related activities that are an integral and necessary part of construction work. Activities that could be regarded as construction work should not be so regarded when they are performed solely as part of a nonconstruction operation. Royal Logging Co., 79 OSAHRC 84/A2, 7 BNA OSHC 1744, 1979 CCH OSHD ¶ 23,914 (No. 15169, 1979), aff'd, 645 F.2d 822 (9th Cir. 1981).

As the Secretary argues, the cementing process could be regarded as construction work. However, the process is performed as an integral and indispensable part of drilling an oil well. See Royal Logging Co., supra. Therefore, even accepting the Secretary's position, the question under Royal Logging Co. is whether the entire process of drilling an oil well is construction within the meaning of section 1910.12(b), note 8 supra.

Section 1910.12(b) defines construction work as "work for construction, alteration, and/or repair, including painting and decorating." The terms in this definition are not further defined. However, the standards in Part 1926 of 29 C.F.R., which apply to construction work, indicate the

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9/ Hughes opposes the Secretary's motion to amend on the basis that the amendments are prejudicial because four years have passed since the accident. Hughes also argues that section 1910.132(a) does not include safety belts as a form of personal protective equipment. Hughes further contends that amendment to section 5(a)(1) adds new, untried issues and that this amendment is not before the Commission for review because the issue of possible noncompliance with section 5(a)(1) was not included in the direction for review.

type of work which the Secretary considered to fall within the definition. Among the standards in Part 1926 that might apply most directly to oil drilling operations are standards covering "Excavations, Trenching, and Shoring" (Subpart P), "Concrete, Concrete Forms, and Shoring" (Subpart Q), and "Tunnels and Shafts, Caissons, Cofferdams, and Compressed Air" (Subpart S). However, there are in these subparts no standards which refer specifically to oil drilling operations. Moreover, the Secretary has not pointed to any standard in Part 1926 which has specific reference to oil drilling or related activities. Thus, we conclude that the Secretary did not specifically consider oil drilling to be construction work when he promulgated the standards in Part 1926.

Moreover, we are not persuaded by the Secretary's argument that Respondent's cementing work for oil drilling operations involves equipment typically used in construction. The same can be said of work which the Secretary has not considered to be construction work. Cf. General Electric Corp., 81 OSAHRC 97/D6, 10 BNA OSHC 1144, 1981 CCH OSHD ¶ 25,736 (No. 76-2879, 1981)(citation alleging noncompliance with the general industry standard requiring a standard railing to guard open-sided floors or platforms, rather than the construction standard stating an identical requirement, where employees were performing drilling and other work on the joints of cast turbine generator shells); Allis-Chalmers Corp., 76 OSAHRC 50/F8, 4 BNA OSHC 1227, 1975-76 CCH OSHD ¶ 20,666 (No. 5210, 1976) (citation alleging noncompliance with the general industry floor or platform guarding standard, rather than the construction floor or platform guarding standard, where employees were constructing and testing power transformers). Moreover, for many of the Part 1926 standards that regulate equipment used in construction work, there are corresponding general industry standards in

Part 1910 regulating the same type of equipment.[10/] Because the Secretary has not shown that the oil drilling process constitutes construction, we conclude that section 1926.28(a) does not apply to Respondent's cement servicing operations. See United Geophysical Corp., 81 OSAHRC 77/D6, 9 BNA OSHC 2117, 1981 CCH OSHD ¶ 25,579 (No. 78-6265, 1981), appeal filed, No. 81-4342 (5th Cir. August 26, 1981).

IV

Although we conclude that section 1926.28(a) does not apply, the Secretary's motion to amend remains to be resolved. Moreover, Hughes has filed a motion to dismiss relying on section 4(b)(1) of the Act. We conclude that the parties should have the opportunity to present evidence and argument on the merits of the section 4(b)(1) issues raised in the motion. Accordingly, we remand the case for further proceedings. If the judge concludes that section 4(b)(1) does not exempt the cited working conditions from the Act, he should rule on the Secretary's motion to amend the citation to allege violations of either section 1910.132(a) or section 5(a)(1) of the Act. See Texaco, Inc., 80 OSAHRC 68/A2, 8 BNA OSHC 1677, 1980 CCH OSHD ¶ 24,574 (No. 77-2014, 1980). SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: MAR 31 1982

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10/ For example, the general industry scaffolding standards at § 1910.28 are very similar to the construction standards at § 1926.451.

Cleary, Commissioner, concurring:

I agree with my colleagues that the construction industry standards do not apply to oil drilling operations. I also agree to remand this case for consideration of Hughes' motion to dismiss based on section 4(b)(1). However, I cannot agree with the conclusory manner in which my colleagues dispose of Hughes' motion and the Secretary's motion to amend the citation.

We have previously held that section 4(b)(1) does not limit the Commission's subject matter jurisdiction, but rather provides an employer with an affirmative defense which must ordinarily be raised before the administrative law judge. Allegheny Airlines, Inc., 81 OSAHRC 37/A14, 9 BNA OSHC 1623, 1981 CCH OSHD ¶ 25,339 (No. 14291, 1981), appeal filed, No. 81-1528 (4th Cir. June 19, 1981). Only in extraordinary circumstances will the Commission address a nonjurisdictional issue that was not raised before the administrative law judge. Commission Rule 92(d), 29 C.F.R. § 2200.92(d); Willamette Iron & Steel Co., 81 OSAHRC 59/A2, 9 BNA OSHC 1900, 1905, 1981 CCH OSHD ¶ 25,427 at p. 31,700 (No. 76-1201, 1981).

In A. Prokosch & Sons Sheet Metal, Inc., 80 OSAHRC 96/A2, 8 BNA OSHC 2077, 1980 CCH OSHD ¶ 24,840 (No. 76-406, 1980), the Commission concluded that there were extraordinary circumstances within the meaning of Commission Rule 92(d) for the Commission to decide an issue not raised until review. The Commission acknowledged that it had decided two other cases in favor of employers on the basis of the issue which Prokosch sought to interject into the case for the first time on review. The Commission concluded, "The goal of uniform application of the Act therefore requires that we consider that issue as it relates to Prokosch." 8 BNA OSHC at 2079, 1980 CCH OSHD at p. 30,627.

Several Courts of Appeals have also considered the question of extraordinary circumstances justifying a party in raising an issue late in the proceedings.[1/] The 6th Circuit in RMI v. Secretary of Labor, 594 F.2d 566 (6th Cir. 1979), and the 9th Circuit in Todd Shipyards v. Secretary of Labor, 586 F.2d 683 (9th Cir. 1978), both decided that, where the employers relied upon cases that were decided after the employers had presented their arguments to the Commission, extraordinary circumstances justified consideration of the issues which were raised for the first time on appeal. In RMI v. Secretary of Labor, the court decided that, because the case on which RMI relied held that the Secretary, not the employer, had the burden of proof on the issue which RMI sought to raise on appeal, it "would be fundamentally unfair to bar RMI" from arguing on appeal an issue which RMI did not earlier know was an element of the Secretary's proof. In Todd Shipyards v. Secretary of Labor, the employer relied on the Supreme Court's decision in Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), which was decided after the employer's appeal to the court. The court expressed concern about precluding an employer from arguing a fundamental question recently addressed in a potentially controlling case.[2/]

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1/ Section 11(a) of the Act, 29 U.S.C. § 660(a), provides, in pertinent part:

> No objection that has not been urged before the Commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. . . .

2/ The Court of Appeals for the 5th Circuit in Power Plant Division, Brown & Root, Inc. v. OSAHRC, F.2d (No. 79-3677, 5th Cir., Unit B. Oct. 26, 1981), has cited these cases with approval, noting that in each the issues were permitted for the first time on appeal because the employers relied on cases decided after argument to the Commission.

In support of its section 4(b)(1) argument, Hughes relies on a decision of the Federal District Court for the Eastern District of Texas, Marshall v. Nichols, 486 F. Supp. 615 (E.D. Tex. 1980), rev'd on other grounds, 646 F.2d 190 (5th Cir. 1981), which was decided after review was directed in this case. The District Court stated that the Coast Guard, United States Geological Survey, and the Interior Department have issued regulations governing the employment relationship on offshore drilling platforms in its entirety. The court concluded that by enacting the Outer Continental Shelf Lands Act, Congress intended to exclude the working conditions on offshore drilling platforms from the coverage of the OSH Act. Accordingly, that court stated that section 4(b)(1) of the OSH Act precludes the Secretary from asserting jurisdiction over working conditions on the outer continental shelf.

If Marshall v. Nichols is correct, the working conditions in this case are entirely exempt from the coverage of the Occupational Safety and Health Act of 1970. Thus, in relying on Marshall v. Nichols, Hughes questions the Secretary's authority to apply the OSH Act to any working conditions on the outer continental shelf. The goal of uniform application of the Act requires that we address the questions raised by Hughes. Accordingly, I agree with the majority in remanding this case.

Since both parties' motions to amend their pleadings were made on review for the first time and I would find extraordinary circumstances justifying consideration of Hughes' motion, considerations of fairness require that the Secretary's motion to amend also be addressed. Therefore, I agree with my colleagues' directions to the judge for consideration of this motion.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, Complainant, | : | |
| v. | : | OSHRC Docket No. 76-2165 |
| B. J. HUGHES, INC., Respondent. | : | |

APPEARANCES:

Allen L. Prince, Esquire, for the Complainant.

Clinton S. Morse, Esquire, for the Respondent.

DECISION AND ORDER ON REMAND

Louis G. LaVecchia, Judge

This is a proceeding under section 10(c) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 751, et seq.). The Review Commission, by order dated June 29, 1979, remanded the case to the undersigned for findings of fact and conclusions of law on the merits, after reviewing the decision of a judge since retired from the Commission. The merits had not been reached in the prior decision.

By citation issued on April 15, 1976 complainant charged that respondent committed a serious violation of section 5(a)(2) of the Act for failure to comply with the standard at 29 CFR 1926.28(a).

The standard provides:

> "(a) The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees."

## The Facts

Respondent is a wholly owned subsidiary of Hughes Tool Company and engages in a number of enterprises including the servicing of drilling rigs and wells throughout the United States. (Tr. 14). It employed about 1,237 individuals, primarily involved in providing cement service work to oil drilling companies. (Tr. 14-15). Service employees are assigned to particular stations under the charge of a district superintendent. (Tr. 20). After receiving a work request dispatchers at each station assign a work crew to proceed to the well site to accomplish the job. (Tr. 22-23). Crews travel to off-shore drilling rigs via helicopter or crew boats provided by the drilling contractors or rig operators. (Tr. 23-24).

Each work crew is under the direction of a company service engineer who is responsible for performing the job satisfactorily. (Tr. 18). This individual is also responsible for on-the-job enforcement of the respondent's safety rules. (Tr. 25).

Since at least 1967 the company employee handbook and safety manual has contained a rule requiring that safety belts be worn whenever work was being performed at a height in excess of 10 feet from the ground. (Tr. 79, Ex. R2, R3, R5).

Ordinarily, in off-shore operations, a crew of two employees consisting of a Service Engineer and an assistant is used. The Service Engineer is charged with the satisfactory performance of the required work, as well as the accomplishment of the job in a safe manner. (Tr. 18).

On March 20, 1976, respondent's employee, Bobby Ray Bobbitt, was the service engineer in charge of a cementing operation being performed at Nicklos Drilling Rig No. 30, about 25 miles southeast of Galveston, Texas, when he fell from a derrick to the rig floor about 50 feet below. (Tr. 26-28). He had been raised to the top of a casing surrounding the drill pipe. The casing was supported by objects termed "elevators." The elevators were surrounded by a 1-foot wide ledge. Bobbitt disengaged himself from the line that secured him to the derrick, and stood on the ledge, free of any protective lines, ropes, or other type of safety equipment. (Tr. 32). Casing elevators are about 3 or 4 feet in diameter. (Tr. 30). Bobbitt used the line attached to the air hoist (derrick) to secure the cap at the top of the casing; then he removed the cap; and the cap was then moved to the casing elevators by the operator of the derrick. (Tr. 31). The line was then undone by Bobbitt and sent to the floor of the rig. (Tr. 31). The operator below assumed that Bobbitt was holding onto a valve supporting the elevator. (Tr. 32). He had no lanyard attached to his safety belt. (Tr. 34). The derrick operator was of the opinion that a lanyard (line) could have been tied around the casing valves by Bobbitt. (Tr. 34). The operator had seen the cementing operation done on previous occasions, and

at times the individuals performing the cementing operation at the top of the casing had tied themselves off with a lanyard attached to a safety belt. On other occasions the persons so engaged had not tied themselves off in that manner. (Tr. 34-35). A second air hoist (derrick) was available for use at the time, but was not requested by Bobbitt. (Tr. 33). The air hoist belt was not a safety belt in the usual sense of the word. It was more like a boatswain's chair, strapping around the hips, and was the property of the drilling company, not the respondent. (Tr. 41). An employee of respondent engaged in the same type of cementing operation on drill rigs, and with 15 years' experience in drilling operations, had seen cementing operations conducted by others. In some instances, the employees removed themselves from the derrick straps in the manner that Bobbitt did, and in other instances they worked with the straps on. (Tr. 40). He had never seen such employees using safety belts until after the death of Bobbitt. (Tr. 42). There was a rule that the safety belts be used, but it had not been enforced prior to the accident. (Tr. 42). After the fatal accident the rule was enforced, requiring employees performing similar operations to use a safety belt and lanyard, and to tie off. Although the line may get in the way of the worker, it does not prevent the job from being done. (Tr. 43).

The safety handbook distributed by respondent to its employees requires that safety belts be worn with an attached safety line any time an employee is working more than 10 feet above the floor. (Tr. 44; Ex.R3, "On the Job" rule 9.) Safety meetings were held at respondent's district

offices once a month, and now are held every two weeks. (Tr. 45). The company did not provide safety belts at jobsites before the fatal accident, but afterwards all units and all offshore rigs were provided such equipment. (Tr. 48). Another of respondent's employees, engaged in the same occupation as the deceased employee, i.e., Service Engineer,[1/] for 10 years with respondent, indicated that he had never had or used a safety belt prior to the accident. (Tr. 51). He stated that in performing cementing operations at heights, the air hoist line was sent down to the working surface for picking up and returning above the necessary materials. He would stand on the elevators, although the portion stood upon was not meant for that purpose. (Tr. 52). There was nothing to prevent a free fall from the elevator lips (protrusions). (Tr. 53). He now performs such work with the safety belt and line attached, without significant inconvenience. (Tr. 53). At company safety meetings the use of safety belts was generally discussed. (Tr. 56). After the fatality, and upon advising the company representative that he had no safety belt, one was provided for him. (Tr. 57). It was a new one. (Tr. 57). He knew of employees being reprimanded for not wearing hard hats on the job, but had not heard of anyone being reprimanded for not wearing a safety belt. (Tr. 62).

Respondent's safety director of 10 years stated that he recalled one previous accident involving a worker falling from a derrick when he failed

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1/ This appears to be a title used by respondent for want of a better description of the employee's duties. It is noted that Bobbitt was a high-school graduate. (Ex. R-1).

to use a safety belt and lanyard. He sustained broken bones, but recovered from his injuries. (Tr. 81).

## Discussion and Conclusions

The respondent challenges the applicability of 29 CFR 1926.28(a) to the alleged violation on the theory that this standard is one of the regulations adopted for controlling the construction industry, and that the operations here involved should not be construed to be construction work. I would agree that drilling for oil or gas is not a construction enterprise. However, 29 CFR 1910.5(c) provides that "any standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for the industry, * * * to the extent that none of such particular standards applies..." Accordingly, I find that 29 CFR 1926.28(a) applies to oil and gas drilling operations similar to those here considered.

As to the substantive violation, assuming the applicability of the challenged standard, the respondent argues that either a safety belt, a shoulder strap belt, or a riding belt effectively prevents an employee from suffering an accidental fall. It is suggested that Bobbitt, who wore a riding belt when lifted to the point from which he fell, violated company policy when he disconnected the lanyard from his riding belt. And it is further argued that in the exercise of reasonable diligence the respondent could not have known of the violation of the safety standard.

The respondent submits that when a violation results from the misconduct of a supervisor or foreman (Bobbitt) the foreman's knowledge cannot be imputed to the employer to establish knowledge, actual or implied, of the violation, citing Horne v. OSHRC, 528 F.2d 564 (5th Cir. 1976), 1975-76 CCH OSHD para. 20,504. But in that case the employer had done everything possible to insure that his safety program was carried out. That was not the case here. The evidence shows quite clearly that employees performing the same operation as Bobbitt commonly worked without a safety belt. Although the company's safety manual prescribed the use of safety belts when working more than 10 feet above a floor, the rule was not enforced. The company's laxity in this respect was well known among its employees. A similar accident had happened in the past, serving notice upon respondent that its safety program needed tightening up, but no such action had been taken. No disciplinary action appears to have been taken against respondent's employees for infractions of the rule concerning safety belts. The fact that Bobbitt was a foreman does not exonerate respondent in the circumstances shown here. In Floyd S. Pike Elec. Contr. v. OSHRC and the Dept. of Labor, 576 F.2d 72 (5th Cir. 1978), 1978 CCH OSHD para. 22,855, the court cited with approval the following language from National Realty v. OSAHRC, 489 F.2d 1257:

> Because the behavior of supervisory personnel sets an example at the workplace, an employer has--if anything--a heightened duty to ensure the proper conduct of such personnel. Second, the fact that a foreman would feel free to breach a company safety policy is strong evidence that implementation of the policy was lax.

I can only conclude that respondent violated the safety standard set forth at 29 CFR 1926.28(a)

The violation charged was properly categorized as "serious" within the meaning of section 17(k) of the Act (29 U.S.C. sec. 666(j)), in view of the death of respondent's employee from the accident, and in the light of my conclusion that respondent had the requisite knowledge of the presence of the violation.

Considering the proposed penalty under section 17(j) of the Act (29 U.S.C. sec. 666(i)) leads me to conclude that the $550 penalty proposed for this serious violation strikes a reasonable balancing of the factors.

## Findings of Fact

The evidence of record having been considered and evaluated in its entirety, the following facts are specifically found:

1. Respondent maintains an enterprise for the servicing of drilling rigs and wells throughout the United States.

2. Respondent operates in interstate commerce.

3. On March 20, 1976 one of respondent's employees was killed when he fell from a derrick to a rig floor about 50 feet below while not wearing a safety belt and lanyard.

3. The deceased employee had disengaged himself from a safety chair attached to the derrick in order that the device be used for raising required equipment from the floor of the rig to the point at which the employee was working.

4. The safety chair or sling was not the property of respondent, but belonged to the drilling company.

5. The deceased employee was not wearing a safety belt and lanyard provided by the respondent.

6. Although the respondent had a safety rule requiring the use of a safety belt when its employees were working more than 10 feet above a floor, the rule was generally ignored by its employees.

7. The respondent knew or in the exercise of reasonable diligence should have known of the violation of its rule requiring the use of safety belts.

8. The respondent's safety training program was essentially ineffective, and disciplinary measures against employees violating the safety rules were not implemented in a manner to achieve compliance.

9. There had been at least one other accident similar to that which occurred on March 20, 1976, and the respondent was aware of it.

10. The deceased employee's misconduct was imputable to the respondent in the circumstances shown.

## Conclusions of Law

1. At all times material hereto respondent was an employer within the meaning of section 3(5) of the Act, engaged in a business affecting commerce, and having employees.

2. The Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter herein.

3. The citation, the notification of proposed penalty, and the notice of contest were served by and upon the respective parties in

accordance with section 10 of the Act.

4. The respondent violated the safety standard set forth at 29 CFR 1926.28(a).

5. The violation was "serious" within the meaning of the Act.

6. The penalty assessed below is reasonable and appropriate in light of the criteria shown in section 17(j) of the Act (29 USC sec. 666(i)).

ORDER

Upon the basis of the foregoing findings of fact, conclusions of law, and the record as a whole, it is ORDERED that:

1. The citation is AFFIRMED.

2. A civil penalty of $550 is assessed.

Louis G. LaVecchia
Judge, OSHRC

Dated: September 12, 1979

Dallas, Texas

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

March 31, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

BORTON, INC.

OSHRC DOCKET NO. 77-2115

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

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-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

David G. Oringer
Judge, OSHRC
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Rev. 10/1/76

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>BORTON, INC.,<br><br>Respondent. | OSHRC Docket No. 77-2115 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge David G. Oringer is before the Commission for review pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Judge Oringer vacated one item of a serious citation issued to Respondent Borton, Inc. ("Borton"), that alleged a failure to comply with the standard contained at 29 C.F.R. § 1926.451(a)(13). Section 1926.451 is entitled "scaffolding" and provides in subsection (a)(13) that "[a]n access ladder or equivalent safe access shall be provided." The Secretary of Labor ("the Secretary") petitioned for review of the judge's decision. Commissioner Cottine granted the Secretary's petition. Pursuant to the direction of Commissioner Cottine, review was to be limited to the following issue:

> Whether the Respondent established an affirmative defense by showing that the employee's failure to use the provided access ladder constituted unpreventable employee misconduct.

I

Borton is a contractor involved in the construction of grain silos or tanks. During the construction of a silo at the Tensas Port Elevator in St. Joseph,

Louisiana, one of Borton's employees, Calvin Williams, fell to his death. At the time, Borton's employees were in the process of removing forms near the top of the inside of the silo. In order to accomplish this task, one of the employees had been assigned to install a scaffold within the tank. The completed scaffold was located approximately seven feet from the top of the silo and approximately 123 feet above the floor of the structure. Employees gained access to the scaffold through a hatch at the top of the silo.

Prior to his fall, Williams was on top of the silo waiting for a co-worker to complete the scaffold. He was equipped with a safety belt and had tied off his safety lanyard at a point approximately seven feet from the access hatch. When his co-worker completed the scaffold and emerged from the silo, Williams proceeded to the hatch. Although Williams was not seen entering the silo, it is undisputed that he did not use a ladder to descend to the scaffold. It appears that he descended to the scaffold either by lowering himself with his safety lanyard or by supporting himself in the hatch opening and dropping to the scaffold. When Williams landed on the scaffold, one of the scaffold planks broke, and he fell through the scaffold to the floor of the silo, 123 feet below, suffering fatal injuries. 1/

John L. Benton, a deputy sheriff in the Tensas Parish sheriff's office, arrived at the accident scene about fifteen minutes after the accident occurred and conducted an investigation. He was told by Ray Powell, Williams' foreman, who had been on top of the silo when Williams entered the hatch, that Williams previously had been reprimanded several times for failing to use a ladder when

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1/ During the fall, Williams' safety lanyard, which was about 36 feet long, broke. Following an investigation, the Secretary cited Borton for a violation of the standard set forth at 29 C.F.R. § 1926.104(d). The standard requires, in pertinent part, that the maximum length of a safety belt lanyard shall permit a fall of no greater than 6 feet. Before Judge Oringer, Borton argued that Williams' use of an excessively long safety lanyard was in violation of Borton's work rule, which limited the length of a lanyard to 20 feet. The judge rejected this argument and found Borton in serious violation of § 1926.104(d). Borton did not petition for review of this aspect of the judge's decision, and review was not directed on this issue.

entering silos. 2/

Donald Billmeier, Borton's superintendent at the worksite, testified that the employees "were supposed to use a ladder" to gain access to the scaffold and that Williams' failure to do so was contrary to this rule. When asked how else employees could reach the scaffold, he replied: "We usually let them down. They can let theirselves down." He then denied that this was the method ordinarily used by employees. As to the method used to return from the scaffold to the silo roof, Billmeier explained: "[M]y procedure is to make them use a ladder, but sometimes they lift each other out." According to Billmeier, if employees fail to use a ladder, "[We] just raise hell with them and tell them either to use it...or hit the road." Billmeier was not aware that Williams had been reprimanded for violations of Borton's work rule requiring the use of ladders, nor was Billmeier present on the top of the silo on the day of the accident.

Borton's safety director, Joe Keating, inspected the work site on the day after Williams fell. According to Keating, he observed an aluminum ladder on top of an adjacent silo approximately 25 to 30 feet from the silo where Williams fell. Keating testified that Borton's instruction to employees working from completed scaffolds inside silos was to use a ladder when entering the silo. In addition, he testified that it was not possible to use ladders when constructing scaffolds because there was no stable place to locate the ladder. Employees who failed to follow instructions were reprimanded or discharged. Keating noted that, in view of the job superintendent's other duties, enforcement of safety rules was partially delegated to the foremen at the worksite. Keating was unaware that Williams had been reprimanded for past failures to use a ladder when entering a silo. Keating

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2/ Foreman Powell and two other persons who worked on the top of the silo on the day of the accident were subpoenaed by the Secretary but failed to appear at the hearing. At the time of the hearing, seven-and-a-half months after the accident, Powell was no longer employed by Borton and his whereabouts was unknown.

also stated that he required regular safety meetings, but did not specify who attended the meetings or whether the work rule concerning use of ladders was discussed at these meetings.

II

Judge Oringer found that Borton met the standard's requirement of providing a ladder at the silo. The judge further reasoned that, in addition to providing a ladder, an employer "should attempt to insure that the ladder is used by the employees for the purpose intended." In this regard, the judge found that Borton instructed employees to use ladders and disciplined noncomplying employees. The judge further found that Williams was an experienced employee and that, in view of his experience, Borton was not required to provide "one to one supervision" to ensure that he used the ladder which had been provided. Judge Oringer therefore vacated the part of the citation alleging a serious violation of section 1926.451(a)(13).

III

On review the Secretary argues that Borton's affirmative defense should be rejected and that the judge's decision should be reversed since Borton failed to ensure, through the application of effective disciplinary measures, that its employees used the provided ladder. The Secretary contends that, in view of Williams' history of noncompliance with Borton's work rules, more effective discipline and closer supervision were required to promote compliance.

Borton did not address the issue of its affirmative defense of unpreventable employee misconduct in its brief on review. Instead, Borton contends that the judge's decision should be affirmed since a ladder was provided at the worksite on the day of the accident. According to Borton, section 1926.451(a)(13) by its terms requires that a ladder be "provided" and does not require an employer to ensure use of ladders. Borton further submits that this matter is controlled by the Tenth Circuit's decision in Usery v. Kennecott Copper Corp., 577 F.2d 1113

(10th Cir. 1977), in which the court, interpreting an identically-worded general industry standard set forth at 29 C.F.R. § 1910.28(a)(12), held that an employer must provide, but need not ensure use of, ladders in order to comply with the standard.

IV

Following the issuance of the judge's decision, the Commission held in Ray Boyd Plaster & Tile, Inc., 78 OSAHRC 47/D8, 6 BNA OSHC 1648, 1978 CCH OSHD ¶ 22,794 (No. 76-814, 1978) ("Ray Boyd"), that the standard at section 1926.451(a)(13) requires that ladders must be used, not merely supplied. In that decision, Commissioner Cleary reasoned that a standard that requires an employer to provide a safety device implicity requires the device to be used. We adhere to the holding of Ray Boyd and adopt Commissioner Cleary's rationale. 3/

The Occupational Safety and Health Act was enacted to "assure so far as possible every working man and woman in the nation safe and healthful working conditions." 29 U.S.C. § 651(b). In keeping with its broad remedial purpose, the terms of the Act and regulations promulgated under it are to be construed liberally. Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980); Bristol Steel & Iron Works, Inc. v. OSHRC, 601 F.2d 717 (4th Cir. 1979); Brennan v. OSHRC (Gerosa, Inc.), 491 F.2d 1340, (2d Cir. 1974). The objective of the standard contained at section 1926.451(a)(13) is to provide employees with safe access to scaffolding by means of a ladder or equivalent device. This objective cannot be achieved if an employer

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3/ In Ray Boyd former Commissioner Barnako also concluded that a use requirement was implicit in § 1926.451(a)(13), but for a different reason. In his view, the standard contained at § 1926.451(a)(13) must be read together with § 1926.450(a)(1), which states: "Except where either permanent or temporary stairways or suitable ramps or runways are provided, ladders described in this subpart shall be used to give safe access to all elevations." (emphasis added) He thus found a "use" requirement to be implicit in § 1926.451(a)(13). Commissioner Cottine agrees that § 1926.450(a)(1) constitutes an additional basis for his conclusion that § 1926.451(a)(13) requires use of an access ladder or equivalent safe access.

is required merely to provide a ladder that may or may not be used by employees to gain access to scaffolding. Final responsibility for occupational safety and health rests with the employer. To read this standard narrowly to require employers to provide a ladder or an equivalent device, but not to require that employers ensure use of such equipment, would improperly shift responsibility for occupational safety and health from the employer to the employee. See Hillsdale Lumber & Manufacturing, Inc., 77 OSAHRC 54/D2, 5 BNA OSHC 1281, 1977-78 CCH OSHD ¶ 21,766 (No. 5815, 1977) (Cleary, dissenting). Accordingly, under section 1926.451(a)(13), an employer must not only provide but also ensure the use of an "access ladder or equivalent safe access" when employees seek to gain access to scaffolding.

We do not agree with Borton's contention that the court of appeals' decision in Usery v. Kennecott Copper Corp., supra ("Kennecott"), controls this case. In Kennecott, the Tenth Circuit affirmed the decision of a divided Commission that the general industry standard contained at 29 C.F.R. § 1910.28(a)(12) did not impose a use requirement. Commissioner Cleary dissented in that case. There, as here, he reasoned that a standard that requires an employer to provide a safety device implicitly requires that the device be used. Kennecott Copper Corp., 76 OSAHRC 81/A2, 4 BNA OSHC 1400, 1976-77 CCH OSHD ¶ 20,860 (No. 5958, 1976) (Cleary, dissenting). As indicated above, we agree with this view. We no longer adhere to the Commission's decision in Kennecott and decline to follow the view of the Tenth Circuit in that case because those decisions failed to construe the word "provide" broadly and remedially in accordance with the purpose of the Act. 4/ See Brennan v. OSHRC (Gerosa, Inc.), supra.

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4/ We also note that the general industry standards contained no counterpart to § 1926.450(a)(1), and Kennecott is therefore distinguishable from this case, which concerns construction industry standards.

We agree with the judge's finding that Borton provided a ladder at the worksite in question. However, based on the uncontroverted evidence that Williams did not use a ladder to gain access to the scaffold, we find that a violation of the standard at § 1926.451(a)(13) was established. Additionally, we do not find that Williams' failure to use the ladder constituted unpreventable employee misconduct.

In order to defend successfully against a citation on the grounds that a violation of the Act arose from unpreventable employee misconduct, an employer must establish that the action of its employee was a departure from a uniformly and effectively communicated and enforced work rule. H. B. Zachry Co., 80 OSAHRC 9/D8, 7 BNA OSHC 2202, 1980 CCH OSHD ¶24,196 (No. 76-1393, 1980), aff'd, 638 F.2d 812 (5th Cir. 1981).

Although Borton adopted a work rule intended to prevent the violation in question, the rule apparently was not in writing and it is unclear if the rule was effectively communicated to employees. Moreover, Williams violated this rule several times and Borton took no action beyond oral reprimands to compel compliance. Additionally, although Billmeier and Keating testified that employees who violated work rules were reprimanded or discharged, there was no evidence of these measures being taken in any specific instance other than the reprimands given to Williams. As the Commission stated in B. G. Maintenance Management, Inc., 76 OSAHRC 60/A2, 4 BNA OSHC 1282, 1284, 1976-77 CCH OSHD ¶20,744 at p. 24,881 (No. 4713, 1976), an employer must make "a diligent effort to discourage, by discipline if necessary, violations of safety rules by employees." Moreover, Billmeier testified that employees sometimes did not use a ladder to move from the scaffold to the silo roof. Additionally, his testimony concerning whether employees used ladders to reach scaffolds in silos was equivocal. Thus, it appears that employees did not uniformly use ladders when rules required them to do so. We therefore agree with the Secretary that Borton's work rule requiring use of ladders was not effectively

enforced. Daniel International Corp., Brown & Williamson Project, 81 OSAHRC 57/A2, 9 BNA OSHC 1980, 1981 CCH OSHD ¶ 25,492 (No. 15690, 1981) pet. for review docketed, No. 81-7602 (5th Cir. July 21, 1981).

We also disagree with the judge's conclusion that Borton was not required to closely supervise Williams because he was an experienced employee. We find no evidence that Williams was experienced. In any event, the fact that an employee is experienced does not relieve an employer from responsibility for affirmatively enforcing its safety rules. Cornell & Co., 77 OSAHRC 164/F5, 5 BNA OSHC 1736, 1977-78 CCH OSHD ¶22,095 (No. 8721, 1977); Taylor Building Associates, 77 OSAHRC 27/A10, 5 BNA OSHC 1083, 1977-78 CCH OSHD 21,592 (No. 3735, 1977). The level of supervision that an employer must provide must be determined by the facts in each case. Lebanon Lumber Co., 73 OSAHRC 10/A2, 1 BNA OSHC 1165, 1971-73 CCH OSHD ¶15,530 (No. 184, 1973). On the day of his fall, Williams violated Borton's workrules not only by entering the silo without using a ladder but also by wearing an excessively long safety lanyard. 5/ Moreover, according to superintendent Billmeier, employees sometimes failed to use a ladder when moving from the scaffold to the silo roof. This lax supervision of safety matters buttresses our conclusion that Borton's workrules were not effectively enforced.

In view of Borton's failure to show that it adequately enforced its safety rules through effective discipline and supervision, we conclude that Borton has failed to establish its affirmative defense of unpreventable employee misconduct and that a violation of section 1926.451(a)(13) must be affirmed.

We further conclude that the Secretary properly characterized the violation

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5/ Although not before us on review, Borton's violation of § 1926.104(d) is relevant to the effectiveness of Borton's safety program. See Jensen Constr. Co., 79 OSAHRC 49/D3, 7 BNA OSHC 1477, 1479 n. 5, 1979 CCH OSHC ¶23,664 at p. 28,695 n. 5 (No. 76-1538, 1979).

in question as serious within the meaning of section 17(k) of the Act. 6/ A fall of approximately 123 feet obviously could and, in this case, did result in an employee's death. Before his fall, Williams had been reprimanded several times for failing to observe Borton's work rule requiring employees to use a ladder when entering a silo. Borton's superintendent also acknowledged that employees sometimes failed to use ladders when emerging from interior scaffolds to gain access to the silo roof. In view of these facts, we find that Borton knew or, with the exercise of reasonable diligence, could have known of its employee's practice of noncompliance with this workrule. Niagara Mohawk Power Corp., 79 OSAHRC 36/A2, 7 BNA OSHC 1447, 1979 CCH OSHD ¶23,670 (No. 76-2414, 1979). Accordingly, we conclude that Borton's violation of section 1926.451(a)(15) was serious.

V

The Secretary proposed a $350 penalty for Borton's violation of the cited standard. We now turn to section 17(j) of the Act to determine an appropriate penalty. 7/ In view of the resulting fatality of Borton's employee, the gravity of the violation is high. Borton exhibited some good faith by conducting safety

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6/ Section 17(k), 29 U.S.C. § 666(j), provides:

> For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

7/ Section 17(j), 29 U.S.C. § 666(i), provides:

> The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

meetings and establishing work rules, and there is no evidence that Borton has been cited for prior violations of the Act. In balance, we conclude that the proposed penalty of $350 is appropriate.

Accordingly, we reverse the judge's decision and affirm a serious violation of the Act for Borton's violation of the standard contained at section 1926.451 (a)(13). A $350 penalty is assessed.

SO ORDERED.

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: MAR 31 1982

ROWLAND, Chairman, dissenting:

I dissent from the majority's conclusion that Borton failed to comply with 29 C.F.R. § 1926.451(a)(13) because its employees did not use a ladder for access to the scaffold. In my view, the standard by its plain terms imposes only the obligation that the employer provide a ladder or other means of access to a scaffold. I would not follow Ray Boyd Plaster & Tile, Inc., 78 OSAHRC 47/D8, 6 BNA OSHC 1648, 1978 CCH OSHD ¶ 22,794 (No. 76-814, 1978), in which the Commission held to the contrary, for I find that case wrongly decided. Since there is no dispute that Borton in fact provided an access ladder to the scaffold in question, it is in compliance with the requirements of section 1926.451(a)(13).

In this case the majority adopts the view previously expressed individually by Commissioner Cleary in Ray Boyd, supra, that the term "provided" as it appears in section 1926.451(a)(13) implicitly requires that ladders be used as well. Commissioner Cottine also interprets this standard to impose a use requirement for the reason stated by former Commissioner Barnako. That is, Commissioner Cottine additionally concludes that section 1926.451(a)(13) must be read together with section 1926.450(a)(1), which requires that ladders "be used" to give safe access to "elevations." 8/ I disagree with both the majority's interpretation of the term "provided" and Commissioner Cottine's view that sections 1926.451(a)(13) and 1926.450(a)(1) are to be read together.

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8/ I note, however, that it is not entirely clear from the majority opinion whether former Commissioner Barnako's view is adopted only by Commissioner Cottine. Although only Commissioner Cottine expressly agrees with former Commissioner Barnako's view that sections 1926.451(a)(13) and 1926.450(a)(1) are to be read together, both Commissioner Cleary and Commissioner Cottine would distinguish Usery v. Kennecott Copper Corp., 577 F.2d 1113 (10th Cir. 1977), on the basis that no equivalent to section 1926.450(a)(1) existed in the standards at issue in that case. To this extent, therefore, it appears that the majority considers the requirements of section 1926.450(a)(1) to be relevant in the disposition of this case.

(Continued)

Regardless of whether, as the majority asserts, standards are to be construed liberally to effectuate the purposes of the Act, it is equally true that the purposes of the Act are not served unless employers have fair notice of their obligations under the standards. Therefore, a standard cannot be construed to mean what the promulgating agency may have intended but did not adequately express. 9/ Bethlehem Steel Corp. v. OSHRC, 573 F.2d 157 (3rd Cir. 1978); Usery v. Kennecott Copper Corp., 577 F.2d 1113 (10th Cir. 1977); Diamond Roofing Co. v. OSHRC, 528 F.2d 645 (5th Cir. 1976). See the discussion in Bethlehem Steel, supra:

> The purpose of OSHA standards is to improve the safety conditions in the working place, by telling employers just what they are required to do in order to prevent or minimize danger to employees. In an adjudicatory proceeding, the Commission should not strain the plain and natural meaning of words in a standard . . . . The responsibility to promulgate clear and unambiguous standards is upon the Secretary.
>
> 573 F.2d at 161.

---

8/ (Continued)

As explained infra, I do not agree that it is appropriate in this case to refer to section 1926.450(a)(1) in interpreting the meaning of section 1926.451(a)(13). Therefore, I do not join in the majority's conclusion that Kennecott Copper, supra, is distinguishable.

9/ Furthermore, none of the authorities cited by the majority in support of the proposition that the Act and the standards are to be liberally construed apply that rule of construction to interpret a standard in a manner contrary to its plain meaning. Indeed, neither Whirlpool Corp. v. Marshall, 455 U.S. 1 (1980), nor Bristol Steel & Iron Works, Inc. v. OSHRC, 601 F.2d 717 (4th Cir. 1979), are even relevant to the issue of interpretation presented in this case. In the former case, the Supreme Court was asked to consider whether a regulation permitting employees to refuse to work under certain conditions was within the Secretary's authority under the Act. In the latter case, the question was whether a general standard requiring that employees be protected from hazards was applicable to employers engaged in steel erection in view of the specific safety standreds promulgated by the Secretary for the industry. Only the court in Brennan v. OSHRC (Gerosa, Inc.), 491 F.2d 1340 (2d Cir. 1974) considered the

(Continued)

As the court properly noted in Kennecott Copper, supra, the word "provide" is not ambiguous. Rather, the term has a plain meaning; it is commonly understood to mean "furnish," "supply," or "make available." The term is not normally understood to refer to "use" as a separate and distinct obligation, nor does its dictionary definition state any such connotation. 10/ Therefore, while a reasonable employer would recognize an obligation under section 1926.451(a)(13) to make a ladder or other means of access available for use by employees, he would not interpret the standard to impose any further requirement.

Similarly, an employer cannot reasonably be expected to refer to other standards to apply to "provide" a meaning contrary to that term as commonly understood. 11/ Admittedly, standards written in broad terms

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9/ (Continued)

meaning of a particular term as used in a standard. The issue before the court was the proper interpretation of a standard requiring that the employer "designate" an inspector for cranes and derricks. Although the court noted as a general principle that regulations must be construed so as to effectuate congressional objectives, it relied in part on a conclusion that the ordinary meaning of the term "designate" was consistent with the interpretation the Secretary sought to apply.

10/ Webster's Third New International Dictionary (1971) lists the following definitions for "provide": To take precautionary measures, make provision; to supply what is needed for sustenance or support; to fit out or fit up, equip; to supply for use. "Supply" and "furnish" are listed as synonyms.

11/ Commissioner Barnako's opinion to the contrary in Ray Boyd, supra, also relied in part on Turnbull Millwork Co., 77 OSAHRC 205/C8, 6 BNA OSHC 1148, 1977-78 CCH OSHD ¶ 22,388 (No. 15047, 1977). That case, however, is inapposite since it involved the question whether under a woodworking machine standard the use of combs or jigs was required by the language "[c]ombs (featherboards) or suitable jigs shall be provided . . . for use when a standard guard cannot be used. . . ." The Commission held that a use requirement was imposed since the standard intended by its plain wording that there be no gap in employee protection when standard guards cannot be used. The question in this case, however, is whether a standard which does not at all mention use may have a use requirement read in from a totally different standard.

which would otherwise be vague may be limited in scope by reference to other relevant standards. Modern Automotive Service, 74 OSAHRC 9/A11, 1 BNA OSHC 1544, 1973-74 CCH OSHD ¶ 17,369 (No. 1541, 1974). See H.E. Wiese, Inc., No. 78-204 (March 31, 1982) (dissenting opinion). However, there is no authority for the proposition that standards written in specific terms which are clear on their face must be interpreted in this manner. 12/ Rather, the use of obviously different terminology within the Secretary's standards is evidence of an intentional differentiation. See Lankford v. LEAA, 620 F.2d 35 (4th Cir. 1980); United States v. Wong Kim Bo, 472 F.2d 720 (5th Cir. 1972). Indeed, the plain distinction between "provided" and "used" is supported by other standards which are expressly directed to the matter of employee use of equipment furnished by the employer. These standards demonstrate that when the Secretary intends to require that employees use such equipment, he consistently employs language which explicitly states that intention.

For example, section 1926.28(a), which is entitled "personal protective equipment," specifically states that the employer must require employees to use such equipment: "The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees." Other standards which do not expressly impose a duty on the employer to require certain conduct by employees nevertheless use language indicating that

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12/ In H.E. Wiese, Inc., No. 78-204 (March 31, 1982) I stated my view that in determining the meaning of the phrase "equivalent safe access" as used in section 1926.451(a)(13) it is appropriate to look to the specifications for ladders set forth in section 1926.450. That conclusion, however, was based on the premise that otherwise the term "equivalent safe access" could be vague. As explained supra, it is not necessary to refer to other standards in order to define "provided" since the meaning of that term is clear on its face.

the standards are directed to employee conduct. Section 1926.451(i)(8) uses the term "permitted" with reference to the number of employees who may work on a suspension scaffold at any one time. This standard also addresses the employer's duty in terms of a specific level of employee safety which must be achieved: "[e]ach employee shall be protected by an approved safety life belt attached to a lifeline." Clearly, the Secretary has deliberately differentiated those situations in which employers need only provide equipment from those situations in which an additional duty with respect to the actions of employees is imposed on the employer.

On the other hand, it is equally plain that the standards imposing an additional obligation on the employer beyond merely the provision of safety equipment are written in general terms which do not precisely delineate the scope of the employer's duty. The Act, however, does not make an employer the insurer of his employees' safety. Kennecott Copper, supra, 577 F.2d at 1118 (citing cases). As the Second Circuit has observed in discussing the breadth of a general industry standard, section 1910.133(a)(1), which states that eye and face protection "shall be required" and that employees "shall use" such equipment, "[i]f employers are to be held to an obligation requiring something more than instructing employees to use protective equipment but something less than guaranteeing use, the promulgation of a standard fleshing out the employer's obligation would provide useful guidance to employers, the Commission, and reviewing courts." General Electric Co. v. OSHRC, 540 F.2d 67, 69 (2d Cir. 1976).

I share the concern of the Second Circuit that the extent of the efforts employers must make to insure that employees use safety equipment be clearly expressed. Therefore, while I am not unmindful of the serious safety hazard existing on the facts of this case, I cannot conclude that Borton did not satisfy its duty to its employees absent evidence to show that Borton failed

to take the appropriate steps to protect its employees from the hazard. Although I believe that Borton complied with the strict terms of section 1926.451(a)(13) by merely furnishing a ladder for its employees to use, I note that Borton also instituted a work rule requiring that employees use the ladder and attempted to enforce this rule by reprimanding or discharging employees. Even if the term "provided" in section 1926.451(a)(13) may properly be interpreted, as the majority concludes, to refer to employee use of a ladder as well as to its availability, the standard would not give notice that Borton needed to make any further efforts to insure that its employees used the ladder which it provided. Therefore, I cannot join in the majority's conclusion that Borton failed to enforce its work rule "effectively" since the evidence presented regarding the adequacy of Borton's safety program shows only that Borton has not been able to prevent every instance of employee noncompliance with the work rule. 10/ Neither the Act nor the standard as interpreted by the majority can properly be said to impose such a stringent obligation on the employer.

Since I would find Borton's conduct reasonable in the circumstances regardless of how section 1926.451(a)(13) is interpreted, I would vacate the citation alleging a violation of that standard.

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10/ For the same reason, I do not agree with the majority that Borton's violation of section 1926.104(d) also demonstrates the lack of effectiveness of its safety program. It is not clear whether the majority is referring to the deceased employee's violation of Borton's rule requiring that the lanyard be no more than 20 feet in length or to the requirement of section 1926.104(d) regarding the maximum length of a lanyard. Insofar as Borton's enforcement of its lanyard rule is concerned, there is no evidence that the deceased or any other employee had ever previously used a lanyard in excess of 20 feet in length. With regard to the requirements of section 1926.104(d), employees could secure their lanyards at any number of locations on the structure, which had a diameter of 26 feet. Other than the circumstances surrounding the fatality in question, there is no evidence that any employee including Williams had ever tied off his lanyard at such a point as to expose himself to a fall of more than six feet.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 400

ATLANTA, GEORGIA 30309

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|---|---|---|
| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 77-2115 |
| | ) | |
| BORTON, INC., | ) | |
| | ) | |
| Respondent. | ) | |

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## DECISION AND ORDER

ORINGER, JUDGE: This is a proceeding under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, et seq., (hereinafter referred to as the"Act") to review a citation issued by the Secretary of Labor (hereinafter referred to as "Complainant") pursuant to section 9(a) and, a proposed assessment of penalties thereon issued, pursuant to section 10(a) of the Act. The Secretary issued a citation to the

respondent subsequent to an inspection of its worksite on June 8 and 9, 1977, alleging "serious" violations of the standards set forth at 29 C.F.R. 1926.104(d) and 29 C.F.R. 1926.451(a)(13) and proposed penalties in the amounts of $420 and $350, respectively, for the aforesaid alleged violations. The respondent filed a timely notice of contest contesting the citation with all of its items thereon as well as all of the proposed penalties.

The violations, as alleged by the complainant in his citation, are described as follows:

| STANDARD, REGULATION OR SECTION OF THE ACT ALLEGEDLY VIOLATED | DESCRIPTION OF ALLEGED VIOLATIONS |
|---|---|
| "The violations described in this citation are alleged to have occurred on or about the day the inspection was made unless otherwise indicated within the description given below." | |
| 1<br>29 C.F.R. 1926.104(d) | "Safety belt lanyard(s) worn by employee(s) were of a length that would provide for a fall greater than 6 feet:<br><br>(a) Tank #200-One employee with 15' lanyard & one employee with 34' lanyard.<br><br>(b) Tank #201-One employee with 15' lanyard & one employee with 20' lanyard.<br><br>This condition occurred on or about March 31, 1977." |
| 2<br>29 C.F.R. 1926.451(a)(13) | "An access ladder or equivalent safe access to scaffold(s) was not provided:<br><br>(a) Tank #200 & Tank #201-Five employees were required to drop approximately 7 feet through access opening of Tank #70 hanging scaffolds.<br><br>This condition occurred on or about March 31, 1977." |

Complaint and answer issued in the case and the cause came to trial on January 17, 1978, in Baton Rouge, Louisiana.

## THE ISSUES

1. Does the respondent's business affect commerce and is this cause within the jurisdiction of this tribunal?

2. Did the complainant prove that the respondent was in violation of the standard set forth at 29 C.F.R. 1926.104(d)?

3. Did the complainant prove that the respondent was in violation of the standard set forth at 29 C.F.R. 1926.451(a)(13)?

Having heard the testimony and observed the demeanor of the witnesses and having considered the same, together with the citation, notification of proposed penalty, notice of contest, pleadings, representations, stipulations and admissions of the parties, it is concluded that the preponderance of the credible evidence of record supports the following

## FINDINGS OF FACT

1. The respondent, Borton, Inc., does business and works in more than one state of the union (Tr. 4).

2. The respondent employs approximately 450 employees annually and has a gross annual volume of business approximately thirty to thirty-five million dollars (Tr. 4).

3. The scaffold from which the accident occurred in the instant cause was inside a concrete silo, one hundred thirty feet high, and approximately circular with a twenty-six foot diameter constructed of concrete and two steel beams with a top to the silo. The scaffold is underneath the top surface of the silo and to get onto the scaffold, the employees must go down to an access hatch (Tr. 9, 10).

4. The scaffold was seven feet below the hatch opening (Tr. 10).

5. The scaffold concerned herein consisted of cables and 2 by 6's, three-ply, nailed toegether hanging down about seven-foot below the entrance into the access hatch and had 2 by 10's laid across and nailed on each end (Tr. 10). The employees were working on and from the scaffold removing forms from the interior of the structure. Ordinarily, the employees got from the opening at the access hatch onto the scaffold by ladder (Tr. 13).

6. Once the employees reach the scaffold, they tie on with safety belts onto a toggle on the ceiling (Tr. 14).

7. The employees normally tie off before they go in through the access hatch (Tr. 14). The reason for having the men tie off outside the access hatch is so that in the event of some traumatic emergency, fellow workers can get ahold of the rope and remove the employee from the scaffold Tr. 16).

The accident complained of herein was the falling of an employee from the scaffold to the concrete floor, one hundred thirty feet below. The accident occurred when his safety rope broke and one of the 2 by 10's was knocked out and missing (Tr. 28, 29).

8. The foreman on top was one, Roy Powell (Tr. 31). The construction superintendent, Mr. Billmeier, instructs his employees that the length of the lanyard should be 20 feet (Tr. 32). The superintendent had disciplined employees for failing to use a ladder to get down onto the scaffold (Tr. 37).

9. The deceased employee was wearing a safety harness and at the time that he was found on the ground had a broken safety line. The deceased was lying on the board that apparently broke off the scaffold platform (Tr. 40, 41).

10. Prior to going into the tank, the deceased asked when he could come into and get on the platform so as to go to work and was advised that it was not quite finished yet and he had to wait awhile (Tr. 42). There was no ladder observed near the opening by the officer who responded to the accident call (Tr. 42). The line that was worn by the deceased, while he was working, was almost thirty-six and a half feet long (Tr. 44, 45).

11. The deceased had to lower himself or jump seven feet to get onto the scaffold so he had approximately twenty-nine feet of slack rope attached (Tr. 45, 46).

12. A test was made by dropping weight identical to that of the deceased and the line of the same length when dropped with the weight also broke (Tr. 46).

13. The deceased had failed to use a ladder several times previously and therefore had been in violation of the superintendent's orders and the respondent's rules. As a result thereof, he had been verbally reprimanded (Tr. 47). The board that broke under the weight of the deceased was not defective and it appeared to be something that you could use on a platform (Tr. 48).

14. The use of the ladder to get onto the scaffold would be perfectly safe (Tr. 51). The government did not allege in the instant cause that the lanyard was not as thick as it should be and did not argue that it did not have the normal breaking strength of 5400 pounds (Tr. 54, 55). The breaking

strength of the rope furnished the employees is about 11,000 pounds per square inch (PSI). It is a a three-quarter inch polypropylene rope (Tr. 57).

15. At this installation, the respondent provided a twelve-foot long aluminum ladder (Tr. 58).

16. The twelve-foot aluminum ladder was located to the south and west of the access opening about a tank away approximately 25 to 30 feet from the access entry involved herein (Tr. 62, 63).

17. The thirty-six foot lanyard used by the deceased was in violation of company policy. However, neither the job superintendent nor the foreman either observed or stopped the deceased from wearing the rope (Tr. 63, entire record).

18. After the employees reached the scaffold, the ladder was removed so that the employees could work inside the silo (Tr. 66).

## OPINION

Taking the allegations of violation in inverse order, the Secretary charged this respondent with a violation of the standard set forth at 29 C.F.R. 1926.451(a)(13) which requires that an access ladder or equivalent safe access shall be provided as a general requirement for scaffolding. The evidence of record convinces me that the respondent provided a twelve foot aluminum ladder at the job site that was, at the time of the accident, some 25 to 30 feet from the access entry to the scaffold. The question remains whether or not the employer or its representative should have been aware that this employee did not have the ladder poised at the proper place for entry into the silo wherein the scaffold was located. In my opinion, the standard calls for the providing of a ladder. The employer did provide it and

while there is some doubt in my mind concerning the foreman's assurance that the ladder was used for the purpose intended, in my opinion, the doubt here must be resolved in favor of the respondent. In addition to providing the ladder, the respondent should attempt to insure that the ladder is used by the employees for the purpose intended. In this case, the superintendent testified, and I believe, that he insisted that the ladder be used and disciplined men for not using it. It is questionable whether or not the foreman should have ascertained whether the deceased employee was using the ladder that was provided. However, the Commission has laid down an axiom that where an experienced employee is concerned, the employer need not exercise one to one supervision over such employee. The Commission stated "such a holding by the Commission, requiring that each employee be constantly watched by a supervisor, would be totally impracticable and, in all but the most unusual circumstances, an unnecessary burden." Secretary v. Canrad Precision Industries, Inc., Hanovia Lamp Division, 75 OSAHRC 61/E6 (2/55), 3 BNA OSHC 1198; 1971-73 CCH OSHD 15,355 (Docket No. 89). Accordingly, in my opinion, this item of the citation must be vacated.

Insofar as the allegation of violation of the standard set forth at 29 C.F.R. 1926.104(d) is concerned, I find that the Secretary has amply proven his case. In this case, the employer normally and usually allowed a twenty-foot lanyard to be used regardless of whether or not there was more than six feet of slack. The standard mandates that a safety belt lanyard shall have a maximum length to provide for a fall of no greater than six feet. In the event that fourteen feet was not being used, the fall could well be more than six feet. In any case,the deceased employee was using a lanyard approximately thirty-six and a half feet. This almost doubled the length

required by the respondent and certainly should have been ascertained by either the construction superintendent or the foreman. Certainly, the foreman was aware that the deceased was awaiting entry and had contact with him on the day in question. The lanyard was so atypical and so different and so much greater that failure to ascertain its deviation from the normal, in my opinion, was negligent supervision by the respondent's supervisory personnel. I find this a different matter than the ladder which was after all provided for the employees and would have taken a short walk to acquire. Here, it did not take close supervision to be aware that the lanyard was almost twice the length of that of any other employee on the job. In my opinion, the supervisor should have been doubly aware inasmuch as this employee had been disciplined for violating company safety regulations on previous occasions. Accordingly, I find the allegation of violation of this standard amply proven by the secretary.

Insofar as the proposed penalty is concerned, I find that the Secretary took into consideration all of the elements of section 17(j) of the Act. Inasmuch as the penalty for the standard set forth at 29 C.F.R. 1926.104(d) is concerned, I find it appropriate in the premises and rather moderate and mild. Insofar as the penalty proposed for the standard set forth at 29 C.F.R. 1926.451(a)(13) is concerned, I find a failure of proof of such violation by this respondent thus the penalty is inappropriate and must fall. The penalty, however, would have been appropriate and in consonance with all of the elements prescribed in section 17(j) of the Act, had the violation been, in fact, proven. In view of the fact I find it not proven, such penalty must fall.

Based on the aforementioned findings of fact and the above opinion the Judge makes the following

## CONCLUSIONS OF LAW

1. At all times herein mentioned, this respondent, Borton, Inc., was engaged in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, and this Commission had jurisdication to hear and decide the within controversy.

2. The respondent, on the day of the accident herein complained of, was in violation of the standard set forth at 29 C.F.R. 1926.104(d).

3. The respondent, on the day of the accident herein complained of, was not in violation of the standard set forth at 29 C.F.R. 1926.451(a)(13).

4. The penalty proposed for the alleged violation of the standard set forth at 29 C.F.R. 1926.104(d) in the sum of $420 is appropriate in the premises and in consonance with all of the elements set forth in section 17(j) of the Act.

5. In view of the fact that the allegation of violation of the standard set forth at 29 C.F.R. 1926.451(a)(13) was found not proven, the penalty proposed therefor was inappropriate and must fall.

In view of the foregoing, good cause appearing therefor, it is ORDERED that:

1. The allegation that this respondent "seriously" violated the standard set forth at 29 C.F.R. 1926.104(d) is AFFIRMED and a penalty of $420 is ASSESSED therefor.

2. The allegation of violation of the standard set forth at 29 C.F.R. 1926.451(a)(13) by this respondent and the penalty proposed therefor in the sum of $350 are both herewith VACATED.

SO ORDERED this 17th day of April, 1978, in Atlanta, Georgia.

DAVID G. ORINGER, JUDGE, OSHRC

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| 78-0204 & 78-0205 | H. E. WIESE, INC., & INDUSTRIAL CONSTRUCTION COMPANY | 3/31/82 | 18/A2 |
| | (Judge's decision) | | 18/C6 |
| 78-555 | HULL POTTERY COMPANY | 3/31/82 | 18/D9 |
| | (Judge's decision) | | 18/D13 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

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UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

March 31, 1982

**IN REFERENCE TO SECRETARY OF LABOR v.**

H. E. WIESE, INC. &
INDUSTRIAL CONSTRUCTION COMPANY

OSHRC DOCKET NO. 78-0204 & 78-0205

**NOTICE IS HEREBY GIVEN TO THE FOLLOWING:**

OF COMMISSION DECISION

To wit: See attached.

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**FOR EMPLOYEES**

-

**FOR THE COMMISSION**

Ray H. Darling, Jr.

**RAY H. DARLING, JR.**
**EXECUTIVE SECRETARY**

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  New York, NY 10036

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>H. E. WIESE, INC., and INDUSTRIAL ELECTRICAL CONSTRUCTION COMPANY,<br><br>Respondents. | OSHRC Docket Nos. 78-204 & 78-205 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

CLEARY, Commissioner:

A decision of Administrative Law Judge David G. Oringer is before the Commission under section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). These cases were consolidated before the hearing on the joint motion of both Respondents, H. E. Wiese, Inc. ("Wiese") and Industrial Electrical Construction Company ("Industrial"). Judge Oringer affirmed a citation against each Respondent alleging a serious violation of section 5(a)(2) of the Act, 29 U.S.C. § 654(a)(2), for failure to comply with the scaffold access safety standard at 29 C.F.R. § 1926.451(a)(13). 1/ The judge also found Wiese in serious violation of the Act for failure to comply

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1/ 29 C.F.R. § 1926.451(a)(13) states:

> § 1926.451 Scaffolding.
> (a) General requirements.
> * * *
> (13) An access ladder or equivalent safe access shall be provided.

with the personal protective equipment standard at 29 C.F.R. § 1926.28(a), 2/ based on the exposure of employees of Wiese who worked without safety belts and lanyards at an unguarded elevation. The Secretary of Labor ("the Secretary") had alleged that the violation was repeated.

The Secretary and both Respondents petitioned for discretionary review of the judge's decision. I directed review on all of the issues raised by the petitions, including:

1. Whether the judge erred in concluding that Wiese failed to comply with 29 C.F.R. § 1926.28(a), and that the failure to comply constituted a "serious", but not a "repeated" violation of section 5(a)(2) of the Act?

2. Whether the judge erred in concluding that both respondents failed to comply with the standard at 29 C.F.R. § 1926.451(a)(13)?

The Commission affirms the judge's finding against both Respondents on the section 1926.451(a)(13) charge. However, the Commission reverses the judge's conclusion that Wiese violated the Act by failing to comply with section 1926.28(a) and we vacate the citation alleging that violation.

I

A

The citations now before us were issued as a result of an inspection conducted by compliance officer Don R. Welch of the Occupational Safety and Health Administration ("OSHA"). Both Respondents were engaged in the construction of a building at the inspected worksite for the Naptha Unit of Dow Chemical. The

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2/ § 1926.28 Personal protective equipment.

(a) The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

citations alleging that Wiese and Industrial failed to comply with section 1926.451(a)(13) related to conditions located in the compressor deck area of the worksite. In this area, an overhead bridge crane spanned the width of the building under construction. Components of the crane included an elevated I-beam, a track (rails) on top of the beam, and a trolley (carriage) that moved back and forth along the track. At the time of the inspection, a scaffold was located on top of the trolley. The I-beam was approximately 20 feet above the compressor deck and 42 feet above the ground.

Compliance officer Welch testified that, as he returned from inspecting the electrical transformer that was the subject of an employee complaint, he observed two people working from the trolley scaffold installing lighting above the compressor deck. The only way to reach the scaffold was to climb a ladder that extended 20 feet from the deck to a 6-inch-wide sheet girder attached to a wall. Industrial's supervisors told the compliance officer that, from this girder, employees stepped across an unguarded 2-foot gap to the I-beam supporting the track, then climbed up the side of the trolley and over the scaffold guardrails onto the scaffold. The two persons observed on the scaffold were employees of Industrial. A third person, employed by another contractor (neither Industrial nor Wiese), told the compliance officer that he had been using the route described above on a regular basis to reach the scaffold, where he had worked as a millwright under Wiese's direction. On this basis, Industrial and Wiese were cited for allegedly violating the requirement of 29 C.F.R. § 1926.451(a)(13) that "[a]n access ladder or equivalent safe access" to scaffolds be provided. At the hearing, compliance officer Welch gave opinion testimony that the method of access used was unsafe because the 2-foot gap exposed employees to a fall of 20 feet to the concrete compressor deck or 42 feet to the ground. Welch further testified that the probable result of a fall through the gap would have been serious injury or death.

In addition the compliance officer testified that, in his opinion, a landing platform with guardrails could have been built and braced across the gap to provide safe access. This testimony was disputed by supervisors and safety managers for both Respondents who testified to conditions which they believed would have made it hazardous to build and use the access platform described by the compliance officer. One of the supports for this platform would necessarily have been the I-beam on which the bridge rail of the crane rested, and on which the crane's trolley and the scaffold traveled back and forth. However, the lower flange of the I-beam was approximately 12 to 14 inches lower than the sheet girder, which would have supported the other side of the platform. Accordingly, B.B. Ouber, Wiese's assistant superintendent, rejected the compliance officer's suggestion on the ground that the landing platform would be steeply slanted, thereby creating a greater risk of falling. Two other methods of constructing a landing platform were suggested. However, these were also rejected by Ouber because, although either method would result in a horizontal platform, both methods required welding. In Ouber's view, welding would weaken the crane and could result in the crane's collapse if it were operated at its full 55-ton capacity. Ouber also suggested the possibility that welding could create an explosion hazard. In addition, another witness, a vice-president of Industrial, asserted that a landing platform should not have been installed because employees would have been endangered while they were welding the platform.

Other possible access methods, and Respondents' objections to them, are also set forth in the record. For example, Ouber described an access route to the trolley temporarily used after the citations had been issued in these cases and after the trolley scaffold had been dismantled. This involved (1) ascending to a platform built on girders, (2) ascending from the platform by means of a

secured ladder to a catwalk, and (3) stepping directly through a hand railing on the catwalk onto the trolley. Ouber also testified, without contradiction, that this method could not have been used at the time of the inspection because it would have precluded trolley movement, which was then necessary in order to complete the installation of lighting. In addition, Ouber testified that prior to the inspection he considered the possibility of providing access by means of a moveable unsecured ladder rested against the catwalk. He noted, however, that the crane could not have been moved, and thus the work could not have been performed, with the ladder in this position. It therefore would have been necessary to remove the ladder after the employees had gained access to the scaffold. Accordingly, Ouber testified, this method of access was "disregarded" because employees would be left with "no way down" in the event of an injury or when they needed to get water or to use the bathroom.

B

Judge Oringer affirmed the alleged violation with respect to both Respondents. After entering findings on the means of access used to reach the scaffold, the judge further found, citing to the opinion testimony of the compliance officer, that "[e]mployees ascending to gain access to the scaffold were exposed to an open span of approximately two feet and thus were exposed to a fall of twenty feet to the concrete compressor deck which could bring about broken bones, concussions, contusions and possible death." Because "the area to which access was needed contained a hazard," the judge concluded that noncompliance with the cited standard had been proved. 3/ The judge also entered findings that two employees of Industrial and a third employee under Wiese's supervision had been exposed to the cited hazard.

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3/ In the course of his discussion, the judge stated that, in his opinion, "the access provided and the access ladder comprised a hazard and when the standard requires that an access ladder shall be provided, it means a safe access ladder." (Emphasis supplied by the judge.)

With respect to the disputed issue of whether safe access could have been provided, the judge concluded that the testimony of the compliance officer was "logical." Based on this testimony, Judge Oringer found that "[t]he hazard could have been abated by utilizing a landing platform which could have been built and braced between the sheet girder and the lower flange on the crane rail." He further found that the violation was abated after the inspection. In addition, the judge rejected Respondents' argument "that the crane could not have been used without such an access hazard being present." He stated, "After reviewing all of the evidence, I do not agree."

On review, the Respondents contend that the judge misconstrued the requirements of the standard. They take exception to his statement that a "safe" access ladder must be provided, arguing that an access ladder was provided as required by the standard and therefore "[t]here was no need to consider an alternative equivalent safe access." They also assert that the ladder was the safest possible access to the scaffold. In addition, Respondents argue that the judge improperly interpreted the standard as requiring that an access ladder extend all the way to a scaffold. Alternatively, they suggest that, if the standard is given the meaning ascribed to it by the judge, then it is unenforceably vague because "[t]he only thing ascertainable from the cited standard is that an access ladder is needed."

Respondents also argue that the judge erred in finding that the hazard could have been abated by erecting a landing platform as suggested by the compliance officer. They assert that their witnesses established that there was no adequate method to secure a platform and that abatement after the inspection was only possible because there was no longer a need to have the crane move. In their view, a landing platform at the time of the inspection would have prevented the necessary movement of the trolley.

The Secretary argues in support of the judge's disposition.

C

At the outset, Commissioner Cottine and I reject the contention of Respondents that they complied with section 1926.451(a)(13) by providing an access ladder, notwithstanding the fact that the ladder in itself did not provide complete access to the scaffold in question. Respondents correctly argue that the standard does not require that an access ladder extend all the way to a scaffold. 4/ Nevertheless, the plain meaning of the standard is that safe access must be provided at all points between the lower elevation and the scaffold, whether by a ladder, by equivalent means, or by a combination of a ladder and other means. Here, Judge Oringer based his conclusion that Respondents failed to comply with section 1926.451(a)(13) on his finding that employees were exposed to a hazard at a point in their access route between the compressor deck and the scaffold. In arriving at this determination, the judge correctly interpreted the standard's requirements. 5/

The Commission recently upheld application of the same rationale to an alleged violation of the standard at section 1926.450(a)(1), requiring ladders or equivalent safe access to all elevations. In Steel Erectors, Inc., 81 OSAHRC 18/F1, 9 BNA OSHC 1399, 1981 CCH OSHD ¶ 25,228 (No. 77-1118, 1981), the Commission agreed with the judge's determination that the employer failed to prove its

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4/ Respondents misconstrue the judge's decision as setting forth a contrary holding. We find no indication that the judge held that a ladder must extend all the way to the scaffold.

5/ Although the judge stated that the standard contains a requirement that any access ladder that is provided must be "safe," it is clear that his finding of noncompliance is based not on any defect in the existing ladder but on the hazard that was present between the top of the ladder and the scaffold. Because Respondents did not provide an access ladder between the 6-inch-wide sheet girder (the top of the existing ladder) and the scaffold, they were required to provide "equivalent safe access" through this last segment of the access route. This they did not do.

access methods provided safe access equivalent to the protection that would have been afforded by use of ladders. The employer in that case provided a stair tower to the elevation in question but employees were nevertheless exposed to a hazard when they crossed unguarded planks to reach the area where they performed their work. The facts in the case now before us are similar to those in Steel Erectors, Inc., and here, as in that case, the employer's defense was correctly rejected by the judge.

Respondents' argument that 29 C.F.R. § 1926.451(a)(13) is unenforceably vague has been rejected previously by the Commission in Ringland-Johnson, Inc., 76 OSAHRC 63/A2, 4 BNA OSHC 1343, 1346 n.11 [7], 1976-77 CCH OSHD ¶ 20,801 at p. 24,947 n.11 (No. 3028, 1976), aff'd, 551 F.2d 1117 (8th Cir. 1977), because in both "common and industry understanding, the words 'ladder' and 'equivalent' are not ambiguous and fairly apprise employers of the conduct required of them." See also, Deering Milliken, Inc., Unity Plant v. OSHRC & Marshall, 630 F.2d 1094, 1103 (5th Cir. 1980), quoting Ryder Truck Lines v. Brennan, 497 F.2d 230, 233 (5th Cir. 1974) ("So long as the mandate affords a reasonable warning of the proscribed conduct in light of common understanding and practices, it will pass . . . muster.") Neither is the phrase "safe access" unclear as it is used in the standard. An access route that includes one or more hazardous areas is not safe because employees will confront the hazard on their way to the scaffold's work surface. The fall hazard posed in these cases by the gap between girder and crane makes the access unsafe. Because neither a ladder nor its equivalent bridged this gap, the standard was contravened.

Respondents further object to the judge's finding that they could have abated the hazard by installing a landing platform. They cite testimony that, in their view, establishes that installation of the suggested platform, as well as the other alternatives considered at the hearing, was impossible. Specifi-

cally, they rely on testimony that welding the platform in place might weaken the structure and testimony that a ladder providing direct access to the work area would preclude operation of the crane trolley, particularly under the circumstances that existed on the day of the inspection.

An employer proves an affirmative defense of impossibility when it shows that (1) either compliance is physically impossible or it would preclude the performance of necessary work, and (2) there are no alternative ways to protect exposed employees. M.J. Lee Construction Co., 79 OSAHRC 12/A2, 7 BNA OSHC 1140, 1144, 1979 CCH OSHD ¶ 23,330 at p. 28,227 (No. 15094, 1979). We conclude that the Respondents have failed to sustain their burden of proof in these cases.

The judge rested his feasibility finding on testimony by the compliance officer that a landing platform could have been anchored to the girder and the crane's I-beam. 6/ Ouber, whose testimony is the basis of Respondents' challenge to the installation of a landing platform, conceded that it was possible to install a platform. In addition, there is no evidence that a landing platform would have prevented the movement of the crane trolley and thus the completion of the work in progress at the time of the inspection.

Similarly, Ouber conceded that employees could have reached the trolley directly by a ladder to the catwalk, so long as the ladder was not secured. If the ladder was removed whenever it was necessary to move the crane, it would not have interfered with the work. While it may have been inconvenient to remove

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6/ We conclude that, although the judge found that the hazard was abated after the inspection, his finding that compliance was possible at the time of the inspection was based on the opinion testimony of the compliance officer and not on the fact of post-inspection abatement. We note that the method of abatement found feasible by the judge was the landing platform recommended by the compliance officer and not the method used after the inspection. Thus, we need not address the question of whether the post-inspection abatement method could have been used prior to the inspection.

and replace the ladder whenever employees needed access to or from the scaffold, mere difficulty or inconvenience of compliance is not a defense.

The testimony in opposition to the alternative of installing a landing platform was treated by the parties and the judge as raising the impossibility defense. However, the testimony of the witnesses as to their differing assessments of the relative safety of the various proposed methods of access squarely raises the issue in these cases as to whether abatement of the fall hazard by means of a landing platform or other suggested alternatives would have created an even greater hazard to employee safety.

To establish the greater hazard affirmative defense, the employer must show that: (1) compliance with a standard would create a hazard greater than that created by noncompliance, (2) alternative means of protecting the employees were either not available or used, and (3) an application for a variance would be inappropriate. Roofing Systems Consultants, 80 OSAHRC 51/C13, 8 BNA OSHC 1446, 1980 CCH OSHD ¶ 24,504 (No. 76-592, 1980); S & H Riggers & Erectors, Inc., 79 OSAHRC 23/A2, 7 BNA OSHC 1260, 1979 CCH OSHD ¶ 23,480 (No. 15855, 1979), rev'd on other grounds, 659 F.2d 1273 (5th Cir. 1981). We conclude that Respondents have also failed to meet this burden and therefore they have not established a greater hazard defense.

In our view, Respondents have not proved that any of three suggested alternatives would have created a hazard greater than that existing at the time of the inspection. We are not persuaded by Ouber's objection to the landing platform suggested by the compliance officer. Even if we agreed with his opinion that a slanted landing platform would have been more hazardous than the open gap, we nevertheless conclude that the platform would have been less hazardous than the cited conditions because of the protection that the guardrails on the platform would have provided. Similarly, we conclude that Respondents have not

established their assertion that a welded horizontal platform would have created a greater hazard. 7/ The opinion testimony of Ouber and of Industrial's vice-president as to the hazards that welding would create must be deemed speculative and unsupported. In particular, there is no explanation of the suggested explosion hazard or the asserted hazard to employees engaged in welding. Finally, we note that Respondent's only objection to the moveable ladder was that employees would be unable to get down from the scaffold when the ladder was removed. Yet there is no reason apparent in the record why the ladder could not have been placed back into position whenever it was needed to provide the necessary means of egress. For the reasons stated, Respondents have failed to meet their burden of proving any of their affirmative defenses. Commissioner Cottine and I affirm the judge's conclusion that Respondents violated the Act by failing to comply with 29 C.F.R. § 1926.451(a)(13).

II

A

The compliance officer testified that during his inspection he observed two of Wiese's employees working near the unguarded edge of a tube-and-coupler scaffold 60 feet above the ground. Neither employee was wearing a safety belt. Welch photographed the men, asked a supervisor to call them down, and then asked the employees whether they had safety belts. One of them stated that they did not. On this basis, the citation alleging noncompliance with 29 C.F.R. § 1926.28(a) was issued to Wiese. The citation further alleged that the violation was repeated.

One of the employees, William Earl Linder, testified that on the day of the inspection he and his co-worker had removed their safety belts after descending

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7/ We note that there was no testimony that it would have been necessary to weld the slanted platform suggested by the compliance officer.

from the scaffold to get more building materials. On their return to the scaffold area, the belts were missing. Linder testified that they then located their foreman, Hall, and informed him of their lack of safety belts. In response, Hall requested belts from the Dow warehouse, but none was available. According to Linder, Hall then told the employees to continue their work and informed them that he would provide them with belts when belts became available at the warehouse. The employees therefore returned to the scaffold, where they were engaged in erecting guardrails when the compliance officer observed them. Linder further testified that he obeyed his supervisor because he thought he could do the work safely without a safety belt and also because disobedience to a supervisor was cause for dismissal. Hall, the foreman, did not testify.

In response to this showing by the Secretary, Wiese introduced extensive evidence as to its efforts to ensure the use of safety belts during the Naptha Unit construction project. At the time of the inspection J. A. Oliver was Wiese's general superintendent in charge of the construction work on the project. Both he and assistant superintendent Ouber, who was the safety officer for the job, testified that Wiese had an established policy concerning the use of safety belts on the project. According to Oliver, Wiese required any employee who had to work in a hazardous position to wear a safety belt. Moreover, Wiese's policy was communicated to employees; for example, through weekly meetings that everyone, including supervisors, was required to attend. At these safety meetings Ouber conducted safety talks, including lectures on the use of safety belts, and this subject was frequently discussed.

In addition, recurring safety inspections or "job site visits" were conducted by Herman Thompson, Wiese's manager of safety and security, with overall responsibility for safety matters in all work performed by either Wiese's construction division or its maintenance division, and Ouber. Thompson's reports of these

inspections, which apparently occurred approximately twice a month, show that he and Ouber consistently made a determination as to whether employees were using safety belts. Furthermore, when the inspectors observed employees without safety belts, the foremen were notified and instructions to use safety belts were issued. Indeed, Ouber testified that, whenever an employee was discovered without a safety belt when a belt was required, the employee was to be reprimanded and, if necessary, fired. Though the record does not indicate whether any employee had been terminated for failure to comply with the safety belt policy, Wiese did produce evidence that it issued reprimands to employees observed in violation of that policy. In addition, several termination slips introduced into evidence by Wiese show that employees were discharged for failure to comply with safety rules and failure to use required safety equipment other than safety belts.

Ouber further testified as to the standard procedure for obtaining safety belts, which were furnished by Wiese. An employee who needed a safety belt would go to his foreman, who would then go to the Dow warehouse and check out a belt. If there were no belts at the warehouse, the foreman was expected to search for belts and borrow them from workers who weren't using their belts.

Wiese's evidence, as set forth above, was corroborated by the testimony of employee Linder. Thus, Linder testified that he had been instructed specifically to wear and use a safety belt when working on a scaffold. In addition, he had been told that he would be fired if he was caught working on a scaffold without a safety belt. Linder stated that, so far as he knew, Wiese had enforced its safety rules. He further testified that he had attended the weekly safety meetings and that safety belts had been discussed at almost every meeting.

The Secretary did not attempt to rebut Wiese's evidence on its safety program. Nor did he seek to establish what further efforts Wiese could have made to prevent the incident that led to the citation.

B

The judge affirmed the citation's allegation of noncompliance with section 1926.28(a) as a serious but not repeated violation of the Act. He credited all of Linder's testimony, including specifically Linder's testimony that he and his co-worker were ordered by their foreman to return to their work station without safety belts. The judge concluded that Wiese was responsible for its foreman's order even though the order contravened Wiese's policy. The judge found that Wiese failed to show that its foreman was adequately instructed about his duty to require his crew to use protective equipment. He refused to find, as Wiese argued, that the behavior of either the foreman or the two employees was unpreventable employee misconduct excusing Wiese from its noncompliance with the standard in this instance. Nevertheless, despite his holdings, the judge repeatedly referred to Wiese throughout his decision as a "safety minded employer."

On review, Wiese advances three arguments for reversal. First, Wiese claims the evidence, particularly Linder's testimony, was unpersuasive and insufficient to establish a violation. Second, it suggests that the conduct of the employees in following Hall's asserted order was unpreventable misconduct, because the employees knew they could be fired for working without tied-off safety belts. In addition, Wiese argues that, if Hall did order the employees to work without protection, the order is not imputable to Wiese.

The Secretary generally endorses the judge's findings and conclusions on this citation. In urging the Commission to reject Wiese's contention that Hall's misconduct was unpreventable, the Secretary cites only the judge's finding that the record does not establish that Hall received proper training and the absence of evidence that either Hall or the employees involved were disciplined as a result of the incident in question.

C

Chairman Rowland and I defer to the judge's decision to credit the testimony of employee Linder as to the events surrounding Wiese's alleged noncompliance with section 1926.28(a). Accordingly, we agree with the judge that the failure of the employees to wear safety belts cannot be deemed unpreventable employee misconduct because they were acting pursuant to their supervisor's instructions. However, we conclude that the judge erred in his determination that Wiese was responsible for the order issued by its foreman even though that order contravened Wiese's policy.

In order to establish a violation of section 5(a)(2) of the Act, the Secretary must prove, among other things, that the cited employer either knew or could, with the exercise of reasonable diligence, have known of the presence of the violative conditions. Daniel International Corp., Wansley Project, 81 OSAHRC 71/D6, 9 BNA OSHC 2027, 1981 CCH OSHD ¶ 25,813 (No. 76-181, 1981). Generally, the actions and knowledge of supervisory employees are imputed to the employer and the employer is responsible for violations committed by their supervisors. Accordingly, the Secretary establishes a prima facie showing of knowledge by proving, as he did in this case, that a supervisory employee was responsible for the violation. See United Geophysical Corp., 81 OSAHRC 77/D6, 9 BNA OSHC 2117, 1981 CCH OSHD ¶ 25,579 (No. 78-6265, 1981), appeal filed, No. 81-4342 (5th Cir. Aug. 26, 1981). However, the employer can rebut this showing by affirmatively demonstrating that the supervisory employee's misconduct could not have been prevented. United Geophysical Corp., supra; Floyd S. Pike Electrical Contractor, Inc., 78 OSAHRC 50/E1, 6 BNA OSHC 1675, 1978 CCH OSHD ¶ 22,805 (No. 3069, 1978). In particular, the employer must establish that it effectively communicated work rules to employees and that its rules were effectively enforced through supervision adequate to detect failures to comply with rules and discipline sufficient to discourage such violations. Id.

We conclude that Wiese has rebutted the Secretary's prima facie showing of knowledge in the case now before us. Wiese established a work rule on the use of safety belts, repeatedly communicated that work rule, and enforced the rule through supervision and disciplinary measures. The Secretary's challenges to Wiese's showing are not persuasive. Wiese's unrebutted evidence concerning the communication of its work rule to all employees, including supervisors, is sufficient to establish that Hall received the same training afforded all employees. Moreover, the fact that Hall and the two employees involved in the incident at issue were not discharged does not compel a finding that Wiese failed to enforce its work rule, particularly in the face of overwhelming evidence to the contrary. For the reasons stated, Chairman Rowland and I conclude that the Secretary failed to sustain his burden of proving a violation of section 5(a)(2) of the Act and we therefore vacate the citation alleging noncompliance with 29 C.F.R. § 1926.28(a).

III

Accordingly, that part of the judge's decision and order finding Wiese in serious violation of the Act for noncompliance with 29 C.F.R. § 1926.28(a) is reversed and the citation is vacated. The Commission affirms the portions of the judge's decision and order finding Wiese and Industrial in serious violation of the Act for noncompliance with 29 C.F.R. § 1926.451(a)(13) and assessing penalties of $225 against Wiese and Industrial for this violation.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: MAR 31 1982

COTTINE, Commissioner, concurring:

I join in the Commission's order affirming the citations for serious violation of the Act based on the failure of Wiese and Industrial to comply with 29 C.F.R. § 1926.451(a)(13) and vacating the citation issued to Wiese alleging a serious violation of 29 C.F.R. § 1926.28(a). However, further explanation of these holdings is necessary.

I

With respect to the section 1926.451(a)(13) allegations, there are several significant areas of disagreement between the majority position as stated in Part I of the lead opinion and the dissenting opinion. In particular, the majority opinion and the dissenting opinion sharply diverge regarding the proper interpretation of the cited standard, the correct allocation of burdens of proof between the Secretary and the Respondents, and the determination of whether the judge's findings are supported by the preponderance of the record evidence. While I join Commissioner Cleary in entering the findings and conclusions of Part I of the lead opinion, I find it necessary to set forth more fully the basis of those findings and conclusions and the reasons for rejecting the contrary views expressed in the dissenting opinion.

The dissent characterizes section 1926.451(a)(13) as a standard "which impose[s] broad requirements on employers simply to protect against 'hazards'." It concludes that the standard is unenforceably vague unless it is "defined and limited by objective criteria sufficient to apprise an employer of his obligations" under the standard. In addition, the dissent concludes that, in the absence of this objective criteria, it is appropriate to impose on the Secretary the same burden of proof he has under the "general duty clause," i.e., section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1), specifically, the burden of proving the feasibility and likely utility of a means of abating the hazard at issue.

The lead opinion concludes that the standard is not unenforceably vague. Commissioner Cleary and I do not go beyond the confines of the express terms of the standard in search of "objective criteria" to define and limit the employer's obligation, as our dissenting colleague does. In addition, we place on Respondents the burden of proving an affirmative defense such as impossibility or the greater hazard defense rather than placing on the Secretary the burden of proving that a safer means of access could have been utilized.

The dissent's analysis errs in characterizing 29 C.F.R. § 1926.451(a)(13) as a standard "which impose[s] broad requirements on employers simply to protect against 'hazards'." The standard at issue is clearly directed to a specific and distinct hazard, the danger of falling while ascending to or descending from a scaffold. Moreover, the standard specifically identifies the primary means of abating this hazard, i.e., "[a]n access ladder." The fact that the standard provides flexibility to employers by allowing them to use alternative means of access does not in any way change this clear and specific standard into a broad, general or potentially vague standard. On the contrary, the standard itself provides "objective criteria sufficient to apprise an employer of his obligations" under the standard. Thus, an alternative means of access is permissible under the standard if it provides "equivalent safe access," i.e., it is equivalent in terms of safety to the protection that would be provided by using an access ladder.

Accordingly, the dissent errs in concluding that it is appropriate to impose on the Secretary the same burden of proof he has under "the general duty clause." Because this case arises under section 5(a)(2) of the Act rather than section 5(a)(1), the Secretary does not have the burden of proving the feasibility and likely utility of compliance with the cited standard. Instead, Respondents have the burden of proving an affirmative defense such as impossibility or

the greater hazard defense. See, e.g., Ed Cheff d/b/a Ed Cheff Logging, 81 OSAHRC 60/A2, 9 BNA OSHC 1883, 1981 CCH OSHD ¶ 25,431 (No. 77-2778, 1981), appeal filed, No. 81-7493 (9th Cir. July 27, 1981). See also A.E. Burgess Leather Co. v. OSHRC & Secretary of Labor, 576 F.2d 948 (1st Cir. 1978).

Because the standard itself provides clear guidance, I also reject the dissent's conclusion that it is necessary to look beyond the terms of section 1926.451(a)(13) to the requirements of other standards in order to determine whether an employer has complied with its obligation under the cited standard. In particular, the dissent erroneously states that "Commission precedent acknowledges that an employer is not in violation of § 1926.451(a)(13) unless the record demonstrates that it has failed to comply with other provisions of subpart L." Two cases are cited for this proposition: Perini Corp., 77 OSAHRC 65/A2, 5 BNA OSHC 1343, 1977-78 CCH OSHD ¶ 21,790 (No. 12589, 1977), and Rust Engineering Co., 77 OSAHRC 37/C8, 5 BNA OSHC 1183, 1977-78 CCH OSHD ¶ 21,693 (No. 12200, 1977). However, neither case stands for the cited proposition. Perini Corp. is clearly inapposite because the standard at issue in that case, 29 C.F.R. § 1926.451(e)(5), permits the employer to choose between only two specified means of access--ladders or stairways. Accordingly, the issue in that case was whether the employer had provided a "ladder," not whether it had provided "equivalent safe access." Moreover, in Rust Engineering, the Commission held only that it was "appropriate" for the judge, under the circumstances of that case, to refer to the specification standards for metal ladders in determining whether the end frame of a scaffold provided equivalent safe access because the specification standards "establishe[d] a basis for determining at least approximate equivalence." 5 BNA OSHC at 1184, 1977-78 CCH OSHD at p. 26,049. The Commission's decision neither expressly nor implicitly holds that a violation of section 1926.451(a)(13) cannot be sustained in the absence of noncompliance with a ladder specification

standard. On the contrary, the decision clearly indicates that the ultimate test for determining whether equivalent safe access has been provided is the test that Commissioner Cleary and I have applied in the cases now before us, i.e., whether the alternative means of access provides the employees access "as safe as that provided by a properly constructed ladder" or "the same protection as an employee using a ladder." Id.

In Rust Engineering, it was "appropriate" to refer to the specification standards for metal ladders because the means of access provided, the scaffold end frame, was structurally similar to a metal ladder. In the cases now before us, however, the means of access provided -- climbing a ladder, crossing an open horizontal gap, and then climbing up the side of a crane trolley -- is not structurally comparable to a ladder. Accordingly, reference to the ladder specification standards is inappropriate in these cases. Nevertheless, even if the test adopted by the dissent is applied, it cannot be concluded that "all the technical requirements of the ladder standard have been met." Thus, if the means of access provided by Respondents is compared to a ladder, the segment of the access route between the sheet metal girder and the I-beam is comparable to a ladder placed in a horizontal position with a 24-inch separation between rungs. Such a ladder would fail to comply with at least two specific requirements of Subpart L. First, it would not comply with the incorporated provisions on the spacing of rungs. See Perini Corp., supra; Rust Engineering Co., supra. Second, it would be contrary to the requirements of 29 C.F.R. § 1926.450(a)(7), which states, in pertinent part:

> (7) . . . . Ladders shall not be used in a horizontal position as platforms, runways, or scaffolds.

Because it is clear that a ladder with a 2-foot-wide opening on a horizontal plane would not comply with the specifications of subpart L, the Secretary has established noncompliance with the cited standard even under the dissent's erroneous interpretation of the standard.

One further matter requires elaboration. The standard's alternative requirement of "equivalent safe access" makes it necessary to consider whether the means of access provided was safe. In his decision below, Judge Oringer expressly found that employees were exposed to a falling hazard during the course of their access to the scaffold. The dissent analyzes the record evidence and concludes that the Secretary failed to prove the existence of this hazard by a preponderance of the evidence. Although the lead opinion implicitly adopts the judge's finding, it does not set forth the basis for this holding. Accordingly, the record must be reviewed to determine whether the judge's finding is supported by the preponderance of the evidence. E.g., Astra Pharmaceutical Products, Inc., 81 OSAHRC 79/D9, 9 BNA OSHC 2126, 1981 CCH OSHD ¶ 25,578 (No. 78-6247, 1981), appeal filed, No. 81-1672 (1st Cir. Sept. 23, 1981).

The judge based his finding on the opinion testimony of the compliance officer who asserted that employees stepping across the 2-foot-wide gap were exposed to the hazard of falling either 20 or 42 feet. In addition, the Secretary offered the testimony of Edward Tannehill, a millwright who had worked from the scaffold under Wiese's direction. Tannehill confirmed the compliance officer's testimony that Tannehill, in his capacity as millwright steward, had initiated the investigation of the access to the scaffold by making an oral complaint during the inspection that the means of access was unsafe. The evidence that could be viewed as contradicting the Secretary's evidence consists of the opinion testimony of three witnesses for Respondents: assistant superintendent Ouber; John Thigpen, Industrial's vice president; and Herman Thompson, Wiese's manager of safety and security. Thigpen expressed his opinion that the means of access provided by Respondents was safe because an employee could hold on to "the crane" while stepping onto the I-beam and the beam provided "a good foot place, a good place to step." Ouber and Thompson both testified in effect that the means of access provided was, in their view, the safest possible means under the circumstances.

The Respondents' evidence does not effectively rebut the Secretary's prima facie showing that the 2-foot gap was hazardous. I am not persuaded by Thigpen's opinion that the presence of something to hold on to and a solid surface to step onto eliminated the hazard involved in stepping from a 6-inch-wide sheet girder over a 2-foot-wide opening that was 20 feet above the nearest floor. Specifically, Thigpen had never used the means of access in question and Respondents introduced no evidence that Thigpen had any expertise in the field of safety. Moreover, the testimony of Ouber and Thompson does not go to the question of whether the 2-foot gap presented a hazard but rather to the question of whether other possible methods of access would have been even more hazardous. Indeed, when Thompson was directly asked for his opinion as to whether the means of access provided was "safe," his only response was that "I checked it out and I couldn't see any other way that it [the ladder] could be put without having to move it everytime those cranes would move back and forth." Accordingly, the judge's finding is supported by the preponderance of the evidence and I expressly affirm that finding.

For the reasons set forth in Part I of the lead opinion, as necessarily amplified by this separate opinion, I affirm the judge's conclusion that Wiese and Industrial failed to comply with section 1926.451(a)(13).

II

With respect to the allegation that Wiese was in serious violation of the Act based on noncompliance with section 1926.28(a), I agree with the majority's decision to affirm the judge's credibility determination and his rejection of Wiese's unpreventable employee misconduct defense to the extent it was based on the asserted misconduct of Linder and his co-worker. However, I conclude that the judge erred in failing to sustain Wiese's unpreventable employee misconduct defense based on the misconduct of foreman Hall and, accordingly, I join in the Commission's order vacating the section 1926.28(a) citation.

An employer is responsible for a violation committed by its supervisory employee, i.e., the employee's actions and knowledge are imputed to the employer, unless the employer demonstrates that the supervisor himself was adequately supervised regarding safety matters. E.g., United Geophysical Corp., 81 OSAHRC 77/D6, 9 BNA OSHC 2117, 1981 CCH OSHD ¶ 25,579 (No. 78-6265, 1981), appeal filed, No. 81-4342 (5th Cir. Aug. 26, 1981); Floyd S. Pike Electrical Contractor, Inc., 78 OSAHRC 50/E1, 6 BNA OSHC 1675, 1978 CCH OSHD ¶ 22,805 (No. 3069, 1978); Connecticut Natural Gas Corp., 78 OSAHRC 60/B3, 6 BNA OSHC 1796, 1978 CCH OSHD ¶ 22,874 (No. 13964, 1978). In order to establish this affirmative defense, the employer must prove that it effectively communicated work rules to employees and that its rules were effectively enforced, that is, it provided supervision adequate to detect noncompliance with the rules and discipline sufficient to discourage such noncompliance. Id. I conclude that Wiese has sustained its defense in this case for the reasons discussed in the lead opinion with respect to the communication and enforcement of Wiese's work rule.

ROWLAND, Chairman, Dissenting in Part:

For the reasons stated by Commissioner Cleary in part II C of the lead opinion, 8/ I join in reversing the judge's decision and vacating the citation alleging that Respondent Wiese failed to comply with 29 C.F.R. § 1926.28(a). For the reasons that follow, I conclude that the judge also erred in finding that Respondents Wiese and Industrial failed to comply with 29 C.F.R. § 1926.451(a)(13), and therefore I dissent from the remainder of the majority opinion.

In concluding that Respondents failed to comply with § 1926.451(a)(13) the majority reasons that the existence of a fall hazard between the ladder and the point of access onto the crane scaffold is sufficient to show that access equivalent in safety to that which a ladder would have provided was not maintained. I disagree with this reasoning since I cannot identify objective facts which would give Respondents notice that the existing means of access was unsafe.

As the majority notes, standards which impose broad requirements on employers simply to protect against "hazards" are vague unless defined and limited by objective criteria sufficient to apprise an employer of his obligations under such standards. E.g., Ryder Truck Lines v. Brennan, 497 F.2d 230 (5th Cir. 1974); Owens-Corning Fiberglas Corp., 79 OSAHRC 26/D6, 7 BNA OSHC 1291, 1979 CCH OSHD ¶ 23,509 (No.

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8/ As Commissioner Cleary correctly notes, under Commission precedent an employer may rebut the Secretary's showing of knowledge based on the imputation of the actions of a supervisory employee by demonstrating that it both communicated and enforced a work rule pertaining to the conduct in issue. Since Wiese satisfied its burden under Commission precedent, I do not find it necessary to consider at this time whether that precedent is correct insofar as it would impose on the employer a duty to enforce as well as to communicate work rules to employees. For a discussion of the question whether an employer should be required to do anything more than give instructions to employees regarding the proper use of safety equipment, see General Electric Co. v. OSHRC, 540 F.2d 67, 69 (2d Cir. 1976); Borton, Inc., No. 77-2115 (March 31, 1982) (dissenting opinion).

76-4990, 1979), aff'd, 659 F.2d 1285 (5th Cir. 1981) (29 C.F.R. § 1910.132(a) 9/ ); Voegele Co., 79 OSAHRC 76/A2, 7 BNA OSHC 1713, 1979 CCH OSHD ¶ 23,860 (No. 76-2199, 1979), aff'd, 625 F.2d 1075 (3d Cir. 1980) (29 C.F.R. § 1926.28(a) 10/ ). Under Commission precedent, the particular specifications set forth in subpart L for ladders 11/ have been used to interpret the requirement of § 1926.451(a)(13) that a ladder or "equivalent safe access" be provided. Indeed, Commission precedent acknowledges that an employer is not in violation of § 1926.451(a)(13) unless the record demonstrates that it has failed to comply with other provisions of subpart L. See Perini Corp., 77 OSAHRC 65/A2, 5 BNA OSHC 1343, 1977-78 CCH OSHD ¶ 21,790 (No. 12589, 1977) (interpreting § 1926.451(e)(5), an analogous standard, and concluding that the employer had failed to provide a ladder under § 1926.451(e)(5) because the spacing of the rungs on the scaffold endframes did

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9/ This standard requires as follows:

> Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

10/ This standard requires that the employer be "responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions . . . ."

11/ Subpart L, entitled "Ladders and Scaffolding," includes sections 1926.450 (ladder) and 451 (scaffolding). Section 1926.450, in addition to the general requirement at § 1926.450(a)(1), includes a number of specifications for fixed ladders and manufactured and job-made portable ladders. The specifications govern such matters as the length, width, and pitch of ladders and the materials for the construction of side rails and rungs.

not satisfy the requirements for ladders set forth in subpart L) and Rust Engineering Co., 77 OSAHRC 37/C8, 5 BNA OSHC 1183, 1977-78 CCH OSHD ¶ 21,693 (No. 12200, 1977) (holding the term "equivalent" as used in the standard at issue in this case means "virtually or in effect identical to a ladder"). 12/

In this case the Secretary presented no evidence or argument that the method of access provided by Respondents was contrary to any particular specification prescribed in subpart L such as § 1926.450(a)(10), which requires that portable ladders be "tied, blocked, or otherwise secured to prevent their being displaced," or § 1926.450(a)(9), which provides, "[t]he side rails shall extend not less than 36 inches above the landing. When this is not practical, grab rails, which provide a secure grip for an employee moving to or from the point of access, shall be installed." On the other hand, Respondents adduced evidence showing compliance with those specifications. On cross-examination, Welch, the compliance officer, conceded that the ladder was fully secured both to the compressor deck and to the girder above. Thigpen, Industrial's vice-president, testified that the top of the ladder was two to three feet higher than the beam and stated that an employee could hold onto the crane structure while moving across the open space. Accordingly, a preponderance of the evidence does not establish that the means of access violated any requirement of subpart L of the Secretary's standards. Indeed, I note that the majority concedes that the cited standard does not require that the access ladder extend all the way to the scaffold. See Frank Briscoe Co., 76 OSAHRC 129/A2, 4 BNA OSHC 1729, 1976-77 CCH OSHD ¶ 21,162 (No. 7792, 1976) (citation alleging violation of § 1926.450(a)(1) in that

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12/ Steel Erectors, Inc., 81 OSAHRC 18/F1, 9 BNA OSHC 1399, 1981 CCH OSHD ¶ 25,228 (No. 77-1118, 1981), on which the majority relies, is incorrectly decided and should not be followed insofar as it holds that the question whether access is equivalent in safety to that of a ladder does not require consideration of the specifications prescribed for ladders.

horizontal rebar protruded through the rungs of a ladder vacated since no provision of that standard prohibits the use of ladders over horizontal rebar). Since it is apparent that all the technical requirements of the ladder standard have been met, the cited access can only be found unsafe, and thus not in compliance with the standard, if other objective facts exist which apprise the employer that the means of access provided is hazardous.

The majority finds the "access route" unsafe solely on the opinion of the compliance officer that a fall hazard existed. Commissioner Cottine would also credit similar opinion testimony of one employee. On the other hand, Thigpen, Industrial's vice-president, who had worked for Industrial for seven years, considered the ladder to be safe. He stated that an employee would hold onto the crane rail while stepping onto the beam, and in describing the beam he said, "[i]t is a good foot place, a good place to step on the bottom and on the top and then the crane was immediately above that." He further testified that no one had ever fallen from the ladder, that he had never observed anyone coming close to falling, and that Industrial's electrician employees had never made any complaints about the ladder. Thompson, Wiese's safety manager, who, as the majority notes, implements Wiese's safety program, stated that the ladder was the safest means of access available in the circumstances. Similar testimony was given by Ouber, Wiese's assistant superintendent, who not only had 25 years experience in the construction industry but for at least two years had been concerned with safety matters at the worksite where the crane was located. As the statement of Ouber's testimony in the majority opinion itself indicates, Ouber had considerable first-hand experience with the matter of providing access to the crane in question. The compliance officer's opinion on which the majority relies as well as the opinion of one employee is not sufficient to prove the

existence of a hazard by a preponderance of the evidence in view of the contrary testimony of Respondents' experienced witnesses that they considered the access safe and the absence of any other evidence to show that Respondents should have had notice that a fall hazard existed. See S & H Riggers & Erectors, Inc. v. OSHRC, 659 F.2d 1273 (5th Cir. 1981); Owens-Corning Fiberglas, supra; Air-Kare Corp., 81 OSAHRC , 10 BNA OSHC 1146, 1981 CCH OSHD ¶ 25,758 (No. 77-1133, 1981) (dissenting opinion).

The majority also errs, as did the Judge, in accepting as dispositive the compliance officer's testimony that safe access could have been provided through the alternative of installing a sloped platform across the open space. The compliance officer based this opinion on one of the photographs he had taken and on a sketch he made at the hearing of the crane and compressor area. The record does not indicate that the compliance officer actually examined the structure where he believed a platform could be placed nor did he testify that he had any knowledge of the method of access he described having been used by any other employer in a similar situation. Furthermore, the Secretary did not establish that the compliance officer had any prior experience with overhead bridge cranes and in particular with the means of access thereto. 13/

Because the compliance officer's testimony is not based on personal knowledge or experience with the means of access he described, his opinion that a sloped platform could be used is merely an abstract suggestion of a possible abatement method.

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13/ The compliance officer's experience is described in general terms as eight years' safety experience, three as a compliance officer and five as a consultant and engineer for companies involved in construction work.

Absent a supporting factual foundation, 14/ his opinion is theoretical and speculative and as such is not entitled to controlling weight. See Ray Evers Welding Co. v. OSHRC; 625 F.2d 726, 733 (6th Cir. 1980); Air-Kare, supra (dissenting opinion).

Even assuming that a sloped platform as described by the compliance officer could physically have been installed, the testimony of Respondents' witness not only establishes that this method would not have been practical because of its slope but also shows that there was no other practical means of providing access to the scaffold. 15/

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14/ The majority observes that Wiese's assistant superintendent Ouber conceded that a platform could be installed. Ouber did not, however, concede that such a platform could have been used to correct the hazardous condition existing on the worksite at issue in this case. In response to a question from the Secretary's counsel on cross-examination as to whether a platform as described by the compliance officer would have been "possible," Ouber stated that while possible, such a platform would not have been level. At another point in his testimony, he specifically stated that he had concluded that a sloped platform could not be used because its slope would create a greater hazard of a fall than the existing ladder. Similarly, while Ouber indicated that a platform could physically be installed in such a manner as to be level, he stated that the welding necessary for a level platform would itself create other hazards. See the discussion infra. The entirety of his testimony, therefore, demonstrates that a platform could not have been used as a means of access under the circumstances in question.

15/ The majority errs in discussing Respondents' evidence in terms of the impossibility and greater hazards defenses. As discussed above, the majority interprets the standard to require a "safe" means of access without regard to the ladder specifications set forth in other standards as a guide to the employer in determining what constitutes "safe" access. Since the standard as interpreted by the majority does not on its face prescribe objective criteria for measuring the scope of the employer's duty, the same burden of proof should be imposed on the Secretary as he has under the so-called "general duty clause" of the Act, 29 U.S.C. § 654(a)(1), which requires that the employer maintain a workplace free from "recognized" hazards. That is, the Secretary must demonstrate what steps Respondents could have taken to improve the safety of the scaffold access and specifically must show the feasibility and utility of another method of access. Evidence adduced by Respondents showing that means of providing access other than the method they had selected would have adverse consequences is relevant as rebuttal to the Secretary's case-in-chief as opposed to a separate affirmative defense. See Royal Logging Co., 79 OSAHRC 84/A2, pp. 19-20, 7 BNA OSHC 1744, 1751, 1979 CCH OSHD ¶ 23,914 at pp. 28,997-98 (No. 15169, 1979), aff'd, 645 F.2d 822 (9th Cir. 1981).

In dismissing as unpersuasive Ouber's opinion that because of its slope use of a platform would increase the hazard to employees, the majority concludes that the platform would be safer than the access provided by Respondents if the platform were equipped with guardrails. However, there is no evidence to support this conclusion. Although Welch stated that a platform with guardrails would provide safe footing, it is not clear from his testimony whether in reaching this opinion he took into consideration the fact that a platform secured as he described would necessarily be slanted. Furthermore, Ouber's opinion that a sloped platform would be hazardous is reasonable in view of the magnitude of the slope involved. 16/ Finally, Thigpen's testimony, as indicated above, demonstrates that in any event the existing means of access was also sufficient to provide safe footing for employees.

Similarly, the majority errs in dismissing Respondents' objections to a welded level platform and use of a removable ladder as speculative and unsupported by the record. Ouber's opinion that welding would not be practical because it would create an explosion hazard and would interfere with the structure of the building and weaken the crane to the point of possible collapse is unrebutted. In view of Ouber's extensive experience on the worksite and with the crane in question, his opinion is reasonable and entitled to weight. His judgment that a removable ladder also would not be feasible because an employee

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16/ It is undisputed that the platform described by Welch would have to be inclined a vertical distance of 12 inches over a horizontal distance of 24 inches, a ratio of 1 to 2. The Secretary's fall protection standard for sloped roofs, 29 C.F.R. § 1926.451(u)(3), applies to roofs sloped in excess of 4 inches in 12 inches, a ratio of 1 to 3. Accordingly, the Secretary considers slopes which are less than the slope involved in this case to present a falling hazard. See Hamilton Roofing Co., 78 OSAHRC 57/C1, pp. 7-8, 7 BNA OSHC 1771, 1773, 1978 CCH OSHD ¶ 22,856 at p. 27,642 (No. 14968, 1978).

could be deprived of a means of descent when needed including an emergency situation also is both reasonable and undisputed. While the majority discredits this opinion on the ground that there is no evidence to show that the ladder could not have been replaced whenever a means of descent was needed, Respondents do not have any burden to present such evidence. Rather, as explained above 17/ the burden is on the Secretary to show that a feasible means of providing safe access was available. Since the Secretary adduced no evidence to rebut Ouber's opinion that a removable ladder would not have been practical, he has not satisfied his burden of proof.

Since the record fails to show that the means of access provided by Respondents was unsafe according to any objective criteria and since the Secretary in any event failed to prove that any safer means of access could feasibly have been used, 18/ the citations alleging failure to comply with 29 C.F.R. § 1926.451(a)(13) should be vacated.

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17/ See footnote 15, supra.

18/ I do not agree with the majority's conclusion, stated in footnote 6, that the judge did not base his finding of a violation on the fact that a different means of access, as described by Ouber, was used after the citations were issued. In discussing the evidence, the judge stated, "Mr. Welch's testimony anent [sic] abatement was logical. A landing platform could have been built and braced between the sheet girder and the lower flange on the crane rail. Feasible means were utilized by the respondent to cure this hazard after the inspection." In his enumerated factual findings, the judge reiterated both compliance officer Welch's opinion testimony and the testimony of an employee describing the means of access used after the inspection. While the judge obviously did not consider Respondents' post-inspection conduct to be dispositive, he clearly relied on it. Indeed, his decision indicates that he considered this evidence to be corroborative of the compliance officer's opinion that a different means of access could have been provided. Since, as the majority notes, there is no dispute that the means of access used subsequently could not have been applied prior to the inspection because it would have prevented the necessary movement of the crane, the judge erred in according any weight to Respondents' post-inspection conduct.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 400

ATLANTA, GEORGIA 30309

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>H. E. WIESE, INC., AND INDUSTRIAL ELECTRICAL CONSTRUCTION COMPANY,<br><br>Respondent. | ) | OSHRC Docket Nos. 78-204 and 78-205 (CONSOLIDATED) |

APPEARANCES

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DECISION AND ORDER

ORINGER, JUDGE: This is a proceeding under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, et seq., (hereinafter referred to as "The Act") to review citation(s) issued by the Secretary of Labor (hereinafter referred to as "Complainant") pursuant to section 9(a) and a proposed assessment of penalties thereon issued, pursuant to section 10(a) of the Act.

At the commencement of the trial the respondent, H. E. Wiese, Inc., withdrew its notice of contest with respect to the last citation involving three non-serious violations and also with respect to item 1 of Citation No. 1 which alleged a violation of 29 C.F.R. 1926.352(d), as well as the penalty proposed in the sum of $240. No objection being made by the Secretary, the allegation of "serious" violation of the standard set forth at 29 C.F.R. 1926.352(d) and the penalty proposed in the sum of $240 were affirmed and assessed on the record.

In its brief filed with the undersigned, subsequent to the trial of this cause, the complainant, the Secretary of Labor, moved to withdraw item 3 of "serious" Citation No. 1 against respondent, H. E. Wiese, alleging a violation of the standard set forth at 29 C.F.R. 1926.451(d)(3) and the penalty proposed therefor in the sum of $240. No objection being raised by the affected respondent, the allegation of violation of this standard and the penalty proposed therefor are both vacated.

Thus, the remaining issues before this tribunal are as follows:

1. Whether or not the respondent, Industrial Electrical Construction Company, was in violation of the standard set forth at 29 C.F.R. 1926.451(a)(13) and, in the event of such violation, was it proven to be of a "serious" character?

2. Whether the respondent, H. E. Wiese, Inc., was in violation of the standard set forth at 29 C.F.R. 1926.451(a)(13) and, if so, was the violation proven to be of a "serious" character?

3. Whether the respondent, H. E. Wiese, Inc., was in violation of the standard set forth at 29 C.F.R. 1926.28(a) and, if so, should such violation be characterized as "repeated?"

4. Whether any or all of the penalties proposed are reasonable and appropriate in the premises.

The descriptions of the remaining allegations of violation in this cause, reads as follows against the respective respondents:

INDUSTRIAL ELECTRICAL CONSTRUCTION COMPANY

| STANDARD, REGULATION OR SECTION OF THE ACT ALLEGEDLY VIOLATED | DESCRIPTION OF ALLEGED VIOLATION |
|---|---|
| 29 C.F.R. 1926.451(a)(13) | "An access ladder or equivalent safe access to scaffold(s) was not provided:<br><br>(a) X71 compressor deck, access ladder to scaffold on top of overhead crane requires employee(s) to climb ladder 20 ft. and exit onto approximately 6 inch wide beam and then step across approximately 2 feet wide gap onto overhead crane exposing employee to a fall of 20 feet to the complressor deck and 42 feet to the ground below." |

H. E. WIESE, INC.

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|---|---|
| 29 C.F.R. 1926.451(a)(13) | "An access ladder or equivalent safe access to scaffold(s) was not provided:<br><br>(a) K71 Compressor deck, access ladder to scaffold on top of overhead crane requires employee(s) to climb ladder 20 feet and exit onto approximately 6 inch wide beam and then step." |
| 29 C.F.R. 1926.28(a) | "Appropriate personal protective equipment was not worn by employee(s) in all operations where there was exposure to hazardous conditions:<br><br>(a) Top deck at furnace #5, employee working at open edge erecting tube and cou pler scaffold without being protected from fall of 60 feet by safety belt and lanyard." |

## OPINION

The proof of record indicates that insofar as the allegation of violation of the standard set forth at 29 C.F.R. 1926.451(a)(13) is concerned, the ladder provided did not reach the exact area upon which the employees had to step to work and they had to do some climbing that left a fall space that could have resulted in a fall of 20 feet and possibly in some cases to 42 feet. The evidence clearly discloses a potential fall hazard space of approximately two feet and employees were exposed thereto.

Mr. Welch's testimony anent abatement was logical. A landing platform could have been built and braced between the sheet girder and the lower flange on the crane rail. Feasible means were utilized by the respondent to cure this hazard after the inspection.

The standard requires an access ladder or equivalent safe access shall be provided. In my opinion, the access provided and the access ladder comprised a hazard and when the standard requires that an access ladder shall be provided, it means a safe access ladder. In this case, the area to which access was needed contined a hazard. Accordingly, in my opinion, a violation of the standard has been proven.

The respondent argues that the crane could not have been used without such an access hazard being present. After reviewing all of the evidence, I do not agree. The evidence is likewise clear that Industrial Electrical Construction Company had two employees working on the scaffold who had utilized the means of access and were installing lighting in the compressor area and, therefore, had been exposed to the hazard. Accordingly, I find that inasmuch as employees of Industrical Electrical Construction Company were exposed to the hazard, the violation was proven against that respondent.

Whether the violation was proven against H. E. Wiese, Inc., contains a further question. The only exposure determined by the Secretary of any other employee was a Mr. Tannehill, who was employed by National Maintenance Company, a separate respondent, however, National Maintenance and H. E. Wiese, Inc., apparently interchanged employees throughout this construction job. In the case involving Mr. Tannehill, while he was paid by National Maintenance Company, he was told where to work and what to do in this instance by H. E. Wiese, Inc. In my opinion, this constitutes sufficient supervision so as to constitute him an employee of H. E. Wiese for the purposes of this Act. Mr. Tannehill described the ascent up the ladder as climbing up and then swinging around to get up on the crane. Mr. Tannehill, the employee who was exposed, was reporting to a supervisor named Voltz, who worked for H. E. Wiese, Inc. However, Mr. Voltz apparently reported to a Mr. Oliver. The immediate supervisor of Mr. Tannehill was Mr. Faus who was employed by National Maintenance. Mr. Voltz and or Mr. Oliver, who were supervisors working for H. E. Wiese, Inc., determined where Tannehill and other employees were going to work and what they were going to do from day to day and, in my opinion, this constituted sufficient supervision to give Voltz and Oliver the duty to make sure that employee Tannehill had a safe area in which to work. Accordingly, I find that the exposure of Mr. Tannehill was sufficient to prove a violation against H. E. Wiese, Inc. Considering the rapid abatement, the fact that only one allegation of violation was made against Industrial Electrical Construction Company and the record indicating that H. E. Wiese, Inc., is a generally safety minded employer, penalties of $225 against each respondent is sufficient to ensure compliance with this standard in the future.

I find the testimony of Mr. William Earl Linder, veritable and of considerable weight, when weighing the allegation of violation of the standard set forth at 29 C.F.R. 1926.28(a). I fully credit his testimony that he and a fellow employee asked his foreman for safety belts and that he was advised that there were none in stock at the time. I further credit his testimony that his foreman, one Mr. Hall, sent them back aloft despite the fact that he knew that the men were not wearing safety belts and thus could not utilize them. It is unfortunate that Mr. Hall's testimony is not in the record, however, I fully credit Mr. Linder insofar as all of his testimony is concerned.

I can further understand the reluctance and refusal of the men to use a safety belt made of rope that they believed to be dangerous. The fact that the safety belt made of rope later proved to withstand 4,000 pounds does not mean that it had the appearance of safety. It is easy to understand a worker preferring to work without a belt than one that appeared to be hazardous to use. An unsafe belt certainly would lull one into a sense of security and create a more dangerous atmosphere than even working without a belt. In my opinion, the employee was fully justified in believing that a belt made of rope would be more dangerous than having none at all.

I credit H. E. Wiese, Inc. with having a policy requiring the wearing of safety belts and from time to time terminating employees for failing so to do. In this case, however, when the work had to be done and no safety belts were available, its foreman sent the men up to work without belts. This is not a case of an isolated idiosyncratic act by an employee. This is not a foreman who exposed himself dangerously in a manner that could not be ascertained by his employer. This is a case where the respondent's foreman

exposed the employees to a hazard. I fully credit Mr. Linder's testimony that the reason he was not wearing a safety belt was the unavailability of safety belts at the time. Regardless of the fact that he and Benton may have been careless in putting down their belts so that some other employees could remove them, this does not excuse the foreman for allowing, suffering, permitting and ordering the men to go back aloft despite his knowledge that they did not have safety belts. The employees had little choice if they refused to go aloft. They would have been terminated for refusing to obey an order from a superior. While the forman's instructions may have been contrary to H. E. Wiese, Inc. written policy, failure to follow the orders of foreman Hall would have resulted in termination to the employees. Accordingly, they had little choice in the matter and, in my opinion, a violation was proven insofar as the standard set forth at 29 C.F.R. 1926.28(a) is concerned. The safety program of H. E. Wiese must be considered however when assessing a penalty.

Insofar as the allegation of "repeated" violation is concerned, I find that this characterization must fall. I find that H. E. Wiese definitely separates its maintenance side from its construction side. The prior violation was by maintenance as contrasted with its construction side. The construction division and the maintenance division are bifurcated and have different supervisors and different tasks and are paid different rates. Accordingly, I find that this was not proven to be a "repeated" violation. In any case, the penalty proposed was in the sum of $800 and as the Commission has stated time and again, the characterization of whether this was a "serious" violation or a "repeat" violation is not important inasmuch as the penalty proposed here can be proposed for a "serious" violation as well as a "repeated" violation. Nevertheless for the reasons previously given, I find

that this was not a "repeated" violation in that the violations were not proven to be in similar construction and the operation of the maintenance part of its business is kept completely separate from its construction business. Accordingly, the violation of the standard set forth at 29 C.F.R. 1926.28(a) is affirmed as a "serious" violation.

Insofar as the penalty is concerned, in my opinion, this is a safety minded employer and in most instances works in a safe fashion, disciplines employees for violating its rules and, accordingly, I find a penalty of $500 appropriate for the violation of the standard set forth at 29 C.F.R. 1926.28(a) herein found proven.

This tribunal gave careful consideration to the testimony of respondent's witnesses. While there was testimony that there were belts always available on the job, I find that this was not so when needed by Linder and Benton. While an employee should not be careless with equipment so necessary to his safety, at the same time carelessness of the employee, insofar as keeping his equipment is concerned, does not mean that his foreman can send him aloft and expose him to a fall hazard such as occurred in the case at bar.

The respondent argues that even if Mr. Linder's testimony was veritable, the conduct of the foreman was totally contrary to H. E. Wiese's policy and constituted an isolated incident. The respondent further argues that one belt was available and Benton was the only one who needed a safety belt inasmuch as he was the only one exposed to a fall hazard and his failure was his decision because he felt the belt was unsafe. I do not agree with either contention and, in my opinion, it was reasonable for an employee to assume that a belt made of rope, like the one that was lying there, was not a safe belt and I believe the testimony of Mr. Linder that there were no belts

available and the foreman sent them back up to the job despite his knowledge that they were not wearing belts.

As previously related, in my opinion, H. E. Wiese, Inc., is a generally safety minded employer and I believe that employees were terminated for unsafe acts. However, in this case, the foreman faced with a choice of work that would be delayed and men working without belts, had the men work without belts. Because of H. E. Wiese's safety performance and rules and programs, this tribunal mitigated the penalty. In my opinion, the cases cited by the respondent, to wit, Horne Plumbing and Heating Company v. OSAHRC and Secretary of Labor, 523 F.2d 564, Brennan v. Butler Lime and Cement Company, 520 F.2d 1011, National Realty and Construction Company v. OSHRC, F.2d 1257; Secretary v. Ocean Electric Corporation, 3 OSHC 1705, are inapplicable to the situation found in the instant cause. The hazard in this case and the employees conduct was not unforeseen or unascertainable. It resulted from the direction of a supervisory employee of this very respondent. In the case at bar, the hazard was not just foreseeable, it occurred at the direction of the respondent's supervisory employee. Despite the occurrence of the violation, however, this tribunal finds that H. E. Wiese is normally a safety minded employer, has a vital safety program, does discipline men for violations thereof and, accordingly, deserves mitigation of the penalty.

Both parties cited National Realty and Construction Company v. OSHRC. 489 F.2d 1257, in which Judge Skelly Wright in his brillant and prescient decision stated:

> "Because the behavior of supervisory personnel sets an example at the workplace, an employer has-if anything-a heightened duty to ensure the proper conduct of such personnel. Second, the fact that a foreman would feel free to breach a company safety policy is strong evidence that implementation of the policy was lax."

National Realty, supra, was cited as precedential in Secretary v. Floyd S. Pike Electrical Contractor, Inc, 6 OSHC 1781 at page 1784. In Pike, supra, the Court was of the opinion that the company's training and safety program, rather than producing an atmosphere in which ordinary employees would warn foreman of imminent risks, was inadequate to prevent crew members from following their foreman's poor example.

In the instant cause, the two employees observed aloft without belts did not follow the poor example of a foreman but followed his direction, in violating the standard. This was not an idiosyncratic isolated act.

There is no proof of record demonstrating that this foreman, Hall, was properly trained so as to create an atmosphere where belts would always be used by employees under his supervision. The proof of record clearly demonstrates that the violation was at his direction. His directions left the employees with a Hobson's choice. If they ascended aloft without belts, they faced termination, however, if they disobeyed the foreman's direction to ascend aloft and complete the work, despite the lack of belts, they would have been terminated more rapidly and without question.

Once the complainant, the Secretary of Labor, has proven that a violation in fact existed at the time of the inspection, the employer may demonstrate as an affirmative defense that the foreman who directed the men to work aloft without belts, performed an isolated idiosyncratic act. The respondent, in my opinion, has totally failed to carry this burden. In the

instant cause, the Secretary made out a prima facie case. The burden then shifted to the employer to rebut the prima facie case or establish an affirmative defense and, in my opinion, he failed so to do.

The Commission's allocation of burdens is appropriate. It may be assumed that it is much easier for the respondent to be able to show proof of the proper training and the isolated act of the foreman Hall than the Secretary's ability to prove the contrary thereto. Thus it is entirely suitable to allocate to the employer the burden of proof of his affirmative defense in this case (See Central of Georgia Railroad Company v. OSHRC and Marshall, U. S. Court of Appeals, Fifth Circuit, July 13, 1978, 6 BNA OSHC 1784).

Having heard the testimony and observed the demeanor of the witnesses and having considered the same, together with the citations, notifications of proposed penalties, notices of contest, pleadings, representations, stipulations and admissions of the parties, it is concluded that the preponderance of the credible evidence of record supports the following

## FINDINGS OF FACT

1. The respondent, Industrial Electrical Construction Company, is a Louisiana Corporation with its office in Baton Rouge, Louisiana, that does business in Baton Rouge with persons and companies who do business in interstate commerce. The respondent purchases materials that come over the State line (Tr. 9).

2. The respondent, H. E. Wiese, Inc., is a Louisiana Corporation domiciled in Baton Rouge, Louisiana, that purchases goods and materials from points outside the State of Louisiana and also has engaged in business outside the State of Louisiana (Tr. 9, 10).

3. The average daily number of employees of Industrial Electrical Construction Company is approximately 60 (Tr. 10).

4. The respondent, H. E. Wiese, Inc., employs an average number of 1500 employees in its construction business not considering its maintenance operation which is separate and apart (Tr. 10).

5. At the K71 compressor deck area of the worksite, there was an overhead bridge-type crane spanning the width of the building. The crane ran on wheels which were afixed to the structural steel beams of the building (Tr. 66).

6. A scaffold that was contained and built on top of the crane was approximately twenty feet above the compressor deck and approximately forty-two feet above the ground (Tr. 26, 27).

7. There was a portable wood extension ladder extending from the top of the compressor deck to the general area of the crane. The ladder rested on a girder (Tr. 28, 29, 30, Exhibits C-1 and C-2). The ladder was fully secured at the top and the deck of the girder (Tr. 68).

8. In order to gain access onto the scaffold, the employee would have to climb up the ladder and upon reaching a beam, step across onto the beam onto the scaffold which was on a movable trolley. The employee would step onto the sheet girder approximately six inches wide and step across a distance to the structural beam that supported the crane rails. From there, the employee would climb onto a fixed platform that was on top of the crane or trolley (Tr. 68, 69).

9. One employee, Mr. Tannehill, had to ascend to the scaffold and described his ascent as climbing up and swinging around and getting up on the crane (Tr. 99).

10. Employees ascending to gain access to the scaffold were exposed to an open span of approximately two feet and thus were exposed to a fall of twenty feet to the concrete compressor deck which could bring about broken bones, concussions, contusions and possible death (Tr. 33, 34, 37).

11. The hazard could have been abated by utilizing a landing platform which could have been built and braced between the sheet girder and the lower flange on the crane rail (Tr. 34). The respondent eliminated the hazard by building the scaffold up so that employees can get off and on without hazard (Tr. 100).

12. Two employees of Industrial Electrical Construction Company were working on the scaffold and used this method of gaining access thereto to install lighting in the compressor area (Tr. 37, 38).

13. An employee, one Edwin Tannehill, employed by National Maintenance Company, was supervised insofar as where to work by one, Cecil Voltz, a supervisor for the respondent, H. E. Wiese, Inc. Cecil Voltz was the immediate supervisor to whom Mr. Tannehill reported daily and from whom he received orders telling him where to work and what to do (Tr. 100, 101).

14. Two employees were working at the open edge of a tube and coupler scaffold erecting a scaffold. The employees were working approximately 60 feet above the ground and were employed by H. E. Wiese, Inc. The employees were working at this level and were not wearing safety belts at the time they were observed (Tr. 50, 51, 52).

15. The two employees previously referred to were exposed to a fall hazard of 60 feet which in the event of an accident occurring would result in serious injuries or death (Tr. 51, 52).

16. One, Mr. William Earl Linder, a carpenter in training employed by H. E. Wiese, Inc., was working in the furnace area on the day of the inspection herein concerned with another employee named Benton. The two employees went down to get more material and when they reached the ground, removed their safety belts. Some other employees took their belts and when Linder and Benton were ready to reascend, they did not have belts. Linder and Benton advised their foreman one, Mr. Hall, that their safety belts were gone and requested additional safety belts. The foreman, Mr. Hall, went to the Dow warehouse and requested safety belts and was advised that there were none in stock at the time. Mr. Hall instructed the two employees to go back up to the scaffold and continue their job. There was one belt lying on the floor that was made of rope that neither Linder nor Benton would use because they were afraid that it was an unsafe belt (Tr. 121 - 131).

17. In the event of an accident, it was possible for either Linder or Benton or both to fall 60 feet which probably would result in serious injury or death (Tr. 52).

18. Respondent, H. E. Wiese, Inc., generally had a stringent safety policy, insofar as safety belts were concerned, and would terminate employees for failing to follow its policy (Tr. 127).

19. In the H. E. Wiese, Inc. Company construction and maintenance are set up as two completely separate units. Each one has a director answerable to the vice president of field operations. Construction operates

independently from maintenance and have different contracts, are bargained for differently and have different rates of pay. The supervisory personnel are different people and, in fact, the construction division and the maintenance division have separate contracts with the general contractor Dow, with different scales of pay (Tr. 220-223).

20. The penalties proposed were inappropriate in the present cause and must be mitigated.

Based on the aforementioned findings of fact, opinion and the entire record, the Judge makes the following

## CONCLUSIONS OF LAW

1. At all times herein mentioned, the respondents, Industrial Electrical Construction Company and H. E. Wiese, Inc., were engaged in businesses that affected commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970 and the Commission had jurisdiction to hear and decide the within controversies.

2. The respondent, Industrial Electrical Construction Company, was in "serious" violation of the standard set forth at 29 C.F.R. 1926.451(a)(13) on the day in question at the worksite herein concerned.

3. The penalty proposed by the Secretary for the allegation of violation of the aforesaid standard, found proven herein, was excessive and a penalty of $225 is found appropriate.

4. The respondent, H. E. Wiese, Inc., having moved at the trial to withdraw its notice of contest to the allegation of "serious" violation of the standard set forth at 29 C.F.R. 1926.352(d) and to the penalty proposed therefor in the sum of $240 and such motion being granted, this item of the citation and the penalty proposed therefor must be affirmed and assessed.

5. On the day of the inspection herein concerned, the respondent, H. E. Wiese, Inc., was in "serious" violation of the standard set forth at 29 C.F.R. 1926.451(a)(13) and an appropriate penalty therefor is $225.

6. The complainant having moved at the time he submitted his brief to withdraw his allegation of violation by the respondent, H. E. Wiese, Inc., to the standard set forth at 29 C.F.R. 1926.451(d)(3) and the penalty proposed therefor in the sum of $240, such allegation of violation and the penalty proposed therefor must fall.

7. On the date of the inspection concerned herein, the respondent, H. E. Wiese, Inc., was in violation of the standard set forth at 29 C.F.R. 1926.28(a) in a "serious" manner and not in a "repeated" manner, and an appropriate penalty therefore is $500.00.

In view of the foregoing, good cause appearing therefor, it is ORDERED that:

1. The allegation of "serious" violation by the respondent, Industrial Electrical Construction Company, of the standard set forth at 29 C.F.R. 1926.451(a)(13) is AFFIRMED and a penalty of $225 is ASSESSED therefor.

2. The allegation of violation by the respondent, H. E. Wiese, Inc., of the standard set forth at 29 C.F.R. 1926.352(d) is AFFIRMED and a penalty of $240 is ASSESSED therefor.

3. The allegation of a "serious" violation by the respondent, H. E. Wiese, Inc., of the standard set forth at 29 C.F.R. 1926.451(a)(13) is AFFIRMED and a penalty of $225 is ASSESSED therefor.

4. The allegation of violation by the respondent, H. E. Wiese, Inc., of the standard set forth at 29 C.F.R. 1926.451(d)(3) and the penalty of $240 proposed therefor are both VACATED.

5. The allegation of violation by the respondent, H. E. Wiese, Inc., of the standard set forth at 29 C.F.R. 1926.28(a) in a "repeated" manner is not found, however, the allegation of violation by this respondent of the said standard set forth at 29 C.F.R. 1926.28(a) in a "serious" manner is AFFIRMED and a penalty of $500 is ASSESSED therefor.

6. A penalty of $225 is assessed against the respondent, Industrial Electrical Construction Company.

7. Total aggregate penalties of $965 are ASSESSED against the respondent, H. E. Wiese, Inc.

SO ORDERED this 12th day of September, 1978, in Atlanta, Georgia.

DAVID G. ORINGER, JUDGE, OSHRC

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D.C. 20006

March 31, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Hull Pottery Company

OSHRC DOCKET NO. 78-555

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | |
| HULL POTTERY COMPANY, | : | OSHRC Docket No. 78-555 |
| Respondent. | : | |
| R. T. VANDERBILT COMPANY, | : | |
| Intervenor. | : | |

DECISION

Before ROWLAND, Chairman; CLEARY, Commissioner.*/

BY THE COMMISSION:

The Secretary of Labor alleges that Hull Pottery Company ("Hull") committed nonserious violations of various provisions of the OSHA asbestos standard at 29 C.F.R. § 1910.1001. The Secretary contends that Ceramitalc HDT, an industrial talc produced by the Intervenor, R. T. Vanderbilt Company, and used by Hull contains asbestos fibers, and that Hull violated section 1910.1001 by sweeping spilled Ceramitalc HDT without first wetting down the material and by failing to affix caution labels to containers of Ceramitalc HDT. Administrative Law Judge George O. Taylor, Jr. found that Ceramitalc HDT does contain asbestos fibers, but he vacated

*/ Commissioner Cottine took no part in the consideration or decision of this case.

the citation because he concluded that Hull did not and could not, with reasonable diligence, know of the presence of asbestos fibers in the talc.

The issues before us for review[1/] include whether the judge's finding that Ceramitalc HDT contains asbestos fibers is correct and, if so whether the judge properly concluded that Hull did not and could not, with reasonable diligence, have known that the talc contained asbestos fibers. We conclude that the judge properly evaluated the evidence on these issues and that his determinations are correct.[2/]

Review was also directed on whether employer knowledge is relevant to an alleged nonserious violation. The Commission has held that employer knowledge is relevant to alleged nonserious violations and that the burden rests with the Secretary to prove that an employer either did know or could have, with reasonable diligence, known of the existence of a violation in order to show that the employer violated a standard. Prestressed Systems, Inc., 81 OSAHRC 43/D5, 9 BNA OSHC 1864, 1981

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1/ This case was previously consolidated with Baldwin Industries, Inc., OSHRC Docket No. 78-741. The cases are hereby severed for decisional purposes. Commission Rule 10, 29 C.F.R. § 2200.10.

2/ Commissioner Cleary notes that the R. T. Vanderbilt Company had been authorized by OSHA to certify that its industrial talcs do not contain asbestos if it had evidence that this was true. Pursuant to this authorization, Vanderbilt represented to users of Ceramitalc HDT that the minerals contained in the talc were "nonasbestiform." Prior to the time of the alleged violations in this case, OSHA rescinded Vanderbilt's authorization to certify that its talcs do not contain asbestos, and Vanderbilt sent a letter to some of its talc customers informing them of this. In Commissioner Cleary's view, any user of Vanderbilt talcs who received this letter would be on notice of OSHA's position that Vanderbilt talcs contain asbestos and could not be found to lack actual or constructive knowledge of this fact. Baldwin Industries, Inc., OSHRC Docket No. 78-741 (March 1982). However, there is no evidence that Hull received the Vanderbilt letter. Accordingly, Hull was entitled to rely on Vanderbilt's earlier representation that the minerals in Ceramitalc HDT were nonasbestiform, and Commissioner Cleary agrees that the judge correctly found Hull lacked actual or constructive knowledge that Ceramitalc HDT contains asbestos.

CCH OSHD ¶ 25,358 (No. 16147, 1981); General Electric Co., 81 OSAHRC 42/A2, 9 BNA OSHC 1722, 1981 CCH OSHD ¶ 25,345 (No. 13732, 1981). Accordingly, having found that the Secretary failed to prove that Hull either knew or, with reasonable diligence, could have known that Ceramitalc HDT contains asbestos fibers, Judge Taylor properly vacated the citation. Because we conclude that the judge correctly disposed of the case on the knowledge question, we do not reach whether the judge properly interpreted the standards Hull was charged with violating.

Accordingly, the judge's decision to vacate the citation is affirmed.[3/] SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRTARY

DATED: MAR 31 1982

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3/ Because Hull is not aggrieved by our disposition of the case, we deny its motion to reopen the record without deciding whether reopening of the record would otherwise be appropriate under the circumstances of this case.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 78-414 |
| MILLER CERAMICS, INC., | : | |
| Respondent, | : | |
| R. T. VANDERBILT COMPANY, INC., | : | |
| Intervenor. | : | |

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| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 78-555 |
| HULL POTTERY COMPANY, | : | |
| Respondent, | : | |
| R. T. VANDERBILT COMPANY, INC., | : | |
| Intervenor. | : | |

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|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 78-741 |
| BALDWIN INDUSTRIES, INC., | : | |
| Respondent, | : | |
| R. T. VANDERBILT COMPANY, INC., | : | |
| Intervenor. | : | |

APPEARANCES

Bruce C. Heslop, Esq., and
Allen J. Rapoport, Esq.,
for the complainant.

Guy F. Driver, Esq.,
for the respondents.

Francis C. Clark, Esq.,
for the intervenor.

DECISION AND ORDER

Taylor, Judge:

Background

The above-captioned cases were consolidated by an order of former Chief Judge David H. Harris, dated May 30, 1978. Hearings were conducted at Columbus, Ohio on June 19-22, 1978, and at Washington, D.C. on September 11-13, 1978.

The Complainant's Case Against Miller

Following an inspection of Miller's ceramic manufacturing business in Weedsport, New York, on September 28, 1977, Miller was issued a citation

for a nonserious violation of 29 C.F.R. § 1910.1001(j)(3).[1/] The citation alleges that Miller did not provide, or make available, comprehensive annual medical examinations to employees who were exposed to airborne levels of asbestos on the

> [m]ain floor, wet clay packing area, slip mixing tanks loading platform and elsewhere throughout the plant where talc is unloaded out of bags, handled or is airborne.

During the inspection, Peter Brown, an industrial hygienist employed by the Occupational Safety and Health Administration (OSHA), observed two of Miller's employees mixing and packing wet clay in Miller's "wet clay area." (Tr. 2: 153, 163-164.) The employees, Ron Moradorf and George Baker, were using talc from 50-pound bags of Nytal 100HR bearing the name of R. T. Vanderbilt Company as the manufacturer. (Tr. 1: 39; 2: 164, 190-191. Item 43, Respondent's Third Request for Admissions.) Brown observed dust as the bags were poured into the mixing tank. (Tr. 2: 164.) Thereafter, Brown obtained six air filter samples from the breathing zones of each of the two employees over a period of 7-1/2 hours. (Tr. 2: 165, 173, 175.) Brown also obtained a bulk sample from one of the bags of Vanderbilt talc. (Tr. 2: 178.) Both Moradorf and Baker told Brown that they had not received any medical examinations while working for Miller. (Tr. 2: 189-190.) Moradorf

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1/ This health standard provides that:

> On or before January 31, 1973, and at least annually thereafter, every employer shall provide, or make available, comprehensive medical examinations to each of his employees engaged in occupations exposed to airborne concentrations of asbestos fibers. Such annual examination shall include, as a minimum, a chest roentgenogram . . . , a history to elicit symptomatology of respiratory disease, and pulmonary function tests to include forced vital capacity . . . and forced expiratory volume at 1 second. . . .

told Brown that he had been working for Miller for 2-1/2 years, and Baker told him that he had been employed by Miller for three months. (Tr. 2: 190-191.)

Brown forwarded all of the samples to OSHA's Salt Lake City laboratory for analysis. (Tr. 2: 180.) The laboratory assigned the following identifying numbers: bulk sample, A-6393; Baker air filter samples, A-6395 through A-6400; Moradorf air filter samples, A-6402 through A-6407. (Tr. 2: 182; Exh. C-9.)

Using phase contrast microscopy, dispersion staining, and related petrographic techniques to analyze a portion of bulk sample A-6393, Willard Dixon, an industrial hygienist employed by OSHA's Salt Lake City laboratory, concluded that two anthophyllite fibers,[2/] four tremolite fibers, and 10 fibers of either tremolite or anthophyllite were present. (Tr. 4: 644, 674, 696-699; Exh. C-21.) The remainder of the sample was sent for further analysis to Ian Stewart, the manager of the electron optics group of Walter C. McCrone Associates, Incorporated. (Tr. 2: 317, 4: 699-700; Exh. C-22.) Using transmission electron microscopy and related techniques, Stewart ascertained that more than two fibers of anthophyllite were present in the portion of the sample that he analyzed. (Tr. 5: 52-53, 121-122.)

Daryl Peterson, a physical science technician at OSHA's Salt Lake City laboratory, analyzed the 12 air filter samples obtained by Brown. (Tr. 4: 734, 7: 737; Exh. C-10.) Using dispersion staining on a slide prepared from sample A-6395, Peterson found six fibers of the tremolite-actinolite series. (Tr. 4: 739, 746; Exh. C-23.) At the request of Dixon, Peterson did another analysis

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2/ As used in this decision, the term "fiber" means a particle that is longer than five micrometers (29 C.F.R. § 1910.1001(a)(2)), and that has an aspect ratio of at least three to one, that is, a particle whose length is at least three times greater than its width. (Para. 1.3, Exh. R-8.) See Borg-Warner Corp., 78 OSAHRC 18/A2 (No. 10757, 1978).

on A-6395, either with the same or a different slide, and detected at least 10 asbestos fibers. (Tr. 4: 747, 750; Exh. C-23.) On examining a portion of A-6396 using dispersion staining, Peterson observed 11 tremolite-actinolite fibers and one anthophyllite fiber. (Tr. 4: 748; Exh. C-23.) Using the same procedure on a part of A-6397, he ascertained that 11 tremolite-actinolite and six anthophyllite fibers were present. (Tr. 4: 749; Exh. C-23.) With dispersion staining, he found seven tremolite fibers and three anthophyllite fibers in the portion of A-6405 that was analyzed. (Tr. 4: 753; Exh. C-23.) He did "just routine phase contrast counting for total number of fibers present" on specimens from the remaining samples. (Tr. 4: 750; Exh. C-23.)

Stewart performed transmission electron microscopy on samples A-6404 and A-6405. (Tr. 5: 118.) His analysis of A-6404 reflected no asbestos fibers greater than five micrometers long. (Tr. 5: 118.) On analyzing A-6405, Stewart identified 20 to 30 anthophyllite fibers. (Tr. 5: 121.)

The Complainant's Case Against Hull

Hull, a manufacturer of pottery tableware, was inspected by Donald Cagle, an industrial hygienist employed by OSHA, during the period September 20-21, 1977. (Tr. 2: 209, 211.) As a result of the inspection, Hull was issued a citation for three nonserious violations. Item 1 of the citation alleges that Hull violated 29 C.F.R. § 1910.1001(c)(2)(i)[3/] in that spilled Ceramitalc HDT was dry swept in Hull's raw material storage area. Item 2

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3/ Section 1910.1001(c)(2)(i) provides that:

> Insofar as practicable, asbestos shall be handled, mixed, applied, removed, cut, scored, or otherwise worked in a wet state sufficient to prevent the emission of airborne fibers in excess of the exposure limits prescribed in paragraph (b) of this section, unless the usefulness of the product would be diminished thereby.

See footnote 4, infra, for the pertinent contents of § 1910.1001(b).

avers that Hull violated 29 C.F.R. § 1910.1001(g)(2)(i)[4/] by not having caution labels affixed "[o]n the pallets and/or bags of Ceramitalc HDT prior to dumping in the clay mixer." Item 3 alleges that Hull failed to comply with 29 C.F.R. § 1910.1001(h)(2)[5/] in that empty Ceramitalc HDT bags were not disposed of in impermeable containers.

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4/ Section 1910.1001(g)(2)(i) provides that:

> Caution labels shall be affixed to all raw materials, mixtures, scrap, waste, debris, and other products containing asbestos fibers, or to their containers, except that no label is required where asbestos fibers have been modified by a bonding agent, coating, binder, or other material so that during any reasonably foreseeable use handling, storage, disposal, processing, or transportation, no airborne concentrations of asbestos fibers in excess of the exposure limits prescribed in paragraph (b) of this section will be released.

Paragraph (b) of § 1910.1001 contains the following pertinent requirements:

> (2) Standard effective July 1, 1976. The 8-hour time-weighted average airborne concentrations of asbestos fibers to which any employee may be exposed shall not exceed two fibers, longer than 5 micrometers, per cubic centimeter of air. . . .
>
> (3) Ceiling concentration. No employee shall be exposed at any time to airborne concentrations of asbestos fibers in excess of 10 fibers, longer than 5 micrometers, per cubic centimeter of air. . . .

5/ Section 1910.1001(h)(2) provides that:

> Asbestos waste, scrap, debris, bags, containers, equipment, and asbestos-contaminated clothing, consigned for disposal, which may produce in any reasonably foreseeable use, handling, storage, processing, disposal, or transportation airborne concentrations of asbestos fibers in excess of the exposure limits prescribed in paragraph (b) of this section shall be collected and disposed of in sealed impermeable bags, or other closed, impermeable containers.

See footnote 4, supra, for the pertinent contents of § 1910.1001(b).

During his inspection, Cagle observed the activities of one of Hull's clay mixers and his helper. (Tr. 2: 216.) He saw the clay mixer cutting 50-pound bags of Ceramitalc HDT, dumping them into a mixing machine hopper, and operating the controls that fed water into the mixing machine. (Tr. 2: 216-217.) He also saw the clay mixer using a forklift in moving pallets of the material to the mixing machine. (Tr. 2: 217.) Cagle testified that from what he recalled the bags indicated that the talc was manufactured by the American Talc Company. (Tr. 2: 234.) Apparently, Cagle was mistaken and the talc was manufactured by the International Talc Company, a subsidiary of the R. T. Vanderbilt Company.[6/] (Tr. 2: 265-268.) Cagle observed the helper cutting clay that extruded from the mixing machine and stacking the extruded clay on a cart. (Tr. 2: 217-218.)

Neither the bags of Ceramitalc HDT nor the pallets on which they were stored had any caution labels on them. (Tr. 2: 234.) When the bags of Ceramitalc HDT were emptied, they were not disposed of in impermeable containers, rather the clay mixer simply threw them behind him and they were later placed in an open trash receptacle. (Tr. 2: 234-235.) Cagle observed broom marks where dry material was on the floor in the area where the Ceramitalc HDT was stored. Hull's management officer told Cagle that a broom was used for sweeping and that they "couldn't wet the material . . . because it would be slippery." (Tr. 2: 233.)

Cagle obtained three air filter samples from the breathing zone of the clay mixer and two from the breathing zone of his helper. (Tr. 2: 222-223.) Cagle also took six bulk samples. (Tr. 2: 226.) Cagle forwarded all of the samples to OSHA's Salt Lake City laboratory where they were assigned laboratory numbers and analyzed. (Tr. 2: 227, 229, 232.) The samples from

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6/ Ceramitalc HDT is a trade name that is registered by the R. T. Vanderbilt Company. (Tr. 2: 267.)

the clay mixer were assigned laboratory numbers A-6236, A-6238, and A-6244. (Exh. C-11.) The ones from the helper were given laboratory numbers A-6237, and A-6245. (Exh. C-11.) Cagle took one of the bulk samples, laboratory number A-6239, from a bag of Ceramitalc HDT that had just been opened by the clay mixer. (Tr. 2: 226, 230; Exh. C-11.) He took four of the bulk samples, laboratory numbers A-6240 through A-6243, from dust that had settled on the floor. (Tr. 2: 227, 231; Exh. C-11.) A-6240 was taken at the base of some steps, about 15 feet from the helper's location at the mixing machine. A-6241 was taken near a post, about 15 feet from the clay mixer. (Tr. 2: 253, 3: 619: Exh. C-11.) A-6242 was obtained in the immediate vicinity of where the clay mixer worked at the machine. (Tr. 2: 254, 3: 619; Exh. C-11.) A-6243 was obtained at the location where the Ceramitalc HDT was stored, about 30 feet from where the clay mixer poured the bags into the machine. (Tr. 2: 251, 3: 619; Exh. C-11.) On Hull's request at the end of the inspection, Cagle took the sixth bulk sample from a torn bag of Westex Black Talc. (Tr. 2: 226, 253.) That talc, which was not being used, was located in another part of Hull's plant. (Tr. 2: 253.) The laboratory number of that sample is A-6246. (Tr. 2: 230-231; Exh. C-11.)

Dan Crane, a physical science technician at OSHA's Salt Lake City laboratory, analyzed the samples obtained by Cagle. (Tr. 2: 333, 3: 535.) Using phase contrast microscopy and related techniques, Crane found a number of fibers in filter samples A-6236, A-6237, A-6238, A-6244, and A-6245. (Tr. 3: 559-562; Exh. C-18.) However, except for sample A-6238, he did not analyze these samples by dispersion staining to ascertain the mineralogical content of these fibers. (Tr. 3: 587, 597, 613-614; Exh. C-18.) Crane's analyses by dispersion staining of three slides prepared from A-6238 revealed the presence of six tremolite or anthophyllite fibers. (Tr. 3: 597; Exh. C-18.) Using dispersion staining on eight slides prepared from bulk

sample A-6239 and four slides prepared from each of the bulk samples identified as A-6241, A-6242, and A-6243, he ascertained that the A-6239 specimens contained 79 fibers that were tremolite or anthophyllite, the A-6241 specimens contained 10 tremolite and two anthophyllite fibers, the A-6242 specimens contained seven fibers that were tremolite or anthophyllite, and the A-6243 specimens contained 34 asbestos fibers. (Tr. 3: 537-548, 551-554, 558; Exh. C-18.) Crane's analysis of bulk sample A-6240 indicated that no fibers were present. (Tr. 3: 550.) Similarly, he detected no asbestos in his analysis of the Westex bulk sample, A-6246. (Tr. 3: 559.)

Subsequently, Ian Stewart performed dispersion staining on bulk samples A-6239, A-6242, and A-6243 and found about 2 to 3 percent fibrous tremolite-actinolite present in A-6239 and A-6243 and "probably less than about 1/4 per cent in A-6242." (Tr. 5: 47, 49.) He also analyzed these samples using transmission electron microscopy. As a result, he identified four anthophyllite fibers in A-6239. (Tr. 5: 105.) Although he saw fibers in A-6242, he could not positively identify them as asbestos. (Tr. 5: 106-107, 109.) By electron microscopic examination of A-6243, Stewart found that A-6243 was substantially similar to A-6239 in that anthophyllite fibers were present in A-6243. (Tr. 5: 107-109.)

## The Complainant's Case Against Baldwin

Baldwin, a paint manufacturer, was inspected by David Barnhill, an OSHA industrial hygienist, during the period June 28-30, 1977, and by Sally Barber, another OSHA industrial hygienist, on October 6 and 11, 1977. (Tr. 3: 620-621; 2: 269, 272.) Following these inspections, Baldwin was issued, on January 17, 1978, a citation for four nonserious violations, which is

designated as Citation Number 2.[7/] Item 1 of the citation alleges that Baldwin's paint mixing area had not been monitored to determine whether the paint mixers were exposed to excessive levels of asbestos fibers as required by 29 C.F.R. § 1910.1001(f)(1).[8/] Item 2 avers that Baldwin violated 29 C.F.R. § 1910.1001(g)(2)(i)[9/] in that raw materials being used in the paint mixing area did not contain caution labels. Items 3 and 4 allege that Baldwin violated 29 C.F.R. § 1910.1001(j)(2)[10/] and (3),[11/] respectively, by not providing employees working in the paint mixing area with preplacement and annual medical examinations as required by these two standards.

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7/ The file in the Baldwin case also contains a citation for a nonserious violation of 29 C.F.R. § 1910.132(a). That citation, designated as Citation Number 1 and issued on October 31, 1977, was not contested by Baldwin and has become a final order of the Commission by operation of law. (Tr. 1: 7.) See 29 U.S.C. § 659(a).

8/ This health standard provides, in pertinent part, that:

> Within 6 months of the publication of this section, every employer shall cause every place of employment where asbestos fibers are released to be monitored in such a way as to determine whether every employee's exposure to asbestos fibers is below the limits prescribed in paragraph (b) of this section.

9/ See footnote 4, supra, for the text of this standard.

10/ Section 1910.1001(j)(2) provides the following as to preplacement medical examinations:

> The employer shall provide or make available to each of his employees, within 30 calendar days following his first employment in an occupation exposed to airborne concentrations of asbestos fibers, a comprehensive medical examination, which shall include, as a minimum, a chest roentgenogram . . . , a history to elicit symptomatology of respiratory disease, and pulmonary function tests to include forced vital capacity . . . and forced expiratory volume at 1 second. . . .

11/ See footnote 1, supra, for text of 29 C.F.R. § 1910.1001(j)(3), the annual medical examination standard.

During his inspection, Barnhill met Baldwin's president, Mr. Carneal. (Tr. 3: 455, 622.) Carneal told Barnhill that the R. T. Vanderbilt talcs used by Baldwin did not contain asbestos and showed Barnhill some letters from Vanderbilt indicating that the talcs did not contain asbestos. (Tr. 3: 628.) Carneal also told Barnhill that Baldwin's employees had not been given any type of physical examination and that Baldwin had done no monitoring "for lead or silica or talc, or any compound." (Tr. 3: 628-630.) Barnhill obtained a bulk sample from a 50-pound bag of Nytal 200 that was being used in Baldwin's plant. (Tr. 3: 626, 629, 634.) Barnhill saw no asbestos caution labels on the bags of Nytal 200 that he observed. (Tr. 3: 629.) He also testified that he had no knowledge as to how long Baldwin had been using Nytal 200. (Tr. 3: 632.)

The bulk sample of Nytal 200 was sent to OSHA's Salt Lake City laboratory, where it was assigned laboratory number A-4976 and analyzed by Willard Dixon. (Tr. 3: 631, 4: 668; Exh. C-15.) Initially, in August 1977, Dixon analyzed A-4976 by using dispersion staining and related techniques. (Tr. 4: 668.) By scanning slides prepared from A-4976, he concluded "that asbestos fibers were present in low concentration around one percent or less." (Tr. 4: 669, 678; Exh. C-15.) In May 1978, he performed another analysis on A-4976 using the same petrographic techniques, but taking an actual fiber count on that occasion. (Tr. 4: 679, 681; Exh. C-20.) This analysis indicated the presence of five anthophyllite fibers, 17 tremolite fibers, and 19 fibers that were either anthophyllite or tremolite fibers. (Tr. 4: 688-691.)

Ian Stewart subsequently analyzed A-4976 using dispersion staining and found 3 to 5 per cent by weight of fibrous tremolite-actinolite. (Tr. 5: 47-49.) His electron microscopic examination of that sample indicated the presence of anthophyllite fibers. (Tr. 5: 116.)

During her inspection, Barber observed two of the respondent's paint mixers pouring talc and other dry materials into a paint mixing vat. (Tr. 2:

280-281.) The talc was in 50-pound bags of Nytal 200 manufactured by R. T. Vanderbilt. (Tr. 2: 281, 3: 453-454.) The bags had no caution labels on them to indicate that they contained asbestos material. (Tr. 2: 300.) Carneal told Barber that Baldwin had not performed any initial monitoring for the presence of asbestos and that Baldwin's employees had not been given any physical examinations. (Tr. 2: 300-301.) Barber did not know how long Baldwin had been in business or how long Baldwin had been using Nytal 200. (Tr. 2: 314, 3: 454-455.) One of the paint mixers told Barber that he had worked for Baldwin for one year. The other employee told her that he had worked for Baldwin for three months. (Tr. 3: 457.) Barber obtained five air filter samples from the breathing zones of each of the paint mixers. (Tr. 2: 280, 282, 287.) These samples were sent to OSHA's Salt Lake City laboratory where they were assigned laboratory numbers A-7015 through A-7024. (Tr. 2: 290-292, Exh. C-13.)

The samples were analyzed by Dan Crane. (Tr. 3: 465; Exh. C-14.) Using phase contrast microscopy and related techniques, he found a number of fibers in his analysis of all the samples except A-7021, which was unacceptable for analysis. (Tr. 3: 465, 512-515, 591; Exhs. C-14, C-17.) In addition, he performed dispersion staining on a part of A-7016 and ascertained that 10 asbestos fibers, either tremolite or anthophyllite, were present. (Tr. 3: 518, 529-531; Exh. C.-17.) Subsequently, by electron microscopic analysis of a portion of A-7016, Stewart identified two anthophyllite fibers and a large bundle of fibers that were comprised of anthophyllite fibers and what he believed to be chrysotile fibers. (Tr. 5: 110-112, 115-116.)

## The Case for the Respondents

Dr. Ann Wylie testified for the respondents as an expert witness on mineralogy and light microscopy. (Tr. 6: 51.) Randall Ross testified for the respondents as an expert witness on electron microscopy, electron

diffraction, and energy dispersion analysis. (Tr. 6: 148-149, 7: 4.) The gist of their testimony is that the analytical techniques used by the Salt Lake City laboratory technicians and by Ian Stewart were inadequate to establish the presence of asbestos fibers.

Wylie testified that the Salt Lake City laboratory personnel did not perform all of the steps she would have used in analyzing the samples. (Tr. 6: 131.) She would have used the ten step procedure described in Exhibit R-30 if she received a sample for analysis that she did not know anything about. (Tr. 6: 52-54, 59.) When asked if she would follow all of these steps if she were asked to analyze a sample for the six asbestos minerals enumerated in 29 C.F.R. § 1910.1001(a)(1), that is, chrysotile, amosite, crocidolite, tremolite, anthophyllite, and actinolite, she answered as follows:

> Yes, I would, unless I knew, for example, exactly the locality it came from and what minerals were there to start with, or if I had some previous knowledge about the sample that I could eliminate a large group of minerals for some reason.
>
> Then perhaps maybe it wouldn't be necessary to go through them all. But without a lot of knowledge, previous knowledge, I wouldn't, I couldn't identify without going through those steps, no. (Tr. 6: 62-63.)

In her opinion, the Salt Lake City analyses were inadequate to identify the minerals in the samples unless there was prior knowledge of the mineral content of the samples. She would have run an x-ray diffraction on the bulk samples. (Tr. 6: 64.)

Wylie stated it was difficult to distinguish tremolite, tourmaline, and prehnite by dispersion staining and that richterite cannot be distinguished from tremolite optically. (Tr. 6: 68-69.) However, tremolite can be distinguished from pectolite and wollastonite by dispersion staining if care is used. (Tr. 6: 70-71.)

Relying on various publications, Wylie testified that tremolite, anthophyllite, and actinolite exist in both asbestiform and nonasbestiform. (Tr. 6: 79-87; Exhs. R-25, R-33.) She explained that from a mineralogical viewpoint a true asbestos fiber is one that grows as a fiber in nature, whereas a cleavage fragment is a fragment that is broken from a larger particle. (Tr. 6: 89, 127.) Using Exhibit R-32, she pointed out illustrations of fibers and cleavage fragments. (Tr. 6: 90-94.) Although she had not heard that a cleavage fragment presents a health hazard, such a fragment would be classified as an asbestos fiber under the OSHA definition if it contained one of the six minerals enumerated in 29 C.F.R. § 1910.1001(a)(1), was longer than five micrometers, and had an aspect ratio of at least three to one.[12/] (Tr. 6: 93-94, 102.) However, it should not be classified as an asbestiform mineral because it didn't "grow as asbestos." (Tr. 6: 127.) In Wylie's opinion, "[a] particle three times longer than it is wide is not a fiber" from a mineralogical standpoint. (Tr. 6: 94-95.) Her study of asbestos, under a grant from the Bureau of Mines, shows that

> for particles longer than five micrometers, about 99 percent of all asbestos fibers have an aspect ratio of about ten to one, and more than half have an aspect ratio in excess of 50 to one. (Tr. 6: 96.)

In analyzing a massive variety of tremolite that was crushed, she found that only five percent of the particles had aspect ratios in excess of ten to one and none were in excess of 50 to 1. (Tr. 6: 96-97.)

Ross testified as to the importance of having appropriate internal standards in analyzing material by electron microscopic techniques. (Tr. 7: 4-6, 17-18.) He also testifed as to the need to have a tilting capacity on the microscope used in such an analysis. (Tr. 7: 6-17, 19-22.)

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12/ See footnote 2, supra.

Ross reviewed Exhibits C-31A-F (Tr. 7: 26), consisting of six photographs of the anthophyllite standards that were used by Stewart in performing his analyses. (Tr. 5: 57.) Ross also reviewed Exhibits C-26, C-27, and C-28, which are illustrations of the techniques used by Stewart in analyzing various samples. (Tr. 5: 81, 83-84, 94, 95; 7: 35-45.) Having made a visual observation of Exhibits C-31A-F and having made various measurements on them, Ross concluded that Stewart had used a poor anthophyllite standard. (Tr. 7: 26-32.) However, Ross also indicated that his opinion might be influenced by deviations resulting from the photographic process and that he would like to see the negatives. (Tr. 7: 32-33.)

Ross stated that Stewart's failure to count the angstrom spacings between the layer lines on the diffraction patterns was generally unacceptable. (Tr. 7: 36.) In Ross's opinion, Exhibit C-27P (fiber bundle, Baldwin, A-7016) and the diffraction patterns shown in the following exhibits were of little or no value for identifying asbestos fibers: C-26Q (Miller, A-6405); C-27N (fiber 1, Baldwin, A-7016); C-27O (fiber 2, Baldwin, A-7016); C-27Q (fiber bundle, Baldwin, A-7016); C-28E (fiber 2, Hull, A-6239); C-28G (fiber 3, Hull, A-6239); C-28K (fiber 4, Hull, A-6239). (Tr. 7: 35-45.) Ross qualified his opinions as to these exhibits by the reservation "that there is a question in the translation . . . from the negative to the print" because deviations might have been introduced by normal photographic procedures. (Tr. 7: 63.) Accordingly, Ross "put in a very strong request to see the original data." (Tr. 7: 65.)

Ross also criticized Stewart's analyses where no photographs were taken because Stewart "merely eyeballed the diffraction pattern and concluded that he had found an amphibole." (Tr. 7: 45.) Ross further pointed out that in an energy dispersive analysis there is a better chance of getting a pure chemical sample, uncontaminated by surrounding

interference particles, by using a selected point method rather than the "elongated concept" used by Stewart. (Tr. 7: 48.)

Findings of Facts in the Miller Case

1. On September 28, 1977, at Miller's plant located in Weedsport, New York, two of Miller's employees, Ron Moradorf and George Baker, were exposed to airborne concentrations of at least two asbestos fibers.

2. Moradorf and Baker had worked for Miller for 2-1/2 years and three months, respectively, and no medical examinations had been provided, or made available, to them.

3. The evidence fails to establish how long Miller had been using Nytal 100HR.

4. The evidence fails to establish that Miller possessed actual or constructive knowledge that Nytal 100HR contained asbestos.

Findings of Fact in the Hull Case

1. On or about September 21, 1977, at Hull's plant located in Crooksville, Ohio, spilled Ceramitalc HDT was dry swept in the vicinity of the raw material storage area, asbestos caution labels were not affixed to the bags of Ceramitalc HDT or the pallets on which they were stored, and empty Ceramitalc HDT bags were not collected or disposed of in sealed, impermeable bags or other closed, impermeable containers.

2. The evidence fails to establish that it was reasonably foreseeable that the failure to collect and dispose of the empty Ceramitalc HDT bags in impermeable bags or impermeable containers could have resulted in the exposure of Hull's employees to airborne concentrations of asbestos fibers in excess of those specified in 29 C.F.R. § 1910.1001(b)(2) or (3).[13/] Similarly, there is no evidence that the dry sweeping of spilled Ceramitalc HDT would

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13/ See footnote 4, supra, for the text of 29 C.F.R. § 1910.1001(b)(2) and (3).

exceed the limits provided in § 1910.1001(b)(2) or (3). However, the evidence establishes that some of the Ceramitalc HDT being used by Hull's employees contained at least two asbestos fibers.

3. The evidence fails to establish that Hull possessed actual or constructive knowledge that Ceramitalc HDT contained asbestos.

Findings of Facts in the Baldwin Case

1. From about June 30, 1977, to October 11, 1977, at Baldwin's plant in Foley, Alabama, Nytal 200 was used by Baldwin's employees while mixing paint. However, the evidence fails to establish that Nytal 200 was used by Baldwin for any additional period of time.

2. Baldwin had not performed any initial monitoring for the presence of asbestos and had not provided, or made available, medical examinations for its employees.

3. Asbestos caution labels were not affixed to the bags of Nytal 200 used by Baldwin's employees.

4. The evidence fails to establish that any employee who worked with Nytal 200 had been employed by Baldwin for as long as one year. It does establish, however, that two such employees, paint mixers, had been employed by Baldwin for more than 30 days.

5. The evidence establishes that the two paint mixers were exposed to airborne concentrations of at least two asbestos fibers each and that these fibers were released by the Nytal 200 that they were using.

6. The evidence fails to establish that Baldwin possessed actual or constructive knowledge that Nytal 200 contained asbestos.

Discussion

Prior to trial, the respondents filed a motion to dismiss all citations because the asbestos standards were improperly promulgated and unenforceably vague. The motion also asserts "that Complainant's continued

enforcement of an unconstitutional and unenforceably vague standard is arbitrary, capricious and constitutes an abuse of direction." The respondent's motion was considered and denied at trial. (Tr. 1: 28-37, 42-52.) In a joint post-trial brief, the respondents and the intervenor ask that I reconsider my denial of the motion. I adhere to my ruling for the reasons stated at trial. In addition, see the discussion of the dichotomy pertaining to the "asbestiform" and so-called "nonasbestiform" of minerals, infra. Also see National Industrial Constructors, Inc. v. OSHRC, 583 F.2d 1048, 1052-53 (8th Cir. 1978.)

Since I found at trial that the asbestos standards were not improperly promulgated or unenforceably vague, it was unnecessary for me to address the assertion that the complainant's enforcement of the standards was arbitrary, capricious, and an abuse of discretion. The joint post-trial brief asserts, however, that "the asbestos standard . . . is arbitrary and capricious." This assertion relates to the wisdom of the asbestos standards. The Commission has held that it is not its function to address the wisdom of the standard. Borg-Warner Corporation, 78 OSAHRC 18/A2 n. 11 (No. 10757, 1978.) Nevertheless, to alleviate possible appellate problems that could result from the absence of a ruling, I conclude that the evidence does not show that the asbestos standards are arbitrary and capricious.

Annual medical examinations are required under 29 C.F.R. § 1910.1001(j)(3) when employees are exposed to airborne concentrations of asbestos, regardless of the levels of exposure. GAF Corp. 75 OSAHRC 3/A2 (No. 3203, 1975), aff'd, 561 F.2d 913 (D.C. Cir. 1977.) However, since §1910.1001(j)(3) applies to employees engaged in occupations exposed to airborne concentrations of asbestos "fibers," I conclude that the standard applies to situations where employees are exposed to airborne

concentrations of at least two asbestos fibers, or will be in the future. See Gilles & Cotting, Inc., 76 OSAHRC 30/D9 (No. 504, 1976.) In these respects, I interpret the requirements for preplacement medical examinations in 29 C.F.R. § 1910.1001(j)(2) to be the same as those in § 1910.1001(j)(3) because the significant language in both standards is identical.[14/]

The evidence establishes that two of Miller's employees, Moradorf and Baker, were exposed to airborne concentrations of at least two asbestos fibers. Dust was observed in the air when bags were poured into the mixing tank. Dixon's analysis of the bulk sample (A-6393) revealed the presence of two anthophyllite fibers, four tremolite fibers, and 10 fibers of either tremolite or anthophyllite. The presence of asbestos fibers in this sample was verified by Stewart whose analysis indicated that more than two

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14/ In their joint post-trial brief, the respondents and the intervenor contend that the medical examination standards are unenforceably vague. In support of this contention they assert that evidence adduced at trial (Tr. 3: 415-425) shows an "unofficial exclusion level 'policy' in certain OSHA offices" providing "that concentrations of .1 asbestos fibers per cubic centimeter of air or greater must be found before any citation under the medical examination provisions would be issued." In this connection, I am asked to take official notice of OSHA Program Directive Number 300-16 issued on October 11, 1978, which, in effect, formally announces this policy. At best, the matters referred to in the joint post-trial brief merely show that the complainant has changed his interpretation of the standards for enforcement purposes. See GAF Corp. v. OSHRC, 561 F.2d.913 (D.C. Cir., 1977). They do not detract from the specificity of the standards as promulgated by the complainant and as interpreted by the Commission and the United States Court of Appeals for the District of Columbia Circuit. Furthermore, the implementation or pronouncement of policies by the Secretary of Labor or his representatives have no binding legal effect on either the Secretary or the Commission when they have not been promulgated as rules on regulations. See Bristol-Myers Co., 78 OSAHRC 106/D13 n.1 (No. 77-3854, 1978); Alfred S. Austin Construction Co., 76 OSAHRC 50/A2 (No. 4809, 1976); GAF Corp.,77 OSAHRC 207/E6 (No. 77-616, 1977) (Alfieri, J. ). Of course, Policy Directive Number 300-16, is also not binding here because it was not issued until well after the issuance of the citations in the instant cases.

anthophyllite fibers were present.[15/] Peterson's analysis of A-6405, an air filter sample taken on Moradorf, showed that seven tremolite and three anthophyllite fibers were present. The presence of asbestos fibers in this sample was also verified by Stewart who observed 20 to 30 anthophyllite fibers in a portion of the sample.

Irrespective of the exposure of Moradorf and Baker to asbestos fibers, the evidence is insufficient to establish that Miller violated 29 C.F.R. § 1910.1001(j)(3). Baker had worked for Miller for only three months. More important, there is no evidence as to how long Miller had been using Nytal 100HR. Thus, it cannot be said that Miller had failed to provide Moradorf or Baker with the annual medical examinations required by § 1910.1001(j)(3). Similarly, the failure to establish how long Miller had been using Nytal 100HR precludes amending the citation and finding a violation of 29 C.F.R. § 1910.1001(j)(2), for a failure to provide preplacement medical examinations.

The evidence establishes that Baldwin's paint mixers were exposed to airborne concentrations of at least two asbestos fibers. This is established by Crane's and Stewart's analyses of air filter sample A-7016. Additionally, Dixon's and Stewart's analyses of the bulk sample obtained by Barnhill (A-4976) show that asbestos fibers were present in that sample. However, as in the Miller case, a violation of 29 C.F.R. § 1910.1001(j)(3) has not been established as the evidence fails to show that either of the paint mixers had

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15/ Stewart testified that analysis by transmission electron microscopy and related techniques was necessary to rule out the possibility of erroneously counting talc fibers as asbestos fibers, which could not be accomplished by the analysis techniques used by OSHA's Salt Lake City laboratory. (Tr. 5: 53.) Accordingly, athough I note that Peterson found asbestos fibers in A-6395, A-6396, and A-6397, I do not rely on those analyses in concluding that Moradorf and Baker were exposed to airborne concentrations of at least two asbestos fibers as Peterson's findings were not verified by Stewart. Also, I do not rely in this decision on other OSHA analyses that have not been verified by Stewart.

been working for Baldwin for a year[16] or that they had been using Nytal 200 for a year in their work.

Barber's testimony establishes that both paint mixers had worked for Baldwin for more than 30 days. Her testimony coupled with that of Barnhill shows that Baldwin had been using Nytal 200 for slightly more than three months between June 1977 and October 1977,[17] well over the 30 calendar days specified in the preplacement medical examination standard, 29 C.F.R. § 1910.1001(j)(2).

Asbestos caution labels must be affixed to products containing asbestos "fibers." 29 C.F.R. § 1910.1001(g)(2)(i). As with the medical examination standards, I conclude that caution labels are required when a product contains at least two asbestos fibers.[18] As previously indicated,

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16/ Barber testified that one of the employees told her that he had worked for Baldwin for three months. As she "recall[ed]" the other indicated to her that he had worked for Baldwin for one year. (Tr. 3: 457.) I consider this to be a rough approximation that could have fell short of being a full year. Accordingly, I find that Barber's testimony is not sufficiently definitive to establish that the employee had worked for Baldwin for a year.

17/ No violation can be found on the date of Barnhill's inspection because the citation was not issued to Baldwin within six months after Barnhill's inspection. 29 U.S.C. § 658(c). Nevertheless, Barnhill's testimony can be used in part to establish the existence of violations at the time of Barber's inspection. For example, Barnhill's testimony can be used to establish that Baldwin was using Nytal 200 at the time of Barnhill's inspection. Furthermore, the bulk sample obtained by Barnhill can be used to show that the Nytal 200 in use at the time of Barnhill's inspection contained asbestos fibers.

18/ To establish a violation of 29 C.F.R. § 1910.1001(g)(2)(i), the complainant is not required to prove "that during any reasonably foreseeable use, handling, storage, disposal, processing, or transportation, no airborne concentrations of asbestos fibers in excess of the exposure limits prescribed in [29 C.F.R. § 1910.1001(b)] will be released." That requirement pertains only to a situation "where asbestos fibers have been modified by a bonding agent, coating, binder, or other material," which is not the situation in the Baldwin and Hull cases.

the presence of at least two asbestos fibers in the Nytal 200 used by Baldwin is established by Crane's, Dixon's, and Stewart's analyses of A-7016 and A-4976. Barber's testimony shows that the bags of Nytal 200 that she observed at the respondent's plant did not have asbestos caution labels.

Cagle's testimony establishes that neither the bags of Ceramitalc HDT used by Hull nor the pallets on which they were stored had asbestos caution labels. The presence of at least two asbestos fibers in the Ceramitalc HDT used by Hull is established by Crane's and Stewart's analyses of bulk sample A-6239 taken from a bag of Ceramitalc HDT and of bulk sample A-6243 taken from the floor in the area where the Ceramitalc HDT was stored.[19/]

Under 29 C.F.R. § 1910.1001(c)(2)(i) asbestos must be handled or worked in a wet state sufficient to prevent the emission of airborne fibers in excess of the exposure limits specified in 29 C.F.R. § 1910.1001(b)(2) and (3). Obviously, this presupposes that when handled or worked in the dry state there would be an emission of airborne asbestos fibers in excess of the § 1910.1001(b)(2) and (3) limits. There is no evidence that the dry sweeping of spilled Ceramitalc HDT would exceed these limits in Hull's plant.

Hull's empty Ceramitalc HDT bags should have been collected and disposed of in impermeable containers if it was "reasonably foreseeable" that their future use or processing might produce airborne concentrations of asbestos fibers in excess of the limits prescribed in § 1910.1001(b)(2) and (3). There is no evidence to establish that it was reasonably foreseeable from Hull's use or other processing of these empty bags that these limits might be exceeded.

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19/ Crane also found asbestos fibers in air filter sample A-6238 and in bulk samples A-6241 and A-6242. Stewart did not analyze A-6238 or A-6241 and could not identify asbestos in A-6242. Therefore, I do not rely on Crane's analyses of these samples. See footnote 15, supra.

The asbestos monitoring standard, 29 C.F.R. § 1910.1001(f)(1) requires monitoring, "[w]ithin 6 months of the publication of this section," of places of employment when asbestos "fibers" are released. Therefore, to establish a violation of this standard, it must be shown that at least two asbestos fibers were actually released from the Nytal 200 being used at Baldwin's plant. See Goodyear Tire & Rubber Company, 77 OSAHRC 82/A2 (No. 13442, 1977.) This is established by Crane's and Stewart's analyses of air filter sample A-7016. The fact that Baldwin had done no initial monitoring for asbestos is established by Carneal's admission to Barber that none had been done.

In my opinion, if an employer should have monitored for asbestos within six months of the publication of 29 C.F.R. § 1910.93(a),[20/] his duty to monitor continues as long as he continues to use products that release asbestos fibers. See Yelvington Welding Services, 78 OSAHRC 84/D6 (No. 15958, 1978). Also, I interpret the standard to require initial asbestos monitoring within a reasonable time after an employer knows or, by the exercise of reasonable diligence, could have known that a product used by him was causing the release of asbestos fibers in his place of employment, even though he was not using this product during the initial six-month period.[21/] As previously indicated, the evidence establishes that Baldwin had

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20/ The asbestos standards were previously codified at 29 C.F.R. § 1910.93a and, on May 28, 1975 were recodified at 29 C.F.R. § 1910.1001. 40 Fed. Reg. 23072 (1975).

21/ The conclusions expressed in this paragraph are supported by 29 C.F.R. § 1910.1001(f)(3)(ii), which provides that:

> After the initial determinations required by paragraph (f)(1) of this section, samples shall be of such frequency and pattern as to represent with reasonable accuracy the levels of exposure of the employees. In no case shall sampling be at intervals greater than 6 months for employees whose exposures to asbestos may reasonably be foreseen to exceed the exposure limits prescribed in paragraph (b) of this section.

been using Nytal 200 from the time of the first inspection to the time of the second one, a period of slightly more than three months, but does not establish when Baldwin first started to use Nytal 200. If Baldwin knew at the time of the first inspection or, by the exercise of reasonable diligence, could have known at that time that Nytal 200 contained asbestos fibers, then the time interval between the two inspections would constitute more than a reasonable period for the accomplishment of the required monitoring.

In my opinion, there is no validity to the respondent's attempt, through the testimony of Wylie and Ross, to impeach the analyses of the samples by Stewart and OSHA's Salt Lake City laboratory. Wylie testified that the Salt Lake City analyses were inadequate unless there was prior knowledge of the mineral content of the samples. However, the Salt Lake City laboratory had such knowledge because the analysts could readily identify a Vanderbilt product under a microscope and had prior knowledge of the mineralogical content of Vanderbilt products. (Tr. 4: 713-714, 717-718, 722.) Also see Borg-Warner Corp., 78 OSAHRC 18/A2 (No. 10757, 1978); Wenczel Tile Company of Florida, Inc., OSAHRC Docket No. 77-2039 (August 14, 1978) (Brady, J.), Commission review ordered, September 13, 1978. Moreover, Stewart's verification of several of the Salt Lake City analyses negates Wylie's reservations as to the mineral content of those samples.[22/]

Ross' criticisms of Stewart's analyses were based on photographic exhibits that were introduced by the complainant merely to illustrate the techniques used by Stewart. Ross admitted that his criticisms could be invalid because of possible deviations in the photographs and requested an opportunity to see the original data. At the trial, I ruled that the respondents' experts would be afforded an opportunity to examine this data and that following the examination I would grant a motion to reopen the

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22/ See footnote 15, supra.

hearing to present evidence as to what the examination revealed. (Tr. 6: 33-34; 7: 80.) The respondents' counsel agreed that he would subsequently advise me as to whether the respondents would avail themselves of the opportunity to have their experts examine the data. (Tr. 7: 77-80.) Thereafter, by a letter dated September 26, 1978, the opportunity was declined. Accordingly, I find that Ross's criticisms are entitled to no significant weight.

The conclusions of the complainant's analysts concerning the mineralogical composition of the fibers they analyzed are supported by Mineral Product Safety Data Sheets prepared by Vanderbilt on May 1, 1975, and January 15, 1978. (Exhs. C-32, C-33.) Those data sheets show that 50 to 70 percent of Ceramitalc HDT and Nytal 100HR and 40 to 60 percent of Nytal 200 is "tremolite and/or anthophyllite," albeit "non-asbestiform."

The Commission has held that the so-called "nonasbestiform" of the minerals regulated by the complainant's asbestos standards fall within the purview of the standards. Borg-Warner Corp., supra. I find nothing in the instant cases that detracts from that holding. Wylie's testimony represents a mineralogical viewpoint as contrasted with the health considerations inherent in the asbestos standards.[23/] Whether the inhalation of tremolite, anthophyllite, and actinolite cleavage fragments[24/] that are longer than five

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23/ Thus, the term "nonasbestiform" appears to be a misnomer from a health standpoint.

24/ As a matter of practice, OSHA's Salt Lake City laboratory did not count a particle as a fiber if its width was greater than five micrometers. (Tr. 3: 506; 4: 717-718, 741.) This tended to eliminate the counting of a cleavage fragment as a fiber. (Tr. 4: 717.)

micrometers with an aspect ratio of at least three to one[25/] is injurious to an employee's health is unclear from the record in these cases. However, there was no evidence introduced during the trial that tends to show that it is not just as injurious to an employee's health to inhale these particles as it is to inhale particles that differ from them only in that they grow naturally as asbestos fibers.[26/] The resolution of this matter is not essential in these cases because a comparison of photographs of tremolite, anthophyllite, and actinolite cleavage fragments and asbestiform fibers (figures 3, 4, and 5, pages 7, 8, and 9, Exh. R-32) with the illustrative photographs of Stewart's analyses of samples A-6405 (Exh. C-26P), A-7016 (Exhs. C-27M and P), and A-6239 (Exhs. C-28A, C, D, F, H, and J) clearly establishes that the particles analyzed by Stewart were of the asbestiform variety as used in mineralogical parlance. (Tr. 6: 97-99.) More important, the respondents and the intervenor concede at page 26 of their joint post-trial brief that the

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25/ Although the three to one aspect ratio requirement is not contained in the asbestos standards, it constitutes a subsequent interpretation of the standard by the complainant. See Borg-Warner Corp., supra. Since that interpretation increases the complainant's burden of proof, the respondents cannot be prejuduced by its use. In regard to Wylie's testimony that about all asbestos fibers have an aspect ratio greater than three to one, I note that Stewart testified that he found some asbestos fibers with about a 100 to 1 aspect ratio. (Tr. 5: 96, 194.)

26/ After trial, however, the respondents requested me to take official notice of pages 2 and 3 of DHEW Publication Number (NIH) 79-1681, entitled "Asbestos: An Information Resource," published in May 1978. That publication states that "recent biological studies suggest that, in terms of carcinogenic activity, mineral shape may be more important than chemical nature." However, several studies by the National Institute for Occupational Safety and Health are more relevant to the health hazards associated with the Vanderbilt products involved in the instant cases. These studies show an increased risk of lung cancer among former miners and millers who had worked with tremolitic talcs for the R. T. Vanderbilt Company in upper New York and reveal an elevated prevalence of pleural thickening is nearly one of every three Vanderbilt tremolitic talc workers with greater than 15 years of exposure. (Exh. R-9.)

complainant's photographs "apparently depict mineralogical fibers" and that "[t]he fibrous morphology of the suspect particles is not debated."[27/]

To establish any violation of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, the complainant must prove that the respondent possessed actual or constructive knowledge of the alleged violative conditions. Wally Taylor Construction Co., 76 OSAHRC 142/F6 (No. 9413, 1976), and the cases cited therein; Scheel Construction, Inc., 76 OSAHRC 138/B6 (No. 8687, 1976). In the instant cases, that equates to a requirement that the complainant prove that the respondents knew or, by the exercise of reasonable diligence, could have known that they were using talcs that contained asbestos fibers. I conclude that the complainant failed to prove that any of the respondents possessed such knowledge.

The complainant attempted to prove that the respondents possessed the requiste knowledge through the testimony of Allen Harvey, the manager

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27/ DHEW Publication Number (NIH) 79-1681 also indicates the following:

> The identification of asbestos is complex because many of the minerals that are chemically almost identical to different varieties of asbestos (e.g., grunerite to amosite, serpentine to chrysotile) exhibit perfect prismatic cleavage (the ability to break along well-defined crystallographic planes), so that physical degradation often leads to the formation of minute cleavage fragments that are chemically as well as physically indistinguishable from asbestos fibers. Recent comprehensive studies at the U. S. Bureau of Mines have concluded that there is currently no absolute way to distinguish between finely divided asbestos and certain other minerals of similar composition. (Emphasis added.)

Because of their indefiniteness, these conclusions are of little significance in the instant cases. Moreover, for the reasons previously discussed in the text, the evidence establishes the presence of asbestos fibers in various samples of Ceramitalc HDT, Nytal 100HR, and Nytal 200 that were analyzed.

for technical development for the R. T. Vanderbilt Company. (Tr. 7: 81.) Harvey identified an unsigned letter (Exh. C-34) bearing the letterhead of the R. T. Vanderbilt Co., dated January 25, 1977, addressed "To Our Talc Customers," which is entitled "Talc Certification." (Tr. 7: 87.) The body of the letter states the following:

> In a letter from the U. S. Department of Labor, dated October 9, 1974, we were authorized to certify that our talc products do not contain asbestos. This reasonable move was followed by OSHA Field Memorandum #74-92, which attempted to clarify the differences between asbestiform and non-asbestiform minerals.
>
> Dr. Morton Corn, the most recent Assistant Secretary of Labor and head of OSHA, informed us in a letter received January 24, 1977, that this authorization has now been rescinded and the Field Memorandum has been cancelled. These most recent rulings were made just prior to Dr. Corn's resignation and mean we are no longer in a position to certify that our talc products do not contain asbestos even though they are composed of the same non-asbestiform minerals processed the same as always.
>
> We are unable to explain this unwarranted reversal of policy by OSHA, but you can be assured we will actively oppose this injustice with all the technical and legal means available to us. Our talcs have been the subject of two OSHA cases during the past year which have gone to litigation. One case remains unresolved and in the other one the Government backed down from their asbestos contention and accepted a settlement which was not even under the Asbestos Standard.
>
> We thank you for your continued consideration and support.

Although Harvey participated in the preparation of the letter, he was not sure that it had been sent to Vanderbilt's talc customers. (Tr. 7: 88-89.) Even if there was evidence that the letter had been mailed to each of the respondents, I would not infer that it had been received by them. There is, however, some evidence from which it can be inferred that Baldwin received

the letter. Based on letters received from Vanderbilt, Carneal told Barnhill that the Vanderbilt talcs being used by Baldwin "don't have any asbestos in them." (Tr. 3: 628.) Subsequently, Carneal gave Barber a letter from Vanderbilt, dated January 25, 1977, addressed to its talc users, and entitled "Talc Certification." (Tr. 3: 455.)

Vanderbilt's letter of January 25, 1977, shows that Vanderbilt, under an authorization granted by the complainant, had certified to its talc users that Vanderbilt's talcs did not contain asbestos. Although the letter states that the complainant had withdrawn the previously granted certification authority, it continues to tell Vanderbilt talc users that Vanderbilt's talc products do not contain asbestos. In my opinion, it was reasonable for users of Vanderbilt talcs, including those who received the January 25, 1977, letter to rely on Vanderbilt's assertions that its talcs were free of asbestos.[28/] It is clear that Baldwin believed the assertions, and it is reasonably expectable that other users also believed them. It would most certainly be unreasonable to expect every user of Vanderbilt talcs throughout the nation to individually have these talcs analyzed for asbestos after having been told by the producers that the talcs did not contain asbestos.[29/] The difficulties of

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28/ There is no other evidence which tends to show that the respondents had any cause to believe that Vanderbilt talcs contained asbestos. To the contrary, the Mineral Product Safety Data Sheets prepared by Vanderbilt on May 1, 1975, and January 15, 1978, to inform its customers of the ingredients in Vanderbilt talcs, indicate that no asbestos is contained in Ceramitalc HDT, Nytal 100HR, or Nytal 200, as the tremolite and anthophyllite contained in these talcs are characterized as "non-asbestiform." (Tr. 7: 82-86; Exhs. C-32, C-33.)

29/ In instances such as this, it would seem that enforcement should be initially directed against the producers to require them to affix asbestos labels to their products where appropriate. If users were so alerted to the presence of asbestos, it should obviate the necessity "to litigate numerous similar cases through the administrative and appeal procedure provided" under the Act. Continental Can Co., U.S.A. v. Marshall, 455 F.Supp. 1015 (S. D. Ill., 1978).

obtaining such analyses are well demonstrated by the record in the instant cases. Thus, I conclude that reasonable diligence did not require the respondents to obtain them.

## Conclusion of Law

1. The Commission has jurisdiction over the cases, the respondents having admitted jurisdiction in their answers to the complaints. (Tr. 1: 9.)

2. The evidence fails to establish that the respondents violated any of the occupational health standards in issue in these cases.

## ORDER

The three citations in issue in these cases are vacated in their entirety.

George O. Taylor Jr.
GEORGE O. TAYLOR, JR.
Judge, OSHRC

Dated: May 29, 1979
Hyattsville, Maryland

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

March 31, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

BALDWIN INDUSTRIES, INC.

OSHRC DOCKET NO. 78-741

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

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  Winston-Salem, North Carolina 27102

FOR EMPLOYEES

-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

OFFICE OF THE JUDGES'
Occupational Safety and Health
Review Commission
1515 Broadway
Room 3800
New York, N.Y. 10036

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | |
| BALDWIN INDUSTRIES, INC., | : | OSHRC Docket No. 78-741 |
| Respondent. | : | |
| R. T. VANDERBILT COMPANY, | : | |
| Intervenor. | : | |
| | : | |

ORDER

Before ROWLAND, Chairman; CLEARY, Commissioner.*/

BY THE COMMISSION:

The Secretary of Labor alleges that Baldwin Industries, Inc. ("Baldwin") committed nonserious violations of various provisions of the OSHA asbestos standard at 29 C.F.R. § 1910.1001.1/ The Secretary contends that NYTAL 200, an industrial talc produced by the Intervenor, R. T. Vanderbilt Company ("Vanderbilt"), and used by Baldwin, contains asbestos fibers, and that Baldwin was therefore required to affix caution labels to containers of NYTAL 200, monitor its workplace for asbestos fibers, and provide medical examinations for employees exposed to airborne asbestos fibers. Administrative Law Judge George O. Taylor, Jr. found that NYTAL

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*/ Commissioner Cottine took no part in the consideration or decision of this case.

1/ This case was previously consolidated with Hull Pottery Co., OSHRC Docket No. 78-555. The cases are hereby severed for decisional purposes. Commission Rule 10, 29 C.F.R. § 2200.10.

200 does contain asbestos fibers, but he vacated the citation because he concluded that Baldwin did not and could not, with reasonable diligence, know of the presence of asbestos fibers in the talc.

Both participating members conclude that the judge's finding that NYTAL 200 contains asbestos fibers is supported by the preponderance of the evidence. They are divided, however, on whether the judge correctly found that Baldwin did not and could not, with reasonable diligence, have known of the presence of asbestos fibers in the talc. Chairman Rowland would adopt the judge's reasoning on this question and he notes that, in the absence of either actual or constructive knowledge of this fact on Baldwin's part, the citation is properly vacated. Prestressed Systems, Inc., 81 OSAHRC 43/D5, 9 BNA OSHC 1864, 1981 CCH OSHD ¶ 25,358 (No. 16147, 1981); General Electric Co., 81 OSAHRC 42/A2, 9 BNA OSHC 1722, 1981 CCH OSHD ¶ 25,345 (No. 13732, 1981).

Commissioner Cleary agrees that an employer's actual or constructive knowledge must be shown in order to sustain the finding of a violation. He would find, however, that Baldwin had the requisite knowledge in this case. Prior to the time of the alleged violation, Baldwin received a letter from Vanderbilt stating that OSHA had rescinded the authorization it had previously granted Vanderbilt to certify that Vanderbilt talcs do not contain asbestos. This letter put Baldwin on notice that the Secretary of Labor now considered Vanderbilt talcs to contain asbestos. In view of this knowledge of the Secretary's position and the well-known, serious health effects associated with asbestos exposure, a reasonably diligent employer would have conducted its own tests to determine whether its employees were being exposed to asbestos fibers. See Hermitage Concrete Pipe Co., OSHRC Docket No. 4678 (March 23, 1982).

Thus, in Commissioner Cleary's view, had Baldwin exercised reasonable diligence it could have known that NYTAL 200 contains asbestos fibers.

Commissioner Cleary would further conclude that Baldwin committed nonserious violations of 29 C.F.R. §§ 1910.1001(f)(1), 1910.1001(g)(2)(i), and 1910.1001(j)(2). Because its employees were exposed to measurable concentrations of airborne asbestos fibers, Commissioner Cleary concludes that Baldwin violated the monitoring and medical examination provisions of sections 1910.1001(f)(1) and 1910.1001(j)(2) under the interpretation of those standards set forth by the Commission in Research-Cottrell, Inc., 81 OSAHRC 26/B13, 9 BNA OSHC 1489, 1981 CCH OSHD ¶ 25,284 (No. 11756, 1981). He would further find that Baldwin violated section 1910.1001(g)(2)(i) by not affixing caution labels to bags containing NYTAL 200.

In order to resolve the impasse created by their differing views on the appropriate disposition of the case, the two participating members agree to vacate the direction for review. See Texaco, Inc., 80 OSAHRC 74/B1, 8 BNA OSHC 1758, 1980 CCH OSHD ¶ 24,634 (No. 77-3040, 1980). This disposition results in the judge's decision becoming the final order of the Commission.[2/] 29 U.S.C. § 661(i).

Accordingly, the direction for review is vacated. SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRTARY

DATED: MAR 31 1982

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2/ Because Baldwin is not aggrieved by this disposition, we deny its motion to reopen the record without deciding whether reopening of the record would otherwise be appropriate under the circumstances of this case.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 78-414 |
| MILLER CERAMICS, INC., | : | |
| Respondent, | : | |
| R. T. VANDERBILT COMPANY, INC., | : | |
| Intervenor. | : | |

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 78-555 |
| HULL POTTERY COMPANY, | : | |
| Respondent, | : | |
| R. T. VANDERBILT COMPANY, INC., | : | |
| Intervenor. | : | |

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 78-741 |
| BALDWIN INDUSTRIES, INC., | : | |
| Respondent, | : | |
| R. T. VANDERBILT COMPANY, INC., | : | |
| Intervenor. | : | |

APPEARANCES

Bruce C. Heslop, Esq., and
Allen J. Rapoport, Esq.,
for the complainant.

Guy F. Driver, Esq.,
for the respondents.

Francis C. Clark, Esq.,
for the intervenor.

DECISION AND ORDER

Taylor, Judge:

Background

The above-captioned cases were consolidated by an order of former Chief Judge David H. Harris, dated May 30, 1978. Hearings were conducted at Columbus, Ohio on June 19-22, 1978, and at Washington, D.C. on September 11-13, 1978.

The Complainant's Case Against Miller

Following an inspection of Miller's ceramic manufacturing business in Weedsport, New York, on September 28, 1977, Miller was issued a citation

for a nonserious violation of 29 C.F.R. § 1910.1001(j)(3).[1/] The citation alleges that Miller did not provide, or make available, comprehensive annual medical examinations to employees who were exposed to airborne levels of asbestos on the

> [m]ain floor, wet clay packing area, slip mixing tanks loading platform and elsewhere throughout the plant where talc is unloaded out of bags, handled or is airborne.

During the inspection, Peter Brown, an industrial hygienist employed by the Occupational Safety and Health Administration (OSHA), observed two of Miller's employees mixing and packing wet clay in Miller's "wet clay area." (Tr. 2: 153, 163-164.) The employees, Ron Moradorf and George Baker, were using talc from 50-pound bags of Nytal 100HR bearing the name of R. T. Vanderbilt Company as the manufacturer. (Tr. 1: 39; 2: 164, 190-191. Item 43, Respondent's Third Request for Admissions.) Brown observed dust as the bags were poured into the mixing tank. (Tr. 2: 164.) Thereafter, Brown obtained six air filter samples from the breathing zones of each of the two employees over a period of 7-1/2 hours. (Tr. 2: 165, 173, 175.) Brown also obtained a bulk sample from one of the bags of Vanderbilt talc. (Tr. 2: 178.) Both Moradorf and Baker told Brown that they had not received any medical examinations while working for Miller. (Tr. 2: 189-190.) Moradorf

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1/ This health standard provides that:

> On or before January 31, 1973, and at least annually thereafter, every employer shall provide, or make available, comprehensive medical examinations to each of his employees engaged in occupations exposed to airborne concentrations of asbestos fibers. Such annual examination shall include, as a minimum, a chest roentgenogram . . . , a history to elicit symptomatology of respiratory disease, and pulmonary function tests to include forced vital capacity . . . and forced expiratory volume at 1 second. . . .

told Brown that he had been working for Miller for 2-1/2 years, and Baker told him that he had been employed by Miller for three months. (Tr. 2: 190-191.)

Brown forwarded all of the samples to OSHA's Salt Lake City laboratory for analysis. (Tr. 2: 180.) The laboratory assigned the following identifying numbers: bulk sample, A-6393; Baker air filter samples, A-6395 through A-6400; Moradorf air filter samples, A-6402 through A-6407. (Tr. 2: 182; Exh. C-9.)

Using phase contrast microscopy, dispersion staining, and related petrographic techniques to analyze a portion of bulk sample A-6393, Willard Dixon, an industrial hygienist employed by OSHA's Salt Lake City laboratory, concluded that two anthophyllite fibers,[2/] four tremolite fibers, and 10 fibers of either tremolite or anthophyllite were present. (Tr. 4: 644, 674, 696-699; Exh. C-21.) The remainder of the sample was sent for further analysis to Ian Stewart, the manager of the electron optics group of Walter C. McCrone Associates, Incorporated. (Tr. 2: 317, 4: 699-700; Exh. C-22.) Using transmission electron microscopy and related techniques, Stewart ascertained that more than two fibers of anthophyllite were present in the portion of the sample that he analyzed. (Tr. 5: 52-53, 121-122.)

Daryl Peterson, a physical science technician at OSHA's Salt Lake City laboratory, analyzed the 12 air filter samples obtained by Brown. (Tr. 4: 734, 7: 737; Exh. C-10.) Using dispersion staining on a slide prepared from sample A-6395, Peterson found six fibers of the tremolite-actinolite series. (Tr. 4: 739, 746; Exh. C-23.) At the request of Dixon, Peterson did another analysis

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2/ As used in this decision, the term "fiber" means a particle that is longer than five micrometers (29 C.F.R. § 1910.1001(a)(2)), and that has an aspect ratio of at least three to one, that is, a particle whose length is at least three times greater than its width. (Para. 1.3, Exh. R-8.) See Borg-Warner Corp., 78 OSAHRC 18/A2 (No. 10757, 1978).

on A-6395, either with the same or a different slide, and detected at least 10 asbestos fibers. (Tr. 4: 747, 750; Exh. C-23.) On examining a portion of A-6396 using dispersion staining, Peterson observed 11 tremolite-actinolite fibers and one anthophyllite fiber. (Tr. 4: 748; Exh. C-23.) Using the same procedure on a part of A-6397, he ascertained that 11 tremolite-actinolite and six anthophyllite fibers were present. (Tr. 4: 749; Exh. C-23.) With dispersion staining, he found seven tremolite fibers and three anthophyllite fibers in the portion of A-6405 that was analyzed. (Tr. 4: 753; Exh. C-23.) He did "just routine phase contrast counting for total number of fibers present" on specimens from the remaining samples. (Tr. 4: 750; Exh. C-23.)

Stewart performed transmission electron microscopy on samples A-6404 and A-6405. (Tr. 5: 118.) His analysis of A-6404 reflected no asbestos fibers greater than five micrometers long. (Tr. 5: 118.) On analyzing A-6405, Stewart identified 20 to 30 anthophyllite fibers. (Tr. 5: 121.)

The Complainant's Case Against Hull

Hull, a manufacturer of pottery tableware, was inspected by Donald Cagle, an industrial hygienist employed by OSHA, during the period September 20-21, 1977. (Tr. 2: 209, 211.) As a result of the inspection, Hull was issued a citation for three nonserious violations. Item 1 of the citation alleges that Hull violated 29 C.F.R. § 1910.1001(c)(2)(i)[3/] in that spilled Ceramitalc HDT was dry swept in Hull's raw material storage area. Item 2

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3/ Section 1910.1001(c)(2)(i) provides that:

> Insofar as practicable, asbestos shall be handled, mixed, applied, removed, cut, scored, or otherwise worked in a wet state sufficient to prevent the emission of airborne fibers in excess of the exposure limits prescribed in paragraph (b) of this section, unless the usefulness of the product would be diminished thereby.

See footnote 4, infra, for the pertinent contents of § 1910.1001(b).

avers that Hull violated 29 C.F.R. § 1910.1001(g)(2)(i)[4/] by not having caution labels affixed "[o]n the pallets and/or bags of Ceramitalc HDT prior to dumping in the clay mixer." Item 3 alleges that Hull failed to comply with 29 C.F.R. § 1910.1001(h)(2)[5/] in that empty Ceramitalc HDT bags were not disposed of in impermeable containers.

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4/ Section 1910.1001(g)(2)(i) provides that:

> Caution labels shall be affixed to all raw materials, mixtures, scrap, waste, debris, and other products containing asbestos fibers, or to their containers, except that no label is required where asbestos fibers have been modified by a bonding agent, coating, binder, or other material so that during any reasonably foreseeable use handling, storage, disposal, processing, or transportation, no airborne concentrations of asbestos fibers in excess of the exposure limits prescribed in paragraph (b) of this section will be released.

Paragraph (b) of § 1910.1001 contains the following pertinent requirements:

> (2) Standard effective July 1, 1976. The 8-hour time-weighted average airborne concentrations of asbestos fibers to which any employee may be exposed shall not exceed two fibers, longer than 5 micrometers, per cubic centimeter of air. . . .
>
> (3) Ceiling concentration. No employee shall be exposed at any time to airborne concentrations of asbestos fibers in excess of 10 fibers, longer than 5 micrometers, per cubic centimeter of air. . . .

5/ Section 1910.1001(h)(2) provides that:

> Asbestos waste, scrap, debris, bags, containers, equipment, and asbestos-contaminated clothing, consigned for disposal, which may produce in any reasonably foreseeable use, handling, storage, processing, disposal, or transportation airborne concentrations of asbestos fibers in excess of the exposure limits prescribed in paragraph (b) of this section shall be collected and disposed of in sealed impermeable bags, or other closed, impermeable containers.

See footnote 4, supra, for the pertinent contents of § 1910.1001(b).

During his inspection, Cagle observed the activities of one of Hull's clay mixers and his helper. (Tr. 2: 216.) He saw the clay mixer cutting 50-pound bags of Ceramitalc HDT, dumping them into a mixing machine hopper, and operating the controls that fed water into the mixing machine. (Tr. 2: 216-217.) He also saw the clay mixer using a forklift in moving pallets of the material to the mixing machine. (Tr. 2: 217.) Cagle testified that from what he recalled the bags indicated that the talc was manufactured by the American Talc Company. (Tr. 2: 234.) Apparently, Cagle was mistaken and the talc was manufactured by the International Talc Company, a subsidiary of the R. T. Vanderbilt Company.[6/] (Tr. 2: 265-268.) Cagle observed the helper cutting clay that extruded from the mixing machine and stacking the extruded clay on a cart. (Tr. 2: 217-218.)

Neither the bags of Ceramitalc HDT nor the pallets on which they were stored had any caution labels on them. (Tr. 2: 234.) When the bags of Ceramitalc HDT were emptied, they were not disposed of in impermeable containers, rather the clay mixer simply threw them behind him and they were later placed in an open trash receptacle. (Tr. 2: 234-235.) Cagle observed broom marks where dry material was on the floor in the area where the Ceramitalc HDT was stored. Hull's management officer told Cagle that a broom was used for sweeping and that they "couldn't wet the material . . . because it would be slippery." (Tr. 2: 233.)

Cagle obtained three air filter samples from the breathing zone of the clay mixer and two from the breathing zone of his helper. (Tr. 2: 222-223.) Cagle also took six bulk samples. (Tr. 2: 226.) Cagle forwarded all of the samples to OSHA's Salt Lake City laboratory where they were assigned laboratory numbers and analyzed. (Tr. 2: 227, 229, 232.) The samples from

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6/ Ceramitalc HDT is a trade name that is registered by the R. T. Vanderbilt Company. (Tr. 2: 267.)

the clay mixer were assigned laboratory numbers A-6236, A-6238, and A-6244. (Exh. C-11.) The ones from the helper were given laboratory numbers A-6237, and A-6245. (Exh. C-11.) Cagle took one of the bulk samples, laboratory number A-6239, from a bag of Ceramitalc HDT that had just been opened by the clay mixer. (Tr. 2: 226, 230; Exh. C-11.) He took four of the bulk samples, laboratory numbers A-6240 through A-6243, from dust that had settled on the floor. (Tr. 2: 227, 231; Exh. C-11.) A-6240 was taken at the base of some steps, about 15 feet from the helper's location at the mixing machine. A-6241 was taken near a post, about 15 feet from the clay mixer. (Tr. 2: 253, 3: 619: Exh. C-11.) A-6242 was obtained in the immediate vicinity of where the clay mixer worked at the machine. (Tr. 2: 254, 3: 619; Exh. C-11.) A-6243 was obtained at the location where the Ceramitalc HDT was stored, about 30 feet from where the clay mixer poured the bags into the machine. (Tr. 2: 251, 3: 619; Exh. C-11.) On Hull's request at the end of the inspection, Cagle took the sixth bulk sample from a torn bag of Westex Black Talc. (Tr. 2: 226, 253.) That talc, which was not being used, was located in another part of Hull's plant. (Tr. 2: 253.) The laboratory number of that sample is A-6246. (Tr. 2: 230-231; Exh. C-11.)

Dan Crane, a physical science technician at OSHA's Salt Lake City laboratory, analyzed the samples obtained by Cagle. (Tr. 2: 333, 3: 535.) Using phase contrast microscopy and related techniques, Crane found a number of fibers in filter samples A-6236, A-6237, A-6238, A-6244, and A-6245. (Tr. 3: 559-562; Exh. C-18.) However, except for sample A-6238, he did not analyze these samples by dispersion staining to ascertain the mineralogical content of these fibers. (Tr. 3: 587, 597, 613-614; Exh. C-18.) Crane's analyses by dispersion staining of three slides prepared from A-6238 revealed the presence of six tremolite or anthophyllite fibers. (Tr. 3: 597; Exh. C-18.) Using dispersion staining on eight slides prepared from bulk

sample A-6239 and four slides prepared from each of the bulk samples identified as A-6241, A-6242, and A-6243, he ascertained that the A-6239 specimens contained 79 fibers that were tremolite or anthophyllite, the A-6241 specimens contained 10 tremolite and two anthophyllite fibers, the A-6242 specimens contained seven fibers that were tremolite or anthophyllite, and the A-6243 specimens contained 34 asbestos fibers. (Tr. 3: 537-548, 551-554, 558; Exh. C-18.) Crane's analysis of bulk sample A-6240 indicated that no fibers were present. (Tr. 3: 550.) Similarly, he detected no asbestos in his analysis of the Westex bulk sample, A-6246. (Tr. 3: 559.)

Subsequently, Ian Stewart performed dispersion staining on bulk samples A-6239, A-6242, and A-6243 and found about 2 to 3 percent fibrous tremolite-actinolite present in A-6239 and A-6243 and "probably less than about 1/4 per cent in A-6242." (Tr. 5: 47, 49.) He also analyzed these samples using transmission electron microscopy. As a result, he identified four anthophyllite fibers in A-6239. (Tr. 5: 105.) Although he saw fibers in A-6242, he could not positively identify them as asbestos. (Tr. 5: 106-107, 109.) By electron microscopic examination of A-6243, Stewart found that A-6243 was substantially similar to A-6239 in that anthophyllite fibers were present in A-6243. (Tr. 5: 107-109.)

## The Complainant's Case Against Baldwin

Baldwin, a paint manufacturer, was inspected by David Barnhill, an OSHA industrial hygienist, during the period June 28-30, 1977, and by Sally Barber, another OSHA industrial hygienist, on October 6 and 11, 1977. (Tr. 3: 620-621; 2: 269, 272.) Following these inspections, Baldwin was issued, on January 17, 1978, a citation for four nonserious violations, which is

designated as Citation Number 2.[7/] Item 1 of the citation alleges that Baldwin's paint mixing area had not been monitored to determine whether the paint mixers were exposed to excessive levels of asbestos fibers as required by 29 C.F.R. § 1910.1001(f)(1).[8/] Item 2 avers that Baldwin violated 29 C.F.R. § 1910.1001(g)(2)(i)[9/] in that raw materials being used in the paint mixing area did not contain caution labels. Items 3 and 4 allege that Baldwin violated 29 C.F.R. § 1910.1001(j)(2)[10/] and (3),[11/] respectively, by not providing employees working in the paint mixing area with preplacement and annual medical examinations as required by these two standards.

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7/ The file in the Baldwin case also contains a citation for a nonserious violation of 29 C.F.R. § 1910.132(a). That citation, designated as Citation Number 1 and issued on October 31, 1977, was not contested by Baldwin and has become a final order of the Commission by operation of law. (Tr. 1: 7.) See 29 U.S.C. § 659(a).

8/ This health standard provides, in pertinent part, that:

> Within 6 months of the publication of this section, every employer shall cause every place of employment where asbestos fibers are released to be monitored in such a way as to determine whether every employee's exposure to asbestos fibers is below the limits prescribed in paragraph (b) of this section.

9/ See footnote 4, supra, for the text of this standard.

10/ Section 1910.1001(j)(2) provides the following as to preplacement medical examinations:

> The employer shall provide or make available to each of his employees, within 30 calendar days following his first employment in an occupation exposed to airborne concentrations of asbestos fibers, a comprehensive medical examination, which shall include, as a minimum, a chest roentgenogram . . . , a history to elicit symptomatology of respiratory disease, and pulmonary function tests to include forced vital capacity . . . and forced expiratory volume at 1 second. . . .

11/ See footnote 1, supra, for text of 29 C.F.R. § 1910.1001(j)(3), the annual medical examination standard.

During his inspection, Barnhill met Baldwin's president, Mr. Carneal. (Tr. 3: 455, 622.) Carneal told Barnhill that the R. T. Vanderbilt talcs used by Baldwin did not contain asbestos and showed Barnhill some letters from Vanderbilt indicating that the talcs did not contain asbestos. (Tr. 3: 628.) Carneal also told Barnhill that Baldwin's employees had not been given any type of physical examination and that Baldwin had done no monitoring "for lead or silica or talc, or any compound." (Tr. 3: 628-630.) Barnhill obtained a bulk sample from a 50-pound bag of Nytal 200 that was being used in Baldwin's plant. (Tr. 3: 626, 629, 634.) Barnhill saw no asbestos caution labels on the bags of Nytal 200 that he observed. (Tr. 3: 629.) He also testified that he had no knowledge as to how long Baldwin had been using Nytal 200. (Tr. 3: 632.)

The bulk sample of Nytal 200 was sent to OSHA's Salt Lake City laboratory, where it was assigned laboratory number A-4976 and analyzed by Willard Dixon. (Tr. 3: 631, 4: 668; Exh. C-15.) Initially, in August 1977, Dixon analyzed A-4976 by using dispersion staining and related techniques. (Tr. 4: 668.) By scanning slides prepared from A-4976, he concluded "that asbestos fibers were present in low concentration around one percent or less." (Tr. 4: 669, 678; Exh. C-15.) In May 1978, he performed another analysis on A-4976 using the same petrographic techniques, but taking an actual fiber count on that occasion. (Tr. 4: 679, 681; Exh. C-20.) This analysis indicated the presence of five anthophyllite fibers, 17 tremolite fibers, and 19 fibers that were either anthophyllite or tremolite fibers. (Tr. 4: 688-691.)

Ian Stewart subsequently analyzed A-4976 using dispersion staining and found 3 to 5 per cent by weight of fibrous tremolite-actinolite. (Tr. 5: 47-49.) His electron microscopic examination of that sample indicated the presence of anthophyllite fibers. (Tr. 5: 116.)

During her inspection, Barber observed two of the respondent's paint mixers pouring talc and other dry materials into a paint mixing vat. (Tr. 2:

280-281.) The talc was in 50-pound bags of Nytal 200 manufactured by R. T. Vanderbilt. (Tr. 2: 281, 3: 453-454.) The bags had no caution labels on them to indicate that they contained asbestos material. (Tr. 2: 300.) Carneal told Barber that Baldwin had not performed any initial monitoring for the presence of asbestos and that Baldwin's employees had not been given any physical examinations. (Tr. 2: 300-301.) Barber did not know how long Baldwin had been in business or how long Baldwin had been using Nytal 200. (Tr. 2: 314, 3: 454-455.) One of the paint mixers told Barber that he had worked for Baldwin for one year. The other employee told her that he had worked for Baldwin for three months. (Tr. 3: 457.) Barber obtained five air filter samples from the breathing zones of each of the paint mixers. (Tr. 2: 280, 282, 287.) These samples were sent to OSHA's Salt Lake City laboratory where they were assigned laboratory numbers A-7015 through A-7024. (Tr. 2: 290-292, Exh. C-13.)

The samples were analyzed by Dan Crane. (Tr. 3: 465; Exh. C-14.) Using phase contrast microscopy and related techniques, he found a number of fibers in his analysis of all the samples except A-7021, which was unacceptable for analysis. (Tr. 3: 465, 512-515, 591; Exhs. C-14, C-17.) In addition, he performed dispersion staining on a part of A-7016 and ascertained that 10 asbestos fibers, either tremolite or anthophyllite, were present. (Tr. 3: 518, 529-531; Exh. C.-17.) Subsequently, by electron microscopic analysis of a portion of A-7016, Stewart identified two anthophyllite fibers and a large bundle of fibers that were comprised of anthophyllite fibers and what he believed to be chrysotile fibers. (Tr. 5: 110-112, 115-116.)

## The Case for the Respondents

Dr. Ann Wylie testified for the respondents as an expert witness on mineralogy and light microscopy. (Tr. 6: 51.) Randall Ross testified for the respondents as an expert witness on electron microscopy, electron

diffraction, and energy dispersion analysis. (Tr. 6: 148-149, 7: 4.) The gist of their testimony is that the analytical techniques used by the Salt Lake City laboratory technicians and by Ian Stewart were inadequate to establish the presence of asbestos fibers.

Wylie testified that the Salt Lake City laboratory personnel did not perform all of the steps she would have used in analyzing the samples. (Tr. 6: 131.) She would have used the ten step procedure described in Exhibit R-30 if she received a sample for analysis that she did not know anything about. (Tr. 6: 52-54, 59.) When asked if she would follow all of these steps if she were asked to analyze a sample for the six asbestos minerals enumerated in 29 C.F.R. § 1910.1001(a)(1), that is, chrysotile, amosite, crocidolite, tremolite, anthophyllite, and actinolite, she answered as follows:

> Yes, I would, unless I knew, for example, exactly the locality it came from and what minerals were there to start with, or if I had some previous knowledge about the sample that I could eliminate a large group of minerals for some reason.
>
> Then perhaps maybe it wouldn't be necessary to go through them all. But without a lot of knowledge, previous knowledge, I wouldn't, I couldn't identify without going through those steps, no. (Tr. 6: 62-63.)

In her opinion, the Salt Lake City analyses were inadequate to identify the minerals in the samples unless there was prior knowledge of the mineral content of the samples. She would have run an x-ray diffraction on the bulk samples. (Tr. 6: 64.)

Wylie stated it was difficult to distinguish tremolite, tourmaline, and prehnite by dispersion staining and that richterite cannot be distinguished from tremolite optically. (Tr. 6: 68-69.) However, tremolite can be distinguished from pectolite and wollastonite by dispersion staining if care is used. (Tr. 6: 70-71.)

Relying on various publications, Wylie testified that tremolite, anthophyllite, and actinolite exist in both asbestiform and nonasbestiform. (Tr. 6: 79-87; Exhs. R-25, R-33.) She explained that from a mineralogical viewpoint a true asbestos fiber is one that grows as a fiber in nature, whereas a cleavage fragment is a fragment that is broken from a larger particle. (Tr. 6: 89, 127.) Using Exhibit R-32, she pointed out illustrations of fibers and cleavage fragments. (Tr. 6: 90-94.) Although she had not heard that a cleavage fragment presents a health hazard, such a fragment would be classified as an asbestos fiber under the OSHA definition if it contained one of the six minerals enumerated in 29 C.F.R. § 1910.1001(a)(1), was longer than five micrometers, and had an aspect ratio of at least three to one.[12/] (Tr. 6: 93-94, 102.) However, it should not be classified as an asbestiform mineral because it didn't "grow as asbestos." (Tr. 6: 127.) In Wylie's opinion, "[a] particle three times longer than it is wide is not a fiber" from a mineralogical standpoint. (Tr. 6: 94-95.) Her study of asbestos, under a grant from the Bureau of Mines, shows that

> for particles longer than five micrometers, about 99 percent of all asbestos fibers have an aspect ratio of about ten to one, and more than half have an aspect ratio in excess of 50 to one. (Tr. 6: 96.)

In analyzing a massive variety of tremolite that was crushed, she found that only five percent of the particles had aspect ratios in excess of ten to one and none were in excess of 50 to 1. (Tr. 6: 96-97.)

Ross testified as to the importance of having appropriate internal standards in analyzing material by electron microscopic techniques. (Tr. 7: 4-6, 17-18.) He also testifed as to the need to have a tilting capacity on the microscope used in such an analysis. (Tr. 7: 6-17, 19-22.)

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12/ See footnote 2, supra.

Ross reviewed Exhibits C-31A-F (Tr. 7: 26), consisting of six photographs of the anthophyllite standards that were used by Stewart in performing his analyses. (Tr. 5: 57.) Ross also reviewed Exhibits C-26, C-27, and C-28, which are illustrations of the techniques used by Stewart in analyzing various samples. (Tr. 5: 81, 83-84, 94, 95; 7: 35-45.) Having made a visual observation of Exhibits C-31A-F and having made various measurements on them, Ross concluded that Stewart had used a poor anthophyllite standard. (Tr. 7: 26-32.) However, Ross also indicated that his opinion might be influenced by deviations resulting from the photographic process and that he would like to see the negatives. (Tr. 7: 32-33.)

Ross stated that Stewart's failure to count the angstrom spacings between the layer lines on the diffraction patterns was generally unacceptable. (Tr. 7: 36.) In Ross's opinion, Exhibit C-27P (fiber bundle, Baldwin, A-7016) and the diffraction patterns shown in the following exhibits were of little or no value for identifying asbestos fibers: C-26Q (Miller, A-6405); C-27N (fiber 1, Baldwin, A-7016); C-27O (fiber 2, Baldwin, A-7016); C-27Q (fiber bundle, Baldwin, A-7016); C-28E (fiber 2, Hull, A-6239); C-28G (fiber 3, Hull, A-6239); C-28K (fiber 4, Hull, A-6239). (Tr. 7: 35-45.) Ross qualified his opinions as to these exhibits by the reservation "that there is a question in the translation . . . from the negative to the print" because deviations might have been introduced by normal photographic procedures. (Tr. 7: 63.) Accordingly, Ross "put in a very strong request to see the original data." (Tr. 7: 65.)

Ross also criticized Stewart's analyses where no photographs were taken because Stewart "merely eyeballed the diffraction pattern and concluded that he had found an amphibole." (Tr. 7: 45.) Ross further pointed out that in an energy dispersive analysis there is a better chance of getting a pure chemical sample, uncontaminated by surrounding

interference particles, by using a selected point method rather than the "elongated concept" used by Stewart. (Tr. 7: 48.)

Findings of Facts in the Miller Case

1. On September 28, 1977, at Miller's plant located in Weedsport, New York, two of Miller's employees, Ron Moradorf and George Baker, were exposed to airborne concentrations of at least two asbestos fibers.

2. Moradorf and Baker had worked for Miller for 2-1/2 years and three months, respectively, and no medical examinations had been provided, or made available, to them.

3. The evidence fails to establish how long Miller had been using Nytal 100HR.

4. The evidence fails to establish that Miller possessed actual or constructive knowledge that Nytal 100HR contained asbestos.

Findings of Fact in the Hull Case

1. On or about September 21, 1977, at Hull's plant located in Crooksville, Ohio, spilled Ceramitalc HDT was dry swept in the vicinity of the raw material storage area, asbestos caution labels were not affixed to the bags of Ceramitalc HDT or the pallets on which they were stored, and empty Ceramitalc HDT bags were not collected or disposed of in sealed, impermeable bags or other closed, impermeable containers.

2. The evidence fails to establish that it was reasonably foreseeable that the failure to collect and dispose of the empty Ceramitalc HDT bags in impermeable bags or impermeable containers could have resulted in the exposure of Hull's employees to airborne concentrations of asbestos fibers in excess of those specified in 29 C.F.R. § 1910.1001(b)(2) or (3).[13/] Similarly, there is no evidence that the dry sweeping of spilled Ceramitalc HDT would

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13/ See footnote 4, supra, for the text of 29 C.F.R. § 1910.1001(b)(2) and (3).

exceed the limits provided in § 1910.1001(b)(2) or (3). However, the evidence establishes that some of the Ceramitalc HDT being used by Hull's employees contained at least two asbestos fibers.

3. The evidence fails to establish that Hull possessed actual or constructive knowledge that Ceramitalc HDT contained asbestos.

Findings of Facts in the Baldwin Case

1. From about June 30, 1977, to October 11, 1977, at Baldwin's plant in Foley, Alabama, Nytal 200 was used by Baldwin's employees while mixing paint. However, the evidence fails to establish that Nytal 200 was used by Baldwin for any additional period of time.

2. Baldwin had not performed any initial monitoring for the presence of asbestos and had not provided, or made available, medical examinations for its employees.

3. Asbestos caution labels were not affixed to the bags of Nytal 200 used by Baldwin's employees.

4. The evidence fails to establish that any employee who worked with Nytal 200 had been employed by Baldwin for as long as one year. It does establish, however, that two such employees, paint mixers, had been employed by Baldwin for more than 30 days.

5. The evidence establishes that the two paint mixers were exposed to airborne concentrations of at least two asbestos fibers each and that these fibers were released by the Nytal 200 that they were using.

6. The evidence fails to establish that Baldwin possessed actual or constructive knowledge that Nytal 200 contained asbestos.

Discussion

Prior to trial, the respondents filed a motion to dismiss all citations because the asbestos standards were improperly promulgated and unenforceably vague. The motion also asserts "that Complainant's continued

enforcement of an unconstitutional and unenforceably vague standard is arbitrary, capricious and constitutes an abuse of direction." The respondent's motion was considered and denied at trial. (Tr. I: 28-37, 42-52.) In a joint post-trial brief, the respondents and the intervenor ask that I reconsider my denial of the motion. I adhere to my ruling for the reasons stated at trial. In addition, see the discussion of the dichotomy pertaining to the "asbestiform" and so-called "nonasbestiform" of minerals, infra. Also see National Industrial Constructors, Inc. v. OSHRC, 583 F.2d 1048, 1052-53 (8th Cir. 1978.)

Since I found at trial that the asbestos standards were not improperly promulgated or unenforceably vague, it was unnecessary for me to address the assertion that the complainant's enforcement of the standards was arbitrary, capricious, and an abuse of discretion. The joint post-trial brief asserts, however, that "the asbestos standard . . . is arbitrary and capricious." This assertion relates to the wisdom of the asbestos standards. The Commission has held that it is not its function to address the wisdom of the standard. Borg-Warner Corporation, 78 OSAHRC 18/A2 n. 11 (No. 10757, 1978.) Nevertheless, to alleviate possible appellate problems that could result from the absence of a ruling, I conclude that the evidence does not show that the asbestos standards are arbitrary and capricious.

Annual medical examinations are required under 29 C.F.R. § 1910.1001(j)(3) when employees are exposed to airborne concentrations of asbestos, regardless of the levels of exposure. GAF Corp. 75 OSAHRC 3/A2 (No. 3203, 1975), aff'd, 561 F.2d 913 (D.C. Cir. 1977.) However, since §1910.1001(j)(3) applies to employees engaged in occupations exposed to airborne concentrations of asbestos "fibers," I conclude that the standard applies to situations where employees are exposed to airborne

concentrations of at least two asbestos fibers, or will be in the future. See Gilles & Cotting, Inc., 76 OSAHRC 30/D9 (No. 504, 1976.) In these respects, I interpret the requirements for preplacement medical examinations in 29 C.F.R. § 1910.1001(j)(2) to be the same as those in § 1910.1001(j)(3) because the significant language in both standards is identical.[14/]

The evidence establishes that two of Miller's employees, Moradorf and Baker, were exposed to airborne concentrations of at least two asbestos fibers. Dust was observed in the air when bags were poured into the mixing tank. Dixon's analysis of the bulk sample (A-6393) revealed the presence of two anthophyllite fibers, four tremolite fibers, and 10 fibers of either tremolite or anthophyllite. The presence of asbestos fibers in this sample was verified by Stewart whose analysis indicated that more than two

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14/ In their joint post-trial brief, the respondents and the intervenor contend that the medical examination standards are unenforceably vague. In support of this contention they assert that evidence adduced at trial (Tr. 3: 415-425) shows an "unofficial exclusion level 'policy' in certain OSHA offices" providing "that concentrations of .1 asbestos fibers per cubic centimeter of air or greater must be found before any citation under the medical examination provisions would be issued." In this connection, I am asked to take official notice of OSHA Program Directive Number 300-16 issued on October 11, 1978, which, in effect, formally announces this policy. At best, the matters referred to in the joint post-trial brief merely show that the complainant has changed his interpretation of the standards for enforcement purposes. See GAF Corp. v. OSHRC, 561 F.2d.913 (D.C. Cir., 1977). They do not detract from the specificity of the standards as promulgated by the complainant and as interpreted by the Commission and the United States Court of Appeals for the District of Columbia Circuit. Furthermore, the implementation or pronouncement of policies by the Secretary of Labor or his representatives have no binding legal effect on either the Secretary or the Commission when they have not been promulgated as rules on regulations. See Bristol-Myers Co., 78 OSAHRC 106/D13 n.1 (No. 77-3854, 1978); Alfred S. Austin Construction Co., 76 OSAHRC 50/A2 (No. 4809, 1976); GAF Corp.,77 OSAHRC 207/E6 (No. 77-616, 1977) (Alfieri, J. ). Of course, Policy Directive Number 300-16, is also not binding here because it was not issued until well after the issuance of the citations in the instant cases.

anthophyllite fibers were present.[15/] Peterson's analysis of A-6405, an air filter sample taken on Moradorf, showed that seven tremolite and three anthophyllite fibers were present. The presence of asbestos fibers in this sample was also verified by Stewart who observed 20 to 30 anthophyllite fibers in a portion of the sample.

Irrespective of the exposure of Moradorf and Baker to asbestos fibers, the evidence is insufficient to establish that Miller violated 29 C.F.R. § 1910.1001(j)(3). Baker had worked for Miller for only three months. More important, there is no evidence as to how long Miller had been using Nytal 100HR. Thus, it cannot be said that Miller had failed to provide Moradorf or Baker with the annual medical examinations required by § 1910.1001(j)(3). Similarly, the failure to establish how long Miller had been using Nytal 100HR precludes amending the citation and finding a violation of 29 C.F.R. § 1910.1001(j)(2), for a failure to provide preplacement medical examinations.

The evidence establishes that Baldwin's paint mixers were exposed to airborne concentrations of at least two asbestos fibers. This is established by Crane's and Stewart's analyses of air filter sample A-7016. Additionally, Dixon's and Stewart's analyses of the bulk sample obtained by Barnhill (A-4976) show that asbestos fibers were present in that sample. However, as in the Miller case, a violation of 29 C.F.R. § 1910.1001(j)(3) has not been established as the evidence fails to show that either of the paint mixers had

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15/ Stewart testified that analysis by transmission electron microscopy and related techniques was necessary to rule out the possibility of erroneously counting talc fibers as asbestos fibers, which could not be accomplished by the analysis techniques used by OSHA's Salt Lake City laboratory. (Tr. 5: 53.) Accordingly, athough I note that Peterson found asbestos fibers in A-6395, A-6396, and A-6397, I do not rely on those analyses in concluding that Moradorf and Baker were exposed to airborne concentrations of at least two asbestos fibers as Peterson's findings were not verified by Stewart. Also, I do not rely in this decision on other OSHA analyses that have not been verified by Stewart.

been working for Baldwin for a year[16/] or that they had been using Nytal 200 for a year in their work.

Barber's testimony establishes that both paint mixers had worked for Baldwin for more than 30 days. Her testimony coupled with that of Barnhill shows that Baldwin had been using Nytal 200 for slightly more than three months between June 1977 and October 1977,[17/] well over the 30 calendar days specified in the preplacement medical examination standard, 29 C.F.R. § 1910.1001(j)(2).

Asbestos caution labels must be affixed to products containing asbestos "fibers." 29 C.F.R. § 1910.1001(g)(2)(i). As with the medical examination standards, I conclude that caution labels are required when a product contains at least two asbestos fibers.[18/] As previously indicated,

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16/ Barber testified that one of the employees told her that he had worked for Baldwin for three months. As she "recall[ed]" the other indicated to her that he had worked for Baldwin for one year. (Tr. 3: 457.) I consider this to be a rough approximation that could have fell short of being a full year. Accordingly, I find that Barber's testimony is not sufficiently definitive to establish that the employee had worked for Baldwin for a year.

17/ No violation can be found on the date of Barnhill's inspection because the citation was not issued to Baldwin within six months after Barnhill's inspection. 29 U.S.C. § 658(c). Nevertheless, Barnhill's testimony can be used in part to establish the existence of violations at the time of Barber's inspection. For example, Barnhill's testimony can be used to establish that Baldwin was using Nytal 200 at the time of Barnhill's inspection. Furthermore, the bulk sample obtained by Barnhill can be used to show that the Nytal 200 in use at the time of Barnhill's inspection contained asbestos fibers.

18/ To establish a violation of 29 C.F.R. § 1910.1001(g)(2)(i), the complainant is not required to prove "that during any reasonably foreseeable use, handling, storage, disposal, processing, or transportation, no airborne concentrations of asbestos fibers in excess of the exposure limits prescribed in [29 C.F.R. § 1910.1001(b)] will be released." That requirement pertains only to a situation "where asbestos fibers have been modified by a bonding agent, coating, binder, or other material," which is not the situation in the Baldwin and Hull cases.

the presence of at least two asbestos fibers in the Nytal 200 used by Baldwin is established by Crane's, Dixon's, and Stewart's analyses of A-7016 and A-4976. Barber's testimony shows that the bags of Nytal 200 that she observed at the respondent's plant did not have asbestos caution labels.

Cagle's testimony establishes that neither the bags of Ceramitalc HDT used by Hull nor the pallets on which they were stored had asbestos caution labels. The presence of at least two asbestos fibers in the Ceramitalc HDT used by Hull is established by Crane's and Stewart's analyses of bulk sample A-6239 taken from a bag of Ceramitalc HDT and of bulk sample A-6243 taken from the floor in the area where the Ceramitalc HDT was stored.[19/]

Under 29 C.F.R. § 1910.1001(c)(2)(i) asbestos must be handled or worked in a wet state sufficient to prevent the emission of airborne fibers in excess of the exposure limits specified in 29 C.F.R. § 1910.1001(b)(2) and (3). Obviously, this presupposes that when handled or worked in the dry state there would be an emission of airborne asbestos fibers in excess of the § 1910.1001(b)(2) and (3) limits. There is no evidence that the dry sweeping of spilled Ceramitalc HDT would exceed these limits in Hull's plant.

Hull's empty Ceramitalc HDT bags should have been collected and disposed of in impermeable containers if it was "reasonably foreseeable" that their future use or processing might produce airborne concentrations of asbestos fibers in excess of the limits prescribed in § 1910.1001(b)(2) and (3). There is no evidence to establish that it was reasonably foreseeable from Hull's use or other processing of these empty bags that these limits might be exceeded.

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19/ Crane also found asbestos fibers in air filter sample A-6238 and in bulk samples A-6241 and A-6242. Stewart did not analyze A-6238 or A-6241 and could not identify asbestos in A-6242. Therefore, I do not rely on Crane's analyses of these samples. See footnote 15, supra.

The asbestos monitoring standard, 29 C.F.R. § 1910.1001(f)(1) requires monitoring, "[w]ithin 6 months of the publication of this section," of places of employment when asbestos "fibers" are released. Therefore, to establish a violation of this standard, it must be shown that at least two asbestos fibers were actually released from the Nytal 200 being used at Baldwin's plant. See Goodyear Tire & Rubber Company, 77 OSAHRC 82/A2 (No. 13442, 1977.) This is established by Crane's and Stewart's analyses of air filter sample A-7016. The fact that Baldwin had done no initial monitoring for asbestos is established by Carneal's admission to Barber that none had been done.

In my opinion, if an employer should have monitored for asbestos within six months of the publication of 29 C.F.R. § 1910.93(a),[20/] his duty to monitor continues as long as he continues to use products that release asbestos fibers. See Yelvington Welding Services, 78 OSAHRC 84/D6 (No. 15958, 1978). Also, I interpret the standard to require initial asbestos monitoring within a reasonable time after an employer knows or, by the exercise of reasonable diligence, could have known that a product used by him was causing the release of asbestos fibers in his place of employment, even though he was not using this product during the initial six-month period.[21/] As previously indicated, the evidence establishes that Baldwin had

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20/ The asbestos standards were previously codified at 29 C.F.R. § 1910.93a and, on May 28, 1975 were recodified at 29 C.F.R. § 1910.1001. 40 Fed. Reg. 23072 (1975).

21/ The conclusions expressed in this paragraph are supported by 29 C.F.R. § 1910.1001(f)(3)(ii), which provides that:

> After the initial determinations required by paragraph (f)(1) of this section, samples shall be of such frequency and pattern as to represent with reasonable accuracy the levels of exposure of the employees. In no case shall sampling be at intervals greater than 6 months for employees whose exposures to asbestos may reasonably be foreseen to exceed the exposure limits prescribed in paragraph (b) of this section.

been using Nytal 200 from the time of the first inspection to the time of the second one, a period of slightly more than three months, but does not establish when Baldwin first started to use Nytal 200. If Baldwin knew at the time of the first inspection or, by the exercise of reasonable diligence, could have known at that time that Nytal 200 contained asbestos fibers, then the time interval between the two inspections would constitute more than a reasonable period for the accomplishment of the required monitoring.

In my opinion, there is no validity to the respondent's attempt, through the testimony of Wylie and Ross, to impeach the analyses of the samples by Stewart and OSHA's Salt Lake City laboratory. Wylie testified that the Salt Lake City analyses were inadequate unless there was prior knowledge of the mineral content of the samples. However, the Salt Lake City laboratory had such knowledge because the analysts could readily identify a Vanderbilt product under a microscope and had prior knowledge of the mineralogical content of Vanderbilt products. (Tr. 4: 713-714, 717-718, 722.) Also see Borg-Warner Corp., 78 OSAHRC 18/A2 (No. 10757, 1978); Wenczel Tile Company of Florida, Inc., OSAHRC Docket No. 77-2039 (August 14, 1978) (Brady, J.), Commission review ordered, September 13, 1978. Moreover, Stewart's verification of several of the Salt Lake City analyses negates Wylie's reservations as to the mineral content of those samples.[22/]

Ross' criticisms of Stewart's analyses were based on photographic exhibits that were introduced by the complainant merely to illustrate the techniques used by Stewart. Ross admitted that his criticisms could be invalid because of possible deviations in the photographs and requested an opportunity to see the original data. At the trial, I ruled that the respondents' experts would be afforded an opportunity to examine this data and that following the examination I would grant a motion to reopen the

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22/ See footnote 15, supra.

hearing to present evidence as to what the examination revealed. (Tr. 6: 33-34; 7: 80.) The respondents' counsel agreed that he would subsequently advise me as to whether the respondents would avail themselves of the opportunity to have their experts examine the data. (Tr. 7: 77-80.) Thereafter, by a letter dated September 26, 1978, the opportunity was declined. Accordingly, I find that Ross's criticisms are entitled to no significant weight.

The conclusions of the complainant's analysts concerning the mineralogical composition of the fibers they analyzed are supported by Mineral Product Safety Data Sheets prepared by Vanderbilt on May 1, 1975, and January 15, 1978. (Exhs. C-32, C-33.) Those data sheets show that 50 to 70 percent of Ceramitalc HDT and Nytal 100HR and 40 to 60 percent of Nytal 200 is "tremolite and/or anthophyllite," albeit "non-asbestiform."

The Commission has held that the so-called "nonasbestiform" of the minerals regulated by the complainant's asbestos standards fall within the purview of the standards. Borg-Warner Corp., supra. I find nothing in the instant cases that detracts from that holding. Wylie's testimony represents a mineralogical viewpoint as contrasted with the health considerations inherent in the asbestos standards.[23/] Whether the inhalation of tremolite, anthophyllite, and actinolite cleavage fragments[24/] that are longer than five

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23/ Thus, the term "nonasbestiform" appears to be a misnomer from a health standpoint.

24/ As a matter of practice, OSHA's Salt Lake City laboratory did not count a particle as a fiber if its width was greater than five micrometers. (Tr. 3: 506; 4: 717-718, 741.) This tended to eliminate the counting of a cleavage fragment as a fiber. (Tr. 4: 717.)

micrometers with an aspect ratio of at least three to one[25/] is injurious to an employee's health is unclear from the record in these cases. However, there was no evidence introduced during the trial that tends to show that it is not just as injurious to an employee's health to inhale these particles as it is to inhale particles that differ from them only in that they grow naturally as asbestos fibers.[26/] The resolution of this matter is not essential in these cases because a comparison of photographs of tremolite, anthophyllite, and actinolite cleavage fragments and asbestiform fibers (figures 3, 4, and 5, pages 7, 8, and 9, Exh. R-32) with the illustrative photographs of Stewart's analyses of samples A-6405 (Exh. C-26P), A-7016 (Exhs. C-27M and P), and A-6239 (Exhs. C-28A, C, D, F, H, and J) clearly establishes that the particles analyzed by Stewart were of the asbestiform variety as used in mineralogical parlance. (Tr. 6: 97-99.) More important, the respondents and the intervenor concede at page 26 of their joint post-trial brief that the

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25/ Although the three to one aspect ratio requirement is not contained in the asbestos standards, it constitutes a subsequent interpretation of the standard by the complainant. See Borg-Warner Corp., supra. Since that interpretation increases the complainant's burden of proof, the respondents cannot be prejuduced by its use. In regard to Wylie's testimony that about all asbestos fibers have an aspect ratio greater than three to one, I note that Stewart testified that he found some asbestos fibers with about a 100 to 1 aspect ratio. (Tr. 5: 96, 194.)

26/ After trial, however, the respondents requested me to take official notice of pages 2 and 3 of DHEW Publication Number (NIH) 79-1681, entitled "Asbestos: An Information Resource," published in May 1978. That publication states that "recent biological studies suggest that, in terms of carcinogenic activity, mineral shape may be more important than chemical nature." However, several studies by the National Institute for Occupational Safety and Health are more relevant to the health hazards associated with the Vanderbilt products involved in the instant cases. These studies show an increased risk of lung cancer among former miners and millers who had worked with tremolitic talcs for the R. T. Vanderbilt Company in upper New York and reveal an elevated prevalence of pleural thickening is nearly one of every three Vanderbilt tremolitic talc workers with greater than 15 years of exposure. (Exh. R-9.)

complainant's photographs "apparently depict mineralogical fibers" and that "[t]he fibrous morphology of the suspect particles is not debated."[27/]

To establish any violation of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, the complainant must prove that the respondent possessed actual or constructive knowledge of the alleged violative conditions. Wally Taylor Construction Co., 76 OSAHRC 142/F6 (No. 9413, 1976), and the cases cited therein; Scheel Construction, Inc., 76 OSAHRC 138/B6 (No. 8687, 1976). In the instant cases, that equates to a requirement that the complainant prove that the respondents knew or, by the exercise of reasonable diligence, could have known that they were using talcs that contained asbestos fibers. I conclude that the complainant failed to prove that any of the respondents possessed such knowledge.

The complainant attempted to prove that the respondents possessed the requiste knowledge through the testimony of Allen Harvey, the manager

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27/ DHEW Publication Number (NIH) 79-1681 also indicates the following:

> The identification of asbestos is complex because many of the minerals that are chemically almost identical to different varieties of asbestos (e.g., grunerite to amosite, serpentine to chrysotile) exhibit perfect prismatic cleavage (the ability to break along well-defined crystallographic planes), so that physical degradation often leads to the formation of minute cleavage fragments that are chemically as well as physically indistinguishable from asbestos fibers. Recent comprehensive studies at the U. S. Bureau of Mines have concluded that there is currently no absolute way to distinguish between finely divided asbestos and certain other minerals of similar composition. (Emphasis added.)

Because of their indefiniteness, these conclusions are of little significance in the instant cases. Moreover, for the reasons previously discussed in the text, the evidence establishes the presence of asbestos fibers in various samples of Ceramitalc HDT, Nytal 100HR, and Nytal 200 that were analyzed.

for technical development for the R. T. Vanderbilt Company. (Tr. 7: 81.) Harvey identified an unsigned letter (Exh. C-34) bearing the letterhead of the R. T. Vanderbilt Co., dated January 25, 1977, addressed "To Our Talc Customers," which is entitled "Talc Certification." (Tr. 7: 87.) The body of the letter states the following:

> In a letter from the U. S. Department of Labor, dated October 9, 1974, we were authorized to certify that our talc products do not contain asbestos. This reasonable move was followed by OSHA Field Memorandum #74-92, which attempted to clarify the differences between asbestiform and non-asbestiform minerals.
>
> Dr. Morton Corn, the most recent Assistant Secretary of Labor and head of OSHA, informed us in a letter received January 24, 1977, that this authorization has now been rescinded and the Field Memorandum has been cancelled. These most recent rulings were made just prior to Dr. Corn's resignation and mean we are no longer in a position to certify that our talc products do not contain asbestos even though they are composed of the same non-asbestiform minerals processed the same as always.
>
> We are unable to explain this unwarranted reversal of policy by OSHA, but you can be assured we will actively oppose this injustice with all the technical and legal means available to us. Our talcs have been the subject of two OSHA cases during the past year which have gone to litigation. One case remains unresolved and in the other one the Government backed down from their asbestos contention and accepted a settlement which was not even under the Asbestos Standard.
>
> We thank you for your continued consideration and support.

Although Harvey participated in the preparation of the letter, he was not sure that it had been sent to Vanderbilt's talc customers. (Tr. 7: 88-89.) Even if there was evidence that the letter had been mailed to each of the respondents, I would not infer that it had been received by them. There is, however, some evidence from which it can be inferred that Baldwin received

the letter. Based on letters received from Vanderbilt, Carneal told Barnhill that the Vanderbilt talcs being used by Baldwin "don't have any asbestos in them." (Tr. 3: 628.) Subsequently, Carneal gave Barber a letter from Vanderbilt, dated January 25, 1977, addressed to its talc users, and entitled "Talc Certification." (Tr. 3: 455.)

Vanderbilt's letter of January 25, 1977, shows that Vanderbilt, under an authorization granted by the complainant, had certified to its talc users that Vanderbilt's talcs did not contain asbestos. Although the letter states that the complainant had withdrawn the previously granted certification authority, it continues to tell Vanderbilt talc users that Vanderbilt's talc products do not contain asbestos. In my opinion, it was reasonable for users of Vanderbilt talcs, including those who received the January 25, 1977, letter to rely on Vanderbilt's assertions that its talcs were free of asbestos.[28/] It is clear that Baldwin believed the assertions, and it is reasonably expectable that other users also believed them. It would most certainly be unreasonable to expect every user of Vanderbilt talcs throughout the nation to individually have these talcs analyzed for asbestos after having been told by the producers that the talcs did not contain asbestos.[29/] The difficulties of

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28/ There is no other evidence which tends to show that the respondents had any cause to believe that Vanderbilt talcs contained asbestos. To the contrary, the Mineral Product Safety Data Sheets prepared by Vanderbilt on May 1, 1975, and January 15, 1978, to inform its customers of the ingredients in Vanderbilt talcs, indicate that no asbestos is contained in Ceramitalc HDT, Nytal 100HR, or Nytal 200, as the tremolite and anthophyllite contained in these talcs are characterized as "non-asbestiform." (Tr. 7: 82-86; Exhs. C-32, C-33.)

29/ In instances such as this, it would seem that enforcement should be initially directed against the producers to require them to affix asbestos labels to their products where appropriate. If users were so alerted to the presence of asbestos, it should obviate the necessity "to litigate numerous similar cases through the administrative and appeal procedure provided" under the Act. Continental Can Co., U.S.A. v. Marshall, 455 F.Supp. 1015 (S. D. Ill., 1978).

obtaining such analyses are well demonstrated by the record in the instant cases. Thus, I conclude that reasonable diligence did not require the respondents to obtain them.

## Conclusion of Law

1. The Commission has jurisdiction over the cases, the respondents having admitted jurisdiction in their answers to the complaints. (Tr. 1: 9.)

2. The evidence fails to establish that the respondents violated any of the occupational health standards in issue in these cases.

## ORDER

The three citations in issue in these cases are vacated in their entirety.

George O. Taylor Jr.
GEORGE O. TAYLOR, JR.
Judge, OSHRC

Dated: May 29, 1979
Hyattsville, Maryland

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

March 31, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Bethlehem Steel Corp.

OSHRC DOCKET NO. 79-310

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR EMPLOYEES

- 

Judge Ralph B. Maxwell
OSHRC
55 East Monroe St.
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-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>BETHLEHEM STEEL CORPORATION,<br>Respondent. | OSHRC Docket No. 79-310 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

CLEARY, Commissioner:

This is a case under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). A decision of Administrative Law Judge Ralph B. Maxwell is before the Commission for review under section 12(j) of the Act, 29 U.S.C. § 661(i). In his decision, Judge Maxwell granted Respondent's motion to dismiss and vacated citation 2, which alleges a serious violation of the Act due to noncompliance with the general industry personal protective equipment standard at 29 C.F.R. § 1910.132(a). 1/ His sole reason for vacating was his conclusion

1/ The standard provides:

> Subpart I - Personal Protective Equipment
> § 1910.132 General requirements.
> (a) Application. Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

that section 1910.132(a) was "inappropriate as the basis for the citation," i.e., it could not be applied, as the Secretary of Labor ("the Secretary") sought to apply it in this case, to compel the use of safety belts as protection against a falling hazard.

The Secretary filed a petition for discretionary review, and Commissioner Cottine directed review on the following issue raised in the Secretary's petition:

> Whether the judge erred in vacating a citation item alleging noncompliance with 29 C.F.R. § 1910.132(a) on the grounds that the cited standard does not require protective equipment where employees are exposed to falling hazards.

For the reasons stated below, Commissioner Cottine and I agree that safety belts are a form of protective equipment required under section 1910.132(a) and that falling hazards are encompassed by the language "hazards of processes or environment" within the meaning of that standard. Nevertheless, for the reasons set forth in our separate opinions, Chairman Rowland and I agree that Judge Maxwell did not err in granting Respondent's motion to dismiss. Accordingly, the judge's decision is affirmed.

I

As a result of an inspection of the mold yard in Respondent's Burns Harbor steel processing plant in Chesterton, Indiana, conducted by a compliance officer from the Occupational Safety and Health Administration ("OSHA"), the Secretary issued citation 2, which alleged, as amended, that Respondent committed a serious violation of the Act in failing to comply with section 1910.132(a) in that:

> Protective equipment was not used where it was necessary by reason of hazards encountered in a manner capable of causing injury or impairment in the function of any part of the body:
>
> > Employees were required to work on top of molds and to work near open sided floors without appropriate personal protective equipment. Such work consisted of banding

> boxes to molds, operating a pendant controlled crane, and pouring sand in the preparation of molds, which exposed employees to falling onto cluttered flatbed rail cars and the ground level approximately twelve feet below.

This citation was based on the compliance officer's observation of two employees of Respondent working on a platform known as the "hot top station," which was approximately 12 feet above the ground. The compliance officer testified that the employees had no fall protection as they prepared large empty molds to be filled later with molten steel. The molds rested on railroad flat bed cars that brought them to and took them away from the hot top platform. During certain phases of the mold preparation process, employees were required to step over a gap from the platform onto the top of the molds, thereby assertedly exposing themselves to the danger of a 12-foot fall. The compliance officer further testified that the employees could have been protected by safety belts, attached by 6-foot lanyards to a jib mechanism or column on the platform.

Following the presentation of the Secretary's case, Respondent moved to dismiss the case on the ground that section 1910.132(a) does not require the furnishing or use of safety belts. At the close of the presentation of its case, Respondent renewed its motion. In his decision, Judge Maxwell granted Respondent's motion to dismiss. He concluded that section 1910.132(a) does not apply to safety belts because they are not "named along with the protective clothing, respiratory devices, protective shields and barriers that are mentioned." He further held that section 1910.132(a) does not apply to falling hazards. Judge Maxwell stated, "The hazard of falling is sufficiently alien to the facial thrust of the regulation, that if there had been an intention to include it, then certainly it would have been mentioned along with 'processes' hazard, 'environmental' hazard, 'chemical' hazard, 'radiological' hazard and 'mechanical' hazard." He found support for his interpretation of section 1910.

132(a) in decisions by other administrative law judges who had concluded that the standard did not apply to safety belts and falling hazards, particularly noting that in John Zink Co., 79 OSAHRC 73/F10 (No. 78-1834, 1979 ALJ), the judge relied in part on evidence that the Secretary had instructed his representatives to no longer cite employers under section 1910.132(a) for failure to use safety belts.

II

The Secretary argues on review that the judge erred in interpreting the list of items in the cited standard following the phrase "protective equipment, including" as exclusive rather than illustrative. According to the Secretary, the language of the standard, when given its plain meaning, does not exclude safety belts, lifelines, and lanyards, but instead includes them because they comprise a form of "personal protective equipment," as indicated in the construction industry standard at 29 C.F.R. § 1926.104. The Secretary further contends that the hazard of falling from the hot top platform onto a railway car or the concrete floor is a hazard "of processes or environment" that could result in bodily injury. In addition, he correctly notes that the decisions of administrative law judges relied upon by Judge Maxwell in his decision are not binding on the Commission. 2/ The Secretary requests that the decision be remanded to the judge to resolve the remaining factual issues.

On review, Respondent urges affirmance of Judge Maxwell's decision. It states that, in determining that section 1910.132(a) is not applicable to safety belts and falling hazards, the judge relied on the well-recognized doctrine of expressio unius est exclusio alterius, i.e., express mention in a statute of one thing excludes others not expressed, which applies to section 1910.132(a)

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2/ E.g., Leone Construction Co., 76 OSAHRC 12/E6, 3 BNA OSHC 1979, 1975-76 CCH OSHD ¶ 20,387 (No. 4090, 1976).

because that standard "clearly specifies various types of protective equipment and hazards but omits reference to safety belts, or to falling hazards." Arguing that this doctrine is strengthened when an item omitted in the cited standard is mentioned in another standard, Respondent lists OSHA standards explicitly requiring the use of safety belts in the ship repairing, shipbuilding, and construction industries. Respondent notes the decisions by other administrative law judges relied upon by Judge Maxwell, especially the one that relied in part on evidence of OSHA Instruction CPL 2-1.13 (April 16, 1979) in which the Secretary instructed his compliance officers to discontinue citing employers under section 1910.132(a) for failure to use safety belts and lines.

III

In Ed Cheff d/b/a Ed Cheff Logging, 81 OSAHRC 60/A2, 9 BNA OSHC 1883, 1981 CCH OSHD ¶ 25,431 (No. 77-2778, 1981), appeal filed, No. 81-7493 (9th Cir. July 27, 1981), the employer argued that 29 C.F.R. § 1910.132(a) does not require the use of seat belts to protect tractor operators from being crushed if the vehicle rolls over. The Commission held that, under the standard, the broad phrase "hazards of processes or environment" includes a rollover hazard created by operation of tracked logging vehicles over uneven terrain. Furthermore, the Commission concluded that seat belts, the suggested protective equipment, can be required under section 1910.132(a) because the use of the term "including" in the standard indicates that the enumerated types of protective equipment are merely illustrative rather than limitations on the scope of the standard. In addition, the Commission found no indication that the drafters of the standard otherwise intended to exclude the use of seat belts from the standard's requirements. Similarly, in United Geophysical Corp., 81 OSAHRC 77/D6, 9 BNA OSHC 2117, 1981 CCH OSHD ¶ 25,579 (No. 78-6265, 1981), appeal filed, No. 81-4342 (5th Cir. Aug. 26, 1981), the Commission concluded that, although the types of hazards

covered under the standard are limited to hazards of injury resulting from "absorption, inhalation, or physical contact," these categories are sufficiently broad to include the hazard of drowning. The Commission also determined that flotation devices can be required under the standard, even though they are not specifically mentioned, again because the list of protective devices at section 1910.132(a) is illustrative and cannot be construed as a limitation on the scope of the standard.

Applying this reasoning to the case before us, Commissioner Cottine and I conclude that the hazard of falling from the hot top platform is a hazard of processes or the environment within the meaning of section 1910.132(a) because the platform is where Respondent's employees stand when making "hot tops" and is thus part of the work surroundings of Respondent's employees. Similarly, we find no indication that the drafters of this provision intended to exclude from the scope of this standard equipment to protect against this hazard -- specifically, safety belts and lanyards. Furthermore, the section 1910.132(a) limitation to hazards "encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact" is sufficiently broad to include the hazard of injury or death by falling. Here, for example, injury could be sustained as a result of "physical contact" with a flatbed rail car or with the concrete floor due to a fall. 3/

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3/ With regard to the Secretary's instruction to cease citing safety belt violations under section 1910.132(a), which was noted by Judge Maxwell in his decision and by Respondent on review, the Commission has held that the Secretary's internal administrative directives lack the force and effect of law and are thus not binding on the Secretary or the Commission. C. R. Burnett and Sons, Inc., 80 OSAHRC 111/A2, 9 BNA OSHC 1009, 1980 CCH OSHD ¶ 24,964 (Nos. 78-1103 & 78-1105, 1980), pet. den., No. 81-7057 (5th Cir. Feb. 6, 1981); FMC Corp., 77 OSAHRC 153/D4, 5 BNA OSHC 1707, 1977-78 CCH OSHD ¶ 22,060 (No. 13155, 1977). In any event, when the Secretary issued his instructions in CPL 2-1.13, he stated that he was doing so because of adverse decisions by Commission judges vacating § 1910.132(a) citations; he did not expressly or impliedly acknowledge the correctness of those decisions.

Accordingly, Commissioner Cottine and I conclude that the standard may properly be read to encompass a requirement that safety belts and lanyards be used to protect against a fall hazard, and it is therefore applicable in the instant case.

IV

Although section 1910.132(a) applies to the cited circumstances, I deny the Secretary's request for a remand and conclude that the citation should be vacated because Respondent was not given sufficient notice of the standard's applicability to fall hazards and safety belts. First of all, the requirements of the standard are set forth in broad, general language necessitated by "the myriad conceivable situations which could arise and which would be capable of causing injury." Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230, 233 (5th Cir. 1974). Thus, the standard itself did not clearly apprise Respondent that it was required to provide safety belts to employees exposed to falling hazards. Secondly, Respondent introduced evidence that the steel industry has not interpreted the cited standard as requiring use of safety belts and does not require safety belts for employees working on mold yard platforms. In addition, the Commission has not until now considered the issue of whether section 1910.132(a) requires safety belts for falling hazards, and the majority of unreviewed decisions by Commission administrative law judges on this issue have held that section 1910.132(a) would not apply to such protective equipment and such a hazard. Although these unreviewed judges' decisions are not binding upon the Commission, see note 2 supra, they created the appearance of a "pattern of administrative enforcement" that failed to give Respondent adequate notice that the standard applied to safety belts and the hazard of falling. See Diebold, Inc. v. Marshall, 585 F.2d 1327, 1336 (6th Cir. 1978). Moreover, as noted by the judge and Respondent, the Secretary has in the past issued a directive

concluding that the standard did not require the use of safety belts. Therefore, in order to give Respondent "the full benefit of the notice denied," I conclude that the citation should be vacated. See Diebold, Inc. v. Marshall, supra, 585 F.2d at 1339; Auto Sun Products Co., 81 OSAHRC 71/E14, 9 BNA OSHC 2008, 1981 CCH OSHD ¶ 25,808 (No. 77-2616, 1981), appeal filed, No. 81-3503 (6th Cir. Aug. 28, 1981).

Citation 2, which alleges noncompliance with section 1910.132(a), is vacated.

IT IS SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: MAR 31 1982

ROWLAND, Chairman, concurring in the disposition:

I agree with Commissioner Cleary's decision to vacate the citation, but for different reasons than those set forth in his opinion. In my view, section 1910.132(a) does not apply to this case because safety belts and lanyards do not constitute the type of personal protective equipment contemplated by that standard.

It is a well-established tenet of regulatory construction that in order to effectuate the intent of the drafter and provide fair notice to the reader, an undefined term, such as "protective equipment" in the cited standard, should be given its commonsense, plain meaning in light of the context in which the term is used. See S.J. Groves & Sons Co. v. OSHRC, No. 80-4201 (2d Cir. May 1, 1981); 2A Sutherland Statutory Construction §§ 47.16, 47.17 (4th ed. 1973).

Section 1910.132(a) explains that "protective equipment" includes "personal protective equipment for eyes, face, head and extremities, protective clothing, respiratory devices and protective shields and barriers." The protective measures listed as "protective equipment" are all the same type: each shares, among other things, the salient quality of restricting or blocking external agents, objects, or substances encountered at the workplace from coming into contact with the employee. Similarly, the personal protective equipment required by the other standards in Subpart I also function as filters or barricades. 4/ For example, sections 1910.133(a)(1) and (a)(3) refer to goggles to block flying objects, glare, liquids and radiation. See also § 1910.134 (respirators), § 1910.135 (helmets), § 1910.136 (safety-toe footwear), § 1910.137 (rubber gloves). Thus, the context in which the term "protective equipment" is used indicates that "protective equipment" means devices which serve as barricades or filters against external agents.

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4/ Section 1910.132(a) is codified in Subpart I, titled "Personal Protective Equipment."

By contrast, safety belts reduce or eliminate potential falls by restraining and restricting the employee himself, rather than barricading or filtering external substances. Moreover, no mention is made of safety belts or similar devices which restrain an employee in either section 1910.132(a) or the other standards in Subpart I. 5/ While the word "including" in section 1910.132(a) shows that the standard is not limited exclusively to the devices listed, it would be inconsistent with the plain thrust of section 1910.132(a), and indeed all of Subpart I, to hold that the cited standard encompasses substantially dissimilar personal protective equipment, such as safety belts and lanyards. Cf. General Electric v. OSHRC, 583 F.2d 61 (2d Cir. 1978).

The majority reasons that the standard evidences no affirmative indication that the drafters of section 1910.132(a) intended to exclude safety belts and lanyards from the scope of the standard. However, the majority's reasoning renders the standard unenforceably vague. Standards cannot be construed to mean what the drafters might have intended but did not express; occupational safety and health standards must give employers fair notice of what is required for compliance. Bethlehem Steel v. OSHRC, 573 F.2d 157 (2d Cir. 1978), Diamond Roofing Co. v. OSHRC, 528 F.2d 645 (5th Cir. 1976). See Owens-Corning Fiberglass Corp. v. Donovan, 659 F.2d 1285 (5th Cir. 1981). Since safety belts are substantially different from the devices referred to in section 1910.132(a), an employer is not, in my view, given fair notice that safety belts constitute the type of protective equipment contemplated by section 1910.132(a).

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5/ I note that Subpart D, another subpart of the general industry standards in Part 1910, is directed toward various falling hazards associated with potentially dangerous walking-working surfaces, such as open-sided platforms and floor openings. However, I need not at this time consider the question of whether Subpart D contains the exclusive requirements regarding fall protection for general industries.

Moreover, contrary to what the majority suggests, the word "environment" as used in section 1910.132(a) does not mean general "work surroundings" in my view. The types of protective equipment referred to in the cited standard and in Subpart I - such as respirators and eye goggles - indicate that the phrase "hazards of . . . environment" concerns hazards such as climatic or air-borne hazards, not hazards of all physical surroundings. In this regard, a fall hazard is not the type of hazard suggested by section 1910.132(a) and the other provisions in Subpart I.

Therefore, while I agree with the majority that a fall could result in injury by "physical contact," I conclude that section 1910.132(a) does not require safety belts and lanyards to reduce potential fall hazards. Because section 1910.132(a) is thus inapplicable to the present case, I would affirm Judge Maxwell's decision to vacate the citation.

COTTINE, Commissioner, dissenting in part:

There has been no showing that Bethlehem was deprived of fair notice as a matter of law that safety belt protection is within the ambit of 29 C.F.R. §1910.132(a). Accordingly, I would remand for a decision on the merits.

I

Commissioner Cleary bases his conclusion that Bethlehem was denied adequate notice of the requirements of section 1910.132(a) on Diebold, Inc. v. Marshall, 585 F.2d 1327 (6th Cir. 1978). In Diebold the court concluded that the due process clause of the Fifth Amendment was violated because two machine guarding standards failed to provide constitutionally adequate warning of the conduct required. The court found that no substantial notice problem was presented based on the mere fact that the standard relied on by the Secretary, 29 C.F.R. §1910.212(a)(3)(ii), was broadly worded. "Thus, if our concern here were merely the non-specificity of the regulation, there would be little room for debate." 585 F.2d at 1336.

The court concluded that the cumulative effect of several additional factors yielded a finding of inadequate notice. First was the "inartful drafting" of another standard, 29 C.F.R. §1910.217(a)(5), which arguably created a specific exemption for the cited machines (press brakes). 585 F.2d at 1336-37. Second was the undisputed "common understanding and commercial practice" relative to press brake guarding. The court concluded that the average employer would be unaware that the requirements applied to press brakes. Third was the pattern of administrative enforcement; a clear majority of Commission judges had held that the cited standard was inapplicable to press brakes. "Whether an employer looked to the language of the regulations or to industry practice, it would have been led to believe that press brakes had been specifically

exempted from guarding requirements." 585 F.2d at 1337 (citation omitted). However, the court noted that if Diebold had been aware of the standards' requirements it could not complain of an inadequate warning to others. 585 F.2d at 1337, citing United States v. Raines, 362 U.S. 17, 21 (1960). Thus, the Diebold analysis was based on a factual record.

The Diebold court also stated that the lack of adequate notice does not automatically lead to vacation of the citation. The court recognized that "there are probably cases in which an order such as the present one could properly be treated as severable, with enforcement denied on due process grounds only in relation to the penalties for past conduct." Id. at 1338-39 (citation omitted). The sole basis for vacating the entire citation in Diebold was that the inadequate notice also deprived the employer of the opportunity to seek a variance from the standard's requirements and thus an opportunity to establish its asserted defense of impossibility of compliance. Moreover, the Diebold court expressly limited its holding to "the particular 'facts of the case at hand'." Id. at 1338, citing United States v. Mazurie, 419 U.S. 544 (1975).

II

The facts in this case are significantly different and the principles applied in Diebold lead to a finding of fully adequate notice here. The cited standard, 29 C.F.R. §1910.132(a), though a broadly worded standard, "appears to have been drafted with as much exactitude as possible in light of the myriad conceivable situations which could arise and which would be capable of causing injury." McLean Trucking Co. v. OSAHRC, 503 F.2d 8, 10 (4th Cir. 1974), quoting Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230, 233 (5th Cir. 1974). Although §1910.132(a) does not explicitly mention safety belt protection, safety belts are a well-known, widely-used form of personal protective equipment. See, e.g.,

National Safety Council, Accident Prevention Manual for Industrial Operations, 1185-1190 (6th ed. 1973). The personal protective equipment provision of the construction industry standards, 29 C.F.R. §1926.28, specifically incorporates provisions concerning safety belts, lifelines and lanyards.[1/] "Both regulations [§§1910.132(a) and 1926.28] require the use of personal protective equipment, such as safety belts, when necessary to protect against hazards such as falling." Turner Communications Corp. v. OSAHRC, 612 F.2d 941, 944 (5th Cir. 1980) (dictum). Thus, if our concern is merely the non-specificity of §1910.132(a), there is little room for dispute that it provided adequate notice of its requirements. Also, unlike Diebold, there are no seemingly inconsistent provisions in this case that reasonably could mislead an employer attempting to comply.

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1/ Subpart C - General Safety and Health Provisions

§1926.28 Personal protective equipment.

(a) The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

(b) Regulations governing the use, selection, and maintenance of personal protective and lifesaving equipment are described under Subpart E of this part.

* * *

Subpart E - Personal Protective and Life Saving Equipment

* * *

§1926.104 Safety belts, lifelines, and lanyards.

(a) Lifelines, safety belts, and lanyards shall be used only for employee safeguarding. Any lifeline, safety belt, or lanyard actually subjected to inservice loading, as distinguished from static load testing, shall be immediately removed from service and shall not be used again for employee safeguarding.

(b) Lifelines shall be secured above the point of operation to an anchorage or structural member capable of supporting a minimum dead weight of 5,400 pounds.

[The remaining provisions of the standard, which merely contain required specifications for safety belts, lifelines and lanyards, are omitted here.]

Bethlehem presented evidence at the hearing that the steel industry did not interpret §1910.132(a) to require the use of safety belts. This is a factual issue on which the judge has not ruled because he disposed of the case on the general applicability issue. The Secretary did not brief this issue and was not on notice to brief it under the direction for review. Thus, Bethlehem's evidence on the steel industry's interpretation is not properly relied on for purposes of this appeal. However, even assuming that Bethlehem is correct regarding the industry's interpretation, the reasons put forward for that interpretation have been rejected. We may not decline to enforce a standard merely because an industry has interpreted it erroneously.

Furthermore, the Respondent was not deprived of fair notice of the applicability of §1910.132(a) to safety belts by prior Commission decisions. Bethlehem points to three unreviewed judges' decisions issued before the alleged violation in this case in which §1910.132(a) was held inapplicable to safety belts.[2/] However, there were also at least two unreviewed judges' decisions before that time finding violations of §1910.132(a) based on lack of proper safety belt protection.[3/] Moreover, the unreviewed

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2/ Belau Transfer and Terminal Co., 78 OSAHRC 28/B5, 6 BNA OSHC 1592, 1978 CCH OSHD ¶22,681 (No. 76-4631, 1978)(ALJ Mitchell); Union Oil Co. of California, 78 OSAHRC 21/E4, 6 BNA OSHC 1433, 1978 CCH OSHD ¶22,614 (No. 76-2784, 1978)(ALJ Mitchell), aff'd on other grounds, 616 F.2d 1113 (9th Cir. 1980); Northwest Bridge and Tank Co., 73 OSAHRC 1/C7, 1 BNA OSHC 3025, 1971-73 CCH OSHD ¶15,342 (No. 1113, 1972)(ALJ Morris). Bethlehem also points to two decisions issued after the alleged violation in this case. John Zink Co., 79 OSAHRC 73/F10, 7 BNA OSHC 2019, 1979 CCH OSHD ¶23,853 (No. 78-1834, 1979) (ALJ Morris); Robberson Steel Co., 79 OSAHRC 1/A2, 7 BNA OSHC 1195, 1979 CCH OSHD ¶23,256 (No. 76-4636, 1979)(ALJ Cronin). However, subsequent decisions could not affect Bethlehem's understanding on the date of the alleged violation.

3/ Sun Ray Lighting Co., 77 OSAHRC 17/B7, 5 BNA OSHC 1071, 1975-76 CCH OSHD ¶20,732 (No. 14580, 1976)(ALJ Burroughs); Technical Tubing Testers, Inc., 78 OSAHRC 34/B13, 6 BNA OSHC 1615, 1977-78 CCH OSHD ¶22,724 (No. 77-1525, 1978)(ALJ Bullis).

decisions of Commission judges are without precedential value and may not be relied on as the Commission's view of the law. Leone Construction Co., 76 OSAHRC 12/E6, 3 BNA OSHC 1979, 1975-76 CCH OSHD ¶20,387 (No. 4090, 1976).[4/] Consistent with the remedial purposes of the Act, the Commission should not decline enforcement of a citation, including the abatement of any hazards that may exist, simply because there is no authoritative interpretation of the standard by the three-member Commission.

Commissioner Cleary also relies on OSHA Instruction CPL 2-1.13 (April 16, 1979). See lead opin., pt. IV. That instruction directed compliance officers no longer to cite employers under §1910.132(a) for failure to wear safety belts. However, that internal administrative instruction was issued after the alleged violation in this case, and thus does not show that Bethlehem was deprived of fair notice of the standard's requirements with respect to this citation. Also, the instruction does not conclude that §1910.132(a) does not require safety belts. Instead, it represents a policy decision based on certain adverse decisions by Commission judges. See lead opin., n. 3.

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4/ In a Commission decision issued in 1975, Commissioner Cleary expressed the view that §1910.132(a) required safety belts. Colorado Fuel and Iron Steel Corp., 75 OSAHRC 67/A2, 3 BNA OSHC 1289, 1974-75 CCH OSHD ¶19,729 (No. 594, 1975). There as here the alleged fall hazards concerned work on railroad cars, and the employees were not provided with safety belts and lifelines. The judge had vacated an alleged §1910.132(a) violation on the ground that the standard is unenforceably vague as applied to the conditions involved. His decision was upheld without precedential effect because the two sitting Commissioners differed in their disposition of the case. Commissioner Cleary's views in that case are significant:

> Assuming arguendo that the Commission has authority to consider the validity of a standard, Commissioner Cleary considers that any question as to the constitutional validity of 29 C.F.R. Sec. 1910.132(a) to be now well-settled. McLean Trucking Co. v. OSAHRC [supra]; Ryder Truck Lines v. Brennan [supra]. . . . Commissioner Cleary expresses the hope, if not the expectation, that the respondent will take voluntarily corrective measures. Moreover, in his view, the Secretary of Labor may reinspect under section 1910.132(a) . . . .

3 BNA OSHC at 1290-91, 1974-75 CCH OSHD at p. 23,538.

In addition, the Secretary has not had a fair opportunity on review to address the factual issue of whether Bethlehem actually was aware of the applicability of §1910.132(a) to safety belts. The Diebold analysis was made on a factual record. The Secretary contended below that Bethlehem admittedly had used safety belts in the mold yard area in the past. This contention is relevant to whether Bethlehem actually knew safety belts are required there. Owens Corning Fiberglass Corp., 79 OSAHRC 26/D6, 7 BNA OSHC 1291, 1979 CCH OSHD ¶23,509 (No. 76-4990, 1979), aff'd, 659 F.2d 1285 (5th Cir. 1981). Thus, this case should not be vacated on notice grounds in reliance on Diebold without a complete factual record.[5/]

III

In summary, there has been no showing that Bethlehem was deprived of fair notice regarding the application of §1910.132(a) to safety belts as a matter of law. Factual issues are not before us at this time and should be resolved by the judge on remand in the first instance. The remaining issues include whether a reasonable person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts unique to Bethlehem's industry, would recognize a hazard warranting the use of personal protective equipment. E.g., Owens Corning Fiberglass Corp., supra. This universal "reasonable person" test eliminates any notice problems of a constitutional dimension. United States v. Petrillo, 332 U.S. 1 (1947); Ryder Truck Lines, Inc. v. Brennan, supra. Accordingly, this case should be remanded for a decision on the merits of the citation.

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5/ Auto Sun Products Co., 81 OSAHRC 71/E14, 9 BNA OSHC 2008, 1981 CCH OSHD ¶25,808 (No. 77-2616, 1981), appeal filed, No. 81-3503 (6th Cir. Aug. 28, 1981), cited by Commissioner Cleary to support vacation of the citation, is inapposite. There, as in Diebold, there was a misleading standard which we found failed to put the Respondent on notice of the standard's requirements. However, there are no misleading provisions here depriving Bethlehem of fair notice of the cited standard's requirements.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v | : | OSHRC Docket No. 79-0310 |
| BETHLEHEM STEEL CORPORATION, | : | |
| Respondent. | : | |

## OPINION AND ORDER

These proceedings were initiated by the complainant (Secretary) on January 9, 1979, by the issuance of a citation charging the respondent Bethlehem Steel Corporation (Bethlehem) with several violations of the Occupational Safety and Health Act. The citation relates to conditions that came to the attention of an OSHA compliance officer during an inspection December 21, 1978 conducted in the mold yard of Bethlehem's steel processing plant in Chesterton, Indiana.

A partial settlement agreement disposed of all of the case except one alleged serious violation. A hearing on this surviving issue was held September 26 and 27, 1979, in Chicago.

The Secretary was represented in these proceedings by Attorney Christopher D. Wolfe of the Office of the Solicitor, Department of Labor, Chicago. Bethlehem was represented by Attorney Mark Floyd Reynolds, II, of Bethlehem, Pennsylvania.

The one item that went to hearing relates to an alleged violation of the safety standard published at 29 CFR 1910.132(a). That standard is in the following language:

> Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

The citation charges that an infraction of provisions of this standard occurred as follows:

> Protective equipment was not used where it was necessary by reason of hazards encountered in a manner capable of causing injury or impairment in the function of any part of the body:
>
> Employees were required to work on top of molds and to work near open sided floors without appropriate personal protective equipment. Such work consisted of banding boxes to molds, operating a pendant controlled crane, and pouring sand in the preparation of molds, which exposed employees to falling onto cluttered flatbed rail cars and the ground level approximately twelve feet below.

At the conclusion of the Secretary's case-in-chief, Bethlehem moved for dismissal upon the grounds that 29 CFR 1910.132(a) "does not require furnishing or use of safety belts." (T 96) After both sides had rested, the motion was renewed. At that time, grounds for dismissal

were expanded. Counsel asserted the standard was so vague that it contained insufficient notice of what was required. (T 173) The Secretary requested time to brief these issues. Such request was allowed, and briefing was completed December 10, 1979.

A short recital of the facts may help to bring the dismissal motion into perspective. In Bethlehem's mold yard, the compliance officer observed two employees on a platform approximately 12 feet high. (T 22) This was called the hot top station. (T 109) He testified the employees did not have any fall protection as they worked to prepare large empty molds to be filled with molten steel. This preparation involved affixing a metal box and an umbrella-like contraption upon the top of the mold. (T 27) Sand was then placed in the umbrella and solidified by infusion of carbon dioxide. (T 160)

The molds rested on railroad flat bed cars that were used to transport them to and from the hot top platform. Certain phases of the work required the employees to take a short step from the platform onto the top of the molds. This meant stepping a horizontal distance of 12 to 18 inches, and a vertical distance ranging up to 10 inches (T 29) No one has ever fallen from the platforms or molds. (T 49)

The Secretary contended that these work conditions presented a falling hazard which 29 CFR 1910.132(a) required the employer to abate by means of safety belts. As above indicated, respondent asserts that not only is the standard void for vagueness, but that its language does

not permit a construction that would encompass safety belts. Bethlehem raised other defenses, including that of hazard enhancement, but they are not germane to the present motion.

Analysis of the standard has brought me to the view that the constitutional challenge need not be confronted, because I find that the regulation was inappropriate as the basis for the citation. The subject standard was not aimed at fall protection. No mention is made of safety belts. Nothing is said about falling hazards. It is silent regarding protection from injuries from falls. The hazard of falling is sufficiently alien to the facial thrust of the regulation, that if there had been an intention to include it, then certainly it would have been mentioned along with "processes" hazard, "environmental" hazard, "chemical" hazard, "radiological" hazard and "mechanical" hazard. Or safety belts would have been named along with the protective clothing, respiratory devices, protective shields and barriers that are mentioned. The failure to mention under these circumstances signifies an intention not to include.

This view has found favor with those OSHRC judges who have been confronted with the same issue.[1] In Sec. v John Zink Company, 7 OSHC 2019 (1979), Judge Morris, in declaring the subject standard did not require use of safety belts, significantly noted that the Secretary has prohibited further use of that standard for safety belt cases. See also Sec. v Robberson Steel Co., 7 OSHC 1195 (1979); Sec. v Belau Transfer, 6 OSHC 1592 (1978); Sec. v Union Oil Co., 6 OSHC 1433 (1978); Sec. v Northwest Bridge and Tank Company, 1 OSHC 3025 (1973).

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1 There have been instances where safety belt violations have been upheld under 132(a). However, in those cases the question of the applicability of the standard to safety belts was never raised. Sec. v Technical Tubing Testers, 6 OSHC 1615 (1978); Sec. v American Window Cleaning Co., 5 OSHC 1583 (1977) (Citation vacated on other grounds); Sec. v Sun Ray Co., 5 OSHC 1071 (1977)

## ORDER

For the reasons set forth above, the respondent's motion for dismissal is granted, and Item 1 of Citation No. 2 and the proposed penalty are in all things VACATED.

Ralph B. Maxwell
Judge, OSHRC

Dated: March 31, 1980

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

March 31, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Duriron Company, Inc.

OSHRC DOCKET NO. 79-5329

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 79-5329 |
| DURIRON CO., INC., | : | |
| Respondent. | : | |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

CLEARY, Commissioner:

An order of Administrative Law Judge J. Paul Brenton approving a settlement agreement between the parties is before the Commission under section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). The principal issue on review is whether the judge erred in entering that order. I would find that he did not err.

The Respondent, Duriron Co., Inc., operates a foundry, in Dayton, Ohio, that was inspected by an Occupational Safety and Health Administration ("OSHA") compliance officer. As a result of that inspection, the Secretary of Labor ("the Secretary") issued two citations to Respondent, the first alleging a serious violation of the Act in that Respondent failed to comply with 29 C.F.R. § 1910.132(a) and the second alleging a repeated violation of section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1). Respondent contested both of these citations and the accompanying

proposed penalties. After a complaint and an answer had been filed, but before a hearing was held, the parties entered into a settlement agreement resolving all of the disputed issues in this case. The record establishes that the parties properly served and notified affected employees, who filed no objections to the agreement. The settlement agreement was summarily approved by Judge Brenton, who entered an order effectuating the terms of the agreement.

My views on the proper role of the Commission in the settlement process are fully set forth in my separate opinions in Farmers Export Co., 80 OSAHRC 66/A2, 8 BNA OSHC 1655, 1980 CCH OSHD ¶ 24,569 (No. 78-1708, 1980), and Nashua Corp., 80 OSAHRC 121/A2, 9 BNA OSHC 1113, 1981 CCH OSHD ¶ 25,020 (No. 78-2146, 1980).

Applying my views in those cases to this case, I conclude that the settlement agreement before us should be approved.

The judge's order approving the settlement agreement is affirmed.

IT IS SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: MAR 31 1982

ROWLAND, Chairman, concurring:

I agree that the settlement agreement should be approved. In the circumstances of this case I believe that the Review Commission should not review the substance of a settlement agreement where the Secretary and the Respondent have reached an agreement and no affected employees or their representative challenge the sufficiency of the abatement date. Marshall v. Sun Petroleum Products Co., 622 F.2d 1176 (3d Cir. 1980), cert. denied 449 U.S. 1061 (1980). See Oil, Chemical and Atomic Workers v. OSHRC, No. 81-1687 (D.C. Cir. Feb. 26, 1982).

COTTINE, Commissioner, dissenting:

A settlement agreement that alters or waives a statutory duty under the Act is inconsistent with the provisions and objectives of the Act and is contrary to the public interest. "It is a necessary adjunct of the Commission's public interest and supervisory role [over the Act's enforcement] that settlement agreements that do not comport with the purposes of the Act be rejected." Farmer's Export Co., 80 OSAHRC 66/A2, 8 BNA OSHC 1655, 1656, 1980 CCH OSHD ¶24,569, p. 30,080 (No. 78-1708, 1980) (Cleary, Commissioner). See John Deere Foundry, 81 OSAHRC 14/B9, 9 BNA OSHC 1351, 1354, 1981 CCH OSHD ¶25,218, pp. 31,145-6, (No. 78-5498, 1981). The proposed settlement agreement in this case does not provide for the abatement required under the cited standard and therefore should be rejected.

I

An inspection of the Respondent's foundry in Dayton, Ohio resulted in the issuance of a citation alleging a serious violation of 29 C.F.R. §1910.132(a) on the grounds that "[f]ull body protective equipment/clothing designed to provide protection against molten metal was not provided and worn [by employees tending the furnaces]." In settlement, the Secretary and the Respondent, Duriron Co., Inc., ("Duriron"), proposed the following:

> 9. Abatement for Citation No. 1 shall be accomplished by provision of Ammonia cured pants and coats or other full body personal protective equipment of the same material to the induction furnace operators and first helpers. Said personal protective equipment is in addition to the eye, face, hand and foot protection, provided by Respondent to induction furnace operators and first helpers prior to August 20, 1979.
>
> 10. Any violation of 29 C.F.R. 1910.132(a) will not be considered as a repeated violation based on the Citation No. 1 of this case, unless Respondent fails to comply with Paragraph 9 in providing personal protective equipment, as defined in Paragraph 9, for furnace operators and first helpers to protect against the danger of splashing molten metal.

Review was directed under 29 U.S.C. §661(i) and Commission Rules 92(a) and (d), 29 C.F.R. §§2200.92(a), (d), on the following issues: (1) Whether paragraphs 9 and 10 above are consistent with the provisions and objectives of the Act, (2) whether paragraphs 9 and 10 limit the Respondent's obligation to comply with the requirements of 29 C.F.R. §1910.132(a) that protective equipment "be provided, used, and maintained," and (3) whether the judge erred in approving a settlement agreement containing the limitations set forth in paragraphs 9 and 10.

II

Workplace injuries and illnesses exact a heavy toll in terms of both human and economic loss. In passing the Occupational Safety and Health Act, 29 U.S.C. §§651-678, Congress "place[d] pre-eminent value on assuring employees a safe and healthful working environment." American Textile Manufacturers Institute, Inc. v. Donovan, 101 S.Ct. 2478, 2506 (1981). The Commission encourages the settlement of enforcement actions arising under the Act. However, when strong public interests are involved in a legislative attempt to correct public harm, "[t]he interests involved are far broader than those of the particular parties in a particular lawsuit . . . [and] the parties cannot be permitted to settle for less than, or for more than, the facts of the case and public policy expressed in . . . [the statute] mandate." Patterson v. Newspaper & Mail Deliverers' Union of N.Y. & Vicinity, 384 F.Supp. 585, 588 (S.D.N.Y. 1974), aff'd, 514 F.2d 767 (2d Cir. 1975), cert. den. sub nom. Larkin v. Patterson, 427 U.S. 911 (1976).

Commission Rule 100(a), 29 C.F.R. §2200.100(a), provides in pertinent part that "[a] settlement proposal shall be approved when it is consistent with the provisions and objectives of the Act." Section 5(a)(2) of the

Act, 29 U.S.C. §654(a)(2), requires each employer to "comply with occupational safety and health standards promulgated under this Act." 1/ The cited standard specifically requires that personal protective equipment be "provided, used, and maintained in a sanitary and reliable condition." An employer's duty under the standard is not satisfied by merely providing appropriate equipment. Lukens Steel Co., 81 OSAHRC 96/A2, 10 BNA OSHC 1115, 1124, 1981 CCH OSHD ¶25,742, p. 32,120 (No. 76-1053, 1981) and cases cited. The use of provided equipment must be enforced. Astra Pharmaceutical Products, Inc., 81 OSAHRC 79/D9, 9 BNA OSHC 2126, 2130, 1981 CCH OSHD ¶25,578, p. 31,900 (No. 78-6247, 1981), appeal filed, No. 81-1672 (1st Cir., Sept. 23, 1981); The Budd Co., 74 OSAHRC 12/A2, 1 BNA OSHC 1548, 1973-74 CCH OSHD ¶17,387 (Nos. 199 & 215, 1974), aff'd, 513 F.2d 201 (3d Cir. 1975). In contrast to the requirements of the cited standard, paragraph 9 of the agreement states that abatement "shall be accomplished by provision of . . . personal protective equipment." This limitation on the employer's compliance responsibilities is reinforced by paragraph 10 which states that any subsequent violation of the cited standard will not be considered repeated unless Duriron fails to provide personal protective equipment for the designated employees.2/ The stipulated limitation on Duriron's statutory duty to comply with the requirements of a safety standard promulgated under the Act is inconsistent

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1/ An employer seeking a variance from a promulgated standard must demonstrate by a preponderance of the evidence that alternative safety measures "to be used by an employer will provide employment and places of employment to his employees which are as safe and healthful as those which would prevail if he complied with the standard." 29 U.S.C. §655(d).

2/ Whether the parties interpret their agreement in a manner different from what I view as an impermissible limitation on an employer's statutory duty is unknown since the Commission, over my dissent, declined to receive briefs on the directed issues in this case.

with the Act's specific duty clause, 29 U.S.C. §654(a)(2),[3/] and the Act's stated purpose of assuring "so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. §651. Accordingly, it is inconsistent with the settlement approval criteria in Commission Rule 100(a), 29 C.F.R. §2200.100(a), that a settlement proposal be "consistent with the provisions and objectives of the Act."

The proposed settlement should be rejected.[4/]

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3/ The limited abatement provision in this agreement is also inconsistent with the Act's variance provision, supra note 1, because it permits less than full compliance with a promulgated standard without the employer's assurance that working conditions will be "as safe and healthful as those which would prevail if he complied with the standard." 29 U.S.C. §666(d).

4/ The limitation on future repeated violations contained in paragraph 10 of the agreement is inconsistent with Commission law regarding repeated violations under 29 U.S.C. §666(a) and provides another basis for rejecting the agreement. See Farmer's Export Co., supra (Cottine, Commissioner, dissenting)

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 240

ATLANTA, GEORGIA 30309

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| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 79-5329 |
| | ) | |
| DURIRON COMPANY, INCORPORATED, | ) | |
| | ) | |
| | ) | |
| Respondent. | ) | |

Brenton, Judge

The stipulation and settlement agreement submitted by the parties on March 17, 1980, is incorporated herein as if fully rewritten.

Consistent with that agreement respondent has withdrawn its notice of contest.

## ORDER

Citations 1 and 2 as amended are affirmed.

A $1,000.00 penalty is assessed.

J. Paul Brenton

JUDGE

Dated: March 19, 1980
Atlanta, Georgia

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

March 31, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

D. F. Goldsmith Chemical & Metal Corp.

OSHRC DOCKET NO. 79-6485

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

- Counsel for Regional Litigation
  Office of the Solicitor, USDOL
  200 Constitution Ave., NW. - Rm. S-4014
  Washington, D.C. 20210

- Herman Grant, Esq.
  Regional Solicitor, USDOL
  Everett McKinley Dirksen Bldg.
  230 S. Dearborn St. - 8th Floor
  Chicago, Il 60604

FOR EMPLOYER

- Ellen J. Friedman, Esq.
  Sachnoff, Schrager, Jones, Weaver
  & Rubenstein, Ltd.
  47th Floor
  Chicago, Il 60611

FOR EMPLOYEES

- Judge Edward A. Bobrick
  OSHRC
  55 East Monroe Street
  RM 1530
  Chicago, Il 60603

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 79-6485 |
| D.F. GOLDSMITH CHEMICAL AND METAL CORPORATION, | : | |
| Respondent. | : | |

DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

An order of Administrative Law Judge Edward A. Bobrick is before the Commission pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678. Judge Bobrick dismissed the Secretary of Labor's charges with prejudice upon the motion of the Secretary. The motion was submitted pursuant to a settlement agreement between the parties by which the Secretary agreed to withdraw the charges with prejudice and D.F. Goldsmith Chemical and Metal Corporation agreed to undertake certain abatement measures.

However, the settlement agreement did not include a certification showing that it was posted to give notice to the affected employees. See Commission Rule 100(c), 29 C.F.R. § 2200.100(c). Accordingly, we affirm the judge's order[1/] upon the condition that the parties submit a certifi-

1/ Upon his own motion, Commissioner Cottine directed review on two issues, one concerning service upon affected employees and the other

(continued on next page)

cation to the Executive Secretary showing that the settlement agreement has been posted (Commission Rule 7, 29 U.S.C. § 2200.7)[2/] and upon the condition that affected employees are afforded at least ten (10) days following posting to comment on or object to the settlement. The certification must be submitted within fifteen (15) days of the issuance of this order. SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: MAR 31 1982

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1/ (continued)

concerning the parties' failure to state specific dates by which abatement will be accomplished. In Commissioner Cleary's view, inasmuch as the Respondent has agreed to substantial abatement measures in the settlement agreement, and has agreed to study other suggested measures, the settlement comports with his position as set out in his dissenting opinion in Nashua Corp., 80 OSAHRC 121/A2, 9 BNA OSHC 1113, 1981 CCH OSHD ¶ 25,020 (No. 78-2146, 1980)

Chairman Rowland concludes that the Commission should not look beyond the terms to which the parties have agreed and therefore the Commission should not require the parties to state any particular abatement terms. See Marshall v. Sun Petroleum Products Co., 622 F.2d 1176 (3rd Cir.), cert. denied, 101 S.Ct. 784 (1980). Accordingly, Chairman Rowland agrees with Commissioner Cleary that the settlement agreement should not be disapproved because of the lack of specific dates by which abatement will be accomplished.

2/ Respondent's employees are not represented by an authorized employee representative. Accordingly, service by posting is sufficient.

COTTINE, Commissioner, concurring:

The majority correctly concludes that the Secretary's motion to dismiss "was submitted pursuant to a settlement agreement between the parties." Thus, the settlement agreement in this case is before the Commission pursuant to our review of the judge's order granting the Secretary's motion to dismiss. In this unique procedural posture, the specific requirements of Commission Rule 100(b)[1/] are not controlling as to whether the judge's order should be affirmed.[2/] Nevertheless, the Respondent has entered into an agreement by which it makes specific abatement commitments and further commits itself to additional means of controlling mercury exposure in its workplace. That agreement and its attachments are the basis for the Secretary's motion and are incorporated into the judge's order. Under these circumstances the agreement is

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1/ Commission Rule 100(b), 29 C.F.R. §2200.100(b), provides:

> (b) Requirements. Every settlement proposal submitted to the Judge or Commission shall include, where applicable, the following:
>
> (1) A motion to amend or withdraw a citation, notification of proposed penalty, notice of contest, or petition for modification of abatement;
>
> (2) A statement that payment of the penalty has been tendered or a statement of a promise to pay; and
>
> (3) A statement that the cited condition has been abated or a statement of the date by which abatement will be accomplished.

2/ The typical settlement agreement submitted to the Commission for approval is a bargained for exchange between the parties that ultimately affirms in part a citation issued by the Secretary. Compare, e.g., Consolidated Edison Co. of New York, 81 OSAHRC 9/B2 9 BNA OSHC 1267, 1981 CCH OSHD ¶25,165 (Nos. 80-999 & 80-1252, 1981) (settlement resulting in affirmance of citation but modifications of characterization and penalty) with Consolidated Aluminum Corp., 80 OSAHRC 125/A2, 9 BNA OSHC 1144, 1981 CCH OSHD ¶25,069 (No. 77-1091, 1980), petition for review filed, No. 81-3079 (6th Cir. Feb. 16, 1981)(citation withdrawn). See also, Power Systems Division, United Technologies Corp., OSHRC Docket No. 79-1552 (Jan. 13, 1982)(ALJ DeBenedetto)(one citation vacated in consideration of abatement measures by the respondent; one citation affirmed). The settlement agreement before the Commission in this case does not affirm in any part the citation issued by the Secretary.

consistent with the Act's provisions and objectives as generally required by Commission Rule 100(a).[3/] Accordingly, I concur in affirming the judge's order granting the motion, conditioned upon posting and an opportunity for affected employees to be heard, John Deere Foundry, 81 OSAHRC 14/B9, 9 BNA OSHC 1351, 1981 CCH OSHD ¶25,218 (No. 78-4449, 1981).

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3/ Commission Rule 100(a), 29 C.F.R. §2200.100(a), provides in part, "A Settlement proposal shall be approved when it is consistent with the provisions and objectives of the Act."

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 79-6485 |
| D. F. GOLDSMITH CHEMICAL AND METAL CORPORATION, a Corporation, | : | |
| Respondent. | : | |

ORDER

The Complainant has filed a Motion to Dismiss, seeking to dismiss with prejudice the Citation, Notification of Penalty and Complaint, having determined he lacked the evidence necessary to establish that a violation occurred, as required under Rule 73 of the Review Commission's Rules of Procedure.

Accordingly, it is hereby ORDERED that the Citation and Notification of Penalty is hereby VACATED and the Complaint is dismissed with prejudice.

Edward A. Bobrick
Judge, OSHRC

Dated: April 20, 1981

Chicago, Illinois

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
Room 7B11, Federal Building
1100 Commerce Street
Dallas, Texas 75242

NOTICE OF DECISION

Secretary of Labor v. Mobil Oil Corporation
OSHRC Docket No. 80-6678

1. Enclosed is a copy of my decision. It will be filed with the Commission on March 1, 1982, and will become the final order of the Commission on March 31, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is March 31, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Stanley M. Schwartz
Administrative Law Judge

Date: February 9, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>MOBIL OIL CORPORATION,<br>Respondent. | OSHRC DOCKET NO. 80-6678 |
| OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION,<br>Authorized Employee Representative. | |

Appearances:

Eve Chesbro, Esq.
Frances Valdez Valdez, Esq.
Dallas, Texas

For the Complainant.

Thomas C. McClellan, Esq.
Dallas, Texas

For the Respondent.

Steven Wodka
Washington, D.C.

For the Union.

## DECISION AND ORDER

SCHWARTZ, Judge:

This is a proceeding brought before the Occupational Safety and Health Review Commission ("The Commission") pursuant to Section 10 of the Occupational

Safety and Health Act of 1970, 29 U.S.C. §651 et. seq. ("the Act"). Respondent contests an alleged willful violation of Section 5(a)(1) of the Act.

An inspection was commenced at Respondent's workplace on August 12, 1980. Mobil timely contested the subject citation. A hearing was held in this matter on June 11 & 12, 1981 in Beaumont, Texas. The Oil, Chemical, and Atomic Worker's International Union, hereinafter the "Union" appeared on behalf of the affected employees. Complainant and Respondent have filed post-hearing briefs.

Respondent concedes that it is engaged in a business affecting commerce within the meaning of the Act and that the Commission has jurisdiction of the parties and of the subject matter. The issues remaining to be decided are twofold. First whether Respondent was in willful violation of Section 5(a)(1) of the Act. If so, the appropriate penalty therefor.

The citation provides as follows:

> Section 5(a)(1) of the Occupational Safety and Health Act of 1970:
> The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or were likely to cause death or serious physical harm to employees, in that:
>
> (a) the employer did not protect employees from the recognized hazard of oxygen deficiency posed by working within a confined space. The employer could have protected his employees by means such as testing confined space atmospheres prior to employee entry. Testing should insure safe concentrations of oxygen and absence of dangerous or harmful air contaminants. Only those employees who are properly trained and equipped, (i.e. respiratory protection, life lines, etc. when necessary) should be allowed to enter confined spaces. Employees were exposed to the hazard of oxygen deficiency in areas such as the Number 2 tank car loading area.

## Evidence

Mr. Joseph Chaisson appeared and testified. He has been employed at Mobil Oil for 39 years. His job is to load tank cars at loading rack number 2. Mr. Chaisson checks the tank cars for cleanliness by looking in the car. He then

notifies the pump house to start loading the car. A gauge indicates when the car is full and the pumphouse is notified to stop the loading procedure. He samples the oil and seals the car. The tank car is picked up by train and distributed to the buyer. The cars are returned after delivery of the lube oil and the above procedure is again followed (T. 23-28).

On August 12, 1980, three employees entered a tank car at loading rack number 2 and passed out from oxygen deficiency. Mr. Chaisson testified that prior to this date Mobil did not require any specific procedures before entering the tank cars at loading rack number 2. Mr. Chaisson was not told about the danger of oxygen deficiency in tank cars prior to this date. A stock oil is loaded into the tank cars. He did not enter every tank car in August 1980. It was unusual to enter the cars because they were built in a different way now. He would not go into a car that had a danger placard on it indicating poison was in the tank car or gas of any kind (T. 27; 30-32; 39).

Mr. Jodie Kimbrough appeared and testified. He has been Mobil's operations supervisor at the lube plant for the past five years. He is responsibile for the shipping and receiving of lube oils. He primarily oversees the transfer of lube oil from one storage tank to another. Mr. Kimbrough is responsible for the loading of tank cars in the lube plant. A checklist is followed which includes inspection of all connections and making sure the tank car itself is clean. The tank cars are inspected by having an employee look into the hatch. An employee is required to stand up on the ladder when an employee is required to enter the tank car (T. 44-47;R's Exh 2).

Mr. Kimbrough has observed employees entering tank cars at loading rack number 2 prior to August 12, 1980. They did not need an entry permit to enter the

cars prior to this date. He was under instructions to always have entry permits before entering confined spaces. He testified that a tank car is a confined space as is any closed vessel. Nevertheless prior to August 12, 1980, an entry permit was not required to enter the lube oil tank cars. The company's policy was not to require a safety permit to enter the tank cars because nobody ever assumed one was necessary because of the product being pumped. The cars were dedicated to lube oil which has no toxicity and a very low flash point. Prior to August 12, 1980, he did not know how the lube oil tank cars were unloaded at their point of destination. He did not know nitrogen pressure was being used to purge the tank cars. Mr. Kimbrough has never heard of any employee either getting nauseated or passing out after entering tank cars dedicated to lube oil (T. 45-52).

Mr. Eugene Reeves also appeared and testified. He worked as the operations superintendent in Respondent's lube plant prior to his retirement. He supervised Mr. Kimbrough at Mobil and was operations supervisor in August 1980. He stated that tank cars were inspected on an infrequent basis prior to August 12, 1980. These inspections were for mechanical defects and cleanliness. Employees did enter the tank cars at various times. Tests were made for hydrocarbons, i.e., explosive tests were made to detect hydrocarbons. These were the only tests he is aware of on the tank cars and they occurred around 1970. They ran no tests for odors in the tank cars. They tested every car but were not going to enter every car. The tests were made simply to determine if there were any hydrocarbon vapors in the air to be sure there was nothing in the lube tank cars that would cause an explosion during loading. Oxygen deficiency tests were not conducted. Respondent was not concerned about entry into the tank cars. The tests were stopped when they found no evidence of explosive mixtures in the lube cars (T. 54-57; 61-62).

Mr. Reeves also indicated that he is a chemical engineer. He testified that nitrogen is odorless and tasteless. He was never notified by Mobil's Customer Rohm and Haas that they were using nitrogen to unload the lube tank cars which Mobil delivered to Rohm and Haas. He indicated that if notified Respondent would have invoked strict precautions before entering the lube cars (T. 61-62). He also stated that safety checks were used before entering storage tanks and vessels at Mobil. A safety man would check for explosive vapors and oxygen deficiency. In addition a safety overseer would stand by when a vessel was entered. These checks were not required of the lube oil tank cars because he saw no reason to have oxygen deficiency or any hazardous thing in a tank car in lube service. No employee had ever passed out in a lube car prior to August 12, 1980. Lube oil is a 100 second neutral oil similar to mineral oil. It is a base stock and Mobil uses it to blend with other oils (T. 62-64).

Mr. Reeves did not ask Rohm and Haas about their unloading procedure prior to the accident on August 12, 1980. He indicated that tank cars are commonly unloaded by pumping them out with suction. He was aware that Mobil had policies and procedures concerning the entering of confined spaces. Management did not feel they applied to lube tank cars. It had been Mobil's policy for years to enter lube tank cars. The policy concerning entry into confined spaces did apply to the tank cars at the refinery that contained gasoline and products like that. The practice concerning entering lube tank cars was never mentioned as an exception to the confined spaces rule. It was a practice that grew up over the years because it had never been necessary to test these cars (T. 63-67; 71; Joint Exh. 1).

Mr. Lyman Limbocker testified. He is presently employed by Mobil as Manager of Safety and Security for the Beaumont Refinery. He has held this position since the first of June 1980. He is supervisor over the safety department

at Mobil as a whole. He was not actually present at the refinery until July 1, 1980. He reviewed Mobil's procedures contained in Tabs 5 and 6 of Joint Exhibit 1. He indicated that if asked he would have interpreted the procedures concerning confined spaces entry to apply to lube oil tank cars. He based this opinion on the fact that the procedures deal with confined spaces and lube oil tank cars are confined spaces. He did not know the history of the lube cars at the Beaumont Refinery. After the accident of August 12, 1980, the safety department notified the management of the lube plant that their personnel could not enter tank cars without a permit. This included lube oil tank cars. He had no personal knowledge about any exceptional practice that had grown up around the subject lube oil tank cars (T. 79-82).

Mr. Rod Lide appeared and testified. He is presently Manager of Materials, Distribution and Contracts for Rohm and Haas, Deer Park, Texas. The raw materials buyers report to him as well as the traffic supervisor. Traffic control is the shipment of Rohm and Haas goods out of the plant and the shipment in of raw materials. The General Service Department also reports to him. They unload tank cars, prepare them for shipment and release them to the traffic department for return to the original shipper. Mr. Lide has a degree in chemical enginering (T. 84-85).

Rohm and Haas is a large chemical complex of approximately 1,000 acres. They are big in the field of acrylates. Rohm and Haas makes a lot of oil additives, the ingredient that gives oil its viscosity improvement. It is a typical chemical industry. The activities of this plant bear no relationship at all to the petroleum refining industry. They are a customer of the refining people (T. 85).

Mr. Lide indicated he has knowledge about what happens to tank cars which come into Rohm and Haas from outside companies. He stated that Mobil is a

reasonably long-term supplier to Rohm and Haas of lubricating or dilution oils. Prior to August 12, 1980, these oils were supplied by Mobil in rail tank cars. Rohm and Haas had been receiving these tank cars at one particular spot in the plant for approximately a year and a half prior to August 12, 1980 (T. 88). They received approximately 20-30 cars a month from Mobil. Upon arrival Rohm and Haas' buyer would designate where the car was to be unloaded and give directions to the train crew where to spot the car. The car would then be unloaded and prepared for shipment back to the supplier. The two areas where the cars were unloaded are referred to as the "K" process and the "F-2" area. Ninety per cent of the cars received from Mobil were unloaded at the "F-2" area (T. 89).

The "F-2" area was set up to pressure the material out of the tank car. Nitrogen was used to pressure the tank cars because it was available at this unloading spot. The car was unloaded by the pumper hooking up a nitrogen line to the top of the tank car. He would hook up the discharge line to the bottom of the tank car and apply nitrogen pressure to the internal sides of the tank car. He would open the valve and the internal pressure would push out the oil into the storage tank. The pumper knew the tank car had been emptied when he could hear the nitrogen going through the bottom drain where the oil had been pushed out. At that point he would close the valves, turn off the nitrogen, bleed the car back to atomospheric pressure, close everything up and prepare the car for shipment back to the supplier. The car is still filled with nitrogen when it is shipped back to a supplier such as Mobil (T. 89-91).

The other part of the plant ("K") unloads tank cars by use of a suction pump which is hooked up to the bottom outlet of the tank car. Rail cars are also unloaded at numerous other spots throughout the plant. They pressure off the cars

to unload them at many of these spots. Sometimes they use plant air to pressurize off a car (T. 91-92).

Mr. Lide stated that they inspect tank cars occasionally for defects and also do some tank car cleaning. It is necessary to enter the cars for these purposes. Rohm and Haas requires the safety department to check all tank cars for explosive readings and oxygen levels before employees may enter these tank cars. He also indicated that his company has never placed any placard or other warning sign on tank cars that have been pressured off with nitrogen prior to returning them to the original shipper (T. 94-96; 101).

Mr. Henry Guillory appeared and testified. He was an oil mover at Mobil lube rack for 38 years prior to his retirement on September 1, 1980. He described the events surrounding his passing out in a tank car on August 12, 1980 at Mobil's lube rack number 2. He arrived at work and began preparing the tank cars for loading of lube oil. He dropped the bottom valves of the tank cars and noticed that the pin from one of the tank cars was out of its slot. The pin runs from the top of the tank car to the bottom and is used to open the valves at the bottom while standing on the top of the cars. Mr. Guillory informed Mr. Chaisson that the pin needed realignment and then placed a ladder in the tank car and entered. A co-worker Ms. Gerry Adams kept watch over him as he worked in the tank car. Mr. Guillory remembers going into the car and putting the pin in place before passing out inside the tank car (T. 124-126; 128-132; 135).

The tank car involved in the accident was tank car ACFX88987. Mobil Oil safety inspector, Aubrey Shafer, took readings for the oxygen content inside tank car ACFX88987 at approximately 8:30 a.m. on August 12, 1980. This was after the accident. He recorded an oxygen content level of 8%. Tests were again taken by Mobil Oil safety inspectors inside tank car ACFX88987 at approximately 9:30 a.m.,

on August 12, 1980, which indicated an oxygen content level inside the tank car of 10 1/2%. Safety Inspector Ronnie Falcon of Mobil also ran tests on several tank cars subsequent to the accident. These tests of tank cars at the number 2 loading rack indicated a range of 12-15% oxygen content inside the cars. He was not testing to enter the cars (T. 138-141; 144; Admissions number 2, 11, & 12). Exposure of employees to oxygen deficient atmospheres is likely to cause serious physical harm (T. 114).

The Secretary's Compliance Officer Mike Adams conducted an investigation into the accident. He interviewed Mr. Hunter Jaggard, Respondent's Lube Plant Manager as well as several employees. Mr. Adams testified that Mr. Jaggard told him he was aware of Respondent's safety policies and procedures that a tank car was a confined space. Mr. Jaggard told the compliance officer that he did not agree with that determination and felt that based upon his experience with lube oil the policies did not apply to entry of lube tank cars (T. 148-149).

Mr. Hugh Short appeared and testified. He has been a safety foreman at Mobil for the last three and a half years. Prior to that he was a safety inspector. His duties include the supervision of fifteen safety inspectors along with three other safety foreman. He trains the inspectors and audits their jobs in seeing that they are performing in accordance with company standards (T. 13-15). Mr. Short also handles requests for entry permits into confined spaces. A particular department calls him and requests an entry permit. He dispatches an inspector to run several tests including a test for oxygen content. If all requirements are met he issues a permit to enter the confined space (T. 15).

He testified that the procedures set forth in Mobil Safety Operating Procedures (Joint Exh 1, Tabs 5 & 6) were in effect at the Beaumont Refinery on August 12, 1980. It was his interpretation in his role of safety foreman that the safe

work permit procedures applied to tank car entries including testing for potential oxygen deficiency before entering lube tank cars. He believed these procedures applied prior to August 12, 1980. The procedures to enter confined spaces would apply because the lube rack number 2 tank cars were confined spaces (T. 17; 21-22).

Mobil runs an oxygen test on all confined spaces when an entry permit is involved. If a safety inspector gets a reading down to 20% oxygen, he will not issue an entry permit. This reading would indicate oxygen deficiency to a safety inspector. The inspector would turn the job down. A safety foreman can approve entry into a confined space down to 16% but he has never approved anything below 20%. The procedures provide that if entry is allowed between 16%-20%, special equipment such as breathing air protection and a safety overseer is required (T. 18-19). Mr. Short testified that there was an entry permit procedure into confined spaces at Mobil's Beaumont Refinery in effect prior to August 12, 1980. The safety department issued 156 entry permits into confined spaces during July 1980. Oxygen deficiency tests were conducted. This was a representative month (T. 166-167).

He also testified that the company has several safety training programs in effect at the Beaumont Refinery. These include an 8 hour course on the safe operating procedures manual and a written test at the end of the lesson. Safety meetings are conducted once a month. These meetings include the use of films such as one entitled "Two Breaths" on entry into a confined space. Weekly toolbox meetings are held. Programs for safety inspectors are conducted each Friday. The purpose is to keep the inspectors updated and trained. In addition the company has a new employee orientation program. This 16 hour program discusses a multitude of topics including chemical handling, safe work habits, confined spaces and request for entry permits. The film on confined spaces is shown (T. 171-176).

Mr. Short also described the sequence of events that occurred on August 12, 1980, at lube rack number 2. He went down to the lube rack after hearing an ambulance call on his office monitor. When he arrived at loading rack number 2, he spoke to the pumper Mr. Welch. Mr. Short was told there were three people down in the tank car. He asked Mr. Welch for a Scott-Air Pack, received it, put it on and went down the stairway at loading rack number 2 (T. 177-178).

When Mr. Short arrived at tank car ACFX-88987 he found Mr. Irwin there. He looked into the tank car and observed they had a red rubber hose near the car. Mr. Short questioned Mr. Irwin as to whether it was a steam or air hose and was informed it was an air hose. He instructed Mr. Irwin to put the yard air hose into tank car ACFX-88987 over Henry Guillory, Gerry Adams, and Wayne Moye (T. 178-179).

Mr. Short attempted to enter the tank car with the Scott-Air Pack on his back. He could not get in the tank car because the manway was too small. The bottle of air was taken off his back and it was held up above him so he could attempt to enter the car a second time. His air mask got hung on the ladder rung and was pulled off his face. He breathed something that upset him and had him coughing. Mr. Short came out of the tank car and breathed two or three whiffs of oxygen (T. 179).

Mr. Short noticed that there was a breathing air trailer at the scene of the accident with a smaller mask. He put it on, attached a lifeline to himself and made a successful entry. He tied a rope on Mr. Moye and signaled to the persons at the top of the hatchway to pull Mr. Moye out. The rope was lowered back into the tank car after Mr. Moye was pulled out into a safe area. He then tied the rope to Mr. Guillory and at the same time accidentally tied his fresh air mask hose in with the rope. When Mr. Guillory was pulled out, Mr. Short's fresh air mask was pulled off.

The mask was lowered back into the tank car. Mr. Short was not able to pull the rubber bands of the mask over his head. He removed himself from the scene when he knew he had become ineffective by signaling to be removed from the tank car. Another person replaced him and pulled Ms. Adams out (T. 179-180).

Mr. Merlin Clark appeared and testified. He is Plant Manager for Mobil's lube plant at St. Louis, Missouri. He has been with Mobil for 37 years. He indicated that lube oil is unloaded at his facility. It is shipped up from the Beaumont Refinery in rail tank cars from time to time. He unloads the cars by use of a suction hose and a pump from the bottom. Mr. Clark testified that all Mobil lube plants employ this method of unloading tank cars (T. 191-192).

Mr. Wayne Moye appeared and testified. He is an operator at Mobil's Beaumont Refinery and has worked for Mobil for 37 years. On August 12, 1980, he noticed Mr. Guillory laying in the bottom of the tank car. He told Ms. Adams that he would go for help. When he returned to the car he observed Ms. Adams inside the tank car laying over Mr. Guillory. His head was under the lube oil. He told the people around him that he was going in the tank car to get Ms. Adams off of Mr. Guillory. He entered the car (T. 200-202).

Mr. Moye indicated that he has had occasion to go in lube oil cars on very rare occasions in the past. He has had occasion to go into other types of tanks and vessels around the refinery. He gets a safety permit before entering any of these vessels or tanks. Mr. Moye indicated that Ms. Adams returned to work (T. 202-203).

Mr. Elton Williams testified that he is traffic manager at Mobil's Beaumont Refinery. His job is to track the movement of the rail cars coming in and going out

of the refinery. This includes tank cars dedicated to lube oil. He gave a history of tank car number ACFX88987. The car left the refinery 14 times in 1980. It left seven times to go to Rohm and Haas, five times to another Mobil installation, once to another customer, and one time it left empty. The tank car was dedicated to lube oil (T. 209-210).

Mr. Gerald Christopher testified that he is a safety supervisor at Mobil's Beaumont Refinery. He previously was a safety inspector. Mr. Christopher conducted tests of the lube tank cars several years ago. The tests were not for oxygen deficiency. Rather he was testing for vapors to be certain there were no explosive vapors in the tank cars. They were concerned that the movement of product, at that time, could create a static electricity spark. The tests were not performed as a preliminary step to an employee entering the tank cars. He normally checked every car at the loading rack (T. 220-223).

Mr. J. D. Theall testified that he has worked at the blending and packaging plant of the Beaumont Refinery since 1940. He has a loading rack referred to as number 9 in his work area. He loaded all types of motor oils and industrial oils at his loading rack in August 1980. They were loaded into rail tank cars. The products are all toxic. Prior to entering any tank car his procedure was to secure an entry permit from the safety department (T. 224-225).

Mr. Burl Martin testified that he has been employed as a boilermaker at Gulf Oil for 33 years. He is Chairman of the Union's Joint Health and Safety Committee. Mr. Martin testified that Gulf Oil has written procedures for entry into vessels. He receives copies of these procedures through his position on the safety committee. He testified that Gulf's procedures require the testing for oxygen deficiency prior to entry into enclosed vessels and tank cars. Gulf Oil has a lube oil tank car loading rack. It also dedicates tank cars to lube oil (T. 227-231).

## OPINION

### 5(a)(1) RECOGNIZED HAZARD

In order to establish a section 5(a)(1) violation, the Secretary must show that: (1) an employer failed to render its workplace free from a recognized hazard; (2) the occurrence of an incident was reasonably foreseeable; and (3) the likely consequence in the event of an incident was death or serious physical harm to its employees. Bomac Drilling, Division of TRG Drilling Corp., 81 OSAHRC 45/A2, 9 BNA OSHC 1681, 1691, 1981 CCH OSHD ¶25,363 at p. 31,547 (No. 76-450, 1981). The Secretary must also demonstrate that there were feasible means available to abate the hazard. National Realty and Construction Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973).

A recognized hazard is a condition or practice in the workplace that is known to be hazardous either by the industry in general or by the employer in particular. Beaird-Poulan, A Division of Emerson Electric Co., 79 OSAHRC 21/D11, 7 BNA OSHC 1225, 1979 CCH OSHD ¶23,493 (No. 12600, 1979). Furthermore, it is the hazard, not a specific incident that resulted in injury, which is relevant in determining the existence of the recognized hazard. See Brennan v. OSHRC, (Vy Lactos Laboratories, Inc., 494 F.2d 460 (8th Cir. 1974); Boeing Co., Wichita Division, 77 OSAHRC 188/D13, 5 BNA OSHC 2014, 1977-78, CCH OSHD ¶22,266 (No. 12879, 1977).

Respondent contends that the hazard in this case was not a "recognized" hazard within the meaning of Section 5(a)(1). In this regard Respondent contends that the evidence shows there was in fact no oxygen deficiency hazard associated with tank cars dedicated to lube oil. Respondent's argument focuses on the fact that the oxygen deficiency came about as a result of the injection of nitrogen into the subject tank car by Rohm and Haas without the knowledge of the Respondent.

Respondent's statement of the hazard emphasizes the cause of the particular accident at lube rack number 2. I find this to be an unreasonable narrowing of the hazard in this case. I agree with the Complainant and the Union that the hazard in this case is an oxygen deficient atmosphere in a confined space. The confined space is the tank car which was entered without a permit by Respondent's employees. It is this danger that must be addressed in deciding whether the condition or practice was known by the industry in general or by the employer in particular to be hazardous.

The record reveals that Mobil recognized the danger presented by an oxygen deficient atmosphere in a confined space under the circumstances of this case. Respondent's own safety policies and procedures in effect on August 12, 1980, recognized tank cars as confined spaces. These procedures point out that one of the hazards posed by a confined space is oxygen deficiency. They require that before an entry is made into a confined space, tests must be conducted for oxygen deficiency.

Respondent's safety program also establishes the fact that it recognizes that an oxygen deficient atmosphere in a confined space is a hazard. Every employee goes through a two day program in which Mobil policies concerning confined spaces are emphasized. The program stresses the dangers of confined spaces. In addition Respondent utilizes the film "Two Breaths" which addresses confined space entries.

Finally, all witnesses recognized the danger of oxygen deficiency in confined spaces such as tank cars. The only disagreement was the belief by some that an exception had grown up around the tank cars dedicated to lube oil. This aspect of the case is relevant to the issue of the proper classification of the citation. However, as noted above, the fact that the subject tank car was dedicated to lube oil and Rohm and Haas used nitrogen to unload it, does not change the hazard

involved here. In fact the record supports a conclusion that the danger of oxygen deficiency in confined spaces at issue here is a matter of common knowledge as well as recognized by Mobil in particular. Thus the record establishes the existence of a recognized hazard at Respondent's worksite.

Furthermore I find that an incident involving this hazard was reasonably foreseeable and the likely result of an incident would be death or serious injury. Respondent was aware that its employees entered tank cars to perform their assigned duties at lube rack number 2. The Secretary need not prove the foreseeablity of the accident as it actually happened with regard to the unloading of the tank car by Rohm and Haas. Rather it is sufficient to show the foreseeability of the general hazard of an oxygen deficient tank car being entered without checking for oxygen deficiency. This was reasonably foreseeable in this case. Respondent has stipulated that exposure of employees to an oxygen deficient atmosphere is likely to cause serious physical harm.

I also find that a feasible means of abatement was available. There was a means of abatement which would materially reduce the hazard. The Respondent's own policies and procedures in effect on August 12, 1980, are feasible in this case. They need only be enforced at lube rack number 2 to abate the hazard of oxygen deficiency in confined spaces. Respondent has in fact applied these procedures to the lube tank cars at loading rack number 2 since the accident on August 12, 1980. Accordingly the Secretary has satisfied his burden of proof with respect to each of the elements of a violation of Section 5(a)(1) of the Act.

## Characterization of the Violation

The Commission characterizes a violation as "willful" if it was committed with either an intentional disregard of, or plain indifference to, the Act's requirements. Mel Jarvis Construction Co., Inc., OSHRC Docket No. 77-2100 (RC

September 30, 1981). The Secretary's burden of proving willful conduct is notably more difficult when an employer is charged with a willful violation under a general standard or "the general duty clause," section 5(a)(1), rather than a specific standard. St. Joe Minerals Corp. d/b/a/ St. Joe Lead Co. v. OSHRC & Marshall, 647 F.2d 840 (8th Cir. 1981). In particular, a more concrete evidentiary showing is required to prove willfulness in this context. Where a willful violation of section 5(a)(1) is alleged, the Secretary has the burden of proving the employer's intentional disregard of or its plain indifference to its statutory duty to furnish a workplace free from recognized hazards that are causing or likely to cause death or serious physical harm. Thus there must be evidence, apart from that establishing knowledge of the hazard, from which I may reasonably conclude that the employer intentionally disregarded or was indifferent to the safety of the workplace. Id at 848-849.

The Secretary's main contention is that Respondent intentionally disregarded and/or showed plain indifference to the very broad duty to furnish its employees a place of employment free from oxygen-deficient atmospheres in confined spaces. The Secretary emphasizes that Respondent had notice that its employees were entering lube oil tank cars without prior testing of the oxygen content.

I have reviewed the record and conclude that the Secretary has failed to carry its burden of proof that Mobil intentionally disregarded or was plain indifferent to its statutory duty under Section 5(a)(1) of the Act. I cannot reasonably conclude from the total evidence of record, that the employer intentionally disregarded or was indifferent to the safety of the workplace. My reasons follow.

This is not a case where the Respondent was completely indifferent to the safety of its employees with respect to entry into confined spaces. The record

establishes that Respondent had an extensive safety training program which emphasized the dangers of confined spaces. It had new employee orientation as well as films on the subject. Training was conducted on a regular basis. In addition the safety department issued 156 entry permits in the month of July 1980 alone.

This case involves an exception to Mobil's confined space procedures which required that no vessel could be entered without an entry permit obtained from the safety department. Tests for oxygen content are run before such a permit is issued. This procedure was not followed at the lube plant with respect to cars dedicated to lube oil. The exception grew up over the years and was based on the belief that lube oil presented no hazard. Lube plant management and employees alike shared this opinion because lube oil is non-toxic and similar to mineral oil. No employee prior to August 12, 1980, had ever become nauseated or passed out in a tank car dedicated to lube oil.

Lube plant management also required that a safety checklist be followed before entering the cars. Personnel at loading rack number 2 had on occasion entered the tank cars for many, many years. This was usually done because of a cleanliness problem or a malfunction. Mobil's employees were only familiar with the suction pump unloading of tank cars which was the exclusive way of unloading at the Beaumont Refinery. They had no knowledge or warning that Rohm and Haas, a chemical industry member, was unloading the cars by the use of nitrogen gas pressure which resulted in an oxygen deficiency inside the car. Finally, after ascertaining the cause of the accident, the Respondent promptly expanded its safety testing procedures for entry into tanks and vessels to specifically include tank cars in lube service. Lube plant management personnel were advised accordingly.

Respondent's total confined space entry program was good. Its basic assumptions and actions over the years were reasonable under the circumstances set forth above. I cannot conclude that there is sufficient evidence to base a finding that Respondent's efforts to discover that Rohm and Haas was using nitrogen gas were so inadequate as to constitute careless disregard of employee safety. In addition I find that the record does not establish Mobil's intentional disregard or its plain indifference to "the safety of the workplace" and its duty under section 5(a)(1) to provide a workplace free from recognized hazards that are likely to cause death or serious physical harm. Consequently, the violation of section 5(a)(1) of the Act is not willful.

I now turn to the assessment of an appropriate penalty in this case. The Secretary proposed a penalty of $2700 out of a possible $10,000 for the alleged willful violation. This penalty must be adjusted since I have found a serious violation of Section 5(a)(1) rather than a willful violation. The maximum penalty for a serious violation is $1,000.

Respondent is a very large corporation. The record reveals no history of previous violations. On the other hand I consider the gravity of this violation to be high. Three employees were exposed to an oxygen deficient atmosphere in a confined space. The duration of the exposure was long enough for them to be rendered unconscious before their rescue. There was a high probability that a serious injury would occur from the 5(a)(1) violation. On balance I conclude that a penalty of $900 is reasonable and appropriate in light of the record and the statutory penalty criteria set forth in Section 17(j) of the Act.

## FINDINGS OF FACT

1. On August 12, 1980, Respondent's lube plant employees were unloading a rail tank car dedicated to lube oil at the No. 2 loading rack of the Beaumont Refinery.

2. Three employees were injured when they entered a tank car at the No. 2 loading rack between 7:30 a.m. and 8:30 a.m. on August 12, 1980.

3. The oxygen content inside the tank car at approximately 8:30 a.m. on August 12, 1980, was 8%, and it was 10 1/2 % at approximately 9:30 a.m.

4. Respondent's safety policies and procedures in effect on August 12, 1980, required a 20% oxygen level in a confined space to permit work without special equipment.

5. Respondent's written safety policies and procedures define tank cars as confined spaces.

6. These same policies require the testing of tank cars for oxygen deficiency prior to entry and the issuing of a work permit.

7. The tank car in question was not tested prior to entry by the three employees to determine its oxygen content.

8. Exposure to an oxygen-deficient atmosphere in a confined space will cause or is likely to cause death or serious physical harm.

9. Respondent had actual knowledge that its employees were entering, on occasion, tank cars dedicated to lube oil without first securing an entry permit and testing for oxygen deficiency.

10. The tank car had been returned empty from Respondent's customer Rohm and Haas.

11. Rohm and Haas had unloaded the tank car with nitrogen gas pressure.

12. Respondent had no knowledge of the purging of the tank car by applying nitrogen gas pressure.

13. Respondent did not use such gas to unload tank cars and did not know of its use by others.

14. The lube oil loaded at the No. 2 loading rack was a neutral, non- toxic base stock type of oil similar to mineral oil.

15. Prior to August 12, 1980, no vessel at the refinery was entered by Respondent's employees without an entry permit except the tank cars in lube service.

16. The issuance of an entry permit requires several tests including one for oxygen content.

17. Respondent had an extensive safety training program which emphasized the dangers of confined spaces prior to August 12, 1980.

18. Prior to August 12, 1980, no employee had ever become nauseated or passed out after entering a tank car dedicated to lube oil.

19. Respondent did not intentionally disregard or show plain indifference to the safety of the workplace with respect to the entry of tank cars dedicated to lube oil without first requiring an entry permit under the circumstances of this case.

## CONCLUSIONS OF LAW

1. Respondent, Mobil Oil Corporation, is engaged in a business affecting commerce and has employees within the meaning of Section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of this proceeding.

2. On August 12, 1980, Respondent was in serious violation of Section 5(a)(1) of the Act.

## ORDER

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Item 1(a) of willful citation number 1 is AFFIRMED as a serious violation.

2. A penalty of $900 is assessed for the aformentioned violation.

Stanley M. Schwartz
STANLEY M. SCHWARTZ
Administrative Law Judge

Dated: March 1, 1982

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1515 Broadway, Room 3800
New York, New York 10036

NOTICE OF DECISION

Secretary of Labor v. NACLERIO CONTRACTING CO., INC.
OSHRC Docket No. 81-1524

1. Enclosed is a copy of my decision. It will be filed with the Commission on March 1, 1982, and will become the final order of the Commission on March 31, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is March 31, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Seymour Fier

SEYMOUR FIER
JUDGE, OSHRC

Date: February 9, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>NACLERIO CONTRACTING CO., INC.,<br><br>Respondent. | OSHRC DOCKET<br><br>NO. 81-1524 |

Appearances:

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Louis C. Raegner, III, Esq.
c/o General Contractors Association of New York, Inc.
60 East 42nd Street
New York, New York 10165
For Respondent

## DECISION AND ORDER

Fier, Judge

## PRELIMINARY STATEMENT

This is a proceeding pursuant to section 659 of the Occupational Safety and Health Act of 1970 (29 U.S.C. section 651 et seq., hereinafter called the Act), wherein Respondent, contests the citation and penalties for both the serious and repeat violations. The citation is dated June 3, 1981.

The citations and proposed penalties were issued pursuant to sections 9(a) and 10(a) of the Act.

Pursuant to section 10(c) of the Act, (29 U.S.C. section 659(c)) the Respondent, through its letter dated June 11, 1981, noted its timely contest to the citations and the proposed penalties.

The standards which were violated are set forth as 29 U.S.C. 654 section 5(a)(1); and 5(a)(2). Penalties totaling $1040.00 were proposed for the violations.

The citations alleged as follows:

Serious - Violation

1
29 CFR 1926.400(h)(1): Approved ground-fault circuit interrupter(s) or an assured equipment grounding conductor program was not used for the protection of employees using 120 volt, single phase, 15 and 20 ampere receptacle outlets that were not a part of the permanent wiring of a building or structure:

> Construction site outside of trailer office. Radial Skilsaw used with yellow extension cord plugged into trailer outlet, which received power from pole outside of trailer (Temporary wiring, extension cord and trailer outlet).

A penalty of $400.00 was proposed.

Repeat - Violation

1
29 CFR 1926.602(a)(9)(i): Bidirectional machine(s) were not equipped with an operable horn, distinguishable from the surrounding noise level:

> Construction site at 138th Street and 11th Avenue. Fiat payloader - license 8801-SD. Reverse signal alarm distinguishable from the surrounding noise level was not provided.

A penalty of $640.00 was proposed.

## ISSUES

The following issues are pertinent to a disposition of this case:

1. Did the Respondent fail to comply with the specific standards of the Occupational Safety and Health Act set forth above.

2. Did the Respondent violate any or all of the above standards previously so as to make the instant violation "Repeat."

3. If the Respondent is found to have violated any or all of the above, what penalty or penalties, if any, should be assessed for any of the violations of the Act.

## SUMMARY OF TESTIMONY

Mr. E. M. Hall, Compliance Officer (hereafter referred to as C.O.) with the U. S. Department of Labor since 1974, testified that he has been involved in the field of safety for 12 years. He has made 639 inspections, half of which

were involved with construction sites (Tr. 8).*

On May 28, 1981, he visited the subject worksite in College Point. He met with Mr. Joseph Naclerio who is a foreman, and noted that there was no shop steward available (Tr. 9). He proceeded to make his inspection in the accompaniment of Mr. Naclerio. The C.O. stated that he saw a radial saw with an extension cord going through a window of the work trailer to the saw (Tr. 11-12). Mr. Naclerio said that the employees worked for him (Tr. 12). The saw had no ground fault circuit interrupter (Tr. 13). The hazard involved is possible electric shock or electrocution (Tr. 12). The C.O. stated that he saw the Respondent's employees using the saw earlier (Tr. 12). The workers were identified by Mr. Naclerio (Tr. 12). The hazard could have been corrected by use of a ground fault interrupter or a program. The C.O. ascertained that the Respondent did not have a program (Tr. 13).

It was ascertained that there was no ground fault interrupter on the worksite (Tr. 13). The hazard was visible by observation. By questioning the employees he ascertained that there was no program.

The unadjusted proposed penalty of $500.00 was reduced by 20 percent to $400.00 (Tr. 14-15).

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*Denotes transcript page.

The C.O. had a closing conference with the Respondent and Respondent said that he would have a job fault interrupter installed (Tr. 19).

Citation 2 is concerned with a repeat violation in which any bi-directional vehicle must have an audio reverse alarm pursuant to section 29 CFR 1926.602(a)(9)(i), (Exhibit C-1). The Respondent was operating the vehicle without the use of an alarm near where the Respondent's employees were working (Tr. 16). There was no alarm or other audio indication that the vehicle was moving back towards the employees. The danger was determined to be at the rear wheels (Tr. 16). The employees were from one to three feet from the vehicle (Tr. 17). Mr. Naclerio identified the employees as his (Tr. 17). The C.O. stated that he saw the vehicle going backwards without the alarm sounding a warning (Tr. 16). There were no precautions taken and the violation was observed by observation. It was ascertained that it was a repeat violation because the Respondent had previously been cited for the same violation and paid a reduced penalty (Tr. 18, Exhibit C-1).

A penalty of $400.00 x 2 equalled $800.00, minus 20 percent for good faith, resulting in an adjustment of the penalty to $640.00.

The Respondent introduced (Exhibit R-1), which was the C.O.'s inspection report (Tr. 21). On cross-examination it

was ascertained that the C.O. entered the trailer for the opening conference and did not see the wire in the trailer at that time. He later observed that the saw was hooked to an outlet in the trailer (Tr. 41).

In going from the trailer to the jobsite, the loader was working in another area. The C.O. saw the loader moving from area to area. The second time he saw the loader vehicle was when it was a block away with employees working around it and the backhoe was moving back and forth (Tr. 43). There were two employees in front of the machine and two to three employees in the rear with shovels (Tr. 46, 47). They were in and out of a trench and the machine was moving back and forward. The employees in front were about one foot from the bucket and the employees in the rear were several inches to one foot from the machine. The employees in the rear had their backs facing the machine and therefore, were not aware of when the machine was going to move back.

Respondent's Exhibit 2, is a publication on Fiat-Allis (Tr. 53). The employees in the rear were using shovels to fill an excavation trench. The machine was moving back and forth at about 2 miles an hour and traveled seven feet from the rear wheels with the employees' backs to the machine (Tr. 56, 57). The vehicle was said to be inches from the employees (Tr. 58). The C.O. made an observation with Mr. Naclerio standing alongside of him. He had a closing

conference and verified a broken window which was replaced (Tr. 64). The C.O. also discussed the other violations. The machine was observed and checked to see if it was functional. Mr. Naclerio said wires were not connected to the horn and he would see to it that it was fixed. The C.O. saw the vehicle parked and when it backed up the alarm was not working and there were no wire connectors to any audio alarm (Tr. 65).

Ralph Johnson, an employee of Naclerio for two years, and in construction for ten years, stated that he was a laborer and also worked as a signalman for a 645B payloader (Tr. 87). The duties of the signalman were described. He was working as a signalman on May 28 and May 29, 1981 (Tr. 89). He was using hand signals, but had no flag (Tr. 90). On May 27, 1981, he had the same duties as signalman (Tr. 90). The employees were not working in the trench that day. He further stated that the employees were not working with their backs to the machine (Tr. 92). It is alleged that the horn alarm was on the machine but was not sounding on May 28, 1981. He also indicated that he was the only one in back of the vehicle, the payloader, on that day acting as signalman (Tr. 97).

The witness stated that on May 28, 1981, he was a signalman for the payloader. He did not see the C.O. on that date. He said there was more than one Fiat loader on the worksite. The witness said there was no alarm, horn or buzzer that sounded when the machine was going back on the 27th (Tr. 99). Similarly,

on the 28th, there was no alarm, horn or buzzer (Tr. 100, 101). The witness said he was acting as signalman in place of the horn or alarm (Tr. 102).

The witness said that the machine may have been tampered with when children pull the wires out on the equipment (Tr. 140).

Mr. Joseph Naclerio testified that he is 22 years of age and has been a superintendent on the job (Tr. 152). He met with Mr. Hall on May 28, 1981 (Tr. 154). He first saw the C.O. as he was walking around the job after coming out of the trailer (Tr. 155). Later, he came back and introduced himself as the C.O. (Tr. 155). The C.O. came into the office and said he was there to inspect the job. Both men walked around the job together. It is stated that the job was pretty much completed at the time. There was a No. 645 payloader parked near the office, but not in operation (Tr. 158-159). The C.O. noticed the broken glass (Tr. 34, 159). This was explained to him and then the C.O. asked if the horn was working. The horn was not working. It was noted that the wires were pulled out and it was attributed to vandalism (Tr. 159). There were two locations where the Respondent was working on the same street. It is indicated that the machine was not in operation when they observed the machine together, referring to the Fiat No. 645. At the time, they were backfilling the excavation and saw the men working with the machine. It was not possible for anyone

to stand in the trench that goes to the center of the street. At that time the signalman is out in the street. A statement was made that the inspector may have told Ralph to tamp the trench. The signalman is always used with the machine and would act as a little "foreman" (Tr. 170). He would tell the operator what to do with the machine. It is stated that there was an air operated manual horn on the machine on May 28, 1981, that was operable. However, the backup alarm was not working because the wires were pulled by vandals (Tr. 174).

It is further stated that with regard to Respondent's Exhibit 2, there is a red mark showing where the floor button is located. The horn works off air pressure and the tank is connected to the brakes. The horn does not work when the motor is off. The direction of travel has nothing to do with the operation of the horn. It is manually operated (Tr. 177). It is further indicated that equipment on the worksite is damaged regularly due to vandalism (Tr. 174). The backup alarm on the No. 645 is located in the left bottom cover behind the radiator cover.

The witness stated that he saw Mr. Hall on the following day, Friday, at the closing conference and completed the inspection. Only the small backhoe was in operation at the time and the C.O. took pictures around the trailer. There was

an electrical cord going from the trailer to the saw outside (Tr. 182). There were no other electrical tools on the job and that if there was defective equipment, it would be promptly replaced. When the C.O. told the witness what a ground fault interrupter was, he then purchased one, but he stated he had no use for one after that date. On the date of inspection, the Respondent concedes there was no ground fault interrupter in use (Tr. 183). The C.O. did not ask if there was an approved plan. It is also stated by the witness that there was no special training necessary for a signalman (Tr. 184). There is a decal on the side of the machine giving instructions (Tr. 184). It is noted that it was not on the Fiat (Tr. 185). The witness did not see any employees within inches of the rear tire of the pay-loader. It is stated that Ralph, the signalman, has control and is to be obeyed. If there is a signalman, he is there to signal or to inform the workers that the machine is in reverse.

On cross-examination, it was established that there was no ground fault program (Tr. 188). The Secretary also elicited that pursuant to Section 1926.201(a)(3), where a signalman is provided, the regulations require the use of flags by the signalman (Tr. 189).

## OPINION

We are first concerned with the alleged serious violation of 29 CFR 1926.400(h)(1) relative to ground fault interrupters.

The record establishes that the Respondent admittedly did not have a ground fault interrupter in use. The record also shows that the Respondent admitted it did not have an approved plan in use at the time of the inspection. The Secretary's Exhibits C-2 and C-3 clearly show that the electric saw was in use on the worksite. It is the testimony of the C.O. that the hazard of electrocution is of sufficient consequence to render the hazard as serious. The evidence establishes that the workers using the electric saw were the Respondent's employees. The Respondent indicated it did not have an interrupter but would get one and use it.

On the basis of the evidence and the testimony, the Secretary has carried its burden of proof that the violation of the standard set forth above has been established.

The unadjusted proposed penalty of $500.00, was reduced to $400.00. After considering the evidence and testimony in the light of Section 17 of the Act, I am convinced that the proposed adjusted penalty is fair and reasonable.

We are next concerned with the alleged repeat violation of 29 CFR 1926.602(a)(9)(i) concerning the use of a bi-directional operable horn on the Respondent's payloader.

To prove a violation in the instant case, the Secretary must not only establish noncompliance with the standard to which condition employees had access, but knowledge on the

part of the employer of the condition constituting the violation. North American Rockwell Corp., 16 OSHRC 444, BNA OSHD 1710, aff'd sub. nom. Dunlop v. Rockwell Int'l., 540 F.2d 1283 (6th Cir. 1976). The applicable standard sets forth two alternatives in that, earthmoving equipment which has an obstructed view to the rear not be used in reverse gear unless there is in operation a reverse signal alarm distinquishable from the surrounding noise level or an employee signals that it is safe to do so. The standard states no preference for either alternative. Brown and Root, Inc., OSHRC Docket Number 76-3942, 8 BNA OSHD 1055, 1980 CCH OSHD ¶ 24,275. Nor does it mandate that an employee who acts in such capacity be limited in his work activities to such duty.

There is a conflict in the evidence as to whether the horn was in fact operational within the purview of the standard at the time the C.O. arrived on the scene.

The evidence asserts that an air pressure manual horn was operative when the machine is in operation. However, the parties agree that the alarm was not in operation because the wires were disconnected. There is evidence that the machine was damaged due to vandals when the windshield was also broken. This was verified by the C.O.

The Respondent provided evidence that a signalman was used with the payloader machine. However, the questioning of the

signalman produced contradictory evidence as to whether flags were used (Tr. 147, 149). The Secretary questions the use of the signalman and asserts that we are actually talking about a laborer, who on occasion, acted as a signalman. The facts show that training provided was barely minimal. The Secretary asserts that the signalman was not at the location when the C.O. made his inspection. The witness stated he would always be with the machine even if the backup alarm was working. He also said there was one signalman for each machine. The witness identified the two other signalmen (Tr. 146).

Accordingly, it is apparent that the Respondent has created a sufficient doubt to overcome the allegations that the alternative to a horn was not in use.

The greater weight of the evidence must be found to support the conclusion that while the horn was not fully operational within the purview of the standard, "so as to be distinguishable from the surrounding noise level", at the time the C.O. arrived upon the scene and throughout the short period of time following, the alternate provision of the standard, i.e., that an employee signal that it was safe to use the equipment in reverse gear was complied with.

One additional factor need be mentioned which was noted earlier. Complainant contends that the violation was established because, not only was the signal alarm not distinguishable from the surrounding noise level when operated in reverse,

but there was no employee specifically designated and assigned to signal that it was safe to operate in reverse gear. As appropriate to the context in which used, the word designate is defined as "to indicate; specify."[1/] The standard does not require a special employee to perform only the limited function of signaling.

After considering the evidence and testimony, it is necessary to vacate the alleged repeat violation set forth above.

## FINDINGS OF FACT

The credible evidence and the record as a whole establishes prepondered proof of the following facts:

1. Respondent, Naclerio Contracting Co., Inc., is engaged in interstate commerce and is subject to the provisions of the Act.

2. The evidence of record shows that the Respondent did use an electric saw without a ground fault interrupter or a program.

3. The evidence of record shows that the failure to use the ground fault interrupter or program created a serious hazard to the Respondent's employees that could have resulted in death or serious injury.

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1/ Webster's New World Dictionary, Second College Edition, World Publishing Co. (1972).

4. The evidence of record shows that the Respondent's payloader did not have a working alarm at the time of inspection.

5. The evidence of record shows that the Respondent provided a signalman in lieu of a signal to warn of the payloaders movements.

6. The evidence shows that the Respondent provided a signalman for each of its payloaders.

7. The evidence shows that the Respondent's equipment was damaged due to vandalism.

8. The evidence shows that the alternative use of a signalman satisfies the requirements of the standard.

## CONCLUSIONS OF LAW

1. Respondent is and was at all times herein, engaged in a business affecting commerce within the meaning of Section 3(5) of the Occupational Safety and Health Act of 1970.

2. The Occupational Safety and Health Review Commission has jurisdiction over the subject matter and parties to this action.

3. The Respondent violated 29 U.S.C. 654(a)(2) by failing to comply with 29 CFR 1926.400(h)(1).

4. The Respondent did not violate 29 CFR 1926.602 (a)(9)(i).

## O R D E R

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record, it is hereby

ORDERED that:

Serious Citation number 1 for a violation of 29 CFR 1926.400(h)(1) is affirmed and a penalty of $400.00 is assessed.

Repeat Citation number 2 for an alleged violation of 29 CFR 1926.602(a)(9)(i) is vacated.

Seymour Fier

SEYMOUR FIER
JUDGE, OSHRC

Dated: March 1, 1982
New York, New York

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| 81-1907 | 82/13/E3 | | 26,002 |
| 81-1975 | 82/33/D14 | | |
| 81-1976 | 82/33/D14 | | 26,104 |
| 81-1977 | 82/15/D2 | | 25,992 |
| 81-1988-S (A) | 82/27/D3 | 10:1720 | 26,119 |
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| | (see prior cites at 79/45/A9, 82/3/D5) | | |
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| | (Judge's decision) | | 27/F13 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR<br>Complainant,<br>v.<br>Baroid Division of N. L. Industries<br>Respondent. | OSHRC DOCKET NO. 16096 |

JUDGE'S DECISION APR 1 '82

FINAL ORDER ON MAY 3 '82

RECEIVED

ORDER

This case is on remand from the Commission.

Complainant's Motion to Withdraw Citation and Complaint is granted.

Accordingly, Citation No. 1, issued November 11, 1975, the proposed penalty based thereon, and the complaint are DISMISSED with prejudice.

James A. Cronin, Jr.
Judge, OSHRC

Dated: April 1, 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
John W. McCormack Post Office and Courthouse, Room 420
Boston, Massachusetts 02109

## NOTICE OF DECISION

Secretary of Labor v. BATH IRON WORKS CORPORATION
OSHRC Docket No. 80-3358

1. Enclosed is a copy of my decision. It will be filed with the Commission on April 1, 1982, and will become the final order of the Commission on May 3, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is May 3, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Foster Furcolo

FOSTER FURCOLO
JUDGE, OSHRC

Date: March 12, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant<br>v.<br>BATH IRON WORKS CORPORATION,<br>Respondent | OSHRC DOCKET NO. 80-3358 |

APPEARANCES:

Ronald Glover, Esq., for Complainant

Mark Haley, Esq., for Respondent

DECISION AND ORDER

This case arose under 29 USC, sec. 651 et seq. of the Occupational Safety and Health Act of 1970 (the Act). As a result of an inspection by the Occupational Safety and Health Administration [OSHA] of the Respondent's premises on or about April 17, 1980, Citation #1 was issued on or about May 15, 1980, charging that the Respondent violated sec. 5(a)(2) of the Act by the serious violation of the standard at 29 CFR 1915.43(c) and/or sec. 5(a)(1) by failing to cover or guard an opening in the deck.

Citation #2 charged the other than serious violation of the standard at 29 CFR 1915.43(e).

On or about June 9, 1980, the Respondent filed Notice of Contest to Citations #1 and #2 and the penalties proposed therefor. At the hearing, the Respondent withdrew its contest of Citation #2...Tr. 2.

The pertinent sections of the Act and the standard are appended to this decision under appropriate titles.

FACTS

The engine room of the ship Corningham (the jobsite) has two working levels, the upper being about 12 feet below the main deck and the lower one being 8 to 9 feet below that. Several months before the inspection in question, as part of an overhaul of the ship, the Respondent had removed some equipment [a fan, air dryer, and duct work] that had been affixed to the deck and bulkhead. As a result, there was an opening [variously estimated at 3-1/2 by 6 feet or 4 by 6 or 5 by 6] flush with the deck and immediately adjacent to the 2 - 3 feet wide passageway through the engine room. Running through that open space, and parallel to the passageway, are two horizontal members [I-beams that had been the foundation for some of the removed equipment] which are about 18 inches apart; and the bulkhead is about 16 inches away from the nearest I-beam. On the day of the inspection, a "sucker hose" [exhaust pipe] extended through the opening down to the lower part of the engine room where work was being done. The opening was partially covered by plywood discs about 24 to 30 inches in diameter and about 1/2 inch thick, leaving an uncovered area variously estimated at 12 to 18 square inches. There are no railings on the passageway, which is the main means of access from the upper level of the engine room to the lower level. A ladderway between the two levels is within 1 foot of the opening. The edge or surface of the horizontal members and the deck are hard or sharp.

[As concerns the different estimates in measurements, this decision is consistent with whatever estimated figures are used, whether minimum or maximum or a combination of both].

On the date in question, some employees were working in the area and others would use the passageway to go from one part of the ship to another. The hazard

was the likelihood of a disc tipping if stepped on, or other misstep directly into the opening, causing an employee to fall into some part of the opening or on the deck, sustaining a possible fracture or other serious injury.

Since the equipment had been removed for many weeks before the inspection, and the passageway was well-travelled, there can be no question that the Respondent knew (or should have known) of the condition.

THE ISSUES

1. Was there any violation?

2. Should the Respondent have protected its employees by the use of guardrails or adequate covering of the opening?

3. Was the nature of work in progress, or the physical conditions, such that the use of guardrails was prohibited?

1915.43(c)

Assuming that some employees were exposed to unguarded edges of a deck more than 5 feet above a solid surface, were the physical conditions such that the use of guardrails was prohibited?

OSHA regulations require that the guardrails would have to be about 42 inches high...Tr. 95, 233, 248. The overhead (ceiling) was about 8 feet high...Tr. 233, 249. The equipment to be installed was approximately 5 feet long and 3 feet square...Tr. 171, 247. Just on the measurements alone, it would seem that the only reasonable conclusion is that it would be practically impossible to install such equipment over 42 inch high guardrails. That conclusion is corroborated by the witnesses who testified on the point.

The Respondent's Chief Safety Engineer [Curtis] testified that, with guardrails or stanchions present, the equipment "could not" have been installed... Tr. 233. In answer to the Judge's question: "You say it would be totally impossible, just not enough room?", Mr. Curtis replied: "Yes, sir."...Tr. 234.

Asked on cross-examination if it was "impossible for them to install this ducting work with the stanchions in place..." Mr. Curtis answered: "That is correct."...Tr. 248.

Mr. Somerville, an apparently neutral witness employed by the U.S. Department of Defense, also testified that the equipment "could not have been installed" with guardrails in place, and it would be "impossible"... Tr. 164, 177.

The other important testimony on the point was from the Compliance Officer, who concluded that he had no opinion "as to whether it would be possible to install...that fan or duct with the guardrails in place"...Tr. 283, 284.

In that state of the evidence -- the testimony of Respondent's employee (Curtis) and a neutral witness (Somerville) both tending to establish impossibility, and the Compliance Officer having no opinion -- I find that the Respondent has established that "the nature of the work in progress or the physical conditions prohibit the use or installation of such guardrails".

Was there "work in progress"? While the evidence was not completely satisfactory, it was established that there was "work in progress" to replace the equipment that had been removed. On that point, the Compliance Officer testified that he did not see any of the equipment in the vicinity of the jobsite; and he recalled no conversations indicating that such work was in progress...Tr. 97-99, 281. However, the Respondent's employees Curtis and Gill both testified that, on the day of the inspection, the Respondent's employees were in the process of bringing ductwork on board or installing it...Tr. 243-247, 276. Although the neutral witness, Somerville, did not see all the equipment, he testified that he did see ductwork in the vicinity... Tr. 158, 186-188.

In view of the positive testimony of Curtis and Gill being at least somewhat corroborated by Somerville, I find that the Respondent's employees were conducting "work in progress" at the time.

Sec. 5(a)(1)

The basic facts testified to by the Compliance Officer were not contradicted: there was an opening in the deck immediately adjacent to the passageway and flush with it. The wooden discs only partially covered it. It could easily have been more adequately and safely covered by planking or plywood fitted to the entire opening. Employees who worked and walked in the vicinity of the hazard could have been seriously injured by it.

The location of the condition, together with the length of time of its existence, establish that the Respondent knew, or should have known, of it.

FINDINGS OF FACT

Having reviewed the testimony and examined the exhibits, the following Findings of Fact are made::

1. At all times concerned, the Respondent regularly received, handled or worked with goods which had moved across state lines.

2. As concerns Citation #1, employees were exposed to the unguarded edges of a deck more than 5 feet above a solid surface but the nature of the work in progress prohibited the use of guardrails.

3. The unguarded edges of the deck in question could have been adequately and safely covered by planking or plywood.

4. The conditions described in Citation #1 exposed the Respondent's employees to sustaining serious harm because of the hazard of falling or tripping in the opening.

5. One or more officers or supervisory personnel of the Respondent knew of the hazardous conditions described herein and knew that employees were exposed to such hazard.

6. The Respondent withdrew its Notice of Contest to Citation #2.

## CONCLUSIONS OF LAW

1. At all times concerned, the Respondent was an employer engaged in a business affecting commerce within the meaning of the Act; and the Occupational Safety and Health Review Commission has jurisdiction over the subject matter and the parties.

2. At all times concerned, the Respondent knew, or with the exercise of due diligence should have known, of the alleged violation.

3. On the date in question, the Respondent was not in compliance with section 5(a)(1) of the Act.

4. The Complainant has not sustained the burden of proving the Respondent violated sec. 5(a)(2) of the Act (sec. 654), as concerns .43(c) but has proven it for .43(e).

## ORDER

The whole record having been considered, and due consideration having been given to 29 U.S.C., sec. 666(j), it is ordered:

1. Citation #1 is affirmed and a penalty of $250 assessed therefor.

2. Citation #2 is affirmed.

SO ORDERED.

FOSTER FURCOLO
JUDGE, OSHRC

Dated: April 1, 1982
Boston, Massachusetts

## APPENDIX

### THE ACT

Section 654 [section 5(a)(1)] Employer "...shall furnish...a place of employment...free from recognized hazards...likely to cause death or serious physical harm to his employees; ..."

Section 654 [section 5(a)(2)] Employer "...shall comply with occupational safety and health standards..."

Section 666 [section 17(b)] "...employer who has received a citation for a serious violation...of this Act...shall be assessed a civil penalty of up to $1,000 for each such violation."

Section 666 [section 17(j)] "...assess all civil penalties...giving due consideration to...the size of the business...gravity of the violation, the good faith of the employer, and the history of previous violations."

Section 666 [section 17(k)] "...a serious violation shall be deemed to exist...if there is a substantial probability that death or serious physical harm could result...unless the employer did not, and could not...know of the presence of the violation."

### THE STANDARD

29 CFR 1915.43(c): When employees are exposed to unguarded edges of decks... more than 5 feet above a solid surface, the edges shall be guarded by adequate guardrails...unless the nature of the work in progress or the physical conditions prohibit the use or installation of such guardrails.

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

May 6, 1982

**IN REFERENCE TO SECRETARY OF LABOR v.**

ARKANSAS RICE GROWERS COOPERATIVE

OSHRC DOCKET NO. 77-3974

**NOTICE IS HEREBY GIVEN TO THE FOLLOWING:**

**FOR THE SECRETARY OF LABOR**

OF COMMISSION DECISION

To wit: See attached.

- **Counsel for Regional Litigation**
  **Office of the Solicitor, USDOL**
  **200 Constitution Ave., NW. - Rm. S-4014**
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**FOR EMPLOYEES**

-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

- Office of the Judges
  OSHRC
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  Room 240
  Atlanta, Georgia 30309

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>ARKANSAS RICE GROWERS COOPERATIVE ASSOCIATION,<br><br>Respondent. | OSHRC Docket No. 77-3974 |

DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge John S. Patton is before the Commission for review pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). In his decision, Judge Patton vacated a citation issued after an employee of Respondent was fatally injured when he fell through an opening on the sixth level of Respondent's workplace, a by-products plant in Jonesboro, Arkansas. As amended in the Secretary's complaint, the citation alleged a serious violation of the Act in that the opening was not guarded in compliance with the requirements of 29 C.F.R. § 1910.23(a)(5) or, in the alternative, 29 C.F.R. § 1910.23(a)(3). 1/

---

1/ The standards at issue provide as follows:

Subpart D - Walking-Working Surfaces

§ 1910.23 Guarding floor and wall openings and holes.

(a) Protection for floor openings.

* * *

(3) Every hatchway and chute floor opening shall be guarded by one of the following:

(i) Hinged floor opening cover of standard strength and construction equipped with standard railings or permanently

Throughout this proceeding, Respondent has presented two principal defenses to the citation. First, it contends that the cited standards do not apply to the cited conditions because the sixth level of its workplace is a roof and not a "floor" within the meaning of the cited standards. 2/ Second, it contends that it lacked either actual or constructive knowledge of the violative conditions because it had provided a cover for the opening and it could not have known that an independent contractor would leave the hatchway cover unsecured, thereby assertedly creating the violative condition. Judge Patton rejected Respondent's contention that the standards at issue are inapplicable, but agreed with Respondent that the citation must be vacated because Respondent neither knew nor, with the exercise of reasonable diligence, could have known of the violation. The Secretary petitioned for discretionary review of the judge's conclusion on the

---

(Footnote 1 cont'd)

> attached thereto so as to leave only one exposed side. When the opening is not in use, the cover shall be closed or the exposed side shall be guarded at both top and intermediate positions by removable standard railings.
>
> (ii) A removable railing with toeboard on not more than two sides of the opening and fixed standard railings with toeboards on all other exposed sides. The removable railings shall be kept in place when the opening is not in use and should preferably be hinged or otherwise mounted so as to be conveniently replaceable.
>
> Where operating conditions necessitate the feeding of material into any hatchway or chute opening, protection shall be provided to prevent a person from falling through the opening.
>
> * * *
>
> (5) Every pit and trapdoor floor opening, infrequently used, shall be guarded by a floor opening cover of standard strength and construction which should be hinged in place. While the cover is not in place, the pit or trap opening shall be constantly attended by someone or shall be protected on all exposed sides by removable standard railings.

2/ The key term "floor opening," as used in the standards at issue, is defined as follows:

> § 1910.21 Definitions.
>
> (a) As used in § 1910.23, unless the context requires otherwise,

knowledge issue and Respondent cross-petitioned on his conclusion that the standards apply. Commissioner Cleary directed review on both issues.

We hold that the judge erred in concluding that the cited standards apply to the cited working conditions. In light of this holding, we do not reach the knowledge issue. Accordingly, we affirm the judge's order vacating the citation, but for reasons different than those stated by the judge.

I

Construction was begun on Respondent's by-products plant approximately fourteen months before the incident that led to the citation now before us. Production operations, i.e., the receiving and processing of chicken feed bran and hulls, commenced approximately two months before the incident. At the time of the fatality, both activities were taking place concurrently and, for the most part, independently. Thus, 15 to 20 of Respondent's employees, working under the plant manager and other supervisory personnel employed by Respondent, were engaged in production operations. During this same period, specifically, the two to three weeks immediately before the incident, approximately 35 construction workers employed by 8 to 10 or more construction contractors worked in

---

(Footnote 2 cont'd)

> floor and wall opening, railing and toe board terms shall have the meanings ascribed in this paragraph.
>
> *  *  *
>
> (2) Floor opening. An opening measuring 12 inches or more in its least dimension, in any floor, platform, pavement, or yard through which persons may fall; such as a hatchway, stair or ladder opening, pit, or large manhole. Floor openings occupied by elevators, dumb waiters, conveyors, machinery, or containers are excluded from this subpart.

In addition, the term "platform" is defined, at § 1910.21(a)(4), as follows:

> (4) Platform. A working space for persons, elevated above the surrounding floor or ground; such as a balcony or platform for the operation of machinery and equipment.

the plant on projects such as the installation of wiring, lighting, and a fire control (sprinkler) system.

Respondent's by-products plant consists of six levels. The sixth level is one of four roofs on the plant. Two other roofs are at lower elevations and the fourth is on top of the manlift that is located on the sixth level. Also located on the sixth level are three receiving filters ("cyclones" or "bins") used in the processing of Respondent's product and a hatchway opening used to raise and lower machinery, motors and other heavy objects into and within the building through the vertical shaft directly beneath the opening.

The fatality in question occurred while Respondent's employees were on the sixth level to clean up a large volume of ground rice hulls that had spilled from one of the receiving filters. A member of Respondent's cleanup crew, while carrying a large bag filled with the spilled hulls, stepped on the middle section of the cover that was installed over the hatchway opening on the sixth level. Apparently, that section had been left unbolted by a construction worker who had previously used the hatchway opening to raise or lower materials used in the construction work. As a result, when Respondent's employee stepped on the cover, both he and the middle section fell through the opening. The employee was fatally injured by the fall.

II

As indicated, Respondent has contended throughout this proceeding that the cited standards do not apply to the hatchway opening in question because that opening is located in a roof rather than a floor. In Central City Roofing Co., 76 OSAHRC 61/A2, 4 BNA OSHC 1286, 1976-77 CCH OSHD ¶ 20,761 (No. 8173, 1976), a divided Commission overruled its prior precedent and adopted the holdings of two appellate courts that the guarding of roofs is not required under the construction safety standard at 29 C.F.R. § 1926.500(d)(1). 3/ See Diamond Roofing Co. v. OSHRC,

---

3/ The standard provides:

528 F.2d 645 (5th Cir. 1976), and Langer Roofing & Sheet Metal, Inc. v. Secretary of Labor , 524 F.2d 1337 (7th Cir. 1975). Specifically, the Commission agreed with the Diamond Roofing and Langer Roofing courts that section 1926.500(d)(1) does not apply to open-sided roofs because a roof is not a "floor" within the meaning of that standard.

In the case now before us, Judge Patton rejected Respondent's contention that sections 1910.23(a)(3) and (a)(5) do not apply to roof openings. Though agreeing with Respondent's contention that the holdings of Diamond Roofing, Langer Roofing, and Central City Roofing are applicable to the general industry standards at issue in this case, the judge nevertheless distinguished those cases on the ground that the sixth level of Respondent's facility housed "substantial equipment" used as a permanent part of Respondent's production operation. Because the sixth level provided a surface on which a part of Respondent's processing work was performed, the judge considered it analogous to a floor regardless of the fact that it also served to cover and complete the building structure.

On review, Respondent contends that Judge Patton erred because he misinterpreted the cases decided under Part 1926. In Respondent's view, those cases stand for the proposition that a roof is not a "floor" within the plain meaning

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(Footnote 3 cont'd)

Subpart M -- Floor and Wall Openings, and Stairways.

§ 1926.500 Guardrails, handrails and covers.

* * *

(d) Guarding of open-sided floors, platforms, and runways.
(1) Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f)(1)(i) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a standard toeboard wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard.

of that term. Because that proposition is equally applicable in interpreting the term "floor opening" as it is used in sections 1910.23(a)(3) and (a)(5), Respondent concludes that the judge erred in distinguishing the instant case from the cases defining the scope of 29 C.F.R. § 1926.500(d)(1).

On review, the Secretary agrees with the judge's conclusion that the sixth level constituted a floor on the facts of this case. The Secretary also reasons that his interpretation of section 1926.500(d)(1) was rejected because it was inconsistent with the roofing industry's practice of not guarding open-sided roofs. In contrast, the Secretary argues that his interpretation of sections 1910.23(a)(3) and (a)(5) in this case "is entirely consistent with the practices embodied in" 29 C.F.R. § 1926.500(b)(1), which expressly requires guarding of roof openings by employers engaged in construction activities. 4/ In support of his analysis, the Secretary cites language in Diamond Roofing, 528 F.2d at 650, to the effect that the customary practice in the roofing industry is to cover or guard roof holes and openings but not to guard the roof perimeter.

In the alternative, the Secretary contends that, if the sixth level is not a "floor," then it is a "platform," as that term is defined at 29 C.F.R. § 1910.21(a)(4). Because the term "floor opening," as defined at 29 C.F.R. § 1910.21(a)(2), includes an opening in a "platform," the Secretary argues that the cited standards apply even if the sixth level was a "platform" rather than a "floor." See note 2 supra.

III

We agree with Respondent's contention that Commission precedent on the scope of 29 C.F.R. § 1926.500(d)(1) is dispositive of the issue before us concerning

---

4/ Section 1926.500(b) is captioned "Guarding of floor openings and floor holes" and it sets forth requirements for such guarding. The definitions that apply to § 1926.500(b) are contained in § 1926.502. Pursuant to those definitions, the terms "floor hole" and "floor opening" as used in § 1926.500(b) refer to specified openings in "any floor, roof, or platform." (emphasis added). Sections 1926.502 (a) & (b). For this reason, § 1926.500(b) requires the guarding of roof openings in the context of Part 1926.

the scope of the standards in 29 C.F.R. § 1910.23(a). In holding that section 1926.500(d)(1) does not apply to open-sided roofs, the court in Diamond Roofing stated that "[a] regulation should be construed to give effect to the natural and plain meaning of its words" and that "a regulation cannot be construed to mean what an agency intended but did not adequately express." 528 F.2d at 649. In addition, the court noted that, where the Secretary intended to include roofs within the coverage of standards imposing requirements for guardrails, he specifically used the term "roof" in those standards. See sections 1926.502(a) & (b), cited at note 4 supra. The Secretary's failure to include the term "roof" in the open-sided floor provision at section 1926.500(d)(1) indicated, in the court's view, an intent to distinguish between a floor and a roof. 528 F.2d at 648.

The Commission majority in Central City Roofing, supra, expressly agreed with the rationale of Diamond Roofing. Moreover, when the Commission reaffirmed this holding in Dun-Par Engineered Form Co., 80 OSAHRC 14/E6, 8 BNA OSHC 1044, 1980 CCH OSHD ¶ 24,238 (No. 16062, 1980), aff'd on other grounds, No. 80-1401 (10th Cir. Apr. 21, 1982), it again stated that it accepted the reasoning of the Diamond Roofing court. 8 BNA OSHC at 1049, 1980 CCH OSHD at p. 29,491. We therefore agree with Respondent's argument that based on applicable Commission precedent a roof is not a "floor" within the plain meaning of that term. 5/

We further conclude that this case cannot be distinguished from Central City Roofing based on the factors relied upon by Judge Patton and by the Secretary. In Dun-Par Engineered Form Co., supra, the Commission rejected the Secretary's contention that it should draw a distinction between roofs on which

---

5/ We note that Subpart D of the general industry standards in which the cited standard is found contains the same distinction between a floor and a roof that the court referred to in Diamond Roofing. See 29 C.F.R. § 1910.22(d)(2) (excessive loads placed "on any floor or roof of a building"). We further note that the Secretary promulgated these standards as an integrated whole notwithstanding the differing source committees within the American National Standards Institute.

professional roofers are performing work, as in Central City Roofing, and roofs on which other types of construction workers are employed, as in Dun-Par. The Commission stated the following:

> The argument that Central City Roofing should apply only when the employees involved are roofers is not persuasive. The Commission in Central City Roofing agreed with the reasoning of the 5th Circuit in Diamond Roofing. The court's decision was based primarily on an interpretation of the language of the standard. The court held, essentially, that the term floor, as used in section 1926.500(d)(1), was not intended to include a roof. To distinguish between roofers and non-roofers would have no effect on this interpretation.

8 BNA OSHC at 1049, 1980 CCH OSHD at p. 29,491. We therefore hold that 29 C.F.R. §§ 1910.23(a)(3) & (a)(5) do not apply to the hatchway opening on the roof of Respondent's workplace. 6/ Because we base this holding on the language of those standards and of the applicable definitions, we conclude, as the Commission did in Dun-Par, that the asserted distinctions relied upon by Judge Patton and by the Secretary are of no legal significance. In particular, we conclude that this case is not distinguishable from the precedent under Part 1926 on the ground that "the roof serves a dual purpose" in this case. In each of the cases under Part 1926, the roofs also served the dual purpose of being both "a covering to protect against the weather and to complete the building" and a walking-working surface for employees. 7/

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6/ We reject the Secretary's contention that the standards apply because the sixth level at Respondent's workplace was a "platform." Because § 1926.500(d)(1) applies to "[e]very open-sided floor or platform etc.," the cases decided under that standard implicitly hold that a roof is neither a "floor" nor a "platform." We expressly hold in the case now before us that the roof of a building is not a "platform" within the plain meaning of that term.

7/ The Secretary's analogy to § 1926.500(b) is also unpersuasive. The terms "floor hole" and "floor opening" as defined and used in that standard expressly include roof openings. See note 4 supra. In contrast, the definition of "floor opening" as that term is used in the standard at issue in this case, § 1910.23(a), does not include any reference to openings in roofs. See note 2 supra. Therefore, the analogy the Secretary proposes based on customary practice in the industry is contrary to the plain wording of the standards.

For the reasons above stated, we affirm the judge's order vacating the amended citation for noncompliance with 29 C.F.R. § 1910.23(a)(5) or, in the alternative, 29 C.F.R. § 1910.23(a)(3) and further vacating the proposed penalty.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: MAY 6 1982

CLEARY, Commissioner, dissenting:

I respectfully dissent from the majority's decision to vacate the citation on review. Based on a narrow and literalistic interpretation of the term "floor," the majority holds that Respondent is not required to guard an opening on the sixth level of Respondent's workplace even though that opening is 4 feet wide, 9 feet long, and 83 feet 9 inches above the first floor level, to which an employee of Respondent fell to his death. As a result of this holding, workers in general industry, who are usually not accustomed to working around the hazards associated with roofs, will not be provided the same protection against unguarded roof openings that is provided even to the most skilled roofers under 29 C.F.R. § 1926.500(b)(3). 8/

It is undisputed that the sixth level of Respondent's workplace is a roof. Nevertheless, it is also clear from the record that during the time period in question the sixth level was used extensively by several employees as a working and walking surface. For example, the three receiving filters permanently installed on the sixth level were each provided with cage ladders on their sides and platforms on their tops. The purpose of these devices was to enable employees to perform routine and recurring tasks that were an integral and ongoing part of Respondent's production operations, more specifically, the operation of the receiving filters. Thus, employees go onto the platforms to install "bags" or "socks" (long tubes used to collect dust), to check the bags, to change them when necessary, or to "set the pulse rate" of the air flowing through the bags. In addition, members of Respondent's cleanup crew perform maintenance and housekeeping work on the sixth level on a regular and recurring basis. Finally, during the time period in question, an unspecified but apparently large number

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8/ The standard at § 1926.500(b)(3) is almost identical to the standard that, in my view, applies in the case now before us. See 29 C.F.R. § 1910.23(a)(3), quoted at note 1 of the lead opinion. Although the applicable definitions of "floor opening" as used in the two standards differ, I do not agree with the majority's conclusion that the scope of these two essentially identical standards differs.

of construction workers employed by independent contractors performed various construction tasks on and from the sixth level. Included among their activities was the apparently frequent use of the sixth level hatchway opening to hoist construction materials to and from the sixth level.

Based on this record, Judge Patton concluded that the cited standards apply to the hatchway opening at issue. In rejecting Respondent's contention that the standards are inapplicable because the sixth level of Respondent's workplace is a roof, the judge stated the following:

> If the roof in the case at bar only served the usual purpose of a roof, constituting a covering to protect against the weather and to complete the building, the position of the respondent in this regard would be sound and would be sustained. It will be noted, however, in this case the roof serves a dual purpose. In the case at bar, there was substantial equipment permanently upon the roof, which equipment was a permanent part of the operations of respondent. The roof . . . was a surface upon which a part of the operation of the respondent was to be permanently performed . . . .
>
> Therefore, . . . the particular facts of this case make the roof not only a roof in the usual sense in which the term is used but make it as well a floor, bringing it under the standards relating to a floor.

The judge's findings, including his ultimate finding that the sixth level of Respondent's workplace served a dual purpose, are fully supported by the record. Therefore, I would adopt the judge's conclusion that the sixth level was not only a roof but also a floor, bringing it within the coverage of the cited standards, for the reasons he stated. See Central City Roofing Co., 76 OSAHRC 61/A2, 4 BNA OSHC 1286, 1976-77 CCH OSHD ¶ 20,761 (No. 8173, 1976)(dissenting opinion).

The majority rejects the judge's reasoning and instead accepts and extends the reasoning of the appellate court in Diamond Roofing Co. v. OSHRC, 528 F.2d 645 (5th Cir. 1976). I do not agree with either my colleagues' decision to adopt the Diamond Roofing reasoning or their decision to apply that reasoning in interpreting the standards that are now at issue.

As indicated in the lead opinion, the court's holding in Diamond Roofing is based on two primary lines of reasoning: the plain meaning doctrine (a roof is not a floor within the plain meaning of that term) and the principle of statutory

construction expressio unius est exclusio alterius ("the expression of one thing [here, floors] is the exclusion of another [here, roofs]"). In my view, the Commission should not follow either of these principles in interpreting the standards before us. The term "floor" does not have a single, restricted meaning. In fact, dictionaries contain numerous definitions of the term "floor," including "the surface or the platform of a structure on which to walk, work or travel." Webster's Third New International Dictionary (1971 ed.). I conclude that the sixth level of Respondent's workplace falls squarely within this definition. Therefore, it was a "floor" within the plain meaning of that term. With respect to the principle expressio unius est exclusio alterius, I adhere to my statement in Central City Roofing Co. that the principle is inapplicable in interpreting the term "floor" because a surface can be both a "roof" and a "floor"; "because a roof can be and for . . . [Respondent's employees in this case] is, a walking surface, the terms cannot be considered mutually exclusive." 4 BNA OSHC at 1288, 1976-77 CCH OSHD at p. 24,897. In particular, I do not agree with the majority's implied conclusion that the principle expressio unius est exclusio alterius applies in the context of 29 C.F.R. Part 1910, Subpart D. 9/

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9/ The majority erroneously relies on the fact that the term "roof" is used in a single subsection of Subpart D, 29 C.F.R. § 1910.22(d)(2). See note 5 of the lead opinion. The standards at issue in this case and the standards in § 1910.22(d) were adopted by the Secretary as "national consensus standards" under § 6(a) of the Act, 29 U.S.C. § 655(a). Yet, the standards contrasted by the majority were derived from two separate and independent sources. See 29 C.F.R. § 1910.31. Section 1910.23, including the standards cited in this case, was derived from ANSI A12.1-1967, Safety Requirements for Floor and Wall Openings, Railings and Toeboards. However, § 1910.22(d) was derived from ANSI A58.1-1955, Minimum Design Loads in Buildings and Other Structures.

In Diamond Roofing, the court reasoned that, because the Secretary had used the terms "roof" and "floor" in one standard but only used the term "floor" in a second standard, the Secretary intended the second standard to apply only to floors and not to roofs. Here, in sharp contrast, neither of the standards being compared by my colleagues were drafted by the Secretary. Instead, they were drafted by two separate ANSI committees acting 12 years apart. Accordingly, there is no basis for concluding that the Secretary intended the term "floor" in § 1910.23(a) to exclude roofs because § 1910.22(d)(2) refers to both floors and roofs.

Although I would adopt Judge Patton's conclusion that the standards in question apply to the cited working conditions, I would reverse his conclusion that Respondent lacked actual or constructive knowledge of the alleged violation. Section 1910.23(a)(3), note 1 of the lead opinion supra, requires employers to guard "[e]very hatchway" by one of two specified means: a "hinged floor opening cover of standard strength and construction equipped with standard railings or permanently attached thereto so as to leave only one exposed side" or "[a] removable railing with toeboard on not more than two sides of the opening and fixed standard railings with toeboards on all other exposed sides." The record clearly establishes that a hatchway opening on the sixth level of Respondent's workplace was not guarded by either of these specified means. While Respondent provided a cover, that cover was not hinged and not equipped with standard railings. 10/ Therefore, I conclude that the Secretary established his alternative allegation that Respondent failed to comply with 29 C.F.R. § 1910.23(a)(3) in that it failed to guard a hatchway in accordance with the specifications of that standard. 11/

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10/ Respondent argues in effect that it provided equivalent protection by providing a cover that could be bolted into place. On this record I cannot accept that contention. The fatality in question apparently occurred as a result of a construction worker's failure to bolt the middle segment of the cover after using the hatchway. Because the cover was unbolted, it moved when Respondent's employee stepped on it, thereby causing the employee to fall through the opening. However, the fatality could not have occurred if Respondent had provided a hinged cover as required under the standard. The hinges would have kept the cover from moving when the employee stepped on it. Indeed, a cover with guardrails would probably have prevented the employee from repeatedly walking across the cover in the performance of his work.

11/ Respondent argues that it would be denied due process if the Commission considered the issue of whether the cover it provided complied with the standard's requirements. It asserts that this case was tried on the theory that Respondent failed to comply with the standard by failing to assure that the hatchway cover was properly bolted and that the Secretary's contention on review that the opening was improperly guarded comes too late in the proceeding. I disagree. The complaint filed by the Secretary in this case clearly and plainly set forth the allegation that Respondent failed to comply with § 1910.23(a)(3) by failing to provide either of the protective devices specified in the standard. There is no denial of due process in affirming the express allegation of the Secretary's complaint.

I further conclude that Respondent either knew or could, with the exercise of reasonable diligence, have known of the violation because it should have been aware that the cover it provided was neither hinged nor equipped with guardrails. Judge Patton concluded and Respondent argues that Respondent lacked knowledge of the violation because it could not have known that an employee of an independent contractor would leave the hatchway cover unsecured. However, in my view, the cover provided by Respondent failed to comply with the standard regardless of whether it was bolted in place. Therefore, it is irrelevant to the knowledge finding whether Respondent could have known that the cover was unsecured.

For the reasons stated, I would reverse the judge's decision and affirm the Secretary's citation.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 400
ATLANTA, GEORGIA 30309

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| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 77-3974 |
| | ) | |
| ARKANSAS RICE GROWERS COOPERATIVE ASSOCIATION, | ) | |
| | ) | |
| Respondent. | ) | |

## DECISION AND ORDER

APPEARANCES

Robert A. Fitz, Esquire, Office of the Solicitor, U. S. Department of Labor, Dallas, Texas, on behalf of complainant

Oscar E. Davis, Jr., Esquire, Little Rock, Arkansas, on behalf of respondent

## STATEMENT OF THE CASE

PATTON, Judge: This is a proceeding pursuant to section 10 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, et seq., 84 Stat. 1590, hereinafter referred to as the Act) contesting a citation issued by the complainant against the respondent under the authority vested in complainant by section 9 of the Act.

The citation alleges that as a result of the inspection of a workplace under the ownership, operation, and control of the respondent located at Jonesboro, Arkansas, the respondent has been charged with violating section 5(a)(2) of the Act by failing to comply with Occupational Safety and Health Standard 29 C.F.R. 1910.23(a)(5) or, in the alternative, standard 29 C.F.R. 1910.23(a)(3).

The hearing was held in Jonesboro, Arkansas, on April 17, 1978. Both parties appeared and presented evidence. There was no motion to intervene. Both parties have submitted briefs.

## LAW AND ISSUES OF THE CASE

It was alleged that an infrequently used trapdoor floor opening on the sixth level of the By-Products Plant of respondent was not guarded by a floor opening cover of sufficient strength and construction, in violation of standard 29 C.F.R. 1910.23(a)(5) or, in the alternative, that a hatchway on the sixth floor of the By-Product Plant was not guarded either by a hinged door opening cover of sufficient strength or construction or by a removable railing on not more than two sides and fixed standard railings on all other exposed sides, in violation of standard 29 C.F.R. 1910.23(a)(3).

Standard 29 C.F.R. 1910.23(a)(3) provides that every hatchway and chute floor opening shall be guarded by either a hinged floor cover of standard strength and construction equipped with standard railings or permanently attached thereto so as to leave only one exposed side or a removable railing with toeboard on not more than two sides of the opening and fixed standard railings with toeboards on all other exposed sides. It is further provided that when the opening is not in use the cover shall be closed, or the exposed side shall be guarded at both top and intermediate positions by removable standard railing.

Standard 29 C.F.R. 1910.23(a)(5) is as follows:

> "Every pit and trapdoor floor opening, infrequently used, shall be guarded by a floor opening cover of standard strength and construction which should be hinged in place. While the cover is not in place, the pit or trap opening shall be constantly attended by someone or shall be protected on all exposed sides by removable standard railings."

It is the contention of the complainant that at a time when the hatchway was not in use the cover was not adequately secure with the result that the cover moved when an employee stepped on it, and the employee went through the hatchway to his death. It is uncontroverted that there were no guardrails up at the time.

The standards are under the subject of "guarding floor and wall openings and holes." The position of the respondent is that the hatchway in question was on a roof, and that the standards apply only to floors; therefore, the standards are not applicable.

It is further the position of the respondent that respondent was not responsible for the hatchway not being secured and had no knowledge it was not secured and, therefore, cannot be held responsible for same.

## EVIDENCE AND EVALUATION OF THE CASE

The respondent permanently maintained several of what were variously called "cyclones" or "filters" in which grain was placed. In the month of October 1977 a problem arose with reference to the filters. Below each filter there is an air lock, and as the material is conveyed in the negative air up to the filter, the material then falls down through the air lock and into a screw conveyor. On October 11, 1977, one of the air locks had been hung and when this happened it started the fans. Mr. Carl Hancock, a by-products machine operator of the respondent was sent up to investigate and start it to running properly again. This was accomplished, but as a result of the malfunction, there had been a substantial spill, with the content spilling not only on the roof at the sixth floor level, but also over to a lower part of the building which was only two stories high (Tr. 38-40). Several employees

constituting a clean-up crew were sent to the sixth level to place the spilled material into hundred-pound bags and to lower the bags over the side to a truck.

A truck was not available on the date of the spillage, so the following Tuesday, being the first date a truck was available, the employees ascended to said level and began to place the spillage in bags and lower them over the side (Tr. 40-41). While engaged in these activities, Mr. James Riley, one of respondent's employees in the clean-up crew, stepped on the hatchway, tipping the opening of the hatchway open, and he went through it to his death.

It is the position of the respondent that the employees were working not on a floor but on a roof, and that under the decisions of the Fifth and Seventh Circuit Courts of Appeals, as well as of the Occupational Safety and Health Review Commission, a standard relating to a floor cannot be considered as also relating to a roof. Admittedly, these decisions have reference to the construction and not the industrial standards. Respondent cites the cases of Diamond Roofing Co., Inc. v. OSHRC, 528 F.2d 645 (5th Cir. 1976), Langer Roofing and Sheet Metal, Inc. v. Secretary of Labor and OSHRC, 524 F.2d 1337 (7th Cir. 1975), and Central City Roofing Co., 76 OSAHRC 61/A2, 4 BNA OSHC 1286, 1976-77 CCH OSHD ¶ 20,761 (No. 8173, 1976).

While the above-cited decisions all relate to construction standards rather than industrial standards, the language of the standards is similar, and it would appear that the reasoning should be the same for an industrial standard as for a construction standard in this regard. Said Circuit Courts

of Appeals, as well as the Review Commission, have held that the terms "floor" and/or "platform" are not broad enough to cover a roof, and that failure of a respondent to conform on a roof to the requirements for a floor or platform cannot be found to be a violation under said standards. If the roof in the case at bar only served the usual purpose of a roof, constituting a covering to protect against the weather and to complete the building, the position of the respondent in this regard would be sound and would be sustained. It will be noted, however, in this case the roof serves a duel purpose. In the case at bar, there was substantial equipment permanently upon the roof, which equipment was a permanent part of the operations of respondent. The roof was not simply a covering to complete the building and to protect against the elements, but it was a surface upon which a part of the operation of the respondent was to be permanently performed. The fact that the top area upon which work was to be performed and which was an integral part of the processing of the work done by the respondent is uncovered does not make it any the less a floor.

Therefore, while the position of the respondent that the cases above cited should be applied equally to the industrial standards is sound, the particular facts of this case make the roof not only a roof in the usual sense in which the term is used but make it as well a floor, bringing it under the standards relating to a floor.

It therefore must be determined whether the respondent has violated either of the above-cited standards.

Mr. Gilmore who was supervisor over the clean-up crew, as well as over others, went to the sixth level to look at the spill before the crew

went up to clean it (Tr. 44). However, he went to cyclone number two and did not go into the area of the hatch (Tr. 44). He was not at the sixth level while the crew was working at that level (Tr. 44). The passageway was normally bolted, and with the bolts in place, the hatchway was secure (Tr. 57). At the time of the accident, a cable was extending down under the hatchway, and the cable could not have gone under the hatchway cover if it had been properly bolted in place (Tr. 57). Three weeks before the accident, Mr. Gilmore inspected the hatchway, and it was screwed in place properly (Tr. 74). Mr. Gilmore had no knowledge of the cable hanging through the hatchway at the time of the accident (Tr. 75). He stated that they had only been working in the building approximately two months. There was a time during construction when no covers were over the hatchway. Mr. Gilmore was not certain how it was protected but thought it was with guardrails at that time (Tr. 80). Subsequent to the accident, a three-inch bar was placed all the way across the roof and fastened to the hatchway, and it was locked with a padlock. Guardrails were established and the bolts were taken out and bored holes went into the other lid so the bolts had to go all the way through both lids (Tr. 80). "Keep off" signs were also erected subsequent to the accident. Employees testified that they went to the area about twice a week to clean it up and sweep the floor off and shovel the material into a bag (Tr. 89).

Ms. Debra Florene Kennedy testified that approximately a week before the accident she was at said level, and two ends of the hatchway cover were bolted down, but the middle part had been raised by construction men bringing material to the roof. She said the middle part slid over a bit while

they were cleaning (Tr. 89). Construction men who were still working on the building were using a winch at the sixth level at the time that said employee was up there (Tr. 91). She has never seen respondent's employees using the winch (Tr. 91). She was "pretty sure" the construction men were through working for the day at the time she was there (Tr. 93). They were, however, still at the building (Tr. 93). She did not know what the situation was in this regard on the day before the spill (Tr. 93). She had no knowledge of the condition of the hatchway between the date she was at the top a week prior to the accident and the date of the accident (Tr. 94). She had never seen the employees of the respondent use the hatchway in any way (Tr. 94).

Mr. Gilmore and the plant manager had 20 or 30 employees to supervise, and there was no way they could deal with all employees in each job they were doing (Tr. 94-95). The employees were instructed to report any unsafe condition they might find (Tr. 95).

Mr. Mark Allen Fox, an employee in the clean-up crew, testified that on the day of the accident the crew was loading the bags and pulling them from one corner of the roof to the other corner and then lowering them over the side (Tr. 100). Mr. James Riley was working with Mr. Fox. They would move the bags across the hatchway cover. Mr. Fox did not notice anything wrong with the hatchway and did not see the cable hanging down (Tr. 100-101). He stated that he did not see any of the supervisors on the roof (Tr. 101).

The truck was located where it was because there was no place they could lower the bags other than the area in which they were lowered

(Tr. 102). There were ladders and other objects on the other side preventing them from lowering the bags in that area (Tr. 102). There were about 30 to 35 bags on the sixth level and also some on other levels (Tr. 103). Nearly all the bags were full, and they weighed about 100 pounds. At first, the employees took them over one at a time and then lowered them, but after they were about half through, they took them across and piled them up before lowering them (Tr. 104). Mr. Riley carried a couple of bags over and lowered them over the side (Tr. 105). It was necessary to cross the hatchway to get from one point to the other. Mr. Fox walked across the hatchway more than five times, and there was no give or tilt (Tr. 105, 107).

A cable was hanging down that loosely fit under the edge of the center hatch. The hatch did not have a real big bolt in it. The cable went under the hatch cover just a bit off center. He did see the cable hanging under it. It did not indicate to him any danger, because he had already walked on the hatch, and it seemed secure (Tr. 107, 108). He did not look to see if the bolts were in place (Tr. 108). He had been instructed that if he saw anything unsafe to report it to his supervisor immediately, but he did not recognize the situation as a problem (Tr. 108). He had been on the roof approximately 15 to 30 minutes when the accident occurred (Tr. 109). He did not look Friday or Saturday to see if the cable was under the lip of the cover; he was only at that time concerned about the spill (Tr. 109). He was not on the roof on Monday (Tr. 110).

He stated he has seen contractors use the hatchway (Tr. 110). The construction men were in and out during the preceding days (Tr. 110). Construction men were in the building on a daily basis and came and went

without in any way contacting anyone related to the respondent. He had never seen the respondent's employees use the shaftway on the roof. He had seen them use it at a lower level, using it to lower a ladder or pull an air hose up (Tr. 111). On the other floors there were no hatchway covers, but there were railings (Tr. 111). It was not unusual that there was no supervisor at said level. (Tr. 112). The employees are just supposed to clean up without being instructed (Tr. 112). Spills happen with great frequency, although they never had, so far as he knows, a previous spill on the roof (Tr. 112-113). He told Mr. Riley the cable was in his way (Tr. 113-114).

At the time of the accident, Mr. Fox had part of one foot resting on the hatchway, and there was about a foot between the hatchway and the railing (Tr. 114). The lid moved, he turned around, and Mr. Riley was already down by the fifth floor (Tr. 115). Mr. Fox did not feel any movement of the hatchway at any other time (Tr. 115).

Mr. Jerry Loux, compliance officer, testified that Mr. Gilmore was aware that the cable was suspended through the hatchway (Tr. 140). Mr. Loux admitted, however, that he had testified in his deposition that Mr. Gilmore did not tell him one way or the other whether or not the cable came from the roof, and that Mr. Gilmore specifically disclaimed knowledge as to whether the cable was coming from the roof. The deposition was introduced in evidence for impeachment purposes. In view of the statements made in the deposition, Mr. Loux must have been in error in his initial statement, and therefore his statement as to an admission by Mr. Gilmore cannot be credited. Mr. Loux stated he did not see any other contractors out there at the time he was there (Tr. 154).

Counsel for the complainant stated that respondent did not know who created the condition, when it was created, or how long it existed, but counsel had concluded that with the exercise of reasonable diligence, the respondent should have known of the condition.

The evidence is to the effect that the respondent had a very complete safety program. The respondent's rules provided for disciplinary action to be taken in case safety rules were violated, and employees had positive instructions to report any unsafe conditions immediately. The hatch was supposed to be bolted down, and none of the supervisors of respondent had any knowledge that it was not bolted down at the time of the unfortunate accident. The evidence is to the effect that employees of respondent did not use the hatchway, although at times the construction workers did. What apparently happened is that a construction worker failed to bolt the hatchway down after completing the work. The evidence is to the effect that this had happened on at least one other occasion; however, there is no indication that it was in any way brought to the attention of supervisors of the respondent. It therefore appears probable that the unsafe condition was created by a person working for another employer, and the respondent had no reason to anticipate that this would have happened. Immediately after the accident, the respondent took substantial precautions, such as erection of guardrails, locking the hatch down, putting up signs forbidding anyone stepping on the hatch, etc. Of course, it would have been better if all of these steps had been taken prior to the date of the accident. There is no reason, however, that the respondent would not have believed that bolting the hatchway down was adequate protection against the hatchway

slipping and creating a hazardous condition. It must therefore be held that the complainant has not established a violation.

## FINDINGS OF FACT

1. Respondent is an Arkansas corporation operating a grain elevator in Jonesboro, Arkansas.

2. On October 11, 1977, the respondent maintained filters for grain on top of the building in which it operated.

3. A hatchway was maintained on top of the building, which hatchway was kept bolted down.

4. The employees of respondent did not use that hatchway, but construction workers did.

5. On October 11, 1977, there was a defect in the filters which caused a spillage of grain which had to be cleaned up by respondent's employees.

6. Respondent sent several employees to the top of the building for the purpose of placing the grain in bags and lowering the bags over the side of the building.

7. The hatchway was not bolted at the time the employees began said clean-up operation.

8. The rules of respondent required that the hatchway be bolted.

9. The supervisors of the respondent did not have knowledge of the fact that the hatchway was not bolted.

10. One of respondent's employees, Mr. Riley, while dragging bags from one side of the top of the building to the other, stepped on the hatchway which tilted, causing Mr. Riley to fall to his death.

11. The respondent had a substantial safety program and instructed its employees to immediately report any unsafe conditions.

12. Respondent took reasonable precautions to avoid an accident such as occurred.

13. Since the respondent had permanent machinery which was a part of its permanent operation on top of the building, said area was not only a roof, but was also a floor as said terms are defined in the standards.

## CONCLUSIONS OF LAW

1. Respondent was engaged in a business affecting interstate commerce and was within the jurisdiction of the Occupational Safety and Health Act.

2. Since the area involved in this case was a floor surface, as well as a roof, standards 29 C.F.R. 1910.23(a)(3) and 29 C.F.R. 1910.23(a)(5) apply to the area involved in this case.

3. Respondent did not violate standards 29 C.F.R. 1910.23(a)(3) or 29 C.F.R. 1910.23(a)(5).

## ORDER

It is therefore ORDERED that:

Respondent is not in violation of standard 29 C.F.R. 1910.23(a)(3).

Respondent is not in violation of standard 29 C.F.R. 1910.23(a)(5).

The allegations of violation of said standards are dismissed.

Dated this 13th day of September 1978.

John S. Patton

JOHN S. PATTON
Judge

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 240

ATLANTA, GEORGIA 30309

# NOTICE OF DECISION

**B. A. B. METAL FABRICATORS, INC. v. SECRETARY OF LABOR**

**OSHRC Docket No. 81-108**

1. Enclosed is a copy of my decision. It will be filed with the Commission on April 6, 1982, and will become the final order of the Commission on May 6, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N. W., Suite 601
   Washington, D. C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is May 6, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Joe D. Sparks

JOE D. SPARKS
Judge

Date: March 17, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

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| B. A. B. METAL FABRICATORS, INC., | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 81-10S |
| | ) | |
| SECRETARY OF LABOR, | ) | |
| | ) | |
| Respondent. | ) | |

## ORDER DISMISSING
## PETITION FOR FEES AND EXPENSES

SPARKS, Judge: After a final decision in which "serious" citation number one was vacated and "other" citation number two was affirmed, petitioner filed a petition for attorney fees and expenses contending it was entitled to such monies pursuant to provisions of the Equal Access to Justice Act (EAJA), 5 U.S.C.A. § 504. The pertinent portion of the Act states as follows:

> "An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding unless the adjudicative officer of the agency finds that the position of the agency as a party to the proceeding was substantially justified or that special circumstances make an award unjust."

Petitioner states it is an eligible party to receive an award as a result of a proceeding before the Review Commission which resulted in a final order on November 25, 1981. Petitioner further contends it was the prevailing party in the adversary adjudication and that the position of the Occupational Safety and Health Administration alleging a violation of 29 C.F.R. § 1910.217(c)(2)(i)(a) was not substantially justified.

The Secretary of Labor opposes any award of fees and expenses and asserts that, if petitioner is entitled to any money, it is limited. Specifically, the Secretary contends the petitioner is not entitled to fees or expenses incurred prior to the effective date of the Act, October 1, 1981, or for expenses for postage, parking, van rental, hearing transcript or other expenses outside the ambit of section 504(b)(1)(A). The Secretary points out that the petitioner did not prevail on all issues because citation number two was affirmed without modification. In addition, the petition is alleged to lack sufficient documentation concerning the eligibility of the petitioner and the expenses claimed. Finally, the Secretary alleges his position in this case was substantially justified.

The Review Commission has published rules implementing the EAJA at 29 C.F.R. § 2204, which require written findings and conclusions concerning significant issues in the proceeding, § 2204.308.

The rules were published pursuant to 5 U.S.C.A. § 504(c)(1) which requires that each agency ". . . establish uniform procedures for the submission and consideration of application for an award of fees and other expenses."

The petition alleges the conclusions specified in the EAJA but does not, in several instances, provide the specific factual information required by Commission Rules at § 2204. The petition alleges petitioner is a "party" as defined in 5 U.S.C.A. § 504(b)(1)(B) but does not specify the conditions which qualify it as a party.

In view of the disposition of this matter, it is assumed without deciding that the petitioner is a "party". Neither is it necessary to decide whether a claim may be made for expenses incurred prior to October 1, 1981, or the proper amount of fees and expenses which may be recovered.

The undersigned administrative law judge, acting as the adjudicative officer, concludes the position of the agency was substantially justified and, accordingly, the petition for fees and expenses must be dismissed. Rules of the Commission (§ 2204.106) provide that the burden of proof that an award should not be made to an eligible prevailing application is on the Secretary.

As stated in the brief for the Secretary:

> "The House Report on the EAJA provides significant guidance in deciding whether the position of the Secretary in this case was substantially justified:
>
> > The test of whether or not a Government action is substantially justified is essentially one of reasonableness. Where the Government can show that its case had a reasonable basis both in law and fact no award will be made . . . The standard . . . should not be read to raise a presumption that the Government position was not substantially justified simply because it lost the case. Nor in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing.
>
> "H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 10-11 (1980) reprinted in 1980 U. S. Code Cong. and Admin. News 4990."

The evidence established the physical conditions alleged in citation number one for which there was legal precedence that a violation of the regulations had been shown. The contentions of the Secretary were reasonable and supportable both in law and in fact. The allegations were made in good faith and after deliberate consideration. That disputes in the evidence and interpretations of law were resolved against the Secretary does not indicate his position lacked justification, nor does the Secretary's failure to appeal the decision show that his position was without merit. The facts and law in this case were such that reasonable people could disagree. Under such circumstances, the positions of the Secretary were substantially justified.

## FINDINGS OF FACT

1. B. A. B. Metal Fabricators, Inc., operates a shop at 4832 Ridge Road, Cleveland, Ohio, where it cuts and forms metal to the specifications of its customers.

2. Following an inspection of its facility, petitioner, on December 5, 1980, was issued two citations alleging violations of the Occupational Safety and Health Act of 1970 by official representatives of the Occupational Safety and Health Administration.

3. Citation number one alleged a serious violation of 29 C.F.R. § 1910.217(c)(2)(i)(a) in that point of operation guards on mechanical power presses did not prevent entry of hands or fingers into the point of operation by reaching through, over, under, or around the guards of the Cleveland press and the Federal press. A penalty of $200 was proposed.

4. Citation number two alleged an other than serious violation of 29 C.F.R. § 1910.219(f)(1) in that gears of a Cincinnati drill were not guarded by a complete enclosure as required by specific regulations. No penalty was proposed.

5. Following a notice of contest, a hearing on the merits was held at Cleveland, Ohio, on July 10, 1981.

6. At the hearing, the Secretary offered credible and probative testimony by Compliance Officers Andersen and Dill that they could reach their hands under the guards of the Cleveland and Federal presses (Tr. 16-17, 22, 24, 28, 37-39, 59-57A). At the time the tests were performed, material was not in the machines.

7. Mr. Joseph Leachko, the principal operator of the presses, testified it was difficult to reach around the guards into the die area and to do so would require a person to move his hand into a "Z" shape to reach the point of operation.

If material were in the press or if the guards were set at one-eighth or one-fourth inches, it would be impossible to get the fingers into the die areas (Tr. 82-85). His testimony was believable, although somewhat confusing concerning whether the conditions he testified about existed prior to changes in the guards made after the inspection.

8. Based upon the disputed, conflicting and reconcilable testimony, the following findings of fact were made:

> "7. On or about November 25, 1980, an inspection was conducted by Compliance Officer Joanne Andersen. As part of her routine inspection, Ms. Andersen was able to push her hand under and past the guards and reach the points of operation with her fingers.
>
> "8. Although it was possible for a person's fingers to reach under the guards and into the points of operation, because of the location and height of the hazardous area considerable effort and manipulation of the hands and fingers was necessary to do so.
>
> "9. Deliberate and intentional action was necessary for a person's fingers to reach the hazardous zone.
>
> "10. There was no legitimate operation reason for a person to place his fingers within the hazardous zone and no evidence that any employee had ever done so.
>
> "11. The Cleveland and Federal Presses did not expose employees to a cognizable hazard."

9. Pursuant to the findings set forth in paragraph eight above, a conclusion of law was entered that respondent had not violated the regulation as charged in the citation.

10. The evidence clearly established that employees were exposed to gears of the Cincinnati drill as alleged in citation number two.

11. Citation number one was vacated and citation number two was affirmed.

12. The evidence presented by the Government was reasonable, relevant and probative to establish its contentions regarding citation number one.

13. The legal arguments of the Secretary that the failure to comply with the terms of a regulation is sufficient to establish a violative hazard are reasonable, legally defensible, and supported by some precedent.

14. Although relevant to the issues, the Secretary's failure to appeal the decision does not establish that his position was without merit.

15. The positions of the Secretary were reasonable in fact and law.

## CONCLUSIONS OF LAW

1. The petitioner was a prevailing party in a significant and discrete substantive portion of the proceeding within the meaning of § 2204.106.

2. The positions of the Secretary were substantially justified in the adversary adjudication in this matter.

## ORDER

The petition for fees and expenses is dismissed.

Dated this 6th day of April, 1982.

Joe D. Sparks

JOE D. SPARKS
Judge

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1515 Broadway
Room 3800

New York, N.Y.
10036

## NOTICE OF DECISION

Secretary of Labor v. NATIONAL PRE-CAST CONCRETE, INC.,
OSHRC Docket No. 81-1988-S

1. Enclosed is a copy of my decision. It will be filed with the Commission on April 6, 1982, and will become the final order of the Commission on May 6, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is May 6, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Jerome C. Ditore

JEROME C. DITORE
JUDGE, OSHRC

Date: March 17, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>NATIONAL PRE-CAST CONCRETE, INC.,<br>Respondent. | OSHRC DOCKET<br>NO. 81-1988-S |

JUDGE'S DECISION
APR 6 '82
RECEIVED
FINAL ORDER ON
MAY 3 '82

Appearances:

Francis V. LaRuffa, Regional Solicitor
U. S. Department of Labor
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Robert Collins, Vice-President
National Pre-Cast Concrete, Inc.
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Bohemia, New York
For the Respondent.

## DECISION AND ORDER

Ditore, J.

## PRELIMINARY STATEMENT

Respondent seeks relief from an order affirming the proposed penalties which became final due to Respondent's late filing of its Notice of Contest to the proposed penalties. If relief is granted from the final order pursuant to Rule 60(b)(1) and (6) of the Federal Rules of Civil Procedure, Respondent contests all the proposed penalties as unreasonable.

A. Late Filing of Notice of Contest to Proposed Penalties

Respondent is in the business of manufacturing concrete and is located at 1225 Church Street, Bohemia, New York. The concrete plant is about five acres in size and employs twenty-five employees. Robert Collins is vice-president of the company and takes care of all of Respondent's business (T. 6, 7, 8).

On May 28, 1981, Respondent's workplace was inspected by Joseph Ornellas, a compliance officer for the Occupational Safety and Health Administration (T. 16, 18). As a result of the inspection, Respondent was issued on June 15, 1981, a citation for sixteen serious violations with a total proposed penalty of $1,850.00, and a citation for twenty-one nonserious violations with a proposed penalty of $50.00 for item 14A of the citation (citations).

Respondent admits it received the citations on June 18, 1981 (T. 6, Exh. C-1). Respondent's time to contest the citations and penalties ended on or about July 10, 1981. Respondent filed a late notice of contest on July 21, 1981, which contested only the proposed penalties (T. 9, item 3 of file).

Robert Collins, Respondent's vice-president, testified that upon receipt of the citations he immediately started to, and has, corrected each of the violations in the two citations; and that he intended on behalf of Respondent, to contest the proposed penalties as unreasonable.

He received the citations at the busiest time of his business year. During this time he worked 15-16 hours a day, six days a week running the plant, setting up new systems, updating some equipment, doing most of the sales and all of the bidding. (T. 6, 8). This heavy workload caused him to lose track of time and overlook the date when he was required to file the notice of contest. He filed the notice of contest a week or so late (T. 6, 8, 9).

The unrebutted testimony of Mr. Collins that he immediately started to and did abate all the violations; that he was under a heavy workload pressure of a 15-16 hour work day, six days a week; and that he was the only officer of the company that handled the day-to-day business of Respondent, gives rise to a finding of excusable neglect on the part of Mr. Collins in filing Respondent's late notice of contest to the proposed penalties. Respondent is granted relief under Rule 60(b)(1) of the Federal Rules of Civil Procedure from the final order affirming the penalties. See, Secretary v. Branciforte Builders, Inc., 9 BNA OSHC 2113, 1981 CCH OSHD ¶25,591 (No. 89-1920, 1981); cf, Secretary v. P & A Construction Co., Inc., 10 BNA OSHC 1185, 1982 CCH OSHD ¶25,783 (No. 80-3848, 1981).

B. Statement of the Evidence as to the Proposed Penalties

Officer Ornellas testified that he made the following observations at Respondent's worksite on May 28, 1981.

Serious Citation

Item 1 - 29 CFR § 1910.23(b)(1)(i)

Officer Ornellas observed an employee working in the hopper building some 14-1/2 feet above ground. A wall opening in the room where the hopper was located was unguarded except for a piece of wood 2 feet high which leaned against the opening. One employee spent about 4 hours a day in this room and in walking between the hopper and wall opening, came within 3 feet of the unguarded opening. The employee was exposed to a fall of 14-1/2 feet (T. 16, 18-23, see also 64-65; Exhs. C-2, C-3). Ornellas proposed a penalty of $350.00, after allowing credits of 20 percent for size, 20 percent for good faith and 10 percent for history (T. 23). This credit allowance applies to all the penalties proposed herein.

Item 2 - 29 CFR § 1910.23(c)(2)

Officer Ornellas observed some railing missing on the upper part of the hopper building. He observed no employee exposed but was told by a foreman that employees go up to that area from time to time to check on various conditions once a week. He believed that an employee in the area of the missing railing was exposed to a 30-foot fall to the ground. After allowing deductions or credits, he proposed a penalty

of $350.00 for this violation (T. 25, 28, 29, 30, 31; Exhs. C-4, C-5). Mr. Collins, Respondent's vice-president, stated that one employee was in this area possibly once a week to grease a belt or to check (T. 65).

Item 3A - 29 CFR § 1910.157(c)(1)
Item 3B - 29 CFR § 1910.106(e)(2)(iv)(a)
Item 3C - 29 CFR § 1910.252(d)(2)(ii)

Officer Ornellas observed that Respondent did not provide portable fire extinguishers in the compressor boiler building and in the maintenance building (item 3A) and did not provide suitable fire extinguishers in the welding area of the maintenance building (item 3C). He further observed that a five gallon container of lubricating oil was uncovered in the maintenance building (item 3B). He believed these three violations exposed some twenty employees working in the area to burn and smoke inhalation hazards in case of a fire. He proposed after allowing credits, a penalty of $200.00 for the three violations (T. 32-37). Mr. Collins, Respondent's vice-president, stated the lubricating oil was oil taken from a vehicle (T. 65).

Item 4A - 29 CFR § 1910.215(a)(2)
Item 4B - 29 CFR § 1910.215(a)(4)

These two violations pertain to one Milwaukee floor pedestal off-hand grinder. Officer Ornellas observed that

the abrasive wheel of the grinder was unguarded and the machine did not have a work rest. He believed that these two violations exposed an employee to the hazards of flying chips if the abrasive wheel shattered. He stated that two employees used the machines, a few minutes at a time, for about 5 to 10 minutes a day. He proposed a penalty of $150.00 after allowing credits for the two violations (T. 37-41, See also T. 65; Exh. C-6).

Item 5A - 29 CFR § 1910.219(d)(1)
Item 5B - 29 CFR § 1910.219(e)(1)(i)
Item 5C - 29 CFR § 1910.219(e)(1)(i)
Item 5D - 29 CFR § 1926.300(b)(2)

These four items relate to lack of guards on pulleys and belts of five different machines. Officer Ornellas observed that the pulleys and belts of a hopper (item 5A(A) and 5B(A), the pulleys and belts of an abrasive cut-off saw (items 5A(B) and 5B(B), the pulleys and belts of a compressor (items 5A(D) and 5B(C), the pulleys and belts of a pedestal drill press (items 5A(C) and 5(C), and the drive pulley of a rebar bender (item 5D) were unguarded (T. 41, 42). Officer Ornellas observed eight employees walk within 2 to 3 feet of the unguarded belts and pulleys located on the lower part of the hopper (T. 42, 43). He observed one employee operating the abrasive cut-off saw, within 12 to 15 inches from the machine's belt. The machine is used about 3 hours daily by one employee (T. 43, 44, 45). He observed that the drill

press had no guard on the rear pulley which was up against a wall. The machine was not in operation at the time of the inspection but officer Ornellas believed that an employee could be exposed to the unguarded rear belt and pulley when walking by the side of the drill press (T. 44). He further observed an air compressor which went on and off automatically, that had an unguarded belt and pulley at the rear of the compressor which was up against a wall (T. 45). He observed one employee enter the compressor area and remain one hour in the room. Ornellas believed that if an employee walked within 2 feet of the side of the compressor and fell, the employee could get his hands in the nip point area (T. 45, 46). He also observed a rebar bender which lacked a guard on its drive pulley (T. 50). He believed that the unguarded pulleys and belts exposed employees who walked by the machines or used the machines, to nip point hazards, i.e., bone fractures or amputations (T. 42). He proposed an adjusted penalty of $250.00 for the collective pulley and belt violations.

Mr. Collins, Respondent's vice-president, stated that the hopper was approachable from one direction only and the closest an employee could come to the belt and pulley area was 5 to 8 feet. The machine was not in a normal work area (T. 65). The abrasive cut-off saw was not used for more

than one hour a day and not on a daily basis (T. 65-66). The drill press was protected on two sides. The rear was against a wall and one side by other equipment. The front of the machine was the only area where an employee could be exposed and this area was guarded (T. 66). The compressor was located in a corner of a wall and was not in a normal work area (T. 66). The rebar bending machine is used by 3 to 4 employees for 2 to 3 hours a day (T. 67).

Item 6A - 29 CFR § 1910.252(a)(2)(iv)(c)
Item 6B - 29 CFR § 1910.101(b)
Item 6C - 29 CFR § 1910.252(a)(2)(ii)(b)
Item 6D - 29 CFR § 1910.252(a)(2)(ii)d)

Officer Ornellas observed in the maintenance building two oxygen and one acetylene cylinders which were improperly stored together, and were not secured (items 6A, 6C). In addition the two oxygen cylinders lacked valve protection caps (item 6D). He further observed in another area of the maintenance building oxygen and acetylene cylinders which were not properly supported (item 6B). He believed that the two oxygen cylinders and one acetylene cylinder in items 6A, C and D, exposed two employees working 20 or 30 feet away, to hazards of gas leakage if the improperly stored, uncapped and unsecured cylinders were to fall and rupture. The same hazard existed for two employees working some 6 feet from the cylinders cited in item 6B (T. 52, 53, 54, 55, 56-58). He proposed an adjusted penalty of $250.00 for the four violations.

Mr. Collins, Respondent's vice-president, stated the cylinders referred to in items 6A, 6C and 6D were empty and stored against a wall, some 20 to 30 feet from where an employee normally worked (T. 67).

Item 7 - 29 CFR § 1926.602(a)(9)(ii)

Officer Ornellas observed a payloader machine operating in the yard area which had no back-up or reverse signal alarm. Seven employees were 5 to 10 feet from the payloader while it was operating (T. 58-60). He proposed an adjusted penalty of $300.00 for this violation.

Mr. Collins stated this vehicle is used about 2 hours a day. At the time of the inspection, the back-up signal was not working. A new part was on order (T. 67).

Nonserious Citation

Item 14A - 29 CFR § 1910.304(f)(5)(v)(e)(1)

Officer Ornellas observed a water cooler in the maintenance building whose electric plug was not properly grounded, exposing those employees who used the water cooler to a possible electric shock hazard. He proposed an adjusted penalty of $50.00 for this violation (T. 61-64).

## OPINION

The specific findings of fact are set forth herein as they apply to the contested penalties.

### Serious Citation

#### Item 1

Respondent was in violation of 29 CFR § 1910.23(b)(1)(i) for failing to guard a wall opening in a room of the hopper building. The opening was 14-1/2 feet above ground. One employee spent four hours a day in this room and was exposed to the improperly guarded wall opening when, and if, he walked between the hopper and the wall opening which placed him within three feet of the wall opening. Based on the above facts and on a consideration of the statutory factors of section 17(j) of the Act, the proposed penalty of $350.00, is unreasonable and is reduced to $250.00.

#### Item 2

Respondent was in violation of 29 CFR § 1910.23(c)(2) for failing to replace some railing on the upper part of the hopper building. The area of the missing railing was 30 feet above ground. Only one employee would be in this area possibly once a week to check or to grease a belt.

Based on the above facts and on a consideration of the statutory factors of section 17(j) of the Act, the proposed penalty of $350.00 is unreasonable and is reduced to $200.00.

Items 3A, 3B, 3C

Respondent was in violation of 29 CFR §§ 1910.157(c)(1), 1910.106(e)(2)(iv)(a) and 1910.252(d)(2)(ii) for failing to provide portable fire extinguishers in the compressor area and maintenance building (item 3A) and in the welding area of the maintenance building (item 3C), and for failing to cover a five-gallon container of lubricating oil that was taken from a vehicle (item 3B). Other than the welding area, and the five-gallon can of vehicle lubricating oil, there is no evidence to indicate the nature and quantity of any combustible material in the compressor room or maintenance building. Based on the facts and on a consideration of the statutory factors of section 17(j) of the Act, the proposed penalty of $200.00 is unreasonable and is reduced to $100.00.

Items 4A, 4B

Respondent violated 29 CFR §§ 1910.215(a)(2) and 1910.215 (a)(4) by failing to guard the abrasive wheel of, and to provide a work rest for, an off-hand grinder. This machine is used by two employees for a few minutes at a time, for a total of about 5 to 10 minutes a day. Based on the infrequent use

of the machine and on a consideration of the statutory factors of section 17(j) of the Act, the proposed penalty of $150.00 is unreasonable and is reduced to $50.00.

Items 5A, 5B, 5C and 5D

Respondent violated 29 CFR §§ 1910.219(d)(1), 1910.219 (e)(1)(i) and 1926.300(b)(2) by failing to guard the pulleys and belts of a hopper, an abrasive cut-off saw, a compressor, a drill press and a rebar bender. The belt and pulley area located on the lower part of the hopper was approachable from one direction only and the closest an employee could come to this area was 5 to 8 feet. The abrasive cut-off saw was not used for more than one hour a day and not on a daily basis. The rear of the drill press where the cited unguarded belt and pulley were located, was against a wall. The front of the machine was the only area where an employee could be exposed and this area was guarded. The compressor's unguarded belt and pulley were at the rear of the machine which was located in a corner of a wall and not in a normal work area. The rebar bender was used by 3 or 4 employees for 2 to 3 hours a day.

The location of the machines, their infrequent use, and and the misapplication of 29 CFR § 1926.300(b)(2) (item 5D), a construction standard, to Respondent's workplace, considered with the statutory factors of section 17(j) of the Act, renders

the proposed penalty of $250.00 unreasonable. The penalty is reduced to $100.00.

Items 6A, 6B, 6C, 6D

Respondent violated 29 CFR §§ 1910.252(a)(2)(iv)(c), 1910.101(b), 1910.252(a)(2)(ii)(b) and 1910.252(a)(2)(ii)(d) for failing to secure, properly store and cap two oxygen and one acteylene cylinders which were located in the maintenance building (items 6A, 6C, 6D), and for failing to properly support oxygen and acetylene cylinders in another area of the maintenance building (item 6B). The two oxygen cylinders and one acetylene cylinder cited in items 6A, 6C and 6D, were empty and stored against a wall some 20 to 30 feet from where an employee normally works.

Based on the above facts and on a consideration of the statutory factors of section 17(j) of the Act, the proposed penalty of $250.00 is unreasonable and is reduced to $100.00.

Item 7

Respondent violated 29 CFR § 1926.602(a)(9)(ii) for failing to have an operating back-up or reverse signal alarm on its payloader machine. The machine was in operation about 2 hours a day, and a new back-up signal was on order. It is questionable whether the construction standard cited applies to Respondent's workplace.

Based on the above facts and on a consideration of the statutory factors of section 17(j) of the Act, the $300.00 proposed penalty is unreasonable and is reduced to $50.00.

Nonserious Citation

Item 14A

Respondent violated 29 CFR § 1910.304(f)(5)(v)(e)(1) for failing to properly ground a water cooler. The proposed penalty of $50.00 for this violation is reasonable.

The total proposed penalty of $1,900.00 is reduced to $900.00.

CONCLUSIONS OF LAW

1. Respondent is, and at all times material herein was, engaged in a business affecting commerce within the meaning of section 3(5) of the Act (29 U.S.C. § 652(5)).

2. The Occupational Safety and Health Review Commission has jurisdiction over the subject matter and parties to this action.

3. Pursuant to Rule 60(B)(1) of the Federal Rules of Civil Procedure, Respondent is granted relief from the final order affirming the original proposed penalties.

4. Under the circumstances of this case with due consideration of the statutory factors of section 17(j) of the

Act, the proposed penalties for the serious violations and one nonserious violation, are reduced as specified in the Opinion supra, pp.10-14. The total proposed penalty is reduced from $1,900.00 to $900.00.

ORDER

Due deliberation having been had on the whole record, it is hereby

ORDERED that Respondent is relieved from the final order affirming the penalties as originally proposed, it is further

ORDERED that the penalties proposed for the serious violations in citation No. 1 are reduced as follows: item 1 to $250.00, item 2 to $200.00, items 3A, 3B and 3C to $100.00, items 4A and 4B to $50.00, items 5A, 5B, 5C and 5D to $100.00, items 6A, 6B, 6C and 6D to $100.00 and item 7 to $50.00, and as reduced, are affirmed, it is further

ORDERED that the penalty of $50.00 for item 14A of the nonserious citation is affirmed.

JEROME C. DITORE
JUDGE, OSHRC

Dated: April 6, 1982
New York, New York

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1515 Broadway, Room 3800
New York, New York 10036

## NOTICE OF DECISION

Secretary of Labor v. CHARLES OFFSET COMPANY, INC.
OSHRC Docket No. 81-0314

1. Enclosed is a copy of my decision. It will be filed with the Commission on April 8, 1982, and will become the final order of the Commission on May 10, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is May 10, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Jerome C. DiTore
JEROME C. DITORE
JUDGE, OSHRC

Date: March 19, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>CHARLES OFFSET COMPANY, INC.,<br>Respondent. | OSHRC DOCKET<br>NO. 81-0314 |

Appearances:

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Charles Offset Company, Inc.
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For the Respondent

## DECISION AND ORDER

Ditore, J.

## PRELIMINARY STATEMENT

Complainant moved to dismiss Respondent's untimely filed notice of contest to the total proposed penalty of $1320. A preliminary hearing on the issue was heard on May 28, 1981, before Judge James P. O'Connell. Prior to a decision by Judge O'Connell, the case was transferred to this Judge.

Respondent through its plant superintendent, Tony DeCesare, waived a new hearing and authorized this Judge to render a decision on the record made before Judge O'Connell on May 28, 1981.

STATEMENT OF THE CASE

Respondent's workplace located at 4-85 48th Avenue, Long Island City, New York, was inspected on October 23, 1980, by an OSHA compliance officer. The inspection resulted in the issuance on November 10, 1981, of two citations and a notification of proposed penalties totalling $1,320, to Respondent. Respondent acknowledged receipt of the citations and notification of proposed penalties on November 13, 1980 (Exh. C-1) but failed to file a notice of contest to the penalties within fifteen (15) working days, as prescribed by the Act (Exh. C-2).

On December 10, 1980, Respondent through its plant superintendent, Mr. DeCesare, filed a late (3 working days) notice of contest to the penalties. Respondent admits the late filing but maintains it was caused by a statement from OSHA's compliance officer that no penalties would be assessed if Respondent abated the violations. The violations were abated (Exh. C-3).

Complainant now moves to dismiss the notice of contest as untimely filed. A hearing was held on May 28, 1981, at New York, New York, to determine whether Respondent's failure to contest within the prescribed time divests the Commission of jurisdiction to determine the merits of the case.

## FINDINGS OF FACT

The credible evidence of record establishes preponderant proof of the following specific findings of fact.

1. On October 23, 1980, Compliance Officer Ernest Giangreco inspected Respondent's workplace located at 4-85 48th Avenue, Long Island City, New York. Mr. Giangreco met several of Respondent's employees including Respondent's plant coordinator, Mr. Anthony, the employer's representative, Mr. Mokrzycki and the union shop steward, Mr. Madorma. He also met briefly with Respondent's plant superintendent, Mr. DeCesare (T. 27).

2. After the inspection, a closing conference was held on October 29, 1980, with Mr. Mokrzycki and Mr. Madorma. Officer Giangreco explained to Mr. Mokrzycki and Mr. Madorma that Respondent had the right to contest any citation issued to it; and that if a citation or citations were issued, Respondent had fifteen (15) working days from its receipt of the citations, to file a written notice of contest to the citations and penalties (T. 28-31).

3. On November 13, 1980, Respondent received by certified mail, the two citations and notice of proposed penalties from Complainant (T. 6, 14).

4. The citations and notification included instructions regarding the procedures to be followed for filing a notice of

contest if Respondent decided to contest the citations and notification (citations; T. 20-21).

5. The citations with the notification were addressed to Mr. Bortner, Respondent's president, but were received by Mr. DeCesare, Respondent's plant superintendent, on November 13, 1980. Mr. DeCesare xeroxed the material and sent a copy to Mr. Bortner.

6. Mr. Bortner received the copy of the citations, and on November 13, 1980, discussed the proposed penalty with Mr. DeCesare, who recommended that the penalties be contested (T. 34).

7. Respondent failed to serve a formal notice of contest on or before December 5, 1980, (the fifteen working days limitation) (T. 15).

8. On December 8, 1980, as a result of Respondent's failure to timely file a notice of contest, OSHA, in writing, requested payment from Respondent of $1,320.00, the total amount of the penalties proposed (Exh. C-2).

9. On December 10, 1980, Respondent's plant superintendent, Anthony DeCesare, responded to OSHA's letter of December 8, 1980, by filing a formal but late notice of contest to the penalties. In the notice, Mr. DeCesare maintained that it was Respondent's understanding based on a conversation Mr. Mokrzycki and Mr. Madorama

had with the compliance officer, that no penalties would be assessed if the violations were corrected (Exh. C-3, T. 16, 18). Mr. DeCesare admits that Officer Giangreco made no such statement to him (T. 19).

10. Respondent did abate the violations at a cost of $5,800.00.

11. There is no evidence that either Compliance Officer Giangreco or any other representative of OSHA made any misrepresentation to, or practiced any deception on Respondent, to cause it to file a late notice of contest to the penalties.

12. There is no evidence of record upon which any finding can be made which would grant relief to Respondent pursuant to Rule 60(b)(1) and (6) of the Federal Rules of Civil Procedure, from the Order which became final by operation of law, and which affirmed the penalties.

## CONCLUSIONS OF LAW

1. The two citations and their proposed penalties issued to Respondent on November 10, 1980, and received by it on November 13, 1980, became final orders of the Review Commission by operation of law, on December 6, 1980.

2. This Commission lacks jurisdiction or authority to review the final orders.

O R D E R

Due deliberation having been had on the whole record, it is hereby

ORDERED that Complainant's motion to dismiss Respondent's notice of contest, is granted, it is further

ORDERED that the final orders, by operation of law, affirming the two citations and penalties, divests the Commission of jurisdiction in this case.

JEROME C. DITORE
JUDGE, OSHRC

Dated: April 8, 1982
New York, New York

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

Secretary of Labor v. Pleasanton Well Service, Inc.
OSHRC Docket No. 80-5165

1. Enclosed is a copy of my decision. It will be filed with the Commission on April 12, 1982, and will become the final order of the Commission on May 12, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is May 12, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Richard J. Murphy
Judge, OSHRC

Date: March 22, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 80-5165 |
| PLEASANTON WELL SERVICE, INC. | : | |
| | : | |
| Respondent. | : | |

Appearances:

FRANCES G. VALDEZ, ESQUIRE
U. S. Department of Labor
555 Griffin Square Building
Griffin and Young Streets
Dallas, Texas 75202
For Complainant

GEORGE R. CARLTON, JR., ESQUIRE
Maxwell, Bennett, Thomas, Carlton
& Maxwell
1200 Diamond Shamrock Tower
717 N. Harwood Street
Dallas, Texas 75201
For Respondent

DECISION AND ORDER

RICHARD J. MURPHY, JUDGE

A workplace under the operation and control of Respondent was inspected by the Occupational Safety and Health Administration (OSHA) on August 6, 1980. The inspection was a general schedule inspection of a well service site at Pleasanton Well Service, Rig 805, Vernor Bedinger Well Site, Carrizo Springs, Texas. Respondent Pleasanton Well Service, Inc., was servicing an oil well there at the time of inspection.

As a result of that inspection, a citation was issued alleging in Item 1 a violation of Section 5(a)(1) of the Occupational Safety and Health Act of 1970 (29 U.S.C.651, et seq) (Act) in that Respondent did not protect employees from the recognized hazard of not having auxilliary means of egress in case of oil well fires, and alleging in Item 2 a violation of 29 CFR 1910.27(d)(5) in that cage protection, or ladder safety devices in lieu of cage protection, were not used on power, water, tank, or chimney ladders over 20 feet in unbroken length. Fines in the amount of $560.00 were proposed for each of the alleged violations.

On October 2, 1980, a formal complaint was filed which was answered by respondent by the 19th of December, 1980. On March 31, 1981 a petition was filed by Complainant asking leave to amend Item 1 to change it from a violation of 5(a)(1) (the general duty clause) to a violation of 29 CFR 1910.36(b)(1). On April 16, 1981, an order has entered allowing the amendment.

This case was heard on May 1, 1981, by Judge Jerry W. Mitchell. By order of February 8, 1982 it was reasigned to me because of the unavailability of Judge Mitchell to this Commission. By order of February 12, 1982, I informed the parties of my intention to decide this case upon the record made before Judge Mitchell and on consideration of the post-hearing briefs filed by the parties. That Order directed the parties to file any objections to that proposed handling by March 8, 1982. No objection has been filed.

Respondent stipulated that it is engaged in interstate commerce; that it has approximately 90 employees; and that it is subject to the jurisdiction of this Commission pursuant to section 10(c) of the Act. It is so found and concluded.

Complainant's exhibit 1 is a picture of Rig 805 taken at the time of the inspection. It is, as described by OSHA Compliance Officer Chapa on cross examination, a large truck rig on which is mounted a telescoping derrick which folds over on the truck bed for movement from place to place. Witness Chapa referring to the rig stated that "It is a mobile structure, yes. You can move it around"(Tr. 33). Rig 805 has platforms approximately 55 to 75 feet high on which respondent employees work. Those platforms are without escape exits.

Respondents defense to Item No. 1 is that 29 C.F.R.1910.36(b)(1) does not apply to Rig 805 for the reason that the rig is not a building or structure within the purview of that regulation.[1/] Respondent

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[1/] 29 C.F.R.1910.36(b)(1) is as follows:

> (b) Fundamental requirements. (1) Every building or structure new or old, designed for human occupancy shall be provided with exits sufficient to permit the prompt escape of occupants in case of fire or other emergency. The design of exits and other safe guards shall be such that reliance for safety to life in case of fire or other emergency will not depend solely on any single safeguard; additional safe guards shall be provided for life safety in case any single safeguard is ineffective due to some human or mechanical failure.

refers to 29 C.F.R.1910.36(a) which specifically states that ". . . Exits from vehicles, vessels, or other mobile structures are not covered by this subpart," and cites Review Commission final orders in Secretary v Parker Well Service, Inc., 5 OSHC 1847 (1977), Secretary v Fairbanks Well Service, Inc., 5 OSHC 1873 (1977) which held that the cited standard is inapplicable to rigs consisting of telescoping derricks mounted on trucks for transportation from one well to another. Complainant argues that Rig 805 was subject to the standard because it is not mobile once it is set up at the worksite. This argument was explicity rejected in the Parker and Fairbanks cases. Complainant argues that Secretary v Fred Wilson Drilling Company, Inc., 6 OSHC 1942 (1978); sustained Wilson v Marshall 624F 2d 38 (5th Cir.1980) is contrary to Parker and Fairbanks. However, the rotary drilling Rig involved in the Wilson case is not truck mounted and is not comparable to Rig 805. I hold that 29 C.F.R1910.36(b)(1) is not applicable to Rig 805 and therefore vacate Item 1 of Citation 1.

In its Post trial brief Complainant moved to amend Item 1 of Citation 1 to include a violation of the general duty clause of Section 5(a)(1) of the Act. As heretofore noted, Complainant originally alleged violation of the general duty clause in Item 1. The order which allowed the complaint to be amended specified that the item would be tried under 29 C.F.R.1910.36(b)(1) and Respondent states that it structured its defense to that issue.

Respondent called no witnesses in its defense and in reply to the Post trial motion states that it would have presented a different defense against a general duty allegation. Respondent opposes the post trial motion on the ground that amendment after trial would be prejudicial to it. I so find and for that reason the motion to amend is denied.

Respondent does not contend that Rig 805 was not subject to the standard set forth in 29 C.F.R.1910.27(d)(5). The picture introduced as Exhibit 1 shows a ladder from the truck bed of the Rig to a platform 65 feet above ground. The ladder was not equipped with cage protection or safety devices that incorporate lifebelts to supply protection against falls. Respondent's foreman,called as a witness for complainant, testified that employees worked on the platform shortly before the inspection and that they climbed the ladder to reach the platform. Witness Chapa testified that a fall from the ladder could cause death or serious injury, and I so find.

Respondent's defense is that a new management commenced operating Respondent in the summer of 1980, several months before the inspection that resulted in the citation at issue here; that a former Loss Control Representative for an insurance corporation with oil field experience was hired as Respondent's safety manager; that he had made a safety inspection of all of Respondent's oil well servicing rigs and had ordered ladder safety devices for all rigs; that ladder safety devices had been installed on six of the company's fifteen rigs at the time of the inspection with the other devices back ordered. The fact that a new

management was actively correcting safety deficiencies it found when it commenced operating respondent a few months before the inspection is not a defense to Item 2 of the Citation. However, it is a factor that should be considered in fixing the penalty. Item 2 is affirmed but the penalty is reduced from the $560.00 sought by complainant to $250.00

## ORDER

Based on the foregoing findings and conclusions it is ordered that:

(1) Item 1 of Serious Citation No. 1 for violation of 29 C.F.R.1910.36(b)(1) is vacated.

(2) Item 2 of Serious Citation No. 1 for violation of 29 C.F.R.1910.27(d)(5) is affirmed and a penalty of $250.00 is imposed.

Richard J. Murphy
Judge, OSHRC

Dated: April 12, 1982
Chicago, Illinois

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
Room 7B11, Federal Building
1100 Commerce Street
Dallas, Texas 75242

NOTICE OF DECISION

Secretary of Labor v. Ray Cook Corporation
OSHRC Docket No. 81-1120

1. Enclosed is a copy of my decision. It will be filed with the Commission on April 12, 1982, and will become the final order of the Commission on May 12, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is May 12, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Louis G. LaVecchia
Judge, OSHRC

Date: March 23, 1982

OSHRC 10021 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, Complainant, | : | |
| | : | |
| v. | : | OSHRC |
| | : | Docket No. 81-1120 |
| RAY COOK CORPORATION, Respondent. | : | |

Appearances: Frances V. Valdez, Esq., and Jack Ostrander, Esq., for the Complainant.

Bob Coleman (Pro Se) for the Respondent.

DECISION

This is a proceeding under Section 10(c) of the Occupational Safety and Health Act of 1970. As a result of a general schedule inspection made after obtaining a warrant the respondent was issued a citation alleging 11 violations of the safety standards promulgated under the Act and set forth in Title 29 of the Code of Federal Regulations, Part 1910. The respondent contested the citation and a hearing was held in the matter on January 29, 1982 at Houston, Texas.

Item 1A - Alleged Violation of 29 CFR 1910.107(c)(6)

The overhead fluorescent two-bulb light fixture located within the spraying area of combustible residues was not of the explosion-proof type approved for Class I, Group D locations conforming to the provisions of Class I, Division I, hazardous locations

Two employees were observed by the compliance officer spraying a flammable lacquer on golf clubs in the back area of respondent's plant. (Tr. 16). The above-described light fixture was in place at the spraying area. The lacquer being used had a flash point of 21 degrees Fahrenheit, assuming the airborne vapors were in the required concentration. (Tr. 21). The inspector was not able to tell what concentration of vapors would cause an explosion at 21 degrees. (Tr. 63). The inspector did not examine the light fixture closely enough to observe whether it was marked for use in the spraying area. (Tr. 26). An exhaust fan was in use for the purpose of drawing overspray from the atmosphere and venting it to the exterior of the building. (Tr. 29). The respondent contended that the spray operations were normally conducted outside the building, and that inside spraying was infrequently done because of unsuitable weather conditions. (Tr. 28).

I am of the opinion that a critical element of the government's case has not been proved. That is, the specific concentration of alleged flammable vapors which existed at the time of the inspection. There is also the question of whether the light fixture might have been suitable for the spraying operations. The latter question depends once again on the missing element, the concentration of vapors existing at the time of the alleged violation. In the circumstances

I conclude that the complainant has failed to prove a violation of the described safety standard.

Items 1B and 1C of the citation will be vacated for the same basic reason, i.e., the lack of specific information regarding the concentration of vapors, since proof of the violations depends on the existence of a dangerous concentration of such vapors.

Items 2A, 2B, and 2C - Alleged Violation of 29 CFR 1910.215(a)(2), 29 CFR 1910.215(a)(4), and 29 CFR 1910.215(b)(9)

These items deal with the compliance officer's observance of a 1/3 horsepower bench grinder which lacked safety guards, and proper adjustment of work rests. Nor were tongue guards provided, as required. The respondent essentially admitted the violations, but objects to their characterization as "serious." I would agree with the respondent in this respect. The grinder is used very infrequently, and generally only by the master machinist who supervises the operations of the plant. (Tr. 42). These items will be affirmed, but as "non-serious" violations of the standards. The adjustment of work rests and the provision of guards was made within 24 hours of the inspection. No penalty will be assessed for the violations.

Items 3A through 3E - Alleged Violations of 29 CFR 1910.217(c)(1)(i), (b)(3)(i), (e)(1)(i), (e)(1)(ii), and 29 CFR 1910.219(b)(1).

These deal with the inspector's observance of a power press which was not equipped with a point of operation guard; which did not incorporate a single-stroke mechanism; which was not the subject of periodic and regular

inspections; and which had flywheels 7 feet or less above the floor without guards.

Exhibit No. C-9 shows the mechanical press observed by the compliance officer. It has no point of operation guard, i.e., an employee could accidentally place some portion of his body, more than likely the upper extremities, including hands and fingers, into the point of operation and sustain a crushing, perhaps amputating injury to the particular member. (Tr. 46). Additionally, the press was equipped with continuous punch action, as opposed to the single-stroke mechanism required by the standards, in order that safer control be maintained over the machine. (Tr. 47,48). The flywheel was exposed to employee contact upon operation. (Tr. 48). Some portions of the rotating machinery were protected. (Tr. 49). No records pertaining to inspection of the press were maintained by the respondent. (Tr. 52). The employee who used the press, for punching lead weights into putter heads, stated that he activated the press with a foot pedal, dropping his hands to his sides, and standing about 20 to 36 inches away from the point of operation. (Tr. 49,50). This, in my opinion, does not indicate that a point-of-operation guard is not required to obviate the hazard presented. It is the first injury that the Act attempts to prevent, not the second or third. In the particular circumstances here shown the hazard was made greater by the continuous-stroke mechanism incorporated in the machine. It is clear that the respondent violated all of the standards shown under items 3A through 3E of the citation. They will be affirmed. The penalty proposed, $90.00, appears to be proper.

## CONCLUSIONS OF LAW

1. The Review Commission has jurisdiction. (Stipulated by the parties).

2. The respondent did not violate the safety standards set forth at 29 CFR 1910.107(c)(6); 107(d)(6); or 107(g)(2).

3. The respondent violated the safety standards set forth at 29 CFR 1910.215(a)(2); 215(a)(4); 215(b)(9). The violations were non-serious.

4. The respondent violated the safety standards set forth at 29 CFR 1910.217(c)(1)(i); 217(b)(3)(i); 217(e)(1)(i); 217 (e)(1)(ii); and 219(b)(1). These violations were serious. A penalty of $90.00 will be assessed for the violation of 29 CFR 1910.217(c)(1)(i).

## ORDER

1. Items 1A, 1B, and 1C of the citation are vacated.

2. Items 2A, 2B, and 2C of the citation are affirmed as non-serious violations of the Act, with no penalty assessed.

3. Items 3A through 3E of the citation are affirmed as serious violations of the Act, with a penalty of $90 assessed against the respondent for the violation of 29 CFR 1910.217(c)(1)(i).

So ORDERED.

Louis G. LaVecchia
Judge, OSHRC

Dated: April 12, 1982
Dallas, Texas.

UNITED STATES OF AMERIC

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

MAY 13 1982

IN REFERENCE TO SECRETARY OF LABOR v.

FURNCO CONSTRUCTION COMPANY

OSHRC DOCKET NO. 78-4731

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF ORDER

FOR THE SECRETARY OF LABOR

- Counsel for Regional Litigation
  Office of the Solicitor, USDOL
  200 Constitution Ave., NW. - Rm. S-4014
  Washington, D.C. 20210

To wit: See Attached.

- Herman Grant, Esq.
  Reg. Sol., USDOL
  Everett McKinley Dirksen Bldg.
  230 S. Dearborn St. - 8th Floor
  Chicago, IL 60604

FOR EMPLOYER

- Irving M. Geslewitz, Esq.
  Adler, Fox, Marcus, Adelstein & Gardiner
  208 South La Salle Street, Suite 1278
  Chicago, IL 60604

  Thomas S. Metakis, Esq.
  Ekers, Metakis & Kyros & Associates
  Three First Nat'l Plaza - 39th Floor
  Chicago, IL 60602

FOR EMPLOYEES

-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Office of the Judges
OSHRC
- 55 East Monroe Street
  Room 1530
  Chicago, IL 60603

Rev. 10/1/78

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 78-4731 |
| | ) | |
| FURICO CONSTRUCTION COMPANY | ) | |
| | ) | |
| Respondent. | ) | |

ORDER

The Commission approves the Settlement Agreement. The Commission grants the Secretary's motion to withdraw citation Item 4 and the parties' joint motion to sever this case from J. L. Manta, Inc., Docket Number 78-4923.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Dated: MAY 13 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket Nos. 78-4731 |
| | | 78-4923 |
| FURNCO CONSTRUCTION CO. | : | 78-5043 |
| J. L. MANTA INC. | | 78-5051 |
| GENERAL DRAINAGE, INC. | : | 78-5060 |
| M & O INSULATION COMPANY | | |
| McAULIFFE MECHANICAL CONTRACTORS | : | |
| Respondents. | : | |

ORDER ON MOTION TO DISMISS

Respondent's Motion to Dismiss citations issued under the coke oven emissions standards (29 CFR 1910.1029) is granted.

The chronology and factual background is briefly summarized, setting forth facts not in dispute and stipulated by the parties:

1. On October 19, 1976, the Secretary of Labor promulgated a new health standard governing employee exposure to coke oven emissions (29 CFR 1910.1029).

2. Petitions for review were filed by several coke producers and their trade associations with the United States Court of Appeals for the Third Circuit. The Court issued its opinion and order

on March 28, 1978, American Iron and Steel Institute, et al. v Occupational Safety and Health Administration, 577 F.2d 825 (3rd Cir. 1978) which held in pertinent part, "the Secretary's coke oven emissions standard (is) affirmed except: . . . . . (3), application of the standard to non-coke oven employers." The court remanded the case for further proceedings consistent with its opinion as to the application of the standard to non-coke oven employers.

3. Respondents are non-coke oven employers who were engaged in construction and maintenance services, as independent contractors, at the Inland Steel plant, East Chicago, Indiana, in August 1978.

4. They were cited in September and October 1978, for violation of the standard.

5. In December 1978, OSHA issued a "Supplemental Statement of Reasons" which states, "This notice delineating the precise application of the standard to non-coke producing employers is in response to the remand ordered by the Court."

6. On January 12, 1979, OSHA published a notice in the Federal Register at page 2725 stating that the Advisory Committee on Construction Safety and Health, (Advisory Committee) would meet on January 31 and February 1, 1979 to consider the application of the

coke oven standard to non-coke oven employers. The Supplemental Statement was then presented to the Advisory Committee.

7. The Advisory Committee met on May 17, 1979, pursuant to a notice in the Federal Register on April 27, 1979, and formulated its recommendations. The Advisory Committee accepted OSHA's determination that the scope and application of the standard, (29 CFR 1910.1029) (a)) applied to all employers. Some disagreement was expressed with parts of the Supplemental Statement. The areas of disagreement have no direct bearing on the issue raised here.

Complainant's position is that the order of remand did not stay enforcement proceedings against non-coke oven employers. Consistent with its position, the Secretary did not institute any rule making proceeding. Instead, a "Supplemental Statement of Reasons" was drafted for public consideration for the purpose of informing the Court of the precise application of the standard to independent contractors.

Respondents maintain that the citations were issued in violation of the Court order and are invalid. Respondents argue that the Court was concerned with due process rights to notice and they were not afforded such notice. Respondents were cited in the interim period between the Court order and publication in the Federal Register of the "Supplemental Statement of Reasons."

The Court's opinion, section VI, deals with the application of the standard to non-coke oven employers. The Court recites the arguments favoring the Secretary's position; announces its conslusion that, despite these arguments, notice was inadequate; and finally gives reasons for its conclusion (577 F.2d at 840). The case was remanded for further proceedings consistent with the opinion. A plain and logical reading would indicate that the Court was indeed concerned with due process rights to notice.

The case law submitted by the parties in support of their interpretations of the opinion and order is inconclusive. The decision cited do not involve notice of rule making, or the court specifically vacated or remanded with specific instructions for proceeding, or specifically ruled that the challenge should be pursued in an enforcement proceeding. However, I find respondent's argument and analogy to the Review Commission decision, in American Urethane Corp., 5 BNA OSHC 1543, 1977-78 CCH OSHD para. 21, 903 (1977) to be persuasive. In American Urethane Corp., the Review Commission interpreted the Third Circuit opinion in Synthetic Organic Chemical Mfrs. Ass'n (SOCMA II), 506 F.2d 385 (3rd Cir. 1974) cert. denied 423 U.S. 830 (1975). The Review Commission held that a Court order of remand does not stay enforcement proceedings where

the basis for the remand is the Court's desire to ascertain the reasons for the agency action. In contrast, when the basis for remand is failure to afford adequate notice, remand was predicated on the conclusion that the promulgation did not meet the requirements of section 6 of the Act and necessitates vacation of the relevant provisions. This conclusion is in accord with the view that an administrative rule not promulgated in accordance with the notice requirements of section 553 of the Administrative Procedure Act is not enforceable. N.L.R.B. v Wyman-Gordon Company, 394 U. S. 759 (1969); Wagner Electric Corp. v Volpe, 446 F.2d 1013 (3rd Cir. 1972); Texaco, Inc. v Federal Power Commission, 412 F.2d 740 (3rd Cir. 1969).

The Court has ruled that respondents did not receive adequate notice. Proceedings, in accordance with the Court order of remand, were not held prior to the issuance of the citations. The defect in promulgation precludes enforcement of the standard against respondents in this case. It is noted that the same issue was before Judge Sparks, Review Commission Judge, in C. H. Heist Corporation et al. (OSHRC Nos. 79-0749 et al., decided November 16, 1979). Judge Sparks held that lack of notice was a fundamental defect and that the standard should not be enforced until the defect has been remedied.

It is ORDERED:

1. The citations alleging violations of 29 CFR 1910.1029 are vacated.

2. General Drainage, Inc., No. 78-5043; M & O Insulation Company, No. 78-5051; and McAuliffe Mechanical Contractors, No. 78-5060 will be notified of the hearing date with respect to those items cited under standards other than 29 CFR 1910.1029.

3. This constitutes a final order with respect to Furnco Construction Co., No. 78-4731; and J. L. Manta, Inc., No. 78-4923.

Louis J. Rubin
Judge, OSHRC

Dated: December 7, 1979

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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RAYMOND J. DONOVAN, SECRETARY OF LABOR,

Complainant,

v.

OSHRC DOCKET No. 78-4731

FURNCO CONSTRUCTION COMPANY,

Respondent.

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STIPULATION AND SETTLEMENT AGREEMENT

I

The parties hereby enter into this stipulation and settlement agreement as full and complete settlement of the instant case which is presently pending upon review before the Occupational Safety and Health Review Commission.

II

The parties stipulate as follows:

(A) The Occupational Safety and Health Review Commission (hereinafter "the Commission") has jurisdiction of this matter pursuant to section 10(c) of the Occupational Safety and Health Act of 1970 (84 Stat. 1590, 29 U.S.C. §651 et. seq.) (hereinafter "the Act").

(B) Respondent, Furnco Construction Company (hereinafter "Furnco"), is a New York corporation engaged as an independent contractor in specialized construction and maintenance activities for various heavy industries including

the steel industry. During the course of its business its employees are engaged in these activities. Furnco uses equipment and material from places located outside the State of New York. Furnco was and is an employer engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the Act and employed employees within the meaning of section 3(6) of the Act.

(C) As a result of a inspection conducted on August 1-2, 1978, at Furnco's workplace at the Inland Steel coke oven battery in East Chicago, Indiana, one citation for ten violations of 29 CFR 1910.1029 was issued to Furnco on September 27, 1978, pursuant to section 9(a) of the Act.

(D) On September 27, 1978, pursuant to section 10(a) of the Act, a notice of proposed penalty recommending a penalty of $9,700 was sent to Furnco by certified mail, return receipt requested.

(E) By letter dated October 5, 1978, Furnco timely contested the citation and proposed penalty. Furnco's notice of contest was duly transmitted to the Commission.

(F) On September 21, 1979, Furnco along with other respondents in a consolidated case, including J.L. Manta, Inc., (Docket No. 78-4923), moved to dismiss on the grounds that the cited standard, 29 CFR 1910.1029, did not apply. The administrative law judge filed his decision and order, granting respondent's motion to dismiss, on December 7, 1979.

(G) On December 28, 1979, the Secretary filed a petition for discretionary review. On January 7, 1980 then-Chairman Timothy F. Cleary directed the case for review.

(H) On November 23, 1980, the Secretary filed his brief in this case against Furnco and J.L. Manta, Inc. In the brief he abandoned his claim that 29 CFR 1910.1029 applied to the cited conditions and moved to amend the citation to allege violations of other standards, as set forth below.

III

Complainant hereby moves to withdraw Items 2, 5, 6a, 6b, 7, 8(a), and 9 of the original citation because of a lack of evidence including evidence, necessary to overcome Furnco's defense that, due to the particular contractual arrangements and physical conditions at the worksite, it was infeasible for it to provide the required facilities and programs set forth in the aforementioned items. Complainant agrees to amend the other items as follows: (a) Furnco, at the aforementioned workplace on August 1, and August 2, 1978, violated section 5(a)(2) of the Act and the following occupational safety and health standards duly promulgated pursuant to section 6(a) of the Act. (Each portion below denoted by a number is a new citation item, e.g. (1) is citation item 1. Each subportion below denoted by a letter is a new citation subitem, e.g. (1)a is citation subitem 1a. The original citation item to which the new item or subitem is related is set forth in parentheses following the portion or subportion.)

(1)a. 29 CFR 1926.55(a). Exposure of a employee to inhalation of coal-tar pitch volatiles at a concentration above the one specified in the "Threshold Limit Values of Airborne Contaminants for 1970" of the American Conference of Governmental Industrial Hygienists (see table Z-1 in 29 CFR 1910.1000) was not avoided in that an ironworker welding on the west end of Coke Oven Battery C was exposed to coal-tar pitch volatiles at concentrations greater than 0.2 milligrams per cubic meter of air averaged over an 8-hour period. (Original item 1).

b. 29 CFR 1926.55(b). Protective equipment as described in 29 CFR 1926.103(b)(3) (Table E-4) was not used to keep the exposure of an employee working in the Regulated Areas associated with Coke Oven Battery C to coal-tar pitch volatiles within the limits prescribed in 29 CFR 1926.55(a) in that the employer did not assure the use of an air-purifying, half-mask, or mouthpiece respirator with filter pad or cartridge, an air-line respirator, or a hose-mask without blower for the ironworker welding at the west end of coke oven battery C when he was exposed to coal-tar pitch volatiles at concentrations greater than 0.2 milligrams per cubic meter of air averaged over an 8-hour period. (Original subitem 3a).

c. 29 CFR 1926.103(c)(1). Employees working in Regulated Areas associated with Coke Oven Battery C required to use one of the types of respirators mentioned in 1(b) were not

instructed in the use and limitations of such equipment. (Original subitem 3(b)).

d. 29 CFR 1910.134(b)(1). Written standard operating procedures governing the selection or use of respirators were not established for employees working in Regulated Areas associated with Coke Oven Battery C. (Original subitem 3b).

e. 29 CFR 1910.134(b)(6). Respirators for employees working in Regulated Areas associated with Coke Oven Battery C were not stored in a convenient, clean, or sanitary location. (Original Subitem 3b).

2. 29 CFR 1926.51(f). The employer did not provide adequate washing facilities for employees engaged in operations where coal-tar pitch volatiles might be harmful to employees, i.e. employees in the Regulated Areas associated with Coke Battery C. (Original subitem 8(b)).

3. 29 CFR 1926.21(b)(2). The employer did not instruct each employee working in the Regulated Areas associated with Coke Oven Battery C in the recognition and avoidance of unsafe conditions and the regulations applicable to his work environment to control or eliminate any hazards or other exposure to illness or injury. (Original item 10).

(b) With respect to amended Citation Item (1)a, alleging violation of 29 CFR 1926.55(a), compliance with the permissible exposure limit may be achieved by means other than engineering and work practice controls. In particular, if Furnco assures that its employees use respirators which comply with the requirements of 29 CFR 1926.55(b) and if Furnco institutes a respiratory protection program in accordance with 29 CFR 1926.103(c)(1) and 29 CFR 1910.134, Complainant represents to and assures Respondent that it will not be cited under 29 CFR 1926.55(a) for allowing its employees to work where the ambient air contains coal-tar pitch violatiles in excess of the permissible exposure limits.

Complainant hereby agrees to reduce the original proposed penalty from $9,700 to $1,000. Furthermore, Complainant hereby moves to withdraw its petition for discretionary review of the judge's decision with respect to Furnco only.

IV

Furnco hereby moves to withdraw its notice of contest of the citation and the penalty proposed therefor, as amended above, submits that it has abated the violations of the Act set forth in the citation, as amended, and agrees to pay the proposed penalty, as amended above ($1000.00), within fifteen (15) days from the filing of this stipulation and settlement agreement with the Commission.

V

Complainant and Furnco move to sever J.L. Manta, Inc., Docket No. 78-4923, from this case. J.L. Manta, Inc. consents to this severance.

VI

Complainant and Furnco hereby agree to bear their own fees and other expenses incurred by them in connection with any stage of this proceeding.

VII

Furnco agrees to post this Stipulation and Settlement Agreement in accordance with Commission Rule 7.

VIII

Except for this matter between the Secretary of Labor and Furnco, and except for the issuance by the Secretary of Labor of a notification of failure to correct these alleged violations or any other subsequent OSHA proceeding between Complainant and Furnco, none of the foregoing agreements, statements, findings and actions taken by Furnco shall be deemed an admission by Furnco of the allegations contained within the Citation and Notifications of Penalty or the Complaint. The agreements, statements, findings and actions taken by Furnco herein are made only for the purpose of compromising and settling this matter economically and amicably, and they shall not be used for any other purpose whatsoever, except as herein stated.

IX

Upon approval of this agreement by the Commission, the agreement shall constitute a final order of the Commission.

WHEREFORE, Complainant and Furnco request the Commission to approve this Stipulation and Settlement Agreement.

FOR THE COMPLAINANT
RAYMOND J. DONOVAN
SECRETARY OF LABOR

FOR THE RESPONDENT
FURNCO CONSTRUCTION
COMPANY

Dated this 1st day of March, 1982.

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

May 13, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Missouri Farmers Association d/b/a Odessa MFA Exchange

OSHRC DOCKET NO. 80-5399

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF ORDER OF REMAND

To wit: See Attached.

FOR THE SECRETARY OF LABOR

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FOR EMPLOYEES

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Judge's Office
Occupational Safety & Health
Review Commission
1114 Market Street, Room 608
St. Louis, Missouri 63101

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>MISSOURI FARMERS ASSOCIATION,<br>doing business as ODESSA MFA EXCHANGE,<br><br>Respondent. | OSHRC Docket No. 80-5399 |

ORDER OF REMAND

This case was remanded to the Commission from the United States Court of Appeals for the Eighth Circuit for the entry of a modified order in accordance with the opinion of the Court. Accordingly, the case is remanded to the Chief Administrative Law Judge for further proceedings with respect to item one of the citation and the entry of a modified order consistent with the opinion of the Court. Item two is vacated. 1/

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: MAY 13 1982

1/ Inasmuch as Judge Wienman is about to leave the Commission, we remand to the Chief Administrative Law Judge.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br><br>Complainant<br><br>v.<br><br>MISSOURI FARMERS ASSOCIATION<br>Doing Business As<br>ODESSA MFA EXCHANGE,<br><br>Respondent | DECISION & ORDER<br>OSHRC DOCKET 80-5399 |

APPEARANCES: EUGENE F. DESHAZO, Esq., U.S. Department of Labor, Office of the Solicitor, Kansas City, Missouri, for the Complainant

ALFRED J. HOFFMAN, Esq., Columbia, Missouri, for the Respondent

Wienman, Judge, OSHRC

## STATEMENT OF THE CASE

This is a proceeding wherein Respondent contests a citation which alleges violations of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, et seq.) at a Missouri Farmers Association ("MFA") grain elevator in Odessa, Missouri. The citation charged two violations of

Section 5(a)(1) of the Act, the so-called "General Duty Clause"[1/] in connection with the procedures Respondent employed in cleaning the grain receiving pit area under the elevator. Respondent timely contested the alleged violations, the time allotted for abatement, and the proposed penalties. The cause was assigned to the undersigned Judge by an order of reference dated November 6, 1980, and a hearing was held in Kansas City, Missouri, on February 25, 1981.

## THE ISSUES

No jurisdictional matters remain in issue. The parties pleaded facts sufficient to establish that Respondent is subject to the Act, and that the Commission has jurisdiction of the parties and the subject matter.

Both citation items charged Respondent with failure to furnish employment free from recognized hazards likely to cause death or serious physical harm to an employee. Specifically, the Secretary alleged the violations occurred when MFA permitted an employee to enter the basement of a grain elevator to remove an accumulation of grain without first testing the atmosphere or providing safety belts and lifelines. This citation described the allegedly hazardous activity as follows:

---

1/ Section 5(a)(1) provides:

> (a) Each employer--
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

Monitoring for oxygen deficiency and for the presence of toxic and explosive vapors was not conducted prior to employee's entry and work in the pit the day it was cleaned, (Item 2); and

Safety belts and lifelines were not provided for quickly removing an employee from a confined space in case of an emergency (Item 1).

By way of defense Respondent contends that the Secretary failed to prove the essential elements of a "General Duty Clause" violation, namely:

1. that a hazard existed;

2. that the hazard was one recognized by the industry or that the employer had actual knowledge of the hazard;

3. that the hazard was likely to cause death or serious injury;

4. that the employer knew or should have known of the hazard; and

5. that feasible measures could have been employed to prevent the hazard.

Thus the issues for decision are whether the evidence establishes the existence of violations as alleged in the citation, and, if so, the assessment of an appropriate penalty.

## SUMMARY OF THE EVIDENCE AND DISCUSSION

The OSHA inspection in August of 1980 was conducted pursuant to a complaint filed by Jerry Ellis, a former Odessa MFA Exchange employee. Mr. Ellis managed the fertilizer and grain storage portion of the MFA facility on the July day when another employee, Jesse Vaughn, entered the basement pit area. Considerable testimony was devoted to the circumstance surrounding this episode, and the pertinent facts are summarized as follows:

The MFA grain elevator at Odessa, Missouri, is a country terminal where three employees are engaged in receiving, storing, and loading out grain. It is part of a facility where 22 employees work, most of whom are located approximately one mile from the elevator (T. 34-35).

Witnesses disagreed as to the exact dimensions of the receiving pit under the elevator, but the consensus indicated an area approximately fifteen feet in height, twelve feet wide, and thirty feet long (T. 36, 50, 61, 158). As a result of operations, over a period of time approximately 75 to 100 bushels of corn, wheat, and soybeans had spilled onto the basement floor (T. 36, 50, 61). About two-thirds of the accumulation had become damp (T. 46, 54, 71) and the grain emitted a strong "rotten egg" odor (T. 38, 51).

In July Ron Soendker, manager of the facility, instructed Ellis to remove the grain from the basement. Ellis refused, and an argument ensued concerning the method to use. Ellis wanted to employ a septic tank company while Soendker wanted Ellis and the two men in his charge to remove the grain.

Ellis maintained that the job was not safe and refused to enter the pit or order employees to do so (T. 38). However, Jesse Vaughn volunteered to do the work and entered the basement and began removing grain by filling a bucket.[2/] Vaughn suffered no ill effects, nor did Soendker who testified that he had inspected the pit earlier in the day (T. 157).

Vaughn had descended into the area through a small square manhole

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2/ He abandoned the job after about one-half hour. It was hot work, and due to the argument between Soendker and Ellis, nobody was bothering to raise the bucket after Vaughn filled it (T. 70). Later a septic tank service firm was hired to finish the chore.

depicted in Exhibit C-1. Witnesses for the Secretary contended this opening was the only source of ventilation. Soendker testified that there were openings in the "legs" which carried grain from the pit and in the grill where the grain was dumped (T. 159). However, MFA testimony suggesting there was active air movement in the pit was contradicted by Vaughn who detected no ventilation (T. 63-64).

It was undisputed that there had been no testing for oxygen deficiency or toxic substances before Vaughn entered the pit since the elevator possessed no monitoring equipment. Vaughn had not been outfitted with a safety belt, harness, or other rescue gear although the elevator owned a safety belt.

The Secretary's contention that Vaughn's entry into the pit under these conditions subjected him to recognized hazards was articulated in the testimony of Carl Astley, industrial hygiene supervisor in OSHA's Kansas City area office, and Charles J. Bryant, corporate industrial hygienist for Farmland Industries. Neither had visited the worksite, but each made inferences from the testimony of Ellis, Vaughn, and Harold Straggs, the third employee.

Mr. Astley concluded that chemical reactions in the wet and decomposing grain pile could produce such by-products as hydrogen sulfide, methane, nitrogen, and carbon dioxide. These various chemicals posed potential hazards as asphyxiators, systemic poisons, or explosive and combustible gases. An employee entering the pit would be subject to a two-fold hazard: the atmosphere might have been oxygen deficient and life threatening because of toxic chemicals, and the lack of safety belt or harness would endanger both the stricken employee and any would-be

rescuers (T. 73-84).

Astley asserted that a potential hazard was created whenever an oxygen-consuming chemical reaction occurred in a confined space, and that such atmospheres should always be monitored before entry (T. 93-96).

On cross-examination Astley testified that he used "confined space" as a word of art and that he did not know if a "country elevator fellow" would know exactly what he meant by the term (T. 98).

In response to a question from the Judge, Astley stated that he believed, from what he was able to read, that the hazard posed by wet grain in a confined space was one recognized by the industry (T. 107). He identified his sources as trade associations, NIOSH, and safety organizations (T. 108).

Mr. Bryant, an industrial hygienist formerly employed by NIOSH, stated that his employer, Farmland Industries, was the "Number 2" grain handler in the nation with 100,000,000 bushel capacity in fifteen terminal elevators. As part of his duties he advised these large elevators on safety procedures; he did not deal directly with smaller cooperative elevators (T. 119).

Bryant testified that under the circumstances existing at the Odessa elevator, he would have recommended atmospheric testing before entry into the pit (T. 122). A hazard could have existed, and the failure to monitor for oxygen deficiency or combustible gases would have been a recognized hazard at Farmland Industries (T. 124-125). Also, the Farmland safety program Bryant developed includes the use of lifelines and harnesses for anyone entering a confined space (T. 126-127).

On cross-examination Mr. Bryant repeated that he did not work with country elevators and did not know if such elevators possessed oxygen monitoring equipment (T. 129). He declared there was no way to tell whether one bushel of grain in a space 30' x 12' x 15' would create a hazard without atmospheric testing (T. 129). He did not know if a country elevator operator would recognize a hazard under the circumstances at Odessa (T. 134). He believed that a prudent person, with some knowledge of the potential hazards, would have monitored before entering the pit area (T. 138). But there was no concrete rule for comparing bushels of rotting grain to cubic feet of space to determine when there was a hazard; therefore, it was necessary to use a lot of discretion (T. 139).

Respondent expressly challenged the Secretary's claim that failure to monitor the atmosphere under the conditions was a hazard recognized by the industry. A number of MFA officials boasting considerable country grain elevator experience declared that sending Vaughn into the pit area without prior monitoring was not a violation of recognized safety practices in the industry. Moreover, Soendker testified that he had conducted a survey of grain elevators in the Odessa, Missouri, neighborhood and found that none had monitoring detection equipment "and they don't even know what you are talking about whenever you say it" (T. 161).

The Secretary did not rebutt this substantial testimony relative to industry safety practices, nor did he call attention to any specific instances of an elevator employee suffering harm because he entered a pit area under similar circumstances.

The Secretary's evidence was persuasive that decomposing grain in an elevator pit area with little or no active air movement creates a condition where occurrence of a hazardous incident is possible. However, the standard of proof for a Section 5(a)(1) violation focuses not on whether a serious injury was possible, but on whether the hazard was "recognized," and the term "recognized" connotes knowledge. As stated by Judge Timbers in Usery v. Marquette Cement Mfg. Co., 568 F.2d 902 (2nd Cir., 1977), to "constitute a recognized hazard, the dangerous potential of a condition or activity must actually be known either to the particular employer or generally in the industry." Supra, 568 F.2d at 910.

The proof herein fails to establish the requisite knowledge, either in the possession of MFA or the industry generally. It is unnecessary to discuss MFA's actual knowledge of any hazards since Respondent's officials have consistently maintained that the conditions in the pit presented no danger to employees. Whether this belief was fact or fancy is not relevant to the question of MFA knowledge; the earnestness with which Respondent denies the existence of hazards negates any theory that the employer had actual knowledge that its practices exposed an employee to danger.

The evidence in support of a theory that the industry generally would recognize hazards herein likewise has little support in the record. Astley and Bryant, the Secretary's two witnesses who addressed themselves to this issue, made no claims about actual industry practices. Astley referred to studies conducted by trade associations and safety organizations, and a number of articles were introduced into the

record (Ex. C-2, C-4, C-5, and C-6). None of this literature appeared to be specifically related to the instant conditions, however, and we cannot conclude that precautions appropriate before entry into enclosed food bins, fumigated tank cars, etc., are necessary before entry into a receiving pit area under an elevator.

Mr. Bryant carefully limited his testimony to procedures he would have recommended under the circumstances, but he expressly denied any knowledge of country grain elevator practices in this regard (T. 129, 134).

It was clear that both Astley and Bryant, well-qualified industrial hygienists, counseled extreme caution before sending an employee into an area where there was even a possibility of serious injury or death because of gases released by decomposing grain. However, their professional recognition of a potential hazard does not establish the existence of a recognized hazard within the meaning of Section 5(a)(1). The industrial hygienists are persuasive that there was a plausible theoretical possibility that Vaughn's entry into the pit area under the conditions could have resulted in serious injury or death. But an employer is not in violation of Section 5(a)(1) whenever the occurrence of an incident capable of causing an employee serious injury is not impossible. Congress did not intend the term "recognized" to be so broadly construed. See, Secretary v. Pratt & Whitney, Aircraft Division of United Technologies Corp., (2nd Cir., April 20, 1981), CCH OSHD ¶25,329.

Since the record is devoid of substantial evidence that the industry recognized as hazardous the conditions and practices described in

the two citation items, the Secretary has failed to bear the burden of proof, and the General Duty Clause allegations must be vacated.

## FINDINGS OF FACT

A preponderance of the reliable, probative, and substantial evidence supports the findings of fact set forth in the Summary of Evidence and Discussion.

## CONCLUSIONS OF LAW

1. At all material times Respondent was an employer within the meaning of Section 3 of the Occupational Safety and Health Act of 1970.

2. Jurisdiction of this proceedings is conferred upon the Occupational Safety and Health Review Commission by Section 10(c) of the Act.

3. The evidence fails to establish the existence of any violations of Section 5(a)(1) of the Occupational Safety and Health Act of 1970.

## ORDER

Based on the above Findings of Fact and Conclusions of Law, it is ORDERED that items 1 and 2 of citation number 1 issued to Respondent September 4, 1980, are vacated.

Date: June 8, 1981

Alan M. Wienman

Alan M. Wienman, Judge, OSHRC

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

May 13, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

DUGGAN & MARCON, INC.

OSHRC DOCKET NO. 81-2716

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF DIRECTION FOR REVIEW AND REMAND

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR EMPLOYER

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FOR EMPLOYEES

-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

- Irving Sommer
  Judge, OSHRC
  1825 K Street, N.W.
  Washington, D.C. 20006

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 81-2716 |
| DUGGAN & MARCON, INC., | : | |
| Respondent. | : | |

DIRECTION FOR REVIEW AND REMAND

Pursuant to section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651-678 ("the Act"), the order of Administrative Law Judge Irving Sommer, dismissing respondent's notice of contest, is hereby directed for review. For reasons that follow, we vacate the Judge's order.

After Judge Sommer issued his order, the Secretary served the Commission with a copy of correspondence between the Secretary and Respondent regarding a possible settlement of the case. The Secretary has not, however, submitted a copy of the proposed settlement to the Commission. In view of the possibility that this case may be settled, and in consideration of the Commission's policy encouraging settlement, we remand the matter to the Judge for such further proceedings as may be appropriate.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: MAY 13 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR<br>Complainant<br>v.<br>DUGGAN & MARCON, INC.<br>Respondent | DOCKET NUMBER 81-2716 |

ORDER

The Respondent was notified by the Executive Secretary of the Commission that Commission Rule 7 requires that notice of contested cases be given to affected employees. A postcard for certifying posting and service together with a notice for informing employees of their rights was enclosed. The Respondent failed to respond to this direction.

Thereafter the Secretary filed a complaint herein on January 5, 1982, to which the Respondent has not filed an answer to date.

On March 3, 1982, I issued a show cause order to the Respondent concerning his failure to file proof of service of the Notice of Contest on affected employees and his failure to file an answer. The Respondent failed to respond to the show cause order. It is apparent the Respondent is abandoning his right to contest the citations herein.

Accordingly, the Respondent's Notice of Contest is dismissed. Citation Number 1 for serious violations issued December 8, 1981, with penalties assessed of $800 is affirmed, and Citation Number 2 for nonserious violations and no penalty assessed is affirmed.

IRVING SOMMER
Judge, OSHRC

Dated: April 12, 1982
Washington, D.C.

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

May 18, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Weisblatt Electric Company, Inc.

OSHRC DOCKET NO. 79-2537

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR EMPLOYEES

-

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Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>WEISBLATT ELECTRIC COMPANY, INC.,<br>Respondent. | OSHRC Docket No. 79-2537 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

The only issue in this case is whether Respondent, Weisblatt Electrical Company ("Weisblatt"), a subcontractor on a multi-employer construction site, took reasonable steps to protect its employees from violative conditions that it neither created nor controlled. We find that Weisblatt did take such steps and vacate the citations.

I.

Weisblatt had been engaged to install an elevator in a six-story building that was apparently undergoing renovation. On the day the alleged violations occurred, two of Weisblatt's employees had returned to the site after a ten-day absence. According to Weisblatt's president, the company "must have left [the worksite] six or seven times, not only for safety [reasons] but for the whole general tenor and the processing of the job." He stated that the general contractor "would call us in, [but] they weren't prepared for us to work or it was just a horrible condition." The president declared that the employees had

returned to the worksite to determine "what the conditions were and [to] make a decision as to whether we stay or we will not stay."

About a half-hour after Weisblatt's employees arrived at the site for this purpose, but before they had begun to work, they met a compliance officer representing the Secretary of Labor who was inspecting the site based on a complaint of unsafe working conditions. The compliance officer testified that he told Weisblatt's employees that they had already been exposed to two falling hazards by walking up an unguarded ramp to the first floor of the building and walking near the unguarded open side of the first floor. The compliance officer also testified that the two employees were exposed to the hazards presented by unguarded floor openings on the first floor. At the request of Weisblatt's foreman, he agreed to inspect their work area on the fourth floor after he interviewed the general contractor. Subsequently, the general contractor began to install a railing on the access ramp. The compliance officer later inspected Weisblatt's work area and advised Weisblatt's employees that the area was safe. However, he also told them that they had been exposed to falling and tripping hazards on the stairways they had used to get to the fourth-floor work area; the hazards resulted from the lack of railings on the stairs and absence of material in the hollow pan-type treads on the individual risers. Weisblatt's president testified that its employees would not have remained on the site if the compliance officer had not been present.

As a result of the inspection, the Secretary issued two citations alleging that Weisblatt violated section 5(a)(2), 29 U.S.C. § 654(a)(2) of the Occupational Safety and Health Act of 1971, 29 U.S.C. §§ 651-678 ("the Act"). Citation 1 alleged that Weisblatt had failed to comply with 29 C.F.R. § 1926.500(b)(1)(unguarded floor openings), (d)(1)(unguarded open-sided floor), (d)(2)(unguarded runway), and (e)(1)(ii)(unguarded stairs). Citation 2 alleged a failure to comply with 29 C.F.R. § 1926.501(f)(unfilled pan-type treads). The Secretary

proposed a total penalty of $1,500 for the violations alleged in citation 1 and $0 for the violation alleged in citation 2.

Weisblatt did not deny before the judge that these violative conditions existed. Instead, its president argued at the hearing that it neither created nor controlled the hazards. Weisblatt's president argued that the company had complained to the general contractor about conditions at the worksite, and that its employees were on the worksite to determine whether the conditions made it safe to work. If it was not safe to work, it was company policy to leave the job.

Judge Ditore affirmed both citations. He assessed a penalty of $650 for the serious citation and no penalty for the nonserious citation. He found that Weisblatt's employees were exposed to the violative conditions and that Weisblatt neither created nor controlled the conditions. The judge noted that Weisblatt's instructions were very general and that its employees were instructed during the inspection "to make the safety determinations, and to ascertain what [the compliance officer] had to say about [Weisblatt's] specific work area." The judge concluded that apart from the general instructions, Weisblatt did not make a reasonable effort to protect its employees.

Weisblatt filed a petition for review, arguing that it did not create the hazards and could not contractually abate them and, therefore, the only means of protecting its employees was to remove them from the worksite.

Commissioner Cottine directed review of all the issues raised by Weisblatt's petition, including whether Weisblatt, as a subcontractor on a multi-employer construction site, took sufficient steps to protect its employees from safety hazards at the site.

In its brief on review, the Secretary contends that Weisblatt's general admonition to leave the worksite when conditions were unsafe was inadequately

communicated and enforced. He also argues that Weisblatt cannot divest itself of responsibility for its employees' exposure to violative conditions by delegating that responsibility to its foreman, unless it shows that its foreman received adequate training and supervision in safety matters.

II.

In allocating employer responsibility at multi-employer construction worksites, the Commission has established an affirmative defense for certain subcontractors. If a subcontractor on a multi-employer worksite neither created nor controlled a hazardous condition, it may defend against a citation by showing either (a) that its employees who were exposed to the hazard were protected by realistic measures taken as an alternative to literal compliance with the cited standard, or (b) that it did not have nor with the exercise of reasonable diligence could have had notice that the condition was hazardous. See Anning-Johnson Co., 76 OSAHRC 54/A2, 4 BNA OSHC 1193, 1198, 1975-76 CCH OSHD ¶ 26,690, p. 24,783 (No. 4409, 1976). Subcontractors are also expected to have made a reasonable effort to detect violations and to have exerted reasonable efforts to have them abated. Grossman Steel and Aluminum Corp., 76 OSAHRC 54/D9, 4 BNA OSHC 1185, 1188, 1975-76 CCH OSHD ¶ 20,691, p. 24,791 (No. 12775, 1976). In determining whether a subcontractor has made reasonable efforts, we look to its overall conduct, rather than to any single act. See Electric Smith, Inc. v. Secretary of Labor, 666 F.2d 1267, 1274 (9th Cir. 1982).

It is undisputed that Weisblatt neither created nor controlled the cited conditions. It is also unrebutted that Weisblatt had taken its employees off the worksite on six or seven occasions because of conditions on the worksite, and had complained to the general contractor about conditions on the site. Its employees, whose presence on the site gave rise to the citations, were there as an inspection party charged with determining whether conditions had improved so that work could continue. Indeed, they took advantage of the compliance officer's

presence on the worksite to ask him to examine the safety of the elevator shaft they were to work in. To find violations here would mean that an employer must issue instructions to employees he orders to inspect a multi-employer construction site that would make it nearly impossible for them to conduct such an inspection. Weisblatt's inspection party would not have been able to get to the site by using the unguarded ramp, but would have been required to report the hazard to the general or controlling contractor, and then return to the site to continue the inspection. Such an approach would place an unreasonable burden on subcontractors, and would make it difficult for them to properly evaluate a multi-employer worksite and try to have noncomplying conditions corrected. In view of all the circumstances, we conclude that Weisblatt has shown that it took reasonable steps to protect its employees.

Accordingly, the judge's decision is reversed. Citations 1 and 2 are vacated.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: MAY 18 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>WEISBLATT ELECTRIC COMPANY, INC.,<br>Respondent. | OSHRC DOCKET<br>NO. 79-2537 |

Appearances:

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United States Department of Labor
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New York, New York 10036
Attorney for Complainant
by Leslie Paul Brody, Esq., of Counsel

I. Wolf Weisblatt
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Walden, New York
For the Respondent

## DECISION AND ORDER

Ditore, J.,

## PRELIMINARY STATEMENT

Respondent contested a citation for serious violations of 29 CFR §§ 1926.500(b)(1), 1926.500(d)(1), 1926.500(d)(2) and 1926.500(e)(1)(ii), a citation for a nonserious violation of 29 CFR § 1926.501(f), and the total proposed penalty of $1,500.00, for the alleged serious violations. A hearing

was held on September 21, 1979, at New York, New York. Specifically, Respondent is charged with the failure to protect its employees from two unguarded floor openings, an unguarded open-sided floor, an unguarded runway and an unguarded stairway which exposed its employees to fall hazards, and to tripping hazards from the unfilled treads of a stairway.

## ISSUES

1. Whether one or more or all of the alleged violations existed at Respondent's workplace on April 19, 1979 at 21 East 63rd Street, New York, New York.

2. If a violation or violations existed, whether Respondent's employees were exposed to the hazard or hazards created by the violation or violations.

3. If Respondent's employees were exposed, whether the hazards or hazards created were serious.

4. If the hazard or hazards were serious, whether Respondent knew of, and was responsible for, the violation or violations.

5. If Respondent was responsible, whether the penalty or penalties proposed were proper.

## STATEMENT OF THE EVIDENCE

On April 19, 1979, pursuant to a complaint, Compliance Officer, Alfred Fisher of the Occupational Safety and Health

Administration, visited a six story office or apartment building construction site at 21 East 63rd Street, New York, New York. (Tr. 8-12) The first floor front or south side of the building was completely demolished, exposing the basement and sub-basement areas. The entrance to, and exit from, the building was by a twenty foot long, eighteen inch wide ramp from the sidewalk to the first floor. The sides of the ramp were unguarded. On either side of the ramp was a drop of five to twelve feet to the cement basement. (Tr. 12,21,26-33; Exhs. C-2,C-3) The ramp lead to the east side of the first floor, adjacent to the wall of an elevator shaft. From this area, an employee had to walk some twelve feet along or near the edge of an open-sided floor to reach the main area of the first floor. The open side was unguarded, exposing a drop of twelve to twenty-four feet to the concrete basement. (Tr. 21,22; Exh. C-2) The ramp and open-sided floor area were the only means of employee access to, and egress from, the building. (Tr. 24; Exhs. C-2,C-3)

At the east rear side of the first floor was an unguarded floor opening, eighteen inches by six feet, exposing a drop of twelve feet to the cement basement. A skid of elevator weights were stored close to the edge of the floor opening. Another unguarded floor opening, twenty-four inches by ten feet, was located at the northwest side of the first floor, exposing a twelve foot drop to the cement basement. Employee access to the upper

floors of the building was either by an east side stairwell, six to eight feet from the unguarded east side floor opening, or by a fire escape at the rear of the building, twelve feet from the east side floor opening and fifteen feet from the unguarded northwest floor opening. (Tr. 14-18, 19-21; Exh. C-1, east side floor opening)

The east side interior stairwell which gave access to the upper floors and to the basement was forty-two inches wide with one open side not guarded by handrails. The treads of the stairs from the second to the third floors were not filled in. (Tr. 33-37,38,41; Exhs. C-4, C-5)

The lack of handrails on the stairwell created a fall hazard of eight feet, and on the stairwell between the second and third floors, the fall hazard was compounded by a tripping hazard from the unfilled stair treads. (Tr. 34,38,39)

Officer Fisher arrived at the worksite on April 19, 1979, about 8:30 a.m. and had an opening conference on the first floor with Respondent's foreman, Mr. Magni. Respondent had two employees at the site, Mr. Magni and a helper. They had returned to the job at 8:00 a.m. that morning after being off the job for ten days. (Tr. 12,13,49) Officer Fisher observed the unsafe conditions stated above, and informed Magni of them. Magni stated that he and his helper came back to the site to observe conditions. He admitted they had to use the unguarded ramp and open-sided

floor to reach the first floor, had to go by unguarded floor openings, and had to use the east side stairwell to reach the upper floors. (Tr. 13,14,15,17,24,32,42,44,56,65)

Mr. Magni requested Officer Fisher to inspect their elevator shaft workplace. Officer Fisher found their workplace properly guarded (Tr. 13,16,44,68) When Officer Fisher informed Mr. Magni of the hazards he and his help were exposed to, Mr. Magni stated he would contact his office. (Tr. 43)

Respondent's two employees were not performing work at the site from 8:30 a.m. when Officer Fisher spoke to them, until after lunch time when Officer Fisher located them at their fourth floor workplace. (Tr. 55,67) Respondent did not create the hazards observed or control the areas where the hazards were located. (Tr. 48,49)

Officer Fisher believed that the unguarded floor openings, the unguarded ramp and open-sided first floor, and the lack of handrails and tread fillings on the east side stairwell exposed Respondent's two employees to fall hazards which could seriously or fatally injure the two employees. (Tr. 16,17,24,25,29,34,35,39) He proposed adjusted penalties of $350.00 for the floor opening hazards, $400.00 for the unguarded open-sided floor hazard, $400.00 for the unguarded ramp hazard, $350.00 for the stairwell fall hazard, and no penalty for the unfilled treads hazard. (Tr. 18-19, 27-28, 32, 36)

Mr. Wolf Weisblatt, Respondent's President, stated Respondent's employees are instructed to inspect their worksite to determine if it is a safe place to work. The safety determine is left to the judgement of its foreman. Mr. Magni called his employer after speaking with Officer Fisher. Mr. Magni was told by his supervisor to stay at the site, to ascertain what Officer Fisher had to say about their work area, and to make a determination as to the safety of the work site. Respondent was informed by Mr. Magni that it would be cited, and that the general contractor was taking steps to correct the violations. Although the two employees should have left the work site, they returned to work in the afternoon. (Tr. 74-77,81,83) The general contractor had abated the ramp violation by 4:00 pm of the inspection day. (Tr. 59,64)

## OPINION

The evidence is undisputed and clearly establishes that the four serious violations and the one nonserious violation existed at Respondent's workplace on April 19, 1979. The evidence also establishes that two of Respondent's employees were exposed to the hazards created by the violations; and that Respondent did not create the hazards, or control the areas where the hazards existed.

Respondent in its letter of October 22, 1979, treated as a post-hearing brief, contends that Respondent instructed

its employees to leave a worksite where safety hazards exist; that its two employees at the East 63rd Street worksite, disobeyed this instruction on April 19, 1979, and subjected themselves to the hazardous working conditions, when they entered the worksite in the morning, when they met with Officer Fisher pursuant to Fisher's instructions, at their elevator installation workplace on the fourth floor, and when they started working in the early afternoon on the assumption that the general contractor was correcting all the violations. Respondent admits that its two employees recognized the hazards but disobeyed Respondent's instructions to leave the unsafe worksite, thereby exonerating Respondent from any responsibility.

Respondent's contention that it is not responsible for the unsafe working conditions at the site because its two employees disobeyed Respondent's instructions, is without merit and is not supported by the evidence.

At the hearing, Respondent admitted it left the determination of whether a worksite is safe or not, to the judgement of its foreman. Respondent cannot divest itself of responsibility by delegating to its foreman the responsibility of determining a worksite's safety. The foreman's determination is Respondent's determination. Respondent is responsible if the foreman's judgement is erroneous.

Further the evidence establishes that Respondent's foreman, Mr. Magni, was informed by his supervisor to stay at the worksite, to make the safety determinations, and to ascertain what Officer Fisher had to say about Respondent's specific work area. Officer Fisher did not request Respondent's employees to stay at the site, and did not request to meet them at their fourth floor worksite. The employees, pursuant to their supervisor's instructions, requested Officer Fisher to inspect their fourth floor worksite.

There is no evidence other than the general instructions given its employees, that Respondent made any reasonable efforts to protect its employees from safety hazards they might encounter at this or any other construction worksite. Respondent knew of the violations and is responsible for them.

The four violations arising from the two unguarded floor openings, the unguarded ramp and open-sided floor, and the lack of handrails on the east stairwell, were serious in that the hazards created by the violations exposed Respondent's two employees to fall hazards of eight to twenty feet. If an accident occurred to the employees because of the hazards, it was more likely then not that the employees could suffer serious physical harm.

The gravity of the violations were moderate to low. The hazards existed in areas to which the two employees had access, and used to reach or leave their work stations. The two men although present on the site, did not work during the morning hours. They commenced their elevator installation work after lunch while the ramp violation was being abated.

Under all the circumstances, including the gravity of the violations and a consideration of the statutory factors of Section 17(j) of the Act, the proposed penalty for the serious violation of 29 CFR § 1926.500(b)(1) is reduced to $100.00; the proposed penalty for the serious violation of 29 CFR § 1926.500(d)(1) is reduced to $200.00; the proposed penalty for the serious violation of 29 CFR § 1926.500(d)(2) is reduced to $200.00; and the proposed penalty for the serious violation of 29 CFR § 1926.500 (e)(1)(ii) is reduced to $150.00. The proposed penalty of zero for the nonserious violation of 29 CFR § 1926.501(f) is proper.

## FINDINGS OF FACT

The credible evidence and the record as a whole establishes preponderant proof of the following specific findings of fact.

1. Respondent, Weisblatt Electric Company, Inc., maintains an office and place of business at Route 208, Post Office Box WE, Maybrook, New York.

2. Respondent is in the elevator installation business and admits its business affects commerce.

3. On April 19, 1979, Respondent was the elevator installation contractor at a six story office or apartment building construction site, at 21 East 63rd Street, New York, New York.

4. Respondent had two employees at the site, a foreman and a mechanic.

5. Respondent admits and does not dispute that the violation set forth in the serious and nonserious citations, and the hazards created by the violations existed at the worksite on April 19, 1979.

6. Respondent did not create the hazards, or control the areas where the hazards existed.

7. Respondent's specific work areas on the site were safe and properly guarded.

8. Respondent delegates the responsibility to its employees to inspect a worksite and determine its safety.

9. Respondent having delegated the authority and responsibility to its foreman at the worksite, to determine the safety of the site, cannot divest itself of responsibility if its foreman's judgement or determination is erroneous.

10. Respondent is responsible for the violations.

11. There is no evidence other than the general safety instructions to its employees, that Respondent made any reasonable efforts to protect its employees from the hazards at the site.

12. Respondent's two employees were exposed to fall hazards of eight to twenty feet created by the violations.

13. If a fall accident occurred to Respondent's employees because of the serious hazards, it was more likely then not that the employees could suffer serious physical harm or death.

14. The gravity of the serious violations was moderate to low.

## CONCLUSIONS OF LAW

1. Respondent is, and at all times material herein was, engaged in a business affecting commerce within the meaning of Section 3(5) of the Act (29 U.S.C. § 652(5)).

2. The Occupational Safety and Health Review Commission has jurisdiction over the subject matter and parties to this action.

3. On April 19, 1979, Respondent was in serious violation of 29 CFR §§ 1926.500(b)(1), 1926.500(d)(1), 1926.500(d)(2) and 1926.500(e)(1)(ii), and in nonserious violation of 29 CFR § 1926.501(f).

4. Under the circumstances of this case with due consideration of the statutory factors of Section 17(j) of the Act, the proposed penalties for the serious violations are reduced as follows:

a. The violation of 29 CFR § 1926.500(b)(1) to $100.00.
b. The violation of 29 CFR § 1926.500(d)(1) to $200.00.
c. The violation of 29 CFR § 1926.500(d)(2) to $200.00.
d. The violation of 29 CFR § 1926.500(e)(1)(ii) to $150.00.

The proposed penalty of zero for the nonserious violation of 29 CFR § 1926.501(f) is proper.

## ORDER

Due deliberation having been had on the whole record, it is hereby

ORDERED that the citation (no. 1) for serious violations of 29 CFR § 1926.500(b)(1), 1926.500(d)(1), 1926.500(d)(2) and 1926.500(e)(1)(ii) is affirmed, it is further

ORDERED that the total proposed penalty for the serious violations as allocated in paragraph 4 of the Conclusions of Law, is reduced from $1,500.00 to $650.00, and as reduced, is affirmed, it is further

ORDERED that the citation (no. 2) for a nonserious violation of 29 CFR § 1926.501(f), and the zero penalty proposed are affirmed.

Jerome C. DiTore

JEROME C. DITORE
JUDGE, OSHRC

Dated: December 18, 1979
New York, New York

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

May 19, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Anheuser-Busch, Inc.

OSHRC DOCKET NO. 79-5002

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF ORDER OF REMAND

To wit: See Attached.

FOR THE SECRETARY OF LABOR

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FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/78

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>ANHEUSER-BUSCH, INC.,<br><br>Respondent,<br><br>TEAMSTERS LOCAL UNION NO. 947,<br><br>Intervenor Employee Representative. | OSHRC Docket No. 79-5002 |

ORDER OF REMAND

This case is before the Commission on remand from the United States Court of Appeals for the Eighth Circuit. The court reversed a decision by former Administrative Law Judge Brenton vacating a citation that alleged a violation of 29 C.F.R. § 1910.23(c)(1). The court held that the cited surfaces were "platforms" within the meaning of 29 C.F.R. § 1910.21(a)(4), ordered that the citation be affirmed, and remanded for further proceedings consistent with its opinion. On rehearing, the court held that because Judge Brenton had not made findings on whether the violation was de minimis, it would not consider whether the citation should be affirmed as de minimis. It stated that on remand initial findings may be made on that matter. Donovan v. Anheuser-Busch, Inc., 666 F.2d 315 (8th Cir. 1981), reh'g denied, 666 F.2d 328 (1982). The case is remanded to the Chief

Administrative Law Judge for further proceedings consistent with the opinions of the court.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: MAY 19 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 240

ATLANTA, GEORGIA 30309

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| SECRETARY OF LABOR, | ) | |
| Complainant, | ) | |
| v. | ) | OSHRC Docket No. 79-5002 |
| ANHEUSER-BUSCH, INC., | ) | DECISION AND ORDER |
| Respondent, | ) | |
| and | ) | |
| TEAMSTERS LOCAL UNION NO. 947, | ) | |
| Intervenor Employee Representative. | ) | |

APPEARANCES

Bobbye D. Spears, Regional Solicitor,
Natalie Elaine Nelson, Esquire,
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on behalf of complainant.

A. Graham Allen, Esquire,
Freeman, Richardson, Watson, Slade,
McCarthy and Kelly, P.A.
Jacksonville, Florida,
on behalf of respondent.

Lewis Loss, President,
Teamsters Local 947,
Jacksonville, Florida.

Brenton, Judge

## STATEMENT OF THE CASE

This case involves the intermittent presence of laboratory technicians, maintenance, and production personnel on top of pasteurizers about six feet above the floor in the performance of certain duties assigned to them during the production of canned beer.

Inspection of respondent's Jacksonville, Florida, brewery on May 1, 1979 through May 7, 1979, by complainant pursuant to the Occupational Safety and Health Act of 1970, resulted in a citation for a §5(a)(2) of the Act non-serious violation. Respondent contested a portion of that citation.

After a complaint and an answer were filed, the case was heard in Jacksonville, Florida, on January 31, 1980.

## THE CHARGE

That top of pasteurizers, units 10, 20, 50, and 70, were open-sided floors or platforms four feet or more above adjacent floor, upon which employees entered for inspection purposes on a routine predictable and scheduled basis with approximate daily exposure to those open sides [29 C.F.R. 1910.23(c)(1)].

## THE STANDARD

Provides that every open-sided floor or platform four feet or more above adjacent floor or ground level shall be guarded by a standard railing [or its equivalent].

## JURISDICTION

Respondent by its answer to the complaint conceded it is engaged in a business affecting commerce.

## ISSUES

Whether the tops of the pasteurizers in issue are platforms within the meaning of complainant's definition of a platform (29 C.F.R. 1910.21(a)(4))?

If the tops should be construed as platforms, whether the exposure is de minimis?

## RESERVED RULING ON MOTION

Respondent objected to receiving evidence on any work related matters not directly connected with the inspection of spray headers as alleged in the citation. Ruling on that objection was reserved to this point in time. Respondent was not taken by surprise and was well aware of the expanded situation. Accordingly, the evidence objected to is allowed to stand of record in this case.

## FINDINGS OF FACT

The material facts are not disputed. Each can-line pasteurizer is approximately six feet in height, 100 feet in length, and 25 to 30 feet in width. The top is essentially flat and consists of stainless steel lids [plates]. Each is five feet in length and two feet in width. They are laid out in nine parallel rows, each row containing 18 plates. Each plate is equipped with an L shaped lifting handle. Fixed ladders with guardrails are provided for ascent and descent to and from the top of each pasteurizer.

Cans are fed into one end of a pasteurizer and are discharged out the opposite end. Aluminum logs are placed on the conveyor belt to separate beer destined for Georgia from beer destined for Florida [to indicate changes in lid type or crown changes]. As those logs are discharged, they are placed on top of the pasteurizer at the discharge end. These logs [bars] are about ten feet in length and weigh six to eight pounds. At periodic infrequent intervals an employee will ascend the top and carry the logs down the middle and place them at the discharge end. In the performance of that operation, the employee is never closer than ten feet to the perimeter of the pasteurizer. Occasionally, a foreman requests an employee to ascend the top to open a lid to observe the progress of the logs so as to determine when they will reach the discharge end. Those two operations require ten minutes per day.

The tops of the pasteurizers are washed and mopped once each week. One employee is engaged in this operation for over an hour using a broom and a mop with a handle five feet in length. His exposure to the perimeter, if any, is miniscule.

Maintenance personnel may ascend the top of a pasteurizer to repair spray heads. At such time, the operation of the pasteurizer is shut down. In the performance of his work the mechanic is usually standing down inside the pasteurizer up to his hips. This kind of operation can occur once or twice a week, usually on week ends when the pasteurizers are shut down.

Among other duties, laboratory technicians check spray headers in the pasteurizers. Each can-line pasteurizer is so inspected at two weeks intervals. The operation is performed on top of the pasteurizer by two laboratory technicians. One raises each lid or plate by using a hook and the other views the spray heads and makes a record of the inspection. The several technicians testifying estimated the time engaged in this operation from 40 to 60 minutes and about one-fifth of that time would be spent near the perimeter. Exposure near the perimeter, not nearer than 30 inches, averages between eight and twelve minutes per technician every two weeks.

The pasteurizers are not equipped with perimeter guardrails and no other equivalent protection is provided to guard against falls from the perimeter.

No employee, required to ascend to the top of a pasteurizer to perform those tasks, as set forth above, operates production machinery or equipment of any kind whatsoever.

During the 11 or 12 years this facility of respondent's at Jacksonville, Florida, has been in operation, no employee has ever fallen from the perimeter of any pasteurizer.

## LAW AND OPINION

In this case, complainant structured his citation conforming in part to the law as pronounced by the United States Court of Appeals for the Second Circuit in General Electric Company v. Occupational Safety and Health Review Commission, 583 F.2nd 61 (1978). This is evidenced by the fact that he confined his charge to employees required to be present on the pasteurizer "on a routine predictable and scheduled basis" for inspection purposes. That, of course, refers to the laboratory technicians but ignors the fact that the Second Circuit confined the elevated working space to one designed primarily for the operation of machinery and equipment.

This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, thus, the Review Commission is not bound to follow the law of the Second Circuit as laid down in General Electric Company v. OSHRC, supra.

At this point in time a consensus among the commissioners does not exist with respect to a clear and unified interpertation of the true meaning of the complainant's codified definition of "platform." That definition is:

> "A working space for persons, elevated above the surrounding floor or ground, such as a balcony or platform for the operation of machinery and equipment." (29 C.F.R. 1910.21(a)(4)).

Complainant argues that the Second Circuits' interpretation of complainant's definition of "platform" is restrictive only to a worker's presence on a flat surface merely for the performance of infrequent maintenance functions. That argument is based upon a footnote to that decision (pages 66 and 67, note 9). Complainant has misread that footnote. That footnote is attached to the end of a lengthy discussion by that Court showing how surprisingly inconsistent and unpredictable the

Commission, the Commission's Administrative Law Judges, and OSHA's compliance officers have been with regard to the definition of the term "platform." That court in that footnote merely stated that the cases in its text and those cited in that note served to demonstrate the confusion generated by the term "platform." Also, that those cases show only a single thread of continuity whenever a"platform" has been found to exist, which was where workers had been assigned to do work on that surface with some regularity and the nature of the work assigned had been central to the processes of the employer.

The Second Circuit by that footnote in no way departed from its interpretation of complainant's definition of the term"platform." In view of that definition, the court described its interpretation of §1910.23(c)(1) as reasonable and said it applies:

> "Only to elevated working spaces, 4 feet or [more] above the ground level, which are designed primarily for the operation of machinery and equipment and which require employee presence on a predictable and regular basis; and not to spaces where only occasional maintenance or repair work is performed."

That court further said:

> ". . . . to depart from this interpretation of the standard is to venture into unreasonableness."

Complainant further argues that the surface of each pasteurizer is a machine in operation where employees monitor the operation and use equipment to make repairs. Complainant concedes that the pasteurizer is non-operating during repair work. During the monitoring [inspection of spray headers] the pasteurizing machinery, all of which is enclosed below the top or surface of the pasteurizer, is in automatic operation. No employee operates the pasteurizer when engaged in an activity on top of the pasteurizer, nor is he required to operate any machinery on

that surface (Tr. 49). The only equipment used or operated on that surface was a bucket, mop, broom, a hook to lift lids, recording paper and pencil, mechanical tools and welding equipment for repairs, and aluminum logs. None of that equipment was permanently affixed to the surface of the pasteurizer nor was that surface, used to perform the work as described by the evidence, designed primarily for the operation of such equipment.

Obviously, had the Second Circuit in the General Electric Company case, supra, included in its interpretation of the application of the cited standard,"any work assigned to be performed on a platform with some regularity which in its nature is central to the process of producing [beer]," the case for complainant would be made. Should the Review Commission, however, elect to live with the rational of the court's interpretation of the cited standard, as set forth on page 65 of its decision and as quoted above, the opposite result would occur.

In this tribunal's view, the interpretation of the application of the cited standard, handed down by the Second Circuit, makes sense. If the fashioners of the standard intended that open sides of every conceivable elevated floor or platform [4 feet or more], where any kind of work is performed, be equipped with a standard railing, they would not have included the words of limitation in their definition of the term "platform."

Moreover, even if the theory of the single thread of continuity of the Commission decisions is followed, it can and probably would produce the same result which was appealed to the Second Circuit in the General Electric Company, case, supra. The point is that any or almost any work activity performed on an elevated surface could be adjudged central to the work processes of the employer.

Under that theory, assuming that mopping was the only work activity performed on the top of the pasteurizers, it could be argued in this case that mopping the top was central to the production of beer because of the necessity to keep the top sanitary in the pasteurizing process. To find that the tops of these pasteurizers were designed to receive and operate a bucket, a broom, and a mop would be ridiculous. The theory makes no case for the aluminum bars [logs] and the maintenance men and their equipment. With regard to the inspections, the tops were designed for access to the spray headers for repairs and maintenance. The handles on each lid provided ready access at a desired location. The handles attached to the lids as part of the top were not designed for the operation of the hooks used by the inspectors but rather the hooks were designed for easy lifting of the lids and save bending and stooping.

Circumventing the true meaning of the term "platform" as defined by the standard [29 C.F.R. 1910.21(a)(4)] only leads to endless ramifications in its application with preposterous results.

Moreover, this tribunal would observe that if the Secretary believes every open-sided floor or platform elevated four feet or more must be guarded by a standard railing, as required by the cited standard, then it is perfectly obvious that he should delete his definition of the term "platform" from the regulations.

The portion of the citation contested should be vacated. With that determination, the de minimis use raised by complainant is moot.

## CONCLUSIONS OF LAW

1. The Review Commission has jurisdiction to hear and decide this case.

2. The cited standard [29 C.F.R. 1910.23(c)(1)] applies only to elevated working spaces four feet or more above adjacent floor or ground level, which

require employee presence for the operation of the machinery and equipment for which it was designed.

3. Respondent's pasteurizer tops, units 10, 20, 50, and 70 were not platforms [working spaces] within the meaning of complainant's definition of the term platform [29 C.F.R. 1910.21(a)(4)].

4. Under the facts and circumstances of record in this case, the cited standard does not apply to the surfaces [tops] of respondent's pasteurizers, units 10, 20, 50, and 70.

## ORDER

Citation 1 is vacated as to tops of pasteurizers; units 10, 20, 50, and 70.

No penalty is assessed.

J. Paul Brenton
JUDGE

Dated: May 22, 1980
Atlanta, Georgia

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

Secretary of Labor v. Exeter Drilling Northern, Inc.,
OSHRC Docket No. 80-0496 & 80-1483 (Cons.)

1. Enclosed is a copy of my decision. It will be filed with the Commission on 4/19/82, and will become the final order of the Commission on 5/19/82, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is 5/19/82. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Quentin P. McColgin
Quentin P. McColgin
Judge, OSHRC

Dated: March 30, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>EXETER DRILLING NORTHERN, INC.,<br><br>Respondent. | OSHRC DOCKET NOS.<br>80-0496 & 80-1483<br>(Consolidated) |

APPEARANCES:

Eugene F. DeShazo, Esquire, of Kansas City, Missouri
for Complainant,
David M. Berrett, Esquire, of Denver, Colorado
for Respondent.

DECISION AND ORDER

Quentin P. McColgin, Administrative Law Judge: This is a proceeding under §10(c) of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. §659(c), involving alleged violations of §§5(a)(1) and 5(a)(2) of the Act, 29 U.S.C. §§654(a)(1) and (a)(2).*/ The jurisdictional issues are admitted in the pleadings.

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*/ "Each employer--(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; (2) shall comply with occupational safety and health standards promulgated under this [Act]."

These cases were consolidated because both involve the common issue of whether respondent's failure to provide an automatic up-travel limiting device on the drawworks on its oil drilling rigs constituted a violation of the so-called "general duty clause." The other issue, which concerns Docket 80-1483 exclusively, is whether the failure to use a kelly bushing guard violates the machine guarding standard of 29 C.F.R. §1910.212(a)(1).

A hearing in this matter was held September 10-12, 1980. No appearance was made on behalf of the affected employees or any of them. At the conclusion of the case-in-chief, respondent moved for a dismissal of the actions and the underlying citations. Following argument on this motion, it was taken under advisement. Thereafter, respondent submitted its defense. Complainant declined to submit any evidence on rebuttal. Complainant further declined to make closing argument, indicating that he would rely upon his brief. Respondent elected to make closing argument indicating that it would also submit briefs. Thereafter, both parties submitted briefs in support of their respective postions. Respondent filed with its brief proposed findings of fact and proposed conclusions of law. Additionally, both parties filed reply briefs.

Having heard and observed the witnesses and having considered the testimony and other evidence together with the pleadings and arguments presented in this matter, the undersigned hereby issues the findings, conclusions and order set forth in this decision. To the extent that the proposed findings of fact or proposed conclusions of law have not been adopted in this decision they were rejected as being inaccurate or unnecessary to the disposition of this case. To the extent that there are any pending motions which have not been specifically granted herein, such motions are denied.

## DISCUSSION

### Alleged General Duty Violation

To establish a violation of the general duty clause, the Secretary must prove (1) that the employer failed to render its workplace free from a hazard which was (2) recognized, (3) the occurrence of an incident was reasonably foreseeable, and (4) the likely consequence in the event of an incident was death or serious physical harm to its employees. Wertern Massachusetts Electric Co., 9 BNA OSHC 1940, 1981 CCH OSHD ¶25,470 (No. 76-1174, 1981); (Bomac Drilling, Division of TRG Drilling Corp., 9 BNA OSHC 1681, 1981 CCH OSHD ¶25,363 (No. 76-0450, 1981). The Secretary must also show (5) that there was a feasible means of abating the hazard. National Realty and Construction Co. v. _____ F.2d 1256 (D.C. Cir. 1973). Based upon this record, the charge cannoth be sustained because the evidence does not establish that respondent's workplace would be rendered any more free of the hazard by adopting the method of abatement proposed by the Secretary than it is by using respondent's existing method of abatement.

The specific allegation in Docket No. 80-0496 is:

> Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or were likely to cause death or serious physical harm to the employees in that:
>
> > An automatic up-travel limiting device (cut-off) was not installed on the drawworks of the Exeter rig #22, located at Little Berthod #1, Highway 44 and I-25 in Weld County, to prevent running the traveling block into crown.

The specific allegation in Docket No. 80-1483 is:

> Section 5(a)(1) of the Occuaptional Safety and Health Act of 1970: The employer did not furnish employement and a place of employment which were free from recognized hazards that were causing or were likely to cause death or serious physical harm to the employees in that:

An automatic up-travel limiting device (cut-off) was not installed on the drawworks of the Exeter rig #2 located off Highway 79, four miles north of Bennett, Colorado.

## Description of Rig Hoisting System*/

The drawworks, traveling block, and crown--more properly, crown block--are parts of the hoisting mechanism of a drilling rig which are used to raise and lower the massive weights required to be hoisted during the course of drilling operations. The crown block and the traveling block operate as a dual system of pulleys. The crown block is stationary. It is suspended from the top of the drilling rig (the mast) and is connected to the traveling block by a wire rope (the drilling line) which is wrapped around four pulleys or sheaves in each block. By letting out or drawing in the drilling line, the traveling block can be raised or lowered from as high as the very bottom of the crown block to as low as the rig floor.

The mechanism which lets out and draws in the drilling line is the drawworks. It is a large, heavy object which is situated on the rig floor. It consists of a revolving drum around which the drilling line is spooled or wrapped. It contains various clutches and gears to spool in or let out the drilling line at various speeds. It also contains a main brake which has the ability to stop the drum from turning.

When heavy loads are being raised or lowered, the main brake is assisted by an auxiliary brake to help absorb the momentum created by the heavy loads. If the drilling line is drawn in to the point where the traveling block is immediately below the crown block, and if pressure is still being applied to draw in the drilling line, the drilling line can be expected to become severed. This will cause the

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*/ Source: Excerpt from A Primer of Oil-Well Drilling, 4th Ed. 1979. (C-8)

drilling line to unravel from the sheaves of the crown block and the traveling block and the latter, which weighs 10,000 pounds, will then come crashing from the area of the mast to the rig floor.

It is important to recognize that it takes a combination of two conditions to cause the severing of the drilling line, and the consequent fall of the traveling block. First, the traveling block must be drawn to its utmost position so that it is in effect stationary. (Tr. 44-45, 48)*/ This occurs when the traveling block is immediately below the crown block, or in the parlance of the industry, when the traveling block "hits the crown block." (Tr. 351) Second, there must be continued pressure being applied to draw in the drilling line. Absent such pressure, there would appear to be no danger of the line severing. (Tr. 353) The hitting of the crown block by the traveling block is called "double-blocking." (Tr. 352) It is clearly a hazard recognized by both the industry and respondent. (Tr. 26, 350) Indeed, to protect against this hazard, respondent installs on its rigs heavy blocks of timber made of oak which are suspended below the crown block and which act to cushion the impact of the traveling block in the event of double-blocking and also serve as an audio warning device in such event. (Tr. 351)

Complainant proposed a different method of protection than that used by respondent. Complainant argues that respondent should use an upward-limit travel switch such as the device which is sold under the trade name Crown-O-Matic. (Tr. 48-51, C-4) This device operates to automatically stop the drum contained in the drawworks from spooling. (Tr. 102) This device is presented as a fail-safe method of preventing the recognized hazard of double-blocking from occurring. (Complainant's Brief at 2) However, after reviewing the conflicting

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*/ The following abbreviations shall be used:
Tr. - Transcript page number
C - Complainant's Exhibit
R - Respondent's Exhibit

evidence on this issue, it is found that such device does not provide complete protection against double-blocking; therefore, it does not render respondent's workplace free from the recognized hazard.

Evidence was elicited from Mr. Matthews, a compliance officer with the Occupational Safety and Health Administration (OSHA), that the installation of a limiting device would prevent the traveling block from hitting the crown block. (Tr. 58-59) Conversely, the evidence elicited from respondent's Vice-President and drilling manager, Mr. Wetterstrom, indicates that in order to perform ordinary drilling operations, the limiting device must, at certain times, be disengaged. (Tr. 359)[*/] Mr. Wetterstrom further testified that the device became inoperative in extremely cold weather and that, depending upon the clearance allowed on the device, coupled with the speed with which the traveling block was being hoisted, the limiting device could not be relied upon to prevent the traveling block from hitting the crown.block. (Tr. 382-383, 408) Finally, Mr. Wetterstrom testified that the device required constant maintenance and adjustment, making it an unreliable personnel safety device. (Tr. 357-358)

While the compliance officer testified that it was not possible for a traveling block to hit the crown block with the limiting device in place, (Tr. 58-59) it appears that his opinion on this issue is based upon a limited familiarity with drilling rig hoisting mechanisms. (Tr. 101-106) Thus, this testimony is rejected in favor of that of Mr. Wetterstrom, whose testimony was based upon a far greater experience and familiarity with the hoisting mechanisms of drilling rigs than was Mr. Matthews'.

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[*/] The Crown-O-Matic promotional literature itself recognizes the need to so disengage the device. (C-4)

Thus, it appears that there is no abatement method which will completely prevent the hazard of double-blocking from occurring. Each of the abatement methods proposed enjoys some substantial risk of an accident occurring as a result of double-blocking, and complainant has failed to prove that its proposed abatement method is superior to that used by respondent. Indeed, based on this record, it appears that the industry and those states that have adopted specific safety regulations for the oil drilling industry consider the two abatement methods to be coequal in efficacy. (Tr. 97-98, 350, R-1 and 2) Accordingly, it is found that the evidence fails to establish the alleged general duty violations.

The Machine Guarding Standard--29 C.F.R. §1910.212(a)(1)

The remaining issue presented here is whether respondent violated the machine guarding standard by failing to guard the rotary table/kelly bushing on its rig #22.*/ This standard, 29 C.F.R. §1910.212(a)(2), provides:

> General Requirements for All Machines (a) Machine guarding--(1) Types of guarding. One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point-of-operation, incoming nip points, rotating parts, flying chips, and sparks. Examples of guarding methods are--barrier guards, two-hand tripping devices, electronic safety devices, etc.

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*/ The specific charge is:

> 29 CFR 1910.212(a)(1): Machine Guarding was not provided to protect operator(s) and other employees from hazard(s) created by: Revolving Rotary Table/Kelly Bushing located on the drilling platform of Exeter Rig #22 at Little Berthod #1, Highway 44, East at I-25, in Weld County.

29 C.F.R. §1926.300(b)(2) was initially pled as an alternative violation; however, complainant withdrew this alternative pleading during the hearing. (Tr. 34)

## Description of Rotating Machinery*/

The exposed pieces of rotating machinery that are involved here consist of the kelly, the kelly bushing, and part of the rotary table. The kelly is a part of the drill stem which begins at the top with the swivel which is hooked onto the hook which hangs below the traveling block and which ends at the bottom with the drill bit. Below the swivel is the kelly which is a three-, four- or six-sided piece of pipe usually about 40 feet long. The kelly is attached to lengths of drill pipe or drill collars. Lengths of drill pipe are connected together and, depending upon the depth at which drilling is being conducted, can extend into the ground for thousands of feet. Finally, connected to the lowest length of drill pipe is the drill bit which actually operates to dig the hole in a rotating motion.

The other pieces of exposed rotating machinery--the kelly bushing and the rotary table--are located at the center of the rig floor. The rotary table consists of a number of different parts, most of which are located below the rig floor. The top surface of the rotary table is generally flush with the rig floor. Most of the rotary table is covered, however, a portion is not. The kelly bushing sits on top of the rotary table. It mates with the master bushing which is a part of the rotary table.

Power is transferred from the engines to the rotary table which generates a rotational motion. When the rotary table rotates, the kelly bushing also rotates. The rotation of the kelly bushing, in turn, causes the kelly to rotate, which then causes the entire drill stem to rotate.

The kelly bushing involved here is a Baash-Ross kelly bushing of the 2-RCS series. (Tr. 436) It and the Varco kelly bushing are the two principal types

*/ Sources: Excerpt from A Primer of Oil-Well Drilling, 4th Ed. 1979 (C-8) and opening statement by respondent which was stipulated as accurately describing an oil rig and its function. (Tr. 21-26, 31)

of kelly bushings used in drilling operations. (Tr. 439) The Baash-Ross kelly bushing involved here is 17 and 1/2 inches in diameter and 24 inches high. It weighs between 1300 and 1500 pounds. (Tr. 507) It is considered by the industry to be the new type of kelly bushing which the industry considers smooth, as distinguished from the old type kelly bushing that contained J-bolts that protruded from its surface. (Tr. 246)

While there are indentations and protrusions on this kelly bushing, they are recessed and rounded so that the sides present a slightly rounded, hemispherical surface and a generally flat surface on top. (Tr. 439, C-6) Its surface is such that it is not likely to catch a chain or a hose, but if such an object were to wrap around the bushing while it is rotating, it would seize the object and cause it to continue to wrap.*/ (Tr. 337-338, 410, 452-457, 500-501).

Two additional terms pertaining to the issues presented here are the "rat hole" and the "mouse hole." The "rat hole" is a pipe upon which the kelly bushing sits when it is disengaged from the master bushing. This pipe is elevated from the rig floor so that the kelly bushing is actually overhead when the crew is working on the rig floor. The "mouse hole" is an opening in the rig floor where lengths of drill pipe are stored.

Complainant's theory of violation is that respondent violated the machine guarding standard by failing to provide a kelly bushing guard. (Tr. 15) As articulated by complainant, the failure to provide such guard resulted in exposing respondent's employees to the hazards of two pieces of rotating machinery, namely, the kelly bushing and the exposed portion of the rotary table. (Tr. 15-16) The hazard of the rotary table is described as:

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*/ The compliance officer who conducted the inspection, Mr. Matthews, opined that the kelly bushing could catch a chain in its indentations and protuberances. (Tr. 70) However, he did not measure them nor did he attempt to find out if they actually would catch. (Tr. 70, 112)

"An employee actually stepping on . . . [the rotary table] . . . and being thrown about the table or platform." (Tr. 16)

The hazard of the rotating kelly bushing is described as:

". . . hoses, chains, and so forth that are used in this area . . . being caught by the bushing." (Tr. 16)

As is evident from the proof offered by complainant, the theory of the latter hazard is that which shall be described here as the entanglement hazard. The danger is that a hose or a chain that are generally used around the rig floor will be caught up in the rotating kelly bushing. The caught-up object could then get wrapped around an employee or one of his appendages and cause the employee to become entangled in the hose or chain that is being wrapped around the rotating kelly bushing. (Tr. 72, 213) This undoubtedly would result in serious or fatal injury--most likely either the crushing of the employee or the amputation of one or more of his appendages (Tr. 72, 213)

As a prelude to considering whether the elements of a violation have been established in this case, two observations are made concerning complainant's theory of the case. First it is observed that the guarding of the rotary table is considered by complainant to be merely incidental to the guarding of the kelly bushing itself. Secondly, it is observed that while respondent's employees are exposed to the kelly which rotates along with the kelly bushing and the rotary table, complainant does not charge respondent with violating the machine guarding standard for failing to guard that piece of machinery. Indeed, the official position with respect to the rotating kelly is, "OSHA is not intending to guard the kelly at this time." (Tr. 256) This is so even though the basic principle underlying the citation is: "Anything that is rotating, a coupler or a shaft, no matter how smooth it is, should be covered."[*/] (Tr. 215, 275)

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[*/] Apparently OSHA does not cite drilling rig operators for failing to guard the kelly because of the difficulties of guarding that piece of machinery. (Tr. 137)

In order to establish a prima facie case that an employer has biolated the cited standard, the Secretary must show (1) the cited standard applies to the facts, (2) there was a failure to comply with the cited standard, (3) employees had access to the hazardous condition and (4) the employer knew or could have known of the condition with the exercise of reasonable diligence. Daniel International Corp., Wansley Project, 9 BNA OSHC 2027, 1981 CCH OSHD ¶25,813 No. 76-0181, 1981)

With one exception, the last three elements are clearly present here.*/ Respondent readily admits that it did not guard the kelly bushing or the exposed portion of the rotary table. Further, the evidence clearly established that one or more of respondent's employees were exposed to the hazard of the rotating kelly bushing. Finally, the evidence shows that a conscious decision was made by respondent's representatives not to guard both the kelly bushing and the rotary table; hence, respondent is charged with knowledge of the conditions.

Respondent does however challenge the applicability of the standard to its operations. This challenge is presented, in part, as a renewal of its pending motion to dismiss. Here, it is contended:

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*/ There is, however, insufficient proof of exposure to the hazard of the exposed portion of the rotary table. As depicted in C-6, the rotary table is situated so that the possibility of someone stepping on it is remote. Furthermore, if someone were to place his foot on the rotary table while it was rotating, it would not likely throw the person into the nearby pieces of equipment. For this to occur, all the weight must be placed on the foot that is stepping on the rotary table, which is not likely to happen unless someone were literally to jump on the rotary table. Realistically, as one commences to step on the table, the rotational force of the rotary table would cause the foot to be brushed back in the direction of the rotation. (Tr. 404)

> The Secretary failed to show that a reasonably prudent person familiar with the oil drilling industry would interpret 29 C.F.R. §1910.212(a)(1), A general machine guarding standard, to require a guard over rotating portions of the rotary table and the kellybushing. (Respondent's Brief at 9)

Two arguments are presented in support of this contention. First it is argued that complainant failed to carry his burden of satisfying the "reasonable man" test which the courts have stated must be applied in interpreting general guarding standards. (Respondent's Reply Brief at 9.) Secondly, respondent argues that a reasonably prudent person familiar with the drilling industry would conclude that the general guarding standard does not require a kelly bushing guard because all but one of the administrative and court decisions preceding the citation which deal with the new style or "smooth" kelly bushings have so held. (Respondent's Brief at 12)

Neither of these arguments support the contention that the standard is inapplicable to rotating parts of oil drilling machinery. As to respondent's second argument, some of the cited cases contain express findings that the machine guarding standard is applicable to oil drilling operations, and those cases which held that the failure to guard kelly bushings was not violative of the guarding standard, base such determinations upon the estabishment of the greater hazard defense.*/

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*/ These cases are identified and discussed <u>infra</u> at p. 19.

Thus, the prior decisions cited by respondent do not support the conclusion that the standard is inapplicable to oil drilling operations even though they may contribute to the industry's underatanding of what protective measures may or may not be required.

Respondent's first argument is also without merit. This argument is based upon respondent's misapprehension that when a general standard is involved, "it must be read to require 'only those protective measures which the knowledge and experience of the employer's industry, which the employer is presumed to share, would clearly deem appropriate under the circumstances.' (Citation omitted)" (Respondent's Brief at 10) This "reasonable employer" showing, which is superimposed upon complainant is, however, limited to those regulations which are not only general but which are also "broadly worded," such as the Personal Protective Equipment Standard of 29 C.F.R. §1926.28(a)*/. S&H Riggers & Erectors, Inc., v. OSHRC, ___ F. 2d, ____, 10 BNA OSHC 1057, 1981 CCH OSHD ¶25,733 (5th Cir. 1981). Here, the machine guarding standard is a general standard, but it is not a broadly worded standard. To the contrary, its requirements are specific by its terms. While it does not specify the particular form of guarding, it is emphatic in its requirement that guarding be provided as protection from "hazards such as those created by . . . moving parts . . ." 29 C.F.R. §1910.212(a)(1).

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*/ This standard provides: "The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees."

Nevertheless, a compelling showing has been made in this case that the machine-guarding standard should not be applied to the oil drilling industry to require the provision of a kelly bushing guard. The basis for this determination is that OSHA has so inconsistently applied the machine-guarding standard to the oil drilling industry (more specifically to the issue of whether kelly bushing guards were required) so as to raise genuine confusion within the industry as to whether the standard applies or not. Because of this circumstance the standard, as applied to this industry, does not meet the Constitutional requirement that it carry "sufficiently definite warnings as to the prescribed conduct when measured against common understanding and practice." U. S. v. Petrillo, 332 U. S. 1, 8 (1947).

The record shows that in some regions of the United States, OSHA enforces the machine-guarding standard to the oil drilling indestry by citing rig operators for failing to guard "smooth" kelly bushings.*/ States in which the standard is so enforced include Colorado, Montana, and, more recently, Kansas. Conversely, there is unrefuted evidence that the standard is not so enforced in many OSHA regions in the country. (Tr. 481, 487, 496)

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*/ There is evidence that the old style "J-bolt" kelly bushings are no longer used on rigs. (Tr. 272) Thus, the inconsistency of OSHA's enforcement program is confined to its policy with respect to what the industry considers to be "smooth" kelly bushings.

Before describing the other actions and inactions by OSHA which demonstrate its inconsistent policies, special consideration shall be given to the testimony of one of the compliance officers, which can be interpreted either as corroborating the evidence cited in the preceding sentence or which constitutes a separate and distinct manifestation of OSHA's inconsistent enforcement policies. This testimony is:

" Q (By Mr. Barret) Is there a kelly bushing used in the industry which is smoother than the ones that are used here?

A Yes. I don't know if they have a picture or not but there are. The sides of them are smoother.

Q If this kelly bushing were completely smooth, by your definition of smooth, would there be a violation charged?

A You've hooked me on that, sir. In Louisiana, we did use that definition for kelly bushing, required a smooth kelly bushing with any protrusion of any type where it could be hung up. We did not cite, we did cite the other. But we did not cite--let's put it this way. If it had protrusions, if there were some protrusion on the kelly bushing such as this, then we cited. In those days, that was the standard." (Tr. 133)

If this testimony were to be accepted as accurately depicting the facts, then it demonstrates the inherent inconsistency of OSHA's enforcement policy. The standard requires that all rotating parts be guarded. Yet here, Mr. Matthews claims that in Louisiana, OSHA did not require smooth kelly bushings to be guarded. The inconsistency here is that whether

smooth or not, the rotating kelly bushing can result in the entanglement hazard. (Tr. 275, 500, 540-541, C-19)

Despite this testimony that there are smoother kelly bushings than that involved in this case, it is found that there are no kelly bushings that are substantially smoother than the Baash-Ross kelly bushing that is involved here. This finding is based upon the testimony of two of respondent's witnesses who are far more experienced in drilling operations and who demonstrated a vastly superior familiarity with the industry, its problems and equipment than did complainant's two witnesses. One of these, was Mr. Wetterstrom, respondent's Vice President and drilling manager. Mr. Wetterstrom, who is a petroleum engineer with nineteen years of experience in the contract drilling industry (Tr. 347-348) testified that he was familiar with the kelly bushings that are available in the industry and that none are smoother than the Baash-Ross kelly bushing used on rig #22. (Tr. 409) The other witness, Mr. Blake, who was qualified as an expert in the field of oil field safety without objection by complainant, (Tr. 432) testified that the kelly bushing involved here was one of the two principal types of kelly bushings that were considered by the industry to be "smooth" kelly bushings.[*/] (Tr. 439) He also iddentified and described the most recent innovations in the design of kelly bushings and testified that these were no smoother than the

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[*/] The other type was identified as the Varco kelly bushing.

kelly bushing involved here. (Tr. 437-439) Finally, he testified that there was no truly smooth kelly bushing (Tr. 439) and that he was unaware of any kelly bushing in the industry that was any smoother than the kelly bushing involved here (Tr. 485)

Having found that there is no smoother bushing than the bushing that is involved here, the most reasonable interpretation of the testimony of Compliance Officer Matthews is that OSHA does not cite oil rig operators in Louisiana for violating the general machine-guarding standard for failing to have a kelly bushing guard.*/ As so interpreted, Mr. Matthews' testimony corroborates the testimony of Mr. Blake that OSHA does not enforce the general machine guarding standard with respect to unguarded kelly bushings in several regions of the country. (Tr. 381, 487 & 496)

Additional evidence of this inconsistent enforcement policy is manifested in the statement contained in the memorandum dated June 19, 1979, from the Director, Federal Compliance and State Programs, to one of OSHA's regional administrators, which provides:

> "Kelly Bushings on oil drilling rigs that are smooth and do not present a potential hazard to employees that might come in contact with the bushings, do not require guarding. However, Kelly Bushings with projections or indentations do present a potential hazard to employees who could come in contact with the Bushing and shall be guarded or employer shall be appropriately cited." (R-6)

Since the kelly bushing involved here is as smooth as any in the industry, the most reasonable interpretation of this statement is that the kelly bushing involved here does not require a guard. Indeed, it

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*/ This interpretation assumes that Mr. Matthews is more familiar with the enforcement policies of OSHA than he is with the physical characteristics of oil rig equipment.

is clear from this statement that this OSHA official has in mind the protection of a hazard which is quite different from the hazard involved in this case. The hazards contemplated by the Director of Federal Compliance and State Programs are those resulting from "contact" with the bushing itself, whereas the hazard noticed in this proceeding is the entanglement hazard.

Since there is unrefuted evidence in this record that contact with a kelly bushing such as that depicted in C-6 does not pose a danger (Tr. 337), it appears that the hazard contemplated by the above quoted OSHA official would not exist in this case. Indeed, the hazard contemplated by that official would ordinarily be present only in those cases involving the old-style kelly bushing with protruding J-bolts.

While the above quoted statement is clearly evidence of OSHA's inconsistent enforcement policy, it also constitutes an express statement by a responsible official of the enforcement authority, indicating a conscious decision to restrict the application of the standard to types of kelly bushings other than that which is involved here. This circumstance alone is a sufficient basis for determining that the standard is inapplicable to the so-called "smooth" type kelly bushings; even though the standard, on its face, would appear to be applicable. See Seattle Crescent Container Services, 7 BNA OSHC 1895, 1979 CCH OSHD ¶24,002 (No. 15242, 1979).

The record further shows that the standard, as applied to the oil drilling industry to require the guarding of smooth kelly bushings, is unenforceably vague. First it is shown that a number of states

wherein oil drilling is prevalent which states have approved health and safety programs do not require the guarding of "smooth" kelly bushings. (Tr. 480) These states are Utah, Michigan, Wyoming, California and Alaska. Only Wyoming's standard contains express provisions exempting kelly bushings from guarding requirements. (Tr. 480, R-1)

Secondly, all but one of the litigated cases which preceded the issuance of the citation sub judice and which involved a "smooth" kelly bushing held that such mechanism need not be guarded. Research discloses eight cases which were decided prior to the issuance of the citation sub judice involving the failure to guard kelly bushings. Two of these were based upon alleged violations of standards other than the machine guarding standard and resulted in the citations being vacated based, in whole or in part, upon the inapplicability of such other standards. DB Drilling Corporation, 78 OSAHRC 21/D2 (No. 76-4668, 1978); MND Drilling Corporation, 77 OSAHRC 183/C5 (No. 76-4149, 1977) (also greater hazard). One case, Signal Oilfield Services, Inc., 78 OSAHRC 39/D1 (No. 77-0226, 1978), which involved the old-style kelly bushing with protruding J-bolts, held that the failure to guard the kelly bushing violated the machine guarding standard. Of the remaining five cases, four vacated citations alleging violations of the machine guarding standard based upon the findings of greater hazard. Graywolf Drilling Company, 78 OSAHRC 94/A3 (No. 77-3803, 1978); Circle Bar Drilling Company, 78 OSAHRC 82/D4 (No. 77-3581, 1978)(also lack of employee exposure); Graywolf Drilling Company, 78 OSAHRC 70/F1, 1978); Hughes Drilling Company, Inc., 79 OSAHRC 58/A2 (Nos. 76-2945 & 76-3574, 1977). In only one of

these eight cases, was the alleged violation of the machine guarding standard affirmed. Fred Wilson Drilling Company, Inc. 78 OSAHRC 67/D2 (No. 77-3578, 1978). However, that decision, which is the only one reviewed on appeal, was subsequently reversed based upon a finding of greater hazard. Fred Wilson Drilling Company, Inc. v. Marshall, 624 F.2d 38 (5th Cir. 1980).

These circumstances, coupled with OSHA's own inconsistent enforcement policies wherein they selectively enforce the machine guarding standard as to kelly bushings and uniformly do not as to the kelly results in creating such confusion within the drilling industry, that the standard, as applied to this industry, does not provide sufficient warning as to its requirements. Thus, as applied to this industry, the cited standard is found to be unenforceably vague. See Diebold Inc. v. Marshall, 585 F.2d 1327 (6th Cir. 1978).

While the foregoing is dispositive of the machine guarding issue, respondent has raised two additional affirmative defenses to this charge. In order to avoid a remand should the foregoing holdings be reversed on appeal, these defenses will also be addressed.

The first affirmative defense is that of impossibility of compliance. This defense is based upon the overwhelming and unrefuted evidence of record that any guard which could be placed upon the rotating kelly bushing would present hazards to respondent's employees which hazards are separate and distinct from the hazards presented by the rotating kelly bushing. This circumstance, it is argued, makes it impossible to comply with the general requirements for machine guards as specified in 29 C.F.R. §1910.212(a)(2) which provides:

> Guards shall be affixed to the machine where possible and secured elsewhere if for any reason attachment to the machine is not possible. The guard shall be such that it does not offer an accident hazard in itself. (Emphasis added)

Despite the compelling logic of this argument, the Commission has held that Subpart (a)(2) of the standard cannot be asserted as an affirmative defense to the machine-guarding standard of subpart (a)(1). Weyerhaeuser Co., 4 BNA OSHARC 1972, 1976-77 CCH OSHD ¶21,465 (Nos. 1231 & 1758, 1977). In view of the Commission's emphatic holding on this issue, the undersigned is constrained to reject this defense even though the record here demonstrates that no guard exists and no guard can be devised, based upon the present state of the art, which do not present hazards themselves.

The final defense is the greater hazard defense. With respect to the first element of this defense, the proof establishes that the use of kelly bushing guards results in the following types of hazards:

1. Interference with the mating of the kelly bushing with the master bushing due to the visual obstruction caused by presence of the guard with consequent risk of hand or finger amputations (Tr. 479)
2. Interference of the kelly bushing guard with the tong lines, creating the possibility of the tongs being swung into a floorhand (Tr. 460 - 461)
3. The possibility that a guard made of expanded metal may catch on the kelly bushing and rotate in such a manner as to present a danger to employees (Tr. 463)
4. The possibility of the guard acting as a deflecting shield in the event of a kick coming out of the well bore (Tr. 464)

5. The possibility that pieces of the kelly bushing or the kelly bushing guard, unseen by the driller, will vibrate loose and then fall down onto the hands when the kelly bushing is raised (Tr. 424-425, 466-468)

6. The possibility of pinched fingers, toes or strained backs resulting from moving the heavy two-piece removable type guard (Tr. 469-470) or the cumbersome combination of the kelly bushing and guard in the case of the one-piece guard (Tr. 479)

7. Blocked escape routes caused by having to find space on the drill floor for a removable type guard (Tr. 472)

These types of hazard are shown to have resulted in injuries ranging from minor bruises (Tr. 465-466 & 479), fractures (Tr. 424-425), the amputation of a hand (Tr. 479) to a fatality resulting from pieces of the kelly bushing falling when the kelly bushing was obscured from view by a guard. (Tr. 466) Additionally there have been other accidents resulting in injuries which are attributable to the presence of a guard. (Tr. 307, 312-312, 315-319, R-4 & 5)

On the other hand, there is evidence of three accidents involving the entanglement of employees with one or more pieces of rotating machinery. In each case, the kelly bushing was unguarded and resulted in either an amputation or a fatality. (Tr. 171-172, 189-196, 204, C-12, C-13 and C-14). While the evidence pertaining to these accidents is far from complete and decidedly speculative, it appears that

one of these three accidents was caused by the unguarded kelly rather than the unguarded kelly bushing (Tr. 447-448, C-14) and another involved the old style kelly bushing which everyone agrees is hazardous and should be guarded. (Tr. 435-437) Only one of these three accidents involved a "smooth" type kelly bushing which could have been prevented by a guard (Tr. 277, 501).

Thus, in comparing the hazards presented by the unguarded, "smooth" kelly bushing against those of the guard itself, it is found that the "smooth" kelly bushing presents more of a hazard guarded than unguarded. Accordingly, it is found that respondent has established the first element of the greater hazard defense.

Respondent also established the second element of this defense--namely that alternative means of protection was provided. This alternative means of protection consisted of the establishment of a written work rule which prohibits employees from being on the drill floor unless the driller is at the console. (Tr. 392, 402-403) This policy would permit the driller to turn off the rotating equipment in the event someone commenced to be entangled in any of the pieces of rotating equipment including the kelly.*/

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*/ In at least two of the three serious accidents which complainant relies upon to establish the hazards of an unguarded kelly bushing, no one was at the console when the employee became entangled. (Tr. 440; C-14. See also Tr. 449-450) It appears likely that either these accidents would not have occurred or they would not have been as serious had the console been manned when the workers commenced to become entangled.

To satisfy the third and final element of this defense, respondent argues that it could not meet the variance procedures specified in 29 C.F.R. §1905.10; therefore, it would have been inappropriate for it to have made application for a variance. Respondent argues that the variance procedures of 29 C.F.R. §1905.10 require the applicant to set forth a statement of when he expects to be able to comply with the standard and that a program exists for bringing him into compliance with such standard. Relying upon the evidence in this case that there is no effective means to guard a rotating kelly bushing, respondent argues that it could not specify in its application when compliance with the standard could be secured. Additionally, it is noted that it has been recognized that when the common understanding within a particular industry is that a particular piece of equipment need not be guarded, such circumstance alone is sufficient to show the inappropriateness of seeking a variance. Diebold Inc. v. Marshall, supra. Thus, it is found that respondent has established all three elements of the greater hazard defense.

In view of the foregoing and pursuant to Fed. R. Civ. P. 52(a) which permits the entry of judgment based upon findings of fact and conclusions of law which appear in a decision, judgment in the form of the order set forth below is hereby entered.

## ORDER

Based upon the foregoing, it is hereby ordered that:

1. Citation No. 1, Items Nos. 1 & 2, in Docket No. 80-0496, are VACATED.

2. Citation No. 1, Item No. 2, in Docket No. 80-1483, is VACATED.

Quentin P. McColgin
Judge, OSHRC

Dated: April 19, 1982

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

S.O. Jennings Construction Corp. v. Secretary of Labor
OSHRC Docket No. 79-69

1. Enclosed is a copy of my decision. It will be filed with the Commission on April 21, 1982, and will become the final order of the Commission on May 21, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is May 21, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Date: April 1, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
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| S.O. JENNINGS CONSTRUCTION CORP.<br>Petitioner | |
| v. | DOCKET NUMBER 79-69 |
| SECRETARY OF LABOR<br>Respondent | |

ORDER

Motion by the Secretary to dismiss the application filed on December 31, 1981, by S.O. Jennings Construction Corp. (Jennings) for an award of fees and expenses under the Equal Access to Justice Act (Act), Pub. L. No. 96-481, 94 Stat. 2325 (1980), (codified at 28 U.S.C. § 2412, 5 U.S.C. § 504) because of lack of Commission jurisdiction to hear the case, or in the alternative for the Commission to grant and award for fees and expenses incurred either before the effective date of the Act or while the case was before the Court of Appeals is opposed by Jennings, the Petitioner.

A short history of the proceedings leading up to the application by Jennings is in order.

After an inspection of Jennings' worksite on July 18, 1978, a citation was issued to Jennings alleging three wilful violations of the trenching standards promulgated by the Occupational Safety and Health Administration, i.e., 29 C.F.R. § 1926.651(i)(1), 29 C.F.R. § 1926.652(b) and 29 C.F.R. § 1926.652(e). A timely Notice of Contest was filed, and the case was tried

before Judge Henry F. McQuade of the Review Commission from January 12-15, 1981, in Washington, D.C. Judge McQuade issued a Decision and Order on May 4, 1981, which affirmed Citation No. 1, Item 1 as a serious violation and assessed a penalty of $1,000, he affirmed Citation No. 1, Item 2 as a serious violation and assessed a penalty of $1,000, and vacated Citation No. 1, Item No. 3. In short, he found two of the items in Citation No. 1 to be serious not wilful, and vacated the third item.

The Secretary filed a petition for discretionary review with the Commission, and upon the failure of the Commission to direct review, the decision of Judge McQuade became a final order of the Commission on April 3, 1981. Section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 661(i). On August 3, 1981, the Secretary filed a petition for review in the U.S. Court of Appeals for the Fourth Circuit. Thereafter the Secretary moved the court for dismissal of this petition which was granted. On December 4, 1981, the petition was dismissed.

The Act which went into effect October 1, 1981, provides for the award of attorneys fees and other expenses to parties who prevail over the Federal government in certain administrative and court proceeedings. Agencies holding covered adjudications are required to establish procedures for the submission and consideration of applications thereunder, said rules to be promulgated after consultation with the Administrative Conference of the United States (ACUS) so as to establish uniformity of the rules implementing the Act. Pursuant to 5 U.S.C. § 504(c)(1) the Occupational Safety and Health Review Commission promulgated interim rules implementing the Equal Access to Justice Act based on model rules issued by ACUS.

The Act establishes a thirty day limit for the filing of applications for fees and expenses. 5 U.S.C. § 504(a)(2). Section 504(a)(2), 5 U.S.C.

§ 504(a)(2) states ". . . A party seeking an award of fees and other expenses shall within thirty days of final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified."

The Occupational Safety and Health Review Commission in its implementing rules to the Act in Subpart C - Procedures for Considering Applications, § 2204.302(a) stated "An application may be filed whenever an applicant has prevailed in a proceeding or in a discrete substantive portion of the proceeding, but in no case later than thirty days after the Commission's final disposition of the preceeding."

Section 2204.302(d) defines "date of final disposition" as:

1) "The date on which the order of the judge disposing of the case becomes final under section 12(j) of the OSH Act, 29 U.S.C. § 661(i) or

2) "The date on which the order of the Commission affirming, modifying, or vacating the Secretary's citation or proposed penalty or directing other appropriate relief becomes final under Section 10(c) of the OSH Act, 29 U.S.C. § 659(c)."

Under Section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 661(i) the judge's order became the final order of the Commission on June 3, 1981, inasmuch as no Commission member "directed that such report shall be reviewed by the Commission."

The Secretary argues that the Commission has no jurisdiction to consider the application filed by Jennings since the Act establishes a 30 day time limit for filing such application. I agree. Both the Act and the Review Commission's rules of procedure implementing the Act direct that any application be filed within thirty days of a final disposition.[1/] The legislative intent demonstrates that this requirement is mandatory. Thusly, the report of the House Committee on the Judiciary, in an analysis of the proposed Act explained that "a party seeking an award of fees must apply to the court within thirty days of final judgment." H.R. Rep. No. 96-1418, 96th Cong. 2d Sess. 18 (1980), reprinted in [1980] U.S. Code Cong. & Ad. News 4984, 4997 (emphasis added). The conference committee similarly "requires a party seeking an award of fees and other expenses to submit an application within thirty days of final judgment. . ." H.R. Rep. No. 96-1434, 96th Cong. 2d Sess. 26 (1980), reprinted in [1980] U.S. Code Cong. & Ad. News 5003, 5015 (emphasis added). This intent is manifest in both 28 U.S.C. § 2412.(d)(3) wherein a court may award fees and expenses and in 5 U.S.C. § 504(a) which deals with the same application at the agency level.

The Act of Congress has created an obligation which heretofore was protected by the principle of sovereign immunity. As such when the statute contains "in itself a statute of limitations, the limitation imposed becomes an integral part of the right of action created by the statute and so limits it that an aggrieved person cannot maintain his suit after the time fixed by the statute has expired." Pennsylvania Company for Insurances on Lives and Granting Annuities v. Deckert et al, 123 F.2d 979, 985 (3d Cir. 1941).

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1/ "A final judgment is one which, if affirmed on appeal, leaves nothing to be done below other than to execute the already rendered judgment" Smith v. Sherman, 394 F.2d 547, 551 (6th Cir. 1965). It is apparent that on June 3, 1981, the Order and Decision of Judge McQuade became final.

The petition filed by Jennings for an award of fees and expenses on December 31, 1981, was filed beyond the thirty day period allowable, to wit, the filing made over five months after its due date under 5 U.S.C. 504. The jurisdictional limitations on the Commission's powers under the Act is explicit. Absent the authority to act on this application after the thirty day filing period set down by statute, the application must fail.[2/]

Accordingly, the Secretary's motion to dismiss the application before the Commission for lack of jurisdiction is granted.

Application is dismissed.

IRVING SOMMER
Judge, OSHRC

Dated: April 21, 1982
Washington, D.C.

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2/ The contention of Petitioner that there was no final order of the Commission until the appeal was decided, thusly extending its time to 30 days after December 4, 1981, when the Court of Appeals dismissed the petition of the Secretary, is without merit.

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

Secretary of Labor v. PHELPS DODGE CORPORATION
OSHRC Docket No. 81-0864

1. Enclosed is a copy of my decision. It will be filed with the Commission on April 21, 1982, and will become the final order of the Commission on May 21, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is May 21, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Richard J. Murphy
Judge, OSHRC

Date: April 1, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 81-0864 |
| PHELPS DODGE CORPORATION, | : | |
| Respondent. | : | |

Appearances:

MARSHALL P. SALZMAN, ESQUIRE
U. S. Department of Labor
450 Golden Gate Avenue
San Francisco, California 94102
For Complainant

JAMES G. SPEER, ESQUIRE
STEPHEN W. POGSON, ESQUIRE
Evans, Kitchel and Jenkins
363 North First Avenue
Phoenix, Arizona 85003
For Respondent

DECISION AND ORDER

RICHARD J. MURPHY, JUDGE

A workplace under the operation and control of Respondent was inspected by the Occupational Safety and Health Administration (OSHA) on November 19, 1980. The inspection was at the bedding plant located in Respondents plant in Morenci, Arizona. As a result of that inspection a citation was issued alleging violation of the Occupational

Safety and Health Act of 1970 (29 U.S.C.651, et seq) (Act). On May 13, 1981, a formal complaint was filed which was answered by Respondent by May 26, 1981. In its answer Respondent admitted that it has employees at the Morenci plant; that it is engaged in a business affecting interstate commerce within the meaning of section 3(5) of the Act. I find and conclude that respondent is subject to the jurisdiction of this Commission pursuant to section 10(c) of the Act.

After the hearing in this case commenced on February 2, 1981, the parties reached a settlement of the issues and were granted leave to file a document setting forth the terms of the settlement. The settlement agreement dated February 4, 1982, has been considered and is approved. It is therefore ordered that the Citation, Pleadings, and proposed penalties, as modified or amended by said settlement agreement, are affirmed.

Richard J. Murphy
Judge, OSHRC

Dated: April 21, 1982
CHICAGO, ILLINOIS

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| 79-6605 | SPECIAL COATING SYSTEMS OF NEW MEXICO, INC. [remand] | 5/26/82 | 29/B7 |
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| | (Judge's decision) | | 29/D9 |
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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

May 25, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

ACKERMANN ENTERPRISES, INC.

OSHRC DOCKET NO. 80-4971

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

- Counsel for Regional Litigation
  Office of the Solicitor, USDOL
  200 Constitution Ave., NW. - Rm. S-4014
  Washington, D.C. 20210

- William S. Kloepfer
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  801 Second National Bldg.
  Ninth and Main Street
  Cincinnati, Ohio 45202

FOR EMPLOYEES

-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Joe D. Sparks
Judge, OSHRC
- 1365 Peachtree Street, N.E.
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Atlanta, Ga. 30309

Rev. 10/1/76

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>ACKERMANN ENTERPRISES, INC.,<br><br>Respondent. | OSHRC Docket No. 80-4971 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge Joe D. Sparks is before the Commission for review pursuant to section 12(j), 29 U.S.C. §661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§651-678 ("the Act"). The Secretary of Labor ("Secretary"), cited Respondent, Ackermann Enterprises, Inc. ("Ackermann"), for, among other things, a violation of section 5(a)(1) of the Act, 29 U.S.C. §654(a)(1). 1/ The citation alleged that three employees were riding in the front bucket of a tractor and were exposed to the hazard of falling or being thrown from the bucket as the tractor traveled between two buildings at Ackermann's construction site. Judge Sparks vacated the citation on the basis that all evidence of the alleged section 5(a)(1) violation was based on impermissible observations by

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1/ Section 5(a)(1) of the Act provides:

Sec. 5(a) Each employer --

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

an Occupational Safety and Health Administration ("OSHA") compliance officer that occurred prior to issuance of an inspection warrant. Commissioner Cleary granted the Secretary's petition for review, particularly directing the Commission to consider the following issue:

> Whether the administrative law judge erred in excluding evidence gathered by the Secretary in support of an alleged 5(a)(1) violation on the ground that the evidence was obtained in violation of Respondent's Fourth Amendment rights?

For the reasons that follow, we reverse the judge's finding that the inspection violated the fourth amendment, and we remand the case for further proceedings.

I.

On June 10, 1980, OSHA compliance officer Robin R. Medlock was returning to Cincinnati, Ohio, on Highway 32 in Clermont County after completing an accident investigation at another facility. As Medlock passed Ackermann's construction site, he noticed two conditions that he believed were in violation of OSHA standards. 2/ After arriving at his office, Medlock was instructed by his supervisor to inspect Ackermann's worksite.

At about 12:30 p.m. the following day, Medlock arrived at the worksite, where Ackermann was in the process of erecting a four-building apartment complex. The buildings were arranged in two rows with two buildings in each row. Two buildings were under construction, and a third had some "finish-up" work to be completed, such as the placement of air conditioners. There was no evidence that any of the buildings were occupied by tenants. Medlock drove onto the site between the buildings under construction. An employee informed Medlock that no supervisory personnel were present, but that there might be someone in the worksite office. At the office, Medlock was told by Mrs. Byrd, the office secretary, that only

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2/ Medlock testified that he observed employees on the site not wearing protective helmets. He also observed a "pump-jack" scaffold that was unguarded. No citations with respect to these conditions were issued.

Tom Ackermann, president and owner, or Jerry Westerkamp, superintendent, could authorize an inspection. Mrs. Byrd stated that neither man was at the project at that time, but Mr. Westerkamp might be back a little later. Medlock indicated that he would wait for someone to return, and Mrs. Byrd agreed.

Medlock went to the parking lot just outside the office and waited near his car. After waiting 15 to 30 minutes, he noticed three workers standing in the front bucket of a tractor. 3/ The tractor, which was also carrying lumber, made eight to ten trips between two of the buildings at the worksite. Medlock, standing in the parking lot, was approximately 300 to 350 feet away from the tractor. He observed the bucket through a zoom lens camera and took photographs. The persons in the bucket, however, were also observable by the compliance officer without the use of the zoom lens.

By approximately 3:15 p.m., neither the owner nor the superintendent had arrived, and Medlock left for the day. Two days later he returned, and again Mrs. Byrd was the only person present in the office. When Medlock asked her whether Mr. Ackermann or Mr. Westkamp had been informed of Medlock's earlier visit, Mrs. Byrd replied, "Yes, I explained that to him, . . . and he told me that he didn't want you on the property." Medlock then left the worksite.

An inspection warrant was obtained, and Ackermann's worksite was inspected pursuant to the warrant on July 7, 1980. 4/ No employees were observed riding in the front bucket of the tractor during this inspection. However, during the inspection one of Ackermann's employees admitted that he had ridden in the front

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3/ Medlock also referred to this tractor as a "front-end loader backhoe." Medlock explained that the tractor had a bucket attachment in the front and a backhoe excavating attachment in the rear. Hereafter, this vehicle is referred to simply as a "tractor."

4/ Ackermann at the hearing conceded that the warrant for the July 7, 1980 inspection was valid.

bucket of the tractor at the time of Medlock's initial visit to the worksite on June 11, 1980.

At the hearing, Ackermann's attorney moved to exclude all evidence related to the compliance officer's observations on June 11. He contended that the evidence was secured improperly before a warrant was issued and hence constituted an illegal search under the fourth amendment.

II.

In his decision, Judge Sparks acknowledged Commission precedent that observations by a compliance officer are admissible when made from public areas such as highways. Laclede Gas Co., 79 OSAHRC 94/E13, 7 BNA OSHC 1874, 1979 CCH OSHD ¶ 24,007 (No. 76-3241, 1979). The judge, however, concluded that the "plain view" exception to the inspection warrant requirement was not applicable here, since there was no indication that the conditions observed by the compliance officer were within the view of the general public. The judge found that the parking lot next to Ackermann's office was "a private lot, not like the parking lot of a shopping center." The judge found that the compliance officer had sought and obtained permission to wait for the owner or superintendent to arrive but had not received consent to observe the activities at the worksite.

The judge, citing Marshall v. Barlow's Inc., 436 U.S. 307 (1978) ("Barlow's"), ruled that the observations of the compliance officer before he obtained a warrant were an infringement of Ackermann's fourth amendment rights. 5/ The judge therefore excluded this evidence, as well as the admission by one of Ackermann's employees

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5/ The fourth amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

that he rode in the front bucket of the tractor. The judge reasoned that the latter evidence was a fruit of the improper observations of the compliance officer and hence likewise infringed Ackermann's fourth amendment rights. Finding no untainted evidence to support the alleged section 5(a)(1) violation, the judge dismissed the citation. He did not address whether a violation would have been established if the evidence had been admitted.

III.

On review, the Secretary contends that the judge incorrectly excluded the evidence concerning the alleged section 5(a)(1) violation. The Secretary argues that no violation of Ackermann's fourth amendment rights occurred since the compliance officer was on Ackermann's property with the consent of Ackermann's agent. The Secretary also points out that the conditions observed by the compliance officer were in plain view. The Secretary further contends that no warrant was required since the compliance officer's observations came within the "open fields" exception noted in Air Pollution Variance Board v. Western Alfalfa Corp., 416 U.S. 861 (1974). Ackermann did not file a brief on review.

IV.

Under Barlow's, supra, inspections of employment premises by OSHA compliance personnel under section 8(a) of the Act, 29 U.S.C. § 657(a), are subject to the fourth amendment. Evidence obtained in violation of the fourth amendment may be excluded from Commission proceedings. Sarasota Concrete Co., 81 OSAHRC 48/A2, 9 BNA OSHC 1608, 1981 CCH OSHD ¶ 25,360 (No. 78-5264, 1981), pet. for review filed, No. 81-5621 (5th Cir. June 23, 1981).

In Barlow's, the Court ruled that, while a government inspector is free to observe what is observable by the public, he may not compel entry into a place of business from which the public is barred and conduct an inspection without a warrant. The Court, however, considered it crucial that the entry by the inspector

in Barlow's was sought over the objection of the employer. The Court thus distinguished the employer in Barlow's from "the great majority of businessmen [who] can be expected in normal course to consent to inspection without warrant." 436 U.S. at 316. Therefore, OSHA inspections fall under the general rule that there is no fourth amendment violation when consent is voluntarily given to the warrantless search or inspection. Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Stephenson Enterprises, Inc. v. Marshall, 578 F.2d 1021 (5th Cir. 1978); Marshall v. Western Waterproofing Co., 560 F.2d 947 (8th Cir. 1977).

We agree with the Secretary that the observations by compliance officer Medlock did not violate the fourth amendment. Mrs. Byrd, the only employee present at Ackermann's office on June 11, 1980, assented to compliance officer Medlock's request to wait at the worksite for the return of Ackermann or Westercamp. Since Mrs. Byrd was the office secretary and was alone in the office, it is reasonable to infer that she had authority to permit a visitor to wait for the owner or superintendent to return, even though she lacked authority to permit a tour of the worksite. Indeed, no contention has been made to the contrary. We therefore are in accord with the judge's finding that Ackermann's agent consented to Medlock's presence on the parking lot. However, unlike the judge, we find that, while in the parking lot, Medlock was not barred from seeing activities and objects around him. A person who consents to an inspection or search of certain areas may deny permission for an inspector to enter other areas. See Walter v. United States, 447 U.S. 649 (1980) (dicta) (plurality opinion). However, if the inspector is granted permission to be in a particular area, his observation of objects in plain view from that area is not a constitutional violation. Harris v. United States, 390 U.S. 234 (1968); see Stephenson Enterprises, Inc. v. Marshall, supra; cf. Titanium Metals Corp. of America, 80 OSAHRC 6/A2, 7 BNA OSHC 2172, 1980 CCH OSHD ¶ 24,199 (No. 14080, 1980) (section 8(a), which is coextensive with fourth amend-

ment, not violated by compliance officers' observation of scaffold violation while on way to administration building), review denied, 636 F.2d 1211 (3d Cir. 1980). Since the tractor here was in plain view from the compliance officer's vantage point on Ackermann's parking lot, 6/ and since Medlock's presence on the lot was proper, we conclude that there was no fourth amendment violation. 7/

There is an additional basis for our conclusion that no fourth amendment violation occurred. There is no violation of fourth amendment rights when a government agent's observations occur in "the open fields," rather than in houses, commercial buildings, or other premises from which the public is excluded. Air Pollution Variance Board v. Western Alfalfa Corp., supra; Hester v. United States, 265 U.S. 57, 59 (1924); Patterson v. NTSB, 638 F.2d 144 (10th Cir. 1980). This is true even if the government agent trespasses on private property to make his observations. Ehlers v. Bogue, 626 F.2d 1314 (5th Cir. 1980); United States v. Williams, 581 F.2d 451 (5th Cir. 1978); Fullbright v. United States, 392 F.2d 432 (10th Cir.), cert. denied, 393 U.S. 830 (1968); McDowell v. United States, 383 F.2d 599 (8th Cir. 1967). Medlock's observation of Ackermann's tractor through the open terrain between two buildings from an apparently unrestricted parking area falls under this "open fields" exception. Because the tractor was readily observable from this area, Ackermann could have no reasonable expectation of privacy with respect to its operation. See Katz v. United States, 389 U.S. 347

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6/ In finding that the observations of the compliance officer were in plain view, we hold that a worksite remains in plain view even where it is observed through a telephoto or zoom lens, and that no exclusion of the evidence obtained in that manner is required. Laclede Gas Co., supra.

7/ Chairman Rowland notes that although Medlock's testimony suggests that Mrs. Byrd specifically denied permission to inspect and only consented to Medlock's waiting for a reasonable time without conducting an inspection, Ackermann did not present sufficient evidence to establish that Medlock's observations were made of or from an area, or at a time, which exceeded the scope of consent. Inasmuch as Ackermann did not meet its burden of proof, Chairman Rowland agrees with the majority that the record does not show that Medlock's observations violated the fourth amendment.

(1967). 8/

V.

Accordingly, we reverse the judge's ruling that evidence of the alleged section 5(a)(1) violation should be excluded, and we remand this case to the judge to address the merits of this alleged violation.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
Executive Secretary

Dated MAY 25 1982

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8/ Chairman Rowland does not join in the discussion of the open fields issue. Not only is the discussion of that issue unnecessary for the disposition of the case, see note 7, supra, but in Chairman Rowland's view, the record does not clearly support the majority's conclusions that, absent the consent from Mrs. Byrd, Medlock's observations were made from an unrestricted area or that Ackermann could have no reasonable expectation of privacy with respect to the area observed.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
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FTS: 257-4197

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| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 80-4971 |
| | ) | |
| ACKERMANN ENTERPRISES, INC., | ) | |
| | ) | |
| Respondent. | ) | |

APPEARANCES:

F. Benjamin Riek, III, Esquire, U. S. Department of Labor, Cleveland, Ohio, on behalf of complainant.

William F. Ultsch, Esquire, Cincinnati, Ohio, on behalf of respondent.

## DECISION AND ORDER

SPARKS, Judge: While waiting in respondent's parking lot for the arrival of a company official with authority to permit an inspection, an OSHA Compliance Officer observed three employees riding in the bucket of a backhoe. Respondent refused to allow an inspection without an inspection warrant and contends that any observations made prior to obtaining the warrant cannot be used as the basis of an alleged violation.

About a month later, after the warrant was obtained, the authorized inspection was conducted on July 7, 1980. During the walk around, an extension cord without a grounding prong was found in one of the work areas.

Two citations were contested: one charged a serious violation of Section 5(a)(1) of the Occupational Safety and Health Act, ("Act"), the general duty clause; and a second alleged a repeated violation of 29 C.F.R. § 1926.401(c).

I

Observations Made Prior to Obtaining a Search Warrant

Respondent contends that observations by the Compliance Officer prior to obtaining an inspection warrant cannot be used as evidence to prove an alleged violation.

On June 10, 1980, Compliance Officer Robin R. Medlock was returning to Cincinnati, Ohio, on Highway 32 in Clermont County after completing an accident investigation (Tr. 11). As he drove along, he saw respondent's construction activity and two conditions which he thought to be in violation of OSHA standards (Tr. 15, 53). After conferring with his supervisor, he was instructed to conduct an inspection of the worksite under OSHA's "general schedule" procedures.

Mr. Medlock arrived at respondent's office near the worksite at approximately 12:30 p.m. to 12:45 p.m., on June 11, 1980. He was informed by the office secretary that only Mr. Tom Ackermann, president and owner, or Mr. Jerry Westerkamp, superintendent, could authorize him to conduct an inspection. The secretary stated that neither man was at the project at that time, but Mr. Westerkamp might be back a little later (Tr. 20). The Compliance Officer then indicated that he would wait around for a while to see if the men returned, to which she consented (Tr. 20).

Mr. Medlock went out into the parking lot right outside the office and waited in and near his car. After waiting 15 to 30 minutes, he observed people riding in the

bucket of a front-end loader backhoe at a distance of about 300 to 350 feet (Tr. 21-22). He watched as they made eight to ten trips in the backhoe and made photographs of them with a camera equipped with a zoom lens (Tr. 23, 93, 107).

Counsel for respondent objected to the admissibility of any evidence concerning the conditions which the Compliance Officer observed on the grounds that evidence secured before a warrant was issued constituted an illegal search (Tr. 21, Respondent's Brief, page 5).

In the watershed decision, the Supreme Court held in Marshall v. Barlow's, Inc., 436 U.S. 307, 98 S. Ct. 1816 (1978), that the protection of the Fourth Amendment extends to businesses and that the OSHA inspector, without a warrant, "... stands in no better position than a member of the public", (436 U.S. 315, 98 S.Ct. 1822). The Court noted, however, that there were no restrictions on reports by employees of conditions which they observe in the non-public areas of an employer's business.

Other cases have held that a compliance officer may properly observe conditions from public areas such as highways. Laclede Gas Company, 79 OSAHRC 94/E13, 5 BNA OSHC 2013, 1979 OSHD ¶ 24,007 (Docket No. 76-3241, 1979).

In the instant case, the Compliance Officer was specifically denied permission to conduct the inspection until approval had been obtained from a designated official. He was authorized to remain on the premises but only for the limited purpose of waiting for an appropriate person to arrive.

While waiting, he saw a backhoe with people in the bucket. Although it was about 300 to 350 feet away, by using the zoom lens of a camera he could tell there were three people in the bucket. Two were young men about 18 years old with wavy hair (Tr. 93, 107).

As a parking lot is a public area to some extent, observations made from it could be considered, arguably, as comparable to observations from a public highway. The parking lot here, however, is a private lot, not like the parking lot of a shopping center. The compliance officer sought and obtained permission to wait, but there is no indication that there was consent to permit more than just wait.

In Laclede gas, supra, which involved an inspection prior to the Barlow's, Inc., decision, the Review Commission held that photographs and observations by a Compliance Officer were admissible when made from a public highway with a telephoto lens at a distance of 200 to 300 feet, even though the photographs were made prior to presenting his credentials to company officials. The decision suggests there is implied consent to observe activities within "plain view."

In the instant case the observations were made from respondent's private property, not a public highway, and were made after the Compliance Officer had been specifically refused permission to conduct the inspection. There is no indication that the conditions were within plain view of the general public. The Compliance Officer's only purpose for being on respondent's property was to conduct an inspection. His observations were not random views seen while going about other business.

The Barlow's, Inc. decision holds that inspections conducted without a warrant or the consent of the employees is an unconstitutional infringement of the Fourth Amendment. The facts of the instant case do not establish actual or implied consent to observe the activities at the worksite.

At the hearing there was no testimony from anyone who had ridden in the bucket of the backhoe or anyone who had observed such activity. There was

testimony by the Compliance Officer that while on his walk around inspection on July 7, 1980, after obtaining a warrant, an employee admitted riding in the bucket. The Compliance Officer testified as follows:

> "I said, ""Do you work for Ackermann Enterprises?"
> And he said, "Yes."
> And I said, "Do you remember me taking photographs at the other end of the building?"
> And he said, "Yes, I remember you taking photographs of us in the front-end bucket."
> And I asked him who the other employees were that work for Ackermann in that bucket at that time, and he said he did not remember who they were. However, that he was an employee that was in the front bucket of that front-end loader." (Tr. 44).

The testimony, although hearsay, was admitted under Rule 801(D)(2) of the Federal Rules of Evidence and would be admissible under the decisions of the Review Commission regarding hearsay testimony. It is clear, however, that all evidence concerning the incident of employees riding in the bucket of the backhoe arise directly from the observations of the Compliance Officer and is likewise found to infringe upon respondent's Fourth Amendment rights. As there is no untainted evidence to support citation number one, it will be dismissed.

II

The Alleged Repeated
Violation of 29 C.F.R. § 1926.401(c)

After obtaining an admittedly valid warrant (Tr. 27), the inspection was conducted on July 7, 1980. During the walk around, the Compliance Officer saw two extension cords which lacked proper grounding. There is considerable confusion in the record whether the two cords were plugged together or one was substituted for the other, but both were at the work site (Tr. 36-37, 99-100, 109-110, 121-123, 148).

Citation number two alleged a repeated violation of 29 C.F.R. § 1926.401(c) in that the grounding path was not permanent and continuous as an extension cord supplying power to a Milwaukee right angle drill had the grounding pin missing.

To the extent there is conflict in the testimony of witnesses, I credit the testimony of the Compliance Officer that he observed an extension cord connected to a power source which was in use or available for use and which lacked a grounding prong (Tr. 37). There is some question whether the extension cord was connected to a right angle drill or a double insulated Sawsall. Witnesses for respondent argue that the extension cord was connected to the Sawsall which was a double-insulated tool and did not require a ground (Tr. 123, 139). Because of the work being done, running duct, the witnesses testified the Sawsall, not the right angle drill, had been used that day (Tr. 146-148). A witness acknowledged that a right angle drill was at the work location but contended it had not been used on the day of the inspection (Tr. 146). The testimony of the employee present at the site, that the right angle drill had not been used that day is credited.

There is no dispute, however, that the right angle drill, which was not double insulated, was at the same location as the ungrounded extension cord and was available for use (Tr. 141, 146). There is no indication the right angle drill had been effectively removed from service. It is sufficient to establish a violation, as here, that the employee was exposed to the hazard by being permitted access to the potentially hazardous condition. Giles & Cotting, Inc., 76 OSAHRC 30/D9 (4/1080), 3 BNA OSHC 2002, 1975-76 CCH OSHD ¶ 20,448 (Docket No. 504, 1976).

The Compliance Officer further testified, firmly and convincingly, that the ungrounded extension cord, itself, presents a shock hazard regardless of the type tool attached to it (Tr. 177-179).

By permitting employees to use an ungrounded extension cord and by permitting access to a tool, which if used with the cord would expose employees to the danger of electrical shock, respondent violated 29 C.F.R. § 1926.401(c). That regulation provides as follows:

> "(c) Effective grounding. The path from circuits, equipment, structures, and conduit or enclosures to ground shall be permanent and continuous; have ample carrying capacity to conduct safely the currents liable to be imposed on it; and have impedance sufficiently low to limit the potential above ground and to result in the operation of the overcurrent devices in the circuit".

Complainant charges the violation is a repeated one, within the meaning of Section 17 of the Act because a previous citation alleging a violation of 29 C.F.R. § 1926.401(c) has become a final order of the Commission (Exhibit G-8; Tr. 81-84).

Exhibit G-8 is a copy of a citation issued to respondent following an inspection of its worksite at 1300 Century Circle, North, Springdale, Ohio. Item four of the citation states as follows:

> "29 C.F.R. 1926.401(c): The path from circuits, equipment, structures, conduit, or enclosure to ground did not have impedance sufficiently low to limit the potential above ground and to result in the operation of the overcurrent devices:
>
> > There was an employee using a portable saw which was connected to a temporary service which had in excess of six (6) ohms resistance to ground".

Official Notice is taken of records of the Review Commission which show that a settlement agreement was entered in the case (Docket No. 78-963) in which respondent withdrew its notice of contest. The alleged violation of 29 C.F.R. § 1926.401(c) was affirmed by order of Judge Cecil L. Cutler, Jr., dated July 24, 1978 (Exhibits A, B, C, & D, attached to complainant's brief).

The same standard, 29 C.F.R. § 1926.401(c), was involved in the 1978 case and the current proceeding (Tr. 82-84, 90-92). Although the language used to describe the violations is substantially different in the two citations, both involve inadequate grounding of electrical equipment. The 1978 citation alleged an insufficient ground as the impedence was too high to trip a circuit-breaker should a short or ground fault occur (Tr. 91). The current violation is a failure to have any ground because of the missing prong of the extension cord.

In a significant decision defining the term "repeated", the Review Commission held as follows:

> "A violation is repeated under Section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation ... The Secretary may establish a prima facie case of similarity by showing that the prior and present violations are for failure to comply with the same standards". Potlatch Corporation, 79 OSAHRC 6/A2, 7 BNA OSHC 1061, 1979 CCH OSHD ¶ 23,294 (Docket No. 16183, 1979).

In this case the same standard has been cited as previously; and although the language is different, both involve defective electrical grounding. As the violations are substantially similar, the Secretary has established a prima facie case of repeated violations, and the respondent has not rebutted that showing. Accordingly, a repeated violation has been proved.

A proposed penalty of $480.00 was recommended by the Secretary (Tr. 87-88). The evidence shows that the defective extension cord was accessible, but the evidence is in conflict whether it was attached to a non-double insulated tool or whether it had been used on the day of the inspection. In any event, the condition was corrected immediately (Tr. 139). The company has about 12 employees (Tr. 160-

161). Considering the gravity of the violation, which is limited in this instance, and the size, history and good faith of the employer, a penalty of $300.00 is warranted for this repeated violation.

## FINDINGS OF FACT

1. Respondent is an employer subject to the Act.

2. The Compliance Officer attempted to conduct an inspection of respondent's construction site on June 11, 1980, but no one was present to give the authorization to do so.

3. Consent was given for the Compliance Officer to wait in the employer's parking lot and, while waiting he observed with the aid of the zoom lens of a camera, three men riding in the bucket attached to a backhoe.

4. Riding in the bucket of backhoe is hazardous and is recognized as such (Tr. 55-57, 64, 66-67).

5. At the time the observations were made, as stated in paragraph three, the Compliance Officer did not have a warrant or the consent of the employer to conduct the inspection.

6. During the walk-around inspection, on July 7, 1980, after a warrant had been obtained, a defective extension cord was discovered in use which lacked a grounding prong. A non-double insulated tool was available and accessible for employee use.

7. The conditions described present the hazard of potential electrical shock to employees.

8. In the event of electrical shock, death or serious bodily injury would likely result.

9. A final order or the Review Commission for a substantially similar violation of 29 C.F.R. § 1926.401(c) is outstanding.

10. A penalty of $300.00 is appropriate for the repeated violation of 29 C.F.R. § 1926.401(c) under the conditions disclosed by the evidence considering the gravity of the violation and the size, history and good faith of the employer.

## CONCLUSIONS OF LAW

1. Testimony and other evidence arising directly from the observations of the Compliance Officer from respondent's parking lot on June 11, 1980, cannot be used to support an alleged violation of the Act.

2. The alleged violation of Section 5(a)(1) of the Act, the general duty clause, must be vacated.

3. Respondent committed a repeated and serious violation of 29 C.F.R. § 1926.401(c).

4. A penalty of $300.00 is appropriate.

ORDER:

1. The alleged violation of Section 5(a)(1) is vacated.

2. The repeated violation of 29 C.R.F. § 1926.401(c) is affirmed.

3. A penalty of $300.00 is assessed.

Dated this 13th day of July, 1981.

Joe D. Sparks

JOE D. SPARKS
Judge

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

May 26, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Special Coating Systems of New Mexico, Inc.

OSHRC DOCKET NO. 79-6605

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION (REMAND)

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR EMPLOYEES

Judge's Office
Occupational Safety & Health
Review Commission
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FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>SPECIAL COATING SYSTEMS OF NEW MEXICO, INC.,<br><br>Respondent. | OSHRC Docket No. 79-6605 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

Administrative Law Judge Vernon Riehl granted a motion by the Secretary of Labor to vacate a notice of contest submitted by Special Coating Systems of New Mexico. The judge found that the citation was properly served and that the notice of contest was mailed after the expiration of the 15-working day contest period set by 29 U.S.C. § 659(a), section 10(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678. The judge's decision was directed for review under 29 U.S.C. § 661(i), section 12(j) of the Act. We remand for further proceedings.

Special Coating Systems argues that the judge erred in finding that it was properly served. In its brief on review, it also argues for the first time that the Commission could entertain a late-filed notice of contest under Federal Rule

of Civil Procedure 60(b). 1/ The Secretary argues that the judge's holding should be affirmed and that Special Coating Systems does not allege sufficient grounds for relief under Federal Rule 60(b).

We decline to consider at this time whether the citation was properly served and whether the notice of contest was untimely. We consider it more prudent in this case to defer any review of those issues until an administrative law judge has had an opportunity to consider the employer's alternative request for relief under Federal Rule 60(b); if relief is afforded, it may then be unnecessary for the Commission to further review this case.

When this case was before Judge Riehl, the Commission's authority to entertain late notices of contest under Federal Rule 60(b) had not been established. The Commission had previously held that it could not grant relief under Federal Rule 60(b) if a notice of contest had not been timely filed. Plessey, Inc., 74 OSAHRC 77/C1, 2 BNA OSHC 1302, 1974-75 CCH OSHD ¶ 18,907 (No. 946, 1974). Only after this case was directed for review did the contrary rule emerge first in J.I. Hass Co. v. OSHRC, 648 F.2d 190 (3d Cir. 1981), and then in Branciforte

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1/ Rule 60(b) states in part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based on been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective applicable; or (6) any other reason justifying relief from the operation of the judgment. . . .

Builders, Inc., 81 OSAHRC 80/A5, 9 BNA OSHC 2113, 2117, 1981 CCH OSHD ¶ 25,591, p. 31,922 (No. 80-1920, 1981). Inasmuch as the parties may not have had a fair opportunity to present evidence on this specific form of relief and because it is more prudent to allow a judge to consider the matter first, we remand this case to the chief administrative law judge 2/ for further proceedings on whether relief under Federal Rule 60(b) should be afforded.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: MAY 26 1982

2/ Judge Riehl has retired.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant<br><br>v.<br><br>SPECIAL COATING SYSTEMS OF NEW MEXICO, INC.,<br>Respondent | OSHRC Docket No. 79-6605 |

ON BEHALF OF COMPLAINANT: ROCHELLE G. STERN, Esquire, U. S. Department of Labor, Office of the Solicitor, Kansas City, Missouri

ON BEHALF OF RESPONDENT: VICTOR E. CARLIN, Esquire, Moses, Dunn, Beckley, Espinosa and Tuthill, Alburquerque, New Mexico

STATEMENT OF CASE

The parties in the above-mentioned cause have submitted this case to me by stipulation.

This is an action wherein the Secretary seeks to vacate respondent's notice of contest to a serious citation alleging a violation of 29 CFR 1926.500(d)(2) because of respondent's alleged untimely filing of a notice of contest. If we determine that the Commission has no jurisdiction of this matter the Secretary seeks, in the alternative, affirmation of the citation, penalty proposed by the citation, and abatement action required for the violation referred to above.

STIPULATED FACTS

1. Respondent is a New Mexico corporation with its corporate headquarters and principle place of business located at 5904 Florence Road,

N. E., Albuquerque, New Mexico.

2. At the time of the compliance officer's inspection and when the citation in this case was issued, respondent was engaged as a painting subcontractor at the Jeffery Energy Center in St. Mary's, Kansas.

3. At the time of the alleged violation and at the time of the citation, respondent employed approximately 11 employees at the Jeffery Energy Center in St. Mary's, Kansas.

4. During the period from August 28, 1979, through August 30, 1979, an inspection was conducted at the Jeffrey Energy Center in St. Mary's, Kansas, by a compliance safety and health officer from the Wichita, Kansas Area Office.

5. A citation alleging a violation of 29 CFR 1926.500(d)(2) together with a notification of proposed penalty was issued on September 7, 1979, pursuant to section 9(a) of the Occupational Safety and Health Act of 1979 (29 U.S.C. 651 et seq.).

6. The citation and proposed penalty were mailed (return receipt requested) on September 7, 1979, to Special Coating Systems, P. O. Box C, St. Mary's, Kansas 66536.

7. The return receipt on said ciation and proposed penalty was signed September 11, 1979, by a Mr. Bruce Ault, an employee of the general contractor at the worksite, Austin Building Company.

8. The correct name of Special Coating Systems is Special Coating Systems of New Mexico, Inc., and its corporate headquarters is at 5904 Florence Road, N. E., Albuquerque, New Mexico.

9. Bruce Ault is not and never has been an employee or agent of Special Coating Systems of New Mexico, Inc.

10. The citation and proposed penalty were transmitted by Bruce Ault to Larry Holm, respondent's work crew foreman at St. Mary's, Kansas, on September 11, 1979.

11. Larry Holm, at all times material herein, has been a work crew foreman of Special Coating Systems at St. Mary's, Kansas. At no time has Mr. Holm been an officer of Special Coating Systems, and at no time has he been involved in the management of said corporation.

12. The citation and proposed penalty, in this case, was received at the corporate headquarters of Special Coating Systems of New Mexico, Inc., in Albuquerque, New Mexico, on October 3, 1979.

13. Respondent's notice of contest was mailed to the Wichita Area Office of the Occupational Safety and Health Administration on October 3, 1979, the same day the citation and proposed penalty were received at the corporate headquarters of Special Coating Systems of New Mexico, Inc.

14. By letter dated October 11, 1979, the Area Director of OSHA received a letter from Larry Holm to the effect that abatement of the aforementioned alleged violation at the Jeffrey Energy Center had been accomplished on the day following the inspection. The letter was written by Larry Holm and signed "Special Coating, Inc., Box C, St. Mary's, Kansas."

15. Said letter was written at the specific request of the OSHA compliance safety and health officer that inspected the Jeffery Energy Center on August 28, 29, and 30, 1979.

16. The law governing this case is the Occupational Safety and Health Act of 1970, federal administrative and judicial decisions

interpreting and applying said Act, and standards duly promulgated by the Secretary pursuant to section 6 of the Act.

## ISSUE

Whether the Review Commission lacks jurisdiction over this matter in light of section 659(a) of the Act.

## DISCUSSION

The Secretary contends that the language of section 10(a) of the Act is unequivocal, and, therefore, respondent is barred from challenging the citations and the Review Commission lacks jurisdiction over this matter. The facts demonstrate that the respondent's notice of intent to contest the citations and penalties was mailed and received beyond the 15 working days provided by the statute.

Further, operation of that provision of the Act does not depend on whether there was prejudice to either party, since the sanction of section 10(a) is statutory. To this we agree.

The Secretary contends that service in the instant case was proper and met the test applied by the Review Commission in B. J. Hughes, Inc., 7 BNA OSHC 1474, Docket No. 76-2165 (1979), which provided:

> . . . that the test to be applied in determining whether service is proper is whether the service is reasonably calculated to provide an employer with knowledge of the citation and notification of proposed penalty and an opportunity to determine whether to abate or contest.

Relying on NLRB v. Clark, 468 F.2d 459 (5th Cir. 1972), and American Football League v. National Football League, 27 F.R.D. 264 (D.Md., 1964), the Review Commission decided that "this approach is consistent with the test applied by the Courts in general when determining sufficiency of service in other areas of law.

Complainant contends that the citation and notification of penalty were forwarded to Larry Holm, respondent's job crew foreman, at the worksite in St. Mary's, Kansas, and that it is reasonable to assume that even though Mr. Holm was not a corporate official, that he should know what to do with the citation and penalty notice, i.e., "know to whom in the corporate hierarchy to forward the documents." B. J. Hughes, supra, at 1474. We agree with this reasoning. Generally, a work crew foreman is in the best possible position with respect to OSHA matters. Job foremen at a local worksite are familiar with the working conditions and practices at the site, and they also have actual knowledge of what transpired during an OSHA investigation. B. J. Hughes at p. 1475.

Holm was responsible for sending the notice to the OSHA Area Office reporting that abatement was accomplished, it also appears that he had management responsibilities over operations and employees at the job-site.

The respondent's return address given by Holm on his letter was a post office box in St. Mary's, Kansas, where the citation and penalty were originally sent by the OSHA Office. Also, respondent has not contended that the Secretary misled him in anyway regarding the time for filing the notice of contest.

It was not necessary for the Secretary to determine who in the corporate hierarchy should be served with the proper documents. Such a requirement places an unreasonable burden on the Secretary. There was valid service upon the responsible employee at a local worksite. The evidence of record demonstrates that the employer received its citation and notice of penalty, and it was, therefore, properly served. See

Kerr-McGee Chemical Corp., 4 BNA OSHC 1739 (1976). The stipulated facts reveal that the citation and penalty notification were received by respondent at its worksite on September 11, 1979.

Respondent's notice of contest was, therefore, untimely filed because it was sent and received beyond the 15 working days from receipt of the citation and notice of penalty at its worksite in St. Mary's, Kansas.

We have considered the respondent's arguments as set forth in his memoranda. The respondent's argument does not establish a proper notice of contest to the Secretary of Labor in the instant case.

The stipulated facts, in the instant case, indicate that the respondent through its job crew foreman, Larry Holm, received notice which was reasonably calculated to provide the employer with knowledge of the citation and notification of penalty, and sufficient opportunity to determine whether to abate or contest, all within the proper framework as set forth by the law.

Respondent through its own supervisory employee had sufficient notice of the citation and proposed penalty. To allow a situation to exist wherein the supervisory employee on the job were to hold back citations and later have the citations vacated because of his acts would be unconscionable insofar as proper implementation of the Act.

As the Commission said in the Hughes case: ". . . an employer always runs a risk that the authority it has delegated to its supervisory personnel will be misused to the company's detriment."

## DECISION

Based upon the above findings of fact and conclusions of law, it is

hereby ORDERED:

1. The Review Commission lacks jurisdiction over this matter in light of section 659(a).

2. The citation, proposed penalty, and abatement date have been affirmed by operation of law.

Date: September 18, 1980

Vernon Riehl, Judge, OSHRC

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

May 27, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Marson Corporation

OSHRC DOCKET NO. 78-3491

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR EMPLOYEES

-

- Judge David J. Knight
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FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>MARSON CORPORATION,<br>Respondent. | OSHRC Docket No. 78-3491 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge David J. Knight is before the Commission for review under 29 U.S.C. § 661(i), section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Judge Knight vacated item 1 of a citation alleging that the Respondent, Marson Corporation ("Marson"), committed a serious violation of the Act by failing to comply with the machine guarding standard at 29 C.F.R. § 1910.212(a)(1). 1/ Commissioner Cleary directed review on the following issue:

> Whether the administrative law judge erred in vacating the alleged serious violation of 29 C.F.R. § 1910.212(a)(1) on

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1/ The standard states:

> § 1910.212 General requirements for all machines.
>
> (a) Machine guarding--(1) Types of guarding. One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are--barrier guards, two-hand tripping devices, electronic safety devices, etc.

> the grounds that [Marson] exercised reasonable diligence and yet lacked knowledge of the presence of the violation?

For the reasons that follow we affirm item 1 of the citation.

I.

Marson, a manufacturer of autobody fillers, operates two Hockmeyer mixers at its Chelsea, Massachusetts plant. Following an incident in which a mixer operator, Soto, had his arm severed by the Hockmeyer no. 2 mixer, Marson was cited for failing to comply with 29 C.F.R. § 1910.212(a)(1) by exposing operators to the unguarded rotating parts and shear points of that machine.

The Hockmeyer no. 2 mixer consists of a cylindrical tank 4 feet in length and 2 feet in diameter fitted with three rotating mixing blades. The tank rests horizontally on four legs. Because the opening of the mixer is about 5 feet above the ground, employees must stand on a 3 foot high platform next to the mixer to feed materials into it. The opening in the top of the tank through which materials are fed into the tank measures 22 inches by 48 inches. Below the opening are mixer blades that rotate with a torque great enough to amputate hands and arms. To protect employees from the moving blades, but permit them to feed materials while the blades are moving, the Hockmeyer no. 2 is equipped with a steel grate or screen over the opening. The grate is held in place by its own weight. Material can usually be added to the mixer through the grate, but a section of the grate can be raised or the entire grate can be removed.

Marson's employees did not remove the grate when the machine was on except when Marglass (a fiberglass filler) was produced out of, among other things, fiberglass. This occurred perhaps once every two months. The grate was removed because fiberglass did not readily pass through it. O'Connor, one of Marson's mixer-operators operated the mixer without the grate. Thiboult, another operator, testified that he did so until he concluded that the practice was unsafe. Soto,

who had been employed by Marson for five days, did not use the grate and had his arm severed as he was emptying a bag of fiberglass into the mixer.

Both Fennessey, Marson's manufacturing manager and head of its safety committee, and Razzak, its technical director, testified that it was company policy that the grates be kept in place when the machine was in operation. Fennessey testified that the policy was enforced by the issuance of warning notices by foremen, and by holding regular safety meetings at which infractions of the policy could be brought to the attention of management by the employees. Fennessey also testified that he made safety tours of the plant. Razzak testified that he physically checked the plant at least once a day. Razzak also testified that technicians, such as Forman, were given a copy of a list of procedures entitled "Responsibilities of the Foreman in the Mixing Room Area" and were requested to write the instructions down as they understood them. 2/ Marson introduced a written transcription of its work rules that Razzak testified had been copied by Forman. Forman testified that the procedures reflected his perception of Marson's procedures but he was not certain it was his transcription. This handwritten document included the following commands:

> 2) With mixer off and screen removed, the stirred paste is added to mixer.

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2/ This document directs the foreman "[t]o check, [that] anybody working in the mixing room uses the safety equipment. ([I]f any mixer [operator] is working with chopped fiberglass he should be double checked for safety equipment)." It also states that the "[m]ixer [operator] should add the white paste when the machine is not running" and directs the foreman to conduct "[r]andom check[s] of the lab technician [to determine] that he is following the procedures." Marson also introduced into evidence a set of instructions governing the manufacture of a number of body fillers. These instructions included a command to "be sure . . . the screen of the mixer is clean and in position" before starting a batch and not to "put your hands in the mixer or do any scraping when the mixer is running . . . or add any powder into the running mixer without the screen."

3) Mixer is placed on slow speed, the screen is replaced, polyester in flow valve is opened and flow meter is started.

Fennessey testified that O'Connor, a mixer, told him that he knew that operating the machine with the grate off was against company policy. A second employee, Thiboult, testified that he knew the practice was contrary to company policy but decided to comply with the rule because he realized the danger presented by the blades, not because of the policy. Forman, the technician in charge of training the mixer-operators and running the mixing room, testified that he observed employees adding material to the mixer with the grate off and the machine on. Soto, the injured employee, testified that he observed other employees pouring compounds into the Hockmeyer no. 2 while it was on and that he had never seen the Hockmeyer no. 2 with the grate on.

Judge Knight vacated the item. He found that Marson knew of the hazard presented by the machine, but did not know of the violative condition even though it exercised reasonable diligence. The judge credited the testimony of Razzak that Marson had a policy against running the machine with the grate on. He implicitly rejected Forman's testimony that he had never been told not to run the mixer with the grate off. He found that Forman and the other technicians, who were responsible for the training and supervision of the mixers, were aware of the dangers of operating a machine without a grate. The judge found nothing to indicate that Forman was inadequately trained. The judge also found that it had not been shown that Marson's safety program was inadequate and that the Secretary had not shown any specific action Marson could have taken to discover the violation.

II.

On review, the Secretary argues that Marson had actual knowledge of the violative condition through its supervisory employee Forman. The Secretary relies on Mercer Well Service, Inc., 77 OSAHRC 178/C6, 5 BNA OSHC 1893, 1977-78

CCH OSHD ¶ 22,210 (No. 76-2337, 1977). He contends that Forman was a supervisor because he was responsible for the training and supervision of employees in the mixing room and that if Forman had received proper instructions, he could have prevented the violations in this case. According to the Secretary, Marson's failure to provide proper instructions establishes a prima facie case of an employer's knowledge of its own acts or omissions.

The Secretary claims that in order to rebut such a prima facie case, Marson would be required to demonstrate that it had a consistently enforced safety program, supervisors adequately trained in safety matters and a mechanism for discovering safety violations. The Secretary argues that even if the command was given not to run the mixer with the screen off, the effectiveness of the rule's communication must be doubted because Marson's employees were either unaware of the rule or felt free to disregard it. Relying on Niagara Mohawk Power Corp., 79 OSAHRC 36/A2, 7 BNA OSHC 1447, 1979 CCH OSHD ¶ 23,670 (No. 76-2414, 1979), the Secretary also contends that because Marson had no mechanism to discover violations of its rules, it failed to enforce its safety program. He argues that detection of violations by the methods Marson employed--safety meetings at which infractions could be pointed out by employees and inspections by Razzak during which he could not actually see whether the grate was in place--would be only accidental.

In conclusion, the Secretary argues that even if the judge was correct in not imputing Forman's knowledge to Marson, he erred in concluding that the Secretary failed to prove a lack of reasonable diligence on Marson's part. The Secretary maintains that an employer "cannot fail to properly train and supervise its employees and then hide behind its lack of knowledge concerning their dangerous working practices," quoting Danco Construction Co. v. OSHRC, 586 F.2d 1243, 1247 (8th Cir. 1978).

On review, Marson urges us to affirm the judge's decision. It contends that it had no knowledge of a violation of the standard by its employees. Marson contends that its safety director and technical director, who conducted safety meetings and made tours of the plant, were unaware that the Hockmeyer #2 was operated without a grate. Marson also argues that because it was entitled to rely on Forman's knowledge of the requirement that no mixer be operated without its grate in place, it did not have constructive knowledge of the violation. To impute the knowledge of a non-management employee, such as Forman, of certain isolated violations of its rules, would Marson argues, amount to the imposition of strict liability.

Contrary to the Secretary's arguments, Marson contends that an ongoing, active safety program was in existence at its plant, and that it disciplined employees who violated its rules. Marson also argues, relying on the holding of the United States Court of Appeals for the Fifth Circuit in Floyd S. Pike Electrical Contractors, Inc. v. OSAHRC, 576 F.2d 72 (5th Cir. 1978), that it can only be held liable for an employee's conduct if that conduct "might have been precluded through feasible precautions concerning the hiring, training, and sanctioning of employees." Marson contends that it did everything it could have done to prevent the violations. It argues that it could not have been expected to discover the occasional violations of the standards unless a management level employee was present when the violation occurred. Thus, it claims that it exercised the degree of diligence required by the Act, and still did not know of the violation.

III.

Section 1910.212(a)(1) requires that employees be protected by a guarding method from the hazards of rotating blades. It is clearly applicable to the cited machine. On the day the alleged violation occurred, the standard was not

complied with because the screen was off and Soto was unprotected from the hazard of the rotating blades. See A.E. Burgess Leather Co., 77 OSAHRC 25/D6, 5 BNA OSHC 1096, 1977-78 CCH OSHD ¶ 21,573 (No. 12501, 1977), aff'd, 576 F.2d 948 (1st Cir. 1978). 3/

Marson claims that it did everything it could have reasonably done to prevent the violation. This claim raises the affirmative defense of unpreventable employee misconduct. In order to establish this defense, an employer must show that it has established workrules designed to prevent the violation, has adequately communicated these rules to its employees, has taken steps to discover violations, and has effectively enforced the rules when violations have been discovered. Jensen Construction Co., 79 OSAHRC 49/D3, 7 BNA OSHC 1477, 1479, 1979 CCH OSHD ¶ 23,664, p. 28,695 (No. 76-1538, 1979). Employees must be properly trained and supervised and must be made aware that the work rules will be enforced. See Danco Construction Co. v. OSHRC, 586 F.2d 1243, 1247 (8th Cir. 1978); see Daniel International Corp., 81 OSAHRC 57/A2, 9 BNA OSHC 1980, 1983, 1981 CCH OSHD ¶ 25,492, p. 31,790 (No. 15690, 1981), appeal filed, No. 81-7602 (5th Cir. July 21, 1981).

We conclude that Marson failed to establish that it adequately trained and supervised its employees and that its efforts to monitor compliance with its

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3/ The judge did find that employees sometimes added fiberglass to the mixer when the screen was off and the mixer was in operation. However, he made no specific finding that the condition presented a hazard, that the standard was not complied with, or that any violation was serious within the meaning of the Act. While a remand to the judge might be necessary in some circumstances in order for the judge to make such findings, here the parties had an opportunity to make a complete record before the judge. Because the Commission has the ultimate authority for making findings of fact, it can make the necessary findings of fact where as here, the record is sufficiently detailed and credibility is not an issue. Franklin R. Lacy (Aqua View Apartments), 81 OSAHRC 7/A2, 9 BNA OSHC 1253, 1254, 1981 CCH OSHD ¶ 25,171, p. 31,073 (No. 3701, 1981). We enter our findings here on the issues not reached by the judge.

rule were adequate. Soto, a new employee, was not apprised of Marson's safety rule; and Forman, the technician in charge of training employees, was not shown to have been adequately supervised in his training duties. After Forman received his initial training, he apparently received no further supervision. Enforcement of the rule was problematic in other respects. Despite safety tours by Fennessey of unknown frequency and thoroughness, occasional visits to the mixing room by Razzak, and a requirement that foremen report rule violations to Razzak, mixer-operators regularly violated the rule when they poured fiberglass into the machine. When one of the operators decided to comply with the rule, he did so not out of fear that he would be observed or disciplined but out of fear of the danger of the unguarded blades. Marson's safety meetings could not be relied on because it was the employees who were expected to raise the matter. Although Razzak was asked by Marson's counsel what would occur if he found an employee violating the rule, Razzak did not testify that infractions would result in disciplinary action. In short, we find that Marson had ineffective means of determining if its rule was followed and that employees were not made aware that the rule would be enforced. 4/

IV.

We also find that the violation was serious within the meaning of section 17(k) of the Act, 29 U.S.C. § 666(j). 5/ Marson failed to adequately implement

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4/ In view of our finding that Marson failed to adequately implement its safety rule we need not reach the issue of whether Forman was a supervisor.

5/ That section provides:

> For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

its safety rule and thus could, with the exercise of reasonable diligence, have known of the violation. See Niagara Mohawk Power Corp., 7 BNA OSHC at 1450, 1979 CCH OSHD at p. 28,703. In addition, the compliance officer testified that an amputation could occur if the mixer opening was not covered. This unrebutted testimony, along with the fact that an amputation occurred, establish a substantial probability of serious physical harm within the meaning of the Act. See Ralston Purina Co., 79 OSAHRC 22/C11, 7 BNA OSHC 1302, 1979 CCH OSHD ¶ 23,507 (No. 76-2551, 1979).

In considering the appropriate penalty, we note that the gravity of this violation is moderately high. Under the circumstances of this case, we find that the $490 penalty recommended by the Secretary is appropriate.

Accordingly, the judge's decision is reversed. We affirm item 1 of the citation and find Marson in serious violation of the Act for failing to comply with 29 C.F.R. § 1910.212(a)(1). We assess a penalty of $490.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: MAY 27 1982

ROWLAND, Chairman, Dissenting:

I dissent from the majority's decision to reverse the judge and affirm the citation in issue. Under Commission precedent, a violation of the Act cannot be found unless the Secretary establishes as part of his case that the employer knew or with the exercise of reasonable diligence could have known of the presence of the violation. Prestressed Systems, Inc., 81 OSAHRC 43/D5, 9 BNA OSHC 1864, 1981 CCH OSHD ¶ 25,358 (No. 16147, 1981); General Electric Co., 81 OSAHRC 42/A2, 9 BNA OSHC 1722, 1981 CCH OSHD ¶ 25,345 (No. 13732, 1981); and cases cited therein. See M. Rothstein, Occupational Safety and Health Law, §§ 76-77 (1978). As the majority correctly observes, the violation in this case occurred when an employee, Soto, was injured by the rotating parts of a machine as a result of his operating the machine without using a guarding device, the metal grate which Marson has provided. 6/ As explained more fully below, Marson did not have actual knowledge of this violation because its supervisory personnel were not present when Soto operated the mixer in this manner. Since the Secretary also failed to demonstrate any defect in Marson's safety program, he has not shown any circumstances sufficient to put Marson on prior notice that an employee might operate the mixer without the grate in place. Therefore, the Secretary has not shown that Marson either knew or reasonably could have known of the violation. The judge properly decided the case, and his decision should be affirmed.

Review of the judge's decision was requested, and directed, on the issue whether the judge erred in finding that Marson lacked knowledge of the violation,

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6/ The judge concluded that Marson provided an adequate guarding device, and he characterized the gravamen of the Secretary's charge as failure by Marson to require the use of this guard. Regardless whether, as the majority claims in note 3 of the lead opinion, the judge failed to make the necessary factual findings, the majority does not dispute the judge's characterization of the issue.

and in their briefs both parties discuss whether or not the facts of record establish such knowledge. Therefore, the only issue properly before the Commission in this case is factual, and in deciding the issue the Commission need do no more than determine whether the evidence of record supports the judge's disposition. See E.I. duPont de Nemours & Co., 82 OSAHRC , 10 BNA OSHC 1320, 1325, 1982 CCH OSHD ¶ 25,883 at 32,381 (No. 76-2400, 1982).

Nevertheless, the majority does not decide this case on the factual issue presented. Rather, the majority injects an issue not directed for review and not briefed by the parties; that is, whether Marson established a supposed affirmative defense of "unpreventable employee misconduct." By deciding the case on this issue, the majority shifts the burden of proof on an essential element of a violation from the Secretary to the employer. 7/ Since this action is contrary to the precedents noted above, as well as to the fundamental principle that the Secretary has the burden of proof in our proceedings, 8/ I must dissent.

I.

The above cited cases supporting the proposition that employer knowledge of a violation is an essential element of the Secretary's case are but a recent expression by the Commission of a long-established principle that the Act does not impose strict liability on employers. As was stated in Prestressed Systems,

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7/ The majority cursorily acknowledges the element of knowledge as a part of the Secretary's case by concluding that the violation was serious in nature under 29 U.S.C. § 666(j) because Marson could have known of it, based on Marson's supposed failure to adequately implement its safety rule. However, at no point in the lead opinion does the majority consider whether the Secretary affirmatively demonstrated that Marson did in fact have knowledge of the violation. Rather, the majority's conclusion that Marson did not adequately implement its safety rule is based on the determination that Marson failed to prove as an affirmative defense that it had an adequate safety program. Since the majority applies the wrong legal test in resolving the question of employer knowledge, its finding must be rejected.

8/ See Commission rule 73(a), 29 C.F.R. § 2200.73(a).

supra, "[t]he Commission has found the burden of proving knowledge to be on the Secretary in furtherance of the Congressional intent that employers only be held responsible for hazards they can reasonably be expected to prevent" (citing cases). 81 OSAHRC 43/D5, p. 11, 9 BNA OSHC at 1868-69, 1981 CCH OSHD ¶ 25,358 at 31,500. 9/

The type of evidence which satisfies this burden will vary depending upon the nature of the violation in issue. In this case, the violation is not the result of any defect in the machinery used by Marson's employees or any failure by Marson to provide appropriate safety equipment. Rather, the violation is based on an employee's failure to use a safety device which Marson had provided. In this situation, the scope of Marson's duty must be measured according to the principle that the Act does not make Marson an insurer or guarantor of proper employee conduct. Brennan v. OSHRC (Raymond Hendrix), 511 F.2d 1139 (9th Cir. 1975). Accord, Horne Plumbing & Heating Co. v. OSHRC, 528 F.2d 564 (5th Cir. 1976). However, in view of the fact that an employer normally acts through its agents, the actions and knowledge of Marson's supervisory employees would be imputed to it, and Marson would be responsible if they have knowledge of the violation. E.g., Floyd S. Pike Electrical Contractor, Inc., 78 OSAHRC 50/E1, 6 BNA OSHC 1675, 1978 CCH OSHD ¶ 22,805 (No. 3069, 1978).

As a result, the Secretary could have established a prima facie case of employer knowledge by demonstrating that a supervisory employee personally observed or reasonably could have observed Soto's misconduct. Ted Wilkerson, Inc., 81 OSAHRC 70/D8, p. 9, 9 BNA OSHC 2012, 2016, 1981 CCH OSHD ¶ 25,551 at

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9/ As the court noted in Brennan v. OSHRC (Raymond Hendrix), 511 F.2d 1139, 1145 (9th Cir. 1975), "[f]undamental fairness [requires] that one charged with and penalized for violation [sic] be shown to have caused, or at least to have knowingly acquiesced in, that violation. Under our legal system . . . no man is held accountable, or subject to fine, for the totally independent act of another."

31,856 (No. 13390, 1981); Minotte Contracting & Erection Corp., 78 OSAHRC 15/D4, 6 BNA OSHC 1369, 1978 CCH OSHD ¶ 22,551 (No. 15919, 1978). However, in order to avoid the imposition of strict liability, Marson could then rebut the Secretary's case by showing that it took all necessary precautions to prevent the hazardous misconduct by the employee. Floyd S. Pike, supra; Rothstein, supra, § 78 (Supp. 1981). Indeed, this principle, that the employer may rebut the Secretary's showing based on the imputation of the knowledge of a supervisory employee, not only is acknowledged in the Secretary's brief filed in this case but was recently reaffirmed by a divided Commission in H.E. Weise, Inc., 82 OSAHRC , 10 BNA OSHC 1499, 1982 CCH OSHD ¶ 25,985 (No. 78-204, 1982). 10/

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10/ Unfortunately, in some cases the Commission has used the term "defense" in referring to the employer's introduction of evidence in rebuttal to the Secretary's showing. E.g., Floyd S. Pike Electrical Contractor, Inc., 78 OSAHRC 50/E1, 6 BNA OSHC 1675, 1978 CCH OSHD ¶ 22,805 (No. 3069, 1978). In other instances including the case now before us, the Commission has further expressly created and identified a specific "affirmative defense" for the characterization of the employer's introduction of such evidence. Use of the term "defense" is at best misleading; the identification and application of an actual "affirmative defense" is contrary to the fundamental rule imposing the burden of proof on the Secretary. Clearly, in presenting its evidence regarding the adequacy of its safety program the employer is not discharging a separate and distinct affirmative defense. Rather, the employer is simply assuming the burden of going forward with evidence in response to the Secretary's case-in-chief. See generally Raymond Hendrix, supra note 9. The difference between the burden of going forward with the evidence and the burden of proof of an affirmative defense is not one of mere semantics but rather can be one of substantive significance.

For example, as rebuttal to the Secretary's case, the employer's showing that it took reasonable steps to prevent the occurrence of the violation need not be specially pleaded. An "affirmative defense" of "unpreventable employee misconduct," however, under Fed. R. Civ. P. 8(c) must be raised in the employer's answer. Furthermore, since the burden of proof remains on the Secretary, the employer may move for dismissal without adducing any evidence if it feels that the Secretary's case-in-chief is insufficient to show knowledge. See former Commissioner Barnako's concurring opinion in Texland Drilling Corp., 80 OSAHRC 106/C13, 9 BNA OSHC 1023, 1980 CCH OSHD ¶ 24,954 (No. 76-5307, 1980).

In this case, however, as explained below, the violation was committed by nonsupervisory employees under circumstances where their supervisor did not observe and could not have reasonably observed the employee misconduct. Therefore, knowledge cannot be found unless there is specific evidence to demonstrate that the employer's safety program was inadequate. Howard P. Foley Co., 77 OSAHRC 90/A2, 5 BNA OSHC 1501, 1977-78 CCH OSHD ¶ 21,862 (No. 13244, 1977); Scheel Construction, Inc., 76 OSAHRC 138/B6, 4 BNA OSHC 1824, 1976-77 CCH OSHD ¶ 21,263 (No. 8687, 1976). 11/

II.

I conclude that the Secretary has failed to satisfy his burden of proof that Marson knew or reasonably could have known that its employee, Soto, would operate the machine in an unsafe manner. Neither of Marson's supervisory personnel, Fennessey, its safety officer, nor Razzak, the technical director, observed Soto's actions, nor is there any evidence to show that at the time the violation occurred either Razzak or Fennessey were located in a position from which they reasonably could have observed Soto in the performance of his work.

The Secretary contends, however, that the knowledge of Forman, the technician, should be imputed to Marson. I disagree because in my view the Secretary has failed to show that Forman is a supervisory employee whose knowledge may properly be imputed. 12/

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11/ Indeed, the Commission has recognized that because the safety and health of employees is entrusted to their supervisors, an employer has a heightened duty to ensure the proper conduct of supervisory personnel. Floyd S. Pike, supra note 10. It necessarily follows that since the Secretary is unable to show that the violation occurred through the actions or with the knowledge of supervisory employees, he must present other evidence to demonstrate that Marson could have prevented the violation.

12/ The majority does not address the question of Forman's status, although they conclude that he was inadequately supervised in the execution of his training responsibilities.

According to Razzak, Forman's duty is to assure quality control by periodically checking and testing the mixture in the tank. Documents describing Forman's duties in more detail state that in checking and correcting the mixture the technician is subject to the supervision of another employee designated as the "foreman." Razzak's testimony further shows that the foreman in the mixing room, rather than the technician, is responsible for informing Razzak of any employee violations of Marson's safety rules. Accordingly, while the technician has some authority to direct the performance of the work, this authority is very limited and is subject to the overall control of another employee. Since technician Forman was not shown to have any responsibility to control the work for purposes of safety or compliance with OSHA standards, he cannot be considered a supervisory employee under Commission precedent. 13/

Thus, I cannot agree with the Secretary's argument that Forman should be considered a supervisory employee simply because he was responsible for giving instructions to mixer operators including Soto. Acceptance of the Secretary's argument would necessarily mean that any employee who gives on the job training to another automatically becomes a supervisor whose knowledge is imputed for purposes of the Act without regard to whether that employee has any responsibility to ensure compliance with the employer's safety rules. Since the record does not show that Forman had any authority to remove employees or take other

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13/ Whether an employee is a supervisor for the purpose of imputing his action or knowledge to his employer depends not on the employee's formal title or designation but rather on the actual duties discharged by the employee. In order for the employee to be considered a supervisor for this purpose he must have the responsibility to direct other employees in the performance or completion of the work. In making this inquiry, the Commission has indicated that it will consider the extent to which the employee is responsible for insuring that the work is performed safely. Mercer Well Service, Inc., 77 OSAHRC 178/C6, 5 BNA OSHC 1893, 1977-78 CCH OSHD ¶ 22,210 (No. 76-2337, 1977); Iowa Southern Utilities Co., 77 OSAHRC 32/C10, 5 BNA OSHC 1138, 1977-78 CCH OSHD ¶ 21,612 (No. 9295, 1977).

appropriate action in the event employees were to disobey their instructions, I conclude that his knowledge should not be imputed to Marson. 14/

The record also does not establish that Marson otherwise should have been aware that Soto would operate the machine in a manner contrary to its work rules. As the majority opinion itself acknowledges, all of the employees who testified or whose statements appear in the record, with the arguable exception of Soto himself, were aware that material is not to be added to the machine when it is running without the grate in place. Insofar as Soto is concerned, Forman specifically testified that just prior to the accident he had explained to Soto step-by-step how the mixing operation was to be performed, and he had instructed Soto to turn the machine off at one particular point when material had to be added to the machine. Although it appears that Soto did not understand these instructions, Judge Knight nevertheless found that Marson could not reasonably have known that Soto was not sufficiently trained and supervised. The judge properly relied on the absence of any evidence to show that Forman himself was inadequately trained or was incapable of correctly instructing Soto. 15/

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14/ I do not mean to suggest, however, that I would necessarily impose on an employer the burden to do anything more than give proper instructions to its employees. See note 16 infra. Nevertheless, so long as the Commission majority, as it does in this case, imposes on the employer a requirement to enforce compliance with established safety rules, I cannot agree to the imputation of knowledge to the employer unless it is shown that the employee whose knowledge is to be imputed is responsible for compliance with the safety rules on the part of other employees.

I further note that even assuming Forman were a supervisory employee whose knowledge may properly be imputed to Marson, the record fails to demonstrate that Forman knew of Soto's misconduct. Forman left the mixing room after having instructed Soto in the proper operation of the mixer. See the discussion in the text infra. There is no showing that Forman observed or reasonably could have observed Soto at the time the accident occurred.

15/ While the majority claims that Soto was not "apprised" of Marson's safety rule, it does not directly address the judge's finding regarding the training and supervision of Forman. Rather, consistent with its erroneous view that the burden of proof in this case is on Marson, the majority requires that Marson affirmatively demonstrate that Forman was in fact properly trained and supervised.

Nor does the record demonstrate that Marson's safety program is deficient in any other respect. Marson's safety rule was being violated in only a fraction of one percent of the total production operations performed in the facility, the production of Marglass, which occurs as infrequently as once every two months, whereas Marson's total production consists of 15 to 20 mixtures per day. Because of the extreme infrequency of the circumstances under which a violation may occur, it is patently unreasonable to expect Marson to predict and prevent every instance of its occurrence. See Borton, Inc., 82 OSAHRC , 10 BNA OSHC 1462, 1982 CCH OSHD ¶ 25,983 (No. 77-2115, 1982) (dissenting opinion). In these circumstances, Marson's regular safety meetings, the daily visits by Razzak into the mixing area, and Marson's practice of issuing warning notices to employees were sufficient measures to detect violations of the safety rules and enforce compliance with those rules. 16/ In any event, the Secretary, who has the burden of proof on the issue, has presented no evidence of any circumstances which could reasonably be considered to put Marson on notice of a defect in its safety program. 17/ Rather, the evidence demonstrates that Marson communicated safety rules to employees, the rules were understood by employees, and

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16/ I do not mean to suggest, however, that I would necessarily place on an employer an obligation to do anything more in its safety program than establish and communicate safety rules to employees. Since I find Marson's mechanisms for detecting and imposing sanctions for violations of its safety rules adequate in the circumstances, I need not now consider whether an employer should be required to enforce as well as establish safety rules. See H.E. Weise, Inc., 82 OSAHRC , 10 BNA OSHC 1499, 1982 CCH OSHD ¶ 25,985 (No. 78-204, 1982) (dissenting opinion).

17/ Fennessey stated that at none of the safety meetings with employees, which are conducted regularly every month, had any mention ever been made of machines being operated without their grates in place. The first time Fennessey became aware that employees were violating the safety rule was during a conversation with employee O'Connor after Soto's accident, at which time O'Connor admitted that he had been violating Marson's safety rules. Similarly, Razzak testified that during his daily visits to the mixing room he had never seen the machine being operated with the grate

employees complied with the rules during the overwhelming majority of production operations. The judge so found, and I would affirm his decision to vacate the citation.

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17/ (continued)

off. He explained that he can determine whether the grating is in place at any given time from the manner in which the employee holds the bag of material while emptying it into the machine and the ease with which the material pours into the machine's tank. Finally, Matz, Marson's president, informed the compliance officer that he was unaware that the employees were removing the grate.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant<br>v.<br>MARSON CORPORATION,<br>Respondent | OSHRC DOCKET NO. 78-3491<br>DECISION & ORDER |

Appearances: For Complainant,
Albert H. Ross, Regional Solicitor
U.S. Dept. of Labor, Boston, MA.,
By: Eunice Chen Wray, Attorney

For Respondent,
Robert F. Sylvia, Esq.,
Fine & Ambrogne, Boston, MA.

Statement of Proceedings:

By letter dated July 27, 1978, Marson Corporation of Chelsea, Massachusetts (respondent), which manufactures automotive body fillers, contested[1/] a citation issued[1/] July 6 and amended (abatement period) on July 24, 1978, by the Occupational Safety and Health Administration of the U.S. Department of Labor (complainant or OSHA) alleging

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1/ Under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§651, et seq., citations are issued after an inspection [§658(a)] and may be contested within a 15 working day period [§659(a)].

serious[2/] violations of two safety standards. On May 9, 1978, in its main mixing room, an employee was exposed to the unguarded rotating parts (blades) and shear points while operating the Hockmeyer #2 mixing machine and respondent is charged in item 1 with not providing the guarding required by 29 CFR §1910.212(a)(1):

> (a) Machine guarding.
>
> (1) Types of guarding. One or more methods of machine guarding shall be provided to protect the operator... from hazards such as those created by... rotating parts... Examples of guarding methods are—barrier guards...

In item 2, the grates on four mixing machines were not affixed to the machines or secured elsewhere and respondent is charged with violating 29 CFR §1910.212(a)(2) which requires

> (2) General requirements for machine guards. Guards shall be affixed to the machine where possible and secured elsewhere if for any reason attachment to the machine is not possible. The guard shall be such that it does not offer an accident hazard in itself.

A proposed civil penalty of $490 was assessed for each allegation.

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2/ A "serious" violation is one in which there is a substantial probability that death or serious physical harm may result unless the employer did not, or could not with the exercise of reasonable diligence, know of the presence of the violation. 29 U.S.C. §666(j).

The matter was heard on November 29, 1978, and both parties were represented by counsel with briefs and post-hearing requests filed by February 2, 1979. No affected employee came forward to claim party status after due notice (Transcript, Tr. 4). Respondent admits the jurisdictional facts and I conclude that the Commission's authority to decide this controversy is proper. 29 U.S.C. §§652(3), (5) and 653(a). It also agrees that the manner in which the inspection was carried out was proper. (Tr. 4-5).

The Issues:

The questions presented are:

Concerning item 1, whether respondent knew or could have known that the mixing machine was being operated with its grate or guard removed; and

Concerning item 2, whether the grates held in place by their own weight were "affixed" to the mixers.

The Evidence and Findings of Fact:

On May 9, 1978, respondent's employee Soto lost an arm in the Hockmeyer #2 mixing machine as he was adding a 25 pound bag of fiberglass to the machine while it was running and its protective grate was removed. The weight of the bag brought it within the vat, the machine's blade cut the bag and pulled his arm in. (Soto, Tr. 89-90). The batch being prepared was Marglass, a fiberglass body filler.

Patrick Cantino, an OSHA compliance officer, described the mixer as a cylinder type tank with three blades. His sketch, exhibit C-1, shows the tank and platform where the employee stands to add the

material through the top of the tank. The opening measures 29 by 48 inches. A grate rests in a ridge on this opening held there by its own weight completely covering the opening and in its center is a removable section measuring 20 by 48 inches through which samples of the batch being made can be taken. (Tr. 14-15 and 29) The employee's platform is three feet high and to the top of the vat is about five feet from floor level (Tr. 30-31). As one walks by this machine, he could not tell whether the grate was in place (Tr. 31). All four mixing machines in the mixing room have this guard (Tr. 12 and 29).

In an interview with an employee (O'Connor), Mr. Cantino was told that the Hockmeyer #2 is used only to mix the Marglass a couple of times a month. The grate is removed to add the fiberglass and it had to be done that way because the material would not go through the grate and the machine would be running. At the time of the accident the grate was not on the machine but it was only removed when making Marglass (Tr. 40-43).

This employee knew it was a violation of company policy to operate the machine with the grate removed (Tr. 44). When the grate is off while the machine is being cleaned it is not running nor is it when samples are taken through the grate's midsection (Tr. 45-46).

In his closing conference, Mr. Cantino was told by Mr. Matz, respondent's president, and Mr. Fennessey, its manufacturing manager, that the policy is to have the grates on at all times when the mixing machines are operating; they were installed as safety devices

because of the hazard presented by the rotating blades; that both men believed that the grates were so used; and that neither knew that the grates would be off while the machine was on (Tr. 52, 57-58). A technician (who would train a new employee) also told him that company policy is to leave the grates on (Tr. 44).

Based on the probability and type of an injury, the number of employees and length of time exposed, Mr. Cantino arrived at the net penalty proposed, $490 for each (Tr. 54). He considered the alleged violations as serious (death or serious physical harm resulting) and the employer knew of the hazard (Tr. 54-55). To a limited extent, he saw other parts of the plant but no condition for which he would recommend a citation (Tr. 58-60).

Bruce Thiboult has been a chemical compounder since February 1978. He has seen employees place materials in the mixer with the grate removed but he was not asked whether the machine was running at those times. When he placed fiberglass in with the grate off and the machine on, he didn't like that because it seemed too easy to slip so he put the grate on. He never has the machine running with the grate off. (Tr. 61-67) He was trained that way by the foreman and a technician, Stephen Foreman (Tr. 67-68). An operator has to get off the platform to reach the emergency switch (Tr. 64-65). And one cannot tell if the grate is on from floor level (Tr. 68). The fiberglass can be added through the grate and it is done that way now (Tr. 68-69).

Stephen Foreman has been a lab technician since September 29, 1977. He does not mix the batches and his function is to assure that the batch comes out right. His assignment in addition was to train

Mr. Soto as the mixer. Prior to May 9, 1978, the procedure for operating the mixer was to remove the grate, turn the machine on, add the materials, replace grate, turn the mixer on, and later to take the necessary samples (Tr 71-72, emphasis mine). Since that date, nothing is added to the machine without the grate in place.

Mr. Soto was a new employee at the time and Mr. Foreman was with him on the platform giving step-by-step instructions. One of these was to add a paste being sure to shut the mixer off. Mr. Foreman stated that he was not told not to leave Mr. Soto and he did not tell Mr. Soto that he should leave the grill on during the operation. Mr. Foreman left him for a minute or two and that was when the accident occurred. He has seen operators mixing Marglass without the grate in place. (Tr. 70-76 and 84)

Mr. Foreman was trained by Mr. Razzak, respondent's technical director, and denied that he was told to run the mixers only when the grate was on. However, if he were to prepare safety instructions for the preparation of batches and the operation of the mixers he would do the same as found on exhibit R-2 which he is not sure is in his handwriting. (Tr. 78-82) Item 2 on page one states, "With mixer off and screen removed..." materials are added. Item 3, "Mixer is placed on slow speed, the screen is replaced..." This would be after all materials are added. Item 8, "...the mixer is stopped, and the sides and top are blown..." In item 10, the cover referred to goes over the screen (Tr. 82). The same pattern follows for two other mixers in that room (page 3 of exhibit R-2).

Elexandro Soto, the injured employee, testified that he had been at work one week before the accident. Mr. Foreman gave him no instructions before the accident. Hockmeyer #2 has no grate; he never saw one. (Tr. 95-96) He received no written instructions when he began work but a man told him how to use the machine. He saw others mix with the Hockmeyer #2 and they never used the grate putting chemicals in while the machine was in operation. He couldn't reach the emergency switch from the platform (marked with an "X" on photo exhibit C-9). (Tr. 91-92, 94) Generally, Mr. Soto, because of language difficulties, had a problem with understanding questions and responding.

Concerning item 2 of the citation, the parties stipulated that the grates are removable, not bolted down, and fit in a ridge inside the mixer resting there on their own weight and they are heavy (Tr. 97 and 99). And complainant rested (Tr. 99).

Bruce T. Fennessey is respondent's manufacturing manager, head of its safety committee, he makes tours through the plant and organizes safety meetings. Respondent has 200 employees. The technical director (Mr. Razzak) controls the mixing room. Anytime the machine is on, the grate -- a single large plate made of cold roll steel and is heavy and awkward -- is to be in place. All products can be fed through it. After the accident in May 1978, Mr. Fennessey spoke with the other mixer there at the time (O'Connor) who admitted that operation without the grate violated company policy but it was easier to add the fiberglass. It had been done three or four times. Then Mr. Fennessey gave specific instructions that

nothing was to be added without the grate on the operating machine. Marglass is made once every two months.

Foremen will warn employees who violate a company rule. General safety committee meetings are held every month and every two weeks Mr. Fennessey meets with the foremen and safety will be one subject. At none of these meetings was it revealed that mixers were operated without the grates. (Tr. 99-109)

Abdul Razzak, respondent's technical director and supervisor of the mixing room formulates the products and gets them into production. All materials are to be added to the mixer through the grate otherwise the machine must be stopped. At no time was any opposite instruction given (Tr. 109-111) but it was emphasized not to run the mixer with no grate (Tr. 117). This is reflected in a written document, "Responsibilities of the Foremen in the Mixing Room" (exhibit R-4) in effect from November 1974 through June 1978 and on page 3, items 17e and 17f require the machine to be off when paste is added and the grates are to be in position when powder is poured in. This document is in both the foremen's and technician's folders. (Tr. 112) In addition, these men have instructions governing the preparation of colored fillers (exhibit R-5) and at several points are warnings not to run the machine with the grate off (Tr. 113-114). Neither of these are given to the mixers (Tr. 118-119). The technician, Stephen Foreman, has both of these documents and Mr. Razzak and others trained him in batch making. And Mr. Foreman, at Mr. Razzak's direction, prepared exhibit R-2 during his training period. (Tr. 114-117)

Mr. Foreman was charged with training Mr. Soto in the preparation of a new product and had no other duties in the mixing room (Tr. 119 and 125). Mr. Soto, in operating the mixer without the grate, violated company policy (Tr. 130). But the technician's bench is outside of the mixing room and he goes back and forth (Tr. 121) and Mr. Razzak will be in that room every day, sometimes twice (Tr. 126-127) but he doesn't check to see if the mixers are adquately trained; that is the technician's responsibility (Tr. 127). The lab people and foremen will be there and come to him with problems (Tr. 127).

Mr. Razzak never saw a machine running with the grate removed (Tr. 127). Although one cannot see the grate's position from the floor, he can tell by build ups on the grate and fluffing of powder whether it is in place (Tr. 122, 129, and 131-133). The fibrous material used in Marglass will not go through the grate and it is removed for the addition. But then the mixer is not running. (Tr. 122-124 and 130) This is also true for sampling and cleaning (Tr. 128). When the machine is on, so is the grate (Tr. 129). A mixer must come down from the platform to reach the emergency switch (Tr. 120).

Thereupon, the respondent rested (Tr. 137).

Based on this evidence and after considering the parties' post hearing proposals, I find:

1. Each of the four mixers in the mixing room is equipped with a heavy grate completely protecting the operator from contact with the machines' rotating blades and this was the case before and after May 9, 1978. Respondent was well aware of the hazard of operating these mixers and the proximity of the blades to the operator and

therefor provided the grates. The grates must be removed to clean and scrape the vat and based on the instructions in exhibits R-2, 4 and 5, this operation is not infrequent. When the vat is cleaned, the mixer is not running nor is it when samples of a batch being prepared are taken through the grates hinged midsection.

2. Up to May 9, all machines, save the Hockmeyer #2, were run with the grate in place and at no time would any machine be on with the grate off. These grates are located five feet from floor level when in place and cannot physically be seen by one passing by.

3. The Hockmeyer #2 is used to produce Marglass, a fiberglass filler, about once every two months and here I rely on the testimony of Mr. Fennessey.

4. The fiberglass used in Marglass is a fibrous material and does not readily pass through the grate. Some employees, prior to May 9, 1978, would add the fiberglass to the mixer while the blades were rotating with the grate removed. I base this finding on the O'Connor statements to the compliance officer and Mr. Fennessey and the testimony of Mr. Thiboult.

5. Mr. O'Connor, an operator of the mixing machines, knew that such a procedure was in violation of company policy and Mr. Thiboult had been trained not to do it and himself felt it was an unsafe procedure.

6. Neither the person totally in charge of plant safety nor the technical director who supervises the mixing room knew that employees added material to the operating Hockmeyer #2 with the grate off and the subject never came up at the monthly and biweekly meetings with

plant personnel and the foremen. When respondent learned that this machine was operated without the grate, at the time of the accident on May 9, 1978, immediately instructions were issued to stop that conduct in accordance with the company policy.

7. Technicians in the mixing room are responsible for production of the various batches and training and supervision of the employees who operate the mixers. The technicians in their own training period are made aware of the danger of running a mixer without the grate (¶4 of exhibit R-5) and of the company policy forbidding that practice. I accept Mr. Razzak's testimony on this point.

8. Stephen Foreman, a technician, was training Mr. Soto on May 9, 1978, in the production of Marglass and had no other function on that day. Mr. Soto is not fluent in English and Mr. Foreman did not sufficiently impress upon him the necessity for having the grate in place at all times when the machine was on. Mr. Soto's training and supervision was incomplete and imperfect and respondent was unaware of this. He had been employed only a week before his accident.

9. There is no evidence that Mr. Foreman, prior to May 9, 1978, was in anyway incompetent or lacking in ability to perform the functions assigned to him. Despite Mr. Soto's difficulty with understanding English, there is no evidence presented by complainant that respondent was on notice that more was required of it. Here, I do not accept complainant's proposed finding stating that "...there are blatant inconsistent policies and understanding of the working procedures of the Corporation [respondent]." (Brief pp 5-6) Mr. Foreman knew of

the danger of operating the mixer without the grate and the company policy forbidding that practice. There is no suggestion in this record that Mr. Foreman was inadequately trained or could not accomplish the proper training of Mr. Soto alone.

10. The grates used on these mixers are made of cold roll steel and are awkward, heavy and large and would not be easily removable.

Conclusions and Order:

Complainant argues, "Also the employer should have known of the violation, had it decided to examine the adequacy of their safety program, or lack thereof." (Brief, p. 9) But the facts do not support the contention that the safety program was inadequate. The practice -- which cannot be characterized as widespread but limited to a single operation on the Hockmeyer #2 every other month -- of running the machine without the grate was unknown to respondent. And complainant's evidence did not develop any specific acts by respondent which would have informed it of this occassional employee misconduct. Cf., Floyd S. Pike Electrical Contractor, Inc. v. OSHRC, et al, 576 F2d 72 (1978). Yet this is the complainant's burden. Brennan v. OSHRC, 511 F2d 1139 (1975), Ocean Electric Corporation v. Secretary of Labor, et al, 75 OSAHRC 84/E11, BNA 3 OSHD 1537, CCH ¶20,012.

It is not enough to show that respondent was aware of a hazard; it must be shown that it knew or should have known of a violation. That awareness is missing. I conclude that respondent was not in violation of 29 CFR §1910.212(a)(1) because it exercised reasonable

diligence and did not know of the violation.[3/] This item (no. 1) and its proposed penalty are vacated in the order below.

Regarding item no. 2 alleging a failure to "affix" guards to the machines, the quoted term has not been specifically defined by the Commission. In dealing with this standard, however, the Commission appears to have adopted a synonym

> Section 1910.212(a)(2) instructs the employer to attach guards to the machines... (emphasis mine) Secretary v. Buckeye Industries, Inc., 75 OSAHRC 21/B3, BNA 3 OSHD 1837, CCH ¶20339

And this implies something less than permanency suggested by the term affix. Thus the word means that the guard must be so placed in whatever manner to effectively protect the employee from the hazard created by the machine's operation. That a guard is removable (complainant's total evidence of a violation here) does not by itself violate this definition especially where the operation requires removal for certain operations such as cleaning the vat.

More positively, the weight, material and configuration of the guard resting on its ridge over the vat absolutely prevents contact between any extremity of the operator and the rotating blades. I conclude that the guards for these mising machines were affixed within the meaning of the standard. There is nothing in complainant's proof

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3/ It appears that the alleged violation more exactly put would be a failure to require the use of the guard rather than a failure to provide it as charged. The point was not raised and, in view of my conclusion, makes no difference even if an amendment were offered. See, Secretary v. P & M Sales, 76 OSAHRC 52/A2, BNA 4 OSHD 1158, CCH ¶20,673.

or argument that more — such as a pressure switch on the ridge where the guard rests which would turn the machine off automatically if the guard is lifted — was intended. Respondent complied with the regulation and this item and proposed penalty are vacated in the order below.

Order:

Based on these findings and conclusions, it is ordered that the citation issued July 6, 1978, as amended July 24, 1978, alleging serious violations of 29 CFR §§1910.212(a)(1), item 1, and .212(a)(2), item 2, and proposing a civil penalty of $490 for each item is vacated.

DAVID J. KNIGHT
Judge, OSHRC

Dated: May 7, 1979
Boston, Massachusetts

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

May 27, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Consolidated Rail Corp.

OSHRC DOCKET NO. 80-3495

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | |
| CONSOLIDATED RAIL CORPORATION, | : | OSHRC Docket No. 80-3495 |
| Respondent. | : | |
| INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS & HELPERS, | : | |
| Authorized Employee Representative. | : | |

DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

This case involves two items of citations received by Consolidated Rail Corporation ("Conrail") following an Occupational Safety and Health Administration ("OSHA") inspection of Conrail's diesel shop in Buffalo, New York. One item alleged that Conrail violated 29 C.F.R. § 1910.22(c)[1/] by failing to cover or guard two locomotive repair pits. The pits were

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1/ The standard provides in pertinent part as follows:

§ 1910.22 General Requirements.

* * *

(c) Covers and guardrails. Covers and/or guardrails shall be provided to protect personnel from the hazards of open pits, tanks, vats, ditches, etc.

within tracks on the floor of the engine house. This alleged violation was characterized as serious. The other item alleged that Conrail violated 29 C.F.R. § 1904.2(a)[2/] by failing to maintain a record of occupational injuries and illnesses at the shop.

The case was tried before Administrative Law Judge Foster Furcolo. Conrail argued that the working conditions cited in this case are exempt from the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), under section 4(b)(1) of the Act, 29 U.S.C. § 653(b)(1).[3/] Judge Furcolo rejected Conrail's arguments and affirmed the two items.

Conrail petitioned for review of the judge's decision, continuing to argue preemption under section 4(b)(1). Conrail also argued that the repair pits item was not a serious violation. Former Commissioner Barnako

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2/ This standard provides:

> § 1904.2 Log and summary of occupational injuries and illnesses.
>
> (a) Each employer shall, except as provided in paragraph (b) of this section, (1) maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment; and (2) enter each recordable injury and illness on the log and summary as early as practicable but no later than 6 working days after receiving information that a recordable injury or illness has occurred. For this purpose form OSHA No. 200 or an equivalent which is as readable and comprehensible to a person not familiar with it shall be used. The log and summary shall be completed in the detail provided in the form and instructions on form OSHA No. 200.

3/ Section 4(b)(1) states, in pertinent part:

> Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

directed review of the judge's decision but limited the issues to whether OSHA recordkeeping requirements were preempted under section 4(b)(1) and whether the repair pits violation was serious. At the time review of this case was directed, the question of preemption of OSHA pit guarding requirements was controlled by the Commission's decision in Consolidated Rail Corp., 81 OSAHRC 8/A2, 9 BNA OSHC 1258, 1981 CCH OSHD ¶ 25,172 (Nos. 78-3100 et al, 1981), appeal filed, No. 81-1210 (1st Cir. Apr. 2, 1981), transferred, No. 81-4192 (2nd Cir. Oct. 2, 1981) (OSHRC No. 78-3100) and No. 81-2639 (3d Cir. Oct. 2, 1981) (OSHRC No. 78-4881) ("Conrail I"). It was this decision upon which Judge Furcolo based his opinion rejecting Conrail's section 4(b)(1) arguments.

However, in the time since Judge Furcolo issued his decision and order, the Commission has reconsidered Conrail I. In Consolidated Rail Corp., No. 79-1277 (Apr. 30, 1982) ("Conrail II"), a divided Commission decided that a policy statement by the Federal Railroad Administration ("FRA"), published at 43 Fed. Reg. 10,583-90 (March 14, 1978), was a sufficient exercise of statutory authority over the hazard of open pits associated with moving railroad equipment in railroad repair facilities to preempt OSHA standards requiring guarding for these repair pits. The pits involved in this case come within this category.[4/] Accordingly, applying Conrail II in this case, the repair pits item is preempted by

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4/ Although we ordinarily will not decide issues which were not directed for review, see 29 C.F.R. § 2200.92(d), evenhanded administration of the Act requires that the scope of review be broadened in light of Commission precedent. See John T. Brady & Co., 82 OSAHRC 9/D10, 10 BNA OSHC 1385, 1982 CCH OSHD ¶ 25,941 (No. 76-2894, 1982).

the policy statement.[5/] We therefore reverse this portion of the judge's decision and vacate the item.

We turn now to the recordkeeping item. In Southern Pacific Transportation Co., 74 OSAHRC 82/A2, 2 BNA OSHC 1313, 1974-75 CCH OSHD ¶ 19,054 (No. 1348, 1974), aff'd, 539 F.2d 386 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977), a Commission majority held that the Department of Transportation's ("DOT") promulgation of regulations requiring the reporting of accidents was a sufficient exercise of statutory authority to exempt the railroad industry from compliance with OSHA regulations covering the same subject matter. Commissioner Cleary dissented. He reasoned that "exact recordkeeping of occupational injuries and illnesses was one of the major aims of the Act" and that "[a]lthough requiring the railroads to maintain OSHA records in addition to [DOT] records would involve some duplication, this is a small price to pay for assuring that accurate records of all workplace injuries and illnesses are maintained." 4 BNA OSHC at 1318, 1974-75 CCH OSHD at p. 22,789.

Although the FRA has the statutory authority to regulate the safety of railroad industry employees, see 45 U.S.C. §§ 421, 431, the entire railroad industry is not exempt from OSHA enforcement. See Southern Pacific Transportation Co. v. Usery, 539 F.2d 386 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977); Southern Railway Co. v. OSHRC, 539 F.2d 335 (4th Cir. ), cert. denied, 429 U.S. 999 (1976). Moreover, the FRA

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5/ Commissioner Cottine would follow the precedent established in Conrail I that the FRA policy statement is not a standard or regulation within the meaning of § 4(b)(1) of the Act and therefore cannot operate to preempt the applicability of OSHA standards to railroad operations. See also Conrail II (Cottine, Commissioner, dissenting). Accordingly, he would affirm the § 1910.22(c) item for the reasons stated by the judge.

policy statement acknowledges that OSHA standards apply to certain working conditions in the railroad industry. See Conrail II, supra. Accordingly, OSHA continues to have an interest in information about occupational illnesses and injuries occurring in the railroad industry. OSHA's recordkeeping requirements are vital to increasing knowledge about occupational illnesses and injuries. See General Motors Corp., Inland Division, 80 OSAHRC 89/D2, 8 BNA OSHC 2036, 1980 CCH OSHD ¶ 24,807 (No. 76-5033, 1980). They allow OSHA to determine the need for future standards and pinpoint those workplace activities that warrant either increased or diminished enforcement efforts. See Puget Sound Tug & Barge, 81 OSAHRC 50/A2, 9 BNA OSHC 1764, 1778, 1981 CCH OSHD ¶ 25,373 at pp. 31,597-98 (No. 76-4905, 1981) (separate views of Commissioner Cottine).[6/] For these reasons, we believe that the railroad industry must comply with the OSHA recordkeeping requirements. Accordingly, we overrule the Commission's decision in Southern Pacific Transportation Co., supra, to the extent that it relieves the railroad industry of OSHA recordkeeping requirements.[7/]

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6/ In Puget Sound, Commissioner Cleary concluded that the employer was not required to comply with OSHA recordkeeping requirements. However, he did so because in his view the working conditions of the seamen involved in Puget Sound were entirely exempt from OSHA enforcement and "it would be unnecessarily duplicative to require respondent to keep records for an area over which there exists a section 4(b)(1) exemption." 9 BNA OSHC at 1783, 1981 CCH OSHD at p. 31,602. As we have stated, the railroad industry is not entirely exempt from the Act.

Chairman Rowland did not participate in Puget Sound and does not adopt its holding.

7/ Chairman Rowland would not overrule Southern Pacific Transportation Co. on this issue. He agrees with the reasoning of the Commission majority in that case that OSHA lacks authority to enforce its recordkeeping requirements because the DOT (FRA) recordkeeping requirements

(continued on next page)

This does not mean that railroad industry employers must use the OSHA form, No. 200, mentioned in section 1904.2(a). Section 1904.2(a) allows an employer to maintain "an equivalent which is as readable and comprehensible to a person not familiar with it [as the OSHA 200 form]." See B.C. Crocker Cedar Products, 76 OSAHRC 132/B6, 4 BNA OSHC 1775, 1976-77 CCH OSHD ¶ 21,179 (No. 4387, 1976); Puterbaugh Enterprises, Inc., 74 OSAHRC 44/B11, 2 BNA OSHC 1030, 1973-74 CCH OSHD ¶ 18,158 (No. 1097, 1974). However, it is incumbent on the employer to insure that its forms contain information equivalent to OSHA form No. 200. In addition, the employer must afford the Secretary's representatives access to these records. See 29 C.F.R. § 1904.7.

Although we hold that railroad industry employers must comply with OSHA recordkeeping requirements, it would be unfair for us to hold Conrail in violation of the cited standard. Until now, Southern Pacific was the Commission precedent and under it railroad employers were not required to comply with OSHA recordkeeping requirements. We therefore vacate the recordkeeping item in this case. By this decision, Conrail and other railroad industry employees are now on notice that suitable

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7/ (continued)

at 49 C.F.R. Part 225 preempt OSHA recordkeeping standards under § 4(b)(1) of the Act. Chairman Rowland also notes that in its policy statement, the FRA said "the railroad industry is subject to the FRA accident/incident reporting requirements and is, therefore, not subject to equivalent OSHA rules." 43 Fed. Reg. at 10,585, citing the Commission's decision in Southern Pacific Transportation Co. See Conrail II, supra. Therefore Chairman Rowland concludes that Conrail was not required to comply with the OSHA recordkeeping requirements. Thus he joins with Commissioners Cleary and Cottine who vacate the item in this case, as they discuss infra. In light of his decision to vacate the recordkeeping item, Chairman Rowland does not address Conrail's argument that it was not "required to prove to the [OSHA] compliance officer that it was reporting to the FRA."

records must be maintained and made available upon request to OSHA representatives.[8/]

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: MAY 27 1982

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8/ Commissioner Cottine prospectively applies the new rule of law in this case because Conrail reasonably relied on published Commission precedent in determining its course of conduct. See also Auto Sun Products Co., 81 OSAHRC 71/E14, 9 BNA OSHC 2008, 2012 n. 9, 1981 CCH OSHD ¶ 25,808 at p. 32,260 n. 9 (No. 77-2616, 1981), appeal dismissed, No. 81-3503 (6th Cir. Aug. 28, 1981) (Federal Register publication of a standard with a typographical error); Pennsuco Cement and Aggregates, Inc., 8 BNA OSHC 1378, 1980 CCH OSHD ¶ 24,478 (No. 15462, 1980) (Cottine, Commissioner, concurring) (Federal Register publication of a memorandum of understanding regarding OSHA-MESA enforcement authority).

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br>Complainant<br>v.<br>CONSOLIDATED RAIL CORP.,<br>Respondent | OSHRC DOCKET NO. 80-3495 |

APPEARANCES:

Douglas Weiner, Esq., for Complainant

Lorraine Staples, Atty., for Respondent

Joseph A. Stinger, Chairman, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, for Employees

DECISION AND ORDER

This case arose under 29 USC, sec. 651 et seq. of the Occupational Safety and Health Act of 1970 (the Act). As a result of an inspection by the Occupational Safety and Health Administration [OSHA] of the Respondent's premises on or about June 3, 1980, Citations 1 and 2 were issued on or about June 5, 1980, charging that the Respondent violated sec. 5(a)(2) of the Act by the serious violation of the standards at 29 CFR 1910.22(c) and 29 CFR 1910.106(e)(6)(i) [respectively items 1 and 2 of Citation #1]; and the other than serious violation of the standards at 29 CFR 1904.2(a), 29 CFR 1910.22(a)(2) and .24(f) [respectively items 1, 2, and 3 of Citation #2].

At the Hearing, by stipulation, Citations 1 and 2 were amended by deleting the standard at 29 CFR 1910.106(e)(6)(i) from Citation #1 and adding it to Citation #2 (where, for the purposes of this case, it will be considered as Item 4 of Citation #2)...Tr. 4-6.

The Respondent filed Notice of Contest to Citations 1 and 2 and the penalties proposed therefor but, at the hearing, it was stipulated that sections (b), (d), and (e) of paragraph V of the Complaint [respectively, items 4, 2 and 3 of Citation #2] be affirmed...Tr. 4-6. At a later time in the hearing, the Respondent also stipulated that the violation alleged in section (c) of the Complaint [item 1 of Citation #2] was being contested solely on jurisdictional grounds...Tr. 104.

The pertinent sections of the Act and the standards are appended to this decision under appropriate titles.

29 CFR 1910.22(c) [Item 1 of Citation #1]

Since the parties were in agreement that the pits in question were not provided with covers or guardrails, the only issues contested were: (1) Did the Respondent establish the affirmative defense that section 4(b)(1) of the Act exempts the Respondent from the cited standards? (2) Was there a hazard of personnel falling into the open pits?

There was no real disagreement about the facts: the jobsite was 2 open diesel pits in the Respondent's engine house in its frontier yard in Buffalo; locomotives were brought over the pits on tracks flush with the floor of the engine house; the pits, which were within the tracks above, were about 120 feet in length by 4 feet in depth and about 44-46 inches in width; the locomotives had an overhang of about 1 to 1-1/2 feet on each side of the tracks; and when 4 locomotives were over the pits [which was the situation 90% of the time] there was no hazard to the Respondent's employees.

Although there was some disagreement among the witnesses as to the amount of water, oil, and grease in and around the pits, all agreed that the amount of such substances was considerable.

KNOWLEDGE

It was evident that the Respondent knew of the pits; in fact, one of its defenses apparently was that their location and its possible hazards were so visible that there was no real danger because everyone was familiar with the situation.

HAZARD

The very description of the pits indicates a hazardous condition where an employee could inadvertently walk into the pit or slip into it because of oil and grease in the area. A fall of 4 feet onto concrete could easily result in a serious injury. Even if there were no hazard 90% of the time (because of the presence of locomotives over the pits) the existence of the condition for even 10% of the time is enough to constitute a hazard.

FEASIBILITY

The hazard could easily be abated by the erection of guardrails or chains. The Compliance Officer's testimony to that effect was not contradicted or even seriously challeneged. In addition, the testimony indicated that guardrails were used by the Respondent for similar conditions in at least one of its other jobsites. Moreover, even the Respondent's witnesses testified that such abatement steps were feasible.

BEFORE CONRAIL 78-4881

Before the Review Commission opinion in Consolidated Rail Corporation [docket 78-4881, decided on February 2, 1981], I had prepared [but not rendered] a decision, the material part of which follows:

"SEC. 4(b)(1)

The Department of Transportation, acting through the Federal Railroad Administration (FRA) published the following Policy Statement in the Federal Register [43 Fed. Reg. 10583-10590]: "...FRA recognizes that OSHA is not precluded from exercising jurisdiction with respect to conditions not rooted in railroad operations nor so closely related to railroad operations as to require regulations by FRA..." [And later] "...OSHA regulations on guarding of open pits, ditches, etc., would not apply to inspection pits in locomotive or car repair facilities..."

In my opinion, that constitutes an exercise of authority by a federal agency (the FRA) sufficient to exempt the Respondent from the standard at 29 CFR 1910.22(c). The Policy Statement is not a vague general directive but is very specific language covering a very specific subject. It is not addressed to some generality that might happen at some undetermined time in the future; rather, it concerns a very limited industrial practice in a very limited situation that is taking place 90% of the time every day of the year in the type of business conducted by the Respondent. Under those circumstances, section 4(b)(1) of the Act is a good defense to the alleged violation of the standard at 29 CFR 1910.22(c)."

This is the decision I had planned to issue, together with the following alternate finding:

"ALTERNATE FINDING

If upon review it be decided that section 4(b)(1) is not a good defense, then I would affirm item 1 of Citation #1, the hazard being that employees often walked close to an open pit flush with a floor that usually had oily spots; and the hazardous condition could easily be abated by the erection of chains or

similar barrier during the estimated 10% of the time that the pit was not substantially covered by locomotives."

DECISION

As a result of the Review Commission opinion in Conrail 78-4881, that "Alternate Finding" now becomes the decision in this case.

1904.2(a) [Item 1 of Citation #2]

Since this item was contested only on jurisdictional grounds, the sole issue is whether the Respondent established the affirmative defense that section 4(b)(1) of the Act exempts the Respondent from the cited standard. That defense has not been established.

FINDINGS OF FACT

Having heard the testimony, observed the witnesses, and examined the exhibits, the following Findings of Fact are made:

1. At all times concerned, the Respondent regularly received, handled or worked with goods which had moved across state lines.

2. As concerns Item #1 of Citation #1, the Federal Railroad Administration published a Policy Statement in the Federal Register that OSHA regulations would not apply to inspection pits in locomotive repair facilities.

3. The open pits were a hazard when not covered by locomotives.

4. The conditions described in Item #1 of Citation #1 exposed the Respondent's employees to sustaining serious or fatal harm because of the hazard of falling into the pit.

5. One or more officers or supervisory personnel of the Respondent knew of the hazardous conditions described herein and knew that employees were exposed to such hazard.

5. The Respondent did not contest the merits of the violations alleged in Items # 1-4 of Citation #2.

## CONCLUSIONS OF LAW

1. At all times concerned, the Respondent was an employer engaged in a business affecting commerce within the meaning of the Act; and the Occupational Safety & Health Review Commission has jurisdiction over the subject matter and the parties.

2. At all times concerned, the Respondent knew, or with the exercise of due diligence should have known, of the alleged violations.

3. On the date in question, the Respondent was not in compliance with the standards cited and the Complainant has sustained the burden of proving the Respondent violated sec. 5(a)(2) of the Act (sec. 654).

## ORDER

The whole record having been considered, and due consideration having been given to 29 U.S.C., sec. 666(j), it is ordered:

1. Item 1 of Citation #1 is affirmed, and a penalty of $350 assessed therefor

2. Items 1, 2, 3, and 4 of Citation #2 are affirmed as other than serious violations.

SO ORDERED.

Foster Furcolo

FOSTER FURCOLO
Judge, OSHRC

Dated: March 10, 1981
Boston, Massachusetts

## APPENDIX

### THE ACT

Section 653 [section 4(b)(1) "Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies...exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."

Section 654 [section 5(a)(2)] Employer "...shall comply with occupational safety and health standards..."

Section 666 [section 17(b)] "...employer who has received a citation for a serious violation...of this Act...shall be assessed a civil penalty of up to $1,000 for each such violation."

Section 666 [section 17(c)] "...employer who has received a citation for a violation of...this Act...specifically determined not to be of a serious nature, may be assessed a civil penalty of up to $1,000 for each such violation."

Section 666 [section 17(j)] "...assess all civil penalties...giving due consideration to...the size of the business...gravity of the violation, the good faith of the employer, and the history of previous violations."

Section 666 [section 17(k)] "...a serious violation shall be deemed to exist...if there is a substantial probability that death or serious physical harm could result...unless the employer did not, and could not...know of the presence of the violation."

### The Standards

1904.2(a): A log of all recordable injuries was not kept [Citation 2, item 1]

1910.22(a)(2): Floors were not dry [Citation 2, item 2]

1910.22(c): "Covers and/or guardrails shall be provided to protect personnel from the hazards of open pits, tanks, vats, ditches, etc." [Citation 1, item 1]

1910.24(f): Stair treads were slippery [Citation 2, item 3]

1910.106(e)(6)(i): Precautions against flammable vapors were not taken [Citation 2, item 4]

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| 77-893 | AMERICAN LUGGAGE WORKS, INC. | 5/28/82 | 30/C7 |
| | (Judge's decision) | | 30/E3 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

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UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

May 28, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

DRAVO CORPORATION

OSHRC DOCKET NO. 14818

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

FOR THE SECRETARY OF LABOR

OF COMMISSION DECISION

To wit: See attached.

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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>DRAVO CORPORATION,<br><br>Respondent.<br><br>LOCAL 61, INTERNATIONAL UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA,<br><br>Authorized Employee Representative. | OSHRC Docket No. 14818 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge David H. Harris is before the Commission for review pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act" or "OSHA"). In his decision, Judge Harris vacated a citation item alleging an other than serious violation of the Act in that Respondent, Dravo Corporation, failed to comply with 29 C.F.R. § 1916.51(a) at its pipe shop on Neville Island, Pennsylvania. 1/ The judge vacat-

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1/ The cited standard was published in 29 C.F.R. Part 1916--Safety and Health Regulations for Shipbuilding. The standard provided:

§ 1916.51 Housekeeping.

(a) Good housekeeping conditions shall be maintained at all times. Adequate aisles and passageways shall be maintained in all work areas. All staging platforms, ramps, stairways, walkways, aisles, and passageways on vessels or drydocks shall be kept clear of all tools, materials, and equipment except that which is in use, and all debris such as welding rod tips, bolts, nuts, and similar material. Hose and electric conductors shall be elevated over or placed under the walkway or working surfaces or covered by adequate crossover planks.

(Footnote cont'd)

ed the item on the ground that 29 C.F.R Part 1916 did not apply to the working conditions in Respondent's pipe shop, including the cited working conditions. Specifically, the judge determined that Part 1916 was inapplicable because Respondent's pipe shop employees were not engaged in "shipbuilding or related employments on the navigable waters of the United States, including dry docks, graving docks and marine railways" within the meaning of 29 C.F.R. § 1916.2(d).

The issues before us on review are the following:

> (1) Whether the judge erred in vacating the citation on the ground that Respondent's pipe shop is not located on "the navigable waters of the United States, including dry docks, graving docks and marine railways."
>
> (2) Whether the judge erred in vacating the citation on the ground that Respondent's employees were not engaged in "shipbuilding" or "related employment."
>
> (3) If the judge erred in concluding that Part 1916 does not apply to Respondent's pipe shop, whether the citation should nevertheless be vacated on the ground that the cited standard applies only to working conditions "on vessels or drydocks."
>
> (4) If the cited standard applies to the cited working conditions, whether Respondent failed to comply with the standard.

For the reasons stated herein, we reverse the judge's conclusion that the inland location of Respondent's pipe shop precluded the application of Part 1916 to the working conditions in that shop. However, we affirm the judge's conclusion that Part 1916 was inapplicable because Respondent's pipe shop employees were not

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(Footnote 1 cont'd)

The Secretary recently has consolidated and revised the standards that previously were published at 29 C.F.R. Parts 1915, 1916 and 1917. These revised standards have been promulgated as a new 29 C.F.R. Part 1915—Occupational Safety and Health Standards for Shipyard Employment. 47 Fed. Reg. 16984-17013 (April 20, 1982). The standard cited in this case and set forth above is now found at 29 C.F.R. § 1915.91(a). 47 Fed. Reg. 17002. In this decision, we will use the old designation for the cited standard, as well as for the other standards and regulations that we refer to that formerly were published in Part 1916.

engaged in "shipbuilding" or "related employment." For this reason, we affirm the judge's order vacating the citation item at issue. 2/

I

Respondent operates a large industrial complex engaged in steel fabrication and shipbuilding on Neville Island, Pennsylvania. The northern edge of the island and of the facility borders along "navigable waters of the United States," while a smaller channel of the river borders the southern edge of the island. The length of the complex, along the east-west axis, is approximately one-half mile. The distance from the main channel on the north to the structural shop on the southern side of the island is 900 to 1200 feet. Marine ways, boat launching facilities, and one of the two separate yards, where towboats and barges respectively are assembled, are located on the north side of the complex. The "most extremely north building on the property," located approximately 100 feet from the river and near the marine launching ways, is the pipe shop where the alleged violation occurred.

The pipe shop occupies most of a "T"-shaped building, including all of the "low bay," which forms the base of the "T," and approximately 70% of the "high bay." The remainder of the building is occupied by the mechanical erection department, a separate operation. The low bay is approximately 60 feet wide

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2/ The four issues set forth above are before the Commission as the result of a direction for review issued by Commissioner Cleary and a supplemental briefing order issued by the Commission after review had been directed. In addition, former Commissioner Moran directed review of the judge's decision "for error." Notwithstanding this general direction for review, none of the parties have taken exception to the judge's decision and order insofar as it amends the citation item on review, vacates an alternative allegation of noncompliance with 29 C.F.R. § 1910.22(b)(2), and vacates a second contested citation item, item 4. There is also no compelling public interest warranting further review of those portions of the judge's decision that relate to those matters. Therefore, those portions of the judge's decision will not be considered on review. See Water Works Installation Corp., 76 OSAHRC 61/B8, 4 BNA OSHC 1339, 1976-77 CCH OSHD ¶ 20,780 (No. 4136, 1976); Abbott-Sommer, Inc., 76 OSAHRC 21/A2, 3 BNA OSHC 2032, 1975-76 CCH OSHD ¶ 20,428 (No. 9507, 1976). The described portions of the decision are accorded the significance of an unreviewed judge's decision. See Leone Constr. Co., 76 OSAHRC 12/E6, 3 BNA OSHC 1979, 1975-76 CCH OSHD ¶ 20,387 (No. 4090, 1976), appeal withdrawn, No. 76-4070 (2d Cir. May 17, 1976).

and 240 feet long. About 25 employees work in the pipe shop. Of these, 12 or 13 are welders and the rest are fitters, machinists, and pipe benders. The employees perform their work at tables set up in the pipe shop. They do not perform work outside of the pipe shop.

The pipe shop employees are engaged in fabricating pipe assemblies and also sub-assemblies, including rudders, Kort nozzles, sewage holding tanks and fittings. When pipe assemblies are completed, they are taken to storage areas in the boat-yards, to marine ways for direct installation in a barge or towboat, or to the structural shop. Completed sub-assemblies are sent to the structural shop for inclusion in larger assemblies. Approximately 90% of the pipe shop's production eventually is installed in towboats or barges assembled in the Respondent's yards. The remaining 10% is used in material handling machinery or plant maintenance.

Respondent's procedure for assembling vessels involves nine steps, taking 55 days from the initial step to launching. Additional work is done on the vessel after it has been launched. Generally, the assemblies fabricated by the pipe shop are completed and stored temporarily before the procedure for assembling the vessel begins.

The citation item at issue resulted from an inspection of the pipe shop by a compliance officer of the Occupational Safety and Health Administration. The cited conditions were located near the south wall of the low bay of the shop. Electrical lines, welding lead lines, oxygen hoses, and acetylene hoses extended from four welding machines placed along the south wall to work tables approximately ten feet from the machines. In addition, lines for four burning or cutting torches extended through the work area. These various hoses and cables crossed each other on the floor in a "spaghetti-like condition." According to the compliance officer, this intermingling of the hoses and cables created a tripping hazard to employees. On the day of the inspection, seven employees were working in the area in question.

II

The initial question to be determined is whether the scope of Part 1916 under OSHA was determined exclusively by the provisions of 29 C.F.R. § 1910.14, as argued by the Secretary on review, or whether it was also limited by the provisions of 29 C.F.R. §§ 1916.1 & 1916.2, as held by Judge Harris and argued by Respondent throughout this proceeding. The standards published at 29 C.F.R. Part 1916, including the cited standard, were originally promulgated by the Secretary as standards under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 ("the LHWCA"). Subsequently, they were adopted as standards under OSHA pursuant to the authority granted to the Secretary in section 6(a) of the Act, 29 U.S.C. § 655(a). 3/ In his decision in this case, Judge Harris concluded that the standards in Part 1916 had "the same meaning, extent and application" under OSHA as they had under the LHWCA. Accordingly, he further concluded that the definition of the term "employee" in 29 C.F.R. § 1916.2(d) "controlled" the extent of an employer's duty under Part 1916, which duty was set forth in 29 C.F.R. § 1916.1(a). 4/ The judge then based his holding that Part 1916 is inapplicable to Respondent's pipe shop in part on his determination that

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3/ Section 6(a) of OSHA provides, in pertinent part:

> Without regard to chapter 5 of title 5, United States Code, or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this Act and ending two years after such date, by rule promulgate as an occupational safety or health standard . . . any established Federal standard . . . .

The term "established Federal standard" is defined, in section 3(10) of the Act, 29 U.S.C. § 652(10), as "any operative occupational safety and health standard established by any agency of the United States and presently in effect, or contained in any Act of Congress in force on the date of enactment of this Act."

4/ 29 C.F.R. § 1916.1 was captioned "Purpose, scope, and responsibility." Section 1916.1(a) provided, in pertinent part:

> Section 41 of the Longshoremen's and Harbor Workers' Compensation Act requires every employer to furnish and maintain employment and places of employment which are reasonably safe for his employees in all employments covered thereby . . . . The purpose of this part [29 C.F.R. Part 1916] is to make

the shop is not "on the navigable waters of the United States, including dry docks, graving docks and marine railways" within the meaning of section 1916.2(d).

The Secretary takes exception to the judge's conclusion that former section 1916.2(d) "controlled" the extent of an employer's duty under OSHA. He contends that sections 1916.1 and 1916.2 were relevant only in determining the scope of Part 1916 under the LHWCA and that they did not affect the scope of those standards under OSHA. Respondent argues in support of the judge's analysis and his conclusions.

We conclude that the judge erred in relying on the definition set forth at 29 C.F.R. § 1916.2(d). The regulation adopting the Part 1916 standards as OSHA standards is published at 29 C.F.R. § 1910.14. Section 1910.14(a) is captioned "[a]doption and extension of established safety and health standards for shipbuilding" (emphasis added). It provides: 5/

> The standards prescribed by Part 1502 of this title and in effect on April 28, 1971, are adopted as occupational safety

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(Footnote 4 cont'd)

> determinations under this standard with respect to shipbuilding activity. (Emphasis added).

29 C.F.R § 1916.2 was captioned "Definitions." Section 1916.2(d) provided:

> (d) The term "employee" means any person employed in shipbuilding or related employments on the navigable waters of the United States, including dry docks, graving docks and marine railways, by an employer as defined in paragraph (c) of this section.

These provisions do not appear in the recently-promulgated new Part 1915. See note 1 supra. However, the new Part 1915 contains comparable provisions that apparently were intended to have the same effect. See 29 C.F.R. §§ 1915.1, 1915.3(a) and 1915.4(c) & (d). 47 Fed. Reg. 16987. In particular, we note that § 1915.4(d), in defining the term "employee," retains the following language from § 1916.2(d): "person engaged in . . . shipbuilding . . . or related employments on the navigable waters of the United States, including dry docks, graving docks and marine railways . . . ."

5/ When the shipbuilding standards were issued under the LHWCA, they were published in 29 C.F.R. Part 1502. Part 1502 was redesignated as Part 1916 after the standards had been adopted under OSHA. We further note that the term "employee" as it is used in § 1910.14 is defined at 29 C.F.R. § 1910.2(d). Accordingly, the definition at § 1916.2(d), note 4 supra, was inapplicable.

> or health standards under section 6(a) of the Act and shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in shipbuilding or a related employment. Each employer shall protect the employment and places of employment of each of his employees engaged in shipbuilding or a related employment, by complying with the appropriate standards prescribed by this paragraph. (Emphasis added).

Furthermore, at the same time the Secretary issued section 1910.14, he also issued 29 C.F.R. § 1910.11 [now § 1910.11(a)], which states:

> The provisions of this Subpart B [including section 1910.14] adopt and extend the applicability of, established Federal standards in effect on April 28, 1971, with respect to every employer, employee, and employment covered by the Act. (Emphasis added.)

Respondent argues and the judge agreed that, because section 1910.14(a) states that Part 1916 applied "according to the provisions thereof," the Secretary in adopting Part 1916 under OSHA also adopted the restrictions on its scope as set forth in sections 1916.1 and 1916.2. We disagree. Subpart B of Part 1910, which includes section 1910.14, also sets forth the following provision at section 1910.11(b):

> (b) It bears emphasis that only standards (i.e., substantive rules) relating to safety or health are adopted by any incorporations by reference of standards prescribed elsewhere in this chapter or this title. Other materials contained in the referenced parties [sic] are not adopted. Illustrations of the types of materials which are not adopted are these. The incorporations by reference of Parts 1915, 1916, 1917, 1918 in §§ 1910.13, 1910.14, 1910.15, and 1910.16 are not intended to include the discussions in those parts of the coverage of the Longshoremen's and Harbor Workers' Compensation Act or the penalty provisions of the Act. Similarly, the incorporation by reference of Part 1926 in § 1910.12 is not intended to include references to interpretative rules having relevance to the application of the Construction Safety Act, but having no relevance to the application to the Occupational Safety and Health Act. [Emphasis added].

It is clear that sections 1916.1 and 1916.2(d) were part of "the discussions in . . . [Part 1916] of the coverage of the Longshoremen's and Harbor Workers' Compensation Act." See note 4, supra and section 2(4) of the LHWCA, 44 Stat. 1424, 1425 (1927). We therefore conclude that the Secretary did not adopt sections

1916.1 and 1916.2(d) as standards under OSHA. Instead, he stated in section 1910.11(b) that these provisions were not adopted under OSHA. 6/

We further reject Respondent's contention that the Secretary had no authority under section 6(a) of the Act to adopt the standards in Part 1916 without also adopting the restrictions in sections 1916.1 and 1916.2(d). The Commission has consistently held that section 6(a) authorized the Secretary to extend "established Federal standards" beyond the jurisdictional limitations of the statutes under which the standards were initially promulgated. Brown & Root, Inc., 81 OSAHRC 17/D14, 9 BNA OSHC 1407, 1409, 1981 CCH OSHD ¶ 25,226 at p. 31,171 (No. 77-805, 1981) (29 C.F.R. Part 1915); Bechtel Power Corp., 76 OSAHRC 38/E2, 4 BNA OSHC 1005, 1008, 1975-76 CCH OSHD ¶ 20,503 at pp. 24,500-501 (No. 5064, 1976), aff'd, 548 F.2d 248 (8th Cir. 1977) (29 C.F.R. Part 1926); Lee Way Motor Freight, Inc., 74 OSAHRC 22/D12, 1 BNA OSHC 1689, 1691, 1973-74 CCH OSHD ¶ 17,693 at p. 22,088 (No. 1105, 1974), aff'd, 511 F.2d 864, 869 (10th Cir. 1975)(Walsh-Healey standards in 29 C.F.R. Part 1910). See generally, American Can Co., 82 OSAHRC / , 10 BNA OSHC 1305, 1982 CCH OSHD ¶ 25,899 (Nos. 76-5162 et al., 1982)(discussion of permissible and impermissible changes in established Federal standards). As indicated, the Secretary exercised this authority when he adopted Part 1916 and extended its application "to every employment and place of employment of every employee engaged in shipbuilding or a related employment."

Accordingly, we reverse the judge's conclusion that 29 C.F.R. § 1916.2(d) "controlled" the extent of an employer's duty under OSHA. Because the Secretary

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6/ The Secretary recently reaffirmed his original intent in the preamble to the new Part 1915. See note 1 supra. Referring to his 1971 adoption of the LHWCA standards on ship repairing, shipbuilding and ship breaking as standards under OSHA, the Secretary stated, at 47 Fed. Reg. 16986:

> As was noted at that time, and as set forth in §§ 1910.13, 1910.14, and 1910.15, the adoption of these standards as OSHA standards did not incorporate those provisions which dealt with application or interpretation of the LHWCA. Several such provisions have continued to be published in Parts 1915 through 1917, but their relevance is limited to LHWCA, and they are not governing under OSHA. The consolidation of the shipyard standards which is being accomplished today does not affect this coverage.

did not adopt that section or section 1916.1, Part 1916 was not limited under OSHA to employment "on the navigable waters of the United States, including dry docks, graving docks and marine railways." For this reason, the judge erred to the extent that he relied on the inland location of Respondent's pipe shop as the basis of his holding that Part 1916 did not apply to working conditions in the pipe shop. 7/

III

Having determined that the scope of Part 1916 under OSHA was governed by 29 C.F.R. § 1910.14 and that Part 1916 therefore applied to "every employment and place of employment of every employee engaged in shipbuilding or a related employment," we must next determine whether the judge erred in concluding that the employees in Respondent's pipe shop were not engaged in "shipbuilding" or "related employment." The applicable definitions of these key terms are set forth in sections 1910.14(b)(1) & (2).8/ The terms are defined as follows:

> (1) "Shipbuilding" means the construction of a vessel, including the installation of machinery and equipment.

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7/ In Dravo Corp. v. OSHRC & Marshall, 613 F.2d 1227 (3rd Cir. 1980), the United States Court of Appeals for the Third Circuit held that a structural shop on the same Neville Island was not covered by the shipbuilding standards. The court reversed a decision by a Commission administrative law judge that had not been reviewed by the Commission. In reversing the judge and finding the shipbuilding standards inapplicable, the court relied on the scope provisions of Subpart A of Part 1916, including the definitions of "employer," § 1916.2(c), and "employee," § 1916.2(d). In Part 1916, the definitions of "employer" and "employee" referred to the narrow situs term "navigable waters." The court noted its view that these definitions limited the coverage of Part 1916 under OSHA to "navigable waters . . . including dry docks, graving docks, and marine railways."

The narrow situs term "navigable waters" is not present in the scope or definition provisions of § 1910.14 and neither the Commission judge nor the Dravo court considered whether § 1910.14 was the exclusively applicable scope provision for Part 1916 under OSHA. Accordingly, the Third Circuit's opinion is not conclusive on this question. Cf. S.E.C. v. Chenery Corp., 332 U.S. 194 (1947)(Chenery II) (a reviewing court considers the propriety of an agency's action only on the grounds stated in the agency decision and the Court's previous reversal and remand of the agency's unsupportable action in Chenery I, 318 U.S. 80 (1943), did not preclude the agency from taking the same action on remand on other grounds supportable by law).

8/ Respondent argues that the applicable definitions of "shipbuilding" and "related employment" were those set forth in §§ 1916.2(i) & (j). For the

> (2) "Related employment" means any employment performed as an incident to, or in conjunction with, shipbuilding work, including, but not restricted to, inspection, testing trials, and employment as a watchman.

The Secretary contends that the employees working in Respondent's pipe shop were engaged in "shipbuilding" or "related employment." The Secretary emphasizes the following facts: (1) the pipe shop was located only 100 feet from the water, (2) the work performed by the employees furthered their employer's business of new ship construction, and (3) 90% of the pipe shop's production was eventually installed in towboats or barges assembled at Respondent's boatyards. The Secretary argues that these facts support a finding that the employees at issue were engaged in shipbuilding or, at the very least, "employment performed as an incident to, or in conjunction with, shipbuilding work" within the meaning of section 1910.14(b)(2), supra.

In particular, the Secretary urges us to draw an analogy to Commission decisions construing the term "construction work" as it is used in determining the scope of Part 1926. The Secretary cites the Commission's decisions in A.A. Will Sand & Gravel Corp., 76 OSAHRC 81/G2, 4 BNA OSHC 1442, 1976-77 CCH OSHD ¶ 20,864 (No. 5139, 1976), and in United Telephone Co. of the Carolinas, 76 OSAHRC 110/B14, 4 BNA OSHC 1644, 1976-77 CCH OSHD ¶ 21,043 (No. 4210, 1976). The Secretary asserts that, under those decisions, the test for determining whether an employee is engaged in "construction work" is whether his work is an integral part of the construction activities at the worksite. Analogizing to this test, the Secretary reasons that the work performed by the pipe shop employees was an integral part of the shipbuilding activities at Respondent's

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(Footnote 8 cont'd)

> reasons stated in Part II of this opinion, we conclude that those definitions were not adopted under OSHA and that they are relevant only in determining the scope of Part 1916 under the LHWCA. Nevertheless, we note that the two sets of definitions are identical and that the terms "shipbuilding" and "related employment" accordingly have the same meaning under both OSHA and the LHWCA.

Neville Island workplace. Accordingly, the Secretary continues, the employees in the pipe shop were clearly engaged in covered activities.

Respondent urges us to adopt the judge's conclusion that its pipe shop employees were not engaged in "shipbuilding" or "related employment." It contends in effect that the term "shipbuilding" refers to the process of actually assembling a vessel. Thus, it notes that shipbuilding at its workplace is an integrated work process consisting of nine steps before flotation of the vessel and additional work aboard the vessel after flotation. It implicitly argues that this integrated work process is "shipbuilding" within the meaning of the term and that the pipe fabrication is not "shipbuilding" because it is not a part of this integrated process but rather is a separate production process.

In addition, Respondent asserts that its pipe shop employees were not engaged in a "related employment." Referring to the examples given in the definition of the term, i.e., "inspection, testing trials, and employment as a watchman," Respondent reasons that activities classified as "related employment" share two essential characteristics: (1) they are contemporaneous with the "actual" shipbuilding process and (2) they result in exposure to the same hazards arising from "actual" shipbuilding activity. In contrast, Respondent continues, the pipe fabrication involved in this case "precedes any actual shipbuilding activity," making it "remote" in both time and hazard potential from the types of employment classified as "related employment."

We agree with Respondent. Sections 1910.14(b)(1) & (3) describe "shipbuilding" as "construction of a vessel, including the installation of machinery and equipment", and "vessel" as "watercraft . . . capable of being used, as a means of transportation on water . . . ." The employees in Respondent's pipe shop do not construct vessels capable of being used in water. Rather, the employees cut sheet metal and pipe into "pre-assemblies", and also fabricate "sub-assemblies" such as rudders, nozzles and sewage holding tanks. Nor do the employees in the pipe shop install

machinery or equipment into vessels; such installation takes place across the street in the "barge shop" or the boatyard, usually after the "pre-assemblies" and "sub-assemblies" have been temporarily stored in an intermediate storage area.

Since the pipe shop operations are not "shipbuilding", the determinative issue is whether the employees in the pipe shop are engaged in "related employment." The plain meaning of the words in the definition of "related employment", as well as the whole regulatory scheme of former Part 1916, suggests that a variety of factors must be considered to determine whether the activities in Respondent's pipe shop constitute "related employment". See Berglund-Cherne General Contractors, 82 OSAHRC / , 10 BNA OSHC , 1982 CCH OSHD ¶ 26,039 (No. 79-4347, 1982) (regulations should be construed to give effect to the natural and plain meaning of its words); § 1910.14(b)(2) defines "related employment" as employment which is "incident to, or in conjunction with" shipbuilding; thus, we must consider whether the cited operations are contingent upon and occur simultaneously with the construction of a vessel. The examples of "related employment" listed in § 1910.14(b)(2)--such as inspections, testing trials, and watchmen duties--suggest that the nature or the type of work is a relevant factor. 9/ In addition, the entire regulatory scheme of the shipbuilding standards in Part 1916 addresses hazards which are unique to the immediate construction of ships. 10/ In our view, the following factors are relevant in determining whether employees are engaged in "shipbuilding" or "related employment": (a) the nature of the work being performed.

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9/ Indeed, the construction cases relied upon by the Secretary look to the nature of the work when applying the "integral part" test. See United Telephone Company of the Carolinas, 4 BNA OSHC at 1645 (reconstruction of telephone lines constitutes "alterations", a term specifically used to define "construction work" in § 1910.12(b)); A.A. Will Sand, 4 BNA OSHC at 1443 (unloading of gravel onto conveyor hopper only as the gravel was needed for the roof repairs, constitutes "construction").

10/ For example: § 1916.32(f) refers to tank shells, decks, overheads, and bulk heads; § 1916.43(a), (b), (c), and (e) refer to deck openings, hatches, flotation devices and bilges; § 1916.44 refers to vessels afloat, gangways, Jakob's ladders; § 1916.55 refers to radar, radios, masts and king posts.

e.g., whether it is peculiar to shipbuilding or common to other industries as well, whether the construction of a vessel is dependent upon the work at issue, etc.; (b) the proximity in terms of time and location of the work at issue to the work of actually constructing the vessel; and (c) the relationship of the work at issue to the hazards that are normally incident to the construction of a vessel.

In the case now before us, the work being performed by Respondent's pipe shop employees was directly related to Respondent's shipbuilding work only in the sense that approximately 90% of the employees' work product was ultimately installed in the towboats and barges assembled in Respondent's boatyards. Nevertheless, the work being performed by these employees was the fabrication of pipes and pipe assemblies. Therefore, the employees were engaged in what was essentially a manufacturing operation that was not significantly different from operations found in various other industries. Moreover, the workplace of these employees was physically separated from the areas where the towboats and barges were assembled, and the work of the employees was completed before the work of assembling the vessels was begun. For these reasons, the working conditions of the employees, including the hazards incident to their work, were comparable to the working conditions of employees engaged in manufacturing operations and dissimilar to the working conditions customarily encountered by employees engaged in the construction of a vessel.

We therefore conclude, on balance, that the work performed by Respondent's pipe shop employees was not "shipbuilding" or "related employment." We agree with Respondent that the work was not covered by Part 1916 because it was remote in terms of time and location from Respondent's shipbuilding activities and it did not involve exposure to maritime hazards.

We base this conclusion on another ground as well. Having reviewed the standards in former Part 1916, we note that there were no standards therein that specifically applied, either by their express terms or their apparent intent, to the types of working conditions that would be found in Respondent's pipe shop. Indeed, many of the standards, including the one at issue in this case, are expressly

limited to working conditions on vessels or drydocks or in confined spaces such as those typically found in vessels. See note 10, supra. We therefore conclude that the Secretary did not specifically consider the work activities that are before us to be "shipbuilding" or "related employment" when he promulgated 29 C.F.R. Part 1916. Cf. BJ-Hughes, Inc., 82 OSAHRC / , 10 BNA OSHC 1545, 1982 CCH OSHD ¶ 25,977 (No. 76-2165, 1982)(holding that Part 1926 does not apply to oil drilling and concluding, based on review of standards in Part 1926, that the Secretary did not specifically consider oil drilling to be construction work when he promulgated Part 1926).

We reject the Secretary's analogy to the cases interpreting the term "construction work" in 29 C.F.R. § 1910.12, which governs the scope of Part 1926, and his argument in support of an expansive interpretation of the terms "shipbuilding" and "related employment." Initially, we note that, while the "integral part" test in the context of Part 1926 was developed as an interpretation of the term "construction work," extension of that test to former Part 1916 would have resulted in a substitution of the "integral part" test for the test expressly set forth by the Secretary in 29 C.F.R. § 1910.14, including the definitions of "shipbuilding" and "related employment." In sum, we conclude that there is no need for applying an "integral part" test to the clear and unambiguous definitions of "shipbuilding" and "related employment."

We further observe that the Secretary adopted in section 1910.14 the same definitions of "shipbuilding" and "related employment" that he had used under the LHWCA. See note 8 supra. This indicates that the Secretary did not extend former Part 1916 to work activities that had not been covered under the LHWCA standards. There is no evidence of which we are aware that the predecessor standards under the LHWCA ever were applied to the types of activities that are before us. Accordingly, we decline to adopt a test for determining the coverage of former Part 1916 that would lead to an expansion of its coverage to these types of activities.

In addition, we conclude that the Secretary's position is contrary to the purposes and objectives of the Act. It is clear that the goal of safe and healthful working conditions in Respondent's pipe shop would be better served by applying to that shop the general industry standards in 29 C.F.R. Part 1910 rather than the shipbuilding standards formerly in Part 1916. The general industry standards are quite pervasive and they are specifically designed to cover many of the hazards that would be encountered in Respondent's pipe fabrication and assembly operations. In contrast, as indicated above, there are no provisions formerly in Part 1916 that appear to be well suited for application to an operation that is essentially a manufacturing operation separated in both time and location from shipbuilding activities and the hazards incident to those activities.

For the reasons stated above, we affirm Judge Harris' conclusion that the employees in Respondent's pipe shop were not engaged in "shipbuilding" or "related employment." Moreover, because the employees at issue were not engaged in a covered employment, we also affirm the judge's conclusion that 29 C.F.R. Part 1916, including the cited standard, did not apply to the working conditions in Respondent's pipe shop. Accordingly, the judge's decision vacating the citation item alleging noncompliance with 29 C.F.R. § 1916.51(a) on the ground that that standard did not apply to the cited working conditions is affirmed.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

Date: MAY 28 1982

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COTTINE, Commissioner, concurring:

I join in Part II of the majority's opinion and their conclusion that the scope under the OSH Act of these standards was governed exclusively by the provisions of 29 C.F.R. § 1910.14. Accordingly, the limitation in 29 C.F.R. § 1916.2(d) to employment on "navigable waters . . . including dry docks, graving docks, and marine railways" was a restriction on the scope of Part 1916 only as it applied under the LHWCA and Judge Harris erred in relying upon the provisions of that section. I also concur with the majority's disposition of the alleged violations. However, I would affirm the judge on different grounds.

I

The majority errs in concluding that Respondent's pipe shop employees were not engaged in "shipbuilding" or "related employment." Rather, the Secretary properly relies on analogous Commission precedent construing the term "construction work" in 29 C.F.R. § 1910.12 and correctly concludes that employees are engaged in "shipbuilding" or "related employment" when their work is an integral part of the shipbuilding activities at their worksite. See, e.g., United Telephone Co. of the Carolinas, 76 OSAHRC 110/B14, 4 BNA OSHC 1644, 1976-77 CCH OSHD ¶ 21,043 (No. 4210, 1976); A.A. Will Sand & Gravel Corp., 76 OSAHRC 81/G2, 4 BNA OSHC 1442, 1976-77 CCH OSHD ¶ 20,864 (No. 5139, 1976); Bechtel Power Corp., 76 OSAHRC 38/E2, 4 BNA OSHC 1005, 1975-76 CCH OSHD ¶ 20,503 (No. 5064, 1976), aff'd, 548 F.2d 248 (8th Cir. 1977). In adopting and extending Part 1916 standards, the Secretary applied those standards to "every employment and place of employment of every employee engaged in shipbuilding or a related employment." 29 C.F.R. § 1910.14(a). (Emphasis added). He then defined "related employment" as including "any employment performed as an incident to, or in conjunction with, shipbuilding work . . . ." 29 C.F.R. § 1910.14(b)(2). Accordingly, the coverage of incidental employment was even clearer in the context of Part 1916 than it is in the context of Part 1926, and the principles underlying the Commission's broad construction of the scope of

Part 1926 are of equal, if not greater, force in determining the scope of the standards formerly published in Part 1916. For these reasons, the test urged by the Secretary is the proper test to be applied by the Commission.

Applying this test to the facts of this case, it is clear that Respondent's employees in its pipe shop were engaged in "shipbuilding" or a "related employment." These employees worked on the premises of a large industrial complex where their employer was engaged in shipbuilding as one of its principal activities. Their particular workplace was located only 100 feet from navigable waters and near the marine launching ways. Moreover, the primary purpose of their work was to further Respondent's shipbuilding enterprises. In addition, their work was a necessary step in the integrated process of vessel construction. At the time of the inspection, approximately 90% of the work product of the pipe shop was eventually installed in towboats or barges assembled by Respondent at this worksite. Accordingly, these employees were engaged in work that was an integral part of the shipbuilding activities at Respondent's Neville Island complex and their work activities were within the scope of the OSHA shipbuilding standards formerly published in Part 1916.

II

Notwithstanding the conclusion that Part 1916 was generally applicable to the working conditions in Respondent's pipe shop, I conclude that the particular standard cited in this case did not apply to the cited working conditions. 1/ On this ground, I join the majority in affirming the judge's disposition of the citation at issue.

Section 1916.51(a) included a provision that working and walking areas "on vessels and drydocks" shall be kept clear of materials that could create an obstruction or a tripping or slipping hazard. In light of the limitations of this provision to conditions on "vessels or drydocks," the Commission issued a supple-

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1/ As set forth in note 1 of the lead opinion, the standard in question was published at 29 C.F.R. § 1916.51(a) at the time the citation on review was issued, but it recently has been renumbered as 29 C.F.R. § 1915.91(a). Throughout this opinion, I use the old codification of the standard.

mental briefing order requesting the views of the parties as to whether section 1916.51(a) in its entirety was limited to conditions on "vessels" and "drydocks." Both the Secretary and Respondent submitted their views on this issue, taking conflicting positions. Nevertheless, the arguments of both these parties share the same underlying premise, that is, that the phrase merely reflected the jurisdicitional limitations of the LHWCA and that it did not have any independent force and effect. This premise is erroneous.

It is more reasonable to conclude that standards using the terms "vessels" and "drydocks" specifically address working conditions or hazards unique to vessels, drydocks, or both vessels and drydocks. In any event, I follow the basic principle that standards should be construed to give effect to all of their provisions so that no part will be rendered superfluous. See In re Surface Mining Regulation Litigation, 627 F.2d 1346, 1362 (D.C. Cir. 1980), citing 2A Sutherland Statutory Construction, § 46.06 at 63 (4th ed. 1973); U.S. v. Menasche, 348 U.S. 528 (1955); Tabor v. Ulloa, 323 F.2d 823 (9th Cir. 1963). In particular, I reject the Secretary's contention that the phrase "on vessels or drydocks" was a limitation on the scope of some of the standards in which it was used but mere surplusage in other standards in which it was used. Section 1910.14(a), the provision that controls the adoption and extension of the LHWCA standards, clearly states that the adopted standards "shall apply according to the provisions thereof." Furthermore, the Secretary's position, if adopted, would require employers to guess as to the meaning of the standards formerly published in Part 1916 and could render particular standards unenforceably vague. Accordingly, I conclude that the phrase "on vessels or drydocks," as used in section 1916.51(a) and other standards formerly published in Part 1916, was a limitation on the scope of those specific provisions.

Although the phrase "on vessels or drydocks" was used only in the third sentence of section 1916.51(a), a reading of the standard as a whole indicates that the entire standard was directed to working conditions and hazards unique to

vessels and drydocks. Accordingly, the cited provision did not apply to the cited conditions in Respondent's pipe shop. For this reason, I concur in the Commission's affirmance of the judge's order vacating this citation item.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|---|
| SECRETARY OF LABOR | : | |
| Complainant | : | |
| v. | : | DECISION |
| DRAVO CORPORATION | : | OSAHRC DOCKET NO. 14818 |
| Respondent | : | |

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Local No. 61

Harris, Judge, OSAHRC

This is a proceeding under Section 10(a) (Section 659 (a)) of the Occupational Safety and Health Act of 1970 which became effective on April 28, 1971 (the Act, 29 U.S.C. 651). The respondent, Dravo Corporation (Dravo), by the Notice of Contest dated August 29, 1975, contests Items 4 and 10 of a citation issued to it on August 13, 1975.[1/]

Item 4 alleged a violation of the standard at 29 CFR 1916.10(a)(2) for that:

> Department of Labor Form Mar-8 designating a competent person had not been filed with the nearest office of the Occupational Safety and Health Administration.

No further reference need be made to this item since the same was vacated on the complainant's motion for the reason that he was satisfied that the form in question had in fact been filed as the standard required (TR. 170-171).

Item 10 alleged a "non-serious" violation of the standard at 29 CFR 1916.51(a) in that:

> Hose and electric conductors were not elevated over or placed under the working surface at the south wall of the pipe shop.

The citation required abatement thereof by August 28, 1975. A Notice of Proposed Penalty issued to Dravo with the said citation proposed a penalty for this violation of $40.

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1/ The citation, following an inspection had on July 29, 1975, alleged a total of 11 items of alleged violation of specific standards promulgated by the complainant. Item 11 was deleted by an amendment dated August 29, 1975.

The standard at 29 CFR 1916.51(a) provides:

> (a) Good housekeeping conditions shall be maintained at all times. Adequate aisles and passageways shall be maintained in all work areas. All staging platforms, ramps, stairways, walkways, aisles, and passageways on vessels or drydocks shall be kept clear of all tools, materials, and equipment except that which is in use, and all debris such as welding rod tips, bolts, nuts, and similar material. Hose and electric conductors shall be elevated over or placed under the walkway or working surfaces or covered by adequate crossover planks.

At the conclusion of complainant's case, Dravo moved to dismiss the citation on the ground that the employees who worked in the area designated in the citation were not engaged in shipbuilding or a related employment described in 29 CFR 1916.2(d) and were therefore not covered by 29 CFR 1916.51(a), one of the shipbuilding standards. Complainant thereupon moved that the citation be amended to charge, in the alternative, that Dravo, on the same facts, was in violation of the standard at 29 CFR 1910.22(b)(2) (TR. 101-109). Dravo vigorously opposed this application. Each of these applications were then taken under advisement (TR. 101;108). Section 1910.22 is generally applicable to all permanent places of employment and the standard at 29 CFR 1910.22(b)(2) provides:

> (2) Permanent aisles and passageways shall be appropriately marked.[2/]

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2/ Although complainant's Brief at pp. 8 and 9 refers to 29 CFR 1910.22(b)(2), as Dravo points out (Br. p. 21 fn.), the language referred to by counsel for complainant actually has reference to 29 CFR 1910.22(b)(1) (TR. 104), which provides:

> (b) Aisles and passageways.
>
> (1) Where mechanical handling equipment is used, sufficient safe clearances shall be allowed for aisles, at loading dock , through doorways and wherever turns or passage must be made. Aisles and passageways shall be kept clear and in good repairs, with no obstruction across or in aisles that could create a hazard.

The facts which bear upon a resolution of the issues raised herein are, in the main, not seriously in dispute.

Dravo is a corporation organized under the laws of the State of Pennsylvania and maintains offices in the city of Pittsburgh, in that state. It is a diversified corporation with sales of approximately $500 million a year and operates an extensive steel fabrication and shipbuilding facility on Neville Island, Pennsylvania, where it employs some 2,000 persons (TR. 5-7).

This facility comprises an area of about one-half mile running east and west along Neville Island. There are marine ways on the north side of the island. On the south side, there is a structural shop which produces material handling equipment for mines and steel mills, pelletized disks, tanner gauges, gun carriages for atomic cannons and oxygen furnaces for steel mills. Here also, are fabricated, steel plates which are cut, shaped and formed into parts for towboats (TR. 112-113). Barges and towboats are assembled in their respective boatyards and launched. The construction process to launching, consumes approximately 55 days. Thereafter, the finishing work is done on the vessel. This includes installing the final interior assemblies, insulation, painting and dressing up (TR.114-115).

The pipe shop, the subject of the investigation and citation herein, occupies part of a structure which is approximately 300 feet long by 120 feet wide (TR. 43) and is located on the main channel side of the Island, near the launching ways (TR. 74). The pipe shop fabricates

sub-assemblies, including rudders, Kort nozzles, sewage holding tanks and fittings for installation in barges and towboats under construction in the boatyards and on the ways. These sub-assemblies are sent to the structual shop for inclusion in other assemblies under construction and then shipped to the boatyards (TR. 111; 113). In the pipe shop also are fabricated, pipe assemblies for eventual installation in the barges and towboats being built in the boatyards (TR. 25; 53; 54; 62; 71; 73). When these assemblies are completed they are loaded into trucks and taken to either the structual shop or directly to a storage area in the boatyard or directly to the ways for installation in a barge or towboat (TR. 64; 71; 75; 116-117). Approximately 90 percent of the pipe shop's production goes into vessels in the assembly area in the boatyards. The remaining 10 percent concerns material handling machinery and maintenance (TR. 63; 117; 140; 166).

The pipe shop employs about 25 men, of these 12 or 13 are welders. The rest are fitters, machinist, and pipe benders. Their work is done on worktables set up in the area occupied by the pipe shop. There is no evidence, nor is it contended, that any of these men were at any time engaged in installing any of their fabrications in a barge or towboat or that they participated in moving any of these fabrications from the pipe shop or a final storage area to or into any vessel in any stage of construction (TR. 58; 61; 62-63; 118; 146; 149; 158; 160-161).

I am constrained, upon these facts, to find that the standard at 29 CFR 1916.51(a) is not applicable to the pipe shop, as it is herein described, for the following reasons. The standard at 29 CFR 1916.51(a) was originally promulgated by the Secretary of Labor as 29 CFR 1502. 51 (a)

on March 27, 1964, pursuant to the Longshoremen's and Harbor Workers' Compensation Act (P. Law No. 85-792, 29 U.S.C. 941 et seq.).[3/] Standards under Part 1502 of Title 29 entitled "Safety and Health Regulations for Shipbuilding," were deemed to be occupational safety and health standards on December 29, 1970, by force of Section 653(b)(2) of the Act and became enforceable against employers by virtue of Section 654(a)(2). On October 18, 1972, the Secretary of Labor, the complainant herein, adopted the standards prescribed in Part 1502 "under section 6(a) of the Act" (Section 655(a)) and on October 19, 1972, these standards were re-designated as Part 1916 of Title 29 (29 CFR 1910.14, 37 F.R. 22104 and 29 CFR 1916, 37 F.R. 22485). The Standard at 29 CFR 1502.51(a) is presently designated as 29 CFR 1916.51(a), and is the standard under which the citation herein has been issued. That the complainant intended that the standards in Part 1916 have the same meaning, extent and application as they had as Part 1502, is, it seems to me, clear.

The purpose, scope and responsibility prescribed in Section 1502.1 is identical with that in Section 1916.1 and both sections state that "The purpose of this part is to make determinations under this standard with respect to shipbuilding activity."

Reference to 29 CFR 1910.14(a) establishes that "The standards prescribed by Part 1502 of this title and in effect on April 28, 1971...

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3/ The sub-section was amended on October 10, 1967, (32 F.R. 14049) and, as amended, is identical in language with 29 CFR 1916.51(a)

shall apply, according to the provisions thereof, to every employment and place of employment of every employee engaged in shipbuilding or a related employment." (Emphasis added). Section (b) defines "shipbuilding" and "related employment" as

> (1) 'Shipbuilding' means the construction of a vessel, including the installation of machinery and equipment; and
>
> (2) 'Related employment' means any employment performed as an incident to, or in conjunction with, shipbuilding work, including, but not restricted to, inspection, testing trials, and employment as a watchman;

29 CFR 1916.2(i) and (j), define the same terms in identical language.[4/]

It is conceded that Dravo is an employer as defined in Section 1916.2 (c) (identical in language with Section 1502.2 (c)) (TR. 96). However, it is the definition of "employee" as it appears in Section 1502.2(d), now 1916.2(d), which controls the requirement in 1916.1(a), that every employer "furnish and maintain employment and places of employment which are reasonably safe for his employees in all employments covered thereby....[5/] (Emphasis added). "Employee" is defined as

> ...any person employed in shipbuilding or related employments on the navigable waters of the United States, including dry docks, graving docks and marine railways, by an employer as defined in paragraph (e) of this section. (Emphasis added).

4/ Taken word for word from 29 CFR 1502.2(i) and (j). Unlike 1904.14(b)(2) "employment" in line 2 thereof, appears in plural form in both 1502.2(i) and 1916.2(j).

5/ Section 41 of the Longshoremen's and Harbor Workers' Compensation Act, supra.

No change has been made in the standards in Part 1916 since their adoption by the Congress as occupational safety and health standards by virtue of Section 4(b)(2) of the Act and it seems clear beyond a doubt that the Secretary of Labor is in accord with the expression in Section 1916.1(a), formerly Section 1502.1(a), that the purpose of these standards is to make determinations "with respect to shipbuilding."

Applying the circumstances of this case, it is clear that Dravo's employees working in the pipe shop were not engaged in the construction of any vessel nor the installation therein of machinery and equipment.

Quaere. Were they engaged in any "related employments on the navigable waters of the United States, including dry docks, graving docks and marine railways"?

No evidence appears to indicate that any of these said employees were working in or on any dry dock, graving dock or marine railway. That being so, was their employment such as is covered by the Longshoremen's and Harbor Workers' Compensation Act?

Section 903(a) of the Longshoremen's and Harbor Workers' Compensation Act, as amended in 1972 (33 U.S.C. 903(a)), provides:

> Compensation shall be payable...only if the disability or death results from an injury occurring upon the navigable waters of the United States (<u>including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel</u>)... (Emphasis shows the 1972 amendments.)

Section 902(3) of the same Act defines employee as follows:

> The term 'employee' means any person engaged in maritime employment, including any longshoremen or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker, .... (Emphasis shows the 1972 amendments.)

Prior to the 1972 amendments, the injury, in order to be covered under the law, had to occur "upon the navigable waters of the United States..." and coverage stopped at the waters edge. The 1972 amendments established a dual test for coverage. The definition of "navigable waters" was expanded to include specified land areas and the employee must have been engaged in "maritime employment." See, ITO Corporation of Baltimore, et al v. Benefits Review Board, U. S. Department of Labor, et al, (4 Cir., December 22, 1975, Nos. 75-1051; 75-1075; 75-1196). As that court said, "The net effect of the 1972 Amendments was therefore to broaden the area in which an injury would be covered, and narrow the class of persons eligible according to job function." The term "maritime employment", as the same court said, "is a phrase that embodies the concept of a direct relation to a vessel's navigation and commerce." For a definition of the term "maritime employment" the House and Senate Reports concerning "Extension of Coverage to Shoreside Areas." are informative.6/ The House Report contains the following:

> The present Act, insofar as longshoremen and and shipbuilders and repairmen are concerned, covers only injuries which occur "upon the navigable waters of the United States." Thus, coverage of the present Act stops at the water's edge;...
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> * * *

6/ S. Rep. No. 92-1125, 92 Cong. 2d Sess. (1972); H.R. Rep. No. 92-1441, 92d Cong. 2d Sess. (1972).

> ...the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipmakers, and other employees engaged in maritime employment...if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.
>
> *  *  *
>
> ...The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. (Emphasis added).

It seems clear that for the purposes of Section 1916.1, the "employments" covered by the Longshoremen's Act, as amended, are limited to those actually engaged in shipbuilding, either on navigable waters or on an adjoining pier, wharf, dry dock, terminal, building way, marine railway or on an adjoining area customarily used by the employer in repairing or building a vessel. The reference to "related employments" in Section 1916.2(d) can only be taken to mean those persons who are actually engaged in support employments such as checking, storing materials and moving materials from final storage points, in an area adjoining navigable waters and customarily used by the employer in the building of a vessel, to or into the vessel. Paraphrasing the language of the 4th Circuit Court in ITO Corporation of Baltimore, supra, I reject the conclusion that all persons, excluding clerical employees other than checkers, who play any part in the overall shipbuilding process are covered by the Act, as amended. I think that, with respect to shipbuilders or other persons engaged in shipbuilding operations, the Amendments

extend only to those employees engaged in shipbuilding and related activities between the ship and the last point of rest of equipment and machinery delivered to the shipbuilding area intended for installation in the ship under construction, including checkers directly involved in such shipbuilding or related functions. (Slip op. p. 24).

I do not believe that the fact that 90 percent of the fabrications formed in the pipe shop eventually are installed in a vessel being built in Dravo's marine yards (TR. 117) alters the fact that the employees in the pipe shop are not engaged in shipbuilding or the type of "related employment" contemplated by the Longshoremen's Act, as amended. I therefore find, for the reasons expressed, that the specific standard at 29 CFR 1916.51(a) is not applicable to the area of and the activities carried on in the pipe shop.

At the conclusion of Dravo's motion to vacate the citation on the ground that the shipbuilding standard at 29 CFR 1916.51(a) is not applicable to the pipe shop, the complainant moved that an alternative allegation that Dravo was in violation of the general standard at 29 CFR 1910.22(b)(2), be added to the citation. Dravo resisted this application, refused the court's offer of a continuance to prepare against the charge in the alternative and elected to proceed (TR. 107-108). There is ample authority for the allowance of the amendment of pleadings under Rule 15(b) of the Federal Rules of Civil Procedure where no undue prejudice will result and the new issue has been tried by express or implied consent; Secretary v. Isaacson Structural Steel Company, 17 OSAHRC 496 (1975); Secretary v. Park Construction Company, 17 OSAHRC 343 (1975);

Secretary v. Brisk Waterproofing Co., Inc., 3 OSAHRC 1132 (1973).

Complainant's motion came at the conclusion of his presentation. Dravo had not yet begun to present its defense and counsel, satisfied that "the facts remain the same in either case." and that "I don't think we need time to present the case," elected to put in his defense to both allegations (TR. 107-108). I can therefore perceive no prejudice flowing to Dravo and am satisfied that it chose to proceed fully aware that if the facts warranted, liability might be predicated upon a violation of the standard at 29 CFR 1910.22(b)(2). I therefore grant complainant's motion to amend. It follows that, since I have determined that the particular standard at 29 CFR 1916.51(a) does not apply to Dravo's pipe shop, the general standard at 29 CFR 1910.22(b)(2) becomes applicable under 29 CFR 1910.5(c)(2).[7/]

Section 1910.22(b)(2) requires that "permanent aisles shall be appropriately marked." I find no testimony that any existing permanent aisles in the pipe shop were not appropriately marked. On the contrary, Reed, the inspecting officer, stated that there were designated walkways

7/ This standard provides:

> (2) On the other hand, any standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for the industry, as in subpart B or Subpart R of this part, to the extent that none of such particular standards applies. To illustrate, the general standard regarding noise exposure in § 1910.95 applied to employments and places of employment in pulp, paper, and paperboard mills covered in § 1910.261.

See, Warnel Corporation, Docket No. 4537 (March 31, 1976).

in the pipe shop and that he did not cite Dravo for improperly marked or cluttered or obstructed walkways (TR. 29; 133-134). There is some testimony that it is necessary to cross hose and weld lines, which are in the work area, in order to get to a designated walkway (TR. 139; 159; 160; 191; Exhs. C-1; R-1; R-2). However, the designated walkways are kept clear (TR. 42-43; 45; 69; 121) and where hose and lines cross walkways, they are covered by metal treadles (TR. 122). I find therefore, for the foregoing reasons, that Dravo was not in violation of Section 1910.22(b)(2) and that Item No. 10 of the Citation herein, as amended, should be vacated in all respects.

So Ordered.

DAVID H. HARRIS
Judge, OSAHRC

Dated: May 11, 1976
Hyattsville, Maryland

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

May 28, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

American Luggage Works, Inc.

OSHRC DOCKET NO. 77-893

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

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-

FOR THE COMMISSION

Ray H. Darling, Jr.

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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 77-893 |
| AMERICAN LUGGAGE WORKS, INC., | : | |
| Respondent, | : | |
| | : | |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge Ben D. Worcester is before the Commission pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Judge Worcester vacated a citation alleging noncompliance with 29 C.F.R. § 1910.212(a)(3)(ii).[1/] The citation alleged that Respondent, American Luggage Works, Inc., failed to guard the points of operation of twenty-five Thomson rivet machines. For the following reasons, we reverse Judge Worcester's decision and affirm the citation.

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1/ 29 C.F.R. § 1910.212(a)(3)(ii) provides:

§ 1910.212 General requirements for all machines.

(a) Machine guarding—

* * *

(3) Point of operation guarding.

* * *

(continued on next page)

I

Respondent manufactures soft vinyl suitcases sold under the American Tourister brand name at its plant in Woonsocket, Rhode Island. The suitcases range in height from twenty-two to twenty-nine inches and are manufactured by joining together vinyl sheets, vinyl straps, rubber and cardboard. The pieces are fastened together by rivets driven by twenty-five Thomson rivet machines, which are a specialized form of power press. The machines are used for four operations: connecting frames to the floor of the luggage and then attaching the frame and floor assembly to the case, attaching handles to the suitcase, attaching bumpers or feet to the luggage, and attaching buckles to shoulder straps which are then attached to the bags.

The rivet machine is operated by depressing a foot pedal, which is shrouded to prevent accidental operation. The foot pedal engages a clutch which engages a power supply from an electric motor. The power is transmitted to a plunger contained within a frame. Directly below the plunger is a pocket holding the rivet. The pocket is about one-half to three-quarters of an inch above the pilot, a pin is used to locate and align work upon the anvil. This pin is about one-eighth of an inch in diameter. The parts to be riveted are assembled over this spring-loaded pilot. When the press is tripped by depressing the foot pedal, the plunger pushes the rivet through the pocket and through the spring-loaded pilot. The pilot retracts downward

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1/ (continued)

(ii) The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

part way, allowing the hollow tubular rivet to be pushed downward through the pilot and through the material to be joined. The rivet expands and sets in place as it strikes the anvil. Washers are used with the rivets to strengthen the attachment of the frame to the floor of the luggage and of the bumpers or feet to the luggage. The operator places the washers on the pilot. After placing the washer, an operator removes his hand from the point of operation to hold the bag steady during the operating cycle.

At the hearing, the Secretary presented as witnesses the inspecting compliance officer, Guido DiCenso, and his supervisor, John Barnes. Mr. Barnes inspected Respondent's workplace after the citation issued. Mr. Barnes testified that the most generally accepted guard for rivet machines is the ring guard. The ring guard consists of an aluminum tube or wire ring, one-eighth of an inch in diameter, around the riveting machine plunger. The ring must drop toward the anvil a predetermined distance, which can be adjusted depending on the thickness of the material being riveted, before the machine can operate. When the ring drops down the predetermined distance without encountering an obstruction, a circuit is closed allowing the machine to cycle. If the operator has part of his body in the point of operation, the ring guard will not drop the predetermined distance, and the machine will not cycle. A brochure explaining the operation of the Touch-O-Matic ring guard device manufactured by the Positive Safety Manufacturing Company indicates that the Touch-O-Matic ring guard can be attached to either a side or the front of the machine by means of three mounting holes. Once attached, only one set screw has to be adjusted to alter the distance the ring guard would be required to drop. Mr. Barnes stated that were an employee to move the guard upwards from its pre-adjusted guarding position and then step on the foot pedal to activate the rivet press the press would not operate.

Mr. DiCenso testified that he observed employees' hands between one and eighteen inches from the point of operation when the machine was activated for different riveting operations. For example, while an employee was attaching handles to a piece of luggage, the compliance officer observed the employee's hands within one inch of the point of operation as the machine cycled. Moreover, while aligning feet on the bottom of the luggage prior to activating the rivet machine, the operator placed his hands directly on the point of operation. The operator removed his fingers from the point of operation before stepping on the foot pedal to activate the machine.

The Secretary also presented as a witness Frances Boni, an employee who operated a rivet machine to rivet a strap and buckle onto the luggage. She stated that her hand was one-half to one inch from the point of operation when the rivet struck the strap and attached it to the luggage bag. She stated that, while she was never injured, she had close calls when her hands slipped while holding the strap over the pin on the anvil.

The Secretary also presented as a witness another employee, Mary Beattie, who riveted the buckle on the zipper which holds the shoulder strap. Mrs. Beattie stated that she had to place a washer right on the pilot at the point of operation prior to removing her hands from the point of operation. When she stepped on the foot pedal, her hands were about two or three inches from the point of operation. She was injured when she accidentally cycled the machine while her hands were still within the point of operation. A rivet and washer went through her thumb and she was out of work for three weeks. However, she thought she had been careless in allowing herself to be injured. The Secretary showed that

five employees had been injured over a three-year period while operating the rivet machines.

Respondent presented three witnesses at the hearing. Henry Stevens, Respondent's director of safety and security, stated that a ring guard was not necessary to protect employees in riveting the frame to the luggage bag and the frame to the floor of the bag since the operator was required to hold the outside of the bag. The operator's hands were therefore away from the point of operation. Moreover, when bumpers were riveted to the bottom of the luggage, there was not sufficient clearance for fingers to get within the point of operation. However, he also stated that this was not true of the three other riveting processes: riveting the frame to the floor, the frame to the bag, and the handle to the bag.

Mr. Stevens stated that he had not attempted to guard the point of operation of the rivet machines before the citation issued in this case. He stated that the ring guard would be appropriate if it closed to within one-quarter of an inch of the point of operation but that the work pieces were of such a configuration that a guard could leave at least half an inch, and possibly a greater opening, at the point of operation. He also testified that, in attaching handle tabs to the covering over the frame of the suitcase, the ring guard would allow the machine to operate while the guard was still an inch and a quarter above the top of the bag.

Respondent's second witness was Marcel Hoyas, a senior loss prevention consultant employed by Liberty Mutual Insurance Company, the company which carries Respondent's workman's compensation policy. He stated

that rivet machines in the luggage manufacturing industry did not have point of operation guards. Mr. Hoyas was familiar with the ring guard protective device but concluded that "the work place configuration" did not lend itself to using the ring guard. He stated that the ring guard could not protect employees riveting the handle to luggage because the handle extended too high above the luggage bag. As a general matter, he concluded that ring guards would not adequately protect employees operating rivet machines because the operator could still reach over, around, or through the guard. He also stated that the ring guard would not protect employees to a greater degree than current operating procedures because the employee would rely on the ring guard rather than adhere to proper work practices. He thought that the ring guard was highly susceptible to malfunction; he had tested ring guards and "in three successive attempts [he] found them to malfunction."

Respondent's last witness was John W. Juechter, a design and mechanical engineer. Mr. Juechter stated that the point of operation of Respondent's rivet machines could not be "effectively guarded" by any guarding device and that for all of Respondent's operations, except one, a ring guard would be "impractical." The only operation in which Mr. Juechter thought a ring guard could be used was attaching bumpers to the bottom of the bag. However, since the operator's hands did not come near the anvil during this operation, he saw no advantage in using a guard for this operation. Because the materials riveted together are not uniform in shape, quality or thickness, and since many pieces are large and supported on a single point, Mr. Juechter stated that it would be impractical to use a ring guard — a device that must be adjusted to drop a predetermined distance.

Mr. Juechter stated he does not design safety guards and did not observe, in preparation for this case, any guards on riveting machines for luggage manufacturing. He has seen the Touch-O-Matic ring guard device for point of operation guarding at a plant of a different employer in Rhode Island. There, the rivet presses were riveting small pieces together. He had never seen a Touch-O-Matic ring guard used on a riveting machine in a luggage operation and thought that there was no serious opportunity for injury where the operator's hands were an inch or two away from the point of operation.

II

Judge Worcester vacated the citation because he concluded that the Secretary had not established how Respondent should have guarded its rivet machines. He found that the Secretary had not established that using a ring guard was feasible. Relying on Respondent's witnesses Mr. Hoyas and Mr. Juechter, he further found that no attentive employee could be injured and that a ring guard would preclude performance of required work.

The Secretary petitioned for review of Judge Worcester's decision and excepted to Judge Worcester's findings that employees attentive to their duties could not be injured, that a ring guard was not reliable and would preclude performance of required work, and that no other type of guard would be feasible. The Secretary also took exception to the judge's placing the burden of proof on the Secretary to show what the employer should have done to comply with section 1910.212(a)(3)(ii). Commissioner Cleary granted the petition and directed review on all issues raised in the petition.

On review, the Secretary argues that the distance of the operator's hands to the point of operation was conceded to be as little as one inch,

establishing exposure to the hazard, and that section 1910.212(a)(3)(ii) requires guarding by a device and does not permit reliance on employee attentiveness. He argues that the employer must establish the affirmative defense of impossibility, not infeasibility, and that the Secretary need not prove feasibility. He further argues that to establish the impossibility defense, the employer must establish that compliance was impossible and that available alternative protective means were used. The Secretary contends that Respondent provided no alternative protection except for legally insufficient safety instructions and made no effort to devise appropriate machine guarding.

The Secretary argues that Respondent failed to establish that it was impossible to guard the riveting machines. He notes that Respondent never hired a qualified consultant to assist in guarding the machines, did not test any guards, and did not apply for a variance. He points out that Respondent's safety director, Mr. Stevens, was not an engineer, never designed point of operation guards for rivet machines, and never tried to use any guards on these machines. He also notes that Respondent's witness Mr. Hoyas, the insurance company employee, was not a mechanical engineer, never designed guards for riveting machines, and stated he was not qualified to design such guards. The Secretary also states that Mr. Hoyas, despite Respondent's injury record, did not consult with anyone to see if a ring guard could be adapted. Moreover, the Secretary points out that Mr. Hoyas did not know what guarding methods had been tried in the industry. Finally, concerning Respondent's witness Mr. Juechter, a mechanical engineer, the Secretary notes that, while the witness concluded that the point of operation could not be guarded, Mr. Juechter had not observed any guarding in preparation for this case, had not run any guarding tests himself, and

had not consulted with any engineers regarding Respondent's machines. The Secretary concludes that, absent even the most basic attempts to test methods of guarding rivet machines, Respondent cannot sustain an affirmative defense of impossibility.

Respondent argues on review that the mere presence of an operator's hands in close proximity to an unguarded machine does not, by itself, show employee exposure to injury. Respondent asserts that, because the foot pedals activating the rivet machines were shrouded and the machines could not cycle more than once when the pedals were depressed, the employees were protected from point of operation hazards. Respondent also emphasizes that employees received instructions on how to operate the machines and, because they were required to hold the materials being riveted while the machines cycled, the employees' hands were inevitably located away from the point of operation. Respondent asserts that, in view of these safety measures, the judge properly found that employees were not exposed to injury.

Respondent further argues that it has proved an impossibility of compliance defense. It points to testimony that (1) ring guards had been tested and had been found to be highly susceptible to malfunctioning, and (2) the different sized pieces of luggage being riveted made installation of the ring guard impossible. Respondent states that its witnesses Mr. Hoyas and Mr. Juechter considered guarding and determined it to be inappropriate. Respondent contends that the Secretary only introduced evidence of the feasibility of installing a ring guard and that Respondent refuted this evidence, showing that no form of ring guard could be installed. Respondent then argues that once it introduces substantial evidence that one method of guarding is impossible, the Secretary must either rebut that evidence or show that some other guarding device is

possible. Finally, Respondent contends that it had instituted alternative protective measures consisting of instructions to employees concerning proper operating procedures in view of the configuration, size, and arrangement of the materials being riveted.[2/]

III

In Buckeye Industries, Inc., 75 OSAHRC 21/B3, 3 BNA OSHC 1837, 1975-76 CCH OSHD ¶ 20,239 (No. 8454, 1975), aff'd, 587 F.2d 231 (5th Cir. 1979), the Commission stated that section 1910.212(a)(3)(ii) prescribes the performance required in guarding the point of operation of machines, that the Secretary need not show that it is possible for guards to be used on machines, and that the impossibility of guarding the point of operation is an affirmative defense that the employer must establish. See also F.H. Lawson Co., 80 OSAHRC 19/A14, 8 BNA OSHC 1063, 1980 CCH OSHD ¶ 24,277 (No. 12883, 1980), appeal dismissed, No. 80-3277 (6th Cir. Feb. 9, 1981). Accordingly, Judge Worcester erred in vacating the citation on the ground that the Secretary failed to establish that there was a feasible method to guard the point of operation.

To establish noncompliance with section 1910.212(a)(3)(ii), the Secretary must show that the point of operation of the machine exposed employees to injury and that it was not physically guarded. Hughes Brothers, Inc., 78 OSAHRC 65/A2, 6 BNA OSHC 1830, 1978 CCH OSHD ¶ 22,909 (No. 12523, 1978); Buckeye Industries, Inc., supra. The record in this case reveals that, during the operating cycle, the operators' hands were as close as one

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2/ Respondent also argues that section 1910.217 exempts rivet machines from the guarding requirements of section 1910.212. We have rejected this argument, Irvington Moore, 75 OSAHRC 45/A2, 3 BNA OSHC 1018, 1974-75 CCH OSHD ¶ 19,523 (No. 3116, 1975), aff'd, 556 F.2d 431 (9th Cir. 1977).

inch to the unguarded point of operation. This is sufficient to show that employees were exposed to injury. See F.H. Lawson Co., supra.

Respondent's argument that its employees were not exposed to point of operation hazards because they were instructed in safe operating procedures and were required to remove their hands from the point of operation during the operating cycle lacks merit. We have previously stated, in Hughes Brothers, Inc., supra, that section 1910.212(a)(3)(ii) requires that guarding be provided by a "device" and does not allow reliance upon the skill or attentiveness of employees. See also Pass & Seymour, Inc., 79 OSAHRC 101/C13, 7 BNA OSHC 1961, 1979 CCH OSHD ¶ 24,074 (No. 76-4520, 1979), appeal dismissed, No. 80-4013 (2nd Cir. Mar. 19, 1980); Slyter Chair, Inc., 76 OSAHRC 46/A2, 4 BNA OSHC 1110, 1976-77 CCH OSHD ¶ 20,589 (No. 1263, 1976); Irvington Moore, 75 OSAHRC 45/A2, 3 BNA OSHC 1018, 1974-75 CCH OSHD ¶ 19,523 (No. 3116, 1975), aff'd, 556 F.2d 431 (9th Cir. 1977). The standard is intended to eliminate danger from unsafe operating procedures, poor training, or employee inadvertence. Pass & Seymour, Inc., supra; Signode Corp., 76 OSAHRC 43/A2, 4 BNA OSHC 1078, 1975-76 CCH OSHD ¶ 20,575 (No. 3527, 1976), appeal denied, 549 F.2d 804 (7th Cir. 1977). In this case, five employees have been injured operating Respondent's rivet machines over a three-year period.

Moreover, the evidence shows that employees' hands were close to the point of operation during the operating cycle. Respondent's reliance on shrouded foot pedals and the machines' non-repeating feature as a method of guarding is misplaced, for these only assist the employees to prevent inadvertent cycling and do not prevent inadvertent contact with the point of operation while the machines are cycling. Thus, the shrouded foot pedals and the non-repeating feature of the machines do not constitute guarding

that prevents employees from having their hands in the point of operation during the operating cycle. See MRS Printing, Inc., 78 OSAHRC 84/B10, 6 BNA OSHC 2025, 1978 CCH OSHD ¶ 23,102 (No. 76-3113, 1978). Accordingly, we conclude that the Secretary has established that Respondent's employees were exposed to the hazard of an unguarded point of operation.[3/]

We further conclude that Respondent failed to establish its defense of impossibility. To establish the defense, the employer must establish either that compliance with the standard would preclude performance of the required work or that compliance would be functionally impossible. The employer must also show that alternative means of protection were unavailable. Pass & Seymour, Inc., supra; M.J. Lee Construction Co., 79 OSAHRC 12/A2, 7 BNA OSHC 1140, 1979 CCH OSHD ¶ 23,330 (No. 15094, 1979). In this case, Respondent has not met this burden.

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3/ Respondent argues that American National Standards Institute ("ANSI") B154.1-1974 is an "appropriate" standard to which an employer may refer, for guidance in guarding, by the terms of § 1910.212(a)(3)(ii), see note 1 supra, and that, because the ANSI standards except rivet machines used to manufacture suitcases from guarding, Respondent was not required to guard its rivet machines. We have recently held, in George C. Christopher & Son, Inc., No. 76-647 (Feb. 26, 1982), that the phrase "any appropriate standards therefor" within section 1910.212(a)(3)(ii) refers only to applicable specific standards published or incorporated by reference as occupational safety and health standards in Title 29 of the Code of Federal Regulations. Since ANSI B154.1-1974 is not a specific standard published or incorporated by reference as an occupational safety and health standard in Title 29 of the Code of Federal Regulations, we reject Respondent's argument. Moreover, ANSI B154.1-1974 requires that the point of operation of rivet setting machines be guarded unless, among other things, the shape or nature of the materials being riveted would preclude guarding. The riveting of suitcases is listed as one example where the method of riveting might preclude guarding the point of operation. As our discussion of Respondent's impossibility defense indicates, Respondent has not shown that its riveting methods fit within the exception to the standard's guarding requirements, and thus has not shown that the ANSI standard, even if applicable, would not require guarding of the point of operation of its rivet setting machines.

The testimony of Mr. Stevens and Mr. Hoyas that the ring guard would leave a large enough opening to permit employees' hands to enter the point of operation while they riveted handles onto the luggage bags was limited to that operation and did not address the impossibility of installing the guard for use in other operations. The testimony of all three of Respondent's witnesses about the problems engendered by the configuration of the materials being riveted is also insufficient to establish the defense. The testimony did not factually describe why a particular riveting operation could not be performed if a ring guard were used to protect employees from contact with the machine at the point of operation. The witnesses' testimony was general and, in essence, conclusory. The witnesses only indicated that, because of the varying shapes, quality, thicknesses, sizes, and ways of holding the materials into the point of operation, use of the ring guard would be, in Mr. Juechter's words, "impractical" and would leave the point of operation "ineffectively guarded." At most, the testimony suggests that the guard would have to be adjusted for different operations and for materials of different sizes and shapes. See F.H. Lawson Co., supra; Hughes Brothers, Inc., supra. However, the Secretary offered unrebutted testimony that the Touch-O-Matic ring guards could easily be adjusted to accommodate different sized pieces riveted together by adjusting one set screw.[4/]

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4/ Even if we were to agree with the Respondent's assertion that during certain riveting operations the point of operation would be ineffectively guarded, the Respondent is not excused from its obligation to provide whatever protection is possible. As we have previously noted:

> To accept Respondent's argument would be, in effect, to allow a total absence of protection because the guard does not provide complete protection. This is contrary to the express purpose of the Act. See

(continued on next page)

Mr. Hoyas testified that he had tested the ring guard, and "in three successive attempts" found that it failed. However, he did not indicate when he made these tests, how they were made, or that he made any attempts to adjust the guards for use on Respondent's machines. Neither Mr. Juechter nor Mr. Stevens testified that they had attempted to design guards for the machines and Mr. Stevens conceded that he had not tried to guard the machines prior to the inspection. What the Commission stated in F.H. Lawson Co., supra, is equally applicable here:

> The flaw in respondent's proof of impossibility lies in its failure to even consider changes in its mode of production that might lead to compliance.
>
> * * *
>
> Thus, a respondent faced with a guarding problem is expected to use the skills and resources at its disposal to develop an acceptable method of guarding. This may, in some cases, require changes in the method of operation of the machine.
>
> * * *
>
> [T]he use of certain guarding techniques may make the operation of respondent's machines difficult. Respondent, however, made no attempt to find an appropriate combination of guarding techniques and operating procedures in order to protect its employees. Therefore, Respondent's defense of impossibility must fail.

8 BNA OSHC at 1067, 1980 CCH OSHD at p. 29,575.

Moreover, a test of the guard would be relatively simple in this case because the guard is available and adjustable. Accordingly, absent

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4/ (continued)

Sec. 2(b) of the Act; Kelly Construction Services, Inc., 76 OSAHRC 89/F3, 4 BNA OSHC 1491, 1976-77 CCH OSHD ¶ 20,925 (No. 7102, 1976).

Boonville Division of Ethan Allen, Inc., 78 OSAHRC 105/B4, 6 BNA OSHC 2169, 2172, 1979 CCH OSHD ¶ 23,219 at p. 28,078-9 (No. 76-2419, 1978).

evidence of an attempt to use the guard in each of the four operations, we do not accept Respondent's impossibility defense. We do not uphold the defense as to the handles riveting operation, despite Respondent's testimony, because Respondent has not tested to confirm its conclusion and, in this operation, an operator's hands are one inch from the point of operation. If Respondent, after installing the ring guard, does find that the guard precludes performance of any of its work, Respondent may file a petition for modification of the abatement requirement. See section 10(c) of the Act, 29 U.S.C. § 659(c).

IV

The Secretary proposed a $60 penalty for the violation, which he alleged was nonserious.[5/] At the hearing, Respondent stated that if a violation was found, Respondent did not contest the proposed penalty. Having considered the factors in section 17(j) of the Act, 29 U.S.C. § 666(i), we assess a penalty of $60.

Accordingly, the judge's decision is reversed and the citation is affirmed. A penalty of $60 is assessed. SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: MAY 28 1982

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5/ Respondent also suggests, in its argument in its review brief, that the possibility of injury is negligible in this case and that therefore the violation should be characterized as de minimis. However, we affirm the violation as nonserious because the possibility of injury evidenced by the record in this case and the nature of the harm that could result from an accident are not negligible. See Pratt & Whitney Aircraft, 81 OSAHRC 39/A2, 9 BNA OSHC 1653, 1981 CCH OSHD ¶ 25,329 (No. 13401, 1981), appeal withdrawn, No. 81-4104 (2nd Cir. Aug. 3, 1981); General Motors Corp., Rochester Products Division, 81 OSAHRC 30/E13, 9 BNA OSHC 1575, 1981 CCH OSHD ¶ 25,279 (No. 78-2894, 1981), and cases cited therein.

ROWLAND, Chairman, dissenting:

This case represents the fourth time that riveting machines in facilities owned by Respondent have been inspected. At each previous inspection, the compliance officers found no violation of point of operation guarding standards on the basis of the exemption set forth in 29 C.F.R. § 1910.217(a)(5).[1/] I believe that the compliance officers were correct the first three times, and that section 1910.217(a)(5) precludes the Secretary from citing Respondent under the general point of operation guarding standard at section 1910.212(a)(3)(ii). However, even assuming that the cited standard applies, I believe the record establishes, for all the rivet machines, either that employees' hands were sufficiently far away and protected from the point of operation when the machines cycled that employees were not exposed to injury when following proper operating procedures, or that it would be infeasible to guard the machines.

It is undisputed that Respondent's riveting machines are mechanical power presses. Section 1910.217 is entitled "Mechanical power presses" and contains detailed requirements such machines must follow, including requirements for guarding the point of operation. See section 1910.217(c). An employer in Respondent's position would therefore naturally look to section 1910.217 to determine the requirements for guarding its rivet machines. See Snyder Well Servicing, Inc., 82 OSAHRC , 10 BNA OSHC 1371, 1375, 1982

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1/ 29 C.F.R. § 1910.217(a)(5) provides, in pertinent part:

§ 1910.217 Mechanical power presses.

(a) General requirements.

* * *

(5) Excluded machines. Press brakes . . . riveting machines and similar types of fastener applicators are excluded from the requirements of this section.

CCH OSHD ¶ 25,943 at p. 32,511 (No. 77-1334, 1982); General Supply Co., 77 OSAHRC 16/A2, 4 BNA OSHC 2039, 1976-77 CCH OSHD ¶ 21,503 (No. 11752, 1977), appeal dismissed, No. 77-1614 (5th Cir. June 22, 1977). When it did so, it would discover that section 1910.217(a)(5) excludes riveting machines "from the requirements of [section 1910.217]." This indicates to employers that point of operation guarding of such machines is not required. Nothing in the standards gives employers fair warning that they are subject to point of operation guarding requirements under other standards. See Irvington Moore v. OSHRC, 556 F.2d 431 (9th Cir. 1977) (Wright, Judge, dissenting). Thus, I would not apply section 1910.212(a)(3)(ii) but, since my colleagues and the judge have applied the standard, I will address the merits of the alleged violation. I believe the record fails to establish a violation.

Respondent performs four distinct riveting operations in its luggage manufacturing plant in Woonsocket, Rhode Island: riveting handles to the suitcase; riveting buckles to shoulder straps, which are then attached to the bag; riveting bumpers, or feet, to the luggage bag; and riveting the frames to the floor of the luggage, and then riveting the frame and floor assembly to the case. The Secretary's compliance officer, Mr. DiCenso, described how different machines were used for different operations. He stated that six machines were used to install handles and that during this installation, an operator's hands could be as little as one inch from the point of operation. Eight machines were used in assembling straps, where the operator's hands were between six and twelve inches from the point of operation, and eleven machines were used to rivet bumpers to the bottom of the suitcase, where the operator's hands would be twelve to eighteen inches from the point of operation. For the bumper attaching operation, there was insufficient clearance for fingers to get within the point of operation.

In attaching the frame to the floor of the luggage and in riveting bumpers on the luggage, a washer was used to strengthen the attachment. The washer was placed on the anvil pilot at the point of operation, after which the operator removed his hands from the point of operation, gripped the sides of the suitcase, and stepped on the foot pedal to operate the rivet press. Moreover, when an employee was riveting the frame to the floor of a piece of luggage and then riveting the frame to the bag, his hands would be a great distance from the point of operation.

The Commission has previously stated that the way a machine functions and the manner in which it is operated by employees must be considered in determining whether it presents a hazard. See Stacey Manufacturing Co., 82 OSAHRC , 10 BNA OSHC 1534, 1537, 1982 CCH OSHD ¶ 25,965 at p. 32,560 (No. 76-1656, 1982); Rockwell International Corp., 81 OSAHRC 118/A2, 9 BNA OSHC 1092, 1097, 1980 CCH OSHD ¶ 24,979 at p. 30,846 (No. 12470, 1980). Moreover, it is during the operating cycle, and not before, that the standard requires that a guarding device protect an employee from having any part of his body in the danger zone. George C. Christopher & Sons, Inc., 82 OSAHRC , 10 BNA OSHC 1436, 1445, 1982 CCH OSHD ¶ 25,936 at p. 32,533 (No. 76-647, 1982). Therefore, guarding is not required if the nature of the machine operation does not expose an employee to injury. Rockwell International Corp., supra; Collator Corp., 76 OSAHRC 32/A2, 3 BNA OSHC 2041, 1975-76 CCH OSHD ¶ 20,446 (No. 2004, 1976).[2/]

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2/ The judge found that, based on 18,000,000 rivets set and only nine minor injuries occurring during a three year period, the probability of injury from operating a riveting machine is remote. The absence of substantial injuries during years of use is probative evidence that a machine's operation does not present a hazard. See A.E. Burgess Leather Co. v. OSHRC, 576 F.2d 948 (1st Cir. 1978).

Mr. DiCenso's testimony established that employees were not exposed to injury while using the eight machines to rivet straps, since their hands were at least six inches from the point of operation when the machine was activated, and there was no evidence indicating employees had any reason to come in contact with the point of operation during the operating cycle. Similarly, employees operating the eleven machines used to rivet bumpers on to the bottom of the suitcases were holding the suitcases to keep them steady while the machine was activated. Their hands were twelve to eighteen inches from the point of operation when they cycled the press and also were not exposed to injury within the meaning of section 1910.212(a)(3)(ii). Finally, for the operations where the frame was attached to the floor and then the frame and floor assembly attached to the bag, Mr. Stevens, Respondent's Safety Director, testified that employees were holding the outside of the bag while cycling the machine for this operation, and their hands were a great distance from the point of operation. Therefore, during this operation, employees were not exposed to injury. Thus, the record establishes, for all operations except riveting the handle to the suitcase, that employees were not exposed to injury during the operation of the machines.

Mr. Hoyas, a senior loss prevention consultant employed by the company carrying Respondent's workman's compensation policy, stated that rivet machines used in the luggage manufacturing industry generally did not have point of operation guarding. He was familiar with the ring guard protective device, and stated that in riveting the handle to the luggage bag, the handle extended so high above the piece that the ring guard would be physically unable to descend to protect employees. Moreover, Mr. Hoyas stated that he had tested several ring guard units and that the guard malfunctioned in three successive tests. Mr. Hoyas further stated that the workplace configuration did not lend itself to using the ring guard.

Mr. Stevens stated that in riveting shoulder straps to the bag, the operator first places the tab and strap assembly on the anvil and aligns them. The strap is attached to a metal loop, which extends above the strap. He stated that the thickness of the strap assembly and the height of the metal buckle at the point of operation would prevent the ring guard from descending and offering any protection.

Mr. Juechter, a design and mechanical engineer, also concluded that the point of operation of Respondent's rivet machines could not be guarded by any guarding device. He stated that since the materials riveted together are not uniform in shape, quality or thickness, and since many pieces are large and supported on a single point, that no device would work to guard the point of operation. Mr. Juechter's opinion was confirmed by Mr. Stevens who also thought the ring guard would prevent the machine from operating because of the location of the pieces at the point of operation.

Mr. Stevens and Mr. Hoyas both testified why other types of guarding devices also would not work. Mr. Stevens stated that a two-hand trigger guarding device could not be used since both hands were needed to hold the bag on the anvil, that a barrier around the bumper or handle would prevent positioning the work, and that a sweep device would sweep work away from the area. He did not know of a safer way to operate these machines. Mr. Hoyas stated that the workplace configuration and the nature of the work being processed would not allow either an interlock, noninterlock, or movable interlock guard to be used. He continued that two hand controls also were not feasible since the operator must position the work with his hands, and that a pull-back or restraining device would not make the operation any safer since it would be difficult to control the amount of restraint such a device would impart to employees.

The majority concludes that the burden is on Respondent to prove that guarding its machines is "impossible." I believe it is more appropriate to speak, as the courts of appeals do, of permitting the employer to show that compliance with a standard is "infeasible." Faultless Division, Bliss & Laughlin Industries, Inc. v. Secretary of Labor, No. 81-1740 (7th Cir. Mar. 30, 1982); A.E. Burgess Leather Co. v. OSHRC, 576 F.2d 948 (1st Cir. 1978); Ace Sheeting and Repair Co. v. OSHRC, 555 F.2d 439 (5th Cir. 1977); Atlantic & Gulf Stevedores, Inc. v. OSHRC, 534 F.2d 541 (3d Cir. 1976). To impose on an employer a burden of proving impossibility is to impose a burden that is unachievable. Moreover, considering only whether compliance with a standard is literally possible precludes consideration of practical problems associated with compliance. Permitting an employer to defend on the grounds that compliance is infeasible permits practical considerations to be taken into account.

The Secretary presented general testimony that the ring guard was the type of guard most commonly used for riveting machines. Respondent then presented evidence specifically explaining why the use of such guards would be infeasible for its operations. Respondent raised two basic objections to the ring guard: the guard would not provide any protection in certain of Respondent's operations, and the guard was generally unreliable and could not be relied upon to prevent the cycling of a machine when part of an employee's hand was in the point of operation. The Secretary did not attempt to rebut this evidence, but argues that it is not probative because of the asserted lack of qualifications of Respondent's witnesses to offer such testimony. The Secretary also contends that the fact Respondent did not attempt to guard its machines prior to the inspection detracts from the weight that should be afforded Respondent's evidence.

I conclude that Respondent has presented sufficient evidence that guarding is infeasible that the burden shifted to the Secretary to rebut this evidence. As the Secretary failed to present any rebuttal, Respondent has established its defense of infeasibility.

The testimony of Respondent's witnesses establishes that use of the ring guard would not provide any protection in certain riveting operations and would be unreliable in those operations for which it could be used. Contrary to the Secretary's argument, this testimony is entitled to the probative and controlling weight which the judge accorded it since the record reveals that Respondent's witnesses were qualified to offer their testimony. Moreover, the Secretary's enforcement officials, who testified concerning the efficacy of the ring guard, had no experience in luggage manufacturing and had not seen a ring guard used in that industry. Accordingly, their testimony that Respondent could use ring guards is not more persuasive than the contrary testimony of Respondent's witnesses. Ultimate Distribution Systems, Inc., 82 OSAHRC , 10 BNA OSHC 1568, 1982 CCH OSHD ¶ 26,011 (No. 79-1269, 1982) (Rowland, Chairman, dissenting).

The fact that Respondent did not test the ring guard in all of its operations prior to the inspection is not, standing alone, a valid reason to conclude that the testimony of Respondent's witnesses is unreliable. Prior to this inspection, the Secretary had taken the consistent position that Respondent's riveting machines did not require point of operation guarding, and it was the consistent practice in the luggage manufacturing industry to operate riveting machines without point of operation guarding devices. Thus, there was no reason for Respondent to test guarding devices. Moreover, Respondent was not indifferent to the potential hazard its machines presented and had protected its employees as well as possible by covering

the foot pedals used to activate the machines, placing the foot pedals a foot or two away from the point of operation to prevent inadvertent cycling, and giving instructions to employees on how to safely operate these machines. The evidence of the low frequency of accidents shows that these measures were effective. Thus, the record shows that Respondent has done all that is feasible to protect its employees, and the citation should be vacated.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant<br>v.<br>AMERICAN LUGGAGE WORKS, INC.,<br>d/b/a AMERICAN TOURISTER LUGGAGE,<br>Respondent | OSHRC DOCKET NO. 77-893 |

Appearances:

Paul Katz, Esq. for Complainant

Patrick A. Liguori, Esq., for Respondent

DECISION AND ORDER

This proceeding arose out of an inspection of American Luggage Works, Inc's, plant at Woonsocket, Rhode Island, on February 16, 1977, where American Tourister brand luggage is manufactured. Two citations alleging violation of The Occupational Safety and Health Act of 1970, 29 U.S.C. section 651 et seq. resulted, but only Item 10 of Citation No. 2 is in issue. All other items mentioned in the two citations have become a final order by operation of law. Item 10 alleged that:

> 29 CFR 1910.212(a)(3)(ii): Point(s) of operation of machinery were not guarded to prevent employee(s) from having any part of their body in the danger zone(s) during operating cycle(s):

The hearing began in Boston, Massachusetts, on November 9 and 10, 1977, resumed on December 21, 1977, and was concluded on March 20, 1978.

## The Issues

The Secretary contends that proof that Respondent's employees' hands came within an inch or less of the point where straps and handles were fastened to luggage by means of riveting machines which had no guards at this point showed that a hazard of serious injury to operators existed and that the burden of proof then shifted to the Respondent to show that the installation of guards would make it impossible to perform the work.

The Respondent, after conceding that there were no guards on the riveting machines, denied violation of the Act because the regulations themselves provide that where there is a particular standard applicable to a method of operation it will prevail over a general standard. 29 CFR section 1910.5(c)(1). Attention was directed to 29 CFR §1910.217 which is applicable to all mechanical power presses and the heading "Excluded Machines", in paragraph (5), where it was stated that:

> "...riveting machines and similar types of fasteners applicators are excluded from the requirements of this section."

The Respondent also contends, assuming arguendo that section 212(a)(3)(ii) is applicable, that there was no violation because there was a failure of the Secretary to prove that a feasible method of guarding exists and, that both practical reasons and company rules made it necessary for the operator's hands to be removed from the point of operation before the machine could be cycled and this was a "method" of operation which satisfies the requirements of section 212(a)(3)(ii).

## Summary of the Testimony

The chief witnesses for the Secretary were Guido DiCenso, the compliance officer who made the February 16th inspection and John Barnes, DiCenso's superior officer who came to the Woonsocket plant to observe Respondent's manufacturing operation on March 25, 1977. This was five weeks after the citation had been issued.

DiCenso has been an OSHA inspection for 3-1/2 years. For 20 years before that he was employed at the United States Construction Battalion Center at Davisville, Rhode Island. For the first 10 or 12 years he was a mechanic repairing all kinds of construction equipment. He later worked as a Production Controller, Contract Specialist and Safety Officer.

Barnes has been a supervising safety specialist with the Department of Labor for about 2 years and a compliance officer for 4 years before that. He had previously been a safety supervisor with Monsanto Chemical Company for 6 years. His only experience with the type of equipment involved, rivet machines, was many years ago when he was self employed in the automobile repair business and used a rivet machine to install brake linings.

The Respondent is a manufacturer of luggage which involves fastening the component parts together with 23 riveting machines in its Woonsocket plant. In order to do this the operator positions the work on the anvil and aligns it in the proper place with his two hands. After his hands have been removed, he depresses a foot pedal about 10 inches away from his foot. This activates the machine and drives the rivet. The pedal is covered with a shroud so that the operator cannot accidentally

step upon the peddle before he removes his hands from the point of operation. The luggage cannot be properly riveted unless the operator removes his two hands from the point of operation to hold the work in place. When he does that his fingers cannot be injured by activation of the machine. Company rules require the operator to refrain from stepping upon the peddle until his hands are removed from the point of operation.

The witnesses for the Secretary, DiCenso and Barnes, said that a ring guard would prevent any accidental or careless movement into the point of operation by the operator and that in failing to install such a device the employer had violated section 212(a)(3)(ii).

The witnesses for the Respondent, on the other hand, said that the use of a ring guard or any other type of guard would make it impossible to perform the work. They both said that if the operators adhered strictly to company rules which required them to avoid activating the riveting machine until the work was in place and their hands removed from the point or operation, no injury would be sustained. See Secretary v. George C. Christofer & Sons., Inc., OSHRC Docket No. 76-647 (1977).

The testimony of three of the Secretary's witnesses supports this opinion. Denis J. Williard, a summer employee, suffered an injury solely because the machine malfunctioned. Francis Boni has worked for the Respondent for more than 3 years as a rivet operator without having any injury. Mary Beattie said that she was injured once but admitted that it was due to her own carelessness. (Tr. IV, p. 83-84). An employer is not in violation when the act or omission complained of is the direct result of the failure to an employee who has had safety training to adhere to

safety requirements, Secretary v. A & W Drill Rentals, Inc., et al, OSHRC No. 271 and 276 (1974); Secretary v. Bechtel Power, 9 OSAHRC 762 (1974).

The Respondent's witness, John W. Juechter, is a consulting engineer. He graduated from Massachusetts Institute of Technology with a degree in mechanical engineering in 1950. After receiving a master's degree in business management from Boston University in 1952, he was employed as a methods engineer for five years, a design engineer for two years, a chief mechanical engineer for five years, and a project and technical advisor to one of the firms engaged in the production of components of the Air Force manned laboratory space project. Since 1970 he has been a partner in his own consulting firm. He has previously testified as an expert in the state and federal courts. When asked how he would compare the machine in question with a mechanical power press he said that a ring guard would be neither effective nor practical. Because of the complexity of the subject his conclusions are best understood when expressed verbatim. He said at Tr. IV, p. 27:

> " It is my opinion that on all of the operations that I observed say but one, the ring guard device would be impractical. The one application where a ring guard might be used was on the operation putting the feet on the bottom of the bag; but since the operator doesn't come anywhere near the anvil with his hands at any time I could see no advantage to doing it, and furthermore because of the size of the bag and the fact that it sits only on a single point anvil the practicality of that operation is questionable with the ring guard."

He had seen ring guards used on a Thompson riveting machine where the product was a small eye protection device where the parts fit together neatly (Tr. IV, p. 52) but:

" The problem here in trying to adapt the ring guard device which basically depends upon some configuration of material dropping down to clear — let's say, dropping down to be certain that the operator's fingers are clear of the work place, this depends — excuse me. For the device to work properly, it has to drop to a predetermined distance, and considering the fact that the materials being riveted together are not uniform in quality; they're not uniform in shape; they ripple; they're soft; they vary in thickness; the pieces that are being riveted are large in size in many cases and they're being supported on a single point, and I think it is impractical to try and set up a ring guard to do this and I know of no other device that would work either." (Tr. IV, p. 31)

He said that as long as the methods of procedure in force at Tourister are followed by the riveting machine operators, even if the fingers were within an inch of the point of operation at the time of cycling, there was no chance of injury (Tr. IV, p. 55, l. 19, 20).

This witness also disagreed with the Complainant's assumption that guarding meant only that a mechanical device which barred entry of the fingers into the point of operation met the requirements of the regulation. He pointed out that covers over mechanical moving parts and power transmission equipment, anti-repeat controls and installation of foot controls at a point removed from the area where the operator stands prior to cycling the machine all were types of guarding. Covering the pedal with a shroud is another method.

The Respondent's witness, Marshall Hoyas, has been a Senior Loss Prevention Consultant for Liberty Mutual Insurance Company for 12 years and as such has visited Respondent's Woonsocket plant on numerous occasions. The Secretary sought unsuccessfully (because his questions on cross-examinations were ruled irrelevant at trial) to ascertain if Hoyas' conclusions were consistent with those of Liberty Mutual. Matters which

have been ruled upon at trial, although a proper subject for discussion in a petition for review, should not be reasserted in a post hearing brief. In any event it is unlikely that Liberty Mutual's loss control expert would express opinions which would be contrary to its objective, that is to keep to a minimum claims for lost time industrial accidents as the Respondent's workmen's compensation carrier. Obviously the objective of Liberty Mutual is wholly compatible with the purpose of the Occupational Safety and Health Act, safety in the workplace. For that reason Mr. Hoyas' opinion based upon his knowledge of the manner of fabricating luggage at Woonsocket and upon his tests and observations is entitled to more weight than that of DiCenso who only observed the process for 30 minutes.

Hoyas said that the Respondent's operating procedure was adequate (Tr. III, p. 163; p. 210, p. 264). Under ANSI standards there are four safety procedures for this type of machine:

1. Training
2. Work Place Configuration
3. Size and arrangement of work force
4. Use of both hands to hold the work (Tr. III, p. 165-166).

He said that a ring guard was prone to malfunction and, for that reason, was not a satisfactory protection device (Tr. III, p. 172). When he had tested a rivet machine equipped with a ring guard by inserting a ball point pen in the point of operation the ring guard failed. The pen which he exhibited at the hearing had a rivet through it (Tr. III, p. 183). In the course of his responsibilities as a loss consultant he had visited the Respondent's plants periodically. In his opinion the accidents which had

occurred in the previous 5 years would not have happened if the affected employees had complied with company safety rules (Tr. III, p. 225).

The Secretary's expertise in the instant case was manifested through the conclusions of DiCenso and Barnes whose sincerity and verocity is not in doubt. However, the superior knowledge and experience of Juechter and Hoyas who also were credible witnesses shows conclusively that a ring guard could not be used on the Respondent's riveting machines. To so conclude is not equivalent to saying that DiCenso's and Barnes' opinions were without merit. Juechter told of his experience in the plant of another manufacturer where a different product was fastened by means of rivets where a ring guard was practical, but he also said that because the size and shape of the luggage made by the Respondent was different than that in the other plant ring guards could not be used. Hoyas on the basis of his knowledge of these procedures and tests he had made reached the same conclusion.

If the preponderance of the evidence shows that it would be both impossible and impractical to do what the Secretary alleges should have been done, then there cannot be a violation of section 212(a)(3)(ii). For that reason it is unnecessary to dispose of the contention of the Respondent that section 217 excludes riveting machines from compliance with section 212. It would be difficult to reject this argument in view of the fact that this is exactly what section 217 says.

However, even if it were assumed that the provisions of section 212 are applicable to riveting machines, no violation occurred.

There is credible, reliable and probative evidence (1) that no employee could be injured if he is attentive to his duties and follows prescribed procedures, (2) that if a ring guard were used, the work could not be done, (3) that no other type of guard would be feasible (4) and that tests of a ring guard on similar machines have demonstrated that it is not reliable. It frequently failed to operate as designed.

The Law

If a regulation does nothing more than create, in effect, a general duty of the employer to meet a standard without stating what specific employer conduct is required for compliance, the burden rests upon the Secretary to show what the employer should have done. General Electric Co. v. Secretary, 540 F.2d 67, 69 (2d Cir. 1976); National Realty and Construction Co., Inc. v. Secretary, 489 F.2d 1268 (1973).

In a manufacturing procedure where the operator's hand comes within an inch of the point of operation and the materials riveted are so varied that the machine would have to be reset after each cycle, the use of a guard would be economically infeasible, impractical and therefore not required. Secretary v. Executone, Inc., OSHRC Docket No. 76-559 (1978). If, the employer has a program of periodic and regular inspection followed by written reports and safety meetings, he has done all he is required to do under 29 CFR section 1910.212(a)(3)(ii). Secretary v. Christoforos and Sons, OSHRC Docket No. 76-647 (1977).

The Complainant after referring to the case of Secretary v. Sheet Metal Specialty Co., OSHRC No. 5622 (April 22, 1975) made the inaccurate and wholly unnecessary comment that the Commission "...in reversing several errors of the Administrative Law Judge..." (Judge Chaplin) held that

29 CFR section 1910.217 does not preempt 29 CFR section 1910.212. A majority did so hold but chiefly to be consistent with their prior ruling in Secretary v. Irvington-Moore, OSHRC No. 3116 (April 7, 1975) decided a year after Judge Chaplin's decision.

Moreover it is not as the Complainant says, most close to the case at bar. In Sheet Metal the Respondent's own witness conceded that a system could be devised to keep the operator's hands out of the danger area. In the case at bar not only has the employer consistently disputed the allegation that the installation of guards on rivet machines was feasible, but also has sustained the burden of proof of impossibility of compliance.

The Complainant overemphasized the significance of the Commission decision in Secretary v. K & T Steel Corp., OSHRC Docket No. 5769 (1976). The employer's evidence in that proceeding consisted solely of unsupported assertions of the manufacturer that no guards were available. That was not true of the case at bar.

In Secretary v. Akron Brick & Block Co., OSHRC Docket No. 4859 (1976) a majority of the Commission held that the method of machine guarding should not be "predominantly" dependent upon human behavior thus indicating that this is in fact one of the "methods" permitted by section .212(a)(1) yet at the same time concluded that work rules "...are not methods of machine guarding contemplated by the standard."

In Secretary v. Garrison & Associates, OSHRC Docket No. 4235 (1975) the Respondent appeared pro se and offered no witnesses, so that this opinion is of no significance.

In Secretary of Labor v. F. H. Lawson Co., OSHRC Docket No. 12883 (1976) cited for the purpose of showing that the burden of establishing

impossibility of performing the work with a guard on a riveting machine, the employer not only offered no proof of any attempt to guard its riveting machines, but also failed to offer any proof of impossibility of performance which is not analagous to the facts in the case at bar where the employer offered substantial expert testimony in support of its contention that it was impossible to install guards and still produce the product being fabricated. This case is now on review before the Commission.

In Secretary v. Zachry Co., OSHRC Docket No. 76-2617 (pending on review) the trial judge held there was no violation where employees could not enter the zone of danger except by deliberate action and that this would be possible (as in the case at bar) even if the machine had guards.

The Respondent has called attention to that clear and plain statement made by the Secretary through the promulgation of 29 CFR section 1910.217(a)(5) under the heading "Excluded Machines" which says that: "...riveting machines and similar types of fastener applicators are excluded from the requirements of this section." The Secretary has not discussed this section, but as the Respondent points out, Judge Cronin in Secretary v. Brown-Jordan Co., OSHRC Docket No. 3982 (1974) and Judge Gold in Collier Construction Co., OSHRC Docket No. 4036 (1974) have held that since section 217 is a specific standard, it prevails over section 212, a general standard, and vacated a section 212 citation. On the other hand, the 9th Circuit Court of Appeals in Gem Top v. Secretary, 556 F.2d 431 (1977) after summarizing the legislative history of sections 212 and 217, decided solely upon the assumed expertise of the Secretary that his argument should be accorded the most weight. However, I don't find this opinion

to be very persuasive when the concurring member of this panel made it clear that he did so reluctantly and solely because of the "expertise" rule. The concurring member said at 436:

> " I concur under the compulsion of the "deference rule" and Judge Lumbard's analysis of the applicability of 654(a)(1) and 655(a) of 29 U.S.C.
>
> In so doing, it is my hope that we are not promoting "delay [of] the day when the occupational safety and health regulations will be written in clear and concise language so that employers [and others concerned] will be better above to understand and observe them." Diamond Roofing v. OSHRC, 528 F.2d 645, 650 (5th Cir. 1976)"

The dissenting member said:

> " An employer is entitled to fair notice when dealing with the Government. An occupational safety and health standard must give an employer fair warning of the conduct which it prohibits or requires. Diamond Roofing v. OSHRC, 528 F.2d 645, 649 (5th Cir. 1976). The regulations in issue do not give this fair warning.
>
> I believe that the employers could properly have assumed that the specific standards of 29 C.F.R. §1910.217 controlled over the more general 29 C.F.R. §1910.212. This is even more supportable when the differing opinions of the administrative law judges and commissioners below are considered.
>
> A statute which is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process. Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322.
> This rule applies to regulations. See Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 72 S.Ct. 329, 96 L.Ed. 367."

The legislative history of section 1910.212 and 1910.217 is bewildering. According to Judge Lumbard for the majority at page 434:

" The two guidelines at issue in this case come from different sources. See 29 C.F.R. §1910.22. The precursor of 29 C.F.R. §1910.212 was a regulation promulgated by the Secretary of Labor in 1969 under the Walsh-Healey Public Contracts Act, 41 U.S.C. §§35(e), 38. On the other hand 29 C.F.R. §1910.217 was derived from consensus standards devised in 1971 by the American National Standards Institute ("ANSI"), a private organization made up of industry representatives and some representatives of labor and government. 6

Since in this case the Secretary's interpretation of his own regulations has been affirmed by the Commission, this interpretation must be accorded substantial weight. (Citations omitted)

Court review here serves only to ensure against circumvention of the public rulemaking process or punishment of employers without fair notice. See, e.g., Diamond Roofing Co. v. OSHRC, 528 F.2d 645, 649 (5th Cir. 1976). Our task is to determine whether the agency's reading of the regulations is reasonable and whether the regulations are not unduly vague.

******

6. Since the promulgation of the power-press guidelines, ANSI has developed safety standards for press brakes. These were published by ANSI in 1973, but they have not been promulaged under OSHA. Petitioners argue that ANSI would not have produced these separate guidelines except on the assumption that press brakes are not covered under existing OSHA regulations.

We find this reading of ANSI's motives unpersuasive; ANSI may have felt simply that it would be desirable to have more detailed standards for press brakes than are supplied in 29 C.F.R. §1910.212. In any event, since §1910.212 is derived from the Walsh-Healey standard rather than from ANSI, ANSI's interpretation of that section is not entitled to weight. See generally National Roofing Contractors Ass'n v. Brennan, 495 F.2d 1294, 1298 (7th Cir. 1974), cert. denied, 419 U.S. 1105, 95 S.Ct. 775, 42 L.Ed.2d 801 (1975)"

## Findings of Fact

Upon consideration of the above mentioned facts I find that:

1. The Respondent was at the time of the inspection and at all times subsequent thereto material to the issues in this proceeding an employer subject to the jurisdiction of the Commission in any proceeding under the provisions of the Occupational Safety and Health Act of 1970.

2. The feasibility of the installation of a ring guard as recommended by employees of the Complainant without notable professional experience is not persuasive when weighed against the findings of an insurance company loss control specialist based upon tests and periodic inspections whose objective is consistent with that of OSHA, the prevention of injuries in the workplace, and the opinions of a professional engineer who had also observed the manufacturing process.

3. A rivet machine is a power press.

4. The installation of a ring guard on the Thompson riveting machines in the Respondent's Woonsocket manufacturing plant would be neither feasible nor beneficial to the safety of employees.

5. The operating procedures established by the Respondent, if adhered to by employees, are sufficient to preclude serious injury or death in the operation of riveting machines.

## Conclusions of Law

1. The Respondent is an employer subject to the provisions of the Occupational Safety and Health Act of 1970.

2. Assuming without deciding that 29 CFR section 1910.212 (a)(3)(ii) is applicable to riveting machines, in view of the fact that

6,000,000 operating cycles are performed annually at the Woonsocket plant and a total of about 18,000,000 rivets were set and only nine minor injuries occurred in a three year period[1/] one of which was due to the negligence of the employee and another due to a machine malfunction, it is plain to be seen that the probability of injury due to the absence of a guard is remote. The Secretary failed to adduce credible, persuasive evidence showing what the employer should have done and some basis for concluding that further efforts would have been feasible and successful. For those reasons, the allegation that the Respondent violated 29 CFR section 1910.212(a)(3)(ii) cannot stand. See General Electric Co. v. Secretary of Labor, 540 F.2d 67, 70 (2nd Cir. 1976).

3. Accordingly, it is unnecessary to decide whether 29 CFR section 1910.217 is applicable to riveting machines.

Order

It is therefore hereby ordered that Item 10, Citation No. 2, dated March 3, 1977, and the proposed penalty thereon be vacated.

Ben D. Worcester

BEN D. WORCESTER
Judge, OSHRC

Dated: July 25, 1978
Boston, Massachusetts

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1/ Tr. II, p. 154

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

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UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

May 28, 1982

**IN REFERENCE TO SECRETARY OF LABOR v.**

BETHLEHEM STEEL CORPORATION

**OSHRC DOCKET NO.** 77-1807

**NOTICE IS HEREBY GIVEN TO THE FOLLOWING:**

**OF** COMMISSION DECISION

**To wit:** See attached.

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**FOR THE COMMISSION**

Ray H. Darling, Jr.

**RAY H. DARLING, JR.**
**EXECUTIVE SECRETARY**

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 77-1807 |
| BETHLEHEM STEEL CORPORATION, | : | |
| Respondent. | : | |
| | : | |

DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge Henry F. McQuade is before the Commission pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651-678 ("the Act"). Judge McQuade found that Respondent, Bethlehem Steel Corporation ("Bethlehem"), was in serious violation of 29 C.F.R. §§ 1910.252(f)(4) and (f)(5)[1/]

---

1/ 29 C.F.R. § 1910.252(f)(4) and (f)(5) provide in pertinent part:

§ 1910.252 Welding, cutting, and brazing.

* * *

(f) Health protection and ventilation--

* * *

(4) Ventilation in confined spaces -- (i) Air replacement. All welding and cutting operations carried on in confined spaces shall be adequately ventilated to prevent the accumulation of toxic materials

(continued on next page)

or 1916.31(a) and (b)[2/] because its workers were exposed to excessive levels of fluorides.

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1/ (continued)

> or possible oxygen deficiency. This applies not only to the welder but also to helpers and other personnel in the immediate vicinity. All air replacing that withdrawn shall be clean and respirable.
>
> (ii) Airline respirators. In such circumstances where it is impossible to provide such ventilation, airline respirators or hose masks approved by the U.S. Bureau of Mines for this purpose shall be used.
>
> * * *
>
> (5) Fluorine compounds - (1) General. In confined spaces, welding or cutting involving fluxes, coverings, or other materials which contain fluorine compounds shall be done in accordance with paragraph (f)(4) of this section. A fluorine compound is one that contains fluorine, as an element in chemical combination, not as a free gas.
>
> (ii) Maximum allowable concentration. The need for local exhaust ventilation or airline respirators for welding or cutting in other than confined spaces will depend upon the individual circumstances. However, experience has shown such protection to be desirable for fixed-location production welding and for all production welding on stainless steels. Where air samples taken at the welding location indicate that the fluorides liberated are below the maximum allowable concentration, such protection is not necessary.

The term "confined space" under these standards is defined at 29 C.F.R. § 1910.252(e)(4) as follows:

> (4) Work in confined spaces - (i) General. As used herein confined space is intended to mean a relatively small or restricted space such as a tank, boiler, pressure vessel, or small compartment of a ship.

2/ 29 C.F.R. § 1916.31(a) and (b) provide:

> § 1916.31 Ventilation and protection in welding, cutting and heating.

(continued on next page)

This case presents the questions of whether the general industry standards in Part 1910 or the maritime standards in Part 1916 should

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2/ (continued)

(a) Mechanical ventilation; requirements. (1) For purposes of this section, mechanical ventilation shall meet the following requirements:

(i) Mechanical ventilation shall consist of either general mechanical ventilation systems or local exhaust systems.

(ii) General mechanical ventilation shall be of sufficient capacity and so arranged as to produce the number of air changes necessary to maintain welding fumes and smoke within safe limits.

(iii) Local exhaust ventilation shall consist of freely movable hoods intended to be placed by the welder or burner as close as practicable to the work. This system shall be of sufficient capacity and so arranged as to remove fumes and smoke at the source and keep the concentration of them in the breathing zone within safe limits.

(iv) Contaminated air exhausted from a working space shall be discharged into the open air or otherwise clear of the source of intake air.

(v) All air replacing that withdrawn shall be clean and respirable.

(vi) Oxygen shall not be used for ventilation purposes, comfort cooling, blowing dust or dirt from clothing, or for cleaning the work area.

(b) Welding, cutting and heating in confined spaces. (1) Except as provided in paragraphs (b)(3) and (c)(2) of this section, either general mechanical or local exhaust ventilation meeting the requirements of paragraph (a) of this section shall be provided whenever welding, cutting or heating is performed in a confined space.

(2) The means of access shall be provided to a confined space and ventilation ducts to this space shall be arranged in accordance with § 1916.46(b)(1) and (2).

(3) When sufficient ventilation cannot be obtained without blocking the means of access, employees in the confined space shall be protected by air line respirators in accordance with the requirements of § 1916.82(a), and an employee on the outside of such a confined space shall be assigned to maintain

(continued on next page)

apply to the alleged violative condition and whether the violations, if any, were serious or nonserious.[3/] The Commission must also decide whether the tests performed by the compliance officer were accurate and whether the Secretary withdrew his original charge under 29 C.F.R. § 1910.1000, the general standard covering exposure to air contaminants.

I

Pursuant to an employee complaint, compliance officers from the Occupational Safety and Health Administration ("OSHA") inspected Bethlehem Steel's shipyard facility at Sparrows Point, Maryland. During this inspection, the compliance officers noted that welders, working in triangular 6-foot by 7-foot areas, were not wearing respirators despite the fact that the welding being performed created a bluish-gray, smoky haze typical of fluoride particle contamination.

---

2/ (continued)

> communication with those working within it and to aid them in an emergency.

The definition of "confined space" under this standard is found in 29 C.F.R. § 1916.2(m), which provides:

> (m) The term "confined space" means a compartment of small size and limited access such as a double bottom tank, cofferdam, or other space which by its small size and confined nature can readily create or aggravate a hazardous exposure.

3/ Commissioner Cottine directed review on all issues raised by the petition, including the following:

> Whether the judge erred in finding the Respondent in serious violation of 29 C.F.R. §§ 1910.252(f)(4) and (f)(5) and §§ 1916.31(a) and (b), based on the exposure of an employee to fluorides for an 8-hour time weighted average of 5.3 mg/M3.

Several days later, the compliance officers returned to the shipyard to obtain a measurement of the fluoride exposure level of the welders. The officers clipped a sampling cassette on the shirt collar of a Bethlehem welder, Mr. Hancock. On this day, Mr. Hancock was working in a triangular bulkhead of a ship. The bulkhead was approximately 239 cubic feet and had a small 15-inch by 23-inch opening. Ventilation was provided by two small mechanical blowers. The compliance officers and Bethlehem welders testified that the blowers were unable to ventilate the area completely and the bulkhead filled with a bluish haze.

Mr. Hancock was wearing a Wilson 1200 negative pressure respirator. However, despite the respirator, Mr. Hancock discharged black nasal mucus at the end of his eight-hour shift. This, according to the compliance officers, indicated that the seal of the respirator was ineffective. The tests performed by the OSHA officials indicated that Mr. Hancock was exposed to a time weighted level of 5.3 $mg/M^3$ of fluorides, more than twice the allowable level for fluoride exposure set forth in 29 C.F.R. § 1910.1000(a)(2), Table Z-1[4/].

---

4/ 29 C.F.R. § 1910.1000(a)(2) requires employee exposure to air contaminants to be limited to the time weighted average given in Table Z-1. 29 C.F.R. § 1910.1000(e) provides:

> To achieve compliance with paragraphs (a) through (d) of this section, administrative or engineering controls must first be determined and implemented whenever feasible. When such controls are not feasible to achieve full compliance, protective equipment or any other protective measures shall be used to keep the exposure of employees to air contaminants within the limits prescribed in this section. Any equipment and/or technical measures used for this purpose must be approved for each particular use by a competent industrial hygienist or other technically qualified person. Whenever respirators are used, their use shall comply with § 1910.134.

The Secretary alleged that Bethlehem committed a serious violation of 29 C.F.R. §§ 1910.1000(a)(2) and 1910.1000(e), the general standards for exposure to toxic substances. The complaint also cited Bethlehem for serious violations of 29 C.F.R. § 1916.31(a) and (b). The complaint was subsequently amended to include serious violations of 29 C.F.R. § 1910.252(f)(4) and (5).

Judge McQuade found that the Bethlehem employees had been exposed to more than twice the allowable level of fluoride. Therefore, he held that Bethlehem had violated section 1910.1000(a)(2). He also found that Bethlehem had violated sections 1910.252(f)(4) and (5) or, alternatively, sections 1916.31(a) and (b) because Bethlehem had failed to provide adequate ventilation for the employees welding in a confined area. Judge McQuade assessed $700 for the violation.

Judge McQuade's decision became a Review Commission final order when no Commissioner directed the case for review. Bethlehem Steel Corp., 78 OSAHRC 70/A2 (No. 77-1807, 1978). However, Bethlehem appealed the Review Commission's final order to the Court of Appeals for the Third Circuit.

The court remanded the case to the Commission for further proceedings. Bethlehem Steel Corp. v. OSHRC, 607 F.2d 1069 (3rd Cir. 1979). In its decision, the court vacated that part of Judge McQuade's decision which held that Bethlehem had violated section 1910.1000(a)(2). The court determined that when the Secretary had amended his complaint he had withdrawn the charges under sections 1910.1000(a)(2) and (e).

Next, the court held that Judge McQuade had made insufficient findings to support his conclusion that the violations of sections 1916.31 (a) and (b) and 1910.252(f)(4) and (5) were serious. The court held

that Judge McQuade's findings did not meet the minimum standards of the Administrative Procedure Act, 5 U.S.C. §§ 551-706. The court stated,

> At a minimum, the ALJ's findings in this case should have indicated the evidentiary basis for his conclusion that the possible accumulation of excess fumes and smoke due to inadequate ventilation in Hancock's workspace created a substantial probability of death or serious physical injury to him, and that Bethlehem with reasonable diligence could have known of the violation. Yet, examination of the ALJ's decision reveals that absolutely no findings were made with respect to the alleged seriousness of the violation. The ALJ simply concluded that the violation was serious.

607 F.2d at 1073. Accordingly, the court remanded the case for the following determinations:

> [W]hether the allegations in the complaint may be read to permit the Government to introduce evidence concerning the company's practices prior to the date of the inspection, to consider whether Hancock's activities prior to the date of inspection may have warranted a finding that the conduct in issue constituted a serious violation, and to make any further findings of fact that may be appropriate in the circumstances.

607 F.2d at 1074. The Commission remanded the case to Judge McQuade and, in a very brief hearing on June 17, 1980, both sides declined to present any new evidence.

In his second decision, Judge McQuade again found that the facts supported findings that Bethlehem had failed to comply with both the general industry and maritime standards. Judge McQuade also said that the court had erred in holding that the Secretary had withdrawn the allegation of violation of section 1910.1000(a)(2). According to Judge McQuade, when he considered the Secretary's proposed amendment, he had treated the amendment as a request to proceed as an alternative to the original allegation of violation of 29 C.F.R. § 1910.1000(a)(2). Therefore, he reasoned that this charge was still before him, and he reaffirmed his prior finding that the standard had been violated.

Judge McQuade also stated that the court misconstrued Commission law when it stated,

> Our threshold inquiry must be whether Bethlehem's alleged noncompliance may be deemed 'serious,' for we need not reach the question of whether the substantive requirements of the standards were violated if such violations may not be characterized as serious.

Judge McQuade went on to observe that, under Commission precedent, a determination is made whether a violative condition existed before the classification of the violation is considered. A violation is serious if it is substantially probable that the result of an incident could be serious injury or death.

Judge McQuade found the violations in this case to be serious.[5/] The judge quoted extensively from Dr. Houten's expert testimony on the chronic effects of fluoride exposure. The judge found that a single exposure to excess fluoride could constitute a serious violation.

---

5/ Judge McQuade made the following findings of fact:

1. Respondent had knowledge or with the exercise of reasonable diligence should have had knowledge of the conditions present in that they assigned an employee, whose normal job function was welding, to work in a confined space without adequate ventilation where the fluoride levels exceed those permitted by regulation.

2. As testified to by Dr. Lorne Houten, exposure to excessive levels of fluorides may acutely affect respiratory, gastrointestinal, and neurological systems causing serious physical harm such as shortness of breath, burning of the nasal passages and buccal cavity, coughing, vomiting, diarrhea, abdominal cramps, headaches and faintness.

3. As testified to by Dr. Houten, short term exposure to fluorides may cause chronic serious physical effects on dentition and the skeletal system. This can cause increased growth of many of the bone elements with possible crippling effects on those exposed to the fluorides.

II

Bethlehem argues that the shipbuilding, rather than general industry, standards apply to the operaton in question but Bethlehem contends that it did not violate any of the cited standards. First, Bethlehem argues that the space in which the employees were welding was not a confined space in that Mr. Hancock had ample room in which to move. In any event, Bethlehem contends that the term "confined space" is unconstitutionally vague.

Bethlehem also objects to the method by which the compliance officer conducted the tests, contending that the testing cassette should have been clipped under the employee's welding hood and not on the lapel of his work shirt. Bethlehem argues that placement of the cassette under the hood which the employee wore while welding would have more closely approximated the actual breathing zone of the employee.

Bethlehem also contends that the Secretary never demonstrated that a feasible means of ventilation existed which would have brought Bethlehem into compliance with the standards. Bethlehem states that the Secretary never presented evidence on this point because there was no feasible means of ventilation to assure compliance with the standards.

Finally, Bethlehem takes issue with the characterization of the alleged violations as serious because ventilation had been provided and the employee was wearing a respirator. Bethlehem also states that the Secretary never produced evidence concerning the number of employees similarly exposed, the length of employee exposure, or actual harm to exposed employees.

The Secretary argues that Judge McQuade's decision should be affirmed. However, the Secretary, like Bethlehem, takes the position

that the maritime standards and not the general industry standards are the applicable standards.

III

Both parties agree that the maritime standards rather than the general industry standards apply.[6/] The welding was being performed inside a swash bulkhead on Table 12 at the Sparrows Point Shipyard. The unit being worked on was to become part of a Liquid Natural Gas tanker. This constitutes "shipbuilding or a related employment." See 29 C.F.R. § 1910.14. Moreover, the requirements of the maritime and the general industry standards, charged in the alternate, are basically the same. Accordingly, we apply the maritime standards in Part 1916.[7/]

A

Bethlehem's "confined space" argument is governed by Commission precedent. Sections 1916.31(a) and (b) forbid welding in a "confined space" without proper ventilation. In Dravo Corp., 80 OSAHRC 2/B10, 7 BNA OSHC 2095, 1980 CCH OSHD ¶ 24,158 (No. 16317, 1980), pet. denied without opinion, No. 80-1267 (3rd Cir. 1980), the Commission held that

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6/ We set aside the judge's decision to the extent he found that Bethlehem violated 29 C.F.R. §§ 1910.1000(a)(2). The Third Circuit unequivocally held that this charge had been withdrawn. Following judicial review under section 11(a) of the Act, 29 U.S.C. § 660(a), the decision of the reviewing court is the law of the case, see Briggs v. Pennsylvania R.R., 334 U.S. 304, 306 (1948). The Commission and its administrative law judges are required to comply with remand orders of the courts of appeals. Butler Lime and Cement Co. v. OSHRC, 658 F.2d 544 (7th Cir. 1981); Frank Irey, Jr., Inc., 77 OSAHRC 192/F11, 5 BNA OSHC 2031, 1977-78 CCH OSHD ¶ 22,283 (No. 701, 1977).

7/ Because both parties agree that the maritime standards apply to the facts of this case, Chairman Rowland believes it is unnecessary for the Commission to independently determine that the maritime standards apply. Chairman Rowland therefore expresses no opinion on whether the work being done at the time of the alleged violation was "shipbuilding or a related employment."

a compartment on a barge with a cubic area sixty times the cubic area of the bulkhead in this case was a "confined space" under section 1916.2(m).[8/] The Commission reasoned that the compartment had very limited access and no natural ventilation, thereby aggravating workers' exposure to welding fumes. The area in this case exhibited these characteristics. The bulkhead was very small and only had a small access hole. There was little or no natural ventilation. Accordingly, we conclude that the cited area was a "confined space" within the meaning of section 1916.31(b).

The artificial ventilation provided by Bethlehem was clearly inadequate. Section 1916.31(a) requires that ventilation be provided that is of sufficient capacity to maintain welding fumes and smoke "within safe limits." Several employees testified that a bluish-gray, smoky haze developed and lingered throughout welding operations. The inadequacy of the artificial ventilation was further demonstrated by the results of the atmospheric testing. Based on the monitoring results, Dennis Hancock was exposed to more than twice the permissible level of fluorides. Accordingly, fumes and smoke were not maintained within safe limits.[9/]

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8/ The Commission also held in Dravo Corp., supra, that the definition of a "confined space" under the maritime standards was not unconstitutionally vague. While acknowledging that the standard requires an employer to use his judgment and experience to determine whether a space is a confined space, the Commission noted that the standard is not unconstitutionally vague simply because judgment must be exercised in determining its application. A standard must be read in light of the conduct to which it is addressed.

9/ Although the maritime standards require that welding fumes and smoke be maintained "within safe limits," the term is not specifically defined. All three Commissioners find 2.5 $mg/M^3$ to be a proper reference for determining employee exposure to fluorides under the maritime standards. However, the Commissioners differ on their reasons for this finding.

(continued on next page)

We are not convinced, from Bethlehem's strenuous argument, that the test results indicating that Mr. Hancock was exposed to twice the permissible level of fluorides were invalid. First, Mr. Hancock testified that he buttoned his collar in such a way that the cassette was located under the hood during welding operations. Second, the cassette was within several inches of Hancock's nose and mouth and therefore within his "breathing zone." Finally, measurements made by Bethlehem on the same day as the Secretary's tests yielded results that are not inconsistent with the Secretary's. We affirm Judge McQuade's finding of fact that the test results were valid.

Bethlehem's argument that the citation should be vacated because the Secretary failed to establish the feasibility of additional ventilation is without merit. Commissioners Cleary and Cottine conclude that the Secretary does not have the burden of proving the feasibility under this specific duty standard. See Marion Power Shovel, 80 OSAHRC 110/A2, 8 BNA OSHC 2244, 2247, 1980 CCH ¶ 24,915 at p. 30,729 (No. 4114, 1980). Nevertheless, an industrial hygienist testifying on behalf of

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9/ (continued)

In the circumstances of this case, Chairman Rowland and Commissioner Cleary find that the unrebutted expert testimony indicates that 2.5 $mg/M^3$ is an appropriate reference for determining whether an employee's exposure to fluorides in welding fumes is "within safe limits" within the meaning of § 1916.31(a).

Commissioner Cottine notes that the maritime standards do not contain threshold limit values for harmful substances. However, the general industry air contaminant standard at 29 C.F.R. § 1910.1000(a)(2), Table Z-1, lists 2.5 $mg/M^3$ as the maximum 8-hour time weighted average for employee exposure to fluoride. Commissioner Cottine would hold that in the absence of a specifically applicable maritime standard, the general industry time weighted average is an appropriate reference for determining whether welding smoke and fumes are within safe limits.

the Secretary described several methods for improving the ventilation in the confined space.[10/]

Under the explicit terms of the standard, if the work is being performed in a confined space and adequate ventilation is not supplied, the employees are to be protected by airline respirators in accordance with section 1916.82(a). Bethlehem failed to comply with this requirement. It only provided a Wilson 1200 negative pressure respirator that was inadequate to filter the fluoride particles. Since the space in which the work was being performed was a confined space and since the ventilation and the respirator were inadequate, Judge McQuade's finding that Bethlehem violated sections 1916.31(a) and (b) is affirmed.[11/]

B

The final question is whether the violation is a serious violation. In order to establish a serious violation, the Secretary must establish that Bethlehem knew or should have known of the violative condition and that the violation gave rise to a substantial probability of death or serious physical harm. 29 U.S.C. § 666(j). In this case,

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10/ Chairman Rowland agrees that the record demonstrates the feasibility of additional ventilation and therefore finds it unnecessary to determine which party has the burden of proof on the issue. Chairman Rowland does not agree that the standard is a "specific duty standard" in all respects. See note 9 supra.

11/ Chairman Rowland finds a violation of these standards based solely on the inadequacy of the existing ventilation. The Chairman does not join in this decision to the extent it concludes that Bethlehem is required under these standards to provide airline respirators. He notes that the only reference to such respirators appears at section 1916.31 (b)(3), which is limited to situations where sufficient ventilation cannot be provided. Since the evidence demonstrates that Bethlehem could feasibly have provided adequate ventilation, the Chairman would not impose on Bethlehem any obligation to use a type of respirator other than that which its employee was wearing.

testimony established that Bethlehem knew that the welding involved fluorides. Accordingly, Bethlehem's knowledge was established. With respect to the health effects of excessive fluoride exposure, the record establishes that long-term exposure can result in permanent harmful effects on the skeletal and neurological systems, as well as permanent discoloration of the teeth. However, even though the expert stated that continued exposure to fluorides at the levels to which Hancock was exposed could result in serious chronic effects, the evidence in this case indicates only one instance of exposure. The expert testimony establishes that acute reactions to fluoride exposure include nonserious problems such as shortness of breath, nausea, and vomiting.[12/] However, the testimony indicates that the levels to which employees may be exposed varies greatly depending on weather conditions, ventilation, where

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12/ Judge McQuade found that short term exposure to fluorides may have chronic serious effects on a person's teeth and skeleton. See note 5 supra. We do not believe this finding is supported by a preponderance of the evidence. Specifically, Dr. Houten, the Secretary's expert witness testified,

> A . . . the literature is consistent with saying that a five to ten-year exposure could produce noticeable effects, and a longer exposure would be more likely to produce noticeable effects.
>
> Q And what effect would that be, in five to ten years?
>
> A Well, one would find radiographic changes in the bone, which could have the effect of limiting joint motion, arthritic changes. It could in severe cases even ultimately lead to loss of use of joints, through pain and stiffness, . . .

The witness also stated that radiographic evidence of fluoride exposure has been noted with as little as six months exposure. Therefore, the record establishes only that serious chronic effects from the exposure to fluorides would require more than the short-term exposure involved in this case.

the welding is performed and whether a respirator is used. Although Mr. Hancock had been a welder for eleven years, the record before us does not establish the length or level of his exposure to fluorides for times other than the inspection involved in this case.

We reverse Judge McQuade and find the violation was nonserious. Evidence that exposure could vary greatly according to weather conditions, location and other factors is sufficient to rebut a presumption that the employee's exposure on the day of the inspection was typical of the level of long term exposure. See Hermitage Concrete Pipe Co., 82 OSAHRC , 10 BNA OSHC 1517, 1982 CCH OSHD ¶ 25,975 (No. 4678, 1982). Moreover, the record does not establish that short term exposure to fluorides at the levels shown to exist in this case gives rise to a substantial probability of death or serious physical harm. Under the circumstances, the exposure must be considered short term and the violation nonserious.[13/] After considering the factors enumerated in section 17(k) of the Act, 29 U.S.C. § 661(j), we assess a penalty of $500.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: MAY 28 1982

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13/ Chairman Rowland does not agree with the Commission's analysis in Hermitage Concrete Pipe Co., supra, and would hold that the Secretary has not proven that the employee was exposed to a level of fluorides which was likely to cause death or serious harm. See Hermitage, supra (Rowland, Chairman, dissenting).

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR | : | |
| Complainant | : | |
| v. | : | OSHRC Docket No. 77-1807 |
| BETHLEHEM STEEL CORPORATION | : | |
| Respondent | : | |

## DECISION AND ORDER ON REMAND

Appearances:

Matthew J. Rieder, Esq.,
for the Complainant

Jack D. Shoffner, Esq.
for the Respondent

Murphy M. Thornton,
for the Employees

McQUADE, Judge:

This proceeding was commenced under section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq., (herein "the Act").

On November 9 – 11, and 15, 1977, hearing was held in Baltimore, Maryland, pursuant to which the following findings of fact and conclusions of law were published in a decision and order of July 13, 1978:

## FINDINGS OF FACT

1. The Secretary and the Commission have jurisdiction over the Respondent's Sparrows Point facility.

2. An investigation was conducted on April 28, 1977.

3. Dennis Hancock, an employee of Respondent, was working in a unit containing 239.768 cubic feet of air space and it must be concluded was a confined space.

4. Dennis Hancock was wearing a 1200 Wilson Respirator.

5. Air samples were taken while fastened to Dennis Hancock showing 5.3 $mg/M^3$ concentration of fluorides during his welding work.

6. Two coppus blowers were used by Hancock during the day of April 28, 1977.

7. There was fresh air furnished by a 10-inch metal tube from a blower which had a 14,000 cubic-foot-per-minute capacity in the passageway of the unit occupied by Hancock.

8. Hancock discharged a black substance from his nose after a day of welding in a small space.

9. Fluorides were present in the welding rods used by Hancock and such fluorides were released into the air during the welding process exceeding 2.5 $mg/M^3$.

10. The sampling by Complainant was in compliance with standards established for that procedure for determination of air contaminants. It must be concluded that the cassette on Dennis Hancock was near his breathing zone during the time he was welding.

11. Complainant did not prove that Hancock or other employees were without personal protective equipment. On the contrary it was shown that Wilson respirators were provided by Respondent and worn by the employees.

12. Motion to impose sanctions merits no useful purpose and should be denied. It appears that a ministerial mistake was made by Respondent and compounded by a member of the Union.

## CONCLUSIONS OF LAW

1. Provisions of the Act were applicable to Respondent.

2. The air contaminants of fluorides exceed the permissible limits of 29 C.F.R. 1910.1000, to wit, 2.5 $mg/M^3$ in that they were 5.3 $mg/M^3$.

3. Dennis Hancock was working in a confined space without adequate exhaust ventilation to remove fluorides produced by welding rods during a welding procedure.

4. Sufficient ventilation was not provided to ventilate hazardous fluorides during welding which utilized welding rods containing fluorine compounds, thereby permitting airborne concentration of fluorides to attain 5.3 $mg/M^3$.

5. Respondent violated 29 C.F.R. 1910.1000(a)(2).

6. Respondent violated 29 C.F.R. 1910.252(f)(4) and (f)(5).

7. Respondent violated 29 C.F.R. 1916.31(a) and (b).

8. The size of Respondent, and the number of employees require a penalty of $700.

The subsequent ORDER, affirmed the Citation (as amended), and assessed a penalty of $700. The amendment to the Citation alleging a violation of 29 CFR 1916.57(e) was vacated.

Respondent filed a petition for discretionary review before the Review Commission. The petition was denied and the aforementioned decision became a final order of the Review Commission August 14, 1978.

Thereafter, Respondent filed an appeal before the United States Court of Appeals for the Third Circuit on October 13, 1978. The Court in its decision dated October 24, 1979 (Bethlehem Steel Corp. v. OSHRC, 607 F.2d 1071, (3rd Cir., 1979)) remanded the case to the Review Commisison for further findings consistent with that opinion.

The Court made two holdings which must be clarified on remand. In its first holding the court stated, "In view of OSHRC's withdrawal of the charge under section 1910.1000(a)(2) we vacate that portion of the ALJ's order holding Bethlehem to be in violation of it." (Bethelehem, supra, at 1072).

The Court's error is transparent at first blush when one understands OSHRC does not have the power under the Act to "withdraw" items of a citation. Under section 10(c) of the Act, after a citation is contested, the Commission is empowered only to affirm, modify, or vacate the Secretary's citation, or proposed penalty (See, 29 U.S.C. § 659(c)). In the instant situation there was no order issued vacating the relevant part of the Secretary's citation. 29 CFR 1910.1000(a)(2) was therefore clearly still in contest, and I made specific findings it had been violated.

The confusion over this issue arose due to faulty draftmanship on Complainant's part. The supposed vacation took place upon my granting of Complainant's motion to amend the citation. In a long, conversational, unspecific, and ambiguous motion, Complainant, in relevant part, prays:

> Moreover, Paragraph VII of the Complaint should be amended to read as follows:
>
> > Paragraphs V and VI of the Complaint amend the Citation pursuant ot 29 CFR 2200.33(a)(3) to describe the violative conditions with greater specificity, add an allegation of violation of 29 CFR 1910.252(f)(4) and (5) to the Citation, and to allege in the alternative violations of applicable Maritime Standards contained in 29 CFR Part 1916.
>
> As grounds for this Motion, Complainant represents that 29 CFR 1910.5(c) requires that if a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable.
>
> Since 29 CFR 1910.252(f)(4) and (f)(5) are standards which deal with the specific operations involved in this case, e.g., welding with material containing flouride fluxes, it is appropriate to charge a violation of the aforesaid standards rather than the standard of general application, 29 CFR 1910.1000.

Nowhere does Complainant specifically request vacation of any item concerning 29 CFR 1910.1000. "Vacation" is a term of art in the legal profession insofar as the Occupational Safety and Health Act is concerned. I was considering a motion to amend, not a motion to vacate. I did not sua sponte (as the Circuit Court's decision implies) vacate the citation. As explained fully in my original decision and order, I granted the motion to amend, and treated it as a request to proceed in the alternative. As previously discussed, when presented with the charge in the alternative I made specific findings that 29 CFR 1910.1000(a)(2) had been violated. As the Circuit Court did not controvert those findings the portion of my decision erroneously vacated by the Circuit Court should have been Affirmed.

The Circuit Court of Appeals made another holding which requires attention in this opinion. The court held, "Our threshold inquiry must be whether Bethlehem's alleged noncompliance may be deemed 'serious' for we need not reach the question of whether the substantive requirements of the standards were violated if such violations may not be characterized as serious." (Supra, at 1072 and 1073). While I will more fully discuss the seriousness issue infra, it should be noted the court has misstated the well established rule of law followed by the Commission and reviewing courts, and mandated by legislative history. The first question faced by the trial judge is whether a violation existed, and if so, what classification is appropriate. The judge's power to reclassify citations to include violations of lesser magnitude is derived from section 10(c) of the Act.[1/] This duty has also been confirmed by the Commision in Secretary of Labor v. Toler Excavating Company, OSHRC Docket No. 2637 BNA 3 OSHC 1421 (1975). In Toler, the Commision stated, ". . . Congress intended that these terms [willful, serious and nonserious] be of primary significance on penalty matters and that the failure of a citation to so

1/ As cited supra, section 10(c) requires the Commisison to affirm, vacate or modify all citations.

classify a violation would not in itself constitute a flaw so fatal as to invalidate the violation. See also Staff of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970, at 856." (Supra, at 1421).

However, this fact does not resolve the reviewing court's underlying doubts concerning the seriousness of the violation. The court found, "examination of the ALJ's decision reveals that absolutely no findings were made with respect to the alleged seriousness of the violation. The ALJ simply concluded the violation was serious." (Bethlehem, supra, at 1073). In its order of remand the court directed I, "consider whether Hancock's activities prior to the date of inspection may have warranted a finding that the conduct in issue constituted a serious violation. . ." (Supra, at 1074). In doing so the court seems to have accepted Bethlehem's assertion that the hazard must present a probability that death or serious bodily injury could result. This is not the law under the Act, an injury need only be possible (i.e., there need only be employee exposure to the hazard). The remand order was issued to decide the question of whether Hancock's single exposure was sufficient to establish a serious violation. The law on this issue is clear. In Secretary of Labor v. Scullin Steel Company, OSHRC Docket No. 13916, OSHD ¶ 22,835 (1978), the Commission reviewed a case of one time exposure to fluorides under 29 CFR 1910.1000(a)(2). The Commission ruled "Respondent challenges the accuracy of the time of exposure used in the compliance officer's calculations. It suffices to note, however, that exposure to the fluoride concentrations during only the 67 minute sampling is prohibited by the standard" [emphasis added]. In Scullin, the Commission affirmed a Notification of Penalty for failure to abate based on a previous uncontested final order. The Commission affirmed a penalty of $1,060. There is no room for doubt that a single exposure to excessive fluoride levels can be the basis for a violation.

The question of seriousness arises when an accident could possibly occur. An accident need not occur for a violation to exist. (Brennan v. Butler Lime and Cement Company, 520 F.2d 1011 (7th Cir., 1975)). The Review Commission has delineated this distinction and the policies underlying it in Secretary of Labor v. Standard Glass and Supply Company, OSHRC Docket No. 585, BNA 1 OSHC 1225 (1973). There the Commission explained:

> It is our view that substantial probability that death or serious physical injury could result, in conjunction with the knowledge of requirement of section 17(k) and the possibility of an accident's occurrence, is all that is required for a violation to be considered serious. The occurrence of an accident because of an existing hazard in violation of the Act need not be substantially probable in order for a violation to be serious, within the meaning of the Act. (Emphasis supplied)

Section 17(k) reads as follows:

> For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation. (Emphasis supplied)

> Serious and non-serious violations are distinguished on the basis of the seriousness of injuries which experience has shown are reasonably likely to result when an accident does arise from a particular set of circumstances. Section 13(a) of the Act provides that the Secretary may petition to restrain conditions which ". . . could reasonably be expected to cause death or serious physical harm immediately. . ." [Emphasis added]. Providing for an additional means of enforcement for conditions which constitute imminent dangers distinguishes section 13 violations from those of section 17(k). The difference is the immediacy of the danger. Similarly, serious and non-serious violations are differentiated on the basis of the degree of probable injury. [footnote omitted]. These

> violations are defined primarily to provide appropriate means of enforcement. Imminent dangers may be restrained. Serious violations, unlike non-serious ones, warrant mandatory penalties. Thus, by reading these sections of the Act together, a rational distinction among the three types of violations is revealed. To require, in addition, that for serious violations the occurrence of accidents be substantially probable is inconsistent with the logical progression of violations and their concomitant remedies. That interpretation would make serious violations and those constituting imminent dangers practically indistinguishable.

Therefore, it is evident from the above that there was no necessity of a finding that serious injury was probable. It need only be found that if an accident were to occur, the result would probably be a serious injury. Further, the Review Commission has emphasized the brevity of exposure does not negate a finding of a violation (Secretary of Labor v. Stahr and Gregory Roofing Company, Inc., OSHRC Docket No. 76-88, BNA 7 OSHC 1010 (1979)). While no finding in my decision of July 13, 1978 states Respondent knowingly placed employee Dennis Hancock in a position where exposure to flourides could produce death or serious physical injury, this could easily be derived from the findings which were made. Indeed, the court in Bethlehem, stated "Fluoride contaminants can be highly toxic and prolonged exposure to excessive levels of fluorides may result in serious injury, even death." (Supra, at 1071). Any excessive exposure to fluorides is dangerous, as the Review Commission stated in Scullin Steel Co., supra, prolonged exposure is irrelevant. The evidenciary basis for this finding is taken from the testimony of Complainant's expert witness, Dr. Lorné Houten.

In testifying concerning the hazards presented by fluoride exposure, Dr. Houten stated:

> A Well, hydrogen fluoride gas is a corrosive substance, related to - a better known substance to which it is closely related is hydrochloric acid. It has many of the same corrosive properties.

Q Now, talking about particularate flouride, could you tell us what the hazards of worker exposure to particulare fluoride?

A Exposure to fluorides in general, and particulate fluorides inhaled in particular, can affect many of the organ systems in the body.

The effects can be both acute and chronic. The acute effects can occur to the respiratory system, with shortness of breath, burning of the nasal passages and buccal cavity, cough. They can affect the gastrointestinal tract, producing vomiting, diarrhea, abdomonal cramps. The vomiting and diarrhea occasionally can be bloody.

It can affect acutely the neurological system, causing headache, faintness. And there is a series of other symptoms which can occur occasionally upon acute exposure to fluorides.

(Tr. 398).

Dr. Houten went on to describe the chronic effects that short term exposure could produce:

THE WITNESS: The chronic effects of exposure again can apply to several of the bodily systems. The most prominent effects are to the skeletal system. Fluorides will replace other substances from the hydroxy-appetite matrix, which comprises much of the bone and teeth, forming a fluoride-type matrix.

It can have an affect on dentition, causing an effect known as mottling. It can have an effect on the skeleton, causing a hyperplasia, or increased growth of many of the bone elements, particularly of the spine, particularly in the areas of muscular attachments and ligament attachments, as well as in the interosseus spaces, or the joint areas. And this can have – and this has had, in severe cases – crippling effects on persons exposed to fluorides.

(Tr. 399–400).

On cross-examination, Dr. Houten opined that levels below those set in the standard could produce serious chronic effects (Tr. 406). As found in my earlier decision, Respondent's operations significantly exceeded the allowable levels of the

standard (findings Nos. 4, 9). The standard allows for permissible level of 2.5 mg/$M^3$, Respondent's operation produced concentrations of 5.3 mg/$M^3$. These findings together with Dr. Houten's testimony make a finding of serious violation imperative.

It cannot be reiterated too strongly that Respondent knew of the conditions present. They placed their employee in a position where he was exposed to a hazard which could have produced death or serious physical illness. Hancock was an employee of Respondent whose regular course of employment as a welder exposed him to a possibility of serious injury, as defined under the Act. While the evidence does not reveal if this exposure was often repeated, as stated above, this is irrelevant to a finding of a serious violation. However, it may be assumed that as welding was Hancock's normal job function, and Respondent's shipbuilding facilities could require welding in confined spaces; it could then be assumed he and other employees were repeatedly exposed to the cited hazards.

In view of the findings of fact adduced in my decision of July 13, 1978, and of the evidence recounted above, it must be concluded Respondent violated the Act in a serious manner, by knowingly placing an employee in a zone of danger created by exposure to 5.3 mg/$M^3$ of dangerous fluorides. All other findings of fact and conclusions of law announced in Bethelehem Steel Corporation, OSHRC Docket No. 77-1807 (July 13, 1978) are adopted and incorporated herein by reference.

As to the Complainant's proposed penalty of $700, Bethlehem Steel Corporation is a large internationally recognized company with many employees at this location, and at sites throughout the country. Respondent has demonstrated good faith at this hearing, however has a history of prior violations of the Act at their Sparrow's Point Yard. The gravity of this violation was found to be serious. For the foregoing reasons the penalty of $700 proposed by Complianant is appropriate.

## SUPPLEMENTAL FINDINGS OF FACT

1. Respondent had knowledge or with the exercise of reasonable diligence should have had knowledge of the conditions present in that they assigned an employee, whose normal job function was welding, to work in a confined space without adequate ventilation where the flouride levels exeeded those permitted by regulation.

2. As testified to by Dr. Lorne Houten, exposure to excessive levels of fluorides may acutely affect the respiratory, gastrointestinal, and neurological systems causing serious physical harm such as shortness of breath, burning of the nasal passages and buccal cavity, coughing, vomiting, diarrhea, abdominal cramps, headaches and faintness.

3. As testified to by Dr. Houten, short term exposure to flourides may cause chronic serious physical effects on dentition and the skeletal system. This can cause increased growth of many of the bone elements with possible crippling effects on those exposed to the flourides.

4. Considering the requirements of 17(j) of the Act, including Respondent's size, history, number of employees and the gravity of the violation, the $700 penalty proposed by Complainant is appropriate.

## SUPPLEMENTAL CONCLUSIONS OF LAW

1. Complainant correctly classified the violation as serious, as defined in section 17(k) of the Act, in that Respondent placed an employee in a position where he was exposed to a hazard where there was a substantial probability death or serious physical harm could result, and Respondent knew of, or with the exercise of reasonable diligence, should have known of the conditions.

## ORDER

1. Citation No. 1 charging a violation of 29 CFR 1910.252(f)(4) and (f)(5); and 29 CFR 1916.31(a) and (b) are affirmed.

2. Respondent is assessed a penalty of $700.

Henry F. McQuade

HENRY F. McQUADE
Judge, OSHRC

Dated: October 6, 1980
Hyattsville, Maryland

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

May 28, 1982

**IN REFERENCE TO SECRETARY OF LABOR v.**

GENERAL ELECTRIC COMPANY

OSHRC DOCKET NO. 77-4476

**NOTICE IS HEREBY GIVEN TO THE FOLLOWING:**

**FOR THE SECRETARY OF LABOR**

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**OF** COMMISSION DECISION

**To wit:** See attached.

**FOR THE COMMISSION**

Ray H. Darling, Jr.

**RAY H. DARLING, JR.**
**EXECUTIVE SECRETARY**

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>GENERAL ELECTRIC COMPANY,<br>Respondent. | OSHRC Docket No. 77-4476 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

The primary issue in this case is whether compliance with the machine guarding standards at 29 C.F.R. § 1910.212 is required during inspection, cleaning and maintenance of a powder compacting press. Administrative Law Judge Henry F. Martin, Jr., held that section 1910.212 is inapplicable during these operations, and vacated a citation alleging that Respondent, General Electric Company ("GE"), had willfully failed to comply with either sections 1910.212(a)(1) or 1910.212(a)(3)(ii). 1/ He also found that the Secretary of Labor failed to establish a violation

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1/ Section 1910.212(a) states in part:

> §1910.212 General requirements for all machines.
> (a) Machine guarding -- (1) Types of guarding. One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are--barrier guards, two-hand tripping devices, electronic safety devices, etc.
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> (3) Point of operation guarding.
> (i) Point of operation is the area on a machine where work is actually performed upon the material being processed.
> (ii) The point of operation of machines whose operation
> . . .

(cont'd)

of 29 U.S.C. § 654(a)(1), section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). The Secretary sought discretionary review; Commissioner Cleary directed review under section 12(j) of the Act, 29 U.S.C. § 661(i), on the issues raised by the petition, including:

> 1. Whether the administrative law judge erred in vacating a complaint alleging that an employee of General Electric Company used a machine the point of operation of which was not guarded as required by the standard at either 29 CFR §1910.212(a)(1) or 29 CFR §1910.212(a)(3)(ii) on the ground that compliance was not required because the employee was performing maintenance, not operating the machine; and
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> 2. Whether the administrative law judge erred in vacating the complaint alleging a violation of section 5(a)(1) . . . on the grounds that General Electric Company did not have knowledge of the alleged hazard and that the alleged violation was caused by an employee's failure to take available and known precautions to prevent creation of the alleged hazard.

We reverse Judge Martin's decision.

I

GE manufactures tungsten carbide products at its plant in Houston, Texas. An initial step in this process is the compression of metallic powder into puck-shaped cakes. Two Baldwin-Lima-Hamilton compacting presses are used to produce the cakes. The presses are operated from a control panel with many buttons. To activate the rams, three power buttons (the master power switch, the oil pump switch, and the drive motor switch) are engaged, and then the "start cycle" switch is engaged. A switch operated by a key ("the press selector switch") allows the

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(Footnote 1 cont'd)

> exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

operator to choose between a run (production) mode and a jog mode. The jog mode permits the operator to "inch" the rams, and is selected by turning the key of the press selector switch. In the jog mode, the rams may be advanced to a specific position for inspection and maintenance by depressing two "inch" buttons on the control panel. In the run mode the press runs at constant speed. The press is designed to operate in the run mode only when a metal guard surrounding the point of operation is in place and pressing on a microswitch. The guard must be removed to clean the machine, to inspect the molds on the ram and to replace the molds. When the guard is removed, the microswitch, which is nine inches from the rams, is released and the power is shut off. To start the press after the guard has been removed, the power buttons must be turned on, and the microswitch manually pressed down. If the power buttons are left in the "on" position, and the press selector switch is in the run position, the press will start up as soon as the microswitch is pressed down.

At the time of the inspection, the cited press could not be operated in the jog mode in the usual way because the key for the press selector switch was broken off in the run position. The inch buttons therefore could not be used. There were, however, two additional ways to jog the press' rams. One method involved turning the "start cycle" switch on and off in rapid succession in order to start and stop the production cycle. The second method involved starting the press, removing the guard, and depressing the microswitch intermittently.

On September 16, 1977, the operator of the press, Linn, was shown what was suspected to be a broken piece of mold. The press had been stopped and Linn removed the guard in order to check the mold, which is attached to the rams. Linn engaged the power buttons, and then jogged the ram with the microswitch in order to align the bottom ram in a suitable position for inspection. Linn then reached in between the rams to check the bottom mold. Linn stated that as he

was removing his hand, he must have brushed the microswitch; the press jogged and crushed three of his fingers. 2/

Judge Martin vacated the citation. He found that the press was adequately guarded during its production cycle and, citing Jersey Steel Drum Manufacturing Corp., 75 OSAHRC 36/E9, 2 BNA OSHC 1663, 1974-75 CCH OSHD ¶ 19,392 (No. 1119, 1975), held that the cited machine guarding standards were inapplicable during cleaning or maintenance operations. The judge found that cleaning and maintenance could not be accomplished without removing the guard, and that no evidence had been presented to show that a guard could be installed that would have permitted the press operator to inspect the mold. The judge also found that Linn was aware of company safety rules, which required the press operator to shut the power off during cleaning operations, and that Linn had instructed several other press operators to observe the power-off rule. Judge Martin found that GE had no knowledge of the broken key in the press selector switch, and had no reason to anticipate that Linn would disobey the safety rule by placing his hand in the mold while the power was on.

On review, GE maintains that it did not violate either of the cited machine guarding standards. It claims these standards apply only to points of operation, and that the definition of point of operation indicates that a point of operation does not exist during inspection, cleaning or maintenance. 3/ GE also argues that it adequately provided for employee safety during cleaning and inspections

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2/ Linn testified that he pressed the off button on the control panel and then tested the microswitch to be certain that the power was off. The judge disbelieved that testimony.

3/ Although GE relies upon the definition in section 1910.211(d)(45), that definition pertains only to terms used in section 1910.217, which was not cited here. We shall consider GE's argument with respect to the similar definition in section 1910.212(a)(3)(i), however.

by providing "power-off" switches. It contends that the Secretary's interpretation of the machine guarding standards would make cleaning and maintenance impossible, because under that interpretation the guards could not be removed. GE also points to testimony by the compliance officer that GE's safety rules met OSHA requirements.

The Secretary contends that the Commission should adopt the rationale suggested by the dissenting opinion in Jersey Steel Drum, and apply section 1910.212 to maintenance and inspection because those functions are frequently performed on the powder press and constitute an integral part of GE's production operation. The Secretary claims that a point-of-operation hazard existed in that the broken press selector switch made it necessary for the operator to remove the guard in order to jog the press' rams with the microswitch. The Secretary argues that sections 1910.212(a)(1) and (a)(3)(ii) should apply "whenever a machine may be operating . . . as long as the employee exposure is reasonably foreseeable."

The Secretary also argues that the judge erred in finding that GE did not know that the press selector switch was broken, given the employees' testimony to the contrary. The Secretary maintains that, because the microswitch was frequently used to jog the press, GE could have known of the broken key with the exercise of reasonable diligence. The Secretary argues that GE's efforts to ensure the observance of safe work practices were minimal, and that GE therefore cannot argue that it did not know of the press' condition.

II

In Jersey Steel Drum, the Commission considered whether section 1910.212(a)(1) applied during maintenance of a drum hoop expander, but that decision contained no majority rationale. Only one member, former Commissioner Moran, found that section 1910.212(a)(1) was not designed to cover maintenance work. Former

Commissioner Van Namee concurred on another ground. Commissioner Cleary dissented on the ground that section 1910.212(a)(1) was intended to protect all employees exposed to machine hazards, including machine hazards arising during maintenance. He emphasized that standards should be construed consistently with the statutory objective of assuring "so far as possible every working man and woman in the Nation safe and healthful working conditions." Section 2(b) of the Act, 29 U.S.C. § 651.

We hold that section 1910.212 applies to machine hazards that arise during inspection, cleaning, and maintenance. We do so primarily because section 1910.212 establishes requirements for the protection of operators and other employees in the machine area from hazards without regard to whether such hazards are created during production or non-production operations. Section 1910.212 does not employ the terms "production" or "maintenance" or otherwise distinguish between production and maintenance. As the facts of this case clearly demonstrate, if a machine is activated during maintenance and commences its operating cycle, the operator can be exposed to injury in the same manner and degree as he can during ordinary production; the operating characteristics of this press were also not materially changed by the maintenance being performed. Therefore, in the absence of an express exclusion for maintenance activities, or other clear evidence of contrary intent, and in view of the standard's and the Act's remedial, protective purpose, we will not imply an exception to section 1910.212 that deprives employees of its protection. See Hughes Brothers, Inc., 78 OSAHRC 65/A2, 6 BNA OSHC 1830, 1833, 1978 CCH OSHD ¶ 22,909, p. 27,717 (No. 12523, 1978).

GE was cited in the alternative under section 1910.212(a)(1) and under section 1910.212(a)(3)(ii), the point of operation standard. We observe initially that, contrary to GE's argument, this case presents a point of operation guarding

problem. Section 1910.212(a)(3)(i) defines "point of operation" as "the area on a machine where work is actually performed upon the material being processed." This provision identifies, in our view, only the location on a machine that is to be considered a point of operation and not, as GE suggests, the occasions when a point of operation exists. See Dayton Tire & Rubber Co., 80 OSAHRC 95/D4, 8 BNA OSHC 2086, 2089, 1980 CCH OSHD ¶ 24,842, p. 30,636 (No. 16188, 1980); Boonville Division of Ethan Allen, 78 OSAHRC 105/B4, 6 BNA OSHC 2169, 2171, 1979 CCH OSHD ¶ 23,219, p. 28,078 (No. 76-2419, 1978)(similar definitional section). Indeed, a contrary construction would lead to the absurd result that the point of operation appears and disappears as the material worked on is fed into and removed, even though the point-of-operation hazard is always present.

Both sections 1910.212(a)(1) and 1910.212(a)(3)(ii) address themselves to the hazard of an unguarded point of operation. Section 1910.212(a)(1) is a broader standard. It speaks of protecting "the operator . . . from hazards such as those created by point of operation," as well as other machine hazards. Section 1910.212(a)(3)(ii), by contrast, specifically addresses point of operation guarding. Inasmuch as the cited powder press posed a point of operation hazard, it appears that both standards apply, and were properly cited. Because this case concerns only a lack of point of operation guarding, and because it would be duplicative to find violations of both standards, we shall only apply section 1910.212(a)(3)(ii). 4/

It is undisputed that the guard was removed during the maintenance operation, exposing the press operator to the unguarded point of operation. It is also

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4/ Because we find that a specific standard applies, citation to section 5(a)(1) of the Act is inappropriate. Mississippi Power & Light Co., 79 OSAHRC 109/D12, 7 BNA OSHC 2036, 2041, 1980 CCH OSHD ¶ 24,146, p. 29,342 (No. 76-2044, 1979). We therefore need not consider the Secretary's alternative allegation that GE violated section 5(a)(1).

established that, if the operator failed to shut the power off after the guard was removed, the rams could be activated by pressing the microswitch. Yet the only protection that GE provided the operator on those occasions when he was required to reach into the point of operation was a work rule that required the press' power to be shut off. Section 1910.212(a)(3)(ii), however, requires the employer to do more than merely establishing rules which, if followed, would render the work safe. The standard requires a "guarding device" to "prevent the operator from having any part of his body in the danger zone during the operating cycle." It rejects reliance upon the skill or attentiveness of employees, see Hughes Bros., 6 BNA OSHC at 1832, 1978 CCH OSHD at p. 27,716, and instead requires physical guarding methods that do not depend for their effectiveness on correct employee behavior. Columbian Art Works, Inc., 81 OSAHRC 96/F5, 10 BNA OSHC 1132, 1133 n.2, 1981 CCH OSHD ¶ 25,737, p. 32,102 n.2 (No. 78-29, 1981), and cases cited therein; H.B. Zachry Company, 80 OSAHRC 69/A2, 8 BNA OSHC 1669, 1674-5, 80 CCH OSHD ¶ 24,588, p. 30,166 (No. 76-2617, 1980); Pass & Seymour, Inc., 79 OSAHRC 101/C13, 7 BNA OSHC 1961, 1963, 1979 CCH OSHD ¶ 24,074, p. 29,238 (No. 76-4520, 1979)("standard is intended to protect against injury resulting from an instance of inattention or bad judgment"). Therefore, we find that GE did not comply with section 1910.212(a)(3)(ii).

We emphasize that the allegedly improper work practice of GE's press operator does not constitute the basis for our finding of noncompliance. The critical question in this case is not whether GE's workrule was followed, but whether GE had the guarding device required by section 1910.212(a)(3)(ii). The press operator's failure to obey GE's workrule, if indeed there was a failure, is therefore irrelevant.

We now examine whether the defense of impossibility of compliance has been established. In order to establish the impossibility defense, the employer must

prove that: (1) compliance with the requirements of the cited standard either would be functionally impossible or would preclude performance of required work, and (2) alternative means of employee protection are unavailable. M.J. Lee Construction Co., 79 OSAHRC 12/A2, 7 BNA OSHC 1140, 1144, 1979 CCH OSHD ¶ 23,330, p. 28,227 (No. 15094, 1979). We find that the first element of the defense has not been established. Although the barrier guard that GE used during production could not be used during maintenance, GE presented no evidence that other guarding devices, such as the two-hand tripping devices and electronic safety devices mentioned in section 1910.212(a)(1), could not have been used to protect its employee. See F.H. Lawson Co., 80 OSAHRC 19/A14, 8 BNA OSHC 1063, 1066-7, 1980 CCH OSHD ¶ 24,277, p. 29,574-5 (No. 12883, 1980). We also note that shortly after the accident involving the powder press, GE rewired the press' microswitch in such a way that the press could not be jogged with it. After the rewiring, the power automatically shuts off when the guard is removed, and the press cannot be cycled until the guard is replaced and the starting sequence repeated. These facts rebut GE's contention that guarding is impossible during maintenance.

We now turn to the questions of the proper classification of the violation and the assessment of an appropriate penalty. GE was originally cited for a willful violation. A violation is willful if it was committed with either an intentional disregard of the requirements of the Act or a plain indifference to them. Mel Jarvis Construction Co., 81 OSAHRC 89/B13, 10 BNA OSHC 1052, 1053, 1981 CCH OSHD ¶ 25,713, p. 32,060 (No. 77-2100, 1981). Because the judge vacated the citation, he did not resolve the willfulness question. In the interests of adjudicative efficiency, the Commission will make the necessary determinations itself instead of remanding. See Accu-Namics, Inc., 74 OSAHRC 35/A2, 1 BNA OSHC 1751, 1756, 1973-74 CCH OSHD ¶ 17,936, p. 22,234 (No. 477, 1974), aff'd, 515 F.2d 828 (5th Cir. 1975), cert. denied, 425 U.S. 903 (1976).

The record before us does not demonstrate that GE acted with either intentional disregard of or plain indifference to the requirements of the Act. GE

had supplied the powder press with a barrier guard. If the guard were removed, power to the press would have automatically shut off. It also had a workrule which was intended to protect the operator. There is no evidence GE believed that the Act and the standards required more than what it provided. On the whole, we cannot say that GE disregarded or was plainly indifferent to the requirements of the Act. Accordingly, the willful characterization is vacated.

Where a violation is alleged to be willful but is not proved to be so, a serious violation may be found if the parties have expressly or impliedly consented to try the issue of whether the violation was serious. Toler Excavating Co., 75 OSAHRC 76/C8, 3 BNA OSHC 1420, 1975-76 CCH OSHD ¶ 19,875, 1975). At the hearing, the compliance officer testified without objection that exposure to the unguarded point of operation posed a serious risk of injury. Also, the Secretary requested in his briefs to the judge and the Commission, and in his petition for discretionary review, that the violation be characterized as serious. The judge found that although the violation was pleaded to be willful, "it has been treated throughout the hearing as a willful[-]serious violation." GE has not objected to the Secretary's request. We therefore conclude that the parties tried the seriousness of the violation, and we amend the pleadings accordingly.

We find that the violation was serious within the meaning of section 17(k) of the Act, 29 U.S.C. § 666(j). 5/ The facts of this case demonstrate beyond

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5/ Section 17(k) of the Act states:

> For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

question that, if an accident occurred, it would be substantially probable that death or serious physical harm would result.

We now consider what penalty would be appropriate under these circumstances. In assessing a penalty, the relevant factors set forth in section 17(j) of the Act, 29 U.S.C. § 666(i), are the gravity of the violation and the employer's size, good faith, and history of previous violations.

The Secretary introduced evidence at the hearing that GE employed 286,000 persons and held assets valued in the billions of dollars. GE demonstrated a good faith concern for employee safety by immediately remedying the hazard, and by issuing workrules in an effort to achieve a safer workplace. The gravity of the violation is moderate to high, considering the number of employees exposed to this press and the potential severity of an injury. Taking these factors together, we consider a penalty of $500 to be appropriate.

Accordingly, the judge's decision is reversed. Citation No. 2 is affirmed; the violation is found to be serious but not willful. A $500 penalty is assessed.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: MAY 28 1982

ROWLAND, Chairman, dissenting,

I dissent from the majority's conclusion that GE committed a serious violation of section 1910.212(a)(3)(ii). In my view, neither section 1910.212(a)(3)(ii) nor the alternatively cited standard, section 1910.212(a)(1), applies to the inspection, cleaning, and maintenance of GE's powder press. I further conclude that Judge Martin correctly vacated the alternatively alleged violation of section 5(a)(1) of the Act.

It is well settled that a standard is to be given a reasonable interpretation which reflects the plain meaning of its terms. Usery v. Kennecott Copper Corp., 577 F.2d 1113 (10th Cir. 1977); Diamond Roofing Co. v. OSHRC, 528 F.2d 645 (5th Cir. 1976); Arkansas Rice Growers Cooperative Association, 10 BNA OSHC 1616 (No. 77-3974, 1982); Berglund-Cherne General Contractors, No. 79-4347 (Apr. 30, 1982). Consistent with this principle, a standard cannot be construed to mean what the drafters may have intended but did not express. E.g., Arkansas Rice Growers, supra, citing Diamond Roofing, supra.

Section 1910.212(a)(3)(ii) provides:

> The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall . . . be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

(Emphasis added.) As commonly understood, the words "operation" and "operating" mean functioning, producing and working. 6/ The terms are not commonly understood to connote inspection, cleaning, or maintenance procedures. Significantly,

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6/ Webster's Third New International Dictionary (1971) lists "functional" as a synonym for "operating" and defines "operating" as "engaged in some form of operation. . .esp: engaged in active business (as manufacture. . .)" "Operation" is described as "the quality or state of being functional or operative". ("Operative" is in turn defined as "engaged in doing work: occupied in productive labor: working.") Similarly, The American Heritage Dictionary of the English Language (1976) defines "operation" as "the state of being operative or functioning" and "a process or method of productive activity."

no reference to maintenance is made in the cited standard. See Bethlehem Steel Corp. v. OSHRC, 573 F.2d 157 (3d Cir. 1978) (standards cannot be interpreted to mean what the drafters did not express). Therefore, the plain meaning of the language in section 1910.212(a)(3)(ii) suggests that the standard applies only during the production cycle, not during the maintenance process. 7/

Moreover, maintenance activities are substantially dissimilar from normal operations because during maintenance, employees are often required to remove the guard and enter the point of operation. Indeed, as the Secretary and the majority concede, GE's employees could not clean, inspect, or repair the broken mold with the barrier guard in place. Since conditions during inspection, cleaning, and maintenance are so unlike those during normal production, I conclude that the drafters of section 1910.212(a)(3)(ii) did not intend for the standard to apply to maintenance. See Ormet Corp., 81 OSAHRC 35/C3, 9 BNA OSHC 1828, 1831, 1981 CCH OSHD ¶ 25,322, p. 31,381-3 (No. 76-4398, 1981) (difficulty of compliance considered in interpreting standard); American Can Co., 82 OSAHRC 5/A2, 10 BNA OSHC 1305, 1310, 1982 CCH OSHD ¶ 25,899, p. 32,413 (No. 76-5162, 1982) (same).

The gravamen of the Secretary's case is not the failure to guard the point of operation but the failure to de-activate the power during maintenance. Yet the plain meaning of the standard at section 1910.212(a)(3)(ii) does not indicate that the standard is intended to encompass a power de-activation requirement. See former Commissioner Van Namee's observations on locking-out in

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7/ While I agree with the majority that the definition of "point of operation" in section 1910.212(a)(3)(i) only identifies the location of the point of operation, which does not appear and disappear as material is fed and removed, I conclude that the terms of the cited standard - section 1910.212 (a)(3)(ii) - further articulate when that standard's guarding requirements apply.

Jersey Steel Drum, supra, 2 BNA OSHC at 1665, 1974-75 CCH OSHD at p. 23,155. Indeed, the Secretary has adopted standards that do require for some machines lockable main power switches, electrical de-activation, and specific measures to protect employees during maintenance. See section 1910.213(b)(5) ("positive means shall be provided for rendering...controls [of woodworking machines] inoperative while repairs or adjustments are being made...."); and sections 1910.217(b)(8)(i) & (ii) (lockable main power switch shall be provided for every power press; motor start button shall be protected against accidental operation), (d)(9)(iv) (safety blocks for dies required during adjustment or repair of dies) and (d)(9)(v) (special tools required during lubrication). 8/ If the Secretary seeks to impose a requirement on employers to electrically deactivate machines during inspection, cleaning, and maintenance, the Secretary has the means and the responsibility to do so by promulgating a specific standard. He cannot distort existing standards which by their plain meaning address different situations and encompass different requirements. See Bethlehem Steel Corp. v OSHRC, supra. 9/

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8/ Although GE's maintenance manager referred to the machine as a "mechanical press" once during the hearing, the record does not otherwise clearly show, and GE does not claim, that this machine is a mechanical power press governed by section 1910.217.

9/ After the citation was issued in this case, the Secretary issued an advance notice of proposed rulemaking to establish a broad lockout and tagging standard, which would require "deactivation of machinery, equipment, systems or processes while installation, repair, servicing and maintenance activites are being performed..." 45 Fed. Reg. 41012 (1980). In this notice, the Secretary referred to existing lockout-related provisions; the list did not include section 1910.212(a)(3)(ii). The Secretary further explained that a new regulation was contemplated to "add new material" because existing provisions were "incomplete". Id., at 41013.

Nor do I find persuasive the majority's reliance on "the standard's and the Act's remedial, protective purpose." As the Ninth Circuit aptly stated, "mere citation to OSHA's remedial purpose...[cannot] substitute for analysis of the problem at hand." Marshall v. Anaconda Co., 596 F.2d 370, 377 n.6 (9th Cir. 1979). Moreover, the Commission is "bound to construe...regulations, not create them ourselves." Id. (emphasis in original). Since the plain meaning of section 1910.212(a)(3)(ii) indicates that the standard only applies during production, and since maintenance involves substantially different conditions, I conclude that section 1910.212(a)(3)(ii) is inapplicable during maintenance of GE's powder press. 10/ Accordingly, I would vacate the citation for an alleged violation of section 1910.212(a)(3)(ii).

I further conclude that the alternatively cited standard, section 1910.212 (a)(1), does not apply. Commission precedent holds that a citation to a general standard is inappropriate when a more specific standard directly addressess the alleged hazard. Mississippi Power & Light Co., supra; See Ladish Co., 10 BNA OSHC 1235, 1237, 1982 CCH OSHD ¶ 25,820, p. 32,281 (No. 78-1384, 1981). This case poses

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10/ The citation, the hearing and the review briefs are directed toward two operations: 1) the "jogging" process during which the rams are positioned for inspection; 2) the maintenance, cleaning, and inspection process durwhich the molds are manually checked for breakage. The majority fails to make this distinction.

Not only would I vacate the citation alleging a violation of section 1910.212(a)(3)(ii) with respect to the maintenance process, but I would also vacate the citation with respect to the "jogging" process. Section 1910.212(a)(3)(ii) requires point of operation guards but makes no reference to "jogging" or "inching" mechanisms. Hence the standard does not cover the broken selector key associated with the "jogging" procedure. In any event, the standard only requires that guards be "designed" and "constructed" whereas the Secretary was concerned that the jogging mechanism was not properly maintained in operable condition due to the broken selector key. See Air-Kare Corp., 81 OSAHRC 98/A2, 10 BNA OSHC 1146, 1981 CCH OSHD ¶ 25,758 (No. 77-1133, 1981) (dissent).

a point of operation hazard and section 1910.212(a)(3)(ii) is the more specific standard addressing point of operation guarding. Cf. George C. Christopher & Sons, Inc., 10 BNA OSHC 1436, 1447, 1982 CCH OSHD ¶ 25,956, p. 32,534 (No. 76-647, 1982) (concurrence) (§ 1910.212(a)(3)(ii) imposes a more specific requirement than § 1910.212(a)(1) with respect to the problem posed by points of operation.) Since section 1910.212(a)(1) is therefore not specifically applicable, I conclude that Judge Martin correctly vacated the alleged violation of that standard. 11/

Because neither section 1910.212(a)(3)(ii) nor section 1910.212(a)(1) are applicable in my view, I turn now to the alternatively alleged violation of section 5(a)(1) of the Act. Having examined the evidence and accepting the judge's express credibility determinations, I conclude that Judge Martin properly vacated the citation for an alleged 5(a)(1) violation for the reasons he stated. 12/ Therefore, I would affirm Judge Martin's decision.

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11/ I need not address the majority's contention that parties impliedly consented to try the seriousness issue, in light of my conclusion to vacate the citation.

12/ As Judge Martin noted in his decision, the 5(a)(1) charge focused on the broken selector key (which allegedly made it impossible to "jog" or de-activate the press), not the failure to guard.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>GENERAL ELECTRIC COMPANY,<br><br>Respondent. | ) | Docket No. 77-4476 |

Appearances:

Gail M. Dickenson, Esq.
and
David S. Jones, Esq.
Dallas, Texas

For the Complainant.

Charles R. Vickery, Esq.
Houston, Texas

For the Respondent.

DECISION AND ORDER

MARTIN, Judge:

This proceeding was brought pursuant to Section 10 of the Occupational Safety and Health Act of 1970, hereinafter referred to as the Act, to contest two citations issued by the Secretary of Labor (complainant) pursuant to Section 9(a) of the Act. As a result of an inspection by complainant's representative on October 6, 1977, through October 28, 1977,

respondent was cited for failing to provide point of operation guards in connection with the operation of a Baldwin-Lima-Hamilton hydraulic powder press at its Houston plant (Carboloy Systems), located at 4435 West 12th Street.

Citation one alleged a serious violation of 29 CFR 1910.212(a)(3)(iii)[1/] because respondent did not furnish special hand-tools for the use of employees in handling, placing, and removing material from the point of operation. Citation two alleged a willful violation of 29 CFR 1910.212(a)(3)(ii)[2/] because respondent did not provide point of operation guarding of machinery to prevent employees from placing any part of their hands in the danger zone during the operating cycle. Penalties of $1,000 and $10,000 were proposed in connection with the serious and willful citations.

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1/ 29 CFR 1910.212(a)(3)(iii) provides as follows:

> Special handtools for placing and removing material shall be such as to permit easy handling of material without the operator placing a hand in the danger zone. Such tools shall not be in lieu of other guarding required by this section, but can only be used to supplement protection provided.

2/ 29 CFR 1910.212(a)(3)(ii) provides as follows:

> The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or , in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operation cycle.

Following the filing of a timely notice of contest complainant filed a complaint which was answered by respondent. After the filing of amended pleadings a formal hearing was held in Houston, Texas, on June 20 and 21, 1978. Subsequent thereto briefs were submitted by both parties.

After alleging that respondent violated the two aforementioned standards complainant filed an amendment to the willful citation to charge respondent with alternative violations of 29 CFR 1910.212(a)(1),[3/] (failure to provide one or more methods of machine guarding), and Section 5(a)(1) of the Act,[4/] (failure to provide a place of employment free from a recognized hazard). Respondent moved to dismiss the citation

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3/ 29 CFR 1910.212(a)(1) provides as follows:

> One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are - barrier guards, two-hand tripping devices, electronic safety devices, etc.

4/ Section 5(a)(1) of the Act reads as follows:

> Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

and amended complaint because of the failure to comply with Section 9(c) of the Act.[5/] Respondent's motion, which was taken under advisement, is here denied.

The issues to be decided herein are whether respondent alternatively violated either 29 CFR 1910.212(a)(1), 29 CFR 1910.212(a)(3)(ii), or Section 5(a)(1) of the Act; whether a willful violation was established in connection with one of the alternative allegations; whether a serious violation of 29 CFR 1910.212(a)(3)(iii) was established; and if any violation is found, what penalty should be assessed.

The investigation by an Occupational Health and Safety Administration compliance officer, Mr. Harrison, was precipitated by an accident on September 16, 1977, when employee Linn lost a portion of three fingers while his hand was under the ram of the press,[6/] feeling for a broken chip or piece of metal in the mold. Mr. Linn testified that a fellow employee, Mr. Otto, showed him a piece of material which he thought had broken off of the mold. The press was stopped and the metal guard (see exhibits R-2(m) and R-2(t)) was removed. He testified that he pushed the on button to start the ram, then jogged the ram with the microswitch button for

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5/ Section 9(c) of the Act reads as follows:

> No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

6/ The Baldwin-Lima-Hamilton hydraulic powder press was a Model 20 Compacting Press and was also known as a 75 ton slugging press which operates automatically, making tungsten carbide cakes. It can be adjusted to pressures of one to 75 tons. The press operates in conjunction with a granulator.

for proper alignment and pushed the stop button (see exhibit R-1, labelled C) to cut off the power. He then hit the microswitch several times to be sure that the power was off. He stated that he put his hand in to find out where the chip or broken piece came from, and in removing his hand, must have accidentally hit the microswitch, resulting in the ram coming down and crushing three of his fingers. He could not account for the microswitch activating the ram when he had allegedly cut off the power to the press. Following the accident the microswitch, which was approximately nine inches away from the ram (see exhibit R-2(k)), was rewired and repositioned, and the press selector switch was repaired. The selector switch is identified by a circle on exhibit R-1.

Mr. Linn blamed his accident on the fact that the press selector switch had a key broken off, resulting in the press being locked in the automatic mode, so that it was impossible to jog the ram from the control panel. It was necessary for Mr. Linn to jog the ram into position by using the microswitch. He testified that the key had been broken off for a year or more and that he had mentioned it to his supervisors, specifically Mr. Williams and Mr. Chandler, Mr. Miller, the plant manager, as well as Mr. Carter, the union steward.

Respondent's supervisory officials testified that they were not aware of the selector key being broken off in the automatic position until after the accident occurred. Mr. Carter, the union steward, testified that Mr. Linn told him about the broken key several times and that he had mentioned the matter to Mr. Miller and Mr. Dowden, manager of

employee relations in the Houston plant when the accident occurred. Minutes of the company-union grievance committee meetings (exhibit R-10) failed to reveal any reference to a broken key in the press selector switch.

29 CFR 1910.212(a)(3)(ii)

This standard, which requires point of operation guards to protect employees from exposure to danger zones during the operating cycle, was the main thrust of complainant's case and was deemed so flagrant that respondent was charged with a willful violation and a maximum penalty was recommended by the area director. The language set forth in the citation to describe the alleged violation is as follows:

> Operators were required to remove the interlocked guard from the press when cleaning the die. The operators were required to depress the micro-switch to jog the ram of the press into position, leave the press running, and remove material, rather than use the press control panel to jog the ram of the press into position, and then cut off the power to the press before putting their hands in the point of operation. The press selector was inoperable because the key was broken off in the automatic mode, thus exposing the operators'hands to the danger zone (point of operation) when conducting the cleaning operations.

The record herein is devoid of any evidence showing that respondent failed to have a point of operation guard to protect employees from the danger zone during the operating cycle. At first blush it might appear that complainant was contending that respondent had no guard on the press. However, by reading the narrative account of the alleged

violation it is noted that respondent's employee was required to remove the interlocked guard to clean the die. Exhibits R-2(m) and R-2(h) show the guard in place on the press and exhibits R-2(s) and R-2(t) show the guard after its removal. It should be noted that the compacting press is a fully automatic machine and is always operated with the guard in place. There is no way a person could put his hand or any part of his body in the danger zone with the metal enclosure, or guard, in place. In order to clean the area around the ram and mold it is necessary to remove the guard. Cleaning or maintenance cannot be accomplished without removing the guard (Tr. 126). This was done on the day of Mr. Linn's accident when he placed his hand in the mold to inspect or locate the place where the broken chip or piece of metal came from. When Mr. Linn performed this function the machine was not operating in its usual sense, that is, it was not automatically making cakes. The press was down for cleaning or maintenance. In other words there was no operating cycle.

Reference here made to the Commission's decision in Jersey Steel Drum Manufacturing Corp., 1974-1975 CCH OSHD ¶19,392 (March 5, 1975), wherein the Commission decided that a drum hoop expander presented no hazard to its operator during normal operations because it was adequately guarded for automatic production. In citing the Grayson Lumber Company case, 1971-1973 CCH OSHD ¶16,171 (June 14, 1973) the Commission stated:

> In the instant case it is apparent that the standard was not designed to cover maintenance work, especially since maintenance work may require the circumventing of safety guarding . . . The machine at issue

> in this case contained no point of operation since it was operated automatically. There was no hazard to employees at the 'point of operation' because employees were not needed to control the work. Since there was no 'point of operation' on this machine as that term is defined by §1910.212(a)(3)(i), we find that the citation was properly vacated for the reasons assigned by the Judge.

Point of operation is defined in 29 CFR 1910.212(a)(3)(i) as follows:

> Point of operation is the area on a machine where work is actually performed upon the material being processed.

Similiar definitions are referred to in various subsections of Subpart O entitled "Machinery and Machine Guarding," to wit, sections 211(a)(1), 211(d)(45) and 211(f)(8). Mr. Linn testified that he knew that he should have the power off when he put his hand in the mold under the ram. He admitted that a former supervisor had made him aware of this matter.

The aforementioned narrative, set forth in citation 2, states that the press selector switch, being broken off in an automatic mode, exposed the "operator's hands to the danger zone (point of operation) when conducting the cleaning operations." A careful reading of Part 1910.212 fails to mention the need for any kind of guarding when a machine is down for maintenance, cleaning or inspection. Clearly, respondent cannot be found in violation of 29 CFR 1910.212(a)(3)(ii) since an interlocked guard was specifically designed for use on this machine and this guard is always in place when the press is in its normal operating cycle.

29 CFR 1910.212(a)(3)(iii)

Respondent was charged with a serious violation because special hand-tools were not provided to keep the operator's hands out of the danger zone. This standard was promulgated to require proper hand-tools to be used to "place or remove material" from the operating zone without the operator putting his hands near the nip point or rotating parts of machinery. This standard is very similiar to 29 CFR 1910.217(c)(4), entitled "Hand feeding tools," and its intent is to require the use of tools to place and remove materials in and out of the point of operation. The descriptive language in the citation states that employees were allowed to use their hands to remove materials from the die of the powder press and were not required to use special hand-tools to place and remove materials in and out of the point of operation. The citation did not indicate what type of materials were to be placed in or removed from the point of operation.

This allegation was not established by complainant. As previously noted the machine in question operates automatically with a wire mesh guard in place and there is no way an operator could put his hand into the point of operation, nor is it possible to use any kind of tool to place materials in the processing area when the guard is in place (Tr 110, 125). Complainant's principal witness, Mr. Linn, testified that he had to use his hand to feel around the mold (see exhibit R-2(b)) to ascertain where the chip or piece of broken metal might have come from (Tr. 94). Admittedly, the press was not in an operating cycle when Mr. Linn was trying to determine whether the mold was broken or chipped (Tr. 103, 104).

Mr. Marple, a compliance officer from the regional office, testified on cross-examination that the paint brush (exhibit R-9) would be an acceptable cleaning tool if the power is locked out.

This standard does not require special hand-tools for cleaning or maintaining a press. Accordingly, it must be concluded that respondent did not fail to comply with 29 CFR 1910.212(a)(3)(iii).

29 CFR 1910.212(a)(1)

This standard, requiring one or more methods of machine guarding to protect the operator or other employees, was mentioned for the first time in an amended complaint filed some six months after the citation was issued. This failure to guard the machinery was alleged to have occurred "during cleaning operations" on the powder press. The amendment does not specifically allege in what manner the press could be guarded during cleaning operations.

No testimony was presented at the hearing to show what kind of a machine guard could have been put on the press which would have permitted Mr. Linn to inspect the ram or mold by using his hand or any hand-tool. Complainant has neglected to point out any provision or wording in Part 1910, subsection 212, which bears any relationship to the inspection, cleaning, maintenance or modification or presses. This standard suggests as guarding methods the use of barrier guards, two-hand tripping devices, and electronic safety devices. None of these devices would serve any purpose whatsoever unless the press was in an operating cycle, making

tungsten carbide discs or cakes. When Mr. Linn's hand was under the ram trying to locate a possible defect in the mold he was not concerned with flying chips, sparks or rotating parts because these hazards were not present.

It is therefore concluded that respondent did not violate the machine guarding standard set forth in 29 CFR 1910.212(a)(1).

SECTION 5(A)(1) OF THE ACT

An alleged willful violation of the "general duty" clause was one of the alternative charges raised in the amended complaint filed on June 6, 1978. It was alleged in paragraph VI(c) as follows:

> The employer failed to furnish to each of his employees employment and a place of employment free from recognized hazards causing or likely to cause death or serious physical harm to its employees in that the employer permitted employees to maintain and clean the Baldwin-Lima-Hamilton hydraulic powder press, in the powder granulate room with the selector switch broken off in the automatic mode thus making it necessary for the operator or person cleaning the machine to perform such operations without being able to use the control panel to jog the machine into cleaning position as needed and/or without being able to clean the machine with the power turned off.

It is here noted that the original concern of complainant was the alleged lack of guarding on the powder press, which was the machine on which Mr. Linn was injured. The alternative theory of resorting to the general duty clause did not surface until the amended complaint was filed.

The amendment was permitted over respondent's objection because of the descriptive language in the willful citation referring to "cleaning operations" on the press.7/

Rule 73(a) of the Commission's Rules of Procedure places the burden of proof in enforcement proceedings upon the Secretary (complainant). After reviewing all of the evidence in the record it is concluded that the key broken off in the press selector switch was not the cause of Mr. Linn's injury. The accident was the result of his own stupidity or carelessness in failing to shut off all power to the press before putting his hand under the ram to ascertain whether the mold was damaged. Mr. Linn testified that he jogged the ram into the desired position by means of the microswitch, pushed the stop button to cut off the power and then hit the microswitch several times to be sure that the power was off before placing his hand in between the ram and the mold. He then stated that the palm of his hand must have hit the microswitch causing the punch (ram) to come down and crush his fingers. Mr. Linn's testimony cannot be accepted at face value. He was either lying or mistaken since he obviously did not shut off the power to the press -

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7/ Rule 15(c) of the Federal Rules of Civil Procedure provides in part as follows:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of original pleading . . .

otherwise his fingers would not have been crushed.[8/] He was unable to account for the ram coming down after he had allegedly cut the power. From the evidence presented it is apparent that the injury to Mr. Linn was caused by the power not being locked out rather than the broken key in the press selector switch as contended by Mr. Linn. Cutting the power off on any electrical machine should furnish 100 percent safety to an operator or person cleaning the machine.

In order for complainant to carry his burden of proof it is necessary for him to establish by a preponderance of the evidence all of the facts set forth in his allegations. This he has failed to do. He alleged that because the selector switch was broken off in the automatic mode the operator could not use the control panel to jog the machine into the desired position for cleaning and could not clean the machine "with the power turned off." It is clear from the evidence that the power could be locked out three different ways; by activating the master switch, the emergency button, and the off button (labelled A, B and C respectively, as shown on exhibit R-1) (Tr. 61, 62, 104, 105). This evidence shows conclusively that an operator cleaning the particular press in question would be able to safely clean the area under the punch with absolutely

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8/ The investigating officer must have felt the same way in view of his remark under item 17 on his work sheet (exhibit R-6) to the effect that "the employee could have some responsibility as to turning off the machine".

no hazard. The press selector switch, which was in the automatic mode, has very little or no bearing as to why the power was not shut off.

Complainant, in order to sustain a violation of Section 5(a)(1) must prove (1) that the employer failed to render its work place free of a hazard which was (2) recognized and (3) causing or likely to cause death or serious physical harm. Actual occurrence of a hazardous condition is not, by itself, sufficient to prove a violation. Feasible measures to reduce the likelihood that a hazard would occur must be shown. Also, the hazard must be preventable. National Realty & Construction Co. v. OSHRC 489 F2d 1257 (D.C. Cir. 1973). Actual knowledge on the part of an employer satisfies the general duty requirement of recognition. Secretary of Labor v. OSHRC & Vy Lactos Laboratories, Inc. 494 F2d 460 (8th Cir. 1974).

There is no dispute over the fact that the press selector switch was broken off in the automatic mode. According to Mr. Linn he brought this matter to the attention of his supervisors, Mr. Williams, Mr. Chandler, Mr. Miller and his union steward, Mr. Carter. Mr. Carter testified that Mr. Linn told him about the broken key two or three times and that he talked with Mr. Miller and Mr. Dowden about the matter. He agreed with Mr. Linn's belief that a hazard was present. He admitted, however, that he had never brought this matter up at a grievance committee meeting. The company officials, Mr. Miller and Mr. Dowden, as well as foreman Williams, Chandler and Grant, all denied knowing about the broken key in the press selector switch prior to the Linn accident.

After hearing all of the testimony of the witnesses and observing their demeanor it is concluded that the testimony of complainant's witnesses was less convincing than the testimony presented by respondent. Mr. Linn, who was very slow in answering some of the questions put to him, blamed his injury on the company's failure to fix the press selector switch. He also complained about the company's failure to properly train him in the operation of the press and on safety measures in general. Mr. Linn had worked on the press with the switch broken off for a year or more and testified that he knew that the power should be off before putting his hand in the mold. He has known this for two or three years (Tr. 107). He testified that a previous supervisor had told him to cut the machine off before he stuck his hand in the mold (Tr. 109). However, a few minutes later he was asked if Leroy Grant or anyone else had told him not to put his hand in the press with the power on. He answered, "not one of them" (Tr. 116). Mr. Linn also testified that he had been made aware of the safety measures outlined in joint exhibit 1 at the bottom of page 6. This paragraph reads as follows:

> The operator should be fully aware of the dangers of carelessness. When operating a piece of equipment as large and powerful as this press it is a matter of keeping alert, and staying clear of the moving parts of the press, during operation. <u>The only time the operator should have his hands near the moving parts is during cleaning and then the press should be shut down</u>. If at any time a situation arises that the operator must make contact with or near the moving parts of the press or table, <u>the press should be stopped</u>. If an emergency arises due to faulty operation, etc., the press may be stopped by depressing only the drive button, rather than following the sequence usually used for halting the press.

It is obvious from the foregoing that Mr. Linn was aware of the safety measures to be followed in cleaning the machine - the most important of which was to cut the power off. He even testified that he taught new employees to make sure that the power was off and named several of them - Ybanis, Otto, Ruben, Magill and Mondragon. He also indicated that he was the senior press operator in the powder granulate room (Tr. 89).

Mr. Linn in his testimony complained about the broken key being a safety hazard and stated that he knew that an accident was going to happen; that the microswitch was in the wrong place. Apparently, however, he never mentioned this to Mr. Miller (Tr. 90). He stated that he told Mr. Williams about the broken key but that he just "turned around and walked off" (Tr. 90). Although Mr. Linn testified that he pushed the stop button (exhibit R-1, labelled OFF) before he put his hand in the mold, he lost parts of three fingers. It is noted, however, that when Mr. Otto showed him the broken chip he (Otto) had turned the power off. Later Mr. Linn asked which button Mr. Otto turned off and he replied, "I think he stopped - - I know he stopped the granulator, this button here" (meaning the button labelled OFF)(Tr. 105). This testimony makes one wonder whether or not Mr. Linn was in fact relying on Mr. Otto to cut off the power to the press rather than doing it himself.

The union steward, Mr. Carter, testified that Mr. Linn reminded him constantly about the broken key and that he discussed this matter

with management officials, Mr. Miller and Mr. Dowden, because he thought it was a hazard. He admitted that he never filed a grievance on this item even though he was allegedly concerned about it. His excuse for not bringing it up at the grievance meetings was that the company and union representatives were not "communicating" very well and that we were told "to talk more, meet more informally and not file as many grievances as we did in the past" (Tr. 176). It was also apparent from Mr. Linn's testimony and that of company officials that relations between them were very strained.

Although Mr. Linn and Mr. Carter indicated worry over the alleged hazard they never saw fit to discuss it formally with management officials (exhibit R-10). This exhibit reveals certain discussions with Mr. Carter and also contains the minutes of several grievance committee meetings in 1977. At the July 14th meeting, it is noted that Mr. Linn was one of those present. It is apparent from a review of these records that Mr. Carter's concern for work place hazards was sidetracked by his emphasis on personnel grievances, job classifications, discrimination and harassment matters. For instance, one of the grievances (No. 77-09) covered the union's protest regarding the by-passing of Mr. Linn and respondent's failure to upgrade him to a higher classification.

An examination of the grievance committee minutes failed to reflect any discussion about the broken key or any safety complaint regarding the Baldwin-Lima-Hamilton powder press. On one occasion Mr. Carter complained of the shop being dusty. It seems strange that Mr. Carter would see fit to

complain about dusty conditions when he indicated such a concern about the broken key in the press selector switch and unsafe conditions in the shop (exhibit R-5) (Tr. 152, 153).

Mr. Linn, in an effort to show knowledge on the part of respondent, testified that he had seen Mr. Williams put his hand into the mold to remove materials and that Mr. Williams as well as Mr. Miller had seen him place his hand in the point of operation (see Mr. Linn's signed statement - exhibit R-4). He neglected to state, however, whether the power was off on those occasions.

Although citation 2 was labelled a willful violation it has been treated throughout the hearing as a willful serious violation. Section 17(k) of the Act defines a serious violation as follows:

> For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Mr. Linn's failure to have the power off was not known to respondent and there is no reason for respondent to have anticipated that Mr. Linn would place his hand in the mold when the power was on in contravention of company safety measures (see Brennan v. OSHRC & Alsea Lumber Co. 511 F2d 1139 (9th Cir. 1975)). Although there is a sharp conflict in the evidence it is concluded that complainant has not shown by a preponderance of the

reliable and probative evidence that respondent had knowledge of the broken key in the press selector switch.

One of the problems encountered in this case is the inadequate investigation which was conducted in the powder granulate room. Throughout the hearing it was brought out that the Baldwin-Lima-Hamilton powder press was in poor mechanical condition, variously being described as being worn out and needing to be replaced and further that the microswitches were malfunctioning every month or two. It appears that a crucial item here was the location of the microswitch directly in front of and in close proximity to the punch and mold. From the evidence it further appears that very little supervision was afforded the employees who operated the presses. These are matters, however, with which respondent has not been charged.

In view of the foregoing it is concluded that respondent should not be held to have willfully or seriously violated Section 5(a)(1) of the Act (29 USC 654(a)(1)).

## FINDINGS AND CONCLUSIONS

1. The Review Commission has jurisdiction over the parties and subject matter herein and respondent at all times material hereto was engaged in a business affecting commerce within the meaning of Section 3(5) of the Act.

2. On September 16, 1977, respondent had employees in its Carboloy systems department in its Houston plant engaged in operating Baldwin-Lima-Hamilton hydraulic powder presses which turn out tungsten carbide

cakes and as a result of an accident on one of the presses, a representative of the Occupational Safety and Health Administration conducted an inspection between the dates of October 6 and 28, 1977.

3. On September 16, 1977, one of respondent's employees was engaged in cleaning and inspecting the area under the punch or ram of the press to determine whether there was a broken piece of metal or chip in the mold. While performing this function the operator lost a portion of three fingers when the press suddenly became operational.

4. Complainant has failed to establish by a preponderance of the reliable and probative evidence that respondent failed to provide special hand-tools for placing material in the point of operation or for removing materials therefrom as required by the standard found at 29 CFR 1910.212 (a)(3)(iii). The aforementioned press operates automatically with a heavy wire guard in place, making it impossible to use hand-tools during its operational cycle.

5. Complainant has failed to establish by a preponderance of reliable and probative evidence that respondent violated the provisions of 29 CFR 1910.212(a)(3)(ii) which standard requires point of operation guards on machinery so as to protect an employee from the danger zone during the operating cycle. The aforementioned press was equipped with an adequate guard when it was in an operating cycle producing tungsten carbide cakes. The standard in question has no application to cleaning, maintaining, repairing, or inspecting machinery. During the operation of the press there is no way an operator can place any part of his body into the danger zone.

6. Complainant has failed to establish by a preponderance of the reliable and probative evidence that respondent violated 29 CFR 1910.212(a)(1) which standard requires one or more methods of machine guarding to protect operators from the hazards created by the point of operation. When the press is operational, producing a product, it is adequately guarded and an employee has no way of putting a member in the point of operation. This standard does not require a guard when the machine is down for cleaning, maintenance or inspection. While being cleaned or repaired the press produces no sparks, rotating parts, in-going nip points, or flying chips which this standard is designed to guard against.

7. Complainant has failed to establish by a preponderance of the reliable and probative evidence that respondent violated the general duty clause of the Act, Section 5(a)(1) thereof, because it has not been shown that the machine could not be cleaned with the power off as specifically alleged in paragraph VI(c) of the amended complaint. Although a key was broken off in the press selector switch, the evidence reveals that the power to the press could be cut off by manipulating a master switch, an emergency button, or an off button, thereby offering 100 percent protection to an employee engaged in the inspection of the punch or mold. Respondent's safety rule requiring "power off" when the operator's hands or near moving parts during the cleaning operations was well known to the person operating the press.

## ORDER

Based upon the foregoing findings and conclusions and the record as a whole, it is ORDERED that citation 1 and citation 2 be and the same are hereby vacated, along with the penalty proposed therefor.

Henry F. Martin Jr

HENRY F. MARTIN, JR.
JUDGE

Date: February 26, 1979
Dallas, Texas

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

May 28, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

STRIPE-A-ZONE

OSHRC DOCKET NO. 79-2380

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION AND REMAND

To wit: See attached.

FOR THE SECRETARY OF LABOR

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RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>STRIPE-A-ZONE, INC.,<br>Respondent. | OSHRC Docket No. 79-2380 |

DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

An order of Administrative Law Judge Louis G. LaVecchia is before the Commission for review pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Judge LaVecchia granted a pre-hearing motion to dismiss filed by Stripe-A-Zone, Inc. ("Respondent"), and vacated the citations issued by the Secretary of Labor ("the Secretary"). The dismissal was sought and obtained on the ground that the Secretary failed to issue the citations with "reasonable promptness" as required under section 9(a) of the Act, 29 U.S.C. § 658(a). 1/ Specifically, Judge LaVecchia found that Respondent had been prejudiced by the passage of 177 days from the

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1/ Section 9(a) of the Act, as codified at 29 U.S.C. § 658(a), provides in pertinent part as follows:

> If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of Section 654 of this title, of any standard, rule or order promulgated pursuant to section 655 of this title, or of any regulations prescribed pursuant to this chapter, he shall with reasonable promptness issue a citation to the employer.

date of the alleged violations until the citations now before us were issued, 2/ in that key witnesses would not be present for the hearing on account of illness or unavailability for other reasons. The only issue before us is whether the judge erred in vacating the citations on the ground that they were not issued with reasonable promptness. For the reasons stated in this decision, we conclude that the judge erred.

It is well settled that unless an employer establishes prejudice in the preparation or presentation of its defense a citation will not be vacated for the Secretary's alleged failure to issue it with reasonable promptness. E.g., Stephenson Enterprises, Inc. v. Marshall, 578 F.2d 1021 (5th Cir. 1978); Todd Shipyards Corp. v. Secretary, 566 F.2d 1327 (9th Cir. 1977); Brennan v. Chicago Bridge & Iron Co., 514 F.2d 1082 (7th Cir. 1975); National Industrial Constructors, Inc., 81 OSAHRC 94/A2, 10 BNA OSHC 1081, 1981 CCH OSHD ¶ 25,743 (No. 76-4507, 1981); Stearns-Roger, Inc., 80 OSAHRC 10[illegible]/A2, 8 BNA OSHC 2180, 1980 CCH OSHD ¶ 24,870 (No. 78-819, 1980). Moreover, the Commission has held that the appropriate consideration for determining whether to vacate a citation for the Secretary's noncompliance with section 9(a) of the Act is the prejudice to the employer from the delay rather than the justifiability of the delay. National Industrial Constructors, Inc., supra; Stearns-Roger, Inc., supra.

In the case now before us, the Secretary argues that the citations should not have been vacated because "[i]t is clear from the face of respondent's motion that the prejudice asserted by respondent is unrelated to the alleged delay in the issuance of citations." Indeed, he continues, "[w]hat respondent is complaining of . . . is not [due to] the Secretary's delay in issuing the

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2/ This case has been before the Commission previously concerning a different issue. Stripe-A-Zone, Inc., 80 OSAHRC 111/D12, 9 BNA OSHC 1040, 1980 CCH OSHD ¶ 24,912 (No. 79-2380, 1980), petition dismissed, 643 F.2d 230 (5th Cir. 1981). The relevant procedural history of the case, including the explanation for the delay in the issuance of the citations, is set forth fully in the Commission's prior decision and it need not be repeated here.

citations but the general delay that has occurred in this case, largely at respondent's own instigation." We agree with this argument.

Respondent's claims of prejudice rest solely on the unavailability of two witnesses. Moore, Respondent's Vice-President and General Manager for safety, suffered a heart attack in September 1980. From that time on, he was no longer able to appear as a witness in this proceeding. Narramore, a former supervisory employee of Respondent, could not be found at his last known address in July 1981 when Respondent attempted to contact him. Even if we assume for purposes of this decision that the unavailability of these two witnesses impairs Respondent's ability to present its case, we cannot find that this was the result of the Secretary's asserted noncompliance with section 9(a). The inspection in this case occurred in November 1978 and the citations were issued in April 1979. Yet, Respondent has failed to establish any connection between the delay in the issuance of the citations and the asserted prejudice resulting from either the September 1980 illness of Moore or the July 1981 unavailability of Narramore. Indeed, Respondent represented to this Commission in January 1980--in its motion to reconsider a Commission order that proceedings be expedited--that "the availability of the relevant witnesses and documents has not changed since the date the original citation was issued." 3/

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3/ It is clear from the record, e.g., the discovery that had occurred prior to January 1980, that Respondent was fully aware at that time that Moore and Narramore would be "relevant witnesses." Moreover, it is equally clear, since Moore and Narramore were both employees of Respondent at the time of the alleged violation, that Respondent would have been aware of any change in the availability of Moore and Narramore prior to January 1980. We therefore interpret Respondent's January 1980 representation as a statement that Moore and Narramore were still available as witnesses in January 1980, nine months after the citations now on review were issued. We also note that on May 30, 1979, over a month after the issuance of the citations, the Secretary sought to take a discovery deposition of the prospective witness Narramore. On June 5, 1979, the Respondent filed an opposition to Complainant's request to take this witness' deposition. We assume that, if there had been any problem with Narramore's availability as a witness at that time, Respondent would have joined in the Secretary's request rather than opposing it, as Respondent did.

Having failed to demonstrate that the asserted prejudice in this case resulted from the Secretary's delay in issuing the instant citations, Respondent did not establish circumstances warranting dismissal and its motion to dismiss for failure to comply with section 9(a) of the Act should not have been granted. See Stephenson Enterprises, Inc. v. Marshall, supra; [4/] Todd Shipyards Corp. v. Secretary, supra. Cf. ASARCO, Inc., El Paso Division, 80 OSAHRC 99/A3, 8 BNA OSHC 2156, 1980 CCH OSHD ¶ 24,838 (Nos. 79-6850 et al., 1980) (dismissal based on the Secretary's failure to comply with the Commission's Rules of Procedure was unwarranted where prejudice due to the unavailability of witnesses' testimony was "not attributable to the Secretary's noncompliance").

Accordingly, Judge LaVecchia's September 16, 1981 order is reversed, Respondent's motion to dismiss is denied, the Secretary's April 26, 1979 citations are reinstated, and the case is again remanded to the judge for further proceedings.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: MAY 28 1982

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4/ In Stephenson Enterprises, Inc. v. Marshall, the Fifth Circuit stated:

> [B]ecause Stephenson has shown no prejudice from the alleged failure to issue the citations earlier and because the record gives us no grounds to presume prejudice, we need not consider whether the Secretary's conduct . . . accorded with Section 9(a)'s requirement that citations be issued with "reasonable promptness."

578 F.2d at 1023.

ROWLAND, Chairman, concurring:

I agree with the majority that Respondent did not demonstrate any prejudice which resulted from the Secretary's delay in issuing the citations. I disagree, however, with the majority opinion insofar as it holds that the Commission cannot consider the justifiability of the delay in determining whether to vacate citations issued in violation of the reasonable promptness requirement of section 9(a).

The Commission is empowered to "fashion a rule giving the 'reasonable promptness' language [in section 9(a)] some effect." Chicago Bridge & Iron Co., supra at 1085. See Todd Shipyards Corp., supra at 1330, citing Chicago Bridge & Iron Co. While, as the majority points out, those courts which have addressed the question have applied the Commission's test based on a showing of prejudice, the facts before the courts in those cases did not demonstrate delay which on its face could be characterized as unjustified. Therefore, the courts had no occasion to consider whether the prejudice test adopted by the Commission would be appropriate in all situations.

In order to give proper effect to the "reasonable promptness" language in section 9(a), the Commission should not, in my view, limit itself to examining only whether the employer was prejudiced by the Secretary's delay in issuing the citations. The Commission should also give relief to an employer in situations where the delay is patently unreasonable, unnecessary, and unjustified. Consistent with the statutory language that citations be issued promptly, I conclude that a citation should not be allowed to stand when unreasonable and unjustified delays unnecessarily postpone the citation--and subsequent proceedings before the Commission--for alleged violations of the Act. See generally Jack Conie & Sons Corp., 76 OSAHRC 70/A2, 4 BNA OSHC 1378, 1976-77 CCH OSHD ¶ 20,849 (No. 6794, 1976) (lead and concurring opinions). However, that is not the situation before us in this case.

In this case, the Secretary originally issued citations less than two weeks after the inspection. He then moved to withdraw the citations and that motion was granted by Judge Tenney. Only one day after Judge Tenney's order became final, the Secretary issued the present citations. Stripe-A-Zone, Inc., supra note 2. In its prior decision in this case, the Commission approved of the Secretary's actions in awaiting a final Commission order on the withdrawal of the prior citations before issuing the citations at issue here. Inasmuch as the Secretary issued the present citations immediately after Judge Tenney's order became final, I conclude that the Secretary's delay from the date of inspection to the issuance of present citations was not unreasonable, unnecessary, and unjustified.

Indeed, to vacate the citations on the grounds that the Secretary's delay was unreasonable, unnecessary, and unjustified would be contrary to the Commission's prior holding that "[t]he Secretary is entitled to pursue an adjudication on the merits of these citations." 80 OSAHRC 111/D12, p. 7, 9 BNA OSHC at 1043, 1980 CCH OSHD ¶ 24,912 at 30,724. Cf., e.g., American Cyanamid Co., 81 OSAHRC 69/F5, 9 BNA OSHC 2052, 1981 CCH OSHD ¶ 25,504 (No. 77-3752, 1981) (prior decision constitutes law of the case which must be followed in subsequent decision respecting the same case.)

Accordingly, I concur with the majority's decision to reverse the judge's order and reinstate the citations.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>STRIPE-A-ZONE, INC.,<br>Respondent. | OSHRC DOCKET NO. 79-2389 |

**ORDER**

The respondent's motion to dismiss this proceeding, filed on July 24, 1981, has been considered. Respondent contends that the citations were not issued with reasonable promptness because of the passage of 177 days, 4 days short of the statutory limit, before the issuance.

Prejudice is asserted by the respondent in that key witnesses, by virtue of illness or unavailability for other reasons, will not be on hand for the trial.

Respondent's motion appearing to be well taken for the reasons asserted, the motion to dismiss is granted.

The citations are vacated. The complaint is dismissed.

So ORDERED.

Louis G. LaVecchia
Judge, OSHRC

Dated: September 16, 1981

Dallas, Texas

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
ROOM 7B11, FEDERAL BUILDING
1100 COMMERCE
DALLAS, TEXAS 75242
FTS 729-6271
COM (214) 767-6271

## NOTICE OF DECISION

Secretary of Labor v. Mesquite Building Systems
OSHRC Docket NO. 81-0678

1. Enclosed is a copy of my decision. It will be filed with the Commission on April 28, 1982, and will become the final order of the Commission on May 28, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D. C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is May 28, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92 and 93.

Administrative Law Judge

Date: April 8, 1982

OSHRC Form 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>MESQUITE BUILDING SYSTEMS, INC.,<br><br>Respondent. | OSHRC DOCKET NO. 81-0678 |

ORDER VACATING NOTICE OF CONTEST
AND IN THE ALTERNATIVE GRANTING DEFAULT JUDGMENT

BLYTHE, Judge:

For the second time, this case was set for hearing on the merits at 10:00 a.m. on March 22, 1982, and at the same time the respondent was ordered to show cause why its notice of contest should not be vacated for failure to certify that it had posted the notice of contest for the benefit of affected employees in accordance with Rule 7(g) of the Commission's Rules of Procedure.

The Secretary was represented at the hearing by Max A. Wernick, Esq., but neither the respondent nor the affected employees were represented. The Secretary moved to vacate the notice of contest and in the alternative for default judgment.

This is the second time the respondent has failed to appear for a hearing. However, at the first hearing, on November 16, 1981, the Secretary

announced that a settlement had been agreed to by the parties. An order was entered November 16, 1981, directing the respondent to submit the signed settlement agreement with 30 days. The Secretary, by letter dated October 21, 1981, (Exhibit C-1) submitted the proposed settlement agreement to respondent, and in a letter dated January 18, 1982, (Exhibit C-2) he urged respondent to sign and return the agreement. At the latest hearing, Mr. Wernick detailed his efforts to contact respondent's president and pro se representative, A.J. Walker, including two telephone calls answered only by an electronic device with which he left messages. One of these calls was made during a 30-minute recess after the latest hearing was called to order.

The respondent is therefore found to be in default, both on the order to show cause and for failure to appear at the hearing on the merits. It is therefore ORDERED that:

1. The motion to vacate respondent's notice of contest is granted.

2. In the alternative, the Secretary's motion for default judgment is granted, and the citations and proposed penalties issued to respondent January 27, 1981, are affirmed.

DEE C. BLYTHE
Administrative Law Judge

Date: April 28, 1982

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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(A) - Notes a case presently under appeal to a U.S. Circuit Court of Appeals.
(D) - Notes a case in which a decision has been issued by a U.S. Circuit Court of Appeals.

* Citations for OSAHRC Reports are listed according to microfiche cites. When applicable citations for the printed volumes of OSAHRC Reports are listed in parentheses.

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

Secretary of Labor v. R. L. MANNING COMPANY
OSHRC Docket No. 80-2827

1. Enclosed is a copy of my decision. It will be filed with the Commission on May 6, 1982, and will become the final order of the Commission on June 7, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is June 7, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Quentin P. McColgin
Quentin P. McColgin
Judge, OSHRC

Date: May 6, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR<br>Complainant,<br>v.<br>R. L. MANNING COMPANY,<br>Respondent. | OSHRC DOCKET NO. 80-2827 |

APPEARANCES:

Jerry R. Atencio, Esquire, of Denver, Colorado
for Complainant
David M. Berrett, Esquire, of Denver, Colorado
for Respondent

DECISION AND ORDER

Quentin P. McColgin, Administrative Law Judge: This is a proceeding under §10(c) of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. § 659(c), involving an alleged violation of §5(a)(2) of the Act, 29 U.S.C. §654(a)(2).*/ The principal issue which requires resolution is whether respondent's failure to guard rotating machinery on its oil rig (the kelly bushing and the rotary table) violates the general machine guarding standard codified as 29 C.F.R. §1910.212(a)(1).

This matter arose out of an inspection which resulted in the issuance of two citations to respondent. Respondent duly filed a Notice of Contest which contested the single item contained in the serious citation (Citation

*/"Each employer-- shall comply with each of the occupational safety and health standards promulgated under this [Act]."

No. 1, Item No. 1) as well as two of the items contained in the non-serious citation (Citation No. 2, Item Nos. 1 & 3). During the hearing, complainant moved to withdraw the charge as set forth in Citation No. 2, Item No. 1, on the basis of insufficient evidence. (Tr. 54)*/ Additionally, respondent moved to withdraw its Notice of Contest as to the remaining non-serious item (Citation No. 2, Item No. ), indicating that such action was not based upon a promise made to it by another party. (Tr. 54) There being no objection,**/ both motions were granted and Citation No. 2, Item No. 1 was vacated and Citation No. 2, Item No. 3, was affirmed.***/

Additionally, the parties have entered into certain stipulations wherein it is agreed that certain testimony which was heard in another case in which the undersigned presided as well as certain exhibits which were proffered in that case would be considered in this case the same as if it were heard and received herein. (Tr. 57) The testimony offered by stipulation consisted of pertinent portions of the transcript of four witnesses who testified in Exeter Drilling Northern Inc., Docket Nos. 80-0496 & 80-1483 (Exeter) during hearings which were conducted September 10-12, 1980. The specific testimony that was so entered into evidence in this case is set forth at pages 7 and 8 of the transcript. Essentially, the stipulation operates to admit into evidence in this case all the testimony of one witness for complainant, Mr. Edward Kassak, and three witnesses for respondent, Messrs. Larry Dernbach, Keith E. Wetterstrom,

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*/ The following abbreviations will be used in this decision:
Tr. - Transcript page number
E. Tr. - Exeter transcript page number
C. - Complainant's exhibit number
R. - Respondent's exhibit number

**/ There was no appearance entered at the hearing on behalf of any of the affected employees. (Tr. 4)

***/ An order confirming this action is included herewith.

and Philip W. Blake except for those portions of their testimony which went to issues in the Exeter case which are not present here. It was further stipulated that this testimony would be received in evidence in this case as C-24 through C-26.*/ Additionally, it was stipulated that certain exhibits that were offered into evidence in the Exeter case "shall be deemed to be exhibits that were offered into evidence [in this case]." These exhibits consist of C-5 through C-8 and C-12 through C-20 inclusive as well as R-1, R-4, R-5, and R-6.**/

At the conclusion of the hearing, both parties waived closing argument and indicated their intention to file briefs. (Tr. 133-134) Thereafter, both parties submitted briefs in support of their respective positions. Additionally, respondent filed both proposed findings of fact and conclusions of law.

Having heard and observed the witnesses and having considered the testimony and other evidence together with the pleadings and arguments presented in this matter, the undersigned hereby issues the findings, conclusions, and order set forth in this decision. To the extent that the proposed findings of fact or proposed conclusions of law have not been adopted in this decision, they are rejected as being either inaccurate or unnecessary to the disposition of this case.

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*/ C-24 consists of the excerpted testimony of Mr. Edward Kassak given during direct examination on September 10, 1980. C-24 contains the testimony given on September 11, 1980, which consists of the remainder of Mr. Kassak's testimony as well as that of Messrs. Dernbach and Wetterstrom. C-26 consists of the testimony elicited from Mr. Blake on September 12, 1980..

**/ This stipulation is set forth in the filing received January 19, 1981, entitled, "Stipulated List of Exhibits." This list includes three exhibits which were rejected (C-15, C-17, and C-18, as well as one exhibit which was not offered (C-16). As to the rejected exhibits, the parties recite in their stipulation "they are included in the record for this proceeding, along with the rulings on why they were not included in the record, in order to preserve those questions for review, if such review is necessary."

## DISCUSSION

The undersigned has previously heard and decided a case involving the same issue as is presented here, namely, whether the failure to guard a kelly bushing and the rotary table violates the machine guarding standard. In Exeter Drilling Northern Inc., Docket Nos. 80-0496 and 80-1483 (Exeter) (decided April 19, 1982) the undersigned found that based upon the record in that case, the failure to guard a kelly bushing did not violate the machine guarding standard. However, the disposition of that earlier case is not necessarily dispositive of this case. This is so because of the differences in the physical characteristics of the relevant machinery, the differences in the evidence pertaining to the perceived hazards, and the differences in emphasis and content of the arguments advanced in support of and in opposition to the violation. Thus, the decision in this case must be based upon this record.

The specific allegation, as set forth in Citation No. 1, Item No. 1, is:

> 29 CFR 1910.212(a)(1): Machine guarding was not provided to protect operator(s) and other employees from hazard(s) created by:
>
> > rotating parts of the rotary table and kelly bushing were not guarded.

The cited standard, 29 C.F.R. §1910.212(a)(1), provides:

> One or more methods of machine guarding shall be provided to protect the operator(s) and other employees in the machine area from hazards such as those created by point of operation, incoming nip points, rotating parts, flying chips and sparks. Examples of guarding methods are--barrier guards, two-hand trippping devices, electronic safety devices, etc.

The two parts of machinery referred to in the above-quoted citation are two of the three principal rotating parts that are situated at the

center of the floor of an oil rig. The function of these parts is to convert the power derived from the engines into a rotating force which, in turn, causes the drill stem to rotate, which is the means by which a hole is dug in the ground by an oil rig.

The drill stem begins at the top with a swivel which is hooked to the lower portion of the hoisting mechanism of a rig called the traveling block. Below the swivel is the third principal rotating part called the kelly which is a three-, four-, or six-sided piece of pipe, usually about forty feet long. The kelly is attached to lengths of drill pipe or drill collars, lengths of which are connected together to form the vast bulk of the drill stem. Below the lowest length of drill pipe is the drill bit, which actually operates to dig the hole in a rotating motion.

The rotary table consists of a number of different parts, most of which are located below the rig floor. The top surface of the rotary table is generally flush with the rig floor.*/ Most of the rotary table is covered, however, a portion is not. The kelly bushing sits on top of the rotary table. It mates with the master bushing which is a part of the rotary table. Power is, thus, transferred from the engines to the rotary table which generates a rotational motion. When the rotary table rotates, the kelly bushing also rotates. The rotation of the kelly bushing, in turn, causes the kelly to rotate which then causes the entire drill stem to rotate. This rotational motion, coupled with the vertical force created either by the weight of the traveling block or the weight of the drill stem is the means by which the hole is dug.

The kelly bushing involved here is a Varco 4KRVS bushing (Tr. 38) That portion of the kelly bushing which extends above the rotary table

*/ In this case the rotary table rests on a platform which is elevated above the rig floor 1 and 1/2 inches. (Tr. 61)

is 24 inches in diameter (Tr. 37)*/ It is constructed of metal and weighs 859 pounds. (C-21) It is considered by the industry to be a new-type "smooth" bushing as distinguished from the old-type kelly bushing which has protruding J-bolts. (Tr. 85, E. Tr. 439) While it is not smooth in the true sense of the word, it is as smooth as any comparably sized bushing in the industry. (Tr. 70, 75, 116, E. Tr. 409, 437-439, 485)**/

As depicted in both the photograph of the bushing (C-27) and the sketch of the model contained in the Varco sales literature (C-21), there are indentations and protrusions on the kelly bushing. However, they appear to be recessed, with the edges smooth so that no sharp edges are presented. There are three inch bolts on the top of the kelly bushing; however, the photograph and the sketch indicate that these bolts are placed in recessed areas so that they do not protrude significantly if at all from the generally flat surface of the top. (Tr. 39, C-21, C-27) The sides of the bushing contain rollers which are estimated to be 14 inches measured horizontally and 10 inches vertically. (Tr. 39) It appears from the sketch that these rollers do not protrude significantly from the hemispherical surface of the kelly bushing's sides, although no measurements were given as to the extent to which they do protrude. (C-21)

Other physical characteristics of the equipment are that the diameter of the rotary table was 30 inches. (Tr. 37) The kelly was four-sided, with each side measuring 4 1/2 inches (Tr. 38) At the time of the inspection, they were drilling at 5,804 feet. (Tr. 20) The kelly, the kelly bushing and the rotary table were rotating at 70 revolutions per minute. (Tr. 19)

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*/ Industry classifies this as a 17 1/2 inch kelly bushing, which is actually the diameter of that portion of the kelly bushing which mates with the rotary table and is below the level of the platform. (Tr. 83)

**/ There is evidence that a much larger bushing used on large rigs to dig deeper wells has a smoother surface than this bushing. (Tr. 117)

In order to establish a prima facie case that an employer has violated the cited standard, the Secretary must show (1) the cited standard applies to the facts, (2) there was a failure to comply with the cited standard, (3) employees had access to the hazardous condition and (4) the employer knew or could have known of the condition with the exercise of reasonable diligence. Daniel International Corp., Wansley Project, 9 BNA OSHC 2027, 1981 CCH OSHD ¶25,813 (No. 76-0181, 1981.)

Respondent's challenge to the existence of these elements is essentially limited to the first element, namely the applicability of the standard to respondent's drilling operations. As to the other elements, respondent readily admits that it did not guard the kelly bushing and the rotary table. The proof shows that respondent's employees walked within two feet of the subject rotating parts; hence, respondent's employees clearly had physical access to the conditions presumed to be hazardous by the standard. Further, it is clear that the failure to guard these rotating parts was a conscious decision of respondent's representatives; hence, respondent is charged with knowledge of these conditions.

Before turning to the arguments pertaining to the applicability of the standard, it is first of all helpful to consider the nature of the hazards which are perceived by complainant to result from failing to guard the kelly bushing and the rotary table and secondly to consider complainant's failure to charge respondent with failing to guard the rotating kelly, which is equally accessible to respondent's employees. However, before doing so, it is noted that the official position with respect to this latter rotating part: "OSHA is not intending to guard the kelly at this time." (E. Tr. 256)[*] This is so even though the basic

[*] The record in this case does not indicate the rationale for this position.

principle underlying the citation is: "Anything that is rotating, a coupler or a shaft, no matter how smooth it is, should be covered." (E. Tr. 215, 275)

The perceived hazards of the unguarded kelly bushing and rotary table were described by the compliance officer who conducted the inspection as follows:

> . . People could fall into the bushing, slip, trip on the rig floor, step on the rotary table and be thrown off the rotary table, collide with the standing pipe section of pipe in the mousehole, could be knocked down in such a way to break bones, severe lacerations, could be caught with their clothing in the rotating bushing. But probably most importantly, is the spinning chain becoming caught and entwined and wrapped around the rotating bushing and catching the floorman and becoming a part of the rotating bushing and being killed or amputated, having a leg amputated or arm amputated. Such things as tools dropping into the rotating table and bushing, very strong possibility. Other tools that are used on the rig such as a water hose to wash the rig floor down could be caught in the rotating bushing and table . . . . (Tr. 42)
>
> * * *
>
> "The hazard would be coming into contact with the rotary bushing and rotary table by approaching, either stepping, falling, slipping into it, clothing being caught, a tool being caught, spinning chain being caught in the bushing." (Tr. 55)

In analyzing these perceived hazards, it appears that three are directed toward the hazards presented by the kelly bushing and a fourth is directed toward the hazards presented by the rotary table. The first kelly bushing hazard is that resulting from contact with the bushing by falling onto it. The second kelly bushing hazard is that of clothing being caught in the rotating bushing. The third is what shall here be described as the entanglement hazard. If one of the tools, such as the spinning chain or a hose were to become wrapped around the rotating bushing, and if an employee were to become entangled with such tool, the

employee could then become entwined with the rotating bushing which would likely result in either death or amputation. The hazard of the rotary table is that of stepping on it and being thrown off onto one of the pieces of nearby heavy equipment.

While the record in this case is silent as to why OSHA does not require the guarding of the kelly, it appears that at least two of the three perceived hazards of the kelly bushing are also present with respect to the kelly. If someone were to fall on the kelly, the injuries would be as serious if not more so than if he were to fall upon the kelly bushing. Indeed, complainant's own compliance officer recounted incidents where a person had his scalp removed and amputations that resulted from falling into rotating shafts. (Tr. 79) Moreover, entanglement with the kelly with resulting death or amputation seems as likely as such entanglement with the kelly bushing. Indeed, one of the three entanglement incidents that resulted in a fatality or amputation appears to have involved the kelly rather than the kelly bushing. (E. Tr. 447-448, C-14)

Turning now to the issue of the applicability of the standard, respondent raises essentially four arguments or defenses in support of its contention that the standard is inapplicable to its operations. The first argument goes to the prima facie applicability of the standard. Here, respondent, relying upon the Commission's decision in Allis-Chalmers Corporation, 4 BNA OSHC 1876, 1976-77 CCH OSHD ¶21,341 (No. 7482, 1976), argues that the general machine guarding standard of 29 C.F.R. §1910.212(a)(1) "is clearly directed towards [machines] which

are or can be used in the production or manufacturing process." (Respondent's brief at 2) Respondent then seems to argue that it is not engaged in the production or manufacturing process but rather is merely engaged in a process of extracting raw material from the ground. (Respondent's Brief at 3)

This argument is unpersuasive. The best that could be said for it is that respondent has made a good case that it is not engaged in the manufacturing process. It ignores, however, the issue of whether it is engaged in the production process. Production is defined in Black's Law Dictionary (Rev. 4th Ed. 1968) as "[t]hat which is produced or made product; fruit of labor . . . ." The extraction of oil or gas from the ground is clearly the initial step in the process which results in the production of finished products such as gasoline or other petrochemical products. Thus, the perview of the standard would, in the abstract, appear to encompass machines used in respondent's drilling operations.

Respondent's second applicability argument is that the standard, being a general standard, is unenforceably vague unless it is interpreted as requiring a showing that the required protective measures were generally recognized by the particular industry as being clearly appropriate under the circumstances. (Respondent's brief at 4) Respondent bases this argument upon the several decisions of the Circuit Courts of Appeal, e.g., B&B Insulation Inc. v. OSHRC, 583 F. 2d 1364 (5th Cir. 1978), which have imposed such a special burden in cases involving other general standards such as the Personal Protective Equipment Standard.*/

*/ That standard, 29 C.F.R. §1926.28(a) provides:

> The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazard to the employees.

Respondent then argues that complainant failed to meet this burden of proof; hence, the charge has not been established.

There is no question but that the evidence in this case does not establish that a reasonable employer in the oil drilling industry would have protected against the rotating kelly bushing and rotary table by guarding such parts. Nevertheless, this argument fails because the standard involved here, while general in its scope, is not so broadly worded as to superimpose upon complainant the burden of making such special showing. See S&H Riggers & Erectors, Inc., v. OSHRC, _____ F. 2d _____, 10 BNA OSHC 1057, 1981 CCH OSHD ¶25,733, (5th Cir. 1981). Here, the machine guarding standard is emphatic in its requirement that guarding be provided as protection from "hazards such as those created by . . . moving parts . . . ." 29 C.F.R. §1910.212(a)(1).

The remaining matters going to the applicability of the standard which, for the most part, are contained in the affirmative defenses of estoppel and vagueness (Respondent's Brief at 15 and 16),[*/] make a compelling showing that the standard should not be applied to require a kelly bushing guard. This determination is primarily based upon the circumstances unique to the oil drilling industry, which result in the standard giving insufficient warning of the proscribed conduct when measured against common understanding and practice.

The first consideration which leads to this conclusion is the non-specifity of the general guarding standard. While, in the abstract, an oil rig would appear to be encompassed within the infinite variety of

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[*/] See also respondent's arguments pertaining to the industry understanding of the guarding requirements set forth in Respondent's brief at 6-9.

machines which come within the perview of the standard, an oil rig is not generally considered to be a machine.*/ Thus, there is an element of ambiguity in the standard created by the nonspecifity of what is included as machines and the absence of a definition of a machine within the standard itself.

The second consideration is the common understanding and commercial practice relative to kelly bushing guarding. The most graphic evidence of industry's lack of awareness of the requirement to guard kelly bushings and rotary tables and the prevalence of the practice within the industry not to guard such parts is the testimony of the compliance officer who, after one hundred inspections of oil rigs, had never seen a kelly bushing guard in operation. (Tr. 67)

The third and final consideration leading to this determination is the pattern of administrative enforcement, which operated to confirm industry practice. Through a variety of different actions by OSHA and others, members of the oil drilling industry could reasonably infer that "smooth" kelly bushings were not required to be guarded.

The actions by OSHA which contributed to this belief consisted essentially of three inconsistent enforcement policies which, to the extent that it did not confuse the industry and constitute arbitrary and capricious action, led industry members into the belief that "smooth" kelly bushings need not be guarded. The first of these actions is that

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*/ It appears that, initially, it did not even occur to the Secretary that rotating parts of oil rigs were encompassed within the variety of machines within the perview of the machine guarding standard. Thus, in the early cases where the failure to guard kelly bushings was challenged as violating safety standards, the respondents were cited for violating standards other than this one. DB Drilling Corporation, 78 OSAHRC 21/D2 (No. 76-4668, 1978); MND Drilling Corporation, 77 OSAHRC 183/C5 (No. 76-4149, 1977).

which has already been referred to, namely, OSHA's policy of not requiring the guarding of the kelly, which is equally hazardous and accessible to oil rig workers as is the kelly bushing. The second is OSHA's policy of requiring the guarding of "smooth" kelly bushings in some areas of the country and not in others (E. Tr. 272, 481, 487, 496) The third and most graphic evidence of this inconsistent policy is presented in the form of what appears to be a clarifying statement contained in the memorandum dated June 19, 1979, from the Director, Federal Compliance and State Programs, to one of OSHA's regional administrators which provides:

> Kelly Bushings on oil drilling rigs that are smooth and do not present a potential hazard to employees that come in contact with the Bushings, do not require guarding. However, Kelly Bushings with projections or indentations do present a potential hazard to employees who come in contact with the Bushing and shall be guarded or employer shall be appropriately cited. (R-6)

Inasmuch as the kelly bushing involved here was one of the two principal types of kelly bushing which the industry considers smooth, (E. Tr. 439) and inasmuch as there is no substantially smoother kelly bushing of this size, the most reasonable interpretation of this statement is that kelly bushings such as the one involved here need not be guarded. In fact, persons associated with the oil drilling industry so interpreted this statement. (Tr. 485-487)

Actions of other enforcement agencies also contributed to the belief that "smooth" kelly bushings need not be guarded. The record shows that a number of states wherein oil drilling is prevalent which states have approved safety programs do not require the guarding of "smooth"

kelly bushings. (E. Tr. 480) These states are Utah, Michigan, Wyoming, California, and Alaska. (E. Tr. 480)[*/]

Finally, the decisions of Commission Judges which preceded the issuance of this citation contributed to the view that "smooth" kelly bushings need not be guarded. Research discloses eight cases that were decided prior to the issuance of the citation sub judice involving the failure to guard kelly bushings. Two of these were based upon alleged violations of standards other than the machine guarding standard and resulted in the citations being vacated based, in whole or in part, upon the inapplicability of such other standards. DB Drilling Corporation supra; MND Drilling Corporation, supra (also greater hazard). One case, Signal Oilfield Services Inc., 78 OSAHRC 39/D1 (No. 77-0026, 1978), which involved the old-style kelly bushing with protruding J-bolts, held that the failure to guard that kelly bushing violated the machine guarding standard. Of the remaining five cases, four vacated citations alleging violations of the machine guarding standard based upon findings of greater hazard. Graywolf Drilling Company, 78 OSAHRC 94/A8 (No. 77-3803, 1978); Circle Bar Drilling Company, 78 OSAHRC 82/D4 (No. 77-3581, 1978) (also lack of employee exposure); Graywolf Drilling Company, 78 OSAHRC 70/F1, 1978); Hughes Drilling Company, Inc., 79 OSAHRC 58/A2 (Nos. 76-2945 & 76-3574, 1977). In only one of the eight cases was the alleged violation of the machine guarding standard affirmed. Fred Wilson Drilling Company, Inc., 78 OSAHRC 67/D2 (No. 77-3578, 1978). However, that decision, which is the only one reviewed on appeal, was subsequently reversed on appeal

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[*/] Only Wyoming's standard contains express provisions exempting kelly bushings from guarding requirements. (E. Tr. 480, R-1)

based upon a finding of greater hazard. Fred Wilson Drilling Company, Inc., v. Marshall, 624 F. 2d 38 (5th Cir. 1980). Thus, the most reasonable interpretation of these decisions is that "smooth" kelly bushings need not be guarded.

These considerations, considered in unison, have operated to either obfuscate or limit the scope of the standard so as to create a reasonable belief in the minds of members of the oil drilling industry that "smooth" kelly bushings need not be guarded. For this reason, it is found that the standard, as applied to the guarding of "smooth" kelly bushings, did not contain sufficient warning as to its requirements and is, therefore, unenforceably vague. Diebold Inc. v. Marshall, 585 F. 2d 1327 (6th Cir. 1978). It is further found that the statement from the Director, Federal Compliance and state Programs, previously quoted, constitutes an express statement by a responsible official of the enforcement authority, indicating a conscious decision to restrict the application of the standard to types of kelly bushings other than that which is involved here. Having so restricted the scope of the standard, complainant is estopped from applying it in this case. See Seattle Crescent Container Services, 7 BNA OSHC 1895, 1979 CCH OSHD ¶24,002 (No. 15242, 1979).

Respondent has raised two additional affirmative defenses to the machine guarding charge. These are the impossibility of compliance and greater hazard defenses. In order to avoid a remand should the foregoing determinations be reversed on appeal, these defenses will also be addressed.

The impossibility of compliance defense is based upon the overwhelming evidence in this record that any kelly bushing guard will present accident hazards. Because of this circumstance, respondent argues that by guarding the kelly bushing, it would be violating 29 C.F.R. §1910.212(a)(2) which provides "the guard shall be such that it does not offer an accident hazard in itself." Inasmuch as the Commission has held that the latter provision cannot be asserted as a defense to the machine guarding standard, this defense must fail. Weyerhaeuser Co., 4 BNA OSHC 1972, 1976-77 CCH OSHD ¶21,465 (Nos. 1231 & 1758, 1977).

To establish the final asserted defense, that of greater hazard, it must be shown that (1) the hazards of compliance are greater than the hazards of noncompliance; (2) alternative means of protecting employees are unavailable; and (3) a variance application was inappropriate. M. J. Lee Construction Co., 7 BNA OSHC 1140, 1979 CCH OSHD ¶23,330 (No. 15054, 1979).

In order to determine, in this case, whether a kelly bushing guard presents more of a hazard than does an unguarded "smooth" kelly bushing, it is necessary to identify, evaluate, and compare the hazards presented in each circumstance. The evidence of hazards presented by an unguarded kelly bushing principally consists of the previously quoted testimony of complainant's compliance officer. The hazards he perceived are:

1. The possibility of falling on the rotating kelly bushing
2. The possibility of clothing being caught on the kelly bushing
3. The entanglement hazard which, as described, is limited to the kelly bushing
4. The possibility of someone stepping on the rotary table and being thrown into one of the nearby pieces of heavy equipment.

With respect to kelly bushing guards, the evidence shows the following types of perceived hazards:

1. Interference of the kelly bushing guard with the tong lines, creating the possibility of the tongs being swung into a floorhand. (E. Tr. 460-461)
2. The possibility of a guard acting as a deflecting shield in the event of a blowout. (E. Tr. 463)
3. Interference with the mating of the kelly bushing with the master bushing due to the visual obstruction caused by the presence of a guard, with consequent risk of hand or finger amputations. (E. Tr. 479)
4. The possibility of a guard becoming disengaged from the catline and falling upon the employees working below while they are engaged in making a connection. (Tr. 126-128)
5. The possibility that parts of the kelly bushing or the kelly bushing guard, unseen by the driller, will vibrate loose and then fall onto the hands below when the kelly bushing is raised above their heads. (E. Tr. 465-466)
6. The possibility that a guard made of expanded metal might become misshapen and catch on the kelly bushing and rotate in such a manner as to present a danger to employees. (E. Tr. 463)
7. The possibility of pinched fingers, toes, or strained backs resulting from moving the heavy two-piece removable type guard (E. Tr. 469-470), or the cumbersome combination of the kelly bushing and guard in the case of the one-piece guard. (E. Tr. 479)

8. In the case of the removable type guard, blocked escape routes caused by the necessity of storing the guard during certain phases of the drilling operations within the limited space available on the drill floor. (E. Tr. 472)

Based upon the empirical evidence in this record, kelly bushing guards have resulted in more injuries than have unguarded "smooth" kelly bushings. Complainant offered evidence of three accidents that resulted in either a fatality or an amputation which involved unguarded kelly bushings. (E. Tr. 171-181, 188-196, 280). However, one of these involved an old-style kelly bushing with protruding J-bolts. (E. Tr. 435-437) In another, the cause of the accident was attributable to the rotating kelly rather than the kelly bushing. (E. Tr. 441-448) Only one of these accidents would not have occurred had the kelly bushing been guarded. (E. Tr. 227) That accident resulted in an amputation of an employee's legs. (C-12) In contrast, the types of hazards described above that are associated with kelly bushing guards have resulted in numerous injuries ranging from minor bruises (E. Tr. 465-466, 479); fractures (E. Tr. 424-425); an amputation (E. Tr. 479) to a fatality (E. Tr. 466). Additionally, there have been other serious injuries which are attributable to the presence of a kelly bushing guard. (E. Tr. 307, 312-313, 315-319, R-4, R-5).

A qualitative evaluation of these perceived hazards also supports the conclusion that, in this case, the hazards of a guard are greater than the hazards of the unguarded "smooth" kelly bushing that was operating on the respondent's rig.

In evaluating the perceived hazards of an unguarded kelly bushing, one of them stands out as significant. If an employee becomes entangled with a chain or hose, which in turn becomes entangled with any of the rotating parts located at the center of the drill floor, then death or serious physical injury is probable. However, as to the other perceived hazards of the unguarded "smooth" kelly bushing, they are either too speculative or remote to be considered significant.

If someone were to fall on the kelly bushing while it is rotating, death or serious physical injury could result. However, this is true whether the kelly bushing is rotating or not, and is attributable to the physical properties of the bushing, namely, that it is a heavy metal object. (Tr. 68, 76) While there is evidence in this case in the nature of opinion evidence that injuries resulting from a fall on a rotating kelly bushing would likely be more serious than a fall on a non-rotating kelly bushing, (Tr. 77) this opinion is unsupported by reasons and constitutes little more than speculation, particularly since the proponent of this opinion had no personal knowledge of such accidents, and did not disclose the nature of any resulting injuries even though he has heard of such accidents occurring. (Tr. 78-79)

Similarly, the evidence pertaining to the perceived hazard of clothing being caught in the kelly bushing is highly speculative. While there is opinion evidence that clothing can get caught in the kelly bushing, (Tr. 42) this evidence is unpersuasive in light of the other evidence in this record which describes experiments conducted with other "smooth" kelly bushings wherein attempts to catch objects in a rotating kelly bushing were unsuccessful. (Tr. 116, E. Tr. 337-338, 342, 452-457)

The fourth and final type of perceived hazard appears to be even more remote and, indeed, unrealistic. This is the hazard of stepping on the rotating rotary table and being thrown onto one of the nearby heavy objects. Since the compliance officer's own measurements show that the diameter of the rotary table is 30 inches and that of the kelly bushing is 24 inches, the exposed portion of the rotary table was only three inches on each side. For someone to step on that narrow an area and to put sufficient weight on that foot to then be thrown into the nearby pieces of equipment simply does not comport with reality. The more realistic view is that if one were to attempt to step on the rotary table, the rotational force of the rotary table would cause the foot to be brushed back in the direction of the rotation before sufficient weight could be placed on the foot that has stepped on the table to cause someone to be thrown about. (E. Tr. 404)

In evaluating the perceived hazards of a guarded kelly bushing, a distinction must be made between the two basic types of guards--the clamshell, removable type of guard and the bell-shaped guard such as the Varco guard depicted in C-22. It appears that the most feasible type for use on an oil rig is the latter. Indeed, the bell-shaped guard is the only manufactured guard available and is designed for use with the very type of Varco kelly bushing involved here.

Five of the perceived hazards associated with kelly bushing guards apply to these bell-shaped guards. Of these, two appear to be more illusory than real, while the other three appear to be significant. One of the perceived hazards associated with this type of guard is that of the tong lines becoming frayed by rubbing against the edges of the

bell-shaped guard while it is resting on top of the kelly bushing which, in turn, is placed in the rat hole.[*] Since the evidence establishes that it takes months for this fraying process to occur, (Tr. 124), it would appear that a modest maintenance program could be expected to prevent this perceived hazard from occurring. The perceived hazard of the bell-shaped kelly bushing guard deflecting the materials that come out of a well during a blowout also appears to be unrealistic if not illusory. The evidence here established that in the case of a blowout, the presence of a guard does not significantly increase the hazards associated with a blowout. (Tr. 103-104)

Three of the perceived hazards associate with bell-shaped kelly bushing guards appear significant. Two of these relate to the presence of the guard when the kelly bushing is being mated to the master bushing. During certain phases of drilling operations, the kelly bushing is disengaged from the master bushing to permit the addition or deletion of pipe from the drill stem. When this occurs, the guard rests on top of the kelly bushing, which is suspended from above by the kelly, which is attached to the traveling block. During this phase of the operation, that portion of the kelly bushing which is above the platform when it is in a drilling mode (the bowl) is covered by the bell-shaped guard. The sides of the guard extend beyond the sides of the bowl approximately six inches (Tr. 88) and the bottom of the guard extends below the bottom of the bowl a few inches. (C-22)

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[*] The rat hole is a pipe which extends vertically from the drill floor to approximately head-high. The kelly bushing and, if used, the bell-shaped guard are placed on the top of this pipe during certain phases of drilling operations.

When the kelly bushing is put back into the drilling mode, it is necessary to physically guide by hand the kelly bushing so that it mates with the master bushing. The presence of this guard during this mating process substantially impedes the mating process and creates a hazard for those who are guiding the kelly bushing into place. First, the guard obstructs the vision of the employees who are guiding the bushing into place. (E. Tr. 524-530) Secondly, in order to guide it, the employees must position their hands under the guard with their view obstructed and risk the possibility of fingers or hands being amputated during this process. Indeed, the record shows that amputations have occurred in this situation. (E. Tr. 479)

It is possible to avoid this hazard by raising the guard from its resting place on top of the kelly bushing by attaching a line to the bushing, which suspends it overhead on the kelly. However, this presents a different hazard which is every bit as significant. The Varco guard, which weighs over 300 pounds, is hoisted by means of a catline. (Tr. 127) A catline is used for hoisting loads up to a thousand pounds. (Tr. 131) It is suspended from the top of the rig. (Tr. 127) It is primarily composed of a 1 1/2 inch thick rope, on the end of which is a chain. (Tr. 128) In order to hoist objects from the rig floor with the catline, the chain portion of the catline is looped around the object. (Tr. 127) However, because of the smooth surface of the Varco guard, it is difficult to wrap the chain around it, and there is a substantial likelihood that, once overhead, the guard will come loose from the chain and fall on the employees who are working immediately below. (Tr. 128)

The third and final significant hazard involved with the bell-shaped guard is also present in the case of the removable guards. The presence of the guard substantially obscures the visibility of the kelly bushing, when it is in a drilling mode and rotating. (E. Tr. 461) The evidence shows that visual contact with the kelly bushing when it is rotating is important in that production and the proper maintenance of the equipment is impeded if visibility is impeded. (E. Tr. 462) As a result of the latter, parts of the kelly bushing, such as bolts contained therein, can and do become loose and can create a significant hazard when the kelly bushing is then raised overhead. (E. Tr. 465-466, 530).

In comparing these hazards, it is apparent that there are serious hazards present whether the kelly bushing is guarded or not. Amputations and fatalities have occurred as a result of unguarded kelly bushings. Indeed, at least one amputation is attributable to a "smooth" kelly bushing that was unguarded. The same results have occurred because of the hazards associated with the most feasible forms of kelly bushing guards, namely, the bell-shaped guard. However, in this case, it appears that the hazards of a kelly bushing guard are greater than the hazards of the "smooth" kelly bushing unguarded because of the work rule adopted by respondent which would limit the severity of the injuries that can be expected to result from the unguarded "smooth" kelly bushing that is involved here.

This work rule provides:

> "At any time an employee's work activities require handling materials which can become entangled in the rotary table, the kelly bushing, or kelly, while such equipment is in motion, there shall be at the controls a person capable of stopping the rotating equipment." (C-23A)

This work rule is directed at what is by far the most significant hazard associated with an unguarded kelly bushing. Moreover, it, unlike a kelly bushing guard, also protects against the same hazard which is associated with the kelly. This work rule is directed not to the prevention of the entanglement hazard, but rather towards reducing the severity of the resulting injuries. The evidence establishes that the rotation of the kelly bushing, rotating at 70 rpm, can be stopped within one revolution. (Tr. 123) There is credible evidence this would substantially reduce the injuries that could be expected to occur in the event of entanglement. (Tr. 124) Because of this work rule, the injuries that could be expected to occur as a result of this unguarded, "smooth" kelly bushing on respondent's rig would appear to be substantially less severe than those which could be expected to occur as a result of the hazards associated with a kelly bushing guard.

It is parenthetically mentioned that complainant challenges this work rule as not being communicated. (Complainant's brief at 15.) The basis of this challenge is that it was not posted on the bulletin board at the rig during the inspection and that the existence of such work rule was not made known to the inspector at the time of the inspection. (Complainant's brief at 10-11) Inasmuch as it is not shown in this record that the compliance officer sought <u>all</u> the applicable work practices during the inspection, the failure of respondent's representatives to voluntarily make known to the inspector the existence of such work rule does not establish that it was not effectively communicated. Similarly, the fact that on a particular day the work rule was not posted does not establish that the work rule was not effectively communicated.

The record affirmatively shows that this work rule was distributed to respondent's employees by a memorandum dated February 27, 1980. (C-23) There is also affirmative evidence that this work rule accurately reflects respondent's policy. (Tr. 90, 123) This evidence is sufficient to establish a prima facie case that the work rule was effectively communicated, and such evidence is not refuted by the matters raised by complainant.

This work rule is not only relevant to establishing the first element of the greater hazard defense, it also establishes the second element as well. The evidence establishes that the full measure of protection contemplated by the standard cannot be provided by alternative means. (E. Tr. 472-476, 518-519) This work rule establishes that respondent took steps to provide some significant measure of protection to its employees even though the full measure of protection contemplated by this standard could not be provided. This is sufficient to establish the second element of the defense. See Harlock Roofing Co., 7 BNA OSHC 1867, 1979 CCH OSHD ¶24,006 (No. 14907, 1979).

To satisfy the third and final element of this defense, respondent argues that it could not comply with the variance procedure specified in 29 C.F.R. §1905.10. Further, respondent argues that it did not have any reason to believe that it was violating the standards. For these reasons, it is argued that making an application for a variance would have been inappropriate. Since the record establishes here that respondent did not have reason to believe that a kelly bushing guard was required, and inasmuch as it is not shown that respondent had actual knowledge of such requirement, it is found that it would be inappropriate for

respondent to have sought a variance. Diebold Inc. v. Marshall supra. Thus, it is found that respondent has established all three elements to the greater hazard defense.

ORDER

In view of the foregoing and pursuant to Fed. Civ. P. 52(a) which permits the entry of judgment based upon findings of fact and conclusions of law which appear in a decision, it is hereby ORDERED that:

1. Citation No. 1, Item No. 1, is VACATED.

2. Citation No. 2, Item No. 1, is VACATED.

3. Citation No. 2, Item No. 3, is AFFIRMED and no penalty is assessed.

Quentin P. McColgin
Judge, OSHRC

Dated: May 6, 1982

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

Secretary of Labor v. NOBLE DRILLING CORPORATION
OSHRC Docket No. 81-0770

1. Enclosed is a copy of my decision. It will be filed with the Commission on May 6, 1982, and will become the final order of the Commission on June 7, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is June 7, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Richard J. Murphy
Judge, OSHRC

Date: April 16, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v | : | OSHRC Docket No. 81-0770 |
| NOBLE DRILLING CORPORATION, | : | |
| Respondent. | : | |

APPEARANCES:

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## DECISION AND ORDER

RICHARD J. MURPHY, JUDGE

Respondent operates oil and gas well drilling rigs in numerous states including the State of Montana. On February 18, 1981, a compliance officer of the Occupational Safety and Health Administration

(OSHA) conducted an inspection of Respondent's Drill Rig 522 which was then in operation at a location near Sidney, Montana.[1/]

As a result of that inspection a citation was issued alleging in Citation 3 that Respondent was in serious violation of the Occupational Safety and Health Act of 1970 (29 U.S.C.651, et seq)(Act) in that rotating parts of the rotary table and kelly bushing on Rig 522 were not guarded as required by the standard set forth in 29 C.F.R.1910.212(a)(1). A fine of $800.00 was proposed.[2/] Respondent's answer is a general denial of the allegation of unlawfulness. No affirmative defenses are asserted in that answer.

This case was heard on December 1, 1981, by Judge Erwin L. Stuller. Subsequently it was reasigned to me because of the unavailability of Judge Stuller to this Commission. By order of February 23, 1982, I informed the parties of my intention to decide this case on the record made before Judge Stuller and on consideration of the post-hearing briefs filed by the parties. That Order directed the parties to file any objections to that proposed handling by March 17, 1982. No objection has been filed.

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1/ Respondent stipulates that it was engaged in a business affecting commerce within the meaning of Section 3(5) of the Act and that this Commission has jurisdiction in this case. It is so found and concluded.

2/ Another citation was issued as a result of the Febuary 18, 1981 inspection but as it was not contested it is not at issue here.

Determination of whether the unguarded rotory table bushing and kelly bushing on Rig 522 violated the machine guarding standard in 29 C.F.R.1910.212(a)(1) requires an understanding of the location of those parts of the rig and their function.

The rotary table master bushing, kelly bushing and kelly are rotary components of a drilling rig. The top of the rotary table is approximately flush with the rig floor. The rotary bushing is a flat circular piece 3 feet in diameter which is exposed through the top of the rotary table. The kelly bushing rests on the rotary bushing. The kelly passes through the kelly bushing and rotary bushing to the drill string which consist of connected lengths of drill pipe with a bit or cutting head on the bottom end. During the drilling operation machinery under the rotary table causes the rotary bushing and the kelly bushing (which is engaged to the rotary bushing) to rotate. The circular action of the kelly bushing causes the kelly to turn and transmit rotary motion to the drill string. (Ex. 4 and 6)

The floor of Rig 522, which is the central to the drilling activity, is metal. It is approximately 32 feet square. A plan of that rig floor[3/] shows that the top of the rotary table is 6'2" x 7" and is located at the approximate center of the floor. Its top is slightly raised above the floor level. The rotary bushing is located in the center of the

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3/ Respondent's Exhibit B

rotary table. There are various structures on or through the rig floor around the rotary table. On one side of the rotary table is a structure called the draw works which is 8'6" from the center hole of the kelly bushing (also 7' from the edge of the rotary bushing and 5' from the edge of the rotary table). On two other sides the center of the rotary bushing is approximately 8'8" from derrick legs On the fourth side, a "mousehole" is approximately 4' from the edge of the rotary bushing. The pipe rack is also on the mousehole side of the floor. A large part of the activity on the rig floor takes place in the area within a 8' radius of the center of the kelly bushing.[4/]

The parties stipulated that Rig 522 had been drilling at the Stanley, Montana, site for approximately 60 days before the OSHA inspection on February 18, 1981; that respondent employed five or six employees a tour (shift) for three tours a day; that the crews for each tour were composed of a derrickman, motorman, fireman, tool pusher and one or two floormen. The parties further stipulated that when the rig commenced drilling at the Stanley site it operated at 120 to 140 revolutions per minute (RPM) and that subsequently the normal drilling speeds ranged from 55 to 65 RPM.

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4/ Mr. Hopkins, Safety Coordinator for Respondent, testified that the area on the drill rig floor between the draw works, pipe works and the two legs is considered the working area of the drill rig floor. (Tr. 113)

During the course of the inspection the OSHA compliance officer observed the drilling operation on Rig 522 for 35 to 45 minutes at which time the rig was operating at 65 RPM. The compliance officer observed employees working in the area of the rotary table. He testified that those employees came to "anywhere from several feet to within approximately a foot of the rotating kelly bushing at that time (Tr 12-13)."

The kelly bushing is a Varco type bushing that does not have bolts which protrude. It is shown in three photographs taken by the compliance officer and received in evidence. It has a rectangular base. It is irregularly shaped with indentations for rollers which press against the kelly. It has bolts in indentations on its surface. These photographs show a chain laying on the metal floor near the edge of the rotary table. The photographs also show mats laying on the derrick floor and the top of the rotary table which are within inches of the rotary bushing. Employees are shown in two of these pictures.

The compliance officer testified that at the time of the inspection the rig floor was wet and slippery. He testified that the unguarded kelly bushing presented hazard to the two to four workers he observed. The compliance officer testified that a worker could incur a minor injury or a serious injury causing death from contact with a rotating kelly bushing. He testified that a man could trip, slip or fall into the bushing, get his clothing or hair caught in the bushing. He also

testified that a spinning chain or the hose that is used to wash drill mud off the floor could become entangled in the rotating kelly bushing and cause injury. A copy of an employer's report to the State of Montana, Division of Worker's Compensation shows that a drill rig roughneck at Richland County, Montana, had both legs amputated as a result of an accident described as follows: "Employee was pulling out spinning chain in order that it could be wound up on the stand of pipe in the mousehole. Chain became entangled in kelly bushing, encircling employee's legs between chain and kelly." While the accident was on a different rig of a different employer and involved a different type of kelly bushing [5/] it's occurrence indicates how serious a kelly bushing accident can be.

The OSHA compliance officer testified that during the course of inspections of other oil and gas well drilling rigs he had observed guards on kelly bushings. Exhibit 13 is a picture of one type of such guard. The derrick man for Rig 522, called as a witness for Complainant, testified that his previous employer did not have kelly bushing guards

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The kelly bushing involved in the accident at Richland County which caused the double amputation is shown in Exhibit 14. It is smoother than the kelly bushing on Rig 522. Respondent's witness Hopkins testified that the kelly bushing shown in Exhibit 14 is similar to the Varco kelly bushing used on Rig 522 but that it has less indentations than the Varco bushing. (Tr 106-107)

on it's drilling rigs when he started working but did have such guards when he left the company. (Tr 72). He also testified that after each additional length of drill pipe is connected to the drill string, that is after each pipe connection, the surface of the platform is washed with a power hose and that in winter months the drill rig floor becomes icy and slippery. On cross examination the derrick man testified that "in the ordinary course of events while the kelly bushing is rotating, there's no job that requires a roughneck or any other member of the crew to be near that kelly bushing (Tr 68)."

Respondent presented three witnesses each of whom has been employed by it for 28 years or more. Each testified that during his long employment with Respondent he had never heard of an injury attributable to a kelly bushing. Witness Hopkins has been safety coordinator for respondent since 1970 and reviews all company accident reports. Each of these witnesses testified that no employee is required to perform any job or task on the kelly bushing while it is rotating, or to perform any task within two feet of the kelly bushing while it is in operation. Witness Hopkins testified on cross examination that activity in near proximity of a rotating mechanism is hazardous and defined near proximity as one to two feet (Tr 113). He acknowledged that employees walk from one side of the rig to the other during the drilling mode and come no closer than two feet of the rotating kelly bushing or rotating part of the table.

Respondents case is that an unguarded kelly bushing is not hazardous. On brief Respondent states that the sole issue in this case is "Is an 'unguarded' kelly bushing a hazard to employees on a drilling rig?" Respondent argues that there is no hazard because employees are not required to work within a "zone of danger" surrounding the kelly bushing on Rig 522. In support of this argument, Respondent relies on the testimony of it's long time employees that unguarded kelly bushings on its rigs had not caused accidents. Respondent also relies on a safety regulation of the Occupational Safety and Health Commission of the State of Wyoming which "does not require that a kelly bushing be guarded but rather relegates the safety requirement to certain work practices." (Respondent's brief P8)

I find that the record in this case proves the hazard of the unguarded kelly bushing and unguarded rotary bushing. Respondent's witness Hopkins, its safety coordinator, conceded that activity in the near proximity of a rotating mechanism is hazardous. The regulation of the State of Wyoming, which as stated by Respondent opts for a work practice regulation rather than a guard for kelly bushings, is a tacit recognition that a rotating kelly bushing is hazardous. The testimony of the OSHA compliance officer that an employee's clothes or hair could become entangled in a rotary kelly bushing or that chains or hoses used on the drilling floor could become entangled on the bushing and cause injury is persuasive. The pictures of the kelly

bushing introduced in evidence support that testimony. Moreover, that testimony as to serious hazard is confirmed by the accident described above which resulted in the amputation of two legs.

I further find that Respondent's employees had access to and therefore were exposed to the above described hazard. Respondents argument that there is no hazard is in part an argument that its employees are not required to work within a "zone of danger" surrounding the rotating kelly bushing, which Respondent's witness Hopkins defined as within two feet of the bushing. I find that a large part of the activity on the rig floor takes place within an eight foot radius of the center of the kelly bushing and within 6 feet of the outside edge of the rotary bushing. The compliance officer testified that he observed employees within several feet to within approximately a foot of the rotating kelly bushing. Witness Hopkins testified that employees walking from one side of the rig floor to the other side come no closer than two feet of the rotating kelly bushing. In view of the uncontested fact that employees work in the area from 2 to 8 feet from the rotating kelly bushing and considering the sometime slippery condition of the floors and the presence of chains and pads on the floor and irregularity in the floor surface, any one of which could cause slipping or tripping, I find that employees have access to and are exposed to the hazard. Secretary v. Brown-McKee, Inc., (1980) 8 BNA OHSC 1248, 1249.

I also find that guards are available. A picture of a kelly bushing guard is shown in Exhibit 13. Mr. Mitchel, derrick man for Respondent on Rig 522 testified that his last employer used guards on its kelly bushings. No evidence was presented to show that the kelly bushing cannot be guarded. Moreover I find that Respondent was aware of the hazard associated with unguarded kelly bushings and rotary bushings. Exhibits 10, 11 and 12, are copies of documents dated in 1976 from Respondent's files which deal with means of guarding kelly bushings to prevent hazard to employees.

I find that respondent's non-compliance with the guarding requirements of 29 C.F.R.1910.212(a)(1) is a serious violation of the Act as defined in Section 17(k) of the Act. The record and the foregoing findings clearly establish that an unguarded kelly bushing is hazardous, and demonstrate the possibility of an accident. The record also shows that in the event of such an accident there is a substantial probability of death or serious injury. Moreover respondent had sufficient knowledge of the hazard, the physical and operating conditions on the drill rig floor and of the availability of kelly bushing guards satisfy the knowledge requirement of Section 17(k).[6/]

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6/ In Secretary v Hermitage Concrete Pipe Co., OSHRC Docket No. 4678, dec. March 23, 1982, 10 BNA OSHC _____, The Commission stated the requirements of Section 17(k) as follows:

> ". . . In order to establish a serious violation of the Act, the Secretary must establish that (1) death or serious physical harm could result if the standard is violated, and (2) that the employer has actual or constructive knowledge of the violative condition."

In making this determination I have not been unmindful of Respondents argument that the absense of kelly bushing accidents on its rigs for many many years disproves the existence of a hazard. However, the absence of injuries in the past does not relieve an employer of his duty under safety standards to prevent future injuries if, as here, there are hazards to which employees are exposed. Secretary v George C. Christopher & Son, Inc. (1982) 10 BNA OHRC 1436, 1446; Secretary v. A. E. Burgess Leather Company, Inc., (1977) 5 BNA OHRC 1096.

I have also considered Respondent's argument based on Fred Wilson Drilling Co. Inc. v. Marshall, 624 F. 2d 38 (5th Cir. 1980) in which the Court of Appeals set aside a final order which held that the unguarded kelly bushing on an oil rig violated 29 C.F.R. 1910.212(a)(1). The Court stated that:

> "In finding Fred Wilson in violation of this standard, the ALJ acknowledged that use of a kelly bushing guard would pose serious hazards, but concluded that an unguarded bushing, on balance, presented the more unsafe situation. . ."

The court in reviewing the record held that the evidence before the Commission did not support the Administrative Law Judge's finding that the greater hazard defense should fail. Thus that reversal, based on an analysis of the evidence in that case, does not provide a rule of law for this case, especially as in this case Respondent does not assert the affirmative defense that compliance with the standard would create a greater hazard than that against which the standard is directed.

Moreover, no evidence was offered by Respondent to demonstrate that it would be hazardous to guard the kelly bushing on Rig 522.

I find that the proposed penalty of $800.00 is appropriate as the factors to be considered pursuant to 17(j) of the Act are fully established on this record. Elements which have been considered in determining the gravity of the violation have been accounted for as two to four employees were exposed to the hazard per tour and Respondent was operating three tours; the duration of the exposure was the greater part of the eight hour tours; and no precautions were taken by respondent to minimize the employees' exposure to hazard.

## O R D E R

Based on the foregoing findings and conclusions it is ordered that Item 1 of Citation No. 3 issued to Respondent February 24, 1981, for violation of 29 C.F.R. 1910.36 (b)(1) is affirmed and a penalty of $800.00 is imposed.

Richard J. Murphy
Judge, OSHRC

Dated: May 6, 1982

CHICAGO, ILLINOIS

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
ROOM 7B11, FEDERAL BUILDING
1100 COMMERCE
DALLAS, TEXAS 75242
FTS 729-5271
COM (214) 767-5271

# NOTICE OF DECISION

Secretary of Labor v. Texas Masonry, Inc.
OSHRC Docket NO. 81-0391

1. Enclosed is a copy of my decision. It will be filed with the Commission on May 17, 1982, and will become the final order of the Commission on June 16, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D. C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is June 16, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed portcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92 and 93.

E. Carter Botkin
E. CARTER BOTKIN
Administrative Law Judge

Date: April 27, 1982

OSHRC Form 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>TEXAS MASONRY, INC.,<br><br>Respondent. | ) | OSHRC DOCKET NO. 81-0391 |

JUDGE'S DECISION MAY 17 '82

FINAL ORDER ON JUN 16 '82

DECISION AND ORDER

Appearances:

Jack Ostrander, Esq., and Anne F. Watson, Paralegal, of Dallas, Texas for the Complainant.

James D. Sprague, Safety Director, The Associated General Contractors of America, of Dallas, Texas for Respondent.

BOTKIN, Judge:

This is a proceeding brought before the Occupational Safety and Health Review Commission ("the Commission") pursuant to §10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq. ("the Act"), contesting citations issued by the complainant, the Secretary of Labor ("the Secretary"), to the respondent, Texas Masonry, Inc. ("Texas"), under authority vested in the Secretary by §9(a) of the Act.

As a result of an inspection conducted during the period of December 4 through December 12, 1980, of a workplace located at 205 North Industrial, Bedford, Texas, where respondent's employees were engaged in the construction of a building, two citations were issued to respondent on January 22, 1981,

alleging violations of §5(a)(2) of the Act. The citations charged respondent with three serious and one nonserious violations for which a total penalty of $1,320.00 was sought.

Respondent timely filed notice of contest on February 3, 1981, commencing this proceeding before the Commission under §10(c) of the Act. Thereafter, a complaint and answer were filed with the Commission.

A hearing was held in this matter on August 21, 1981, in Dallas, Texas. No affected employees or representatives of affected employees participated in the proceeding. The matter is now ripe for decision.

## JURISDICTION

In its answer, respondent admitted that jurisdiction of the proceeding was conferred on the Commission by §10(c) of the Act. It also admitted that it has a place of business and office located at 3517 Dividend, Garland, Texas. It denied that it is an employer engaged in a business affecting commerce who has employees within the meaning of §3(5) of the Act. However, at the hearing, respondent stipulated that it is an employer within the meaning of §3(5) of the Act (Tr. 3). Therefore, no issue remains in regard to jurisdiction.

## MOTION

At the hearing, complainant moved to withdraw item 1 of serious citation 1 (Tr. 3). A ruling was not entered at that time. Complainant's motion is hereby granted.

## ISSUES

1. Whether respondent was in serious violation of 29 CFR 1926.451(d)(7),

and, if so, the appropriate penalty therefor.

2. Whether respondent was in serious violation of 29 CFR 1926.451(d)(10), and, if so, the appropriate penalty therefor.

3. Whether respondent was in nonserious violation of 29 CFR 1926.152(a)(1) and, if so, the appropriate penalty therefor.

## PARTIAL RESOLUTION OF THE FACTS

John T. Sayers, a compliance officer ("the CO") for the Occupational Safety and Health Administration ("OSHA"), conducted the inspection (Tr. 5,7). He has been a compliance officer with OSHA for approximately seven years (Tr. 6-7). Prior thereto, he spent 30 years with fire departments of various military branches of the federal government where he inspected for hazards involving fire, electricity, safety and building stress. His duties also involved inspection of all buildings under construction at his various duty stations (Tr. 6).

During the period of December 4 to December 12, 1980, the CO and another compliance officer conducted an inspection of a workplace at the northwest corner of I-20 in Bedford, Texas, where a department store was under construction.[1] Respondent was one of the subcontractors inspected by the CO (Tr. 7, 33-34). Respondent's representative at the opening conference was a foreman who accompanied the CO during most of the inspection (Tr. 8, 9). Respondent's employees were engaged in masonry work at the workplace (Tr. 8).

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1 The specific location set forth in the citation was 205 North Industrial, Bedford, Texas.

Cliff Johnston ("Johnston") had been vice-president of respondent for approximately three months prior to the date of the hearing (Tr. 41, 43-44). In that position, he is charged with responsibility for field operations and the estimating and financial departments (Tr. 41). Prior thereto, he was general manager (Tr. 43-44). At the time of the hearing, his total length of employment with respondent was approximately 14 months (Tr. 46, 47-48). He is the holder of a master's degree in mechanical engineering. While pursuing his education, he worked for a consulting engineer. Prior to joining the respondent, he had 16 years of experience as a design engineer in the aerospace industry (Tr. 44).

Douglas J. Perrin ("Perrin") has been employed in the construction business for 27 years. He commenced work as a laborer for bricklayers, then became a mason, and ultimately became a supervisor (Tr. 49). He had been a foreman until approximately four months prior to the inspection, when he became field superintendent for respondent (Tr. 48, 53). His duties as field superintendent include scheduling jobs, making sure that foremen on jobs have the necessary personnel and equipment, assisting foremen solve problems in the field, insuring that worksites are in compliance with OSHA standards through directives to his foremen, and communications between the field and Johnston and the home office (Tr. 48-49, 53-54). His routine involves going to the office in the morning, taking calls from foremen, and then dispatching or filling various requests by the foremen. Thereafter, he makes routine visits to various jobsites to help solve problems or program the work (Tr. 53). In this job capacity, he keeps abreast of safety requirements of OSHA as they apply to worksites. He has been concerned and interested in OSHA requirements since the Act became effective (Tr. 53).

Respondent's safety program has been in effect for a number of years. It is established by written directive. Management thereof flows from upper management to the superintendent, then through the foremen to workers by way of weekly safety meetings on each job. Written reports of those meetings are compiled and maintained. There is also a monthly meeting of foremen where safety and other topics are discussed (Tr. 41-42, 45). Additionally, respondent's insurance carrier performs periodic inspections of various worksites on a random selection basis, furnishing written reports thereof to respondent (Tr. 45). The results thereof and a good safety record have yielded several letters of commendation from safety inspectors (engineers) for said insurance carrier and reasonably low insurance rates (Tr. 42). There have not been any recent job-related accidents of a serious nature (Tr. 42-43). Respondent is an associate member of The Associated General Contractors of America, a type of membership for subcontractors (Tr. 44-45). Since 1975, respondent has been inspected by OSHA on at least three occasions, including the current inspection (Tr. 45-46, 54-55). No citations were issued as a result of one inspection. During another inspection which took place in the late spring or early summer of 1980, a citation was issued for not maintaining eyewash and clean water beside a bucket of brick cleaner (Tr. 55).

(A) 29 CFR 1926.451(d)(7)- Securing of Scaffold Issue

Item 2 of serious citation 1 alleges a violation of 29 CFR 1926.451(d)(7) as follows:

29 CFR 1926.451(d)(7): Tubular welded frame scaffold(s) were not secured to the building or structure at least every 30 feet horizontally:

Scaffolds approximately 24 feet high and 231 feet long--North and South walls.

The cited standard provides:

§1926.451 Scaffolding.

* * *

(d) Tubular welded frame scaffolds

* * *

(7) To prevent movement, the scaffold shall be secured to the building or structure at intervals not to exceed 30 feet horizontally and 26 feet vertically.

Many of the underlying facts related to this citation are not in dispute. The north and south walls of the building were under construction on the date that respondent was inspected. Respondent had 32 employees on the project (Tr. 11). For approximately 1 1/2 to 2 hours, the CO observed approximately 20-25 employees performing work from scaffolds while installing masonry blocks to form those walls (Tr. 11-13, 20). One half of that crew (20-25) was working on each wall (Tr. 11). The scaffolds were not secured to the walls (Tr. 9, 10, 14). Measurements by the CO revealed that a section of scaffolding was six feet tall, seven feet long and five feet wide (Tr. 10, 19). Although the frames of the scaffolds are five feet wide, there is a side bracket, which is approximately 24 inches wide, on which masons walk along the walls. Therefore,

the width of the scaffolds, including side brackets, from the interior (side closest to the wall) to the exterior of the scaffolds is approximately seven feet (Tr. 59).[2] There were 31 sections (217 feet) of scaffolds on the south wall and 33 sections (231 feet) thereof on the north wall, lengthwise or horizontal; and they were three sections (18 feet) and four sections (24 feet) in height (Tr. 10, 19; 10, 18-19). There was debris on the ground underneath and also adjacent to the exterior side of the scaffolds. It was composed of masonry blocks, pieces of masonry blocks, lumber and other unidentified materials (Tr. 13, Exs. C-1 and C-2).[3] The scaffolding had good footing, was on level ground and had a good base under it. Scaffold frames were aligned and X-braced (Tr. 49).

The first issue to be resolved involves an interpretation of the standard. The decisive question is whether the cited standard applies to scaffolding which exceeds 30 feet in length, but does not reach 26 feet in height. Based on training and instructions, the CO interprets the standard to require scaffolds to be secured to a building or structure at both (i) vertical intervals not to exceed 26 feet, and (ii) horizontal intervals not to exceed 30 feet (Tr. 35).[4] Cross-examination of the CO by respondent appears to reveal that its position

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2 No evidence was introduced as to whether the side brackets were level with scaffold platforms.

3 Exhibits C-1 and/or C-2 appear to show some lumber, bags of material (presumably cement) and unbroken masonry blocks in the area of the scaffolding.

4 Since the scaffold did not reach 26 feet in height at any place, the citation was based on a lack of securing it at intervals not exceeding 30 feet in length (Citation, Tr. 34-36).

is that a scaffold need not be secured unless it has reached both proportions, 26 feet vertically and 30 feet horizontally (Tr. 34-35). Johnston testified that it has been respondent's standard procedure to tie off the scaffolding when it reaches 26 feet in height. Although it may be done by some firms, he had never seen anyone tie off a scaffold that is six feet high and 35 feet long (Tr. 43).[5] His personal interpretation of the standard was formed during or after the early fall of 1980 (Tr. 46-47). In the context of an interpretation of the standard for purposes of respondent's work, Perrin's answer is somewhat different. He stated that a scaffold must be tied off at 30 feet horizontally and 26 feet vertically, when it reaches 26 feet in height and is going higher (Tr. 52).[6] In terms of tiers of scaffolding (vertical), tying off would begin on the fifth tier of scaffolds (Tr. 52).[7] In response to the question of whether height or length of scaffolds is the determining factor of when to secure, he responded that height is more so than length (Tr. 49-50).

I agree with the Secretary.[8] While the standard could have been written in more precise English, its meaning is far from ambiguous. The illogic of a

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5 Also, see page 46 of the transcript. Thus, his testimony seems to give total deference to height.

6 This statement assumes a length of 30 feet. Also, see his testimony in more general terms relating to vertical heights of scaffolds at page 49 of the transcript.

7 Each tier is six feet tall (Tr. 10, 19).

8 However, the Secretary's introduction of that portion of the Manual of Accident Prevention in Construction, relating to tubular steel scaffolding (§14-2.7), issued by The Associated General Contractors of America, has not been persuasive (Ex. C-3). It does not support the Secretary's contention. It refers to height and width, not length. Testimony relating thereto can be found at pages 54-59 of the transcript.

contention that both vertical and horizontal elements of the standard must be met prior to an application of the standard can easily be seen. This would permit a contractor to erect and work from unsecured scaffolding 100 feet high if it was not 30 feet long.[9] I further find that a scaffold's length has some effect on its stability regardless of its height.[10] As aforesaid, the dimensions of the scaffolding were 217 feet in length on the south wall and 231 feet on the north wall, with its height varying from 18 to 24 feet (Tr. 10, 19;10, 18-19). The scaffolds were not secured to the walls and employees were working on them at heights of 18 and 24 feet (Tr. 9, 10, 14; 16, 18-19, 36, Exs. C-1 and C-2). The standard applies to the cited condition and the terms of the standard have not been met. Therefore, the existence of the hazard has been established.[11] Broadly stated, this standard is designed to protect workers from hazards related to the instability of scaffolds. More specifically, a movement of the scaffolding could cause the scaffolding together with work materials and workers to fall,

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9 Based on Johnston's testimony, I realize that respondent does not follow such a practice (Tr. 43).

10 In so holding, I have not overlooked Johnston's assertion that he has never seen a scaffold tied off which is six feet high and 35 feet long (Tr. 43). However, his experience in the construction business is limited (Tr. 44-48). Such a height would certainly be a factor in determining the character of a violation (serious, nonserious, or de minimis). I agree with Perrin that height is a more important factor than length (Tr. 49-50). However, that is reflected in the standard itself by the different footage set forth.

11 See Pratt & Whitney Aircraft, 81 OSAHRC 39/A2, 9 BNA OSHC 1653, 1981 CCH OSHD ¶25,359(No. 13401, 1981), appeal withdrawn, No. 81-4104 (2nd Cir. August 3, 1981), and cases cited in that decision for a discussion of this type of standard where a hazard is presumed.

or workers to fall from the scaffolding (even if the scaffolding did not fall).[12]

In order to establish a serious violation of the Act, the Secretary must establish that (i) there is a substantial probability that death or serious physical harm could result if an accident occurred, and (ii) the employer has actual or constructive knowledge of the violative condition. The probability of an accident occurring is irrelevant. See Niagara Mohawk Power Corp., 79 OSAHRC 36/A2, 7 BNA OSHC 1447, 1979 CCH OSHD ¶23,670 (No. 76-2414, 1979). Here, respondent does not argue that it lacked knowledge of the violative condition, rather that the standard does not apply. Moreover, respondent had a foreman on the jobsite at the time of the inspection and its superintendent had been there on the same date, prior to the inception of the inspection (Tr. 8, 9). The violative condition was readily discoverable by sight if either of them had exercised reasonable diligence. Therefore, the requisite knowledge was present. It is well established that a supervisor's knowledge is imputable to an employer. Wander Iron Works, 80 OSAHRC 40/A2, 8 BNA OSHC 1354, 1980 CCH OSHD ¶24,457 (No. 76-3105, 1980). If an accident occurred, the CO testified that the probability of

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12 The CO expressed the hazard in terms of the scaffold falling if overloaded (Tr. 12). Undoubtedly, the distribution of weight (men and supplies) would be a prime factor in causing unsecured scaffolding to fall. Other factors, apparently not present in this case, might be unevenness of the ground or high gusts of wind. Statements by Perrin that the scaffolding was safe in that it (i) had good footing, (ii) was on level ground, (iii) had a good base underneath it, and (iv) had frames aligned and X-braced, has not been ignored (Tr. 49, 50). However, this standard does not speak in terms of equivalence. While those factors might reduce the possibility of an accident, they do not eliminate it. They are properly considered in assessing the gravity of the violation for penalty purposes.

death or serious physical injuries resulting therefrom were "...pretty good... medium and above..." (Tr. 13). In so stating, the CO took into consideration such factors as (i) scaffolds, men and work materials falling 18 to 24 feet, and (ii) the debris or rubble in the vicinity of the scaffolding (Tr. 12-13). I find it obvious that, if an accident occurred, there was a substantial probability that the result thereof could be death or serious physical harm. Furthermore, I make the finding not only in regard to workers on the scaffolding, but also to those workers on the ground in near proximity thereto.[13]

Unrebutted testimony by the CO reveals that abatement in this case, securing the scaffolding to the walls at least every 30 feet horizontally, could have been achieved by placing a heavy wire, or an eyebolt with a connected chain, into mortar between the masonry blocks, either of which is tied to the scaffolding after the mortar has hardened (Tr. 14-16). I so find.

In assessing a proposed penalty of $420.00, the CO stated that the factors considered were the employer's size, good faith and history of previous violations. He did not mention the other statutory criterion under §17(j) of the Act, the gravity of the violation (Tr. 23-25).[14] However, the elements thereof can be gleaned from his other testimony (Tr. 11, 14-15, 13-14). The penalty

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13 Exhibit C-2 reveals workers on the ground where scaffolding, men and supplies could strike them if an accident occurred.

14 Elements to be considered in determining gravity include the number of employees exposed to the risk of injury, duration of the exposure, precautions against injury, and the degree of probability of occurrence of an injury. National Realty & Construction Co., Inc., 72 OSAHRC 9/A2, 1 BNA OSHC 1049, 1971-73 CCH OSHD ¶15,188 (No. 85, 1972), rev'd on other grounds, 489 F.2d 1257 (D.C. Cir., 1973).

recommended by the complainant has been fully considered. However, the Commission is not bound to follow complainant's recommendations. Nacirema Operating Co., 1 OSAHRC 33, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶15,032 (1972). In light of the record and the statutory penalty criteria set forth in §17(j) of the Act, I conclude that a penalty of $200.00 is reasonable and appropriate.

## FINDINGS OF FACT

The evidence of record having been considered and evaluated in its entirety, the following facts are specifically found:

1. To avoid repetition, those facts set forth (i) under the headings entitled JURISDICTION and PARTIAL RESOLUTION OF THE FACTS, and (ii) those undisputed facts set forth in the third paragraph of the foregoing discussion of item 2 of serious citation 1 (immediately following a recital of the standard), are hereby incorporated by reference to the extent that they are not set forth hereunder.

2. During the period of December 4 to December 12, 1980, an inspection was conducted by compliance officers of OSHA of a workplace located at 205 North Industrial (the northwest corner of I-20), Bedford, Texas, where a department store was under construction.

3. Respondent, whose employees were engaged in masonry work at that location, was one of the subcontractors inspected by the CO.

4. The north and south walls of the building were under construction on the date that respondent was inspected. Approximately 20-25 of respondents employees were working from scaffolds while installing masonry blocks to form those walls. One half of that crew was working on each wall.

5. Each section of the scaffolding was six feet tall, seven feet long and five feet wide. Although the frames of the scaffolds were five feet wide, there was a side bracket, approximately 24 inches wide, on which masons walked along the walls. Therefore, the width of the scaffolding was approximately seven feet from the interior to the exterior sides thereof.

6. There were 31 sections (217 feet) of scaffolds on the south wall and 33 sections (231 feet) of scaffolds on the north wall, lengthwise or horizontal. They were three sections (18 feet) and four sections (24 feet) in height.

7. There was debris on the ground underneath and also adjacent to the exterior side of the scaffolds. It was composed of masonry blocks, pieces of masonry blocks, lumber and other unidentified materials.

8. The scaffolding had good footing, was on level ground and had a good base under it. Scaffold frames were aligned and X-braced.

9. The scaffolding was not secured to the walls at intervals not exceeding 30 feet horizontally.

10. Employees were working on the scaffolds at heights of 18 and 24 feet.

11. The employees were not protected from hazards related to the instability of scaffolds. A movement of the scaffolding could cause the scaffolding, together with work materials and workers, to fall, or workers to fall from the scaffolding (even if the scaffolding did not fall). Uneven distribution of weight (men and supplies) would be a prime factor in causing unsecured scaffolding to fall.

12. Respondent's supervisors knew or, with the exercise of reasonable diligence, could have known of the hazard (created by the work conditions described in findings of fact nos. 4 through 10) described in finding no. 11 hereof.

13. If an accident occurred as a result of respondent's failure to secure the scaffolding, there was a substantial probability that death or serious physical harm could result therefrom.

14. Respondent was in serious violation of §29 CFR 1926.451(d)(7).

15. The appropriate penalty is $200.00.

(B) 29 CFR 1926.451(d)(10) - Guardrails and Toeboards Issue

Item 3 of serious citation 1 alleges a violation of 29 CFR 1926.451(d)(10) as follows:

> 29 CFR 1926.451(d)(10): Standard guardrails and toeboards were not installed at all open sides and ends on tubular welded frame scaffolds more than 10 feet above the ground or floor:
>
> > Tubular welded frame scaffold--no guard rails on work platform--North exterior wall scaffold and South exterior wall scaffold.

The cited standard provides:

> §1926.451 Scaffolding.
>
> * * *
>
> (d) Tubular welded frame scaffolds.
>
> * * *
>
> (10) Guardrails made of lumber, not less than 2x4 inches (or other material providing equivalent protection), and approximately 42 inches high, with a midrail of 1x6 inch lumber (or other material providing equivalent protection), and toeboards, shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor. Toeboards shall be a minimum of 4 inches in height. Wire mesh shall be installed in accordance with paragraph (a)(6) of this section.

The scaffolding is the same as that involved in item 2 of serious citation 1 (Tr. 16, 19). Additionally, the same workmen were involved at the identical time (Tr. 20). Therefore, the undisputed facts set forth in the third paragraph of the discussion of item 2 of serious citation 1 (immediately following the recital of the standard involved therein) are incorporated herein by reference.

The objective of this standard is (i) to protect workers from the hazard of falls from the sides and ends of scaffolds which are more than ten feet above the ground and, (ii) to protect workers on the ground in the area of such scaffolding from the hazard of falling objects, i.e., tools and work materials. The CO testified that there were no standard guardrails or toeboards in use on the scaffolds (Tr. 16, 18, 32, 36). I find his testimony persuasive. Moreover, two photographs support that assertion (Exs. C-1 and C-2).[15] In so finding, I have not overlooked Perrin's statement that he believed that a toprail and mid-rail were installed at a location where work had been completed (Tr. 50). I interpret the CO's statement to mean an absence of standard guardrails where work was actually being performed. The photographs do reveal X-bracing along both the interior and exterior sides of the scaffolding.[16] The evidence does not establish the dimensions of the X-braces or where the diagonal bars cross. While they may

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15 I make this finding despite Perrin's testimony regarding (i) the posts and the one lone "rail" shown in Ex.C-1, and (ii) respondent's intentions to install guardrails (Tr. 50-52). The CO had been there for 1 1/2 to 2 hours observing this violation (Tr. 20). At some time later, respondent started putting up "rods used for expresses" for toprails (Tr. 22).

16 No evidence was introduced as to the distance between the interior side of the scaffold, or the side bracket attached thereto, and the wall. Therefore, a fall hazard was not established for the interior side of the scaffold.

provide some protection, the pictures clearly reveal that they do not constitute a satisfactory substitute for a midrail on the exterior side of the scaffolding.[17] I find that the exterior sides and ends of the scaffolding were "open" within the meaning of the standard. As aforesaid, Perrin believed there were guardrails at a location where work had been completed (Tr. 50). Apparently, these are the rods mentioned by the CO, who did not believe they created a standard guardrail (Tr. 22). Since they were not up where work was being performed, the questions of whether (i) they were at the proper heights, and (ii) were constructed of material providing equivalent protection, are moot. At any rate, they were not sufficiently described for respondent to meet its burden of establishing that they were constructed from "other material providing equivalent protection." See Dick Corporation, 79 OSAHRC 101/E8, 7 BNA OSHC 1951, 1979 CCH OSHD ¶24,078 (No. 16193, 1979).

Approximately 20-25 employees were engaged in work activities on said scaffolding at levels of 18 and 24 feet (Tr. 10-13, 18-20). The CO felt that workers were exposed to falls of 18 to 24 feet (Tr. 20-21). I agree. He noted that (i) most of the time, workers are in the center of the scaffolding, (ii) the scaffolding is five feet wide, and (iii) they are only two feet away from the edge should they make a mistake or misstep (Tr. 20-21). However, the CO apparently overlooked the fact that the side bracket on the interior of the wall is 24 inches wide. Therefore, the width of the scaffolds from interior to exterior is approximately seven feet (Tr. 59). As previously noted, no evidence

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17 Moreover, by virtue of their configuration alone, X-bracing could not provide the protection accomplished by both a toprail and midrail.

was introduced on whether the side bracket was level with the scaffold platform. I presume that masons work off of the side bracket while actually building the walls. However, at times, they would be near the unguarded exterior of the scaffolding (preparatory to dismounting the platform or after mounting the platform). Moreover, the photographs reveal that work supplies stored on the platform would, at times, draw either masons or their helpers close to the center or near the edge of the exterior side of the scaffold (Ex. C-1 and C-2).

The evidence reveals that there was debris on the ground adjacent to the exterior side of the scaffolding. It was composed of masonry blocks or pieces thereof, lumber and other unidentified materials (Tr. 13, Exs. C-1 and C-2). I find that, if an accident occurred (a fall from the scaffold at either height, or objects such as tools or work materials fell and struck workers on the ground), there was a substantial probability that the result thereof could be death or serious physical harm.[18] This violative condition was also readily discoverable by sight if either the foreman or superintendent had exercised reasonable diligence. Therefore, the requisite knowledge was present and is imputed to respondent.

The CO's testimony regarding the factors considered in assessing a proposed penalty of $480.00 has been fully considered (Tr. 23-25).[19] In light of the record and the statutory penalty criteria set forth in §17(j) of the Act, I conclude that a penalty of $220.00 is reasonable and appropriate.

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18 In effect, the CO so testified (Tr. 21).

19 Also, see Tr. 11, 13-15.

## FINDINGS OF FACT

The evidence of record having been considered and evaluated in its entirety, the following facts are specifically found:

1. To avoid repetition, those facts set forth (i) under the headings entitled JURISDICTION and PARTIAL RESOLUTION OF THE FACTS, and (ii) those undisputed facts set forth in the third paragraph of the discussion of item 2 of serious citation 1 (immediately following the recital of the standard involved therein) are hereby incorporated by reference to the extent that they are not set forth hereunder.

2. The OSHA inspection in December 1980 disclosed that approximately 20-25 of respondent's employees were working on scaffolds installing masonry blocks to form the north and south walls of a building under construction. One half of said crew was working on each wall.

3. The employees were working on the scaffolding at heights of 18 and 24 feet.

4. The scaffolds were not equiped with standard guardrails, lacking toprails, midrails and toeboards.

5. There was X-bracing along both the interior and exterior sides of the scaffolding.

6. While the X-bracing provided some protection, it did not provide a satisfactory substitute for a midrail on the exterior side of the scaffolding.

7. The exterior side and the ends of the scaffolding were open within the meaning of §29 CFR 1926.451(d)(10).

8. There was debris on the ground adjacent to the exterior side of the scaffolding composed of masonry blocks or pieces thereof, lumber and other

unidentified work materials.

9. The evidence does not establish that a fall hazard existed on the interior side of the scaffolding (side closest to the wall).

10. Approximately 20-25 workers on the scaffolding were exposed to the hazard of falls, ranging from 18 to 24 feet, off of the exterior side and the ends of the scaffolding.

11. Other workers on the ground adjacent to the exterior side and the ends of said scaffolding were exposed to the hazard of falling objects, i.e., tools and materials.

12. The exposure to said fall hazard would occur when workers were near the ends or exterior side of the scaffolding (mounting and dismounting the platform) and, at times, when they were near the center or close to the edge of the exterior side of the scaffolding while obtaining work materials.

13. If an accident occurred (a fall from the scaffold at either height, or objects such as tools or work materials fell and struck workers on the ground), there was a substantial probability that death or serious physical harm could result therefrom.

14. Respondent's supervisors knew or, with the exercise of reasonable diligence, could have known of the hazards (created by the work conditions described in findings of fact nos. 2-8) described in finding of facts nos. 10-12.

15. Respondent was in serious violation of §29 CFR 1926.451(d)(10).

16. The appropriate penalty is $220.00.

## (C) 29 CFR 1926.152(a)(1)-- Safety Can Issue

Item 1 of nonserious citation 2 alleges a violation of 29 CFR 1926.152 (a)(1) as follows:

> 29 CFR 1926.152(a)(1): Containers other than approved metal safety cans were used for the handling and use of flammable liquids in quantities greater than one gallon:
>
> > Five gallon can containing gasoline used to refuel 3 mortar mixer engines.

The cited standard provides:

> §1926.152 Flammable and combustible liquids.
>
> > (a) General requirements. (1) Only approved containers and portable tanks shall be used for storage and handling of flammable and combustible liquids. Approved metal safety cans shall be used for the handling and use of flammable liquids in quantities greater than one gallon, except that this shall not apply to those flammable liquid materials which are highly viscid (extremely hard to pour), which may be used and handled in original shipping containers. For quantities of one gallon or less, only the original container or approved metal safety cans shall be used for storage, use, and handling of flammable liquids.

Applicable definitions in 29 CFR 1926.155 are as follows:

> §1926.155 Definitions applicable to this subpart.
>
> > (a) "Approved", for the purpose of this subpart, means equipment that has been listed or approved by a nationally recognized testing laboratory such as Factory Mutual Engineering Corp., or Underwriters' Laboratories, Inc., or Federal agencies such as Bureau of Mines, or U.S. Coast Guard, which issue approvals for such equipment.

(b) "Closed container" means a container so sealed by means of a lid or other device that neither liquid nor vapor will escape from it at ordinary temperatures.

(c) "Combustible liquids" mean any liquid having a flash point at or above 140° F. (60° C.), and below 200° F. (93.4° C.).

* * *

(h) "Flammable liquids" means any liquid having a flash point below 140° F. and having a vapor pressure not exceeding 40 pounds per square inch (absolute) at 100° F.

* * *

(i) "Flash point" of the liquid means the temperature at which it gives off vapor sufficient to form an ignitable mixture with the air near the surface of the liquid or within the vessel used as determined by appropriate test procedure and apparatus as specified below.

* * *

(l) "Safety can" means an approved closed container, of not more than 5 gallons capacity, having a flash-arresting screen, spring-closing lid and spout cover and so designed that it will safely relieve internal pressure when subjected to fire exposure.

There were gasoline powered engines used at three separate mud-mixing areas on the jobsite.[20] Gasoline used to power the engines was in five gallon

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20 The only evidence introduced by the parties relating to this citation was the testimony of the CO. Therefore, his testimony went completely unchallenged except for cross-examination.

cans.[21] Two of the cans were plastic and the other was a metal can without lids (Tr. 26). The CO observed one employee using a container to refuel an engine (Tr. 28-30). By lifting the can, the CO determined that it was over one half full of gasoline (Tr. 38).

As pertinent hereto, this standard is designed to prevent the ignition of flammable liquids while being handled or used by workers. Equally important, it seeks to contain the spread of fire if ignition takes place. Here, the terms of the standard have not been met by any of the three cans, since two were made of plastic, rather than metal, and the metal can contained no lids whatsoever. I agree with the CO that metal cans with removable caps (lids that screw onto the can) do not satisfy the standard (Tr. 27-28). It calls for a spring-closing lid. A spring-closing lid is opened by pressing on the handle and closed by removing that pressure (Tr. 27). Moreover, it cannot be reasonably questioned that gasoline is a flammable liquid (Tr. 28).

Uncontraverted testimony by the CO reveals that (i) as gasoline is poured from a can, vapors are released, and (ii) as those vapors mix with oxygen, the chances of explosion (ignition) increase (Tr. 30). He further stated that, should a workman spill gasoline onto the hot metal parts of an engine, a flash fire could erupt.[22] Under such a circumstance (flash fire), a worker could by simple reflex action release the pressure on the handle of a spring-closing lid, thereby closing the gasoline can. If he dropped the can, the gasoline would

---

21 The CO determined the cans contained gasoline (i) by smell, and (ii) by deduction, since they were being used to refuel gasoline engines (Tr. 28-30).

22 This was admitted by respondent during cross-examination (Tr. 39).

not spill out onto or near his feet, eliminating the possibility of standing in a blazing pool of gasoline (Tr. 27, 39).[23] Approved metal safety cans are available at area supply houses (Tr. 32).

I find it patently clear that the terms of the standard were not met. Therefore, a worker was exposed to the hazard that said gasoline, a flammable liquid, might ignite and, if so, that it would not be contained.

The respondent was charged with a nonserious violation. Based on the same factors set forth and discussed in regard to serious violations of citation 1, I find that respondent possessed the requisite knowledge. Other testimony by the CO reveals that, if an accident occurred, there was a substantial probability that death or serious physical injury could result therefrom (Tr. 30). However, this record does not convince me that the issue of a serious violation was tried either by express or implied consent. I find that the violative condition did bear a direct and immediate relationship to employee safety and health. Therefore, a nonserious violation was established. No penalty was proposed, and none will be assessed.

## FINDINGS OF FACT

The evidence of record having been considered and evaluated in its entirety, the following facts are specifically found:

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23 The CO also testified that, if fire had traveled inside the can, then a worker could, by releasing pressure on the spring-closing lid, shut off its source of oxygen (Tr. 27). Unquestionably, that is true. However, it appears that the purpose of a flash-arresting screen is to prevent fire from entering a can. Accordingly, I discount this part of the CO's testimony since the record is silent on whether the cans lacked flash-arresting screens.

1. To avoid repetition, those facts set forth under the headings entitled JURISDICTION and PARTIAL RESOLUTION OF THE FACTS are hereby incorporated by reference to the extent that they are not set forth hereunder.

2. The OSHA inspection in December 1980 revealed that respondent used gasoline powered engines on the jobsite.

3. Gasoline is a flammable liquid.

4. Five gallon cans were used to carry the gasoline to the engines for refueling purposes.

5. Two of the cans were plastic and the other was a metal can without lids.

6. The cans were not approved metal safety cans, as required by 29 CFR 1926.152(a)(1), in that two cans were made of plastic and the third can lacked a spring-closing lid.

7. A spring-closing lid is opened by pressing on the handle and closed by removing that pressure.

8. The worker, who refueled the engines, was exposed to a hazard of the gasoline igniting.

9. If the worker spilled gasoline on hot engine parts while refueling the engines, a flash fire could erupt.

10. Under the circumstances set forth in finding of fact no. 9 hereof and if there was a spring-closing lid on the can, a worker could close the can by simply releasing the pressure on the handle of the can.

11. In the circumstances set forth in findings of fact nos. 9 and 10, this would prevent gasoline from spilling on or near the worker's feet if he dropped the can.

12. Respondent's supervisors knew or, with the exercise of reasonable diligence, could have known of the hazard created by the above-described work conditions.

13. The violative condition did bear a direct and immediate relationship to employee safety and health.

14. Respondent is in nonserious violation of 29 CFR 1926.152(a)(1).

15. A penalty is not warranted by the facts.

## CONCLUSIONS OF LAW

1. At all times material hereto, respondent was an employer within the meaning of §3(5) of the Act, engaged in a business affecting commerce, and having employees.

2. The Commission has jurisdiction over the parties and the subject matter of the proceeding.

3. Respondent was in serious violation of 29 CFR 1926.451(d)(7).

4. Respondent was in serious violation of 29 CFR 1926.451(d)(10).

5. Respondent was in nonserious violation of 29 CFR 1926.152(a)(1).

## ORDER

Upon the basis of the foregoing findings of fact, conclusions of law, and the record as a whole, it is ORDERED that:

1. Item 1 of citation 1, alleging a serious violation of 29 CFR 1926.451 (a)(13), is VACATED.

2. Item 2 of citation 1, alleging a serious violation of 29 CFR 1926.451 (d)(7), is AFFIRMED, and a civil penalty of $200.00 is ASSESSED.

3. Item 3 of citation 1, alleging a serious violation of 29 CFR 1926.451 (d)(10), is AFFIRMED, and a civil penalty of $220.00 is ASSESSED.

4. Item 1 of citation 2, alleging a nonserious violation of 29 CFR 1926.152(a)(1), is AFFIRMED, and no penalty is ASSESSED.

E. Carter Botkin

E. CARTER BOTKIN
Administrative Law Judge

Date: May 17, 1982

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

# NOTICE OF DECISION

**SECRETARY v. GEORGIA NARROW FABRICS CORP.**

**81-2085**

1. Enclosed is a copy of my decision. It will be filed with the Commission on May 18, 1982, and will become the final order of the Commission on June 17, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N. W., Suite 601
   Washington, D. C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is June 17, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

EDWIN G. SALYERS
Judge

Date: April 28, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

| | | |
|---|---|---|
| SECRETARY OF LABOR, | ) | |
| Complainant, | ) | |
| v. | ) | OSHRC Docket No. 81-2085 |
| GEORGIA NARROW FABRICS CORP., | ) | |
| Respondent. | ) | |

APPEARANCES:

Daniel A. Caldwell, Esquire, Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia, on behalf of complainant

Mr. Bernard M. Cole, President, Georgia Narrow Fabrics Corp., pro se

## DECISION AND ORDER

Respondent, Georgia Narrow Fabrics Corp., has its principal office in the state of New York. Respondent operates a manufacturing plant in Jesup, Georgia, where it engages employees in the production of fabrics and other materials.

On July 29 and 30, 1981, a compliance officer representing the Secretary of Labor conducted an inspection of respondent's Jesup operation under the provisions of the Occupational Safety and Health Act (29 U.S.C. § 651, et seq.). As a result of this inspection, respondent was charged with one serious violation consisting of eight items and one "other" violation consisting of thirteen items. Respondent filed its notice of contest on August 24, 1981, and a hearing was conducted in Savannah, Georgia, on March 25, 1982.

In its notice of contest, respondent did not dispute the fact of violations but did contest the payment of penalties in the amount of $1,470. At the hearing Mr. Bernard M. Cole, respondent's president, confirmed that the fact of violations was not in dispute (Tr. 9). Thus, the sole issue for determination by the undersigned Administrative Law Judge is whether the proposed penalty, under the circumstances of this case, is appropriate.

Section 17(j) of the Act sets forth the factors to be considered in determining penalties under the Act as follows: (1) size of the business, (2) the gravity of the violations, (3) the good faith of the employer, and (4) history of previous violations.

In computing the proposed penalties, the Secretary gave due regard to all of the above factors in accordance with the Secretary's regulations (Tr. 14). No reduction of penalties was allowed for the size of the business since the company employs in excess of one hundred employees (Tr. 12). A 20 percent reduction was allowed for good faith in this case in lieu of the maximum of 30 percent allowed under the regulations for this factor. The maximum 10 percent was allowed for history, and it does not appear in the record that the respondent has been previously cited for violations of the Act. No reduction of penalty was allowed for the gravity factor.

The Secretary is empowered by law to propose penalties in cases of this type, but it is the Review Commission which is the final arbiter of such penalties. Secretary v. OSAHRC and Interstate Glass Co., 487 F.2d 438 (8th Cir. 1973). The Commission must give due consideration to the purposes of the Act and arrive at a just and equitable penalty in keeping with the circumstances of each case. Primary emphasis must be placed on the gravity of the violations. Nacirema Operating Company, 72 OSAHRC 1/B10, 1 BNA OSHC 1001, 1971-73 CCH OSHD ¶ 15,032 (No. 4).

The gravity factor is determined by the possibility that exposure to the cited hazards may result in serious bodily injury or death to employees. Thus, it is necessary to examine the circumstances alleged in the citations issued. Respondent has been charged with and has admitted a number of serious violations. The most serious include:

1. Exposing employees to work on an elevated platform 8 feet 9 inches above the floor to a falling hazard since there were no standard railings to prevent falling from this height in the rear knit office.

2. Failure to provide drenching or flushing facilities in an area where employees were exposed to corrosive materials.

3. Allowing employees to use circular hand-fed rip saws which were not properly guarded.

4. Failure to insulate steam pipes in the dye house.

It is obvious that these conditions pose some threat of injury to employees. However, it does not appear that any of these conditions would be life-threatening or would even constitute a basis for concluding that employee exposure would result in grave bodily harm. The undersigned has carefully reviewed the work sheets used in computing the proposed penalties in this case (Ex. C-1 through C-8) wherein the compliance officer evaluated such factors as the number of employees exposed, the frequency of exposure and the proximity to danger. Based upon this review, I conclude the gravity factor should be assessed as low to moderate[1/] and the penalties should be accordingly reduced.

---

1/ These sheets consistently reflect a low or moderate rating on each factor assessed.

Two other factors have been considered in determining a proper penalty in this case. The record reflects all violations were immediately abated when called to respondent's attention. It further appears that respondent has an ongoing safety program of its own administered by its insurance carrier (Tr. 5-6) and is sincerely interested in the safety and health of its employees. After due consideration of the entire record, a penalty of $800 is considered appropriate and will be assessed.

## ORDER

Citation Nos. 1 and 2 are affirmed and a penalty of $800 is assessed.

Dated this 18th day of May, 1982.

Edwin G. Salyers

EDWIN G. SALYERS
Judge

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| 80-5983 | METAL RECYCLING COMPANY | 6/18/82 | 33/C8 |
| 81-1975 | KECO INDUSTRIES, INC. | 6/21/82 | 33/D14 |
| 81-1976 | KECO INDUSTRIES, INC. | | 33/D14 |
| 81-1664 | KENNETH J. HERMAN, INC. | 6/24/82 | 33/F6 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

Secretary of Labor v. AL COHEN CONSTRUCTION CO.

OSHRC Docket No. 80-2727

1. Enclosed is a copy of my decision. It will be filed with the Commission on May 19, 1982, and will become the final order of the Commission on June 18, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is June 18, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Quentin P. McColgin

Quentin P. McColgin
Judge, OSHRC

Date: April 29, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR<br><br>Complainant,<br><br>v.<br><br>AL COHEN CONSTRUCTION COMPANY,<br><br>Respondent | OSHRC DOCKET NO. 80-2727<br>JUDGE'S DECISION<br>MAY 17 '82<br>RECEIVED<br>FINAL ORDER ON JUN 18 '82 |

ORDER

Complainant, in his motion dated May 11, 1982, entitled "Motion to Amend Decision and Order" requests that the Decision and Order which were served on the parties April 29, 1982, be amended to correct an error which appears on page nine of such decision.

Good cause having been shown and counsel for respondent reporting that he does not object to the relief requested, complainant's motion is hereby granted.

IT IS THEREFORE ORDERED that line nine of page nine of the Decision and Order in this proceeding which bears the issuance date of May 19, 1982, be amended to read:

"instance d) has not been made out."

It is further ordered that the corrected page attached to this order, which is numbered "9 (amended)" be substituted for page nine of such decision.

SO ORDERED.

Quentin P. McColgin
Judge, OSHRC

Dated: May 17, 1982

opening was to step on a piece of plyboard which was used as a partial cover for the floor opening. (C-13) However, as depicted in C-10, C-11 and C-12, there was debris on the middle of this piece of plyboard which would have operated as a barrier between the person who was observed stepping on one end of the partial cover and the exposed floor opening on the other end. Since the compliance officer admitted that the employee was not going in the direction which would have exposed him to danger, (Tr. 163) employee access to the hazardous condition alleged in instance d) has not been made out.

Complainant has further failed to establish the requisite employee exposure to the hazardous conditions created by the absence of toeboards on the fourteenth-floor level. While there is ample evidence of the existence of debris near the floor opening on the fourteenth-floor level, the evidence does not establish the presence of someone below the floor opening during the time there was anyone who was near the platform containing the debris on the fourteenth-floor level. Indeed, the compliance officer who conducted the inspection testified that he did not observe debris being dropped down through the elevator shaft during his inspection. (Tr. 183, 184, 206, 215-16; see also Tr. 282)

While not challenging the serious characterization of this violation, respondent nevertheless argues that the proposed penalty of $640.00 for this violation is excessive. This argument is found to be without merit. The hazardous conditions that existed on the tenth-, eleventh- and twelfth-floor levels in each case exposed at least one of respondent's employees to a fall hazard of approximately 100 feet or greater. While it would appear from this record that the duration of exposure to the hazardous conditions created by the open-sided floors was limited,

CERTIFICATE OF SERVICE

Service of the foregoing ORDER has this date been made by mailing a copy thereof, via first class mail, postage prepaid, to the following:

Jerry R. Atencio, Esq.
Office of the Solicitor
1585 Federal Building
1961 Stout Street
Denver, Colorado 80294

Rodney L. Smith, Esq.
Eiberger, Stacy & Smith
410 17th Street, Suite 2390
Denver, Colorado 80202

Margaret A. Clarke
Secretary to Quentin P. McColgin
Judge, OSHRC

Dated:

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR<br><br>Complainant,<br><br>v.<br><br>AL COHEN CONSTRUCTION COMPANY,<br><br>Respondent | ) | OSHRC DOCKET NO. 80-2727 |

JUDGE'S DECISION
MAY 19 '82
RECEIVED
FINAL ORDER ON
JUN 18 '82

APPEARANCES:

Office of the Solicitor
U. S. Department of Labor
on behalf of Complainant
by Jerry R. Atencio, Esquire
of Denver, Colorado

Eiberger, Stacy & Smith
of Denver, Colorado
Attorneys for Respondent
by Rodney L. Smith, Esquire

DECISION AND ORDER

Quentin P. McColgin, Administrative Law Judge: This is a proceeding under §10(c) of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. §§659(c) involving alleged violations of §§5(a)(1) & 5(a)(2) of the Act, 29 U.S.C. §§654(a)(1) and (a)(2). */ The jurisdictional issues are admitted in the pleadings.

This matter arose out of an inspection of a work site located at 1601 Arapahoe Street, Denver, Colorado, where respondent was engaged in construction. As a result of that inspection, three citations containing an aggregate of eleven items were issued to respondent, all of which were duly contested.

*/ "Each employer--(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; (2) shall comply with occupational safety and health standards promulgated under this [Act]."

A hearing was held in this matter on November 19 & 20, 1980. No appearance was entered on behalf of the affected employees. (Tr. 3-4)*/ At the outset of the hearing, respondent moved to withdraw its notice of contest as to Citation No. 3, Item Nos. 4 & 6, which motion was granted.**/ At the conclusion of the hearing, both parties waived closing argument indicating that they would file briefs. (Tr. 355) Thereafter respondent filed proposed findings of fact and proposed conclusions of law, together with a brief in support thereof (Respondent's brief). No posthearing submissions were filed on behalf of complainant.

Having heard and observed the witnesses and having considered the testimony and other evidence together with the pleadings and arguments presented in this matter, the undersigned hereby issues the findings, conclusions and order set forth in this decision. To the extent that the proposed findings of fact and proposed conclusions of law have not been adopted in this decision, they are rejected as being either inaccurate or unnecessary for the disposition of this case. To the extent there are any pending motions that have not been specifically granted herein, such motions are denied.

## DISCUSSION

The nine alleged violations at issue here consist of a single alleged violation of the general duty clause, (§5(a)(1) of the Act, 29 U.S.C. §654(a)(1)) and eight alleged violations of construction

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*/ The following abbreviations shall be used in this decision:
Tr. - Transcript page number
C - Complainant's Exhibit number
R - Respondent's Exhibit number
RB - Respondent's brief

**/ These items are affirmed in the order issued herein.

standards. To establish a violation of the general duty clause, the Secretary must prove (1) that the employer failed to render its workplace free from a hazard which was (2) recognized, (3) the occurrence of an incident was reasonably foreseeable, and (4) the likely consequence in the event of an incident was death or serious physical harm to its employees. Western Massachusetts Electric Co,., 9 BNA OSHC 1940, 1981 CCH OSHD ¶25,470 (76-1174, 1981); Bomac Drilling, Division of TRG Drilling Corp., 9 BNA OSHC 1681, 1981 CCH OSHD ¶25,363 (No. 76-0450, 1981). The Secretary must also show (5) that there was a feasible means of abating the hazard. National Realty & Construction Co. v. OSHRC, 489 F 2d 1257 (D.C. Cir. 1973). To establish a violation of a standard, the Secretary must show (1) the cited standard applies to the facts, (2) there was a failure to comply with the cited standard, (3) employees had access to the hazardous condition, and (4) the employer knew or could have known of the condition with the exercise of reasonable diligence. Daniel International Corp., Wansley Project, 9 BNA OSHC 2027 1981 CCH OSHD ¶25,813 (No. 76-0181, 1981).

Because of the discrete nature of the alleged violations at issue here, they will be discussed separately.

§5(a)(1) of the Act

The first charge, as set forth in Citation No. 1, Item No. 1, is:

> Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or were likely to cause death or serious physical harm to employees, in that:
>
> > A safe means of access was not provided for employee(s) working on the 4th floor level; employee(s) were required to

climb the end member of the scaffold stairway and step over an opening of 19 inches to floor ledge to gain access to working area, exposing employee(s) to a falling hazard in excess of 25 feet.

The basis for this charge is that the compliance officer who inspected the worksite observed respondent's employees working on the fourth-floor level. Observing no other means of access to this level other that the scaffold that was located in the stairway shaft and observing a 19-inch gap between the side of the scaffold and the adjacent floor ledge where he thought the employees must have gained access (the north side) the compliance officer concluded that the employees who gained access on that side were subjected to the hazard of falling through the 19-inch gap to the first-floor level, which was forty feet below.

Respondent's carpenter foreman, on the other hand, testified that the north side of the scaffold was not intended as the place for gaining access to the fourth-floor level. He testified that he had caused a guardrail to be placed on that side to prevent access there and had intended employees to gain access at a point designated on C-31 "A" which was on the west side of the scaffold, near the north end. He further testified that his intended access point was the most convenient place to gain access to the fourth-floor level, and that he had witnessed employees using such point as a place of access.

Since the compliance officer did not observe anyone accessing the fourth-floor level from the scaffold or vice versa and did not testify as to any statements made to him which conflicted with the aforesaid testimony of the foreman, the latter's testimony stands unrefuted. Thus, it is found that entry to the fourth level was gained at the point

designated on C-31 as "A". Since the gap between the scaffold and the adjacent floor ledge was only six inches on this side, the hazard of falling through the gap to the first level did not exist. For this reason, the alleged general duty violation has not been established.

29 C.F.R. §1926.350(a)(7)

The second charge involves an alleged serious violation of 29 C.F.R. §1926.350(a)(7). The specific charge, as set forth in Citation No. 1, Item No. 2, is:

> 29 CFR 1926.350(a)(7): A suitable cylinder truck, chain, or other steadying device was not used to keep compressed gas cylinder(s) from being knocked over while in use:
>
> > Basement level, south side--oxygen and acetylene cylinders with regulators attached and in use leaning against the south wall on unstable ground.

The standard provides:

> A suitable cylinder truck, chain, or other steadying device shall be used to keep cylinder bottles from being knocked over while in use.

The evidence establishes a violation of the cited standard. It is undisputed that there were two cylinders--an oxygen cylinder and an acetylene cylinder--in the basement of respondent's work place. These cylinders were propped up against a wall without any measures having been taken to prevent them from being knocked over. Hoses were attached to the cylinders and, while the compliance fficer did not know how much pressure there was in each cylinder, there were readings on the pressure gauges and they were in use. (Tr. 147-48) Additionally, there is evidence that five of respondent's employees were in the area, (Tr. 148) one of whom was within two feet of the cylinders. (Tr. 153)

The foregoing establishes that respondent failed to comply with an applicable standard. Furthermore, under this standard, there is a

rebuttable presumption that the cylinders contained at least enough residual gas to present a hazard to the employees in the area. Austin Building Company, 8 BNA OSHC 2150, 1980 CCH OSHD ¶24,839,(No. 77-3878, 1980); Williams Enterprises, Inc., 7 BNA OSHC 1015; 1979 CCH OSHD ¶25,279 (No. 14748, 1979). Since this presumption has not been rebutted, the evidence is sufficient to establish that respondent's employees had access to the hazardous condition. Finally, the volative condition was in plain sight in an area where respondent's employees were working. Thus, respondent's representatives, with the exercise of reasonable diligence, could have detected such conditions, and respondent is charged with constructive knowledge thereof. MCC of Florida, Inc., 9 BNA OSHC 1895, 1981 CCH OSHD ¶25,420 (No. 15757, 1981)

Respondent's defense to this charge is confined to an asserted failure of proof that the cylinders were in use and that respondent had knowledge of the volative conditions. Having found that the cylinders were in use and that respondent had constructive knowledge of the volative conditions, respondent is found to have violated the cited standard.

Respondent also challenges the characterization of the violation as serious, arguing that complainant failed to prove a substantial probability that death or serious physical injury could result from the unsecured cylinders. The sole evidence pertaining to the serious nature of this violation consists of a brief recitation by the compliance officer of having been shown in a training institute how compressed gas cylinders with broken stems have taken off and gone through brick walls. (Tr. 33) However, the compliance officer failed to determine the pressure

of the cylinders involved here. Thus, whether these cylinders had the capability of becoming projectiles is purely a matter of conjecture. (Tr. 146, 155)

For these reasons, it is found that the evidence is insufficient to establish a serious violation of the standard. Accordingly, the violation is affirmed as an other than serious violation and no penalty shall be assessed.

29 C.F.R. §1926.500(b)(1)

The third charge, as set forth in Citation No. 2, Item No. 3, is:

> 29 CFR 1926.500(b)(1): Four opening(s) were not guarded by standard railings and toeboards or covers:
>
> a) 10th floor--standard rail was not provided on the south side of elevator shaft floor opening, exposing the employee working in this area to a falling hazard in excess of 40 feet.
>
> b) 11th floor--employee exposed standing on edge of elevator shaft opening (12'9" x 7') cutting operation, standard guardrail not installed, exposing employee to a falling hazard in excess of 50 feet.
>
> c) 12th floor--elevator shaft opening (12'9" X 7' was not provided with standard guardrails on all open sides. Employee exposed to falling hazard; area is used for access to and from 9 1/2 ft. scaffold work station.
>
> d) 14th floor at stairway landing, north side of elevator shaft opening--seven ft. section was not guarded by standard railings and toeboards at walkway to outside balcony. Toeboards required at elevator shaft opening in addition to the existing standard railing.

The cited standard, 29 C.F.R. &1926.500(b)(1) provides:

> Floor openings hall be guarded by a standard railing and toeboards or covered as specified in paragraph (f) of this section. In general, the railing shall be provided on all exposed sides, except at entrances to stairways.

Respondent's arguments in opposition to this violation are limited to the issue of whether respondent's employees were exposed to the

hazardous condition of unguarded floor openings at the designated floor levels. Insofar as they apply to the conditions on the tenth, eleventh, and twelfth levels (instances a), b), and c)), these arguments are without merit. With respect to instance a)--the floor opening at the tenth floor level--there is unrefuted evidence that the employee was observed "standing at the edge of the opening. . ." (Tr. 35) With respect to instance b)--the eleventh floor level--it is clear from the citation and the testimony of the compliance officer that the person considered by the Secretary as being exposed to the hazard of the unguarded floor opening was the person described as the helper, who is shown in the photographs admitted into evidence to have been close enough to the edge of the floor opening on the eleventh floor to be exposed to a fall hazard. (C-5 & C-6A & B)[*/] Thus, employee exposure, as alleged in instance b), has clearly been established.

Employee access to the hazardous condition created by the unguarded floor opening on the twelfth floor has also been established. The photographs in evidence as C-7A-C and C-8 are sufficient in themselves to establish employee exposure to the hazardous condition described in instance c). These photographs show that in order to gain access to the scaffold on the twelfth-floor level or to exit therefrom, the employee shown on the scaffold would be within a few feet of the unguarded floor opening. This evidence is sufficient in itself to establish the violation as alleged in instance c).

Respondent's argument of a lack of employee exposure to the unguarded floor opening on the fourteenth floor is well-taken. The evidence with respect to employee access to the floor opening on this floor indicates that the closest anyone got to the unguarded floor

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[*/] There is evidence which indicates that this helper would have been required to have been within the perimeter of the guarded area during certain phases of his work. (Tr. 159) However, there is also evidence which shows that during other phases of his work he would have been outside the perimeter of the guarded area. (Tr. 159)

opening was to step on a piece of plyboard which was used as a partial cover for the floor opening. (C-13) However, as depicted in C-10, C-11 and C-12, there was debris on the middle of this piece of plyboard which would have operated as a barrier between the person who was observed stepping on one end of the partial cover and the exposed floor opening on the other end. Since the compliance officer admitted that the employee was not going in the direction which would have exposed him to danger, (Tr. 163) employee access to the hazardous condition alleged in instance c) has not been made out.

Complainant has further failed to establish the requisite employee exposure to the hazardous conditions created by the absence of toeboards on the fourteenth-floor level. While there is ample evidence of the existence of debris near the floor opening on the fourteenth-floor level, the evidence does not establish the presence of someone below the floor opening during the time there was anyone who was near the platform containing the debris on the fourteenth-floor level. Indeed, the compliance officer who conducted the inspection testified that he did not observe debris being dropped down through the elevator shaft during his inspection. (Tr. 183, 184, 206, 215-16; see also Tr. 282)

While not challenging the serious characterization of this violation, respondent nevertheless argues that the proposed penalty of $640.00 for this violation is excessive. This argument is found to be without merit. The hazardous conditions that existed on the tenth-, eleventh- and twelfth-floor levels in each case exposed at least one of respondent's employees to a fall hazard of approximately 100 feet or greater. While it would appear from this record that the duration of exposure to the hazardous conditions created by the open-sided floors was limited,

respondent's size (a medium-size employer), coupled with its previous history of having violated safety standards--makes the imposition of a $640.00 penalty for this violation appropriate.

29 C.F.R. §1926.28(a)

The fourth charge involves an alleged repeated violation of the personal protective equipment standard. The specific allegation, as set forth in Citation No. 2, Item No. 1, is:

> 29 CFR 1926.28(a): Appropriate personal protective equipment was not worn by employee(s) in all operations where there was exposure to hazardous conditions:
>
> a) 11th floor inside elevator haft (sic) opening employee(s) performing cutting operation, working off of a 4' X 8' 3/4" inch sheet of plywood was not provided with safety belt and life line, exposing employee to a falling hazard in excess of 50 feet.
>
> b) 13th floor east side of elevator shaft opening--(12 feet, 9 inches by seven feet)--Employee making observations for installation of guard rails was not provided with a safety belt and lifeline attached, exposing employee to a falling hazard in excess of 60 feet.

This standard, 29 C.F.R. §1926.28(a), provides:

> The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions, or where this part indicates the need for using such equipment to reduce the hazards to the employee(s).

With respect to instance a), respondent concedes the relevant facts necessary to establish a prima facie violation of the standard. (RB at 20) Nevertheless, respondent asserts here the affirmative defense of employee misconduct. The proof establishes that respondent maintained a specific work rule requiring the wearing of safety belts in the conditions such as those presented in instance a). (Tr. 309-10) The proof further shows that such rule was effectively communicated and enforced; but that, without its knowledge, respondent's employees violated such rule.

This work rule was discussed on at least one occasion at respondent's weekly safety meetings held during January, 1980.*/ (Tr. 311-12, 335-36) Additionally, the immediate supervisor of the employees who violated the work rule in instance a) personally instructed every new man on the job how and when to tie off. (Tr. 326) Furthermore, the proof establishes that the two employees who were not tied off were given specific instructions by their immediate supervisor on how to tie off at their work station prior to the time they were observed working without being tied off. (Tr. 265-66) Additionally, they were issued safety belts and lanyards that very morning with which to tie off. (Tr. 313, 327)

The only evidence which can be construed as conflicting with the foregoing is the testimony of the compliance officer who testified that when he spoke to the two employees immediately after they were observed working without being tied off, one of them, identified as Randy Crawford, told him that the reason he was not wearing his safety belt was because respondent "ran out of safety belts." (Tr. 79-80) However, little credence is given to this uncorroborated statement. First of all, the employee who allegedly made this statement, Randy Crawford, was not working on the floor where the hazardous condition was observed on the day in question. (Tr. 241-42) The more credible evidence establishes that the two employees involved were Mr. Strenge and Mr. Lapointe. (Tr. 242, 307) Secondly, both had been issued safety belts the morning before the inspection (Tr. 327-28) and both had been observed using them earlier that day. (Tr. 329) Finally, there was testimony that there were approximately twenty safety belts on the job site, and that respondent had not run out of the necessary equipment. (Tr. 241-42, 307, 314) Thus, it appears that if the compliance officer was told by one of the

*/ Attendance at these meetings was mandatory. (Tr. 312)

offending employees that respondent had run out of safety belts, such statement was more likely a self-serving declaration than it was an accurate statement concerning the availability of personal protective equipment at respondent's work place.

It further appears that respondent adequately enforced this work rule. While only one of respondent's employees had been terminated prior to the inspection for safety rules infractions, (Tr. 299) there is evidence that oral reprimands had been given for safety infractions in advance of the inspection. (Tr. 252) The evidence also shows that employees who continued to violate safety rules were terminated. (Tr. 315-16, 338)

Indeed, respondent's enforcement program seems both reasonable and adequate when it is considered that this was a relatively new job with new employees. The first laborers, which were the category of employees who were involved in instance a), came on the job in late January. (Tr. 325) By March 13, two or three safety infractions had been observed and had been dealt with by oral reprimands. (Tr. 252) As a result of the infraction which occurred March 17, one of the offending employees was demoted to an unskilled position with a consequent reduction in pay, whereas the other employee, who was unskilled and untrained, was transferred to a less hazardous job assignment. (Tr. 348) Subsequent thereto, more severe discipline, including termination, was administered for repeated safety violations. (Tr. 316)

Thus, it is found that respondent maintained an adequate safety program which included the existence of specific rules designed to

prevent violations such as the one involved here, an effective method of communicating these rules to its employees, both in writing and orally, and regular supervison to insure that the rules were enforced. Under these circumstances, it is found that the hazardous condition described in instance a) of the citation was the result of employee misconduct and the violation cannot be sustained.

Respondent's defense to the second alleged violation of this standard--instance b)--is twofold. First, respondent argues that there has been a failure of proof that a "reasonable person, familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts unique to a particular industry, would recognize a hazard warranting the use of such equipment." (RB at 25) Secondly, respondent asserts the affirmative defense of impossibility of compliance to this alleged violation.

The relevant facts, which are uncontroverted, are that one of respondent's employees was observed on the thirteenth-floor level of respondent's workplace, was not wearing a safety belt and lanyard which was tied off while he was engaged in making observations for the installation of guardrails for a floor opening on that level. This employee was observed by the compliance officer who was on the twelfth-floor level who observed the employee walking the 10 to 12 foot length of a ledge next to the floor opening which ledge was from four to five feet wide.

It is not necessary to consider respondent's first argument because the evidence establishes the existence of both elements of the impossibility defense. To establish this defense, respondent must show (1) compliance with the requirements of the standard (a) would be functionally impossible

or (b) would preclude performance of the required work, and (2) alternative means of employee protection were unavailable. M. J. Lee Construction Co., 7 BNA OSHC 1140, 1979 CCH OSHD ¶23,330 (No. 15094, 1979).

The evidence establishes that the only feasible place which could be used by the employee walking the ledge on the thirteenth-floor level to tie off was between the supporting columns located on the opposite side of the floor opening from the ledge.*/ (Tr. 245) Because of this circumstance, it would not be possible to tie off to these columns with a lanyard designed to prevent a fall of less than six feet, and still have the employee perform his necessary function. To the contrary, the evidence establishes that a lanyard in excess of fifteen feet (which would be in clear violation of 29 C.F.R. 1926.104(d)) would be required in order to tie off between the columns. (Compare Tr. 172-74 with Tr.245)

Thus, it is found that it would be impossible to comply with the applicable regulations and still perform the required task of taking measurements for the installation of guardrails around the unguarded floor opening on the thirteenth floor. It is further found that alternative means of protection were unavailable. Here, the only alternative means of protection suggested is the installation of guardrails which could not be installed until the employee involved here completed his task of taking the measurements for such guardrails. Thus, the elements to the impossibility defense having been established as to the hazardous conditions involved in instance b), the alleged violation of the personal protective equipment standard cannot be sustained.

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*/ There is some suggestion in the record that a tie off could have been made to the column between the windows above the floor ledge (Tr. 83, C-17) or to studs positioned in the wall behind the ledge. (Tr. 173) However, the proof establishes that such alternative tie off places were inadequate. (Tr. 246, 275)

29 C.F.R. §1926.302(b)(1)

The fifth charge, as set forth in Citation No. 3, Item No. 1, is:

> 29 CFR 1926.302(b)(1): Pneumatic power tool(s) were not secured to the hose or whip by some positive means to prevent the tool from becoming accidentally disconnected:
>
> > Basement level, south side - pneumatic hammer hose length was not provided with safety retainer clips at connection point.

This standard, 29 C.F.R. §1926.302(b)(1) provides:

> Pneumatic power tools shall be secured to the hose or whip by some positive means to prevent the tool from becoming accidentally disconnected.

The evidence establishes that this citation was issued because of a lack of a safety retainer clip or other positive means being used to prevent the accidental disconnection of two lengths of hose that were connected to an air hammer. (Tr. 175) However, the cited standard has been construed to apply only to the connection between the power tool and the hose, and not to the connection between two lengths of hose. Dick Corporation, 7 BNA OSHD 1951, 1979 CCH OSHD ¶24,078 (No. 16193, 1979). Thus, the cited standard does not apply to the cited conditions, and the alleged violation cannot be affirmed.

29 C.F.R. §1926.352(e)

The sixth charge, as set forth in Citation No. 3, Item No. 2, is:

> 29 CFR 1926.352(e): Additional fire prevention precautions were not provided when welding, cutting, or heating operations were such that normal fire prevention precautions were not sufficient:
>
> > 11th floor--employee(s) performing cutting operation at elevator shaft were not provided with a fire watch, sparks falling down shaft exposing employee(s) working at lower levels to a potential fire hazard.

This standard, 29 C.F.R. §1926.352(e), provides:

> When the welding, cutting, or heating operation is such that normal fire prevention precautions are not sufficient,

additional personnel shall be assigned to guard against fire while the actual welding, cutting, or heating operation is being performed, and for a sufficient period of time after completion of the work to insure that no possibility of fire exists. Such personnel shall be instructed as to the specific anticipated fire hazards and how the firefighting equipment provided is to be used.

The evidence in support of this charge consists exclusively of the testimony of the compliance officer who conducted the inspection. He observed a cutting operation being performed on the eleventh-floor level (Tr. 105) which resulted in sparks falling on an employee who was working on the tenth-floor level. (Tr. 177)[*/] He further testified that he "couldn't see a fire watch or any type of fire extinguishers." (Tr. 106) Respondent's labor foreman, on the other hand, testified that a fire watch with a fire extinguisher was stationed on the tenth-floor level during the cutting operations on the eleventh floor. (Tr. 320) He further testified that the fire watch also had at his disposal a water hose, which ran up the elevator shaft from the first level to the twelfth level. (Tr. 321) Finally, he testified that the fire watch was trained in the use of both the hose and the extinguisher. (Tr. 321)

The testimony of respondent's foreman stands unrefuted. It is not clear that the compliance officer even looked on the tenth-floor level for the fire watch. (See Tr. 105-107, 176-78) He did not even ask to be shown the fire extinguishers when he was told that they were present; instead, he relied upon the absence of such extinguishers in the photographs he had taken during his inspection as a basis for concluding that the fire extinguishers were not present. (Tr. 106) Finally, the

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[*/] It is clear from the compliance officer's testimony that he considered only one person affected by the hazardous condition he observed, namely the person located on the tenth-floor level. (Tr. 176-77)

compliance officer didn't even know whether there was a water hose running up the elevator shaft which could have been used as a means of additional fire protection. (Tr. 178) Thus, the testimony of respondent's representative stands unrefuted.

Moreover, the Secretary has failed to identify what "normal fire precautions" were taken by respondent nor has he established why these precautions were "insufficient" so as to require the stationing of a fire watch at respondent's worksite. For these reasons, it is found that the evidence offered in support of the charge is patently insufficient to establish the violation.

29 C.F.R. §1926.450(b)(5)

The seventh charge, as set forth in Citation No. 3, Item No. 3, is:

> 29 CFR 1926.450(b)(5): The side rails of a job-made single cleated ladder was (sic) not parallel or flared top to bottom by not more than one-quarter of an inch for each 2 feet of length:
>
> Basement level south side-- A-frame ladder used by employees to make water hose connections.

This standard, 29 C.F.R. §1926.450(b)(5), provides:

> Side rails shall be parallel or flared top-to-bottom by not more than one-quarter of an inch for each 2 feet of length.

Respondent's challenge to this charge is limited to the applicability of the standard. Respondent's principal argument is that the standard, properly interpreted, does not apply to the cited conditions. Additionally, respondent argues that there is a failure of proof that the ladder at issue here was "job-made."

While conceding that the ladder was not parallel and that it flared more than is permitted by the standard, respondent argues that the standard, properly interpreted, does not apply where the flare is at the bottom of the ladder rather than at the top. While respondent's argument as to the proper construction of the standard is persuasive, the issue need not be decided on that basis.

By its terms, the cited standard applies only to "job-made" ladders. Here, the compliance officer admitted that the ladder at issue here was not job-made. (Tr. 183) Thus, the cited standard is found to be inapplicable to the cited conditions and complainant has failed to establish the violation, as charged.

The eighth charge, as set forth in Citation No. 3, Item No. 5, is:

> 29 CFR 1926.500(b)(8): Floor hole(s) were not guarded by a standard railing and toeboard or a floor hole cover of standard strength and construction secured against accidental displacement:
>
> a) 17th floor - two floor holes measuring 3 inches and 8 inches in diameter at stairway.
>
> b) 18th floor - two floor holes measuring 3 inches and 8 inches in diameter at stairway.

This standard, 29 C.F.R. §1926.500(b)(8), provides:

> Floor hole(s) into which persons can accidentally walk shall be guarded by either a standard railing with standard toeboard on all exposed sides, or a floor hole cover of standard strength and construction that is secured against accidental displacement. While the cover is not in place, the floor hole shall be protected by a standard railing.

The facts pertaining to this charge can be summarily stated. On walkways located on the seventeenth- and eighteenth-floor levels there were two groups of floor holes, each of which consisted of one hole

that was three inches in diameter and one hole that was eight inches in diameter. (Tr. 112-16, C-24, C-25, & C-26) The hazards presented by these condition, as described by the compliance officer, were a tripping hazard and the hazard of debris falling to the lower levels. (Tr. 117) Assuming without deciding that these are the hazards the standard was designed to prevent, and assuming without deciding that the standard is applicable to the cited conditions, the violation, nevertheless, has not been established. Here there is insufficient evidence that respondent's employees were exposed to the conditions perceived as hazardous, for the reason that it is not established that a single employee was working on the seventeenth- or eighteenth-floor levels at the time of the inspection. (Tr. 117)

29 C.F.R. §1926.850(h)

The final charge at issue here, as set forth in Citation No. 3, Item No. 7, is:

> 29 CFR 1926.850(h): Sign(s) warning of the hazard of falling materials were not posted at each level:
>
> > Daniel's & Fisher Tower--1st through 17th floors, at elevator shaft openings.

This standard, 29 C.F.R. §1926.850(h), provides:

> When debris is dropped through the holes in the floor without the use of chutes, the area onto which the material is dropped shall be completely enclosed with barricades not less than 42 inches high and not less than 6 feet back from the projected edge of the opening above. Signs, warning of the hazard of falling materials, shall be posted at each level. Removal shall not be permitted in this lower area until debris handling ceases above.

The facts pertaining to this charge are stated as follows. The compliance officer inspected the worksite, a multi-storied building, on the 13th of March.

That day, he observed that there were no warning signs posted at the unenclosed elevator shaft openings on the various floor levels which would warn employees of the hazard of falling materials. (Tr. 118) He was subsequently informed by the job superintendent that while the elevator shaft was used to dump debris, such dumping operations did not commence until after the end of each work day (3:30 p.m.) when the employees, other than those engaged in the dumping operations, were out of the building. (Tr. 184) The job superintendent also informed the compliance officer of the precautions taken to assure that all employees, other than those engaged in the dumping operations, were out of the building before dumping operations were commenced. (Tr. 184) After confirming these reports by conducting interviews with respondent's employees, (Tr. 184) respondent was nevertheless cited for failing to post warning signs.

When asked to identify the employees who were exposed to the hazardous condition presented by the failure to post such warning signs, the compliance officer identified a single employee, who was observed on the tenth floor level at 10:30 a.m. on March 17. (Tr. 184-85) . The compliance officer admits that no dumping operations were being coonducted at the time this employee was observed on the tenth floor. (Tr. 184) Furthermore, the compliance officer admits that by this day--the 17th of March--signs had been posted warning employees of the danger of falling materials. (Tr. 118)

In view of the foregoing, the most charitable conclusion that can be reached is that the Secretary has failed to prove the requisite employeee exposure to the hazard perceived by the standard. Thus, the violation has not been established.

## FINDINGS OF FACT

1. Respondent constructed and maintained a tubular welded scaffold at its workplace located at 1601 Arapahoe Street, Denver, Colorado, which was used as a means of access to and from the first- through the sixth-floor levels of said workplace. (Tr. 15-16, 233-34)

2. The scaffold was situated in the existing stairway shaft and was adjacent to the floor ledge of the fourth-floor level on three sides. (Tr. 15-16, 233-34)

3. At the fourth-floor level, there was approximately a 19-inch gap between the north side of the scaffold and the adjacent floor level. (Tr. 256-58)

4. At the fourth-floor level, there was approximately a 6-inch gap between the west side of the scaffold and the adjacent floor level. (Tr. 236-38, C-31)

5. Due to the configuration of the stairway shaft, the scaffold could not be moved closer to the floor ledges on the fourth floor, which were adjacent to the north and west sides of the scaffold (Tr. 234)

6. Respondent secured a waist-high guardrail on the north side of the scaffold on the fourth-floor level in order to prevent its employees from using that side as a means of access. (Tr. 239-240, 256)

7. Respondent intended that its employees gain access to and from the scaffold at the fourth-floor level at a point designated on C-31 as "A" which point was on the west side of the scaffold where the gap between the scaffold and the adjacent floor ledge was only 6 inches. (Tr. 236-38, C-31)

8. The area designated as "A" on C-31 was the most convenient place to gain access to and from the scaffold on the fourth-floor level.

9. Respondent's employees gained access to and from the scaffold on the fourth-floor level at the point designated on C-31 as "A". (Tr. 238-39)

10. During the inspection, one or more compressed gas cylinders that were in use were observed propped up against the wall of the basement of respondent's workplace. (Tr. 28-30, C-3) The cylinders were not secured by a cart or other suitable cylinder truck nor were they secured by a chain nor other stabilizing device which would have prevented them from falling over or being knocked over.

11. At least three of respondent's employees were exposed to the hazardous conditions described in the preceding finding. (Tr. 32)

12. The elevator shaft on the tenth, eleventh, twelfth, and fourteenth levels of respondent's workplace were not guarded by standard guardrails on one or more sides or otherwise covered to prevent someone from falling to the ground below.

13. If someone were to have fallen in the floor openings that were unguarded on the tenth, eleventh, twelfth or fourteenth floor levels, a fall of 100 feet or greater would result. (Tr. 36)

14. The tenth, eleventh, twelfth and fourteenth floor levels were not barricaded or posted as restricted areas. (Tr. 78)

15. One of respondent's employees had access to the hazardous condition of the unguarded floor opening on the tenth-floor level in that he was observed at the edge of such opening.

16. At least one of respondent's employees had access to the hazardous condition of the unguarded floor opening on the eleventh-floor level. (Tr. 38-44, C-5 & C-6A & B)

17. The work that was being performed in the floor opening of the eleventh floor level--that of cutting the I-beam in the elevator shaft--could have been performed with standard guardrails installed to guard the perimeter of the floor opening. (Tr. 41, 44, C-5 & C-6A & B)

18. At least one of respondent's employees had access to the hazardous condition of the unguarded floor opening on the twelfth-floor level in that such employee was within a few feet of the opening when exiting or accessing the scaffold that was located on that level. (Tr. 46-48, C-7A-C, C-8, & C-9)

19. The employee who was observed on the fourteenth-floor level was not walking in the direction which would have exposed him to the hazard of the unguarded floor opening on that level. (Tr. 68-78, C-10, C-11, C-12, C-13)

20. The unguarded floor opening on the fourteenth-floor level was partially covered by a four foot by eight foot piece of plywood which had debris on it. (Tr. 162-63, C-9, C-10 & C-12)

21. Two of respondent's employees, Joe Lapointe and Mark Strenge, were engaged in a cutting operation in the elevator shaft of the eleventh-floor level of respondent's workplace on March 17, 1980. Such employees were not equipped with safety belts and lanyards. (Tr. 38-40, C-5, C-6)

22. Respondent had a well-defined and specific rule requiring the use of safety belts and lanyards by employees assigned cutting operations or other work in the elevator shaft. (Tr. 264-65, 307-08, R-1)

23. Respondent's rule requiring the use of safety belts and lanyards was communicated to its employees through the existence of a written safety manual, discussion of the rule in weekly safety meetings, (Tr. 311-12, 335-36) and specific instructions by the two employees' supervisors, Charles Sheridan and Samuel Graves, to wear safety belts and lanyards, tied to a rope stretched between two nearby columns, while performing cutting operations in the elevator shaft. (Tr. 265-66, 313, 326)

24. The two employees in question were told by respondent to wear their safety belts on March 17, 1980. (Tr. 313)

25. Respondent provided the necessary safety belts and lanyards on the job site, (Tr. 242, 262, 314) and issued such equipment to the two employees in question on March 17, 1980. (Tr. 313, 327)

26. Respondent did not have knowledge that the two employees were working on the eleventh level on March 17, 1980 without their safety belts and lanyards. (Tr. 243, 314)

27. Upon learning of the violation of its safety rules by the two employees, respondent's carpenter foreman ordered the two employees to obtain and wear their safety belts, which they did. (Tr. 169, 242)

28. In response to the violation of its safety rules, respondent's labor foremen disciplined the two employees by threatening them with a layoff or termination, transferring them to different jobs, resulting in the loss of pay to one of the employees. (Tr. 315-16, 348) Approximately three weeks later the other employee was terminated for repeated violations of respondent's safety rules, including the failure to wear safety belt and lanyard. (Tr. 315-16, 349)

29. As part of respondent's safety program, respondent regularly disciplined other employees for violations of its safety rules (Tr. 251, 298-99)

30. One of respondent's employees was observed walking along a four to five feet wide ledge on the thirteenth level of respondent's workplace for the purpose of taking measurements for the installation of guardrails. The employee was not equipped with a safety belt and lanyard. (Tr. 87, 171, C-17)

31. The only appropriate tie-off point for an employee walking the ledge previously described, were the supporting columns located on the opposite side of the opening from where the employee was required to work. (Tr. 245, C-19) Tying off to such supporting columns could not be accomplished with a lanyard which would prevent a fall of not greater than six feet. (Tr. 245, C-19)

32. It was impossible for the employee to tie-off to the column between the windows above the floor ledge where the employee walked because the windows were sealed shut, (Tr. 245-46) and because a tie-off at this point with a lanyard designed to prevent a fall in excess of six feet, would not allow the employee to walk the distance of the ledge, approximately twelve feet. (Tr. 173-74)

33. It was impossible for the employee to tie-off to studs or bolts in the wall behind the ledge where the employee walked because the wall was composed of brittle "gyp block" and would not support a tie-off. (Tr. 246-47, 275) Similarly, a tie-off to studs or bolts in the wall behind the ledge, with a lanyard designed to prevent a fall in excess of six feet, would not allow the employee to walk the distance of the ledge, approximately twelve feet. (Tr. 174)

34. Respondent did not contest a prior citation alleging a violation of §1926.28(a). (Tr. 95-96, C-30)

35. Respondent was cited for failure to provide safety retainer clips at the connection between two lengths of pneumatic hammer hose. (Tr. 175, C-21)

36. Respondent positioned a fire watch with a fire extinguisher and fire hose at the level below the cutting operations at the eleventh floor of respondent's workplace on March 17, 1980. (Tr. 319-29)

37. Respondent's fire watch was fully trained and instructed in the use of the fire extinguisher and the fire hose. (Tr. 321)

38. Respondent maintained a ladder which was wider, by more than 1/4" for each 2 feet of length, at the bottom than at the top. (Tr. 110, C-21)

39. A ladder which is wider at the bottom than at the top is more stable and safer than a ladder whose side rails are parallel or a ladder which is wider at the top than at the bottom. (Tr. 178-83)

40. The ladder at issue was not "job-made". (Tr. 183)

41. A group of holes, one of which was three inches in diameter and the other eight inches in diameter, was observed on both the seventeenth- and eighteenth-floor levels of respondent's workplace. (Tr. 112, C-24, C-25, C-26)

42. Respondent utilized floor openings without a chute for the purpose of dumping debris generated through demolition of the building. (Tr. 117-18)

43. All dumping of debris was conducted after 3:30 p.m., after all employees were out of the building. Respondent utilized radio control to assure that no employees were in the intermediate levels of its workplace during such dumping operations. (Tr. 184, C-33).

44. Warning signs had been posted before the employee was observed in the area wherein he would have been exposed to the danger of falling debris. (Tr. 118, 184)

## CONCLUSIONS OF LAW

1. The evidence is insufficient to establish a violation of §5(a)(1) of the Act, 29 U.S.C. §654(a)(1) in that the proof does not establish that respondent's employees were subjected to a falling hazard while accessing to and from the scaffold on the fourth-floor level of respondent's workplace.

2. Respondent failed to comply with 29 C.F.R. §1926.350(a)(7) in that it failed to provide a suitable cylinder truck, chain, or other steadying device for the one or more compressed gas cylinders which were located in the basement area of respondent's workplace.

3. Respondent's employees had access to the hazardous conditions described in the preceding conclusion and respondent with the exercise of reasonable diligence could have discovered the hazardous condtion. Therefore, respondent violated 29 C.F.R. §1926.350(a)(7).

4. The aforesaid violation was non-serious in nature.

5. In view of the circumstances, it would be inappropriate to assess a penalty for the aforesaid violation.

6. Respondent failed to comply with 29 C.F.R. §1926.500(b)(1) in that it did not provide standard guardrails or covers for floor openings on the tenth-, eleventh-, twelfth- and fourteenth-floor levels of respondent's workplace.

7. Respondent failed to comply with 29 C.F.R. §1926.500(b)(1) in that it failed to provide standard toeboards around the floor openings on the fourteenth-floor level.

8. Respondent either knew or with the exercise of reasonable diligence could have known of the aforesaid hazardous conditions.

9. One or more of respondent's employees were exposed to the hazardous conditions created by the unguarded floor openings on the tenth-, eleventh-, and twelfth-floor levels. Therefore, respondent violated 29 C.F.R. §1926.500(b)(1).

10. The evidence fails to establish the respondent's employees were exposed to the hazardous conditions created by the absence of standard guardrails and toeboards around the floor opening located on the fourteenth-floor level of respondent's workplace.

11. If an accident were to occur as a result of the aforesaid violations of 29 C.F.R. §1926.500(b)(1), death or serious physical injury would likely result. Therefore, such violations were serious within the intent and meaning of the Act.

12. Taking into consideration respondent's size, previous history and good faith together with the gravity of the aforesaid violation, a penalty of $640.00 is appropriate.

13. The evidence establishes that the two employees who were observed near an unguarded floor opening on the eleventh-floor level without appropriate personal protective equipment (safety belts and lanyards) violated respondent's well defined and specific work rule requiring the use of such equipment in such circumstances. The evidence further establishes that such work rule was effectively communicated and enforced and that respondent did not have active knowledge of its employees' noncompliance with such rule. Therefore the defense of employee misconduct has been established to the alleged violation of 29 C.F.R. §1926.28(a) as alleged in instance a) of Citation No. 2, Item No. 1.

14. The evidence establishes that compliance with the personal protective equipment standard--29 C.F.R. §1926.28(a)--was impossible in the case of the employee who was observed near an unguarded floor opening on the thirteenth-floor level. The evidence further establishes that alternative means of protecting such employee were unavailable. Therefore, respondent has established the impossibility defense to the alleged violation of 29 C.F.R. §1926.28(a) as alleged in instance b) of Citation No. 2, Item No. 1.

15. A violation of 29 C.F.R. §1926.302(b)(1) has not been established because such standard does not apply to the cited conditions of failing to provide safety retainer clips at the connection of two lengths of hose attached to a pneumatic hammer.

16. The evidence is insufficient to establish that respondent failed to comply with 29 C.F.R. §1926.352(e).

17. A violation of 29 C.F.R. §1926.450(b)(5) has not been established in that it has not been proven that the ladder was job-made.

18. The evidence is insufficient to establish a violation of 29 C.F.R. &1926.500(b)(8) in that the proof does not establish that any of respondent's employees had access to the seventeenth- and eighteenth-floor levels where unguarded and uncovered floor holes were observed.

19. The evidence is insufficient to establish a violation of 29 C.F.R. §1926.850(h) in that the proof does not establish that any of respondent's employees were exposed to a hazard resulting from respondent's failure to comply with such standard.

## ORDER

In view of the foregoing, IT IS HEREBY ORDERED that:

1. Citation No. 1, Item No. 1, is VACATED.

2. Citation No. 1, Item No. 2, is AFFIRMED as a non-serious violation and no penalty is assessed.

3. Citation No. 1, Item No. 3, is AFFIRMED, and a penalty of $640.00 is ASSESSED.

4. Citation No. 2, Item No. 1, is VACATED.

5. Citation No. 3, Item No. 1, is VACATED.

6. Citation No. 3, Item No. 2, is VACATED.

7. Citation No. 3, Item No. 3, is VACATED.

8. Citation No. 3, Item No. 4, is AFFIRMED, and a penalty of $130.00 is ASSESSED.

9. Citation No. 3, Item No. 5, is VACATED.

10. Citation No. 3, Item No. 6, is AFFIRMED, and no penalty is assessed.

11. Citation No. 3, Item No. 7, is VACATED.

Quentin P. McColgin

Quentin P. McColgin
Judge, OSHRC

Dated: May 19, 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
Room 7B11, Federal Building
1100 Commerce Street
Dallas, Texas 75242

NOTICE OF DECISION

Secretary of Labor v. Metal Recycling Company
OSHRC Docket No. 80-5983

1. Enclosed is a copy of my decision. It will be filed with the Commission on May 19, 1982, and will become the final order of the Commission on June 18, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is June 18, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Stanley M. Schwartz
Administrative Law Judge

Date: April 29, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>METAL RECYCLING COMPANY,<br>Respondent. | OSHRC DOCKET NO. 80-5983 |

JUDGE'S DECISION MAY 19 '82 RECEIVED

FINAL ORDER ON JUN 18 '82

Appearances:

Patricia D. Keane, Esq.
Dallas, Texas

For the Complainant.

Thomas L. Varkonyi
El Paso, Texas

For the Respondent.

DECISION AND ORDER

Schwartz, Judge:

This is a proceeding brought before the Occupational Safety and Health Review Commission ("The Commission") pursuant to Section 10 of the Occupational Safety and Health Act of 1970 29 U.S.C. §651 et seq ("the Act"). Respondent contests alleged serious violations of 29 C.F.R. 1910.1025(d)(2); 1910.1025(d)(6(ii); 1910.1025(h)(1); 1910.1025(j)(1)(i); 1910.1025(j)(2)(i) and 1910.1025(l)(1)(ii).

An inspection was commenced at Respondent's workplace on April 9, 1980. Respondent timely contested the subject citation. A hearing was held on the matter on April 27, 1981, and May 21, 1981, in El Paso, Texas. No additional parties intervened in the matter.

Respondent concedes that it is engaged in a business affecting commerce within the meaning of the Act and that the Commission has jurisdiction of the parties and of the subject matter. The issues remaining to be decided are twofold. First whether Respondent violated the aforementioned regulations and if so the appropriate penalties therefor.

The regulations involved in this matter provide as follows:

29 C.F.R. 1910.1025(d)(2): Each employer who has a workplace or work operation covered by this standard shall determine if any employee may be exposed to lead at or above the action level.

29 C.F.R. 1910.1025(d)(6)(ii): If the initial determination or subsequent monitoring reveals employee exposure to be at or above the action level but below the permissible exposure limit the employer shall repeat monitoring in accordance with this paragraph at least every 6 months. The employer shall continue monitoring at the required frequency until at least two consecutive measurements, taken at least 7 days apart, are below the action level at which time the employer may discontinue monitoring for that employee except as otherwise provided in paragraph (d)(7) of this section.

29 C.F.R. 1910.1025(h)(1): Surfaces. All surfaces shall be maintained as free as practicable of accumulations of lead.

29 C.F.R. 1910.1025(j)(1)(i): Medical Surveillance - General. The employer shall institute a medical surveillance program for all employees who are or may be exposed above the action level for more than 30 days per year.

29 C.F.R. 1910.1025(j)(2)(i): Blood lead and ZPP level sampling and analysis. The employer shall make available biological monitoring in the form of blood sampling and analysis for lead and zinc protoporphyrin levels to each employee covered under paragraph (j)(1)(i) of this section on the following schedule:

(A) At least every 6 months to each employee covered under paragraph (j)(1)(i) of this section;

(B) At least every two months for each employee whose last blood sampling and analysis indicated a blood lead level at or above 40 ug/100 g of whole blood. This frequency shall continue until two consecutive blood samples and analyses indicate a blood lead level below 40 ug/100 g of whole blood; and

(C) At least monthly during the removal period of each employee removed from exposure to lead due to an elevated blood lead level.

29 C.F.R. 1910.1025(l)(l)(ii): The employer shall institute a training program for and assure the participation of all employees who are subject to exposure to lead at or above the action level or for whom the possibility of skin or eye irritation exists.

## Evidence

The Secretary presented Ms. Karen Heckmann as its chief witness. Ms. Heckmann is employed as an Industrial Hygienist for OSHA. She previously held the position of Director of Industrial Hygiene for Sherwin-Williams Company in Cleveland, Ohio. She has also taught environmental health (T. 81).

Ms. Heckmann testified that she inspected Respondent's workplace as a result of an employee complaint. The inspection occurred on April 9, 1980. She gave the owner, Mr. Thomas L. Varkonyi a copy of the complaint, held an opening conference and commenced the inspection. The first part of the inspection was visual. She also collected some preliminary wipe samples and bulk samples for materials in the workplace. A bulk sample is a quantity of materials large enough so that a chemist can make a general analysis for content (T. 83-86). Ms. Heckmann explained the results of the bulk samples that she took on April 9, 1980, at the Respondent's workplace. She took one sample near Respondent's small furnace by scooping up a small amount of material into a small glass vial. The vial was capped, labeled and sent by certified mail to a laboratory in Salt Lake City. The parties stipulated that the results of the analyses as indicated on the analyses sheets are correct. This stipulation went to the fact that the tests were properly performed in Salt Lake City and that the chain of custody was intact. The sample

from the furnace area indicated a 19% lead content (T. 87-88; 189; Complainant's exh. 1). A second bulk sample was taken of floor dust which was located near a drill press. This press was in the same general area of the small furnace. The laboratory analysis indicated a 32% lead content (T. 89; Complainant's exh 2).

Ms. Heckmann further testified that she took several wipe samples on April 9, 1980. She explained that a wipe sample is taken with a piece of filter paper. The paper is moistened with distilled water. She tries to take a wipe sample 4" on each side in a square. The filter is put into a glass vial, capped, sealed and sent to Salt Lake City, Utah, for analysis (T. 90-93).

She indicated that one wipe sample was taken from the underside of a cover which was placed over the top of the small furnace noticed at the workplace. This sample showed 23,000 micrograms of lead. A second wipe sample was taken from a steel or metal table top inside a lunchroom. This sample showed 130 micrograms. A third wipe sample taken from the east side of a relay box for the 20 horse power grinder showed 3,000 micrograms of lead. She took a fourth sample off the surface of an air compressor tank. It showed 26,000 micrograms of lead. A final sample was taken from what she described as a dry pulverizing mill cover. It showed 26,000 micrograms of lead (T. 90-96; Exhibits 3-7).

Ms. Heckmann returned to the Respondent's workplace on June 25, 1980, to take air samples. She used a filter which is attached to a pump. The pump draws air through the filter and removes particulate matter from the air which passes through the pump. The filter is approximately 1 1/2" in diameter. The opening which allows air to enter in and around the filter is less than a 1/4" in diameter (T. 123-124).

She described the sampling procedure employed by OSHA. An employee wears an air pump on his belt and a piece of tubing connects the air pump to the filter. She attached the air pump to three employees at Respondent's workplace. Two employees were warehouse employees and one was a warehouseman and welder. The equipment was calibrated on the day prior to the inspection of June 25, 1980. The machines were recalibrated after use on June 25, 1980. The same 2 liters were shown at each calibration (T. 125-129; 132).

The employees wore the pumps for 6 1/2 - 7 hours on June 25, 1980. She took the pumps off for a lunch break. After lunch she replaced the pumps and added new filter devices. She did this by disconnecting the old filter but not removing it from the plastic cassette. It was her practice to place a small plastic cap in the air hole of a used filter and then she placed a snug seal around it. Ms. Heckmann testified that she changed the filters on June 25, 1980, when the type of work changed. Changing the filter helps to identify the source of exposure if you change it simultaneous with work changes (T. 129-130).

One employee, a Mr. Hernandez, had three different filters attached to him during the day. The first one was on for 84 minutes and the second one for 126 minutes. She took the last filter off of Mr. Hernandez at 5:22 p.m. The average for the three filters together showed that Mr. Hernandez had an exposure of .041 milligrams per cubic meter averaged out over eight hours. This result was above the action level of .030 set forth in the regulations (T. 131-132; Complainant's exh. 8).

Ms. Heckmann put the first filter on Mr. Carrillo at 8:55 a.m. and removed the last one at 5:21 p.m. She used three filters. She indicated that the pumps were turned off when she removed them from an individual. There is no likelihood of

contamination getting into the pump and filter once it is turned off. The three filters taken off of Mr. Carrillo were analyzed. They showed an exposure average over 8 hours of .040 milligrams per cubic meter of lead (T. 132-135; Complainant's exhibit 9).

The final employee sampled was a Mr. Pinedo. She used two filters sampling him. He was performing welding during the day and did not have a distinct break in his work as the other two did. His results showed an exposure averaged over eight hours of .036 milligrams per cubic meter. He worked about 7 hours. The average over the eight hour day spreads the same amount of material over a greater period of time and results in lower concentrations (T. 136).

Ms. Heckmann testified that on June 25, 1980, none of the employees sampled had been there for more than 2 months according to their own statements. The employees told her that what they were doing on the day of the air sampling was normal. They were outside for part of the day and inside for part of the day (T. 172; 237). Ms. Heckmann also testified that she had no reason to doubt that what the employees did on June 25, 1980, was what they normally did at Respondent's workplace (T. 237).

The Secretary also called Mr. Richard Dean Wingo, Regional Industrial Hygienist with OSHA. He oversees the industrial hygiene enforcement policy procedures. He has previously worked as a Field Industrial Hygienist in the OSHA Area Office in Oklahoma City. Mr. Wingo testified that he has collected over 2,000 air samples with OSHA and has participated in over 200 industrial hygiene inspections. Forty-five of these inspections have involved lead.

Mr. Wingo stated there are two routes of entry of lead into the body. One is by breathing where lead is inhaled and swallowed into the stomach or digestive tract. The other is ingestion of blood into the body. He also testified that four

areas of the body are affected by lead which is an accumulative toxin. It tends to accumulate and is stored in the bones. Lead affects the central nervous system, peripheral nervous system, blood system itself and the kidneys. It was his opinion that death or serious physical injury could occur (T. 286-290).

Mr. Wingo also explained that an action level is the level in the air where more action must be taken. It is not a level where OSHA requires controls to be installed or that respirators be provided. The action recommended is basically a housekeeping program and a medical program to evaluate the blood. In addition monitoring is required (T. 296).

He also testified that all of Ms. Heckmann's results appear to be extremely reliable. They are consistent and are all about the same level of exposure. This indicates the samples weren't contaminated by external means (T. 323).

The Secretary also called Mr. Hector Pinedo who was a student at El Paso Community College at the time of the hearing. He previously worked for the Respondent for about 2 1/2 - 3 months as a welder and warehouseman. He was one of the employees involved in the air sampling at Respondent's workplace on June 25, 1980. He wore an air pump on that day (T. 22-23).

He indicated that his duties were just about the same on the day air sampling was conducted as on previous days. He spent more time indoors on the day of sampling. He then stated that he also spent his average time welding on that day. Mr. Pinedo stated that on the day of inspection the conditions in the plant were no different than ordinary. They weren't any worse than usual or any better.

On cross-examination Mr. Pinedo indicated that his main duties at Respondent's warehouse involved welding. On the day proceeding the sampling inspection he worked mainly on outside work welding and fixing fence gates. His

usual duties required him to work on the outside. However on the day of the sampling inspection he spent most of the day inside. He also testified that his usual duties included sweeping and picking up big pieces of metal. On the night of June 24 and the day of inspection June 25, 1980, he just picked up big pieces of metal involving his own work. On redirect examination he indicated that he always limited his pick up to his own area. The rest of the place looked like it always looked (T. 24-30).

The Respondent called Mr. Carlos Gonzales as a witness. Mr. Gonzales was assigned to inspect Respondent's workplace as a result of an employee complaint. His inspection dealt primarily with the safety items of the complaint. There was only one safety item out of 6 on the employee complaint (T. 100, 111; Respondent's exh 3).

Mr. Gonzales testified that he explained to Mr. Varkonyi, Respondent's owner, that it was a safety and health complaint. There was no Resident Industrial Hygienist at El Paso so he came to make the safety part of the inspection. He told Mr. Varkonyi there would almost certainly be an industrial hygiene inspection. This hygiene inspection would be a continuation of his inspection. He went to great lengths to explain this procedure because Mr. Varkonyi was quite concerned about being harassed by the INS and other sections of the Department of Labor. He wanted him to understand that the two visits actually constituted one inspection. He stated that it was standard procedure for a industrial hygienist to follow up in his area as soon as one was available (T. 100, 104, 113).

Mr. Stanley Frazier also appeared and testified on behalf of the Respondent. He was employed by the Respondent as a truck driver at the time of the hearing. He was not employed by Metal Recycling Company at the time of the inspection.

He joined the company approximately four months prior to the hearing on April 27, 1981 (T. 200).

Mr. Frazier testified that he has never observed the melting of lead at Respondent's workplace. He has never cut or drilled lead. He has handled lead to put it in a drum and seal it. Mr. Varkonyi has talked to him about the possibility of lead contamination and the need to take a blood test. Mr. Frazier signed an employee blood test waiver (T. 200-202; Respondent's exhibit 5).

Mr. Thomas L. Varkonyi appeared and testified. He is the owner of Metal Recycling Company. He owned the company for almost six years at the time of the hearing. He employs three to four warehouseman and two office employees. These employees generally spend two to three months in his employment. The company recycles metals, plastics and papers. The process involves the collection, packaging and shipping of lead. He handles lead and receives just about any item made of metal (T. 8-10), 12).

The lead is put into 55 gallon steel drums and shipped to smelters. He cuts the lead when it does not fit into the drums. He testified that he cuts lead two or three times a year. The metal is shipped to the smelter when he has a full truckload of approximately 40,000 pounds. Mr. Varkonyi keeps a small melting furnace on the premises. He has used it in the past to melt out small samples before he ships to the smelter. The smelter pays him based on lead content. Therefore he takes a little sample and sends it out to a laboratory to make sure he is not cheated. He stated that he does the melting after working hours when no employees are on the premises. He performs the melting operation once a year because he usually sends out a shipment once a year. The melting pot is 18" high. He also uses a drill press to drill and take samples. He also collects batteries and

ships them once a year. He stores them in a special area on wooden pallets (T. 8-12; 108; 150; 176).

Mr. Varkonyi has never conducted any kind of monitoring for exposure to lead. He has never done any air sampling (T. 12-13). He was aware at the time of the inspection and prior thereto that he had lead on his premises and that he worked with it (T. 16).

Mr. Varkonyi also described his housekeeping program. It includes sweeping the aisles and picking up everything on the floor and putting it into drums. His normal procedure is to sweep the warehouse with wide brooms. They sweep where the dust is accessible or where it seems to fly up. He uses a hose with a head which sprinkles out a very fine mist of water. It is used to wet down the concrete to prevent dust from flying all over. They sweep the area after using the hose. Respondent also has an industrial type vacuum cleaner that suctions up both and wet and dry. This vacuum is used occasionally especially in the sampled area (T. 13, 344).

He also stated that he questioned the reliability of the air sampling results recorded by Ms. Heckmann. He gave as one example the fact that all the men wear gloves with which they have handled lead. He observed the employees reach up and touch the pump during the inspection. He believes the lead from the gloves could have contaminated the samples. He also recalled that the air sampling devices were laid on a table while Ms. Heckmann did her recording. This table was the one where most of the tools and the gloves were laid at lunchtime and after working hours. Mr. Varkonyi did not know if she had the air pump operating when it was laid on the table. He testified that he was not familiar with the use of air sampling devices at the time of the inspection but had read up on the subject subsequently (T. 19-21).

Mr. Varkonyi also testified that he was aware that OSHA was coming back for the air sampling portion of the inspection. He deliberately left the area untouched from the last time it had been used rather than clean it up. He did this in order to allow OSHA to take samples which he thought they wanted. He was afraid if he cleaned it up OSHA would say he was covering up and would use it against him. Therefore he did not sweep up or pick up big pieces of scrap metal. In addition he indicated his employees did not work the same type of job on that day as they usually performed. He knew OSHA was coming for the sampling inspection and felt they would have to be on the premises. He cancelled all pickups for that day and all outside jobs and kept all employees on the premises for the OSHA inspection (T. 15-16; 18).

Mr. Varkonyi also stated that on the day of the air sampling his emplyees were moving some boxes of plastic which contained a very heavy layer of dust, much of which was powered lead. The boxes had been in the warehouse for better than two years and at one period of time were in direct contact with the lead materials. The lead powder was emptied into drums immediately within inches of these same boxes and settled on these boxes.

He indicated that the boxes were moved after a period of time into another room of the warehouse. They were covered up to prevent displacement of the dust. The boxes were moved, loaded and left the warehouse on the day of the air sampling inspection. This movement dispersed the lead powder (T. 391-392).

Mr. Varkonyi also stated that his employees know that they handle lead and that it is toxic. He believes anyone working in the scrap business knows these facts and he also tells them at the time they are hired (T. 351).

## Opinion

### Harassment

Respondent raised the issue of government harassment at the hearing. Stated another way, Mr. Varkonyi argues the inspection was not conducted in a reasonable manner as set forth in the Act. This contention is rejected. The record clearly shows that both Mr. Gonzales and Ms. Heckmann conducted themselves in a courteous and professional manner. Mr. Gonzales went to great lengths to explain why there would be a follow-up inspection by the next available hygienist. The Secretary conducted the initial inspection as a result of a complaint as is required in such a situation. There is no basis in law or fact to conclude that OSHA's actions in this matter in any way constituted harassment of the Respondent, Metal Recycling Corporation.

### Revised Lead Standard

Respondent contends that the revised lead standard requires that this case be decided in his favor. The standard was under reconsideration by OSHA at the time of the hearing. Subsequent to the hearing OSHA issued a document titled "Revised Statement of Reasons on the Feasibility of the Workplace Standard on Lead" (46 FR 60758, December 11, 1981).

I have reviewed the revised lead standard. It has a specific section addressed to the Respondent's industry which is the collection of lead scrap. It details specific reasonable changes which are geared to help small scrap collectors. The revised standard provides for a 30-day exemption from the requirement that engineering controls be installed, use of respirators in some instances and an extended time period for compliance. Overall the lead standard was found feasible for Respondent's industry with the aforementioned changes. These changes do not

affect the action level contained in the original standard, the need for initial and periodic monitoring, medical surveillance, housekeeping or training programs. Consequently these items will be discussed on their merits in this decision.

## Reliability of Air Sampling Measurements

Respondent contends the citations should be vacated on the ground that the samples were contaminated and are unreliable. It suggests this occurred by employees touching the device with their gloves and the placement of the device on a table used for gloves and tools at the end of the day. These contentions must be rejected for two reasons.

First Ms. Heckmann and Mr. Wingo are extremely knowledgeable industrial hygienists. They have extensive qualifications in conducting industrial hygiene inspections including the taking of numerous samples. They gave detailed explanations why the results were consistent and reliable. Mr. Varkonyi's experience in this area is extremely limited. I credit the opinions of Ms. Heckmann and Mr. Wingo on this technical subject giving proper deference to their educational experience as well as hands on experience in the area of air sampling.

In addition the Secretary has established the presence of airborne lead at Respondent's facility. The burden shifted to the Respondent to show, by other than mere suggestion, that these measurements were unreliable. Respondent failed to rebut these measurements. It also did not conduct any tests of its own. Consequently the objections set forth above must be labeled speculative in this case. I find that the figures stated above accurately reflect the amount of airborne lead to which Respondent's employees were exposed.

## Merits

### Items 1A & 1B - Initial and Periodic Monitoring

The regulations set forth at 29 C.F.R. 1910.1025(d)(2) and 1910.1025(d)(6)(ii) require monitoring for employee exposure to lead. An employer must carry out initial monitoring of his employees where they are exposed to lead. The results of this initial monitoring determines the need for follow-up action.

The lead standard applies by virtue of 29 C.F.R. 1910.1025(a)(1) to all occupational exposure to lead except construction work. The revised standard continues the scope of the original standard except for the stevedoring industry. Respondent's industry, scrap collection, as noted above, is specifically mentioned in the statement of reasons concerning the feasibility of complying with the lead standard for certain industries. There is no question that Respondent did not conduct either initial or follow-up monitoring in this case. The standard required initial monitoring at the very minimum at Respondent's workplace. The Secretary has established a violation of both 29 C.F.R. 1910.1025(d)(2) and 1910.1025(d)(6)(ii) under the circumstances of this case. The violation of item 1(b) is of course a technical one stemming from the Respondent's failure to conduct initial monitoring. The substantive violation is the failure to conduct any monitoring of the workplace.

### Item 2 - Housekeeping

The Secretary's Industrial Hygienist took several wipe samples in the area of Respondent's workplace where lead was handled. I have previously given my reasons for concluding the sampling results are reliable. They establish that Respondent failed to keep this area as free as practicable of accumulations of lead. Mr. Varkonyi has indicated that he did not clean up the area in anticipation of the

OSHA health inspection. The Secretary has presented a former employee who testified concerning his cleanup efforts prior to the inspection. It is not necessary to resolve the conflict, if any, between these individuals. There is no question that the housekeeping provisions of the regulations were violated by the failure to maintain the area. Mr. Varkonyi's reasons for not cleaning up will be considered in assessing an appropriate penalty for this violation. A violation of 29 C.F.R. 1910.1025(h)(1) has been established.

Items 3(a) & 3(b) - Medical Surveillance-Biological Monitoring

These items involve a slightly different issue. There is no question that the Respondent failed to institute a medical surveillance program or provide biological monitoring as set forth in the cited regulations. The regulations also indicate that these programs are only required for employees who are or may be exposed above the action level for more than 30 days per year. The issue to be resolved is whether the Secretary has established the 30 days per year requirement under the circumstances of this case.

Respondent argues that the Secretary failed to carry its burden of proof for two reasons. First it argues that OSHA should have taken another sampling before presuming that the employees exposed on the day of inspection may be exposed above the action level for more than thirty days a year. Secondly Respondent contends that the employees would not be exposed more than 30 days a year because they were not performing their usual duties at the time they were sampled.

Mr. Varkonyi's first contention must be rejected. Ms Heckmann acted reasonably in presuming the employees would be exposed for more than 30 days. She had previously taken wipe samples. She also conducted interviews on the subject with Respondent's employees. She interviewed Mr. Pinedo and understood

from him that he was performing his usual duties on that day. Consequently Respondent's contention must be rejected.

Respondent's second contention is essentially a factual matter. There is no conflict between Ms Heckmann and Mr. Varkonyi. Rather the question to be answered involves a resolution of the conflict between Respondent's former employee, Mr. Pinedo, and Mr. Varkonyi.

Mr. Varkonyi testified unequovically that he was aware that OSHA would be coming out for the air sampling portion of the inspection. He cancelled all pickups for that day and all outside jobs. He kept all the employees on the premises for the inspection.

Mr. Pinedo's testimony was somewhat conflicting. He testified on direct that his duties were about the same on the day in question. He did state he spent more time indoors on the day of the sampling. He also indicated that he spent his average time welding on that day. On cross-examination he acknowledged that his main duties at Respondent's warehouse involved welding. He worked mainly on outside work on the day prior to the inspection. This was consistent with his usual duties which required him to work on the outside. He acknowledged that on the day of the sampling he spent most of his time inside.

The undersigned has evaluated the testimony of these witnesses concerning the duties performed on the day of the air sampling inspection. I conclude that Mr. Varkonyi has the clearer recollection of the events. He was extremely sure of the facts. In addition a close look at Mr. Pinedo's testimony indicates that he corroborates Mr. Varkonyi's recollection of the events in most respects. Consequently Mr. Varkonyi has successfully rebutted the Secretary's case with respect to the 30 day requirement. The evidence of record does not establish that

the employees were performing their usual duties on that day. Consequently I cannot conclude that these employee, based on the one sampling, may be exposed for more than 30 days. Therefore items 3(a) & 3(b) must be vacated.

Item 4 - Training Program

29 C.F.R. 1910.1025(l)(L)(ii) requires a training program for all employees who are subject to exposure to lead at or above the action level. The specifics of the training program are spelled out in the regulation. There is no exception for intermittent exposure of less than 30 days as found in the medical surveillance provisions.

I previously held that OSHA's samples were reliable. They clearly show exposure above the action level on June 25, 1980. The items concerning medical surveillance and biological monitoring were vacated for a failure of proof that employees may be exposed above the action level for more than 30 days per year. This exception, as noted above, is not applicable with respect to training programs.

Mr. Varkonyi testified concerning his training program. It consisted of the presumption that every employee who handles lead knows that it is toxic. If they did not know it at the time they were hired, he tells them of the dangers of lead. This program does not meet the specific requirements noted in the regulation. Therefore Respondent was in violation of 29 C.F.R. 1910.1025(L)(2)(ii) at the time of the inspection.

It is noted that Respondent may need only to comply with 29 C.F.R. 1910.1025(L)(2)(i) after conducting future monitoring of its workplace. This provision provides that each employer who has a workplace in which there is a potential exposure to airborne lead at any level shall inform employees of the content of Appendices A and B of the regulation. The more detailed program is

addressed to situations where the action level is reached. This distinction is pointed out for future guidance to the Respondent as to the appropriate training program required under the regulations.

## Penalty Determination

I turn now to the assessment of an appropriate penalty for items 1(a), 1(b), 2 & 4. There is no question the combined violations are properly classified as a serious violation. Mr. Wingo's testimony fully explains the reasons for such a characterization. The Act requires the assessment of some penalty for a serious violation.

In determining the appropriate penalty in this case, there are several factors to be considered. Respondent is a very small employer and is normally exempt from all OSHA inspections except complaint inspections and health inspections. Respondent belongs to the National Association of Recycling Industries which has actively sought changes in the lead standard. Respondent has followed these challenges closely. The revised standard contains some of the suggestions of Respondent's trade group. The revised standard also specifically addresses the scrap collection industry in its statement of reasons and provides insight into OSHA's positions on various issues. I conclude that with this background a sizeable penalty is not appropriate in the case. Rather a nominal penalty of $1.00 is appropriate. The proposed penalty of $1600 is best applied toward the monitoring by Respondent of his workplace as required by my decision of the merits.

## Conclusions of Law

1. Respondent, Metal Recycling Company, is engaged in a business affecting commerce and has employees within the meaning of Section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of this proceeding.

2. Respondent was in serious violation of 29 C.F.R. 1910.1025(d)(2); 1910.1025(d)(6)(ii); 1910.1025(h)(1) and 1910.1025(L)(1)(ii).

3. Respondent was not in violation of 29 C.F.R. 1910.1025(j)(1)(i) and 1910.1025(J)(2)(i).

## ORDER

On the basis of the foregoing Findings of Fact contained in the body of my decision and the above Conclusions of Law it is ORDERED that:

1. Items 1(a), 1(b), 2, and 4 of serious citation number 1 are affirmed and a penalty of $1.00 is assessed.

2. Items 3(a) & 3(b) of serious citation number 1 are VACATED.

So ORDERED.

Stanley M. Schwartz

STANLEY M. SCHWARTZ
Administrative Law Judge

Dated: May 19, 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 240

ATLANTA, GEORGIA 30309

# NOTICE OF DECISION

SECRETARY v. KECO INDUSTRIES, INC.

OSHRC Docket Nos. 81-1975 and 81-1976 (Consolidated)

1. Enclosed is a copy of my decision. It will be filed with the Commission on May 20, 1982, and will become the final order of the Commission on June 21, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N. W., Suite 601
   Washington, D. C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is June 21, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Joe D. Sparks

JOE D. SPARKS
Judge

Date: April 30, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

| | | |
|---|---|---|
| SECRETARY OF LABOR | ) | |
| Complainant, | ) | |
| v. | ) | OSHRC Docket Nos. |
| KECO INDUSTRIES, INC., | ) | 81-1975 and 81-1976 |
| Respondent, | ) | (Consolidated) |
| and | ) | |
| INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, LOCAL LODGE NO. 162, DISTRICT LODGE NO. 34, | ) | |
| Authorized Employee Representative. | ) | |

APPEARANCES:

Gary A. Boncella, Esquire, Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, on behalf of the complainant.

Robert A. Adair, General Counsel, Keco Industries, Inc., Cincinnati, Ohio, on behalf of the respondent.

## DECISION AND ORDER

SPARKS, Judge: The two consolidated cases involving eight alleged violations of the Occupational Safety and Health Act (the "Act") were tried February 10—12, 1982, at Cincinnati, Ohio.

In addition to denying the violations and contesting the penalties, respondent affirmatively asserts "[t]hat the Citations and all actions of the Complainant associated therewith were, and are, vindictive and retaliatory and part of Complainant's continuing effort to harass, embarrass, and damage the Respondent because Respondent has successfully contested similarly groundless Citations . . . ."

Respondent is engaged in manufacturing sophisticated systems for air and space applications (Tr. 459-460).

I

ISSUES

1. Whether respondent violated 29 C.F.R. § 1910.303(a) by using conductors and equipment which had not been approved in that a circuit breaker box had a pigtail socket and socket fuse in place of a circuit breaker.

2. Whether respondent violated 29 C.F.R. § 1910.303(g)(2)(i) by failing to guard live parts against accidental contact in that covers of two electrical switch boxes were missing.

3. Whether respondent violated 29 C.F.R. § 1910.304(3)(1)(i) by failing to protect conductors and equipment from overcurrent in that two 15-amp fuse links were being used in lieu of the required one 15-amp fuse link for the #14 (AWG) gauge conductor in the service box for the Di-Acro press.

4. Whether respondent violated 29 C.F.R. § 1910.304(f)(4) by failing to have a permanent and continuous path to ground from the air conditioner located in the first floor lab office.

5. Whether the conditions described in paragraphs one through four, above, constitute serious violations.

6. Whether respondent violated 29 C.F.R. § 1910.106(e)(6)(ii) by dispensing Class I flammable liquids into containers without electrically interconnecting the nozzle and the container (Tr. 21).

7. Whether respondent violated 29 C.F.R. § 1910.303(f) by failing to have disconnecting boxes identified in that five boxes at column 11-C in the shop area were not marked.

8. Whether respondent violated 29 C.F.R. § 1910.305(g)(1)(iii)(a) by using flexible cord as a substitute for fixed wiring in that flexible cord for the Everett saw in the machine shop was not in conduit and was lying on the floor over a pile of material.

9. Whether respondent violated 29 C.F.R. § 1910.305(g)(1)(iii)(b) by using flexible cords in a prohibited manner in that the flexible cord to the air conditioner located in the lab was run through a wall to an electrical outlet in the next room.

10. The amount of penalty, if any, which is appropriate.

11. What are reasonable periods for abatement.

12. Whether respondent established in fact and in law its second defense which is alleged in its answer as follows:

> That the Citations and all actions of the Complainant associated therewith were, and are, vindictive and retaliatory and part of Complainant's continuing effort to harass, embarrass, and damage the Respondent because Respondent has successfully contested similarly groundless Citations in cases docketed under OSHRC Numbers 78-661, 79-4912, and 79-5145.

Without question respondent has been the object of numerous inspections under the Occupational Safety and Health Act. Mr. Cicchiani, the plant manager, estimated there had been 12 to 14 inspections in the last seven or eight years (Tr. 296). Representatives of OSHA stated there had been 11 inspections (Tr. 452). Respondent asserts these were caused by "a wrongful and insidious relationship between the OSHA and dissident employees . . ." (Tr. 302-305, 320-321).

It seems clear that the management-employee relationship is poor at Keco's plant (Tr. 66). There are allegations that the employees at Keco filed complaints of alleged violations with OSHA as a means of "getting back" at the company (Tr. 322-323). Whether the employees believed the company was unresponsive to safety complaints or whether employees merely wanted to harass the company is not established in the record (Tr. 58-59). The motive of the employees in filing complaints with OSHA is not a relevant issue in this proceeding (Tr. 84, 300-302). In its motion to quash the warrant, the allegations made by respondent were considered and rejected by the Magistrate and two judges of the United States District Court (Ex. J-1—J-4; Tr. 67, 411-413). The inspection warrant was sustained and led to the inspection which resulted in the citations at issue (Tr. 35-36, 52-55, 297, 361-362).

Respondent repeatedly suggests there was a plan "to get Keco" as evidenced by the dismissal of citations in OSHRC docket numbers 78-661, 79-4912 and 79-5145 (Ex. J-5, J-6), and the belated demand for and payment of $135 in penalties which respondent owed since 1975 (Ex. J-7; Resp. brief p. 13).

Respondent attempted to offer evidence concerning the reasons for Judge Chaplin's and Judge Taylor's orders and the motivation for complainant's effort to

collect the old outstanding penalty (Tr. 75-76, 305-306). Such evidence was ruled inadmissible as irrelevant and/or immaterial to the issues of this case (Tr. 84, 289-293, 411-423). Evidence was admitted which would bear directly on the credibility, bias or prejudice of witnesses in this case or would show the inspection was not conducted in a reasonable manner as required in section 8(a) of the Act (Tr. 16-19, 300-302, 307, 534-535). Respondent made several proffers of excluded evidence.

The evidence of record including testimony shows no bias or prejudice against respondent, nor does it reflect any unreasonable conduct by complainant or his agents during the inspection. The evidence establishes that complainant received complaints of alleged safety violations which he considered necessary to investigate (Ex. C-1; Tr. 59-64, 91, 298). The inspection resulted in findings of violations which caused the issuance of citations. Rather than demonstrating a plan to "get Keco", the record indicates the Secretary was merely performing his duty as he understood it to be (Tr. 143-144, 440, 445, 524-526).

## II

## FINDINGS OF FACT

1. Respondent is an employer subject to the Act.

2. An inspection of Keco's plant was undertaken as a result of three employee complaints of alleged safety and health violations at respondent's facility (Ex. C-1; Tr. 60-64).

3. Following an opening conference, a walkaround inspection was made on July 27, 1981. On the inspection team were Compliance Officers Washam and Gilgrist, Plant Manager Cicchiani, Plant Services Manager Howard and Union Representative Hustead (Tr. 37, 462).

4. During the walkaround inspection, Industrial Hygienist Richard T. Gilgrist observed three drums in a breezeway area. One drum contained toluene, one contained lacquer thinner and a third contained Stoddard solvent (Tr. 38, 45).

5. Toluene used at respondent's plant is a Class I flammable liquid (Tr. 47, 51).

6. Mr. Gilgrist did not see anyone pouring liquids from either of the drums. He did observe a detached nozzle of the type used to attach to 55-gallon drums in a pan of the Stoddard solvent which was below the drum marked Stoddard. It had a wire connected to it with an alligator clip on the end which is normally used for bonding purposes (Tr. 42, 45, 71, 80).

7. Painters use toluene and the lacquer thinner from the drums approximately every other day (Tr. 46).

8. A painter had not been trained to bond containers while pouring the liquid and did not maintain direct contact from one container to the other. A safety can was used which had a flame arrester, but it did not afford the protection of bonding (Tr. 47-48, 70-72).

9. The absence of bonding will permit an electrical spark which may jump between positively charged and negatively charged containers starting a fire (Tr. 48-49, 72-73, 79).

10. The painter did not as a practice hold one can directly in contact with the other container (Tr. 47-48).

11. The evidence does not firmly establish whether the nozzle with the alligator clips was used to effect a bond.

12. An electrical circuit breaker box located near a soldering area door

contained a "pigtail" electrical socket into which an electrical connection had been plugged (Ex. C-2, C-3; Tr. 93-95, 145, 166, 324, 327).

13. The "pigtail" had been plugged into an opening which would normally accommodate a circuit breaker switch. Such "pigtails" are customarily used to hook up a temporary light but in this case was equipped with a fuse and used as a power source for telephone switching gear (Tr. 93-94, 97-99, 100-101, 166).

14. The "pigtail" was not approved electrical equipment for the purpose for which it was being used (Tr. 97-98, 99, 227-228).

15. The circuit breaker box had been maintained in that condition for at least a year (Tr. 102, 174, 195-196).

16. Several hazards are presented by the unapproved use of the "pigtail". In order to change the fuse, because of its location in the box, it would be necessary for a person to pull out the fuse holder with his fingers which would be very close to live parts. There was no disconnect on the box and it was not readily accessible to employees in case of emergency. It was possible for a person to stick a finger into live parts although the likelihood of such an intentional act is remote (Tr. 168-171, 175-178, 187-188, 203-231, 240, 249, 284-285).

17. Although not approved equipment, the "pigtail" could operate as a fuse. If the box were properly covered and a disconnect switch provided, no danger is presented to persons working nearby or in the box (Tr. 252-254, 283-284).

18. At the time of the inspection, respondent had signed a contract to replace its telephone system which would include the entire connection. The installation had been completed by August 14 (Tr. 316, 327, 328, 330, 332, 362).

19. No work had been performed by the telephone company on Keco property to replace the switching equipment prior to July 1, 1981 (Tr. 363).

20. According to Mr. Andrews, the "pigtail" had been at Keco since about 1959 (Tr. 488).

21. An electrical motor starter switch located on the west wall of the welding area did not have a cover over the box (Ex. C-4; Tr. 103B, 107, 333, 368).

22. An electrical outlet located on column 11-A did not have a cover over the box. The receptacle was designed for voltages above 110 (Ex. C-5; Tr. 104, 235, 337).

23. Tests with a biomedical field probe and a volt meter established that the two boxes without covers contained live electrical current (Tr. 105-107, 109-111).

24. Employees were working in the areas near the boxes containing live electrical wiring and could come into contact with live parts (Tr. 107-111, 140, 179, 181, 188-189).

25. Respondent's managers frequently inspect the plant including verifying that covers are on outlets. The plant manager had passed the location of the boxes but had not seen the covers off. The compliance officer did not inquire about the covers or inform others during the inspection of the possible violation. Managerial employees inspect the plant frequently looking for items such as missing electrical covers. The evidence does not show that Keco knew or could have known of the condition (Tr. 180-181, 182-185, 333-336, 339-340, 371).

26. Exposure to live parts by any person at the breaker box containing the "pigtail" and at the two uncovered boxes presents the possibility of death or serious injury (Tr. 189-191, 195, 237-239).

27. Metal bandings when cut can travel through the air and enter uncovered electrical boxes (Tr. 263).

28. Mr. Cicchiani's testimony that the cover for the on/off switch for the fan was on the floor after having been left there "either a few hours or the evening before . . ." is reasonable since work was being performed on the equipment (Ex. R-6, R-7; Tr. 333, 335-336, 343).

29. The covers were replaced during the final conference (Tr. 268).

30. The electrical switch box which services the Di-Acro press contained three cartridge fuses each of which contained two replaceable 15-amp fuse links (Ex. C-6, C-7; Tr. 112, 345).

31. The compliance officer testified that a hazard was present because the conductor wiring was rated for only a 15-amp fuse and the effect of the two replaceable 15-amp fuses was approximately 30 amps (Tr. 116, 118, 156).

32. The compliance offier was informed by one of respondent's electricians that the wiring was 14 gauge size under the American Wire Gauge (AWG) and the type was THHN (Tr. 117, 152-153, 164, 197).

33. According to Table 310-12 of the National Electric Cde, the maximum fuse capacity for 14-gauge wire (AWG), type THHN, is 15 amps (Ex. C-8; Tr. 120-122, 244-245, 268, 272).

34. The Di-Acro press required the protection of a 30-amp fuse (Tr. 151, 359).

35. A 30-amp fuse would provide appropriate protection for 10-gauge wire (AWG), type THHN (Tr. 154).

36. A 10-gauge wire is adequately protected by a 20-amp fuse (Tr. 260, 270).

37. The wire serving the Di-Acro press was actually 10 gauge THW 600 volt (Ex. R-9; Tr. 274-276, 354,512).

38. The 30-amp fuse is adequate protection for the 10-gauge wire servicing the Di-Acro press (Tr. 275, 356).

39. Mr. Joseph L. Zimmerman measured the wire servicing the Di-Acro press and determined that each lead was .105 inches in diameter. By reference to the Machinist's Handbook and with the assistance of Mr. Andrews, respondent's president, he determined that the wire was 10 gauge (Ex. R-10; Tr. 397-401).

40. Mr. Andrews, respondent's president and a graduate engineer, determined that the wire servicing the Di-Acro press was 10 gauge (Tr. 471-476).

41. The independent electrician who replaced the wiring to the Di-Acro press determined that the wire he removed was 10 gauge (Tr. 512).

42. An air conditioner located in the laboratory office area was plugged into a three-prong electrical outlet, but the power cord itself only had two prongs. There were no bonding straps to conduit or grounding rods (Ex. C-9, C-10; Tr. 123, 126).

43. The electrical grounding of the air conditioner was tested by the compliance officer by use of a ground loop impedance tester. The test resulted in a "flickering light" indicating there was not a constant ground (Tr. 128, 186-187, 278, 281-282, 357, 379-380).

44. Complainant's expert witness, Mr. Bland, was of the opinion that an air conditioning circuit which produced a flickering light on the ground loop impedance tester could give an electrical shock to a person coming in contact with it (Tr. 264-247).

45. Mr. Andrews, respondent's president and a highly qualified engineer in heating and air conditioning, was of the opinion the air conditioning unit was

adequately grounded as it was in a metal frame which in turn was in contact with the metal beams of the building which were grounded (Tr. 479, 499, 500-501).

46. Greater weight is given to the tests performed by the compliance officer and it is found that the air conditioning unit was not grounded continuously (Tr. 248).

47. Complainant offered the testimony of Mr. Larry P. Bland who was qualified by his knowledge, skill, experience and training as an expert in electricity and electrical maintenance (Tr. 214, 223-225).

48. The electrical cord for the air conditioning unit located in the laboratory office ran through a hole in the wall to an outlet in an adjacent room or hallway (Ex. C-9, C-13; Tr. 137-138, 483).

49. A flexible cord run through a wall presents a hazard in that the insulation may break down and not be observed. An electrical short could result in starting a fire (Tr. 138).

50. Four electrical disconnect boxes located on a wall near the paint spraying area were not marked or identified as to the purposes of the boxes and the purpose was not evident by their location (Ex. C-11, C-12, C-13; Tr. 129-130, 132, 480).

51. Employer representatives on the walkaround inspection could identify the equipment served by two of the boxes but did not know the purposes of the other two boxes (Tr. 131).

52. The hazard presented to workers nearby is they would not be able to quickly locate the disconnect box in case of an emergency (Tr. 132-133).

53. A flexible electrical cord, approximately 20 feet in length which

provided power to an Everett saw, was not conduit and was stretched across a stack of aluminum stacks (Ex. C-12; Tr. 133).

54. The Everett saw remains at its location in the machine shop but must be repositioned as much as ten feet to handle different types of materials (Tr. 135, 481-482).

55. The flexible cord was a tripping hazard to employees in the area and presents a potential shock hazard in the event the insulation becomes worn or damaged (Tr. 135-316).

III

DISCUSSION

A. OTHER CITATION 1, ITEM 1
(OSHA Citation Number G6639 197 [Tr. 431])

The only item alleged in docket number 81-1975 charges that respondent violated 29 C.F.R. § 1910.106(e)(6)(ii) by dispensing Class I flammable liquids into containers without electrically interconnecting the nozzle and the container.

Section 1910.106(e)(6)(ii) of 29 C.F.R. provides as follows:

> Grounding. Class I liquids shall not be dispensed into containers unless the nozzle and container are electrically interconnected. Where the metallic floorplate on which the container stands while filling is electrically connected to the fill stem or where the fill stem is bonded to the container during filling operations by means of a bond wire, the provisions of this section shall be deemed to have been complied with.

Toluene and lacquer thinner are used by painters about every other day. Toluene is a Class I flammable liquid to which the cited provisions apply.

The compliance officer did not see the liquid being poured but by talking with a painter learned that he had not received training regarding bonding, used a safety

can while pouring the liquid and did not regularly make contact between the containers while pouring.

The compliance officer had observed a nozzle and wire of the type used to effect bonding and the record does not affirmatively negate the possibility that it was used while pouring toluene (Tr. 45). The evidence is insufficient to make a prima facie showing of noncompliance and the citation must be vacated.

B. SERIOUS CITATION 1, ITEM 1
(OSHA Citation W8484 184)

Item one alleges a serious violation in that an unapproved "pigtail" was used in a circuit breaker box. The cited regulation, 29 C.F.R. § 1910.303(a), provides as follows:

> Approval. The conductors and equipment required or permitted by this subpart shall be acceptable only if approved.

The evidence establishes that an unapproved "pigtail" was in use which created a hazard for employees who had to service the box and also exposed workers nearby to the hazard. Respondent implies the "pigtail" was in the box for only a short period of time and had been placed there by employees of the telephone company. The weight of the evidence supports the finding, however, that the "pigtail" had been in use for at least a year and respondent knew or should have known of the condition. The violation has been proved.

C. SERIOUS CITATION 1, ITEM 2

Item two of the serious citation is based on the observation that two electrical boxes containing live parts were observed and photographed during the walkaround inspection (Ex. C-4, C-5).

Section 1910.303(g)(2)(i) of 29 C.F.R. provides:

> Guarding of live parts. (1) Except as required or permitted elsewhere in this subpart, live parts of electric equipment operating at 50 volts or more shall be guarded against accidental contact by approved cabinets or other forms of approved enclosures, or by any of the following means:

Respondent acknowledges the boxes were uncovered at the time of the inspection but contends the covers were on the floors nearby where they had been placed by mechanics working on the boxes either earlier that morning or the day before. The covers were not seen on the floor by the compliance officer, but neither did he ask the company official about the location of the covers or advise them of his observations about the missing covers. Mr. Bland, complainant's expert witness, acknowledged that it was a common practice for workmen to place a cover below where work was being performed and to fail to immediately replace the cover after the work was completed (Tr. 265). Evidence is lacking that the company knew or should have known of the violative conditions as required by section 17(k) of the Act. A serious violation cannot be sustained and the item is vacated.

D. SERIOUS CITATION 1, ITEM 3

Complainant alleges that the cartridge fuses for the Di-Acro press provided inaequate protection and therefore violated 29 C.F.R. § 1910.304(e)(1)(i) which provides:

> Overcurrent protection. (1) 600 volts, nominal, or less. The following requirements apply to overcurrent protection of circuits rated 600 volts, nominal, or less.
>
> (i) Protection of conductors and equipment. Conductors and equipment shall be protected from overcurrent in accordance with their ability to safely conduct current.

The preponderance of evidence establishes, however, that the wiring was not 14 gauge but 10 gauge (AWG) and was adequately protected by the two 15-amp link fuses. Accordingly, the item will be vacated.

E. SERIOUS CITATION 1, ITEM 4

Complainant alleges that the air conditioner was not adequately grounded constituting a violation of 29 C.F.R. § 1910.304(f)(4) which provides as follows:

> Grounding path. The path to ground from circuits, equipment, and enclosures shall be permanent and continuous.

Although the opinion of Mr. Andrews that the ground was adequate is entitled to considerable weight, he did not perform any tests. The tests performed by the compliance officer indicated the ground was not permanent and continuous and are convincing that a violation existed and will be affirmed. The conditions create the hazard of an electrical shock and could cause death or serious bodily injury. Keco could and should have become aware of the conditions by performing similar tests.

F. OTHER CITATION 2, ITEM 1

The citation alleges that disconnect boxes were not adequately marked in order to determine their purposes, thereby violating 29 C.F.R. § 1910.303(f) which provides:

> Identification of disconnecting means and circuits. Each disconnecting means required by this subpart for motors and applicances shall be legibly marked to indicate its purpose, unless located and arranged so the purpose is evident. Each service, feeder, and branch circuit, at its disconnecting means or overcurrent device, shall be legibly marked to indicate its purpose, unless located and arranged so the purpose is evident. The markings shall be of sufficient durability to withstand the environment involved.

Four disconnect boxes at column 11-C were not marked so as to determine the purposes of the boxes and were not so located or arranged so that the purposes were evident (Ex. C-11). Company officials on the walkaround could state the purposes of two boxes but not the other two. An "other than serious" violation is established.

G. OTHER CITATION 2, ITEM 2

The flexible cord to the Everett saw was an improper substitute for fixed wiring under the conditions proved in the record. A violation of 29 C.F.R. § 1910.305(g)(1)(iii)(a) is established. The section provides as follows:

> Unless specifically permitted in paragraph (g)(1)(i) of this section, flexible cords and cables may not be used:
> (a) As a substitute for the fixed wiring of a structure;

Even if it is necessary to move the saw as much as ten feet, only a much shorter flexible cord would be warranted. The conditions show a violation of the cited regulation.

H. OTHER CITATION 2, ITEM 3

The compliance officer observed that flexible cord from an air conditioner was run through a wall to an outlet in an adjoining room or hallway. The condition was cited under 29 C.F.R. § 1910.305(g)(1)(iii)(b) which provides:

> Unless specifically permitted in paragraph (g)(1)(i) of this section flexible cords and cables may not be used:
>
> * * *
>
> (b) Where run through holes in walls, ceilings, or floors;

It is not disputed that the condition existed as described by the compliance officer. A violation has been established.

## IV

## PENALTIES

In considering the appropriate penalty, complainant determined respondent had approximately 300 employees and did not adjust the penalty due to the size of the employer. Because of several prior inspections, no adjustment was made due to prior history. A reduction of 20% was made, however, on the grounds the respondent had exhibited "good faith" (Tr. 139, 141-143).

For the two serious violations of citation one which were found to have been proven, the Secretary proposed penalties of $320 for item one and $240 for item four.

Item one involved the unapproved "pigtail" in the circuit breaker box. It was shown the condition had existed for a long period of time. Although the chances of an accident were not great, the consequences, if an accident did occur, electrical shock, would likely be death or very serious injury. A penalty of $320 is reasonable considering all the conditions.

Item four concerned the inadequately grounded air conditioner. Again the consequences of an electrical shock would likely be death or very serious injury. The air conditioner was operated only in the summer so the time employees were exposed to injury was not as long. Also, the hazard would not be as readily apparent to management as would the unapproved "pigtail". The proposed penalty of $240 is appropriate.

V

## ABATEMENT

At least one of the conditions found to be in violation of the Act, serious citation one, item one, use of the unapproved "pigail", was abated prior to the date of the hearing.

The remaining violations can and should be abated within ten days following the date this order becomes final. Materials necessary to abate the conditions are readily available and the labor required to make such corrections would not be prohibitive.

VI

## CONCLUSIONS OF LAW

1. The Review Commission has jurisdiction of the parties and the subject matter.

2. The respondent violated 29 C.F.R. § 1910.303(a) and 29 C.F.R. § 1910.304(f)(4) under conditions constituting serious violations of the Act.

3. Penalties of $320 and $240 are appropriate for the violations.

4. The respondent violated 29 C.F.R. § 1910.106(e)(6)(ii), 29 C.F.R. § 1910.305(g)(1)(iii)(a) and 29 C.F.R. § 1910.305(g)(1)(iii)(b) under conditions constituting other than serious violations of the Act.

5. No penalty is appropriate for the other than serious violations.

6. Respondent did not violate other citation one, OSHA number G6639 187, item one.

7. Respondent did not violate 29 C.F.R. § 1910.303(g)(2)(i) and 29 C.F.R. § 1910.304(e)(1)(i) of serious citation one.

8. Abatement periods extending ten days beyond the date of the final order are reasonable and appropriate.

## ORDER

It is ORDERED:

1. Other citation one, item one, OSHA # G6639 187, is vacated.

2. Serious citation one, item one, is affirmed and a penalty of $320 is assessed.

3. Serious citation one, item two, is vacated.

4. Serious citation one, item three, is vacated.

5. Serious citation one, item four, is affirmed and a penalty of $240 is assessed.

6. The following other than serious violations are affirmed without penalty:

   (a) Other citation two, item one

   (b) Other citation two, item two

   (c) Other citation two, item three

7. All violations shall be abated within ten days after this order becomes final.

Dated this 20th day of May, 1982.

Joe D. Sparks

JOE D. SPARKS
Judge

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1515 Broadway, Room 3800
New York, New York 10036

## NOTICE OF DECISION

Secretary of Labor v. KENNETH J. HERMAN, INC.
OSHRC Docket No. 81-1664

1. Enclosed is a copy of my decision. It will be filed with the Commission on May 25, 1982, and will become the final order of the Commission on June 24, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is June 24, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

DAVID G. ORINGER
JUDGE, OSHRC

Date: May 5, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>KENNETH J. HERMAN, INC.,<br>Respondent. | OSHRC DOCKET<br>NO. 81-1664 |

Appearances:

FOR THE SECRETARY OF LABOR

Francis V. LaRuffa, Regional Solicitor;
William G. Staton, Esq., of Counsel,
U. S. Department of Labor
1515 Broadway, Room 3555
New York, New York 10036

FOR THE RESPONDENT

Kenneth J. Herman, President
Kenneth J. Herman, Inc.
67 Albany Avenue
Amityville, New York 11701

DECISION AND ORDER

ORINGER, JUDGE: This a proceeding under Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, et seq., (hereinafter referred to as "the Act"), to review a citation issued by the Secretary of Labor, (hereinafter sometimes referred to as "Complainant"), pursuant to Section 9(a) of the Act, and a proposed assessment of penalties thereon issued, pursuant to Section 10(a), of the Act.

This cause arose as a result of one citation being issued against the Respondent by the Complainant, alleging a serious violation of the standard set forth at 29 CFR 1926.500(d)(1) and proposing a penalty of $250.00 therefor.

The description of the allegation of violation in this case reads as follows:

CITATION NO. 1 FOR SERIOUS VIOLATION

| Standard, Regulation or Section of the Act Allegedly Violated | Description of Alleged Violation |
|---|---|
| 29 CFR 1926.500(d)(1) | Open-sided floors or platforms, 6 feet or more above adjacent floor or ground level, were not guarded by a standard railing or the equivalent on all open sides:<br><br>38-18 Queens Boulevard, 2 extension trestles used to support aluminum platform, 10' 6" high 12" wide and 24' long - spanning a 22' distance, outboard side exposed. [sic] |

TEXT OF THE STANDARD INVOLVED HEREIN

| Standard, Regulation or Section of the Act Allegedly Violated | Text of Standard |
|---|---|
| 29 CFR 1926.500(d)(1) | 500(d) Guarding of open-sided floors, platforms, and runways<br><br>1. Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f)(i) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing |

| Standard, Regulation or Section of the Act Allegedly Violated | Text of Standard |
| --- | --- |
| 29 CFR 1926.500(d)(1) (Cont'd) | shall be provided with a standard toeboard wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard. |

## THE ISSUES

1. Whether or not the Respondent, Kenneth J. Herman, Inc., was in violation of the standard set forth at 29 CFR 1926.500 (d)(1)?

2. In the event that a violation by this Respondent is found proven, of the standard set forth at 29 CFR 1926.500(d)(1), was the violation properly characterized as "serious"?

3. In the event a violation is found proven, what is the appropriate penalty?

## STATEMENT OF THE CASE

The instant case has an unusual history. The case was originally tried before Judge James P. O'Connell, who left the Commission prior to writing a decision. Subsequent to his leaving the Commission, the case was reassigned to the undersigned.

This tribunal offered the parties three choices. In the first instance, they could settle the case; in the

second instance, they could waive credibility findings and allow the undersigned to render a decision on the record or they could exercise a third option and have the case retried. The parties opted for re-trial of the case. This tribunal advised both sides on the record, that in the event there was a conflict of testimony between the original record and the record made before this tribunal, such discrepancies might well be considered. No essential discrepancies having been found or claimed by the parties, any credibility findings made are on the strength of the record made in the proceeding before this tribunal.

The president of the corporation represented the Respondent in a competent manner.

OPINION

In this case, the Respondent was placing a metal front on a one-story bank building.

On his arrival at the worksite, the compliance officer observed two employees of the Respondent working on a platform made of aluminum approximately 24 feet long and 1 foot wide which had no fall protection for anyone working on the platform. The span of the platform was approximately 22 feet in length. At either end of the platform it was suspended between an A-frame ladder reinforced by a trestle ladder on each side.

The compliance officer testified and the Respondent's witnesses do not dispute that when the Secretary's representative

first viewed the platform and the men working on it, there was no fall protection whatsoever.

It is the Respondent's argument that he only sends up safe people to work on the scaffold and they know how to handle themselves when working with height. He also argued that to put guardrails on a one foot wide platform would not give them enough room to work and a wider platform would be hazardous because public passing by might bump in to it.

The standard specifically requires that every open-sided platform six feet or more or above adjacent floor or ground level, shall be guarded by a standard railing or the equivalent. Accordingly, giving the Respondent the best of the evidence, a violation existed. Guardrails would not have made the job impossible of performance, nor would it have increased the hazard of working on the platform.

Moreover, Respondent's president admitted in the first trial of this cause before Judge O'Connell and in the instant cause before the undersigned, that the proper type of scaffold for this job was a rolling scaffold which contained guardrails on each side. Thus, the evidence is clear and unequivocal that the Respondent knew how to abate such a fall hazard. Certainly the fact that the Respondent claims that the foreman in charge of this job has not been involved in a fall accident previously, is no defense to the citation.

The record does reflect that Respondent is a safety-minded employer, uses the newer type tools, tries to keep the best equipment but in this case Respondent clearly violated the standard despite knowing a proper method of abating the hazard. Accordingly, the Secretary has proven the violation.

The Respondent knew of the lack of protection against fall hazards.

In the event of an accident, serious injury could have occurred. Certainly a fall in excess of six feet and in this case what appears to be approximately ten feet could well have resulted in death or serious injury. Accordingly, the violation proven must be characterized as serious.

Insofar as penalty is concerned, the employer's safety-mindedness is clear. It does use the newest equipment and tools, attempts to keep equipment that complies with OSHA and, accordingly, such conduct must be taken into consideration when assessing a penalty.

In view of all of the elements involved and the type of operation run by the Respondent, this tribunal finds a penalty of $100.00 reasonable and appropriate in the premises. The Respondent must heed this caveat however, in the future, in the event it must use a narrow scaffold such as this one, it must use the rolling scaffold described by the Respondent's President Herman as the proper type of equipment on a job such as this one, if it deems the platform too narrow to equip it with standard guardrails.

The record reflects that both Mr. Giangreco, the Secretary's representative and Messrs. Stetson and Herman, the Respondent's witnesses possess long years of experience in the construction field. The Secretary's representative has, in addition, training in the safety area. The standard is unequivocal in its requirements and the evidence is incontrovertible insofar as the lack of fall protection is concerned. Accordingly, the violation was proven. The testimony of record also reveals that a fall of ten feet to a concrete ground below which was a possibility in this case, could result in death or serious physical harm. Accordingly, the violation was proven to be serious.

Insofar as abatement is concerned, assuming the Respondent did not desire to use standard guardrails on either side of a one-foot wide platform as well as on the two ends, it could have used the rolling platform described by the Respondent which contained guardrails and thus fall protection for men working thereon. Certainly the rolling platform would have been a feasible means of abatement as it was described by Mr. Herman during his testimony.

The Respondent's defense pointed out that Stetson felt safe on the scaffold. This is a poor argument in view of the standard here involved and its explicit requirements, particularly in view of the fact that President Herman himself, on page 94 of the transcript stated that "the whole

scaffold [sic] should have been scrapped for safety reasons . . ." Mr. Herman's candidly honest testimony reflected his opinion of the platform as unsafe and page 95 of the transcript disclosed his opinion that a rolling scaffold 2 to 2 1/2 feet with guardrails would have abated the hazard.

The method of abatement described by Mr. Herman may have been superior to that suggested by the compliance officer, Mr. Giangreco, but that does not obviate the fact that a hazard existed that violated the standard. Accordingly, the allegation of violation of the standard set forth at 29 CFR 1926.500(d)(1) must be affirmed.

Having heard the testimony and observed the demeanor of the witnesses and having considered the same, together with the citation, notification of proposed penalty, notice of contest, pleadings, representations, stipulations and admissions of the parties, it is concluded that the preponderance of the credible evidence of record supports the following

## FINDINGS OF FACT

1. The Respondent, Kenneth J. Herman, Inc., is incorporated in the State of New York and does business in the entire tri-state area (Tr. 5 & 6).

2. The Respondent never filed for a variance from the standard set forth at 29 CFR 1926.500(d)(1) (Tr. 10).

3. At the time of the inspection herein concerned, the Respondent was placing a metal front on an existing store front on a one-story building that was occupied by a bank (Tr. 16).

4. The employees were cutting metal pieces to size and taking the metal pieces up a ladder and installing them on the building utilizing an electric drill with a screwdriver head (Tr. 16).

5. The two employees of the Respondent who were working were at a height of approximately 10 feet 6 inches off the ground. The platform was approximately 1 foot or 12 inches wide and had 22 feet in length as working space. The platform was between the beams on A-frame ladders reinforced by trestle ladders stabilizing the ends of the platform (Tr. 17).

6. The platform had no fall protection whatsoever (Tr. 30 and 80).

7. It was the opinion of the Respondent's president that the whole scaffold was unsafe and should have been scrapped for safety reasons (Tr. 94).

8. In the opinion of the Respondent's president, the safest method of working would have been with a rolling scaffold provided with guardrails (Tr. 95).

9. The Respondent however, did not use a rolling scaffold with guardrails at the time that the inspection took place and in fact the platform had no fall protection whatsoever (entire record).

Based on the aforementioned findings of fact, opinion and the entire record, the Judge makes the following

CONCLUSIONS OF LAW

1. At all times herein mentioned, the Respondent, Kenneth J. Herman, Inc., was engaged in a business that affected commerce within the meaning of Section 3(5) of the Occupational Safety and Health Act of 1970 and this tribunal has jurisdiction to hear and decide the within controversy.

2. This Respondent, at the time of the inspection herein concerned, was in serious violation of the standard set forth at 29 CFR 1926.500(d)(1) and a penalty of $100.00 is appropriate therefor.

O R D E R

In view of the foregoing, good cause appearing therefor, it is ORDERED that:

The allegation of serious violation by this Respondent, of the standard set forth at 29 CFR 1926.500(d)(1), is AFFIRMED and a penalty of $100.00 is ASSESSED therefor.

SO ORDERED.

DAVID G. ORINGER, JUDGE, OSHRC

Dated: May 25, 1982
New York, New York

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| | (Judge's decision) | | 34/B9 |
| 76-4278 | PRESTRESSED SYSTEMS, INC. [remand] | 6/29/82 | 34/C7 |
| | (Judge's decision) | | 34/C10 |
| 79-2827 | METRO ELECTRIC, INC. | 6/29/82 | 34/E12 |
| | (Judge's decision) | | 34/E14 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
|---|---|---|---|---|

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

June 25, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Jones & Laughlin Steel Corporation

OSHRC DOCKET NO. 76-2636

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

- Counsel for Regional Litigation
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FOR EMPLOYER

- Daniel H. Minnick, Esq.
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  Legal Division
  3 Gateway Center
  Pittsburgh, Pa. 15263

FOR EMPLOYEES

-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

OFFICE OF THE JUDGES'
Occupational Safety & Health Review Commission
1515 Broadway
Room 3800
New York, N.Y. 10036

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 76-2636 |
| JONES & LAUGHLIN STEEL CORPORATION, | : | |
| Respondent. | : | |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

An employee of Respondent, Jones & Laughlin Steel Corporation ("J&L"), was killed in an accident involving an overhead electric crane at J&L's Aliquippa, Pennsylvania steel mill. The Secretary of Labor ("Secretary") issued a citation charging that J&L had violated section 5(a)(1), 29 U.S.C. § 654(a)(1), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act").[1/] The citation alleged that J&L had not instructed its motor inspectors in Stripping Yard Crane No. 7 concerning proper crane boarding procedures and hazards associated with improper crane boarding.[2/] A penalty of $800 was proposed. Administrative

---

1/ Section 5(a)(1) of the Act provides that "[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

2/ The Secretary's complaint amended the citation to add the following language:

> and there was not on that date, nor prior thereto, a safety program with systematically enforced work rules which would effectively compel the motor inspectors and other employees exposed to hazards associated with the boarding of cranes to follow safety procedures directed to those hazards.

Law Judge Joseph Chodes vacated the citation on the basis that J&L had adequately instructed its employees on proper procedures and that the Secretary failed to show that J&L had not taken adequate measures to implement its crane boarding safety rules. For the reasons set forth below, we affirm.

I.

J&L's Aliquippa Works, a vast facility, occupied a site six miles long and employed 11,000 employees. Its operations were organized into about 120 divisions, each headed by a general foreman. There were more than 100 overhead cranes at the facility.

On the morning of the fatality, motor inspectors John Plonka and Blaise Churney were assigned to change the ram brake shoes of electric crane No. 7, located in the stripper yard. Crane No. 7, a "stripper" crane, was a large overhead crane sixty feet wide mounted on parallel runways between forty and sixty feet above the ground. The ram brakes were on the crane above the level of the runways. The cab from which the crane operator controlled the crane was twenty to thirty feet below the level of the runways and twenty to thirty feet above the ground.[3/]

The job classification of motor inspector, to which Plonka and Churney were assigned, was a "sixteen point" job, the highest level non-supervisory job in J&L's maintenance department. To attain this position, an employee had to work his way up a series of maintenance jobs and pass a battery of tests. Motor inspectors performed crane inspection, troubleshooting, and electrical repairs. Plonka had been a motor inspector for about twenty years. Churney, a motor inspector for one year, had worked on overhead electric cranes for about eight years and had a total of fifteen years with J&L.

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3/ Two witnesses gave varying estimates of the height of the crane cab and the runways.

After receiving instructions to change the brake shoes from Fred D'Antonio, crane repair foreman, Plonka and Churney proceeded to the crane boarding station, where they waited for the brake shoes to be brought to them. The boarding station was twenty to thirty feet above the ground, the same height as the crane operator's cab. After waiting for some time without receiving the brake shoes, the two employees walked up a stairway to one of the crane runways. The motor inspectors waited while the crane, approximately 100 yards away, cleaned up the yard with a magnet. When it appeared that the No. 7 crane was not going to return to the boarding station, which it normally did upon the completion of a particular task, Plonka and Churney started to walk north along the runway towards the crane.[4/] The crane was above a "drag," several molds filled with hot steel, that was to be stripped by the crane. At that point, foreman D'Antonio noticed the two motor inspectors on the runway and told them to "hold up." D'Antonio called the operator of crane No. 7 to come out of the crane cab. After determining that the drag was to be stripped before the brake shoes were to be changed, D'Antonio instructed the motor inspectors to go to the south corner and wait for the crane. According to D'Antonio, Churney and Plonka acknowledged him by shaking their hands and nodding their heads.[5/]

Plonka and Churney remained on the runway, however, and watched the stripping operation for a short time. Then they decided to board the crane.

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4/ By this time, the brake shoes had arrived. For reasons not explained, however, Plonka and Churney moved to board the crane without the brake shoes.

5/ The crane operator testified that the two motor inspectors were instructed to go to the south corner and to wait for him to finish stripping the drag. He observed Plonka and Churney start to walk toward the south end. Churney, however, did not recall being told to wait at the south end of the runway. Although D'Antonio was standing 40 to 60 feet below the two motor inspectors, both D'Antonio and Churney testified that they had no difficulty hearing each other.

Churney, "knowing" that the crane would not move when it was over a mold, walked onto the crane. Upon reaching the trolley of the crane, Churney attempted to ask the crane operator to stop the crane so that Plonka could board. However, the crane's speaker system was not functioning and the crane continued moving from mold to mold stripping the steel ingots. Plonka, apparently thinking that the crane had stopped, walked up the crane runway. However, the crane moved toward Plonka, and he was pinned between the crane bridge guardrail and an adjacent upright column along the runway. Plonka died of the injuries he sustained.

At the hearing, J&L admitted that it was a recognized hazard for an employee to board a crane without notifying the crane operator. To protect against this hazard, J&L had a work rule requiring its employees to notify the crane operator whenever they intended to board a crane. After such notification, the crane operator was required to turn the main electric switch of the crane off and to observe the employees boarding the crane. J&L equipped its cranes with red and green lights which indicated whether the crane is energized.

J&L's work rules also required employees to board cranes only from designated boarding platforms and prohibited employees from walking upon crane runways unless authorized to do so by the "person in charge." However, when a crane was broken down in a location away from the boarding platform, it was necessary for repair personnel to board a crane from the crane runways. Motor inspectors, in performing repairs, did not need to obtain permission from their foreman each time they walked on the crane runways, but they still were required to notify the crane operator prior to boarding a crane.

J&L's safety rules and procedures relating to cranes were contained in a booklet entitled, Safety Rules for Electric Overhead Traveling Cranes or Gantry

Crane Operators, Crane Directors, Hook-up Men, Repairmen (Cab Operated). Instructions in the booklet relating to boarding cranes were comprehensive and unambiguous. The booklet, first prepared in 1949 and updated periodically, was available in various units of J&L where such rules would apply and was also referred to on a sign, "Notice to Crane Operators," which was posted in every crane cab. The booklet was also, at least to some extent, distributed to individual employees. Plonka was issued a copy of this booklet in 1952. Three employees testified that they received copies of this booklet when they began working in the stripper yard, in each instance over 20 years previously. Churney and two other employees, however, testified that they never received the booklet.

Employees experienced in crane operations testified that they knew the crucial crane boarding rules and procedures, including use of prescribed boarding areas whenever possible in getting on and off cranes, notification of the crane operator before boarding a crane, and the requirement that cranes not be boarded when the green indicator light was on. For the most part, the employees' knowledge of the safety rules was acquired on the job by observation of and discussion with other employees. Several employees, however, further testified that on occasions they boarded cranes without notifying the crane operator, but that they knew they were violating J&L's safety rules. Two crane operators, Kozlina and Bielorucki, testified that violations of crane boarding rules occurred about 10% of the time.[6/]

Churney and another motor inspector stated that they knew they were violating J&L's safety rules when they boarded cranes without notifying the crane operator.

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6/ Millwright helper Mancini testified that he boarded the crane from the crane runway about 85% of the time. However, he generally boarded a crane only after it was deenergized for repairs. Mancini also testified that he rarely worked in the stripper yard.

They both expected discipline or a reprimand if a violation was discovered. Kozlina and Bielorucki also expected that employees would be reprimanded if management learned about crane boarding violations. Kozlina testified that, when employees had boarded his crane without notification, he had become angry and told them "I don't care for it." However, he did not notify management about such violations because he did not want to "squeal" on employees and get them in trouble.

The superintendent of the Aliquippa Works and the crane repair foreman testified that, prior to the accident, they had never observed or known of any crane boarding violations. The superintendent testified that, although there was an average of two supervisors in the stripper yard for each shift, discovery of crane boarding violations was difficult because employees were reluctant to report violations to management, and it would be hard to come across an unreported violation. If employees failed to comply with J&L's safety regulations, they were verbally reprimanded, and, in more serious cases, disciplined with "written reprimands, time off, further suspension, and even termination." Discipline procedures were provided in the union contract, and salaried supervisory employees also had been disciplined for safety violations.

J&L's safety program at its Aliquippa Works included safety seminars attended by persons selected by union and management, the posting of signs around the plant, and awards to divisions with the best housekeeping. A field safety inspector, whose duties were to attend safety meetings, look for unsafe practices, and review accident reports, was assigned to the Steel Works Department and reported to J&L's safety administrator. A joint labor-management safety and health committee also met monthly.

Supervisory employees and foreman D'Antonio testified that superintendents held monthly safety meetings with general foremen. The general foremen met

monthly with the foremen under their direction, who in turn were required to hold two safety meetings per month. However, some of J&L's employees testified that safety meetings were held less frequently.

The general foreman of each plant division was required to make a job safety analysis each month of some operation within the division. A job safety analysis of crane No. 7 had not been done before the accident because the crane had been in operation only five months.

Compliance Officer O'Matz testified that a crane boarding fatality occurred at J&L's Pittsburgh plant in 1973.[7/] That fatality involved a "trainee-type" person who was crushed between the crane and a column when he was attempting to board a moving crane. No citation was issued under section 5(a)(1) of the Act as a result of that incident. Safety administrator Gilberg testified that, prior to Plonka's death, there had never been any similar crane boarding accidents at the Aliquippa Works.

II.

Judge Chodes found that the failure of an employee to notify a crane operator of his intention to board a crane was a hazardous practice and was

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7/ Judge Chodes refused to consider this testimony on the basis that it concerned a different plant. The Secretary argues that evidence of this fatality was of some relevance to this proceeding and should not have been excluded from evidence. We agree. See Bethlehem Steel Corp., 81 OSAHRC 86/A2, 9 BNA OSHC 2177, 1981 CCH OSHD ¶ 25,645 (No. 77-617, 1981) appeal docketed, No. 81-2802 (3d Cir. Oct. 30, 1981); York Heel of Maine, Inc., 81 OSAHRC 114/D14, 9 BNA OSHC 1803, 1981 CCH OSHD ¶ 25,011 (No. 78-5920, 1981). However, consideration of the Secretary's offer of proof about this incident does not affect our disposition. The occurrence of the fatality at the Pittsburgh facility must be balanced against the absence of crane boarding accidents and lack of management knowledge of crane boarding violations at the Aliquippa facility. At Aliquippa, where there were over one hundred cranes and numerous employees getting on and off cranes every day, there had been no prior crane boarding accidents similar to the incident at issue in this case. Therefore, we do not agree with the Secretary that the fatality at Pittsburgh should have provided notice to J&L of a need to change its safety program with respect to crane boarding at the Aliquippa facility.

recognized as hazardous by J&L in its crane boarding rules. However, the judge determined that J&L's employees were adequately instructed on proper crane boarding procedures, including the requirement of prior notice to the crane operator of intention to board a crane, and thus he concluded that J&L did not violate section 5(a)(1). The judge noted that all the employees who testified were aware of the hazards associated with crane boarding. While the rule requiring notice to the crane operator was occasionally disregarded, Judge Chodes found that such instances were not brought to the attention of any level of J&L's supervisory structure. The judge thus concluded that J&L with the exercise of reasonable diligence could not have known of breaches of its safety rules. Additionally, the judge determined that the accident resulting in Plonka's death "would not have occurred but for the action of two employees who had full knowledge that what they did was contrary to their own appreciation of the risks involved and in direct violation of the respondent's safety rules."

The judge determined that a specific program for monitoring employee adherence to crane boarding rules was not necessary as of the date of the accident since all J&L employees who worked around cranes were familiar with the rules and since no violations of these rules had come to the attention of supervisors. Additionally, the judge concluded that failure to implement a monitoring program was not shown to be a recognized hazard. The judge also noted that, while J&L disciplined employees who violated safety rules, no such disciplinary action had been taken with respect to crane boarding rules since no violations of those rules were known by J&L's supervisory personnel. Finally, the judge found that J&L's failure to conduct a job safety analysis study of crane No. 7 was not a recognized hazard.

III.

The Secretary contends that J&L failed to implement three feasible precautions that would have materially reduced the likelihood that J&L's employees would improperly board cranes, and that because it did not implement these three precautions, J&L violated section 5(a)(1) by failing to free its worksite of recognized hazards.[8/] The Secretary maintains that J&L's safety program was deficient in that J&L should have distributed copies of safety rules to all employees, instituted a program of formal instruction or discussion of crane boarding rules, and systematically monitored employee compliance with crane boarding rules.

In order to establish a section 5(a)(1) violation, the Secretary must prove: (1) the employer failed to render its workplace free of a hazard, (2) the hazard was recognized either by the cited employer or generally within the employer's industry, (3) the hazard was causing or was likely to cause death or serious physical harm, and (4) there was a feasible means by which the employer could have eliminated or materially reduced the hazard. Baroid Division of NL Industries, Inc. v. OSHRC, 660 F.2d 439 (10th Cir. 1981); St. Joe Mineral Corp. v. OSHRC, 647 F.2d 840 (9th Cir. 1981); National Realty & Construction Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973); Whirlpool Corp., 79 OSAHRC 32/A14, 7 BNA OSHC 1356, 1979 CCH OSHD ¶ 23,552 (No. 9224, 1979), rev'd on other grounds, 645 F.2d 1096 (D.C. Cir. 1981).

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8/ The Secretary argues that the judge also erred in requiring proof of industry recognition of feasible means of abating a hazard. In the Secretary's view, the relevant standard is whether such precautions are feasible, not whether they are recognized by the industry.

An employer's duty under section 5(a)(1) is to free its workplace — to the extent feasible — of recognized hazards that are likely to cause death or serious injury. When elimination of a particular hazard requires employees to follow certain procedures, the employer must take the steps necessary to assure that employees in fact follow those procedures. General Dynamics Corp., Quincy Shipbuilding Division v. OSHRC, 599 F.2d 453, 458 (1st Cir. 1979); National Realty & Construction Co., supra. An employer is not, however, a guarantor of its employees' safety and cannot be expected to guard against conduct that is so idiosyncratic that a reasonable safety program would not guard against it. National Realty & Construction Co., supra. An employer is not in violation of section 5(a)(1) if it has established workrules designed to prevent the violation, has adequately communicated workrules to its employees, has taken steps to discover violations of the rules, and has effectively enforced the rule in the event of infractions. See Mercer Well Service, Inc., 77 OSAHRC 178/C6, 5 BNA OSHC 1893, 1977-1978 CCH OSHD ¶ 22,210 (No. 76-2337, 1977).[9/]

In this case, J&L was cited for failure to instruct its employees about hazards associated with crane boarding and for failure to implement a safety program that would compel employees to follow safe crane boarding procedures. The hazards associated with crane boarding are not in dispute, and the Secretary does not contend that J&L's crane boarding rules and procedures

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9/ Since the Secretary failed in this case to demonstrate that J&L had not taken adequate measures to implement its safety rules, Chairman Rowland does not find it necessary to consider at this time whether an employer may properly be required to enforce workrules which have been communicated to employees. For a discussion of the question whether an employer should be required to do anything more than give instructions to employees regarding proper safety procedures, see General Electric Co. v. OSHRC, 540 F.2d 67, 69 (2d Cir. 1976); Borton, Inc., 82 OSAHRC _____, 10 BNA OSHC 1462, 1982 CCH OSHD ¶ 25,983 (No. 77-2115, 1982) (dissenting opinion).

were themselves inadequate. Further, the evidence establishes that J&L's crane boarding rules were sufficient, if followed by employees, to protect against crane boarding hazards.

The Secretary, however, argues that J&L's crane boarding rules were not sufficiently communicated to employees because copies of written rules were not distributed to all employees and because formal instructions or discussion of crane boarding rules was infrequent or, according to some J&L employees, nonexistent. The Secretary maintains that such measures would assure that all employees knew the crane boarding rules, eliminate employee confusion about the application of such rules, and underscore the importance of complying with the rules.

We disagree. The Secretary's arguments overemphasize the formal aspects of J&L's safety program and fail to give proper significance to its substance. See Texland Drilling Corp., 80 OSAHRC 106/C13, 9 BNA OSHC 1023, 1980 CCH OSHD ¶ 24,954 (No. 76-5307, 1980). Six J&L employees who worked on overhead cranes testified at the hearing, and each of these employees was familiar with the basic elements of J&L's crane boarding rules, i.e., that employees boarding cranes were to notify the operator before boarding and that employees if possible were to board cranes from crane boarding platforms.[10/] The employees also showed appreciation of the hazards associated with crane boarding. Further, testimony by several employees that reprimands or discipline would result if crane boarding

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10/ The Secretary takes exception to the judge's finding that Plonka knew proper crane boarding procedures, contending that Churney's testimony that Plonka knew the rules was "incompetent." However, Churney had not only worked with Plonka for a number of years but had been trained as a motor inspector by Plonka. In Churney's opinion, based on his experience, Plonka was very safety conscious. Thus Churney's statement that Plonka was familiar with crane boarding rules is not only admissible, but credible. In any event, our disposition here is not affected by whether it was shown that Plonka knew the crane boarding rules, since knowledge of the rules was exhibited by the other employees who testified.

violations were detected demonstrates the employees' understanding that compliance with crane boarding safety rules was viewed as important by management.

There is no evidence that violations of J&L's crane boarding rules occurred inadvertently as a result of confusion about the meaning of the rules. Rather, the violations of the rules that were discussed in the testimony were committed by employees who knew they were violating the rules but were taking chances for reasons of convenience.[11/] Therefore, we conclude that additional distribution of crane boarding rules and formal discussion of such rules would not have significantly improved employee safety awareness of crane boarding hazards, employee understanding of proper crane boarding procedures, or employee compliance with these procedures. See Champlin Petroleum Co. v. OSHRC, 593 F.2d 637 (5th Cir. 1979).

J&L did not have a formal program to monitor employee compliance with its crane boarding procedures. However, two supervisors, on the average, were present in the stripper yard, and J&L as part of its general safety program periodically

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11/ The Secretary contends that there was confusion even among J&L's supervisory employees about whether motor inspectors needed to obtain prior authorization from their supervisors each time they walked on the crane runways and about under what circumstances it was proper for employees to board cranes from the crane runways. However, the only employees who did not routinely obtain supervisory permission to walk on the runways were motor inspectors. The mill superintendent testified that it was not necessary for motor inspectors to obtain permission each time they walked on the runways because motor inspectors are authorized to perform all necessary repairs to cranes. Although both Gilberg, the safety administrator, and foreman D'Antonio testified that Plonka and Churney were not permitted under J&L's safety rules to go onto the crane runway in this instance, their opinion was based on the view that the crane was operative and thus could have been brought to the boarding station. Accordingly, the witnesses' testimony is not inconsistent as the Secretary contends. Similarly, with respect to the boarding of cranes from runways, the evidence shows that all such boardings that occurred at J&L's facility were the result of necessity or of a deliberate violation of J&L's safety rules. Therefore, the evidence does not establish that J&L's employees were confused about when they should board cranes from runways.

monitored employee safety compliance. The Secretary argues that J&L's monitoring of employee crane boarding was inadequate and that J&L should have increased its supervision or directed its supervisors to increase their commitment to safety functions.

There is no evidence, however, that J&L should have perceived a need for additional monitoring of crane boarding or that such an effort would have led to the discovery of crane boarding violations. As the judge noted, prior to the fatality no J&L supervisor was aware of employee violations of its crane boarding rules. J&L's employees did not report crane boarding violations to management because they did not want to get their coworkers "in trouble." Additionally, it was difficult for supervisors to spot crane boarding violations if they were not reported, apparently because an employee's failure to notify a crane operator before boarding his crane could not be readily detected from observation and because it was permissible for employees to walk on the crane runways under some circumstances. Moreover, employees engaged in crane boarding would be standing on runways or boarding platforms above the large, busy floor of the stripping yard, thus making observation of them more difficult. In addition, the employees involved in crane boarding here were motor inspectors, the most senior and experienced employees in J&L's entire maintenance department. It was reasonable for J&L to expect that close monitoring of such experienced employees would not be necessary. Therefore, we conclude that under the circumstances of this case J&L's monitoring of employee crane boarding was not shown to be inadequate.

We therefore conclude that J&L did not violate section 5(a)(1) of the Act since the Secretary failed to show what further measures J&L could have taken to render its worksite free of the cited hazard. Accordingly, the judge's

decision vacating the citation and proposed penalty is affirmed.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: JUN 25 1982

J+L
76-2636



COTTINE, Commissioner, dissenting:

In their opinion my colleagues erroneously conclude that the Respondent could not have discovered the continuing, pervasive violations of its safety rule.

I

As the lead opinion states, "J & L admitted that it was a recognized hazard for an employee to board a crane without notifying the crane operator." J & L attempted to counteract the hazards associated with crane boarding by implementing workrules requiring employees to notify the crane operator before boarding and to board cranes from designated platforms unless repairs were to be performed on cranes in areas inaccessible from boarding platforms. Even in this circumstance, notification of the crane operator was required by J & L.

My colleagues recognize that violations of the crane boarding workrule were commonplace. However, they fail to focus on the routine pattern of workrule violations. The lead opinion accurately indicates that there were more than 100 cranes at the Aliquippa worksite and, "numerous employees getting on and off cranes every day . . . ." Lead opinion at n. 7. In its brief on review, J & L refers to the number of electrical overhead cranes at Aliquippa -- "over one hundred, at least." It also makes reference to the usual, everyday practice of boarding the cranes -- "the hundreds of people who have gotten on and off cranes day in and day out for years at this plant. . . ."

My colleagues further cite the testimony of several employees who stated that they knowingly violated the rule by boarding cranes without

notifying the operators. The lead opinion also accurately states that two crane operators, Kozlina and Bielorucki, testified that violations of crane boarding rules occurred about 10% of the time. None of this evidence is rebutted. Thus, the record evidence reveals that 10% of the hundreds of employees who board more than 100 cranes each day do so in a manner admitted by the Respondent to constitute a recognized hazard!

II

Incredibly, my colleagues conclude that a program to monitor for employee compliance was not required because J & L did not know about employee non-compliance. Of course, it did not know of employee non-compliance because it failed to adequately monitor compliance with the workrule.

The lead opinion attempts to support its conclusion that monitoring was not required by stating,

> As the judge noted, prior to the fatality no J & L supervisor was aware of employee violations of its crane boarding rules. J & L's employees did not report crane boarding violations to management because they did not want to get their coworkers "in trouble."

Yet, the supervisors' ignorance of workrule violations was a direct result of their failure to monitor. Furthermore, the need for management monitoring is reinforced by the understandable failure of employees to report one another's workrule violations.

The lead opinion continues:

> Additionally, it was difficult for supervisors to spot crane boarding violations if they were not reported, <u>apparently</u> because an employee's failure to notify a crane operator before boarding his crane could not be readily detected from observation and because it was permissible for employees to walk on the crane runways under some circumstances. Moreover, employees engaged in crane boarding would be standing on runways or boarding platforms above the large, busy floor of the stripping yard, thus making observation of them more difficult. (emphasis added.)

Encountering "difficulty" in spotting a violation does not negate the obligation to do so. As the lead opinion correctly states, "An employer is not in violation of section 5(a)(1) if among other things it . . . has taken steps to discover violations of [workrules]. . . . See Mercer Well Service, Inc., 77 OSAHRC 178/C6, 5 BNA OSHC 1893, 1977-78 CCH OSHD ¶22,210 (No. 76-2337, 1977)." Moreover, as my colleagues amply demonstrate through their equivocation ("apparently"), the record does not indicate why the workrule is even "difficult" to enforce.[1/]

The lead opinion's unsuccessful attempt to support its result continues:

> In addition, the employees involved in crane boarding here were motor inspectors, the most senior and experienced employees in J & L's entire maintenance department. It was reasonable for J & L to expect that close monitoring of such experienced employees would not be necessary.

My colleagues ignore Commission precedent that would lead to a contrary conclusion. Well-settled Commission and courts of appeals precedent holds that an employer has responsibility for providing a safe and healthful workplace and delegation of that responsibility to employees is inconsistent with the purposes and policies of the Act. PBR, Inc., 643 F.2d 890, 895 (1st Cir. 1981); Empire Detroit Steel Division v. OSHRC 579 F.2d 378, 385 (6th Cir. 1978); Atlantic & Gulf Stevedores, Inc. et al v. OSHRC, 534 F.2d 541, 553, 554 (3rd Cir. 1976). As the Commission has stated, "The fact that. . .employees in positions of responsibility thought that deviation from [a safety workrule] was acceptable conduct is persuasive evidence that a requirement to comply with the rule was

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1/ Nor does the record reveal any evidence that it is difficult to observe activity above the work level because that work level is large and busy.

not effectively. . .enforced by the company." Western Massachusetts Electric Co., 81 OSAHRC 63/B13, 9 BNA OSHC 1940, 1945, 1981 CCH OSHD ¶25,470 at p. 31,766 (No. 76-1174, 1981). See also Ted Wilkerson, Inc., 81 OSAHRC 70/D8, 9 BNA OSHC 2012, 2016, 1981 CCH OSHD ¶25,551 at p 31,856 (No. 13390, 1981) (violation occurring in presence of leadman results in rejection of defense to 5(a)(1) violation based on workrule because leadman could have known of violation); United Geophysical Corp., 81 OSAHRC 77/D6, 9 BNA OSHC 2117, 2123, 1981 CCH OSHD ¶25,579 at p. 31,907 (No. 78-6265, 1981), appeal filed, No. 81-4342 (5th Cir. 1981) (lax implementation of safety policy evidenced by supervisor breach). In addition, the Commission has consistently noted that,

> [E]xperienced as well as inexperienced workers may be subject to accidents resulting from inadequate operating procedures, poor training, and employee inadvertence (citations omitted).

Cornell & Company, Inc., 77 OSAHRC 164/F5, 5 BNA OSHC 1736, 1739, 1977-78 CCH OSHD ¶22,095 at p. 26,608 (No. 8721, 1977). See also Hughes Brothers, Inc., 78 OSAHRC 65/A2, 6 BNA OSHC 1830, 1978 CCH OSHD ¶22,909 (No. 12523, 1978) and cases cited. Though the degree of supervision may vary, there is a minimum requirement to protect the health and safety of all employees regardless of their experience.

III

The lead opinion correctly states that,

> When elimination of a particular hazard requires employees to follow certain procedures, the employer must take the steps necessary to assure that employees in fact follow those procedures. General Dynamics Corp., Quincy Shipbuilding Div. v. OSHRC, 599 F.2d 453, 458 (1st Cir. 1979); National Realty & Construction, supra.[2/]

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2/ It is not clear whether Chairman Rowland adheres to this view because he "does not find it necessary to consider at this time whether an employer may properly be required to enforce workrules. . . ." Lead op. at n. 9. He avoids the issue by concluding that the Secretary has failed to demonstrate that J & L failed to implement its safety rules.

Under section 5(a)(1) the employer has the duty to take all feasible steps to eliminate hazardous conduct from its workplace. General Dynamics Corp., Quincy Shipbuilding Div. v. OSHRC, supra; National Realty & Construction Co. v. OSHRC, 489 F.2d 1257, 1266-67 (D.C. Cir. 1973). Beaird-Poulan Div., Emerson Electric Co., OSAHRC , 7 BNA OSHC 1225, 1230, 1979 CCH OSHD ¶23,493 at p. 28,460-6 (No. 12600, 1979); See Brennan v. Butler Lime and Cement Co., 520 F.2d 1011, 1017 (7th Cir. 1975).

As the Commission recently stated, "The nature of an employer's duty to prevent hazardous conduct is the same whether the case arises under section 5(a)(1) or 5(a)(2). The elements of an effective safety program do not depend on the action [sic] of the Act that is allegedly violated." Western Massachusetts Electric Co., supra, 9 BNA OSHC at 1944-45, 1981 CCH OSHD at p. 31,765. The Commission emphasized that, under section 5(a)(2), when employee conduct has resulted in noncompliance with a standard, it is the employer's burden to plead and prove as an affirmative defense that it could not prevent the employee's misconduct. Under section 5(a)(1) the burden is on the Secretary to prove that the cited employer breached its duty to render the workplace free of a hazard and an employer may rebut on the basis that it took all necessary precautions to prevent the occurrence of the violation. 9 BNA OSHC at 1945, 1981 CCH OSHD at p. 31,765-66. As stated by the U.S. Court of Appeals for the 1st Circuit,

> [w]hen the employer's defense is that the hazard occurred as a result of unauthorized and idiosyncratic behavior by its employees, the issue of an employer's training and supervision of its employees automatically arises as part of the employer's showing that it took all feasible steps to avoid the occurrence of the hazard.

General Dynamics, Corp., Quincy Shipbuilding Div. v. OSHRC, 599 F.2d at 459.

IV

In this case the unrebutted evidence that 10% of the hundreds of boardings that occur daily are in violation of J & L's safety rule establishes that the worksite has not been freed of the cited hazard.[3/] The Secretary has thus sustained his burden of proof. J & L has totally failed to rebut this prima facie case. "There is no evidence that Respondent made any efforts to ascertain whether its safety rules were followed. Effective safety enforcement requires a diligent effort to discover and discourage violations of safety rules by employees." Paul Betty dba Betty Brothers, 81 OSAHRC 18/B11, 9 BNA 1379, 1383, 1981 CCH OSHD ¶25,219 at pp. 31,151-52 (No. 76-4271, 1981). Workrules must be enforced through supervision adequate to detect failures to comply with the rules. United Geophysical Corp., supra; Floyd S. Pike Electrical Contractor, Inc., 78 OSAHRC 50/E1, 6 BNA OSHC 1675, 1978 CCH OSHD ¶22,805 (No. 3069, 1978). J & L's failure in this regard is obvious. The violation should be affirmed because J & L failed to rebut the Secretary's evidence establishing a recognized hazard that could have been obviated by implementation of an adequately enforced workrule and because the hazard was likely to, and in fact did, result in death or serious physical injury to an employee.

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3/ In Marson Corp., No. 78-3491 (May 27, 1982), Chairman Rowland recently dissented to the majority's affirmance of a machine guarding violation. He stated that the employer's safety rule was violated "in only a fraction of one percent of the total production operations " and explained that, "Because of the extreme infrequency of the circumstances under which a violation may occur, it is patently unreasonable to expect Marson to predict and prevent every instance of its occurrence." In this case, the workrule violations were not extremely infrequent; they occurred in 10% of the hundreds of daily boardings.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR | : | |
| Complainant | : | DECISION AND ORDER |
| v. | : | OSHRC Docket No. 76-2636 |
| JONES & LAUGHLIN STEEL CORPORATION | : | |
| Respondent | : | |

APPEARANCES:

Matthew J. Rieder, Esq., of Philadelphia, Pennsylvania, for the Secretary of Labor

Daniel R. Minnick, Esq., and Robert C. Gombar, Esq., of Pittsburgh, Pennsylvania, for the Respondent

Chodes, Judge

STATEMENT OF THE CASE

This is a proceeding pursuant to section 10 of the Occupational Safety and Health Act of 1970 (29 U.S.C. §651 et seq., hereinafter referred to as the Act), in which the respondent is contesting Citation No. 3[1/] issued by the complainant against the respondent under the authority vested by section 9(a) of the Act. The citation which was issued on May 20, 1976, alleged that on the basis of an inspection made on May 6, 10 and 11, 1976, of a place of employment

1/ Respondent was also issued Citation No. 2 which contained items 1a and 1b. Item 1a was deleted and item 1b was added to Citation No. 1. Citation No. 1 was not contested and became the final order of the Commission under the provisions of section 10(a) of the Act (29 U.S.C. §659(a)).

located at the Aliquippa Works, Aliquippa, Pennsylvania, the respondent violated section 5(a)(1) of the Act (29 U.S.C. §654(a)(1)), the so-called general duty clause, by failing to furnish its employees employment and a place of employment which was free from recognized hazards that were causing or were likely to cause death or serious physical harm to employees. A penalty of $800 was proposed for the alleged violation.

After the respondent contested the enforcement action and a complaint and answer had been filed by the parties, the case was heard in Pittsburgh, Pennsylvania on March 8 and 9, 1977.

STIPULATIONS (T-6-8, 54)

1. The legal name of the respondent is Jones & Laughlin Steel Corporation and the state of incorporation is Pennsylvania.

2. In May 1976 the respondent was engaged in the manufacturing of steel and steel products by manufacturing them in Pennsylvania and shipping them to locations outside of Pennsylvania. Therefore, respondent is engaged in interstate commerce.

3. Respondent is ranked seventh nationally as a steel corporation in terms of sales and shipments.

4. In 1975 the net income of the respondent was approximately $30.6 million, a 1.8 percent return on sales. Shipments slightly exceeded four million tons of steel.

5. The net worth of respondent as of December 31, 1975, was $839,802,000.

6. On May 4, 1976, the date of the alleged violation, respondent was the employer of John Plonka, whose injury and subsequent death was the basis for the investigation which resulted in this Citation.

7. Mr. Plonka was employed at the Aliquippa Works of the respondent. The respondent is responsible for the control of equipment located at the work site.

8. At the time of the incident, the respondent's work force at Aliquippa Works was approximately 11,000 people, a figure which varies because it includes people who are on vacation, not working because of illness, on leave of absence, or other reasons.

9. The respondent posted the Citation and Notice of Contest and Notice of Hearing on the bulletin board at the north end of the stripper yard, steel works department, Aliquippa Works. This is a common bulletin board in an area where notices are normally posted.

THE ACCIDENT

On May 4, 1976, John Plonka and Blaze F. Churney, motor inspectors, were called over respondent's public address system by Fred D'Antonia, foreman, to change the brake shoes on the ram of Crane No. 7, located in the stripper yard of respondent's Aliquippa Works. They proceeded to the crane boarding station where they waited for the brakes, which weighed 40 pounds each, to be brought to them from a building in another location. The brakes were a long time in coming so they climbed up steps to the crane runway which was about 30 feet above the crane operator's cab and about 60 feet above the ground and watched while the crane cleaned the yard with the magnet. By the time the crane finished the cleaning-up job, the brakes arrived, but instead of the crane coming back south, which would be the normal procedure, the crane stayed at the north end (T-70-77).

Because the crane wasn't coming to the south end, Mr. Plonka and Mr. Churney walked on the runway towards the crane where there were eight buggies of molds with hot steel waiting to be stripped. Fred D'Antonio, foreman, saw the two inspectors on the runway about 40 to 50 feet above (his estimate) and told them to "hold up." Mr. D'Antonio called the crane operator, Wasso Kozlina, Jr., to come out of the crane cab and told him to ask the "steel chaser" to let him (D'Antonio) know whether to strip the heat (steel) or give the crane over to the inspectors to do the brake job. Mr. Wasso contacted the steel chaser and told Mr. D'Antonio the heat was to be stripped before the brakes were replaced. Mr. D'Antonio informed Mr. Plonka and Mr. Churney that the crane would strip the heat first and then they could have the crane. He told the inspectors to go to the south end and wait for the crane. Mr. Churney testified that he did not recall being told by Mr. D'Antonio where to wait until the crane became available (T-78, 79, 81, 369, 370).

Mr. Plonka and Mr. Churney watched the stripping operation for awhile and then decided to go on the crane with the intention of telling the crane operator to stop the crane. Mr. Churney watched the crane when it was over a mold and, "knowing" that it would not move, he boarded the crane. As soon as Mr. Churney reached the crane trolley, he tried to get in touch with the crane operator, Mr. Wasso, through the speaker system, but was unable to do so because the system was broken down. He called to Mr. Wasso to stop the crane and let Mr. Plonka on, but got no response. Mr. Wasso continued to operate the crane, going from mold to mold stripping the steel. Mr. Plonka apparently thought that

the crane had stopped and started up the crane and was pinned between the guardrail and column at the point marked "H" on Exhibit C-1. Mr. Churney tried to have the crane stopped and then turned the power off at the main disconnect. Mr. Plonka died of the injuries he sustained. Mr. Churney testified that the light was green when he and Mr. Plonka boarded the crane and he knew he was violating the crane boarding rules when he did not notify the crane operator that he and Mr. Plonka wanted to board the crane, but he took a calculated risk (T-82, 83, 92-94, 110).

## THE CITATION

The fatality resulted in an OSHA inspection and the issuance of the citation which is the subject of this proceeding. The citation, as amended, alleged the following:

> The employer did not furnish to each of his employees employment and a place of employment which was free from recognized hazards that were causing or were likely to cause death or serious physical harm to his employees in that:
>
> On May 4, 1976, motor inspectors in the following location, were not adequately instructed on the proper crane boarding procedures and/or hazards associated with improper crane boarding, and there was not on that date, nor prior thereto, a safety program with systematically enforced work rules which would effectively compel the motor inspectors and other employees exposed to hazards associated with the boarding of cranes to follow safety procedures directed to those hazards.

The citation poses the question whether respondent's safety program adequately instructed employees on the proper crane boarding procedures and systematically enforced work rules which would compel employees to follow instructions.

## RESPONDENT'S SAFETY PROGRAM

Respondent has an overall safety program which is contained in Exhibit R-2, a 40-page manual entitled "Manual Covering the Administration of the Basic Accident Prevention Program." A booklet (Exhibit R-4) entitled "General Safety Guides for All Employees" is distributed to new employees when initially hired and at the same time they are indoctrinated safety-wise with a slide program (T-285). Chapter X relates to Overhead Traveling Cranes and advises employees connected with crane work to obtain a copy of the Safety Rules for Electric Overhead Cranes (Exhibit C-3) referred to below.

Respondent has a "Keep Your Buddy Safe" program in its Alliquippa Works. This includes safety seminars attended by persons selected by the union and management. "Keep Your Buddy Safe" slogans are posted around the plant. Monthly meetings are held in each department at which subjects for discussion are submitted in advance. Also, awards are made to divisions with the best housekeeping. Posters received from the National Safety Council on various safety subjects are posted about twice a month. A field safety inspector whose duties are to attend safety meetings, look for unsafe practices and review accident reports is assigned to the Steel Works Department. He works with the supervisors and reports to Garold Gilberg, respondent's safety director (T-289-293).

Respondent also has a joint labor-management safety and health committee which meets every month, composed of four management and four hourly or union people present. A job analysis program requires the general foreman of each plant division (there are about 120)

to make a job safety analysis each month. The general foreman gets his foremen and frequently also employees together for their input. A job safety analysis of Crane No. 7 was not done because it was relatively new, having been installed in 1975 (T-288-290, 298, 374).

Respondent's safety rules or procedures relating to cranes are contained in a booklet (Exhibit R-3) entitled "Safety Rules for Electric Overhead Traveling Cranes or Gantry Crane Operators, Crane Directors, Hook-up Men, Repairmen (Cab Operated)." Instructions relating to boarding cranes are as follows:

INSTRUCTIONS FOR ALL PERSONS
GETTING ON AND OFF CRANES

1. Employes shall use only the regular prescribed stairways or ladders and crane approaches when getting on or off cranes.

2. Employes shall at no time walk crane runways unless authorized to do so by the person in charge.

3. No one shall get on or off moving cranes.

4. Authorized employe, before getting on a crane which is manned, shall first notify the crane operator of his intention. The crane operator shall then place the main electric switch in "off" position with red indicator light "on" and assume a position outside of the crane cab where he can be seen by the employe wishing to board the crane. After the employe has arrived in the crane cab, the crane may be put into operation.

5. When getting off a crane which is manned, the employe shall first notify the crane operator of his intention. The crane operator shall then place the main electric switch in "off" position with red indicator light "on" and assume a position outside the crane cab where he can see the person after he gets off the crane. The crane operator shall not put the crane into operation until he receives a signal from the person getting off the crane that he is in the clear.

6. If the red indicator light is out of order, contact shall be made with the crane operator. If the crane operator is off the crane, the Supervisor in charge will advise persons intent on getting on crane.

It is not established that all persons involved with crane operations received this booklet. Mr. Plonka was issued a booklet in 1952 (T-304), Wasso Kozlina, the crane operator, received a booklet in 1946, and Peter Koman, inspector, received a booklet 25 years ago, but Mr. Churney, Donald Mancini, millwright helper, and Wallace Ermi, motor inspector, testified that they were not furnished the booklet (T-16, 103, 121, 138, 171). However, the booklet is distributed routinely to employees and supervisors in the various units where the rules apply and are available to employees on request (T-282). The booklet is referred to by its title on the "Notice to Crane Operators" (Exhibit R-1) which is posted in all overhead crane cabs, in the Steel Works Department and in the Maintenance Office which is frequented by motor inspectors and millwrights . The booklet is also discussed with supervisors at regularly scheduled meetings (T-286-288).

All persons authorized to work on cranes were familiar with the proper boarding procedures. Employees confirmed their knowledge of the crucial crane boarding points, including use of regular prescribed stairways or ladders when possible in getting on and off cranes, notification of the crane operator before boarding a crane, and not to get on a crane when the green light is on indicating that the crane is operative. For the most part the employees' knowledge of the safety rules was acquired on the job by observation of and discussion with other employees (T-21, 22, 38, 39, 57, 58, 101).

There is evidence that at times respondent's employees did violate the crane boarding safety rules. Mr. Churney testified that sometimes, under pressure to get the job done, he would take a shortcut to get

on a crane (T-116). Mr. Kozlina, the crane operator, testified that employees have boarded his crane without notifying him and have boarded the crane from the runway when the crane was not broken down (T-24, 25). Neither Mr. Churney nor Mr. Kozlina notified supervision of any infraction of the crane boarding safety rules (T-43, 119). Mr. Kozlina also testified that salaried (supervisory) employees also boarded the crane without notifying him, but that he knew they were coming on the crane. On questioning, Mr. Kozlina did not furnish the supervisor's scope of authority nor identify the supervisor involved (T-23, 43, 44). Frederick S. Kelsey, Superintendent of Steel Works, testified that a violation of the crane boarding procedures was never brought to his attention (T-337). Mr. D'Antonio, foreman, never saw any supervisory person get on a crane without notifying the crane operator (T-366) and he never saw an employee board a crane from a runway when the crane could be moved (T-379).

## DISCUSSION

To prevail in this proceeding, complainant must establish that respondent did not furnish its employees with employment and a place of employment which was free from recognized hazards. The failure of an employee to notify a crane operator of his intention to board a crane is a recognized hazard in industry (T-198) and this is also recognized by the respondent in its safety rules for electric overhead cranes (Exhibit R-3). Notifying the crane operator of intention to board the crane before doing so is the most important safety factor involved in crane boarding (T-200, 221). Consequently, if respondent did not instruct its employees to observe this safety rule and, if necessary, take disciplinary action to enforce the rule, a finding could be made that respondent did not furnish its employees a place of employment that was free from recognized hazards. A violation of the general duty clause

occurs whenever an employer fails to take reasonable precautionary steps to protect his employees from reasonably forseeable "recognized hazards" that are causing or are likely to cause death or serious physical injury. Brennan v. OSHRC and Vy Lactos Laboratories, 494 F.2d 460, (8th Cir., 1974).

However, the preponderence of the evidence establishes that respondent's employees were adequately instructed on the proper crane boarding procedures including prior notice to the crane operator of intention to board the crane, and the testimony adduced evinced an awareness by all witnesses of the hazards associated with crane boarding. While there was occasionaly disregard of the rule regarding notice to the operator, there is no substantial evidence that these instances were brought to the attention of the respondent at any level of its supervisory structure or that these breaches of safety rules could have been known by the respondent with the exercise of reasonable diligence. The accident, which resulted in the death of an employee, would not have occurred but for the action of two employees who had full knowledge that what they did was contrary to their own appreciation of the risks involved and in direct violation of the respondent's safety rules.

Louis O'Matz, the complainant's Compliance Officer, who conducted the investigation in this case, testified that a program for safe crane boarding procedures should include furnishing information to employees of accidents as they occur with the view to preventing future accidents, job safety analysis studies with employee participation, and enforcement of safety rules by taking disciplinary actions against employees, including supervisors, who do not obey safety rules (T-207-209).

With respect to discussing accidents with employees, it is considered a fair inference that such matters, which are generally well known when they occur, are discussed at regularly scheduled safety

meetings. Exhibit 5, which is a "Fatal Accident Report," indicates that following the occurrence of an accident, employees are informed and methods of avoiding similar occurrences are suggested. As for job safety analysis studies, such studies are conducted by respondent as part of its general safety program. While no studies were made in connection with the operation of Crane No. 7, which had been in operation a relatively short time, it would be straining to conclude that this failure constituted a recognized hazard related to safe boarding procedures. As for disciplining employees who disregard safety rules, respondent, as part of its general safety policy, did discipline employees for violation of safety rules but, admittedly, no disciplinary action was ever taken for violation of crane boarding rules for the very good reason that no violation was ever brought to the attention of respondent's supervisory personnel.

While there was no specific program for monitoring adherence to the crane boarding rules, the evidence does not establish that, as of the date of the accident, there was a need for such a program, given the fact that all employees engaged in working around cranes were familiar with the rules and no instance of a violation of the rules came to the attention of supervisors. Even if it is assumed that an affirmative program checking on employee compliance with the safety rules would be desirable, there is no showing that failure to implement such a program was recognized as a hazard by the respondent or by industry generally. Absent proof of a recognized hazard, a citation under the general duty clause cannot be sustained.

On the basis of the record in this case, it is concluded that the complainant has not established by a preponderence of the evidence that the respondent failed to furnish its employees employment and a place

of employment which was free from recognized hazards that were likely to cause death or serious physical harm.

## CONCLUSIONS OF LAW

The citation, notification of proposed penalty, notice of contest, pleadings, stipulations, the testimony and exhibits adduced to the hearing, and the representations of the parties, support the following conclusions:

1. The respondent at all times material hereto was engaged in business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970.

2. The respondent at all times material hereto was subject to the requirements of the Occupational Safety and Health Act and the standards promulgated thereunder, and the Commission has jurisdiction of the parties and of the subject matter herein.

3. Respondent did not violate section 5(a)(1) of the Act as alleged in Citation No. 3 issued on May 20, 1976.

## ORDER

Upon the basis of the foregoing and upon the entire record it is

ORDERED that Citation No. 3, issued on May 20, 1976, and the proposed penalty are vacated.

JOSEPH CHODES
Judge, OSHRC

Dated: June 15, 1977
Hyattsville, Maryland

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

June 29, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Prestressed Systems, Inc.

OSHRC DOCKET NO. 76-4278

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION (REMAND)

To wit: See attached.

FOR THE SECRETARY OF LABOR

- Counsel for Regional Litigation
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- Bobbye D. Spears, Regional Solicitor
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  Mr. Elliott Goldstein, Safety Director
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  P. O. Box 660128
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- James D. Burroughs, Judge
  Occupational Safety & Health
  Review Commission
  1365 Peachtree Street, N. E.
  Room 240
  Atlanta, GA. 30309

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>PRESTRESSED SYSTEMS, INC.,<br>Respondent. | OSHRC Docket No. 76-4278 |

DECISION

Before: ROWLAND, Chairman; CLEARY AND COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge James D. Burroughs has been directed for review under 29 U.S.C. § 661(i), section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678. Relying on Frank Briscoe Co., 76 OSAHRC 129/A2, 4 BNA OSHC 1729, 1976-77 CCH OSHD ¶ 21,162 (No. 7792, 1976), Judge Burroughs found that a violation had not been proved because the use of safety belts had not been shown to be feasible. After the judge's decision was issued, the Commission overruled Frank Briscoe in S & H Riggers & Erectors, Inc., 79 OSAHRC 23/A2, 7 BNA OSHC 1260, 1979 CCH OSHD ¶ 23,480 (No. 15855, 1979), rev'd, 659 F.2d 1273 (5th Cir. 1981). Accordingly, this case is remanded for further proceedings in light of that case.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: JUN 29 1982

ROWLAND, Chairman, dissenting:

Judge Burroughs' decision was correct and should be affirmed for the reasons he gave. I would adhere to the test set forth in Frank Briscoe and require the Secretary of Labor to prove the feasibility and likely utility of the personal protective equipment that should have been used.

Since section 1926.28(a) does not prescribe objective criteria for determining the employer's duty, the Secretary must prove that the use of safety belts was feasible. See H.E. Wiese, Inc., 82 OSAHRC _____, 10 BNA OSHC 1499, 1511 n.15, 1982 CCH OSHD ¶ 25,985, p. 32,619 n.15 (No. 78-204, 1982)(Chairman Rowland, dissenting in part); and Bethlehem Steel Corp., 82 OSAHRC _____, 10 BNA OSHC 1607, 1611 n.4, 1982 CCH OSHD ¶ 26,043, p. 32,704 n.4 (No. 77-1545, 1982)(Chairman Rowland, concurring)(section 1910.132(a)). I would vacate the citation because the record does not show that safety belts were feasible. 1/

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1/ I express no view here on the correctness of the Commission's reasonable person test in S & H Riggers & Erectors, Inc., 79 OSAHRC 23/A2, 7 BNA OSHC 1260, 1979 CCH OSHD ¶ 23,480 (No. 15855, 1979), rev'd, 659 F.2d 1273 (5th Cir. 1981).

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 400
ATLANTA, GEORGIA 30309

| | | |
|---|---|---|
| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket Nos. |
| | ) | |
| PRESTRESSED SYSTEMS, INC., | ) | 76-4276 and 76-4278 |
| | ) | |
| Respondent. | ) | (Consolidated) |

## DECISION AND ORDER

APPEARANCES: Annette Ball, Esquire, Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia, on behalf of complainant.

Clair W. Langmaid, Esquire, Atlanta, Georgia, on behalf of respondent.

## STATEMENT OF CASE

Burroughs, Judge: This is a consolidated proceeding initiated pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et. seq., 84 Stat. 1590 ("Act"). Respondent seeks review of item one of a non-serious citation issued to it on September 1, 1976 (Docket No. 76-4276), a serious citation issued to it on September 8, 1976 (Docket No. 76-4278) and a repeated citation issued to it on September 8, 1976 (Docket No. 76-4278).

Review is also sought of the penalties proposed for the alleged violations.

Respondent is a corporation with a place of business at 5601 N.W. 72nd Avenue, Miami, Florida. It is engaged in the business of forming and prestressed concrete construction. The non-serious citation issued in docket number 76-4276 emanated from an inspection conducted on August 24, 1976, at a construction site located at 8th Street S.W. and 107th Avenue, Miami, Florida. The serious citation and repeated citation issued in docket number 76-4278 emanated from an inspection conducted on September 1, 1976, at Palm Beach Lakes Boulevard and Congress Avenue, West Palm Beach, Florida.

Item one of the non-serious citation issued to respondent on September 1, 1976 (Docket No. 76-4276) alleges that respondent violated section 5(a)(2) of the Act by failing to comply with the housekeeping standard set forth at 29 C.F.R. § 1926.25(a). The citation described the alleged violation as follows:

> "Debris was not kept cleared from the following:
>
> (a) eastern approach to the building site, 1st, 2nd and 3rd levels."

A penalty of $40 was proposed for the alleged violation.

The serious citation issued to respondent on September 8, 1976, alleges that respondent committed four separate violations of the outrigger scaffold standards set forth at 29 C.F.R. §

1926.451(g). The four alleged violations were construed in the aggregate as constituting a serious violation. The citation set forth the provisions allegedly violated and described the alleged violations as follows:

Item 1a - 29 C.F.R. § 1926.451(g)(5)

"Standard guardrails and toeboards were not installed at all open sides and ends on outrigger scaffold(s) more than 10 feet above the ground or floor:

(a) at the 5th level on the south side of the building there were no guardrails and toeboards on the outrigger scaffold."

Item 1b - 29 C.F.R. § 1926.451(g)(1)

"On outrigger scaffold(s) the inboard end of the outrigger beams, measured from the fulcrum point to anchorage point, was less than 1 1/2 times the outboard end length:

(a) at the 5th level on the south side of the building, beams supporting the scaffold platform measured six feet outboard length and only five feet from the fulcrum point to the anchorage point."

Item 1c - 29 C.F.R. § 1926.451(g)(3)

"Outrigger scaffold(s) were not designed by a registered professional engineer competent in this field, nor constructed and erected in accordance with Table L-13:

(a) scaffold planking on the outrigger scaffold at the 5th level on the south side of the building was cracked and broken 3/4 inch plywood sheets."

Item 1d - 29 C.F.R. § 1926.451(g)(4)

"On outrigger scaffold(s) the planking was not laid tight:

"(a) at the 5th level on the south side of the building there was a 7 1/2 inch gap between plywood sheets."

A penalty of $950 was proposed for the alleged violation.

The repeated citation issued to respondent on September 8, 1976, alleged a violation of the personal protective equipment standard set forth at 29 C.F.R. § 1926.28(a). The citation described the alleged violation as follows:

"The employer did not require the wearing of appropriate personal protective equipment in all operations where there was an exposure to hazardous conditions:

(a) employees installing forming on the 2nd level of the parking building were walking along 8 inch wide concrete beams, carrying several 4x4 inch form braces, while exposed to a fall hazard of 10 feet, were not required to wear safety belts securely attached to lifelines until form decking had been placed to protect them from the fall hazard."

A penalty of $160 was proposed for the alleged violation.

On December 2, 1976, an order was issued consolidating Docket Numbers 76-4276, 76-4277 and 76-4278 for purposes of hearing, briefs and decision. Subsequent to the hearing, complainant filed a notice of withdrawal in Docket Number 76-4277. An order was issued on February 23, 1977, severing Docket Numbers 76-4276 and 76-4278 from Docket Number 76-4277.

A hearing was held in these consolidated cases on January 11, 1977, in Fort Lauderdale, Florida. No additional parties desired to intervene in the proceeding (Tr. 4).

During the course of the hearing, counsel for respondent sought to amend the answer to raise the defense that it was impossible to comply with 29 C.F.R. § 1926.28(a). The defense had not been raised prior to the trial. The motion to amend was denied (Tr. 37-39). Respondent argues in its brief that the failure to grant the motion to amend was in error.

## JURISDICTION AND ISSUES

Respondent, at all times material to this proceeding, concedes that it was engaged in a business affecting commerce within the meaning of the Act and that the Commission has jurisdiction of the parties and of the subject matter (Paras. I, II, Complaints and Answers).

The following issues are presented to the Commission for determination:

1. Did respondent violate section 5(a)(2) of the Act by failing to comply with the following standards:
   a. 29 C.F.R. § 1926.25(a)
   b. 29 C.F.R. § 1926.451(g)(1)
   c. 29 C.F.R. § 1926.451(g)(3)
   d. 29 C.F.R. § 1926.451(g)(4)
   e. 29 C.F.R. § 1926.451(g)(5)
   f. 29 C.F.R. § 1926.28(a)
2. Were the violations of 29 C.F.R. § 1926.451(g)(1), (3), (4) and (5), if they occurred, serious within the meaning of section 17(k) of the Act?

3. Was the violation of 29 C.F.R. § 1926.28(a), if it occurred, a repeat violation within the purview of section 17(a) of the Act?

4. Did the Judge error in refusing to allow respondent's motion to raise an affirmative issue during the course of the hearing?

5. What penalties, if any, should be determined in the event any violations are determined against respondent?

FINDINGS OF FACT

The following facts are specifically determined in resolving the issues in dispute:

1. Respondent is a corporation with a place of business and doing business, among other places, at 5601 N.W. 72nd Avenue, Miami, Florida. It is engaged in the business of forming and concrete construction (Para II, Complaints and Answers; Tr. 62).

2. Respondent's annual volume of business in 1976 was $8,000,000.00. In previous years its volume of business has been higher. Most of its business has arisen in Florida (Tr. 60, 61).

3. During the course of a single year, respondent may be involved in 100 to 120 different jobs. During any given week, it has between 15 to 20 active jobs (Tr. 60, 136).

DOCKET NO. 76-4278

A. SERIOUS CITATION

4. On September 1, 1976, Compliance Officer John S. Ruggles, Jr., conducted an inspection of respondent's work site located at

Palm Beach Lakes Boulevard and Congress Avenue, West Palm Beach, Florida. A ten-story office building was under construction at the site (Para. IV, Complaint and Answer; Tr. 6, 8, 42).

5. Two outrigger scaffolds were located side by side at the fifth level on the south side of the office building under construction. The scaffolds projected out approximately six feet from the side of the building. The scaffolds had no guardrails or toeboards (Exs. 1, 3, 4; Tr. 8, 13, 75).

6. The scaffolds were some 32 to 35 feet above the ground surface. The area below was dirt with some debris scattered over the ground (Ex. 1; Tr. 9, 13).

7. Four-by-four pieces of lumber had been stacked on the scaffolds by two employees of respondent sometime prior to the inspection. The scaffolds had no guardrails or toeboards at the time the lumber was stacked. The employees wore no safety belts while stacking the lumber (Exs. 1-4; Tr. 8, 13, 43, 44).

8. Compliance Officer Ruggles observed no employees on the outrigger scaffolds at anytime during his inspection (Tr. 43).

9. The outrigger beams projecting outside the building were six feet in length. The inside end of the beams, measured from the fulcrum point to anchorage point, was five feet (Exs. 1, 4; Tr. 10, 14, 88).

10. The outrigger scaffolds were not designed by a registered professional engineer (Tr. 11).

11. The scaffolds were covered with three-quarter-inch plywood sheets. The portion on which the four-by-fours were stacked had double sheets of plywood. The area, as one entered the scaffolds from the building, was covered with one sheet of plywood. There was a gap of seven-and-one-half inches between the two scaffolds which ran essentially through the center (Exs. 1, 3; Tr. 11, 14, 89-91).

12. A corner of one of the plywood sheets that was used for single coverage was broken and moved downward with the pressure of a foot on it (Ex. 3; Tr. 15-16, 90-91).

13. The outrigger scaffolds were of a standard design utilized by respondent on other jobs. Respondent has never experienced any trouble in the use of this particular outrigger scaffold (Tr. 74).

14. Respondent's employees had been instructed to use safety belts when they went onto an outrigger scaffold. Guardrails tended to interfere with the lifting of materials from the crane onto the scaffold (Tr. 77).

DOCKET NO. 76-4278

B. REPEAT CITATION

15. A parking building under construction was located to the north and rear of the office building. Employees of respondent were laying four-by-four inch stringers on the second level to support plywood sheets to form the foundation for a cement pour for the second level of the parking garage (Tr. 18-19, 20, 42-43).

16. Two employees were observed standing on eight-inch wide prestressed concrete beams located approximately ten feet above a cement floor. They were engaged in setting the forming work by laying the stringers. They worked from their position on the prestressed concrete beams (Ex. 5; Tr. 18-19, 20).

17. The prestressed concrete beams had reinforcing rods projecting up from the center. Employees walked along the beams carrying pieces of four-by-four (Tr. 19, 23).

18. The employees wore no type of safety equipment (Ex. 5; Tr. 19).

19. The parking building was to be four levels. At the time of the inspection, employees were working on the second level (Tr. 19).

20. Subsequent to the inspection, respondent planked over the stringers to provide a safer walking and working surface (Tr. 19-20, 21-22).

21. Compliance Officer Ruggles held a closing conference with respondent's safety director, Elliott Goldstein (Tr. 34).

22. On October 7, 1975, Compliance Officer B. T. Beall, Jr., conducted an inspection of respondent's work site located at 1980 Northwest 10th Avenue, Miami, Florida (Tr. 46). As a result of the inspection, respondent was issued a serious citation alleging that it violated 29 C.F.R. § 1926.28(a) (Ex. 6; Tr. 25-26, 46). An informal conference was held with the area director concerning

the alleged violation. As a result of the conference, the violation was downgraded to a non-serious violation, and the non-serious citation issued on October 24, 1975, was not contested (Ex. 6; Tr. 25-26, 46, 55, 61-62, 64-65).

23. In addition to the non-serious citation issued to respondent on October 24, 1975, respondent has been issued citations on six other occasions as a result of inspections conducted at its work sites. None of the citations were contested (Ex. 7; Tr. 28-31).

24. On October 7, 1975, employees of respondent were in the process of setting formwork for the fourth level concrete pour of a building under construction. The top of the formwork was approximately 42 feet above ground level and nine feet above the next floor level. Employees were walking the beams and were not provided any type of fall protection (Exs. 8, 9; Tr. 46-53).

25. Compliance Officer Beall held a closing conference with Elliott Goldstein, respondent's safety director, after the October 7, 1975, inspection (Tr. 54).

DOCKET NO. 76-4276

26. On August 24, 1976, Compliance Officer Samuel Drexler conducted an inspection at respondent's work site located at Southwest 8th Street and 107th Avenue, Miami, Florida (Tr. 92-93). A three-story lab building for Florida International University was under construction (Tr. 101-102).

27. Upon entering the perimeter of the building under construction, Drexler traversed an accumulation of debris, rubble, cut-off lumber with protruding nails, building blocks and broken masonry (Exs. 10, 11; Tr. 93, 95).

28. Employees generally approached the building from the same direction taken by Compliance Officer Drexler (Tr. 93). Employees were observed walking over the debris at coffee breaks and lunch periods (Tr. 116). They did not follow any particular routes or avenues (Tr. 114).

29. The ground level of the building contained broken conduit pipe, wiring, wire strapping, broken masonry, sawed-off lumber with protruding nails, empty cardboard cartons and scraps of lumber. Employees of respondent had to traverse the ground level to reach the upper levels (Ex. 12; Tr. 96, 98, 104-105, 119). Similar conditions were observed on the second and third levels (Ex. 13; Tr. 98, 104). Employees of respondent were working on all three levels (Tr. 98, 101).

30. Certain passageways were kept cleared (Tr. 142).

31. At the time of the inspection, respondent was in the process of cleaning up the job (Tr. 123, 125-126, 135). Employees had been engaged in stripping forms on August 23, 1976, and August 24, 1976 (Tr. 125).

## RESPONDENT'S SAFETY POLICY

32. Respondent holds monthly meetings with its foremen to discuss safety problems and solutions. Written safety talks are issued to the foremen every week, and the foremen give a five-minute safety talk to their men. Respondent has a written safety outline defining safety duties and responsibilities for its foremen (Tr. 65-66).

33. When employees have been found violating company safety policy, disciplinary action, ranging from suspension to termination, has been instituted (Ex. B; Tr. 66, 68-69).

34. Respondent issued a memo to all its field personnel concerning personal protective equipment. Each employee was required to keep a copy of the memo and to sign a copy to return to his personnel file (Ex. A; Tr. 67-68). The memo provided, in part (Ex. A):

> "Prestressed Systems, in an effort to comply with this law, is furnishing and requiring the use of certain personal protective equipment. All employees must properly use and maintain this equipment according to these rules:
>
> * * * *
>
> 2. P.S.I. will furnish safety belts and lifelines to employees working near the perimeter of a slab which is at least 6 feet higher than the slab or ground below. These belts are to be worn and tied off to a structural member whenever the employee is within 5 feet of the edge and there are no approved guardrails or safety nets in place. The lifeline must limit all falls to no more than 6 feet.

* * * *

"4. Personal protective equipment must be inspected regularly and any damaged or worn equipment must be turned in to the foreman on the job for repair or replacement.

"You, the worker, are P.S.I.'s most important asset. These safety rules have been established for your protection. They must be obeyed in addition to any other safety regulations issued by the Company.

"FAILURE TO OBSERVE THESE RULES WILL RESULT IN DISCIPLINARY ACTION OR DISCHARGE."

OPINION

Respondent is engaged in the business of forming and concrete construction. The issues raised in this consolidated proceeding arose from separate inspections of two different work sites.

I DOCKET 76-4276

Following an inspection on August 24, 1976, of a work site located at Southwest 8th Street and 107th Avenue, Miami, Florida, respondent was issued a non-serious citation. A lab building at Florida International University was under construction at the time of the inspection. Respondent contested item one of the citation which alleges that it violated 29 C.F.R. § 1926.25(a)[1/]

---

1/ 29 C.F.R. § 1926.25(a) provides:

"(a) During the course of construction, alteration, or repairs, form and scrap lumber with protruding nails, and all other debris, shall be kept cleared from work areas, passageways, and stairs, in and around buildings or other structures."

by failing to keep debris cleared from the eastern approach to the building and from the first, second and third levels.

Section 1926.25(a) requires an employer to keep all debris cleared from work areas, passageways and stairs in and around buildings or other structures during construction, alteration, or repairs. There is no dispute that debris was scattered around the perimeter of the building and on the first, second and third levels. Olin Patterson, a carpenter for respondent, testified that passageways were kept clear (Tr. 142). There is no evidence to contradict his testimony. However, the compliance officer testified that he observed employees walking over the debris at the ground level and the eastern approach to the building at coffee breaks and during the lunch period (Tr. 116). It serves no useful purpose to clear passageways if employees are allowed to traverse the debris.

The compliance officer testified that the second and third levels contained debris similar to the approach to the building and the ground level. This type of debris is visually reflected in exhibits 10, 11 and 12. The debris on the second level was not as extensive as that shown at the approach to the building and the ground level (See exhibit 13). The evidence reflects that employees were working on all three levels, but does not indicate the specific areas of those levels in which employees were working. Furthermore, the evidence does not reflect the extent of the debris

in the work areas for the second and third levels. The complainant has failed to prove that the actual work areas or passageways on the second and third levels were not kept cleared. The fact that debris existed on the second and third levels and that employees worked on those levels does not per se establish that specific work areas on those levels were not kept clear. Since the evidence indicates passageways were kept clear, some evidence was necessary to show specific areas where employees were working and the condition of those areas.

The evidence establishes that respondent was in the process of doing some cleaning at the site. Under such circumstances, respondent argues that it was not the intent of 29 C.F.R. § 1926.25(a) to create a violation which arises when one is in the process of eliminating the conditions which might otherwise give rise to a violation. Respondent relies on the Judge's decision in Julius Nasso Concrete Corporation, 75 OSAHRC 79/D2, 3 BNA OSHC 1509, 1974-1975 CCH OSHD ¶ 19,832 (1975) and the Commission decision in Anning-Johnson Co., 76 OSAHRC 54/A2, 4 BNA OSHC 1193, 1975-1976 CCH OSHC ¶ 20,690 (1976), affirming the Judge's decision as to 29 C.F.R. § 1926.25(a).

In Julius Nasso Concrete Corporation, supra, the exposed employees were actually engaged in cleaning the floors. The Judge interpreted the standard to contain "an implicit exclusion

in respect of acts performed in the process of complying with its explicit mandate." Since the exposed employees were engaged in cleaning operations, it would have been grossly unfair to hold the employer in violation while his employees were in the process of accomplishing the cleaning necessary to comply with the standard. There has been no showing that the exposed employees in this case were actually engaged in the cleaning operation.

In Anning-Johnson Co., supra, the Commission upheld the Judge's decision to vacate the allegation on the basis that respondent maintained a force of approximately seven employees whose sole task was to remove all debris from an area before its employees entered to perform their work. In addition, the same work force removed all debris actually created by respondent's employees in the performance of their work. The rationale of the Commission is difficult to comprehend. The stipulation of the parties stated that the foreman was aware of the conditions and still permitted employees to work in debris areas. Unlike Julius Nasso Concrete Corporation, supra, the record does not disclose that only employees engaged in cleaning operations were working in debris areas. The Commission seems to be saying that the mere fact that an employer has employees assigned to clean up the site is sufficient to comply with the standard. While the exact implication of the Commission's decision is unclear, this Judge declines to interpret it to mean that the mere assigning of employees to clear a construction site complies with the standard.

Employees of respondent seen traversing the debris on the ground level and the approach to the building were not engaged in cleaning operations. The mere fact that someone was assigned to clean up the debris is insufficient to justify employees walking over and working in the debris. Time cards submitted by respondent reflect that three employees were engaged in a number of activities on August 23, 1976, and August 24, 1976, including some clean-up duties (See exhibit C). The employees spent a total combined time of 12 hours on August 23, 1976, and August 24, 1976, cleaning up the site. It is obvious that such a limited time was totally insufficient to accomplish the job.

The standard says that all debris shall be kept cleared from work areas, passageways, and stairs. The obvious intent is to protect employees from tripping and falling or stepping on a protruding nail. The fact some cleaning is being done at a particular site is not sufficient justification for ignoring the clear mandate of the standard unless the exposed employees are actually engaged in cleaning up the site to comply with the standard. The employees observed traversing the debris at the approach to the building and on the ground level have not been shown to have been engaged in cleaning operations. Accordingly, a violation as to the eastern approach to the building and on the ground level has been established.

## II DOCKET NO. 76-4278

On September 1, 1976, Compliance Officer John S. Ruggles, Jr., conducted an inspection at respondent's work site located at Palm Beach Lakes Boulevard and Congress Avenue, West Palm Beach, Florida. Respondent's employees were engaged in the construction of a ten-story office building and an adjacent garage. As a result of that inspection, a serious citation, a repeated citation and a non-serious citation were issued to respondent on September 8, 1976, The serious and repeated citations were contested.

### A. SERIOUS CITATION

The serious citation combines four alleged violations of the outrigger scaffold standards set forth at 29 C.F.R. § 1926.451(g). Two outrigger scaffolds were located side by side at the fifth level on the south side of the building. Complainant treated the two scaffolds as one for purposes of the citation. The scaffolds were located some 32 to 35 feet above the ground level.

1. Alleged violation of 29 C.F.R. § 1926.451(g)(5)

Complainant alleges that respondent violated 29 C.F.R. § 1926.451(g)(5)[2/] by failing to install guardrails and toeboards

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2/ 29 C.F.R. § 1926.451(g)(5) states:

> "(5) Guardrails made of lumber, not less than 2 x 4 inches (or other material providing equivalent protection), approximately 42 inches high, with a mid-rail of 1 x 6 inch lumber (or other material providing equivalent protection), and toeboards, shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor. Toeboards shall be a minimum of 4 inches in height. Wire mesh shall be installed in accordance with paragraph (a)(6) of this section."

at all open sides and ends of the scaffolds. Respondent concedes that no guardrails or toeboards were utilized.[3/] It argues that there was no direct evidence presented that its employees were out on the outriggers and exposed to any hazards and that employees had been instructed to use safety belts when working from the scaffolds.

The compliance officer did not observe anyone on the scaffolds during his inspection. He did observe a stack of four-by-fours on the scaffolds. Respondent's foreman, who accompanied the compliance officer on the inspection, informed the compliance officer that he and another employee had stacked the lumber on the scaffold some three to four days prior to the inspection. The foreman further informed the compliance officer that they did not wear safety belts and that the scaffolds were in the same condition as observed at the time of the inspection, i. e., they contained no guardrails or toeboards.[4/] Respondent offered no evidence to contradict the testimony of the compliance officer. The violation of 29 C.F.R. § 1926.451(g)(5) has been established.

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3/ Photographs introduced as exhibits one through four clearly show the absence of guardrails and toeboards.

4/ Rule 801(d)(2)(D) of the Federal Rules of Evidence concerning admissions by party--opponent provides for the admission of "a statement by his agent or servant concerning a matter within the scope of his agency or employment made during the existence of the relationship." Under Rule 801 such an admission by the foreman was admissible.

2. Alleged violation of 29 C.F.R. § 1926.451(g)(1)

Complainant alleges that respondent violated 29 C.F.R. § 1926.451(g)(1)[5/] by failing to have the inboard end of the outrigger beams, measured from the fulcrum point to the anchorage point, at least 1-1/2 times the outboard end in length. Respondent does not contend that the inboard end of the outrigger beams was at least 1-1/2 times the outboard in length. It argues that while the outriggers did not strictly comply with the standard, the scaffold satisfied the minimum load bearing capabilities required by the standard.

Compliance Officer Ruggles testified on the basis of measurements made during the inspection that the length of the scaffold projecting outside the building was six feet and that the inboard length of the scaffold beams measured from the edge of the building was five feet. Respondent's general superintendent testified that the scaffold beams were six feet out and eight feet back (Tr. 73).

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5/ 29 C.F.R. § 1926.451(g)(1) states:

> "(g) Outrigger scaffolds. (1) Outrigger beams shall extend not more than 6 feet beyond the face of the building. The inboard end of outrigger beams, measured from the fulcrum point to anchorage point, shall be not less than 1-1/2 times the outboard end in length. The beams shall rest on edge, the sides shall be plumb, and the edges shall be horizontal. The fulcrum point of the beam shall rest on a secure bearing at least 6 inches in each horizontal dimension. The beam shall be secured in place against movement and shall be securely braced at the fulcrum point against tipping."

There is nothing to indicate his testimony was based on measurements made by him. Assuming, arguendo, that the general superintendent was correct, respondent was still in violation of the standard since the inboard length would have had to be at least nine feet. The violation has been established.

3. Alleged violation of 29 C.F.R. § 1926.451(g)(3)

Complainant alleges that respondent violated 29 C.F.R. § 1926.451(g)(3)[6/] by utilizing scaffolds that were not designed by a registered professional engineer competent in the design of such

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6/ 29 C.F.R. § 1926.451(g)(3) provides:

"(3) Unless outrigger scaffolds are designed by a registered professional engineer competent in this field, they shall be constructed and erected in accordance with Table L-13. Outrigger scaffolds, designed by a registered professional engineer, shall be constructed and erected in accordance with such design."

TABLE L-13--MINIMUM NOMINAL SIZE AND MAXIMUM SPACING OF MEMBERS OF OUTRIGGER SCAFFOLDS

| Maximum scaffold load. | Light Duty | Medium duty |
|---|---|---|
| | 25 p.s.f. | 50 p.s.f. |
| Outrigger size | 2 x 10 in. | 3 x 10 in. |
| Maximum outrigger spacing. | 10 ft. 0 in. | 6 ft. 0 in. |
| Planking | 2 x 10 in. | 2 x 10 in. |
| Guardrail | 2 x 4 in. | 2 x 4 in. |
| Guardrail uprights | 2 x 4 in. | 2 x 4 in. |
| Toeboards | 4 in. (minimum). | 4 in. (minimum). |

scaffolds and, in addition, the scaffolds were not constructed and erected in accordance with the requirements of Table L-13. Respondent submits that the scaffolds satisfied the minimum load capabilities required by the standard.

Respondent's foreman informed the compliance officer that the scaffolds had not been designed by a registered professional engineer. The foreman's admission was not disputed. However, respondent's vice-president of engineering, who is a registered engineer, testified that in his opinion the outrigger scaffold used by respondent had a load bearing capacity equal to that required by 29 C.F.R. § 1926.451(g)(3) and Table L-13 contained therein. His opinion was based on an erroneous fact. He assumed the full surface of the scaffolds was coverd with double sheets of three-quarter-inch plywood which he concluded was equal to 2 x 10 inch planking. The facts show that part of the surface of each of the scaffolds was covered with only one sheet of three-quarter-inch plywood. In addition, the plywood was in poor condition. One corner of the plywood in the single thickness portion was broken and moved downward under the pressure of a foot. The scaffold did not meet the requirements of Table L-13. The violation has been established.

4. Alleged violation of 29 C.F.R. § 1926.451(g)(4)

Complainant alleges that respondent violated 29 C.F.R. §

1926.451(g)(4)[7/] by failing to lay the planking tight. Complainant treated the two scaffolds as one. Each scaffold was constructed opposite a column. There was a 7-1/2 inch gap between the two scaffolds which resulted from the width of the column. Complainant treated the gap as being in the center of one scaffold.

The standard requires tight planking to within three inches of the building. Each scaffold complied with this requirement. The gap appeared between the two scaffolds. However, the 4 x 4's stacked across the two scaffolds indicate that respondent was not treating each scaffold with a separate identity. There was no way that guardrails could be separately installed on each scaffold since the 4 x 4's extended the length of both scaffolds (See exhibits 1-4).[8/] Since the obvious intent was to use the two scaffolds as one, there should not have been a gap between the two scaffolds. Employees were not restrained in any manner from stepping over the gap from one scaffold to the other. Accordingly, the violation has been established.

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7/ 29 C.F.R. § 1926.451(g)(4) states:

> "(4) Planking shall be laid tight and shall extend to within 3 inches of the building wall. Planking shall be secured to the beams."

8/ Guardrails separately installed on each scaffold would have eliminated the gap. Employees on each scaffold would have been protected against the hazard.

B. REPEATED CITATION

Employees of respondent were working on a parking building located to the rear of the office building. Two employees of respondent were observed laying stringers to support plywood sheets which in turn would support a cement pour for the second level of the parking garage. Complainant alleges that respondent violated 29 C.F.R. § 1926.28(a) by failing to require the employees to wear appropriate personal protective equipment.

The photograph introduced as exhibit 5 shows two employees working on the parking garage. Respondent submits there was no direct evidence establishing that the employees were not wearing personal protective equipment. It is clear from the photograph that the employees are not wearing safety belts. Compliance Officer Ruggles testified that the two employees were subject to a fall of approximately ten feet (Tr. 18). There is no evidence to contradict a finding that the employees were not wearing personal protective equipment.

In Frank Briscoe Company, Inc., 76 OSAHRC 129/A2, 4 BNA OSHC 1729, 1976-1977 CCH OSHD ¶ 21,162 (1976) the Commission concluded that 29 C.F.R. § 1926.28(a) was a performance rather than a specification standard since it is not limited to particular hazards or to protection by particular methods. The Commission followed the rationale expressed in National Realty and Construction Co. v. OSAHRC , 489 F.2d 1257 (D.C. Cir. 1973) and concluded that where

complainant relies on 29 C.F.R. § 1926.28(a), he "must both allege the specific measures the cited employer should have taken to avoid [the] citation and prove the feasibility and utility of those measures." Thus, complainant must not only allege that safety belts should have been used but must also "prove the feasibility and utility" of using safety belts.

Complainant offered no evidence to show how safety belts could be utilized to protect the employees. Compliance Officer Ruggles testified that the two employees needed to be protected by doing their job differently. He offered no explanation as to how the employees could have used the belts. There is no evidence as to where the belts could be tied off. The employees were actually protected by doing the job in a different manner. Respondent planked over the stringers as the employees progressed outward. This provided a safe walking and working surface (Tr. 19-22).

Two employees were exposed to a potential fall of ten feet. However, respondent is charged with the failure to utilize appropriate personal protection. The record fails to establish the feasibility of utilizing safety belts. The fact respondent acceded to the opinion that a hazard existed and agreed to abate it by doing the job in a different manner does not support a conclusion that safety belts were feasible. The alleged violation is vacated.

## III VIOLATIONS OF 29 C.F.R. § 1926.451(g)(1), (g)(3), (g)(4) and (g)(5) CONSTITUTED A SERIOUS VIOLATION

Complainant alleges that the violations of 29 C.F.R. § 1926.451(g)(1), (g)(3), (g)(4) and (g)(5) constituted a serious violation within the meaning of section 17(k) of the Act. The occurrence of an accident because of an existing hazard in violation of the Act does not have to be substantially probable in order to be classified a serious violation. An accident must simply be possible. Serious and non-serious violations "are distinguished on the basis of the seriousness of injuries which experience has shown reasonably likely to occur." Natkin and Company, 73 OSAHRC 16/E3, 1 BNA OSHC 1204, 1971-1973 CCH OSHD ¶ 15,679 (1973). The probability of an accident occurring is relevant only to the gravity of the violation. See Emory H. Mixon, 73 OSAHRC 57/D11, 1 BNA OSHC 1500, 1973-1974 CCH OSHD ¶ 17,027 (1973).

Respondent's foreman was aware that he and another employee were unprotected while they were stacking the 4 x 4's on the two scaffolds. The scaffolds were some 32 to 35 feet above the ground level. A fall from a distance of 32 feet to a ground surface would certainly result in death or serious physical harm. The absence of guardrails, standing alone, is sufficient to justify classfying the violations as serious within the meaning of section 17(k) of the Act.

## IV PENALTY DETERMINATIONS

The Commission is the final arbiter of penalties in all contested cases. Secretary v. Occupational Safety and Health Review Commission and Interstate Glass Co., 487 F.2d 438 (8th Cir. 1973). Under section 17(j) of the Act the Commission is required to find and give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer and the history of previous violations in determining the assessment of an appropriate penalty. The gravity of the offense is the principal factor to be considered. Nacirema Operating Company, Inc., 72 OSAHRC 1/B10, 1 BNA OSHC 1001, 1971-1973 CCH OSHD ¶ 15,032 (1972).

### A. Violation of 29 C.F.R. § 1926.25(a)

Employees were observed traversing debris at the eastern approach to the building and on the ground level. While respondent had cleaned some debris from the site, it is clear that its efforts were insufficient. Employees were permitted to traverse the debris. A penalty of $25 is deemed appropriate for the violation.

### B. Violations of 29 C.F.R. § 1926.451(g)(1), (g)(3), (g)(4), and (g)(5)

The outrigger scaffolds exposed two employees to a potential fall of 32 to 35 feet. No attempt was made to protect the employees. The employees were stacking some 4 x 4's on the scaffolds. The period of exposure was undoubtedly brief. They were working from

a flat surface. A penalty of $500 is considered appropriate for the violation.

## CONCLUSIONS OF LAW

1. Respondent, at all times material to this proceeding, was engaged in a business affecting commerce within the meaning of section 3(5) of the Act.

2. Respondent, at all times material to this proceeding, was subject to the requirements of the Act and the standards promulgated thereunder.

3. On August 24, 1976, respondent permitted employees at its work site located at S.W. 8th Street and 107th Avenue, Miami, Florida, to traverse debris located at the eastern approach to the building and on the ground level in violation of 29 C.F.R. § 1926.25(a).

4. On September 1, 1976, employees of respondent were working at a work site located at Palm Beach Lakes Boulevard and Congress Avenue, West Palm Beach, Florida. Two outrigger scaffolds were located at the fifth level of a ten-story office building under construction.

5. The outrigger scaffolds were not designed by a registered professional engineer and were not constructed in accordance with Table L-13 as required by 29 C.F.R. § 1926.451(g)(3).

6. The outrigger scaffolds contained no guardrails or toeboards in violation of 29 C.F.R. § 1926.451(g)(5).

7. The inboard end of the outrigger beams, measured from the fulcrum point to the anchorage point, was less than 1-1/2 times the outboard end length and was in violation of 29 C.F.R. § 1926.451(g)(1).

8. The two outrigger scaffolds were being used as though they were one. There was a 7-1/2 inch gap between the two scaffolds. Since the two scaffolds were used as one, the gap was in violation of 29 C.F.R. § 1926.451(g)(4).

9. Two employees at the Palm Beach Lakes Boulevard work site were working on the second level of a parking building. They were walking along eight-inch concrete beams and exposed to a fall of ten feet. Respondent was not in violation of 29 C.F.R. § 1926.28(a) since complainant failed to establish the utility and feasibility of safety belts.

10. The violations of 29 C.F.R. § 1926.451(g)(1), (g)(3), (g)(4), and (g)(5), in the aggregate, were serious within the meaning of section 17(k) of the Act.

11. A penalty of $25 is assessed for the violation of 29 C.F.R. § 1926.25(a).

12. A penalty of $500 is assessed for the serious violation.

## ORDER

Based upon the findings of fact and conclusions of law, it is

ORDERED: (1) That item one of the non-serious citation issued to respondent on September 1, 1976 (Docket No. 76-4276), is affirmed as to the eastern approach to the building and the first or ground level and is vacated as it pertains to the second and third levels;

(2) That the penalty proposed for item one of the non-serious citation issued to respondent on September 1, 1976, is modified to assess a penalty of $25;

(3) That the serious citation issued to respondent on September 8, 1976 (Docket No. 76-4278), is affirmed;

(4) That the penalty proposed for the serious violation determined in docket number 76-4278 is modified to assess a penalty of $500; and

(5) That the repeated citation and penalty proposed therefor issued to respondent on September 8, 1976 (Docket No. 76-4278), are vacated.

Dated this 20th day of June, 1977.

James D. Burroughs
JAMES D. BURROUGHS
Judge

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

June 29, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Metro Electric, Inc.

OSHRC DOCKET NO. 79-2827

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

FOR THE SECRETARY OF LABOR

OF COMMISSION DECISION

To wit: See attached.

- Counsel for Regional Litigation
  Office of the Solicitor, USDOL
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FOR EMPLOYEES

-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

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OSHRC
- Federal Building
  Room 7B11
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  Dallas, Texas 75242

Rev. 10/1/76

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>METRO ELECTRIC, INC.<br>Respondent. | OSHRC Docket No. 79-2827 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

Administrative Law Judge Henry F. Martin, Jr., affirmed a citation charging Respondent, Metro Electric, Inc., with a serious violation of the occupational safety and health standard at 29 C.F.R. § 1926.500(d)(2) and assessed a $50 penalty. Having reviewed the record and the parties' arguments, we agree with the judge's reasoning and conclusion. Accordingly, we adopt the judge's decision. See Gulf Oil Co., 77 OSAHRC 216/B10, 6 BNA OSHC 1240, 1978 CCH OSHD ¶ 22,737 (No. 14281, 1977).

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
Executive Secretary

DATED: JUN 29 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>METRO ELECTRIC, INC.<br><br>Respondent. | OSHRC DOCKET NO. 79-2827 |

Appearances: Robert L. Sims, Esquire
Douglas N. White, Esquire
Dallas, Texas
For the Complainant

Norton A. Colvin, Jr., Esquire
Brownsville, Texas
For the Respondent

DECISION AND ORDER

MARTIN, Judge:

This is a proceeding brought by the Secretary of Labor, United States Department of Labor, pursuant to the provisions of Section 10 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, et seq.) hereinafter referred to as the "Act". On April 20, 1979, a compliance officer of the Occupstional Safety and Health Administration conducted an inspection of respondent's workplace located at a construction site at 2255 North Expressway, Brownsville, Texas. As a result of the inspection respondent was issued a serious citation on May 14, 1979 and a penalty of $360 was proposed by complainant.

Following the issuance of the citation respondent filed a timely notice of contest.[1/] Thereafter, complainant filed a formal complaint which was answered by respondent's attorney. Pursuant to formal notice a hearing was held in this proceeding in Brownsville, Texas on October 30, 1979 at which time complainant was represented by Robert L. Sims, Esquire and Douglas N. White, Esquire, of the Regional Solicitor's Office, Department of Labor, Dallas, Texas and respondent was represented by its attorney, Norton A. Colvin, Jr., Esquire, of Brownsville, Texas. Post-trial briefs were submitted by both parties.

Respondent was alleged to have violated the provisions of Section 29 C.F.R. 1926.500(d)(2) because standard guardrails or the equivalent were not provided for the protection of its employees using runways, 4 feet or more above ground level on several different floor levels on two wings of Motel 6 in Brownsville, Texas, which was then under construction.[2/]

The issues to be resolved in this proceeding are whether respondent, an electrical sub-contractor on a multi-employer construction worksite,

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1/ Another citation, alleging two non-serious violations, was not contested and the same has become a final order pursuant to Section 10(a) of the Act.

2/ Section 29 C.F.R. 1926.500(d)(2) provides as follows:

> "Runways shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f) of this section, on all open sides, 4 feet or more above floor or ground level. Whenever tools, machine parts, or materials are likely to be used on the runway, a toe board shall also be provided on each exposed side."

violated the provisions of 29 C.F.R. 1926.500(d)(2) and if so, whether the violation was one of a serious nature within the meaning and intent of Section 17(k) of the Act. Also to be determined is whether the requested penalty is appropriate.

The salient facts are not in dispute. On April 20, 1979 respondent had five employees engaged in installing electrical outlets at several different locations on the Motel 6 construction site on the second and third levels of the A and B wings. There were no guardrails or equivalent protection along the walkways which employees would have to traverse or at the work stations where respondent's employees were engaged. The workmen were exposed to falls of approximately 9 feet and 17 feet at the second and third levels respectively. The walkways were approximately 4 feet wide and in one instance the useable width of the walkway was reduced from 4 feet to 2 feet because of an obstruction created by a stack of form lumber on the walkway. (Tr. 53).

Complainant's exhibit C-1 is a rough drawing showing the runways or walkways in question. Exhibits C-2 through C-8 reveal the absence of guardrails along the outer edge of the walkways. Exhibits C-4, C-5, and C-6 reveal a large stack of forming lumber which severely restricts the width of the walking area. Exhibit C-6 shows one of respondent's employees (Mr. Esquill) on the third level of the A wing. The workman in exhibit C-7 (Mr. Owen) is shown using an electric drill with his right foot very close to the outer edge of the walkway on the third level of the B wing. He was engaged in installing a light fixture. The runway between the A and B wings was reported to be approximately 11 feet long and there

were no guardrails on either side.

Respondent has contended that the violation in question should have been charged against the general contractor who had authority to provide the standard railings. He also stated that other sub-contractors who were using the walkway in question were not cited for a violation. Respondent's principal argument was that the runways were not under the control or authority of respondent and that respondent should not have been charged with violating the cited standard.

Respondent's argument cannot prevail in face of the Review Commission's precedent cases. In Anning-Johnson Co., Docket No. 4409, 1975-76 CCH OSHD para. 20,690 and Grossman Steel and Aluminum Corp., Docket No. 12,775, 1975-1976 CCH OSHD para. 20,691, the Review Commission held that a non-creating and non-controlling sub-contractor on a multi-employer construction site can defend by showing that it took realistic steps as an alternative to literal compliance with the standard in order to protect its employees.[3/]

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3/ In Grossman, the Review Commission stated:

> "Simply because a sub-contractor cannot himself abate a violative condition does not mean that it is powerless to protect its employees. It can, for example, attempt to have the general contractor correct the condition, attempt to persuade the employer responsible for the condition to correct it, instruct its employees to avoid the area where the hazard exists if this alternative is practical, or in some instances provide an alternate means of protection against the hazard. We therefore expect every employer to make a reasonable effort to detect violations of standards not created by it but to which its employees have access and, when it detects such violations, to exert reasonable efforts to have them abated or take such other steps as the circumstances may dictate to protect its employees. In the absence of such actions, we will still hold each employer responsible for all violative conditions to which its employees have access."

Respondent's foreman, Mr. Fangmann, testified that he would not expose an employee to hazardous conditions and did not believe that any of his employees were subjected to dangerous conditions on the motel jobsite. When questioned as to whether he had ever approached the general contractor about installing guardrails he stated that he had inquired about the matter and was advised that they were on the way. Mr. Fangmann also testified that employees are cautioned to be careful. This clearly does not fall within the guidelines of Anning-Johnson and Grossman Steel which requires reasonable efforts to have the hazard abated.

Although respondent's foreman contended that his employees moved around too much to be tied off to the building this would not appear to be a valid reason when an employee is installing a light fixture on the outside of the building (see exhibits C-7 and C-8). An employee could have tied a lanyard onto the building framework.

The evidence in the record discloses that respondent's employees were subjected to the hazard of falls from the second or third level and that broken bones or more serious injuries might result. Respondent's foreman (or assistant foreman) was on the job at all times and his knowledge can be imputed to respondent. A serious violation within the purview of Section 17(k) of the Act has been established.[4/] Based upon

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4/ Section 17(k) of the Act provides as follows:

> "For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."

all of the evidence in the record it is concluded that a penalty of $50 will satisfy the remedial purposes of the Act.

ORDER

Based upon the entire record it is hereby ORDERED that:

1. Citation 1 issued on May 14, 1979 be and the same is hereby affirmed.

2. A penalty of $50 is assessed therefor.

So ORDERED this the 13th day of March 1980 in Dallas, Texas.

Henry F. Martin Jr

HENRY F. MARTIN, JR.
JUDGE

TABLE OF CONTENTS


| Docket No. | Case Name | Date of Decision | Coordinates |
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| 77-1796 | UNITED STATES STEEL CORPORATION | 6/30/82 | 35/A2 |
| | (Judge's decision) | | 35/C1 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

June 30, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

United States Steel Corporation

OSHRC DOCKET NO. 77-1796

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
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| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | |
| UNITED STATES STEEL CORPORATION, | : | OSHRC Docket No. 77-1796 |
| Respondent. | : | |
| UNITED STEELWORKERS OF AMERICA - LOCAL 4889, | : | |
| Authorized Employee Representative. | : | |

DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge William E. Brennan is before the Commission pursuant to section 12(j)[1/] of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). United States Steel Corporation ("USS" or "Respondent") takes exception to the judge's affirmance of a citation issued in connection with its open hearth furnace operation in Fairless Hills, Pennsylvania. The citation and complaint issued by the Secretary of Labor ("the Secretary") allege that USS failed to comply with section 5(a)(1) of the Act, the "general duty clause,"[2/] in that:

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1/ 29 U.S.C. § 661(i).

2/ Section 5(a)(1), 29 U.S.C. § 654(a)(1), provides:

(continued on next page)

> A safe and healthful workplace free of recognized hazards likely to cause death or serious physical harm is not provided to employees in the open hearth in that employees are required to change oxygen lances atop the furnaces with molten metal in the furnaces. This process involves hazards associated with water becoming entrapped below molten metal.

The issues on review are whether the administrative law judge erred in deciding the case on a theory other than that agreed upon at the outset of the hearing, and whether a preponderance of the evidence demonstrates a violation of the general duty clause.[3/]

I

The investigation which led to the citation in this case was conducted in response to an employee complaint to the Occupational Safety and Health Administration ("OSHA") of unsafe work conditions. Specifically, millwrights at the Fairless Works objected to a newly instituted work rule which required that oxygen lances be replaced in furnaces

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2/ (continued)

Sec. 5(a) Each employer —

> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

3/ Former Commissioner Barnako's direction for review requested submissions from the parties on two issues: (1) whether the trial judge committed reversible error in affirming that item of the citation which alleged that employees required to change oxygen lances are exposed to hazards associated with water becoming trapped below molten metal, and (2) if the judge did not err, whether he assessed a proper penalty. In its petition for review USS argued, in addition, that the judge erred in affirming a second item of the citation alleging that employees involved in lance changes could be knocked off balance and onto the roof. That item was not directed for review and is therefore not before us. See Henry C. Beck Co., 80 OSAHRC 67/D13, 8 BNA OSHC 1734 n.2, 1980 CCH OSHD ¶ 24,590 at p. 30,169-3 n.2 (No. 77-963, 1980).

containing molten metal. Previously the practice had been to change inoperative lances before molten metal was added to a furnace. The millwrights told the OSHA compliance officer that the new procedure was dangerous because it could cause water to become entrapped in molten metal and explode.[4/]

Because the issues on review turn largely on questions of evidence, and that evidence tends to be highly technical in nature, we begin our discussion with a description of the open hearth furnace operation, according to the evidence developed below. USS's nine open hearth furnaces resemble large bathtubs, each measuring 60 to 90 feet by 12 to 20 feet, with an interior depth of 15 to 16 feet. They are constructed of heat-resistant basic bricks mounted on steel rods and are protected from the intense heat by a network of pipes which carry cooling water over the structures, particularly around doors and other apertures. Furnace doors are fitted with "wicket holes" through which the millwrights can observe the contents of the furnace and through which samples of molten metal are extracted for analysis.

Steel is produced in the open hearth operation at a rate of about 750 "heats" per month. A heat begins with the charging of limestone, scrap metal, and ore into the empty furnace. Molten iron is then poured in. The initial interaction of hot iron, ore, and scrap metal causes a violent boiling action which can send molten metal flying out of the furnace. For this reason "Danger" signs are posted on the charging floor

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4/ The change in work practices was the subject of an arbitration proceeding. The board of arbitration declined to rule on the merits of the millwrights' complaint, but determined that USS had failed to comply with its collective bargaining agreement by attempting to negotiate the terms of the new work rule directly with the millwrights rather than through the company's Joint Health and Safety Committee.

in front of the furnace before hot iron is added, and employees are kept at least 40 feet from the furnace doors until the foreman determines that the bath has stabilized. This violent period usually lasts one to two hours. Thereafter the mixture "cooks" anywhere from four to eight hours, until the desired grade of steel has been produced and is tapped off.[5/] As the mixture cooks, impurities called slag rise to the surface. The furnaces are designed so that some of the slag is removed through openings in the furnace, but a layer three to four inches thick generally remains throughout the heat. Temperatures inside the furnace during a heat range from 2300 to 2900 degrees Farenheit.

In the mid-1950s it was discovered that the heat time could be reduced by about half if oxygen is blown into the bath as it cooks. The oxygen is pumped into the furnace through "lances," or "jets," which are 18-foot steel pipes,[6/] six and one half-inches in diameter, weighing approximately 900 pounds. Each furnace is equipped with two or three lances, suspended vertically by overhead crane through eleven-inch holes in the roof. Oxygen enters the lance at its top end, which protrudes above roof level, and is blown out through oxygen ports in the bottom, the "head." Each lance is protected from the intense heat by cooling water which is circulated through the pipe's interior, entering and exiting through two

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5/ The administrative law judge found as fact that the bath is unstable from the moment molten iron is added to the ore and scrap until refined steel is tapped off and that this entire period lasts about one and one-half hours. This is error. The record establishes that the period of instability or turbulence to which the judge referred is followed by at least three to four hours of "cooking" time during which the bath remains stable unless ore is added or substantial water leaks develop.

6/ The judge stated in his decision that the lances are 16 feet long. However, Exhibit C-17, which is a blueprint of one of USS's furnaces, shows that the overall length of a lance is 18 feet.

two-inch ports at the top of the lance. A fully functional lance holds 18 gallons of water.

The lances are subject to two types of malfunction. The oxygen ports can become clogged, and substantial water leaks can develop. In either event, the non-operational lance is pulled up and away from the metal bath, its oxygen and water supplies are turned off at the source, and the flow of oxygen to the remaining lance or lances is increased. Until 1975, if all lances in a furnace failed during the heat, the heat was simply continued without benefit of added oxygen at the slower rate necessary to that process. In May 1975, however, USS directed the millwrights to change one lance if all lances in a furnace failed, even while the furnace contained molten metal, so long as the foreman had determined that the bath was stable.

The procedure for changing a lance is essentially the same whether or not the furnace contains molten metal. The replacement lance is suspended by a cable and moved by a crane from the charging floor to the area above the furnace where three men standing on girders and beams directly above the roof push and pull the suspended pipe into the lance hole. Once the tip of the lance has been maneuvered into position, its water and oxygen supplies are turned on. The lance is then lowered until its head is directly above but not touching the bath. A man standing on the charging floor watches the lance's descent through the wicket hole and signals to the crane operator when the lance has reached its proper depth. Due to the great weight of the lance and the limited clearance above the furnace roof, it is not uncommon for the lance to bump into and break water pipes on the roof, causing water to leak into the furnace.

As the bath cooks it is in a constant state of upheaval, much like a pot of boiling candy. Stringers of molten metal are sometimes tossed up from the surface and even out of the furnace itself. This boiling action can be significantly increased by water leaks, which are an unavoidable accompaniment to the process. Water pipes are often broken by unmelted scrap and ore as they are tossed about in the furnace, or by the oxygen lances in transit over the roof. In addition, the lances themselves can develop water leaks. When large amounts of water leak into a furnace the normal agitation of the bath is increased. This is particularly true when the water is released beneath the surface of the bath, as in the case of a lance head becoming submerged in molten metal and the casing being melted away before the water supply is turned off. In addition to the increased agitation caused by water leaks, the steam which results pours out of the furnace, pushing with it flames and smoke.

Another cause of increased turbulence in the bath is the addition of limestone or ore to the molten metal at an advanced stage of the heat. When ore is added to reduce the temperature of the bath or to adjust the grade of steel being produced, the initial interaction between the ore and the molten metal releases gases which cause an intense boiling action capable of tossing hot metal out of the furnace.

The record establishes that there are three reasons why a lance change would not be made during the period of instability caused by addition of ore to molten metal. First, instability in the bath is readily apparent to the melter foreman and first helper, whose job it is to assess the stability of the bath at all stages of the heat. Under the new procedure a molten metal lance change would be prohibited over an unstable bath. Second, lance failure is normally manifested by reduced

temperature in the bath. The bath cannot be tested for temperature if it is unstable. Therefore, lance failure and the need to replace a lance will not be apparent until the bath has stabilized. Third, a lance change is only made if all the lances are inoperative. In such a situation, however, the temperature of the bath drops and it would not be necessary to add ore to reduce the temperature.

II

A

On the first day of the hearing the parties and the administrative law judge agreed that the issue to be tried was whether the practice of changing oxygen lances over molten metal will result in entrapment of water and explosion. USS conceded that if water is trapped below molten metal an explosion can result, but denied that the practice of changing lances over molten metal will cause entrapment of water.

During the five days of the hearing frequent reference was made to the limited scope of the Secretary's charge:

> The Judge: I think the pleadings and the documents within the docket file pretty much reflect at least part of that position. That is, that the Respondent does not agree that there is a danger of water entering into the molten metal because of the practice of changing the oxygen lances; but perhaps we have saved some time by stipulating that getting water into the metal is a recognized hazard.
>
> The Secretary: Well, once water is into the metal and entrapped in the metal, that is a recognized hazard. Really, the issue rendered by that item is whether or not the practice of changing lances will result in water becoming entrapped.
>
> The Judge: That is the way I read the file. All right. Any further stipulations?

* * *

The Secretary: It is the theory of the Government that the recognized hazard which is an explosion, can be the result of changing oxygen lances during the time molten metals are in the furnace.

* * *

The hazard, of course, is the potential of an explosion. Cited in the citation is the practice which by its nature may lead to that possibility.

* * *

The Judge: Millwrights don't want to be up on that roof if there is a chance of a tube of water falling into that hot metal because they are convinced . . . that you can wind up with an explosion.

* * *

[T]he question there is when the lance is being changed with hot metal in the furnace, is there a realistic possibility of an explosion or other type of occurrence because of that process which would endanger the Millwrights that are doing the job.

* * *

There has to be encapsulation for explosion. We then come to the question of what are the realistic possibilities of such encapsulation because of the oxygen lance procedure?

* * *

What I am asking you . . . to do is try and prove to these Millwrights that their fear of a lance exploding is not founded on fact.

On occasion USS objected to evidence on the ground that it was not probative of an issue in the case:

The Union: Now, can you relate some of the causes of a violent reaction insofar as they are related, let's say to a water problem?

USS: Your Honor, I object. I think again we are going beyond the scope of direct examination. I also object on grounds of relevancy because that is not the issue in this case.

The Court: Technically you are right, Mr. Carney.

* * *

The Union: Can you describe for us the type of damage caused by the addition of water or after the addition of hot metal and such violent reactions?

USS: Your Honor, I object again. I think we are just going far afield in terms of talking about -- in extensive detail a reaction which is not at issue in this case.

In deciding the case, however, the judge did not rule on the issue framed by the parties. He acknowledged that the question for decision was whether the changing of lances over molten metal would result in entrapment of water, causing explosions, and that "Complainant's evidence, in major part was aimed at establishing this possibility whereas Respondent's evidence was directed to showing no such realistic possibility exists." Nevertheless, he concluded that the record when taken as a whole shows that the real danger posed by the lance change procedure is that it brings employees within range of molten metal eruptions caused by factors other than the lance change itself. "The chance of explosion or 'violent eruptions,' from many unpredictable water sources, with the risk of partial roof damage or collapse, and the spraying of molten steel, is real, based on the total evidence of the record."

On review USS argues that it was denied due process of law when the judge changed the issue in the case after the hearing and without affording USS an opportunity to present argument or evidence on the new issue. USS points to the passages in the record quoted above in which the judge stated that the hazard at issue was explosion caused by the lance change procedure and notes that although the judge states that the broader issue was specifically tried by the parties, he cites no

evidence in the record that any issue other than that agreed upon at the outset was being litigated. Finally, USS points out that its brief to the judge was limited to the question of whether the lance change procedure could cause entrapment of water.

B

We agree with USS that the judge acted improperly in finding a violation based on possible eruptions of molten metal from causes other than a lance change. The citation was limited to a potential hazard resulting from a lance change, and statements made at the hearing by all parties and the judge establish that the parties did not intend to expand the charge beyond that contained in the citation. It was therefore error for the judge to decide the case on a different issue. "It is patently unfair for an agency to decide a case on a legal theory or set of facts which was not presented at the hearing." National Realty and Construction Co. v. OSHRC, 489 F.2d 1257, 1267 n. 40 (D.C. Cir. 1973).

We recognize that the millwrights are genuinely concerned for their safety and that their concern extends beyond the issue tried by the parties.[7/] However, the Commission's decision must be based on evidence

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7/ Although we do not rule on the broader issue framed by the judge, we note several errors in the judge's analysis of the evidence, which cast doubt on the accuracy of his conclusion that millwrights performing a molten metal lance change would be exposed to hazards arising out of the ordinary operation of the furnace. The record establishes that there is a period of extreme turbulence immediately after the addition of molten iron to the scrap and ore, that this period lasts approximately one and one-half hours, and that thereafter the mixture cooks for several more hours in a relatively stable manner unless certain specified events occur. The judge, however, mistakenly concluded that the one and one-half hours of extreme turbulence constituted the entire cook time, so that millwrights going up on the roof after addition of molten iron are necessarily exposed to a highly agitated bath. See note 5 supra. He also concluded that until the institution of the new lance change procedure millwrights were never required to go up on the roof after hot iron had

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of record as it pertains to the Secretary's theory of the case. The Secretary chose to limit the charge to the hazard of entrapment of water in molten metal as caused by the lance change procedure. During the five days of the hearing the judge and the parties repeatedly referred to the limited nature of the charge. Evidence of nonentrapment hazards created by the ordinary operation of the furnace was relevant to the agreed-upon charge because it provided background information necessary for an understanding of this highly technical operation, and because the millwrights who provided much of this testimony did so in response to the questions regarding the basis of their fears of the molten metal lance change procedure. Under these circumstances USS did not receive fair warning that a broader issue was being tried.

III

A

Section 5(a)(1) requires employers to provide their employees workplaces "free from recognized hazards that are causing or are likely to cause death or serious physical harm." Numerous Commission and court de-

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7/ (Continued)

been added to the furnace. However, as indicated at note 9, infra, there is unrebutted testimony in the record that millwrights have traditionally gone up on the roof, without objection, to repair door frames while the furnace contains molten metal. The judge also disregarded entirely the testimony of the two expert witnesses on the ground that it related "chiefly to the scientific physics of explosions as they might be caused by an oxygen lance falling into a furnace after the addition of hot metal. . . ." However, inasmuch as the experts' testimony was relevant to the case, the judge's reason for disregarding it is not valid. The judge also improperly rejected in large part the testimony of USS's Division Superintendent regarding precautionary measures that would be taken before and during a lance change on the ground that this witness was not required to change lances over molten metal himself.

cisions have interpreted this language and have given various formulations of the elements the Secretary must prove in order to establish that an employer violated section 5(a)(1). See, e.g., Baroid Division of NL Industries, Inc. v. OSHRC, 660 F.2d 439 (10th Cir. 1981); Whirlpool Corp., 79 OSAHRC 32/A14, 7 BNA OSHC 1356, 1979 CCH OSHD ¶ 23,552 (No. 9224, 1979), vacated and remanded on other grounds, 645 F.2d 1096 (D.C. Cir. 1981). In Bomac Drilling, Division of TRG Drilling Corp., 81 OSAHRC 45/A2, 9 BNA OSHC 1681, 1981 CCH OSHD ¶ 25,363 (No. 76-450, 1981), the Commission expressed the elements of a section 5(a)(1) violation in a manner that differed from most prior court and Commission decisions by including the reasonable foreseeability of an incident as a distinct element of a violation:

> In order to establish a section 5(a)(1) violation, the Secretary must show that an employer failed to render its workplace free from a hazard that is recognized, the occurrence of an incident was reasonably foreseeable, and the likely consequence in the event of an incident was death or serious physical harm to its employees . . . . The Secretary must also demonstrate that there were feasible means available to abate the hazard.

9 BNA OSHC at 1691, 1981 CCH OSHD at p. 31,547 (citations omitted). In a concurring opinion in Bomac, Commissioner Cleary criticized the inclusion of the reasonable foreseeability of an incident as a separate element of a section 5(a)(1) violation. He noted that the facts relied on by the majority to conclude that an incident was reasonably foreseeable were the same as those on which they found that the employer had failed to free its workplace from a recognized hazard. Thus, he considered that including the reasonable foreseeability of an incident as a separate element of a violation simply added an unnecessary complication to the analysis of section 5(a)(1) cases.

We conclude that the reasonable foreseeability of an incident should no longer be considered a separate element of a section 5(a)(1) violation.

In addition to agreeing with Commissioner Cleary's rationale in Bomac, we note that the United States Court of Appeals for the Second Circuit has specifically disapproved of the Commission's application of "reasonable foreseeability" to a section 5(a)(1) case. Pratt & Whitney Aircraft v. Secretary of Labor, 649 F.2d 96 (2d Cir. 1981). Moreover, other courts of appeals that have decided section 5(a)(1) cases have done so without resorting to a discussion of whether an incident was reasonably foreseeable. Baroid Division of NL Industries, Inc. v. OSHRC, supra; St. Joe Minerals Corp. v. OSHRC, 647 F.2d 840 (9th Cir. 1981); Whirlpool Corp. v. OSHRC, 645 F.2d 1096 (D.C. Cir. 1981); Empire Detroit Steel Division, Detroit Steel Corp. v. OSHRC, 579 F.2d 378 (6th Cir. 1978); Getty Oil Co. v. OSHRC, 530 F.2d 1143 (5th Cir. 1976); National Realty & Construction Co. v. OSHRC, supra. The disparity between the formulation stated in Bomac and that stated by such a large number of courts of appeals is a potential source of confusion and fruitless litigation. Accordingly, we overrule Bomac to the extent it held that the reasonable foreseeability of an incident is a distinct element of a section 5(a)(1) violation.

B

The citation alleges that USS failed to render its workplace free of the hazard of explosions resulting from water becoming entrapped below molten metal as a result of a lance change. USS contends that a lance change over molten metal cannot lead to water entrapment and a resultant explosion. Although the administrative law judge did not rule on this issue, we need not remand for further findings of fact. The Commission, not the administrative law judge, is the ultimate trier of fact. Accu-Namics, Inc. v. OSHRC, 515 F.2d 828 (5th Cir. 1975), cert. denied, 425 U.S. 903 (1976).

Both USS and the Secretary produced expert testimony on the question of entrapment explosions, Geoffrey Belton for the Secretary, and Chester Bieniosek for USS. Although they disagreed sharply in several respects, Belton and Bieniosek were in complete agreement that water released below the surface of the bath will normally vaporize and come to the top rather than become entrapped. An explosion due to entrapment of water occurs only if water is subjected to extreme heat while caught behind a solid barrier which prevents its escape as it vaporizes and expands. USS's expert, Bieniosek, explained how an entrapment explosion of this type can occur in an open hearth furnace. Water, particularly ice or snow, is sometimes mixed in with the ore charged at the bottom of a furnace. When molten iron is poured onto the ore and scrap, a "skull" of solid metal can form temporarily between the water at the bottom of the furnace and the hot iron. As the heat transfers through the skull, the water beneath evaporates, expands, and builds up sufficient pressure to blow through the skull. Also, water is sometimes trapped inside the batteries mixed in with the scrap metal. Bieniosek testified that the potential for this kind of explosion is one of the reasons the danger sign is posted on the charging floor until the melter foreman is certain that the mixture in the furnace has stabilized.

The two experts also agreed that if a lance containing water were to fall into the bath, if its water ports were to become blocked, and if water were trapped inside, the lance could explode. Further, both experts stated that it is not possible to calculate with mathematical certainty the rate and force with which steam would issue from the lance or the rate at which slag would solidify in the ports. They reached differing conclusions, however, as to whether water could actually become entrapped in a fallen lance.

Belton, the Secretary's expert, hypothesized that a lance could fall into the furnace and water could become trapped inside if the lance fell through the lance hole at about a 30-degree angle[8/] or if it fell through a large hole in the roof caused by a collapse of the brick and metal structure. The lance would descend into the bath like a falling spear, bouy back up, and come to rest floating horizontally in the slag layer. The slag would begin to solidify in the ports immediately upon contact with the lance because the lance would be much colder than the slag. In Belton's opinion this solidifying process would occur more rapidly than the water inside the lance would turn to steam. Consequently the water would be trapped inside as it vaporized and expanded, and eventually the lance would explode.

In Bieniosek's opinion, the chance of this happening is "practically zero" because steam would rush out of the ports with sufficient force and speed to prevent slag from blocking the ports. Bieniosek stated categorically that the extremely high temperature and large quantity of molten metal surrounding the lance would cause the water inside to vaporize so quickly and with such force that it would blow out of the ports before they could become blocked. Even if it were possible for a layer of slag to obstruct the ports completely, that slag would be so weak and thin that the steam could easily break through. He stated that one reason for the slag's inability to form a strong barrier in the ports is that it is a complex material that does not solidify at

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8/ The lance must fall at an angle in order to clear the roof, because the lance is approximately 18 feet long and the furnace interior is only 15-16 feet deep. On the other hand, the lance must not fall at too oblique an angle or it will be caught in the lance hole, which is only 11 inches in diameter.

a given temperature, but "goes through a range of temperatures during the solidification process which means for a considerable time there is a mixture of solids and liquid in the slag."

We find Bieniosek's testimony more convincing than Belton's for the following reasons. Belton predicated his hypothesis on several factors not present at the cited furnaces. He assumed a slag depth of eight to twelve inches, but it was the uncontradicted testimony of USS's plant superintendent that the maximum slag depth is three to four inches. He assumed the water ports are one and one-half inches in diameter, but blueprints in evidence show that the ports are two inches in diameter. His hypothesis required that the lance fall through the lance hole at a 30-degree angle or through a large hole in the roof, but he specifically stated he had made no effort to calculate the likelihood of a lance falling at the requisite angle, and it was the uncontradicted testimony of the Fairless Division Superintendent and the Open Hearth General Foreman of Maintenance that a lance could not fall into the furnace due to a collapse of the roof. Both witnesses testified that the network of steel rods on which the bricks are mounted would make it impossible for large sections of roof to collapse, and that a lance swinging above the roof would be caught by the pipes and girders above the roof. Moreover, Belton did not state his opinion with any degree of certainty. Although he stated on direct that it is "very likely" that the water ports would become clogged with solidified slag before steam could escape, on cross examination he conceded that "in general [I] think the solidification is probably less likely than the evolution of steam from the nozzles." Further, Bieniosek had more professional experience in the matters at issue than Belton. Belton stated that he had no direct experience with

oxygen lances, had never personally observed a lance change, and had no professional experience working with the interaction of liquid water and steel. Bieniosek, on the other hand, described extensive experience in the interaction of oxygen and water with molten metal and had observed oxygen lances in operation for 20 years. He stated that during that time he had never seen or heard of an explosion anywhere caused by a fallen lance. Finally, he gave his expert opinion without reservation.

The two experts also testified regarding the possibility that large quantities of water floating on top of the bath could cause an entrapment explosion. According to Belton, if water were to pour into the furnace at a rate of 250 gallons per minute, either from a broken lance or from pipes broken by the lance in its progress over the roof, not all the water would vaporize. Instead, a layer of steam would form on top of the slag, and liquid water would float on that. If a lance, or bricks or pipes knocked loose by a lance, were then to fall into the furnace, they would travel through the slag and into the molten metal, creating a pathway into the bath. Liquid water would follow in the pathway and molten metal would close in behind the water. Although ordinarily water in molten metal does not explode, the combination of splashing, impact, and high temperature would result in explosion. Belton based his opinion on a study in which water was sprayed from a hose onto molten aluminum. However, he was unable to give a definite opinion as to whether a brick or lance falling into the furnace would have sufficient impact to cause an explosion. He stated that the degree of impact required for such an explosion, is something "not well understood" and that the water and aluminum experiment on which he relied was "not very well designed" with regard to the impact factor.

Bieniosek, on the other hand, stated that a lance or brick falling onto a vapor and water layer in an open hearth furnace would not cause an explosion. According to Bieniosek, not only are impact and turbulence necessary under the circumstances described by Belton, but in addition the water must be trapped between the falling object and the molten metal, rather than traveling behind. In any case, Bieniosek did not believe that falling bricks could penetrate the slag layer due to the highly viscous condition of the slag. Although a falling lance would penetrate the slag layer, Bieniosek believed that water pushed into the molten metal would have ample opportunity to escape around the pipe and into the furnace.

Even if viewed in the light most favorable to the Secretary, it cannot be said that Belton's testimony preponderates over Bieniosek's. At best the two experts' testimony is evenly balanced. Nor does other evidence in the record regarding the accumulation of large quantities of water in the furnaces tend to add weight to either expert's testimony. Several millwrights testified that liquid water can and does accumulate on the surface bath, but the Division Superintendent at Fairless testified that an accumulation of two to three inches is an unusual condition, and that no lance change would be ordered under unusual conditions. He also testified that large amounts of water would not accumulate in the furnace after millwrights go up on the roof because a newly leaking pipe or lance would be turned off at the source. This testimony was never rebutted.

The Secretary also introduced into evidence USS's "Safe Job Procedure for Changing Lances," and its "Safe Job Procedure for Lowering Jets After

Hot Metal Addition." "Safe Job Procedures" are documents drafted by USS purporting to set forth safe procedures for performing various tasks. The "Safe Job Procedure for Changing Lances" provides, among other things, precautionary measures to be taken before and during a molten metal lance change. The precautions include: (1) no lance change during the first 60 minutes after the addition of hot iron to scrap and ore, or thereafter until the bath has been deemed stable by the melter foreman and first helper, (2) no lance change unless all driven fuel has been turned off 20 minutes, and (3) no pit or buggy activity on the charging floor or addition of ore to adjacent furnaces during the procedure. Item 1.4.1 of the "Safe Job Procedure for Lowering Jets After Hot Metal Addition" provides: "If the jet hangs up and causes slack in cable, the sudden drop can cause cable to break and jet will fall free. If hose pinches or breaks water leakage can cause roof damage and water leakage into furnace can cause explosion." The Secretary contended that these two safe job procedures, together with the historical rule against changing lances over molten metal, constitute an admission by USS that molten metal lance changes can cause explosions.

However, one of the millwrights who participated in formulating "Safe Job Procedure for Changing Lances" testified that it was instituted after an employee working over the roof was caught in a crane cable. He also stated that the purpose of the ban on molten metal lance changes was "for nobody to be on top of that roof," but inasmuch as the record establishes that millwrights do go up on the roof to repair door frames, even when there is hot metal in the furnace, we can infer very little

from that statement.[9/] Moreover, the Division Superintendent testified that at the time this Safety Rule was developed, furnaces were constructed of silica, rather than basic brick, and the dangers of roof collapse were considerably greater then. Finally, the "Safe Job Procedure for Changing Lances" makes no mention of an explosion hazard.

The "Safe Job Procedure for Lowering Lances After Addition of Hot Metal," does refer to explosion hazards created by water leaks. However, as indicated earlier, the period immediately after addition of hot iron to the unmelted scrap and ore is known to be a particularly dangerous stage of the heat for reasons not related to water leaks. More importantly, it is clear from the record that the terms "explosion," "violent reaction," and "turbulence" are used interchangeably by millwrights. Consequently, use of the term "explosion" on this Safe Job Procedure does not constitute a concession that entrapment occurs; it may merely refer to a matter not at issue in the case, i.e., turbulence caused by water leaks in the absence of entrapment.

For these reasons we conclude that the record developed below does not demonstrate by a preponderance of the evidence that USS failed to render its workplace free of the alleged hazard of explosions resulting from entrapment of water below molten metal caused by changing oxygen lances

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9/ The judge found as a matter of fact that "there was an ironclad rule that, once hot metal from the blast furnace had been added to the open hearth furnace, no employees were allowed to go up on the roof superstructure of the open health furnace." However, the record contains uncontradicted testimony that millwrights do go up on furnaces containing molten metal in order to repair door frames.

above a furnace containing molten metal. Accordingly, the citation is vacated.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: JUN 30 1982

COTTINE, Commissioner, concurring:

I concur in my colleagues' conclusion that the Secretary failed to establish that United States Steel Corporation ("USS") violated section 5(a)(1) of the Act, the "general duty" clause.[1/] However, I adhere to the Commission's view in Bomac Drilling, Div. of TRG Drilling Corp., 81 OSHRC 45/A2, 9 BNA OSHC 1681, 1981 CCH OSHD ¶25,363 (No. 76-450, 1981), and its framework for analyzing alleged section 5(a)(1) violations. Accordingly, I would not overrule Bomac. However, the citation in this case should be vacated because the Secretary failed to establish that the occurrence of an incident was reasonably foreseeable.

I

The analysis in Bomac was based on the Commission's extensive experience in dealing with section 5(a)(1) cases. This experience demonstrated that many section 5(a)(1) citations were issued following specific incidents that led to death or injury in the cited workplaces. In these situations, the parties tended to focus on the specific incidents rather than on the general hazards alleged in the citations. This Commission and reviewing courts repeatedly pointed out that the proper inquiry was whether the general hazard was recognized within the meaning of section 5(a)(1), not whether a particular incident that had resulted in death or injury constituted a violation of section 5(a)(1). See General Dynamics Corp., Quincy Shipbuilding Div. v. OSHRC , 599 F.2d 453 (1st Cir. 1979); Brennan v. Butler Lime and Cement Co., 520 F.2d 1011 (7th Cir. 1975); Brennan v. OSHRC (Vy Lactos Laboratories, Inc.), 494 F.2d 460 (8th Cir. 1974); Western Massachusetts Electric Co., 81 OSAHRC 63/B13, 9 BNA OSHC

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1/ Section 5(a)(1), 29 U.S.C. §654(a)(1), is quoted at note 2 of the lead opinion.

¶25,470 (No. 76-1174, 1981); Beaird-Poulan, a Div. of Emerson Electric Co., 79 OSAHRC 21/D11, 7 BNA OSHC 1225, 1979 CCH OSHD ¶23,493 (No. 12600, 1979); Boeing Co., Wichita Div., 77 OSAHRC 188/D13, 5 BNA OSHC 2014, 1977-78 CCH OSHD ¶22,266 (No. 12879, 1977). Despite these admonitions, the parties continued to focus on the foreseeability of specific incidents rather than on general hazards in many cases.

In Bomac, as in previous cases,[2/] the Commission stressed that hazards in section 5(a)(1) cases should be defined generically, in order to avoid the tendency to focus on a specific incident. However, inquiring whether the employer recognized the generic hazard does not take into consideration whether the employer had the ability to prevent the occurrence of an incident that could endanger its employees. Because an employer's duty under section 5(a)(1) is an achievable one, a section 5(a)(1) violation can only be found if the employer had the ability to prevent the occurrence of such an incident. See National Realty and Construction Co. v. OSHRC, 489 F.2d 1257, 1266 (D.C. Cir. 1973). If an employer, in the exercise of reasonable diligence, cannot foresee that a hazardous incident will occur, the employer cannot be found in violation of the Act. See General Electric Co., 81 OSAHRC 42/A2, 9 BNA OSHC 1722, 1733, 1981 CCH OSHD ¶25,345 at p. 31,455-5 (No. 13732, 1981) (Cottine, Commissioner, concurring in part and dissenting in part). As stated by the U.S. Court of Appeals for the First Circuit, "An employer is not an insurer and need not take steps to prevent hazards which are not generally foreseeable. . . but at the same time an employer must do all it reasonably can to prevent

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2/ See, e.g., Brown & Root, Inc., 80 OSAHRC 97/A2, 8 BNA OSHC 2140, 1980 CCH OSHD ¶24,853 (No. 76-1296, 1980).

foreseeable hazards." General Dynamics Corp., 599 F.2d at 458. Therefore, requiring that an incident be reasonably foreseeable is necessary to assure that the employer is not held to a standard of strict liability under section 5(a)(1). See National Realty & Constr. Co. v. OSHRC, supra.

Bomac presents a coherent, integrated approach to the adjudication of section 5(a)(1) cases. The generic definition of hazards assures that the citation and the Secretary's evidence focus on the general hazard the citation seeks to abate, rather than on a specific incident that may or may not be foreseeable. Requiring proof that an incident associated with the generic hazard is reasonably foreseeable assures that the duty imposed on the employer under section 5(a)(1) is achievable.[3/]

II

In this case, the generic hazard is explosions caused by the entrapment of water in molten metal. USS concedes that it recognizes this hazard, and previous cases have shown that the steel industry generally recognizes the hazard. See Babcock & Wilcox Co. v. OSHRC, 622 F.2d 1160, 1164 (3d Cir. 1980); Empire Detroit Steel Div., Detroit Steel Corp. v. OSHRC, 579 F.2d 378, 383 (6th Cir. 1978). Moreover, the worksite was not free of the hazard because of the unavoidable presence of water in USS's open hearth furnaces necessitated by the use of water as a coolant in the steelmaking process. However, the issue tried by the parties was whether an entrapment explosion could foreseeably occur as a result of an oxygen lance change over a furnace containing molten metal. In my opinion, the Secretary failed to prove that this incident was reasonably foreseeable.

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3/ As the lead opinion points out, the Secretary must also prove that an incident is likely to cause death or serious physical harm and that a feasible means exists to eliminate or materially reduce the hazard in order to establish a section 5(a)(1) violation.

The Secretary's expert witness, Mr. Belton, postulated two methods by which a lance change could result in an entrapment explosion. First, he suggested that the lance itself, which was filled with water, could fall into the furnace, the ports through which water entered and left the lance could become blocked with solidified slag, and the water thereby entrapped could cause the lance to explode. However, USS's expert, Bieniosek, believed slag would not solidify in the water ports because the water would immediately turn to steam when the lance fell into the molten metal and the steam rushing out of the ports would prevent slag from solidifying and water from becoming entrapped. Both experts were well-qualified, but Belton was not personally familiar with USS's furnaces, and his opinion was based on two assumptions not shown to be present. He assumed that the slag depth was eight to twelve inches when it was in fact three to four inches, and he assumed that the ports were one and one-half inches in diameter when they were in fact two inches in diameter. Thus, his opinion was based on the presence of more slag than was actually present and on the belief that it would become solidified in smaller openings than the lances contained. These important variations diminish the weight to be assigned Belton's opinion. Considering the record as a whole, the Secretary has not proven it was reasonably foreseeable that a lance falling into a furnace could lead to an entrapment explosion.

Belton next suggested that if a large quantity of water entered the molten metal bath, as could occur from a leak in the water pipes in the roof, and if a solid object then fell into the bath, the impact of the

solid object could drive some of the water into the molten metal and an explosion could result. However, this type of explosion could only occur if the impact of the falling object is sufficient to entrap water between the molten metal and the falling object, and Belton was uncertain whether a falling brick or lance would have sufficient impact to do this. Bieniosek, on the other hand, was of the opinion that neither bricks falling from the furnace ceiling nor a falling lance could produce the necessary impact. Under these circumstances, I conclude that the Secretary failed to prove that this type of explosion was reasonably foreseeable.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|---|
| SECRETARY OF LABOR<br>Complainant<br>v.<br>UNITED STATES STEEL CORPORATION<br>Respondent<br>and<br>U. S. STEELWORKERS OF AMERICA - LOCAL 4889<br>Affected Employees | : | DECISION AND ORDER<br>OSHRC Docket No. 77-1796 |

APPEARANCES

FOR THE SECRETARY OF LABOR

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FOR THE RESPONDENT

James T. Carney, Esq.
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FOR EMPLOYEES

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Brennan, W. E., A.L.J.

STATEMENT OF THE CASE

This case arises under the provisions of Section 10(c)[1/] of the Occupational Safety and Health Act of 1970 (the Act).[2/] There is involved two Items of a Serious Citation, issued pursuant to Section 9(a) of the Act,[3/] by the Secretary of Labor through the Area Director of the Occupational Safety and Health Administration for Philadelphia, Pennsylvania (Complainant), to United States Steel Corporation at its Fairless Hills, Pennsylvania steel plant (Respondent). Penalties of $450 for each Item were proposed by Complainant pursuant to Section 10(a) of the Act.[4/]

On October 20, 1976, in response to employee complaints, Compliance Officers (C.O.) Hrin and Savage of the Philadelphia OSHA office, began an inspection of Respondent's Fairless Hills steel producing plant, specifically the practice of changing oxygen lances in its open hearth furnaces, the basis of the employee complaints. The on site phase of this inspection was substantially completed on October 22, 1976, when C.O. Hrin advised mangement representatives that he was not sufficiently knowledgeable concerning the oxygen lance changing procedure to hold a closing conference and therefore it would not be held until he and C.O. Savage

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1/ 29 U.S.C. 659(c).

2/ 29 U.S.C. 651 et seq.

3/ 29 U.S.C. 658(a).

4/ 29 U.S.C. 659(a).

conducted necessary research. (TR. 104-107). Upon completion of this research which was rather prolonged because it was conducted as an additional responsibility to an otherwise full work schedule, (TR. 108-125), a closing conference was held with U. S. Steel's Fairless management on May 4, 1977. On May 6, 1977, the two Itemed Citation for serious violations of the "general duty" clause of the Act,[5/] was issued (R.p. 1), which was contested by Respondent (R.p. 2).

After the pleadings were perfected (R. pp. 4, 6), and pretrial motions ruled upon (R.p. J-1, J-5, J-7, J-14, J-16, J-17, J-18), this case was heard in Philadelphia, Pennsylvania, pursuant to written notices (R.p. J-4, J-22), on September 1 and 2, November 8, 9 and 10, 1977.

Both Complainant and Respondent were represented by counsel, as was Local 4889, United Steelworkers of America, the affected employee representative which had earlier claimed party status. (R.p. J-6, J-15).

The two Items of the Serious Citation allege as follows:

Item No. 1

> A safe and healthful workplace free of recognized hazards likely to cause death or serious physical harm is not provided to employees in the open hearth in that employees are required to change oxygen lances atop the furnaces with molten metal in the furnaces. This process involves hazards associated with water becoming entrapped below molten metal:
>
> a) Open Hearth, furnace #3[6/]

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[5/] Section 5(a)(1) of the Act, 29 U.S.C. 654(a)(1), which provides that;

> Each employer-
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

[6/] Complainant's Motion to amend each Item to allege the existence of the violations at all of Respondent's nine open hearth furnaces rather than just furnace #3, (R.p. J-14), was granted prior to trial by written Order (R.p. J-17).

Item No. 2

A safe and healthful workplace free of recognized hazards likely to cause death or serious physical harm is not provided to employees in the open hearth in that employees involved in changing oxygen lances atop the furnaces, if knocked off balance can land on the roof of the furnace and suffer serious burns:

a) Open Hearth, furnace #3[7]

Immediate abatement as to both Items was ordered.

ISSUES

1. Does the practice of changing oxygen lances after the addition of molten metal to its open hearth furnaces, as followed at the Fairless works, expose Respondent's employees to any recognized hazards which are likely to cause death or serious physical harm?

2. Does the process of changing oxygen lances, during regular furnace maintenance, as carried out at the Fairless works, expose millwrights to the dangers of falls onto the top of furnace roofs?

For the reasons which follow, these issues are answered in the affirmative.

STIPULATIONS

United States Steel Corporation is a Delaware corporation with its principal office located in Pittsburgh, Pennsylvania. It acknowledges that it is engaged, as the largest domestic steel producer in the United States, in a business affecting commerce. It has an average number of some 167,000 employees, [employed at various locations, one of which

[7] See footnote 6, supra.

being located at Fairless Hills, Pennsylvania], and had gross 1976 sales of approximately nine billion dollars. Exhibit C-1 reflects some facts concerning the history of prior OSHA inspections and Citations involving the Fairless works. (TR. 7-9).

Additionally, the parties stipulated, at the opening of the trial:

> "... that if water is entrapped by hot or molten metal in a furnace, that an explosion may result and that this is a hazard that is recognized by the steel industry. However, United States Steel will not stipulate that the procedure of changing jet lances while there is hot metal in the furnace will cause this condition to result." (TR. 6).

There was thus drawn, a rather narrow question, namely will the oxygen lance changing procedure as followed at the Fairless works, done after hot metal is added to the furnaces, result in entrapping water in the molten metal within the furnace, thereby creating an explosion? Complainant's evidence, in major part, was aimed at establishing this possibility whereas Respondent's evidence was directed to showing no such realistic possibility exists.

However, the answer to the legal issues posed in this case, as set forth supra under "Issues", can not be determined by answering the more narrow question attempted to be framed by the parties in their stipulation. An evaluation of all of the evidence of this record, (which raises the legal issues as framed, supra) mandates the affirmative answers to these legal issues.

## BACKGROUND

The following background information, as established by the evidence of this record, is helpful to an understanding of this case.

There has been operated at the Fairless works over the years, a number (not less than 9 as of 1976) of "open hearth" furnaces used to produce various types of steel.

These "open hearth" furnaces range from 60 to 90 feet long and from 14 to 20 feet wide, resembling a very large bath tub. The brick or hearth portion are relatively shallow, measuring approximately 20 to 22 feet in their interior. As a total unit, they are massive structures resting upon very large, steel sub-structures. (Exh. C-18). The hearth of the furnace is constructed of refractory brick, a type of heat resistent brick. Its brick bottom is saucer shaped and its verticle sides are covered with a domed, brick roof. This brick structure is built within a large network of large steel beams - called "binders" and frames, which support and bind together the interior brick hearth. Some of these binding steel members and frames, as well as other steel components of these furnaces, are water cooled to prevent their destruction because of the extreme heat necessary to produce steel. On the front of these furnaces are numerous large, water cooled steel doors (weighing approximately one ton each), through which the raw materials are inserted into the furnace, a process known as "charging" the furnace. The brick roofs of these furnaces are supported by a network of large steel "binders", smaller steel "I" beams, and steel rods. On top of the face of the furnace, above the charging doors, is located a water "header", one main source for the distribution and flow control of the water used to cool the various steel components of the furnace.

The brick inner lining of these furnaces, which are subjected to enormous heat, from 2,000° to 3,000°F, are burned thin during a "campaign".

A "campaign" consists of approximately 500 "heats" and takes about six months to complete. A "heat" consists of producing one furnace load of steel, from the addition of the raw material to the "tapping" off (drawing off) of the fully smelted steel. At the end of each "campaign", the furnace is shut down and its inner brick lining rebuilt and other repairs made. Upon being rebuilt, the furnace is then launched upon its next "campaign", the first step of which is to heat the furnace, by burning various types of fuels. Then the following steps are taken.

1. The furnace is prepared for the next "heat". Dolomite (a highly heat resistant substance) is first injected onto the floor with an electrically driven dolomite gun to preserve the furnace bottom. The interior brick surfaces are checked for cracks or other damage.

2. The "charging" of the furnace is then begun. A predetermined amount of limestone is next placed on the bottom of the furnace, on top of the dolomite, both as an ingredient of the steel to be made and as additional insulation for the furnace bottom. At this point the inside temperature of the furnace ranges from 2,000° to 2,900°F, depending upon whether this is the first "heat" of the campaign, or a subsequent "heat". If a subsequent "heat", the interior temperature is in the high range because the prior "heat" has just been "tapped" off.

3. There is then added a predetermined amount of iron ore.

4. There is then added scrap iron. The "charging" of the furnace with the limestone, iron ore and scrap iron, is accomplished by using "charging" machines brought to the doors of the furnace by railroad buggies.

5. After this "charging" is accomplished, the furnace doors are "banked" - a process by which dolomite dams are built up on the inside of the furnace doors.

6. At this point, any required maintenance of the furnace is done, such as changing doors, oxygen lances, frames, etc. After this maintenance is completed, -

7. The last scheduled addition is "hot metal". This is molten steel, brought from a blast furnace and added to the furnace using a huge, 150 ton capacity ladle. (Photograph Exhibit C-3, shows this step of the process). This step is particularly hazardous and recognized as such by all steel men. Danger signs are placed on the "charging" floor in front of the furnace and all employees, except the First Helper who directs the pouring of the hot metal from the ladle by signals to the crane operator, must stay some 40 feet back away from the face of the furnace behind a "charging" rail. With the addition of the hot metal, the bath becomes particularly "unstable", that is, it boils and reacts violently. This unstable, reacting condition can last up to just before the finished steel is tapped off the furnace, from 1 to 1-1/2 hours, and employees are directed to stay clear of the front of the furnace. The furnaces are normally run constantly, seven days a week, "tap" to "tap", through approximately 500 "heats" which constitutes one "campaign". The furnaces, are "fired", i.e., heated by burning various fuels such as natural gas, oil, etc. They also have various vents and flues for carrying off unwanted gases. (See Exh. C-18).

Sometime in the late 1950's, (1956, 1957 or 1958), the practice of using oxygen lances began at the Fairless works.

These oxygen lances, also called "jets", are essentially two steel pipes each encased in an outer steel pipe. At the lance center is a steel pipe through which is pumped oxygen to a copper/alloy "head" or tip at a minimum pressure of 150 pounds per square inch (p.s.i.). The inner oxygen pipe is encased in a larger pipe through which cooling water runs. The two inner pipes are encased in a third, outer steel pipe into which cooling water is pumped at about 40 p.s.i., about 250 gallons per minute. This water is discharged through the second water pipe. The oxygen and water are pumped into and, as to the water, away from the lance, through large flexible hoses at the top of the lance. (Exh. C-19, C-4).

Each lance is about 16 feet long, 6-5/8 inches in outside diameter and weighs 820 pounds when empty. It is designed to hold about 151 pounds of water, approximately 18 gallons, when operating. Thus, when in operation the lance weighs almost one half ton (971 pounds).

The intended use of these lances, at the Fairless works, is for them to be inserted through holes in the furnace roof. Each lance hole is about 11 inches in diameter and its circumference is ringed with a water cooled "doughnut", i.e., a collar through which water is pumped at 40 p.s.i. to assist in shielding the lance from the intense heat within the furnace.

The lance is inserted through the "doughnut" into the interior of the furnace, usually right after the scrap iron has been "charged." The oxygen being pumped through this lance aids in increasing the heat within the furnace and consequently the speed and efficiency of the smelting process.

After the hot metal is added, the intended position of the lance is that its tip, should be inserted through the layer of slag,[8/] which because of its lighter density floats on top of the molten steel, to the interface of the slag and molten steel. In this position, the oxygen being pumped through the lance assists in reducing the time necessary to produce the desired steel.

Each furnace at Fairless is equipped with not less than two nor more than three of these lances. Because of the nature of the smelting process, these lances are subject to two types of malfunctions. First, the lance tips are sometimes rendered inoperative because the oxygen holes become plugged or the tips are damaged. This damage is caused, in major part, when the lance is first lowered into the furnace and inadvertently strikes unmelted scrap iron. The employee responsible for lowering the lance is called the First Helper. He is directly responsible for running the furnace and is paid on an incentive basis as opposed to an hourly wage, under which, the more "heats" his furnace produces, the bigger his pay check. He lowers the lance by looking through an inspection hole (wicket hole) in the furnace door. The practice is to lower the lance rather close to the scrap iron and melt a "puddle" of the scrap directly below the lance, thus forming the spot in the mass into which the lance will be

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[8/] Slag is a rather complex, molten product consisting of various impurities and other elements produced by the smelting process. The level of the slag within the furnace is kept at a relatively constant thickness, of 3 to 4 inches on top of the molten steel, by having it drain off through one or more of the furnace doors through a "dolomite" dam type of arrangement. The "bath" within the furnace, i.e., the molten steel being processed, is from 3 to 4 feet deep under the layer of slag.

further lowered to the interface of the slag and molten metal after the addition of hot metal. Judging the exact level to which the lance must be lowered after the scrap iron is added, is difficult due to visual distortions within the furnace caused by the intense heat, i.e., "heat waves". Additionally, it is not uncommon that when the lance is so positioned, the oxygen causes the rapid melting of the bases of piles of scrap iron, causing the piles to fall over, striking and damaging the lower tip, or body of the lance.[9/]

Secondly, the lances are subject to malfunctions causing water leaks. Any mechanical breakdown of the water tight integrity of the outer shell of the lance, allows water, at 40 p.s.i., to escape until the water source is turned off. These breakdowns occur because of undetected defective welds in the lance, or when the lance head burns off the lance. Any mechanical failure of the water components of the lance, for any reason, results in water leaking from the lance.

The evidence establishes that the normal "heat" time for a furnace with one to three lances operating properly is about 6 hours. That time is approximately doubled, to about 12 hours, in a furnace without any lances operating.

The malfunctioning of lances has been a common occurrence at Fairless. From their introduction in the 1950's up to some unspecified time in 1975, when a lance malfunctioned, the accepted practice was to elevate it well above the slag surface and turn off both the oxygen and

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[9/] The experience and therefore skill of First Helpers naturally varies. Thus the frequency of this type of damage to the lance varies.

water. Then the oxygen flow was increased in the still functional second (or third) lance within that furnace and the "heat" continued to "tap" time. If the last functioning lance within a furnace malfunctioned, it too was rendered inoperative and the "heat" continued for the longer period of time made necessary by no operating lances. This procedure was ridgedly adhered to because there was an ironclad rule that, once hot metal from the blast furnaces had been added to the open hearth furnaces, no employees were allowed to go up on the roof superstructure of the open hearth furnaces.

Under this twenty year long procedure, inoperative or leaking lances were changed only after the finished steel had been tapped off the furnace, during the furnace maintenance step of the "charging" cycle, but before any hot metal was added to the furnace.[10/]

## LANCE CHANGE

The process of changing a lance involves four millwright employees. One remains on the "charging" floor in front of the furnace and is referred to as the "ground man". He is responsible for turning off the water to the lance by shuting a gate valve located on the front of the furnace structure, some 7 to 9 feet above that floor level. He also removes the "choker" cable from the old lance, once it is brought to the charging floor by an overhead crane, and reconnects this "choker" cable

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10/ At this point, the rate of "firing" i.e., heating of the furnace is reduced, and the vents and exhaust flues for the furnace are operating. Thus the ambient temperature above the furnace - in the range of 120°F to 140°F, is less than at the stage after the hot metal is added to the furnace.

to the new (reconditioned) lance which is craned up to the furnace roof. Further, he transfers an oxygen fitting from the old to the reconditioned lance.

One millwright, referred to as the "roofman", is positioned on a steel, grated catwalk atop the furnace. This catwalk is permanently afixed to the top of the large steel "binders", the biggest steel beams supporting the brick roof of the furnace, and is approximately 3-1/2 to 4 feet above the brick roof. This catwalk is equipped with a two-cabled railing along one side. (See Exh. C-7, photograph 3). Because of the lack of clearance from the top of these cables to overhead building structures, these two cables are routinely disconnected and laid on the catwalk during a lance change to provide needed clearance for movement of the lances off and on to the top of the furnace.

Once a nonfunctioning lance is raised out of the furnace, the roofman "pitches", i.e., throws a temporary lid over the lance hole to cover it. If he should miss the hole, or the temporary lid needs adjustment to completely cover the lance hole, the roofman then leaves the catwalk and steps down onto the large steel "binder". (Shown in photograph number 2, Exhibit C-7). From there, he steps further downward to a smaller, (six inch wide) steel "I" beam, part of the supporting roof structure, until he can reach and adjust the lid properly over the lance hole, using a broom handle or any other available object. At this point, marked with a "X" on photograph number 4, Exhibit C-7, the roofman is only 4 to 6 inches above the brick roof of the furnace.

All horizontal surfaces on top of these furnaces, including the brick furnace roof itself, are covered with graphite, a recognized dry

lubricant. When the hot metal leaves the blast furnace, graphite (in powdered or fine granulate form) is spread on the top of the hot metal to conserve its heat during transport to the open hearth furnaces. When the hot metal is poured from the giant ladle into the open hearth furnaces, the graphite becomes air borne and settles onto all horizontal surfaces. The grey, sparkling material shown in photographs numbered 2, 3 and 4 of Exhibit C-7 is this graphite. The roofman is instructed to sweep this graphite off the large "binder" before he steps onto it from the catwalk. (Exhibit C-2, paragraph 2.3).

Once a reconditioned lance is ready to be inserted into the furnace, the roofman again leaves the catwalk, steps onto the "binder", which is 18 inches above the brick roof, and manually guides the lance through the "doughnut" into the lance hole in the furnace roof. Photograph number 2 of Exhibit C-7 shows this procedure. However, the task of the roofman may, on occasion, involve considerable movement and require considerable leverage, to align the reconditioned lance properly with the "doughnut" and lance hole. These water cooled "doughnuts", constructed by Respondent's masons during furnace reconditioning at the end of a campaign, are either not properly aligned over the lance hole when built, or the "doughnut" may shift out of proper alignment, due to the intense and prolonged heat during a "campaign". (See Photographs numbered 1, 2 and 3, Exhibit C-9 which show flames shooting out of the "doughnut" holes with oxygen lances in place and operating). This misalignment has been so severe that roofmen have had to use shovels to pry and force reconditioned lances through misaligned lance holes. Additionally, when malfunctioning lances are craned off the furnace roof, they are suspended from the traveling crane

by one cable called a "choker" cable. If the "choker" cable is not wrapped around the old lance at or near its proper balance point, the lance will not assume the necessary angle from the verticle to allow it to be moved off the roof without striking the lower catwalk, water pipes located on the furnace roof or the main water "header" atop the face of the furnace. The proper angle is necessary because of limited clearances between the furnace superstructures and structural members of the building's roof above. When this situation arises, the roofman must manhandle the lance over the catwalk. Further, if the "choker" cable is placed around the lance at a seriously out of balance position, the off-balance movement of the lance can be extreme, end-over-end, an action aptly called "helicoptering" by the millwrights. The amount of movement and agility required by the roofman, under these varying conditions, is in part depicted in photographs numbered 1 and 2 of Exhibit C-6.[11/]

The two other millwrights involved in a lance change are stationed on an upper steel catwalk, some 15 feet above the furnace roof. The beginning of the lance change involves raising the lance by its own lifting cable out of the furnace to a certain level at which the lance safety chain[12/] is removed so that the oxygen and water hoses may be disconnected. At this point, the lance is suspended only by its own lifting cable, a cable which the millwright witnesses testified to having seen break on a number of occasions. Next the lance is further elevated

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[11/] All photographic exhibits were taken by the compliance officers during their October, 1976 inspection at the Fairless works.

[12/] The safety chain is on the lance to prevent the lance from falling into the furnace if the lance hoisting cable breaks or malfunctions.

by its own hoisting cable to a higher level, at which point, the oxygen and water hoses are disconnected by the use of a hammer. The disconnected hoses are draped over the railings of this upper catwalk. (See photographs numbered 1 and 2, Exhibit C-5, photograph 3, Exhibit C-6). Then a large traveling crane hook and its block is signaled into place by the upper catwalk millwrights. The crane operator is located in the crane cab, at approximately the same level as the upper catwalk but some 70 feet away from the catwalk. A "choker" cable is then wrapped around the lance and the crane takes a strain on this cable. The lance is then lowered by the crane, upon signal by the millwright, to a point where the millwrights can remove the lance "lifting yoke" or "bale", a "U" shaped bridle by which the lance lifting cable is attached to the lance. (See Photograph 3, Exhibit C-4). The upper catwalk millwrights then signal the craneman to take the old lance off the furnace roof. This involves rather skilled crane operation because of hoisting limitations of the crane itself as well as clearance limitations between the lower catwalk, the main water header and building roof structures. Under normal conditions, the transiting lances clear the lower catwalk by about 3 inches and the water header by about 6 inches. The millwright witnesses testified to having seen lances in transit strike and damage both the lower catwalk and water header. When the water header has been damaged, water poured out in large volume, running down the face of and into the furnace. On these occasions, no hot metal had as yet been added to the furnaces. The old lance is then deposited by the crane on the furnace charging floor, the "choker" cable switched from the old lance to the reconditioned lance and

the oxygen fitting changed by the "ground man". The new lance is then craned to the furnace top, connected to its own hoisting cable, and the oxygen and water hoses connected and safety chain affixed. The "choker" cable is removed (by the roofman, again standing on a "binder") and the crane hook and block clears the area. Water into the new lance is then turned on, the lance is checked for leaks and then lowered through the "doughnut" hole into the furnace. The millwrights then leave the top of the furnace. At this point the First Helper on the charging floor takes control of the newly inserted lance. Oxygen is turned on, and the lance, being observed and controlled by the First Helper, is checked for proper operation and lowered to the desired level.

If no unforeseen problems arise, the changing of a lance takes approximately twenty minutes. Speedy work is a necessity because of the extremely high temperatures on the furnace roof. Millwright Joseph Vandergrift testified to having "passed out" doing lance changes and to having the hair in his nose and his legs burned from the ambient heat atop these furnaces. These episodes are significant as they occurred during the normal lance changing procedure at Fairless, before hot metal was added to the furnace. At that point, the ambient temperature above the furnaces is lower (the evidence does not reveal how much) than after the hot metal, (at close to 2,800°F) is added.

As mentioned previously, this lance changing procedure, done during the maintenance step of "charging" before hot metal was added to the furnace, has been followed for approximately twenty years at the Fairless works. (See copy of a Memorandum of Procedure issued by Respondent on June 2, 1956, Exhibit C-10. This Exhibit, illegible as C-10, is

reproduced at page 3, Exhibit C-11, an Arbitration Award, issued on December 28, 1976. The third numbered provision of the 1956 Memorandum, provides, "Jet will not be changed after hot metal has been added.").

THE DESIRED NEW LANCE PROCEDURE

In 1975, a newly assigned Superintendent of the open hearth furnaces, a Mr. Thompson,[13/] arrived at the Fairless works from U. S. Steel's Gary, Indiana works. Reportedly a procedure of changing the last operative lance, when it malfunctioned, after hot metal had been added to the furnace, had been followed for many years at the Gary works.[14/]

In May of 1975, the new Superintendent, Mr. Thompson, persuaded the millwrights to make one lance change after hot metal had been added to a furnace, reportedly with the understanding by the millwrights, that they would not be required to do this task again. There is a suggestion in the evidence that the millwrights consession to make this one lance change over hot metal, was in part at least brought about by the following circumstances. The Respondent, in consultation with appropriate union safety committee employees, routinely issues Safe Job Procedures (SJPs) for various job tasks. One such SJP was issued early in 1975, covering, in Part A, the long established procedure of changing lances with no hot metal in the furnace, and in Part B, the newly desired procedure of changing lances after hot metal had been added. The names of the

[13/] Mr. Thompson was not produced as a witness.

[14/] No witness produced by Respondent testified to any necessary details of Respondent's lance changing procedures followed at its Gary works to allow any comparison between the Gary and Fairless procedures.

participating union safety committee representatives, Messrs. Golden and Martino, appear on this SJPs. Thus, the argument was made to the millwrights, (either expressly or by implication) that because the union safety committee members names were on this SJP, it constituted a union safety committee endorsement of the Part B section of the SJP (lance change after hot metal added), and thus, an agreed upon safe procedure.

However, Mr. Martino testified (TR. 439-455) that both he and Mr. Golden participated in drafting only Part A of this SJP, (Exhibit C-2), but declined to assist in drafting Part B, both believing that it was not safe to change lances after hot metal had been added. Both Mr. Martino and Mr. Golden specifically disagreed with Part B of this SJP and requested the removal of their names from this SJP. Their names, were not removed until after the millwrights had made the one lance change over hot metal. (Exhibit C-15).

At any rate, the millwrights, after making this one lance change over hot metal, thereafter steadfastly refused to do so again, believing that such a procedure subjected them to unnecessary additional risks of serious injury or death, in an admittedly hazardous occupation and environment. Management, upon such refusals, began to discipline the millwrights by sending them off the job with loss of pay.

Thus, under provisions of the collective bargaining agreement at Fairless, the millwrights instituted a grievance procedure which resulted in the issuance, on December 28, 1976, of an Arbitration Award, in their favor. (Exhibit C-11).

Evidently, the lost pay of those millwrights sent home (over 20), prior to the Arbitration Award, was recouped more than a year after the issuance of this Award (TR. 1109).

Since the millwrights refusal to change the lances over hot metal, management personnel have made these changes, when necessary. We are thus brought to a highly significant, and uncontested fact.

The need to change the last functioning lance, after hot metal has been added to the open hearth furnaces, has occurred only from 4 to 7 times in the past two years at Fairless (from 1975 to date of trial, September, 1977). This is quite understandable when it is recalled that each furnace is equipped with either two or three lances. When one malfunctions, it is raised, put out of operation and the oxygen flow in the remaining one or two lances, increased. Thus, the practice of changing a lance over hot metal, which occurs only when all lances in a furnace have malfunctioned, is not a common occurrence.

Additionally, when such an occurrence takes place, i.e., the failure of all lances within a furnace, management has two choices.

First, it may insist on changing one of the lances over hot metal, or secondly, it can continue the "heat" for the necessary additional 6 hours.

Thus, assuming that just one of the nine open hearth furnaces at Fairless is operated for 200 days in one year (165 days of down time for rebuilding at the end of campaigns or for other reasons). On a 24-hour a day operating basis, this furnace will be operating for 4,800 hours in a year. If this one furnace has 7 episodes of total lance failure in one year,[15/] and management chose the second option above, it would mean that

[15/] The evidence reveals that from 4 to 7 total lance failures were experienced, over almost a two year period, in all nine open hearth furnaces operated at Fairless.

7 "heats" (out of approximately 800 "heats" - 4 per 24 hour period times 200 days) would each have to be lengthened by 6 hours. Thus, 42 hours would be added to the year's 4,800 hours of "heat" time, without any loss of the amount of steel produced.

The foregoing calculation, based on the evidence of record, puts this case in its proper perspective and is essential to a reasoned and just determination of the issues raised. In short, it is not inappropriate in this case, indeed it is essential, to balance the possible additional 42 hours of "heat" time in a 200 day-yearly production cycle against those hazards to which the millwrights would be subjected if forced to change lances over hot metal.

## COMPLAINANT'S POSITION

The testimony of eight employees of Respondent, six millwrights with over 110 years of combined open hearth experience, (see testimony of Mr. Vandergrift, TR. 224-383, 1103-1130; Mr. Hormel, TR. 393-437; Mr. Martino, TR. 439-455; Mr. Park, TR. 455-469; Mr. Gregory, TR. 470-484; and Mr. Forney, TR. 992-1024), and First Helper Silvestri with over 36 years' experience (TR. 1037-1196), clearly establish the following.

At the start of a "campaign", the brick roof (referred to as "basic" brick), is about 18 inches thick. These brick consist in part of a "chrome" base, the intended use of which is to fuse the individual bricks together under high heat, as the brick roof is built without mortar. Respondent's Steel Production Superintendent at Fairless, Mr. Krupp, testified that prior to the mid-1950's, the steel industry used a "silica" type brick in its open hearth furnace roofs, which was less durable than

"basic" brick, and thus sometime in 1956 or 1957, the industry changed to "basic" brick. Although the evidence is not precise, it best supports the conclusion that the Fairless works, followed the industry trend and thus changed to "basic" brick construction in the late 1950's. (TR. 620-622).

As more and more "heats" are carried on in a furnace, with interior temperatures ranging from not less than 2,000°F up to close to 3,000°F, the brick roof essentially burns away, that is, its original thickness is gradually reduced to 4 inches or less. As the brick in the furnace roofs become thinner, a point is reached when these brick will glow a cherry red color. At this point, the exterior temperature of the brick is in excess of 1,000°F. As the furnace roof is burned away, it is not uncommon for sections to fall into the interior of the furnace, at unpredictable times, necessitating a patch of the roof holes caused thereby.

The millwright witnesses testified most convincingly that they fear for their lives if made to change oxygen lances after hot metal is added to the furnace, fearing that water may get into the bath and cause an explosion.

An "explosion", as far as this case is concerned, is the rapid conversion of water into steam, under conditions which do not allow the gradual escape of the steam, but rather the confinement therefore until sufficient pressure, i.e., energy, is built up to overcome the confinement, and at that point, the rapid release of the steam, commonly called an explosion. Respondent's witnesses carefully avoided the term "explosion", consistently referring to this phenomena as "eruptions" and/or "violent eruptions".

The long experienced millwrights have witnessed many explosions (or violent eruptions) in the Fairless furnaces with which they have worked. These explosions are caused, by water, in one form or another, becoming entrapped in the bath in these furnaces. The sources of this water, are indeed, numerous. The limestone or iron ore can contain sufficient water, particularly ice particles, to cause such explosions. The bundles of scrap iron too, can contain water, or ice particles which cause explosions. Perhaps the most dangerous source of water in the open hearth furnace operation, is the furnace itself. As alluded to earlier, these massive structures consist in major part of a steel framework of water cooled supporting and binding members, which hold the brick, inner portion of the furnace together. Various steel frames in the sides, back and front of these furnaces are water cooled.[16/] The large, one ton doors are water cooled. The lance collar or "doughnut" is water cooled. Thus, to a highly significant degree, part of the furnace structure is a system of water pipes which circulate water to these water cooled furnace components. At least one main source for the distribution and control of this water is on the top of the face of the furnace, above the charging doors, the so called "water header". Additionally, numerous pipes are located on top of the furnace as part of this cooling system. Of course, the oxygen lances themselves, being water cooled, and operating within the interior of the furnaces, are an important potential source of interjecting water into the bath.

The millwrights testified to oxygen lances malfunctioning within the furnace when the lance head or tip has burned off, leaking water (under 40

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16/ The evidence is not too specific on these details.

p.s.i.) into the furnace, and explosions resulting. One such episode caused a large explosion which blew two furnace charging doors off the furnace, (each weighing about one ton), blew off one furnace frame and caused bricks to fly about. They have seen malfunctioning lances, when being craned on top of the furnaces after withdrawal from the furnace interior, slip within the "choker" cable, striking and rupturing water pipes on top of the furnace, causing water leaks. They have seen the lance hoisting cable break, when lifting a malfunctioning lance out of the furnace. On at least one occasion, when the lance was being transported by the crane, the "choker" cable broke and the lance went through the furnace roof. There have been not less than 6 or 7 episodes, (and perhaps many more) in the past eight years, when "choker" cables have broken or lances slipped when being transported by these cables. These episodes took place, before hot metal had been added to the furnace, during the normal lance change period, i.e., the maintenance step as set forth, supra. They have seen the lance hole collar or "doughnut" rupture and leak water - at 40 p.s.i. into the furnace. They have seen lances, during the changing procedure, strike the water header, severely damaging it and rupturing water lines allowing water to run down the face of and into the interior of the furnace. (This accident also occurred before hot metal had been added. No explosion resulted but evidently a large volume of steam was produced which caused "some problems", unexplained in the record.) There was at least one episode when part of the brick roof of a furnace fell in, after hot metal had been added, which caused an explosion. Considerable damage to the furnace resulted, bricks were blown about, and

molten metal was blown out of the furnace, scarring a panel board, some 70 feet from the face of the furnace. Evidently a hole was blown in the brick furnace roof, necessitating patch work after the explosion.

The melting ingredients within these furnaces, are, particularly at certain steps, an inherently unstable commodity. During the heat, or "cook", the melting ingredients bubble and are agitated as the intense heat causes the melting of the ingredients and generation of gases. This instability of the melt is intensified after the hot metal is added to the furnace, as it reacts with the scrap metal and other ingredients within the furnace. If water from any source, should get into this unstable bath, the chances of some of the water becoming entrapped with a resulting explosion, are increased.

The millwrights have known (and seen the results) of explosions which have occurred during the period from the time hot metal has been added up to the time that the furnace is tapped. This period is recognized by Respondent as a particularly dangerous time, as "Danger" signs are posted on the "charging" floors and employees (except for the First Helper who is in charge of the cook) must stay behind a "charging" rail, some 40 feet away from the face of the furnace.

It, understandably, is often times difficult to pinpoint the precise cause of these explosions or "violent eruptions", i.e., the source of the water which, basically, causes the explosions, because, when an explosion occurs, the employees are, pursuant to Respondent's policy, away from the furnace, and those nearest these explosions, hurriedly remove themselves from the scene. Sources of such explosions have, in the past, been

established as excessively leaking lances, undetected leaking water cooled frames of the furnace, as well as water moisture in the limestone, iron ore and scrap iron charges. Thus, as a general proposition, an open hearth furnace, at the Fairless works, during a "heat", is an inherently dangerous and partially unpredictable instrument of steel production.[17/]

First Helper Silvestri, with approximately 40 years of this type of experience, testified that on the furnaces under his supervision, he has seen explosions or "blows" caused by leaking lances. Based on his long experience,[18/] he always changes leaking lances at the normal maintenance phase of the "charging" process, before hot metal is added to the furnace.[19/] Lance changes at this time are relatively common, with 50 to 60 such changes per month, on all furnaces, normally being done by the millwrights. If lances malfunction after hot metal is added to his furnace, Mr. Silvestri raises them above the bath and turns off the oxygen and water, because he is afraid of an explosion if the malfunctioning lance were allowed to remain active in the furnace. (TR. 1037-1096).

RESPONDENT'S DEFENSES

Respondent's basic defense, as to both Items of the Serious Citation, is that the hazards involved are not "recognized hazards" within the meaning of Section 5(a)(1) of the Act.

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17/ The interior of open hearth furnaces with hot metal therein bares some resemblances to the interior of a controlled volcano containing molten lava.

18/ The judgment of the First Helper is subject to being overruled by the "Melter Foreman", his immediate superior and a member of management.

19/ Leaking lances are used in the furnaces, being changed only if the First Helper determines that the lance is leaking so badly that it will not last to the end of the heat.

Item No. 1

As to this Item, Respondent argues that the evidence of record fails to show that changing oxygen lances, after hot metal is added to the furnaces, is a hazard, "recognized" by either U. S. Steel, or the steel making industry generally. Thus this Item must be dismissed.

The evidence of record, considered as a whole, does not support this position.

The strongest evidence that changing oxygen lances over hot metal, at the Fairless works is hazardous, is the totally convincing testimony of the millwright employees, with combined work experience in and around Respondent's furnaces of well over 100 years. This testimony, of explosions occurring, for numerous reasons, at all stages of the "heat" process, including after hot metal had been added to the furnaces, is not rebutted in this record. Such employee recognition of a hazard, based on their day-to-day involvement with the steel making process, over so many years, can not be discounted. It supplies that objective proof of the "recognized" character of hazards, which the cases cited by Respondent in brief speak to.

Indeed, from 1956 to 1975, U. S. Steel itself clearly recognized that changing lances after hot metal had been added to the furnaces was hazardous - and, specifically forbid the practice at Fairless. (Exhibits C-10, C-11; "3. Jet [lances] will not be changed after hot metal has been added.").

Further, as late as February 28, 1975, U. S. Steel, in its "Safe Job Procedure" (SJP) for "Lowering Jets After Hot Metal Addition"

clearly recognized the dangerous possibility of explosion during this procedure. Paragraph 1.4.1 of this SJP reads:

> 1.4.1 If the jet hangs up and causes slack in cable, the sudden drop can cause cable to break and jet will fall free. If hose pinches or breaks water leakage can cause roof damage and water leakage into furnace can cause explosion.
>
> (Exhibit C-12)

It was not until the arrival of Messers. Thompson and Krupp (Management supervision from another U. S. Steel plant), that the long accepted, and <u>enforced</u> procedure of <u>not</u> changing lances after hot metal addition was sought to be changed. The only reason for this change, as far as the evidence of this record reveals, was to avoid prolonging the 4 to 5 "heats" per year (for all nine furnaces) for the added 6 hours per "heat" with no lances operating. In short, the reason was strictly economic, and the economic loss to Respondent, for the 4 or 5 twelve hour long "heats" as compared to these 4 or 5 "heats" taking six hours was indeed, quite insignificant. The insignificance of such an economic loss, (for a company which in 1976 had gross sales of approximately nine billion dollars) fades into total insignificance when measured against the realistic possibility of an explosion occurring after hot metal had been added to a furnace, and the grave consequences to the millwrights, atop the furnace making a lance change. The adamant refusal of the millwrights to engage in this type of a poker game, with their own lives as the stake, is not only understandable, but commendable.

The testimony of Respondent's management witness, Mr. Krupp, that the practice complained of is not hazardous, is extremely unpersuasive.

He is not obligated, (under the threat of being sent home without pay - as were the millwrights) to routinely engage in this practice. As Respondent's Division Superintendent for Steel Production at Fairless, he was one of two management men who, after his arrival at Fairless in 1975, sought to change a twenty year practice. His stated opinion that this new practice was not hazardous, is understandable, but worthy of no weight.

Respondent's argument that changing lances after hot metal has been added to furnaces, is not a "recognized" hazard but "the usual practice in the steel industry", is equally unconvincing on the evidence of this record. (Respondent's Brief, p. 6).

Respondent relies on the testimony of Mr. Krupp that oxygen lances were changed with hot metal in the furnaces at other plants of U. S. Steel, at a Canadian plant (Stelco Corp.) and at Bethlehem's Sparrows Point steel plant. However, a close examination of this testimony (TR. 584-727) immediately reveals a striking lack of any details of the exact procedures followed elsewhere in the industry, i.e., exact placement of millwrights during the procedure, the exact steps followed, the exact equipment used such as cranes, cables, etc., the exact configuration, construction, age, etc., of the furnaces involved, to admit of any realistic comparison between the Fairless procedure and the procedure followed anywhere else. The evidence is so meager that it can not support any conclusion as to what "industry practice" or U. S. Steel practice at sites other than Fairless is regarding the changing of oxygen lances after hot metal has been added to open hearth furnaces.

Respondent argues that Compliance Officer Hriu's research concerning this practice resulted in his finding that Bethlehem's Sparrows Point

plant does change lances over hot metal. Thus, this discovery establishes this procedure as an "industry practice". This argument is also not persuasive for the same reason as stated, supra. No details of Bethlehem's procedure nor furnaces are set forth in this record. Thus, exactly what the "industry practice" may be is not established by the evidence herein.

Furthermore, even assuming that there is an "industry practice" or U. S. Steel practice at plants other than Fairless, of changing oxygen lances after hot metal is added to open hearth furnaces, such a practice may well be as hazardous as the evidence herein proves Respondent's Fairless works procedure to be. In short, the label "industry practice" does not necessarily equate with "hazardous free", or safe practice.

As stated in Cape Vineyard Div. of the New Bedford Gas and Electric Light Co. v. OSHRC, 512 F.2d 1148, 1152, (1st Cir., 1975);

* * *

> We would expect, most often, that reference to industry custom and practice will establish the standard of conduct. There may, however, be instances where industry practice fails to take reasonable precautions against hazards generally known in the industry; in such event it may not be unfair to hold the employer to a standard higher than that of actual practice.

In summary, the overwhelming weight of the evidence of this record establishes that changing oxygen lances, after hot metal has been added to the open hearth furnaces at Respondent's Fairless works, a practice clearly recognized for over 20 years by Respondent as hazardous, and to this date still recognized by the Fairless millwright employees who would actually be obligated to perform the tasks associated therewith, is a "recognized" hazard which is likely to cause death or serious physical harm to Respondent's millwrights, within the meaning of Section 5(a)(1) of the Act.

This case involves more than the very narrow issue of whether a lance, during a change, can fall into a furnace and thereby cause an explosion. This is so because the evidence establishes that explosions occur in open hearth furnaces for reasons other than having a lance fall into a furnace during a lance change. Such explosions have occurred, and can occur, by the entrapment of water in the hot metal from sources completely separate from the lance, such as, a leaking water cooled furnace frame, a leaking "charging" door or damaged and leaking cooling water pipes of numerous types. These occurrences are largely unpredictable, and thus can occur when millwrights would be atop the furnace, changing a lance after hot metal is added to the furnace. The effect of such an occurrence most probably would be death or at least serious physical harm to these millwrights. This issue was specifically tried by the parties during this five day trial, and thus the legal issue presented by this record is broader than initially framed by the parties.

Thus the testimony of the two expert witnesses, Mr. Belton for Complainant (TR. 505-566) and Mr. Bieniosek for Respondent, (TR. 869-970), which related chiefly to the scientific physics of explosions as they might be caused by an oxygen lance falling into a furnace after the addition of hot metal, is not determinative of the broader legal issue presented, and fully tried, in this case.

Item No. 2

Respondent basically interjects the same defense to this Item as to Item No. 1, that the evidence does not establish that having the roofman millwright leave the furnace roof catwalk, stepping down onto binders,

or below, in order to guide lances into the water cooled roof hole, is a "recognized" hazard within the meaning of Section 5(a)(1). Respondent argues that Complainant, "... has been engaged in the business of making a mountain out of the molehill." (Respondent's Brief, p. 13).

Although less evidence was introduced by the parties as to Item No. 2 as compared to Item No. 1, the evidence does establish that the practice of allowing millwrights to leave the furnace roof catwalk and go down onto the large binders, and below onto smaller "I" beams, to not only guide lances into the "doughnut" holes, but to adjust the temporary cover placed over the lance hole, is a recognized hazard that can cause death or serious physical harm.

The evidence is clear, that from 50 to 60 oxygen lance changes per month, in all the furnaces, are routinely made during the normal, maintenance step of the charging procedure, before any hot metal is added to the furnace. During this maintenance step, the fires of the furnaces are reduced, and exhaust vents and flues are fully operating, venting some of the massive heat (and gases such as carbon monoxide), from within the furnaces. However, the interior furnace temperatures do not go below 2,000°F, and the ambient temperatures on the furnace roofs are extremely high, 140°F or higher. Depending on how "old" the brick roof is, and thus the thickness of the brick, the external temperature of this brick evidently vary from very hot to cherry red. (The evidence is rather meager as to external brick temperatures). However, the evidence does establish, by the direct testimony of millwright Vandergrift, (TR. 224-390; 1103-1128), who routinely changes oxygen lances during the maintenance step, that the heat

is so extreme on the furnace roofs during this procedure that he has become unconscious, he has had his normal work pants ignite from the heat, has burned his legs and thus must wear long underwear year around, and he and other millwrights have seen 2" x 12" planks - left on the roofs by masons who had repaired furnace holes,[20/] ignite and burn because of the heat on the furnace roofs.

Sometime in 1972, the millwrights were supplied with jackets and pants made of yellow heat resistant material (Exhibit C-14 is a patch of this material). However, this heat resistant cloth is not "fireproof", as it will burn when exposed to flame, and will also ignite from extreme temperature. One worker (Tom Johnson) while wearing pants of this heat resistant cloth, had his legs burned in 1976, when the cloth ignited because of extreme heat. (TR. 268-275). Millwright Hormel testified (TR. 393-437) to having been told that the external temperature of "red" brick in the furnace roofs is in the neighborhood of 1,200°F. Additionally, he testified that while wearing a jacket of this flame retardant cloth, he accidently backed into a steam pipe and was burned. Thus, it is apparent, that if a millwright were to slip or be knocked to the cherry red bricks of a furnace roof, severe burns, shock and very probably death could result.

As to the likelihood of slipping or being knocked off onto the furnace roof, the evidence is overwhelming.

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[20/] The masons, while repairing burned out and collapsed holes in the brick roof tops, normally wet down the planks they use as scaffold boards to prevent their ignition.

As alluded to earlier, all horizontal surfaces, including the catwalks, binders, "I" beams and the furnace roof itself, are covered with heavy layers of graphite. This condition is readily apparent in the photographs of Exhibit C-7. Graphite is a recognized dry lubricant. Although the millwrights are instructed to sweep the graphite off the large binder before going upon it, (Exhibit C-2, paragraph 2.3), no such instruction is given as to the smaller "I" beams, onto which millwrights step to adjust the temporary lance hole cover. The slipping hazard, of course, is accentuated when, depending upon the height of the millwright performing the "roofman's" task, he may lean out beyond the binder to grasp a lance, or to strenuously shove the lance into proper alignment to be inserted through the "doughnut" hole in the furnace roof. Both hands must be used for this task leaving the millwright with a reduced chance of saving himself from a fall in the event of slipping on residual graphite on the binder.

The possibility of being knocked off the binder, is established in this record. When lances malfunction, it is not uncommon that a knob or ball of solidified steel anneals itself to the lance tip. Before the lance can be withdrawn through the lance hole, this knob must be burned off. Thus the lance is lowered into the bath and varying lengths of the lance are melted away. Thus when the lance is finally removed from the furnace, its length will differ from the normal 16 feet. Then, when the crane choker cable is attached, and the lances lifting cable and safety chain is removed, the lance can swing end over end if the choker cable is not affixed at the proper balance point, the "helicopter" action seen by

millwrights during lance changes. If this lance, weighing many hundreds of pounds, should strike a millwright, he may be knocked onto the furnace roof. Further, in inserting reconditioned lances into the lance hole, considerable force is exerted to properly align the lance for insertion, made necessary, in varying degrees, by possible misalignment of the "doughnut" water cooler and furnace roof hole. This task is done by the millwright while standing on the binder, 18 inches above the brick furnace roof.

Due to restricted clearances, the damaged lance being craned off the furnace roof, must be guided and manhandled, over the roof catwalk by the roofman. (See Exhibit C-6, Photograph 1). (This catwalk has been "torn up" by a lance striking it during a lance change). If this lance should slip within the choker cable, or the choker cable break at this point, (both types of occurrences have happened in the past), there is a high possibility that the millwright might be knocked off the catwalk onto the furnace roof.

After the large oxygen and water hoses have been disconnected from the lance, they are draped over the upper catwalk railing. (See photographs 3 and 4, Exhibit C-6; photograph 1, Exhibit C-5). If the lance should accidently strike and dislodge these hoses, because of choker cable slippage or breakage, the large hoses with heavy metal "knock" fittings, could be dislodged and strike the roofman below, knocking him onto the furnace roof.

Thus, the evidence establishes numerous realistic and potential causes of the roofman either slipping or being knocked off balance, while

working either on the roof catwalk, or the large binder, and the possibility of his landing on the extremely hot brick furnace roof.

That such hazards, at least before the trial of this case, were recognized by Respondent is demonstrated by its Safe Job Procedure dated July 21, 1975, Exhibit C-2. The following paragraphs are illustrative of the "Hazards" so recognized:

2.3.1 Loss of balance while sweeping binder

2.3.2 Be alert to dust & graphite in eyes when sweeping binder

2.4.1 Loss of balance

2.4.2 Tripping hazard - tools or debris on roof

3.2.1 Struck by hammer [used to strike "knock" joints to disconnect oxygen and water hoses]

3.2.2 Slipping hazards

3.3.2 Struck by lance

3.5.1 Struck by crane block

5.3.2 Do not reach out for lance. Call roofman to to assist. Do not over extend your reach.

5.6.1 Slipping hazard - dust accumulated on binder

8.1.1 Slipping hazard - dust on binder

9.1.1 Struck by tools or materials

In my view, this 1975 statement by Respondent at its Fairless works of some, (but not all), of the "Hazards" associated with the roofman's duties in changing lances atop the furnaces is adequate in itself to establish the "recognized" character of these hazards by this Respondent.

Additionally, a thorough evaluation of all of the evidence of this record, as to both Items of the Citation, clearly establish that both practices alleged to be hazardous are patently dangerous to the millwrights charged with carrying out these tasks.

As recently noted by the Review Commission in Sec. of Labor v. Schriber Sheet Metal & Roofers, Inc., OSHRC Docket Nos. 15681, 15927 & 76-02 (1977)

> ".... even without evidence of industry recognition, certain conditions are so patently dangerous that they must be classified as a recognized hazard and are within the scope of section 5(a)(1)." (Slip opinion, p. 5, citing Usery, Sec. of Labor v. Marquette Cement Manufacturing Co., _____ F.2d _____ (2nd. Cir., No. 76-4083, 1977).

It is therefore concluded, that Respondent's defense to both Items of the Citation, i.e., the lack of "recognition" of the hazards complained of at its Fairless works, is not supported by either the law or facts. It is therefore rejected.

Respondent's last defense is that the record herein does not establish that accidents and injuries have occurred because of the practices set forth in both Items, and thus no violations have been established.

It has long been held that the likelihood of an accident occurring, or indeed the occurrence of an accident, is not essential to the proof of a violation of the Act. Rather the question is whether there is a substantial probability that death or serious physical harm would occur in the event an accident occurred. The probability of an accident occurring is relevant only to the gravity of the violation. See National Realty and Construction Co., Inc. v. OSHRC & Sec. of Labor, 489 F.2d 1257, 1267,

(C.A.D.C., 1973); California Stevedore & Ballast Co. v. OSHRC, 517 F.2d 986, 988 (9th Cir., 1975); Sec. of Labor v. Coastal Pile Driving, Inc., OSHRC Dkt. No. 14458 (1977); Sec. of Labor v. Vecco Concrete Construction, Inc., OSHRC Dkt. No. 15579 (1977).

The evidence here clearly establishes a substantial probability that death or serious physical harm will occur to the Fairless millwrights, under either practice set forth in Items 1 or 2, in the event of accident. The probability of an accident occurring under Item 1, changing lances after hot metal addition to the furnaces, because of the unpredictability of explosions, "eruptions", "blows", partial roof collapses, and malfunctioning cables used to lift and transport the lances, is high. The probability of an accident occurring under Item 2, is perhaps less than under Item 1, but nevertheless very real. The absence of such recorded accidents in the past is due more to the agility, strength and caution of the millwrights engaged in lance changes rather than the lack of dangers associated therewith.

This defense of Respondent's is not supported in law or by the evidence of this record.

One last item need be mentioned for a resolution of the issues herein.

> To assure that citations issue only upon careful deliberation, the Secretary must be constrained to specify the particular steps a cited employer should have taken to avoid citation, and to demonstrate the feasibility and likely utility of these measures.
>
> National Realty & Construction Co., Inc. v. OSHRC & Sec. of Labor, supra, at 1268.

In short, what could have been done by this Respondent to avoid this Citation?

Item No. 1

The Complainant's witnesses, C. O. Hrin, millwright Vandergrift, and long experienced First Helper Silvestri, ambly supplied the required evidence. Indeed, the solution to the dangerous practice of changing oxygen lances after hot metal is added to the furnaces, is obviously, not to do it. That is, to return to Respondent's pre-1975 practice - a practice followed for over the preceding two decades. In fact, the precise practice currently followed by its long experienced First Helper Silvestri. When the last functioning lance malfunctions he raises it above the melt, totally deactivates it and continues the melt for the necessary added time, not more than 6 hours, depending on when during the "heat", the last lance is rendered inoperative. Because this situation occurs only from 4 to 5 times within one year, as to all of Respondent's operating furnaces, the added production time (24 to 30 hours per year) and expense must be considered totally insignificant when weighed against the risk to the millwrights, involved in this procedure (3 millwrights per lance change, atop the furnace for each episode with exposure lasting for not less than 20 minutes).

Item No. 2

As to the common practice of lance changes before hot metal is added, during the normal maintenance step, the millwright who is really exposed to danger is the roofman. Some steps have already been taken by Respondent to reduce the hazard of falls onto the furnace roof. A steel rod with an "S" shaped hook at its end, was designed after the inspection herein, to

be used by the roofman from the lower catwalk to guide the lance into the roof hole, thus allowing this task to be performed from the catwalk, not the binder below. Some modifications in this hook have been made, and its feasibility is being tested. Evidence was adduced, that the cover, used to temporarily cover the lance hole during a change, could be equipped with an "eye" and the steel rod used to place this cover accurately over the hole, obviating the need for the roofman to descend to within 4 inches of the brick roof to adjust a misaimed, misthrown cover.

Additionally, C. O. Hrin testified that guardrails could be installed on the large binder onto which the roofman steps from the catwalk, to guide the reconditioned lance into place. No evidence was introduced showing that any of the foregoing procedures were not, or would not be, feasible.

The record herein thus satisfies the burden of proof of the Section 5(a)(1) violations charged, as announced in the National Realty case, supra.

## Penalties

Having independently considered the statutorily mandated elements for penalty assessment set forth in Section 17(j) of the Act,[21/] i.e., the size of Respondent's business, the gravity of the violations, Respondent's good faith and history of prior violations, it is concluded that the proposed penalties, are not appropriate.

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[21/] 29 U.S.C. 666(i)

Item No. 1

The evidence establishes that the gravity of this violation is high. The inherent dangers, atop the roof of the blast furnaces at Fairless, are increased with the addition of hot metal to these furnaces. The chance of explosions or "violent eruptions", from many unpredictable water sources, with the risk of partial roof damage or collapse, and the spraying of molten steel, is real, based on the total evidence of this record. The only reason revealed in the evidence for Respondent's insistence on having millwrights change a last functioning lance at this stage of the "heat", is economic. The economic saving to Respondent is indeed, minuscule.

Three millwrights are atop the furnace during this procedure, all of whom are exposed to these unpredictable dangers. However, the millwrights did engage in only one lance change over hot metal, before their sense of self preservation took over, and they thereafter, wisely and justifiably refused to make any additional changes. Thus, as of the time of trial, employee exposure was low, due however to the employees desire for survival not to Respondent concern for the millwrights safety.

As to Respondent's size, it is the largest domestic steel producer in this country, with 167,000 employees on the average at its various plants and had gross 1976 sales approximating nine billion dollars.

It does have a history of prior violations of the Act, but the evidence is unsatisfactorily non-detailed regarding this history (Exh. C-1).

As to Respondent's good faith, the evidence establishes a striking lack thereof.

Two exhibits clearly show this lack of good faith, Exhibits C-2 and C-15, two versions of a "Safe Job Procedure" for changing lances after the addition of hot metal.

Exhibit C-2, initially issued on July 21, 1975, and revised on March 26, 1976, in Part B, sets forth the steps the employees should follow in making the lance change with hot metal in the furnace. After it became apparent to management that the millwrights were adamant in their refusal to make such lance changes (even under pain of being sent home with loss of pay), the 1975 SJP was reissued on August 11, 1977, and is Exhibit C-15. The following procedures on the 1975/76 SJP, (Exh. C-2), (all of which were designed to assure a safer procedure), were deleted in the 1977 revision, Exhibit C-15.

(Deletions from the 1975/76 SJP in brackets.)

Exhibit C-2, Part B

Paragraph

[10.3 Fuel must be off for minumum duration of 20" before lance change will start.]

[10.4 Hot metal addition must not have been made less than 60" before lance change will start.]

[10.7 Physically check to make certain that all four (4) reversing dampers are in raised position.]

10.9 Melter[22/] will check bath activity. If he deems the bath to be stable, [he will accompany the furnace Maintenance personnel to the roof for the lance change.]

10.10 [Maintenance foreman and] First Helper will maintain positions at furnace panel and make certain that no furnace controls are touched.

---

22/ A "Melter" is a management employee as opposed to a millwright.

10.11 Jet change to proceed as outlined in Steps 2-9. [Melter will remain on roof during lance change.]

[10.12 If duration of time incurred in jet change, and or furnace conditions dictate that the Maintenance personnel leave the roof to revive themselves before completion of repairs, Melter may call a "break." Work will be completed as soon as the men are refreshed.]

10.15 A. ---
B. ---
[C. No buggy activity past front of furnace.]

(Compare Exhibits C-2 and C-15; TR. 380-385).

Further, when the millwrights at Fairless were told that oxygen lances were changed after hot metal was added to the furnaces at U. S. Steel's Homestead works, they sought but were denied permission to visit the Homestead works to observe those practices for themselves. However, Respondent, at the beginning of the second day of trial, (September 2, 1977), did agree not to implement a work order at Fairless under which millwrights would be expected to change lances over hot metal, until a decision herein. (TR. 223).

Item No. 2

The gravity of this violation is less than Item No. 1, but still significant. The lance changing operation, during normal maintenance, is a common practice, 50 to 60 times a month. The four lance changing positions (groundman, roofman and two upper catwalk men) are rotated among the millwrights. Thus, 50 to 60 times a month, the millwright acting as roofman is exposed to the dangers of slipping or being knocked off the binder onto the roof structure during this process. If such an accident

occurs, the probability of death or serious physical harm is rather high. Thus the gravity of this violation is high. The evidence reveals that little was done by Respondent to protect this roofman except to provide a broom to sweep the lubricating graphite from the binder, and in 1972, to supply him with "heat resistant" clothing. The relatively simple measures to make this task safer, as alluded to supra, were either not taken, or were implemented only very recently.

Based upon the foregoing, it is concluded that a penalty of $1,000 for Item No. 1 and $800 for Item No. 2 is appropriate and reasonable upon the evidence of this record and pursuant to Section 17(j) of the Act.

## CONCLUSION

The jurisdiction of the Review Commission in this case is not contested and is established by the pleadings and stipulated facts, pursuant to Sections 3(4)(5) and 10(c) of the Act.[23/]

Based upon the foregoing and pursuant to Sections 10(c) and 12(j) of the Act,[24/] it is hereby,

ORDERED:

1. That Items numbered 1 and 2 of the Citation for Serious Violation of 29 U.S.C. 654(a)(1) are AFFIRMED.

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[23/] 29 U.S.C. 652(4)(5) and 659(c).

[24/] 29 U.S.C. 659(c) and 661(i).

2. A penalty of $1,000 as to Item No. 1 and $800 as to Item No. 2, of said Citation, totalling $1,800, is ASSESSED.

William E. Brennan
WILLIAM E. BRENNAN
Adm. Law Judge, OSHRC

Dated: April 24, 1978
Hyattsville, Maryland

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

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UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

June 30, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Little Beaver Creek Ranches, Inc.

OSHRC DOCKET NO. 77-2096

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

FOR THE SECRETARY OF LABOR

OF COMMISSION DECISION

Counsel for Regional Litigation
Office of the Solicitor, USDOL
200 Constitution Ave., NW. - Rm. S-4014
Washington, D.C. 20210

To wit: See attached.

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FOR EMPLOYEES

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

James A. Cronin, Jr., Judge
Occupational Safety & Health
Review Commission
1050 Seventeenth Street
Prudential Building-Suite 1718
Denver, Co. 80265

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 77-2096 |
| LITTLE BEAVER CREEK RANCHES, INC., | : | |
| Respondent. | : | |
| | : | |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

One employee of Respondent, Little Beaver Creek Ranches, Inc. ("Little Beaver"), was killed and three other employees were injured when a piece of irrigation pipe came in contact with an energized power line. The Secretary of Labor ("Secretary") issued a citation[1/] alleging that Little Beaver had violated section 5(a)(1), 29 U.S.C. § 654(a)(1), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act").[2/] A penalty of $540 was proposed. Administrative Law Judge James A. Cronin, Jr., vacated the citation on the basis that Little Beaver had implemented an adequate safety

1/ The citation alleged that irrigation water pipes were not stored and handled at a safe distance from power transmission lines, insulated rubber gloves were not provided, and a protective insulated boot was not placed over power transmission lines nor were the power transmission lines deenergized.

2/ Section 5(a)(1) of the Act states: "Each employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

program with respect to the handling of irrigation pipe in the vicinity of power lines. For the reasons that follow, we reverse Judge Cronin's decision and conclude that Little Beaver committed a violation of section 5(a)(1) of the Act.

I.

Little Beaver engages in cattle ranching and farming near Frenchtown, Montana. On the morning the incident occurred, Little Beaver's foreman, Curtis Kaiser, and four high-school-aged summer employees were moving irrigation pipe. The employees were working near the south edge of a hayfield, which was separated by a 4 1/2-foot-high wire fence from the north side of an interstate highway right-of-way. A 7,200 volt power distribution line owned by Missoula Electric Cooperative ran along the right-of-way. The poles for the three-phase power line were located 8 feet from the fence. An 8-foot-long crossarm was mounted on each pole, and each end of the crossarm supported an energized line. A third line ran along the center of the poles. The line nearest the hayfield was 4 feet laterally from the fence and 24 feet above the ground; the center phase line was 8 feet laterally from the fence and 26 feet above the ground. The power line was located on flat land and was in plain view from the hayfield.

Little Beaver's employees were disconnecting sections of irrigation pipe and were loading the pipe onto a trailer so that the pipe could be moved to another hayfield. Each section of pipe was approximately 30 feet long and weighed about 30 pounds. The pipe in the hayfield was laid out in two directions -- the "main line" ran parallel to the power line, and several "hand lines," placed at intervals about 60 feet apart, ran perpendicular to the power line.

The hand lines ended about 30 feet from the fence.[3/] In lifting the pipe onto the trailer, the employees lifted the pipe about 3 1/2 to 4 feet off the ground.

Work began at 8:00 a.m. Foreman Kaiser supervised the work until 9:45 a.m., when he left the field to return to the ranch in order to receive instructions concerning the operation of a new tractor backhoe. Kaiser instructed the boys to continue moving the main line and to proceed to pick up and move the hand line. Three of the boys -- Robert DeWald, Guy Neusse, and Patrick Whelan -- had been working for Little Beaver for about a month. During that time, they had moved several hundred irrigation pipes, including some in the same hayfield. The fourth employee, Marvin Fowler, had done this work the preceding summer. Although Fowler did not have any job title, foreman Kaiser testified that Fowler "was directly under me" and that "if I wanted any particular thing done I would go to him." Pat Whelan also testified that he considered Fowler to be in charge when foreman Kaiser was not present.

The incident occurred sometime prior to 11:27 a.m., the time when the Missoula County sheriff was notified of the electrocution. Patrick Whelan, the only one of the boys to testify, did not recall what happened. His last recollection before the incident was loading pipe onto the trailer. Occupational Safety and Health Administration compliance officer Frank Bruno, however, related his conversation with Robert DeWald. DeWald told Bruno that, prior to the incident, Marvin Fowler and DeWald were loading a length of irrigation pipe when they found a gopher inside. They proceeded to shake the

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3/ In picking up the hand line segments, the truck pulling the trailer came between the end of the hand line and the fence. Little Beaver's foreman, Kaiser, testified that the truck came within 15 to 20 feet of the fence, while one of the high-school-aged employees, Pat Whelan, testified that the truck came within 5 to 10 feet of the fence.

gopher out and load the pipe onto the trailer. After loading three more lengths of pipe, Fowler discovered another gopher in one of the pipes on the trailer. Fowler and Whelan took the pipe off the trailer, and they raised one end of the pipe to shake out the gopher. The pipe contacted the power line.

After the incident, the boys were found in the hayfield about 10 feet from the fence. Marvin Fowler died as a result of the contact of the pipe with the power line. Pat Whelan, who was in serious condition, burned his knees and a foot. Guy Neusse was seriously burned and lost "a couple of fingers." Bob DeWald received a slight burn on his thumb.

Respondent's foreman Kaiser testified that the boys were instructed numerous times to stay away from all power lines and "to have nothing to do with power." Kaiser assumed that he gave this instruction on the day of the incident, but he did not recall giving it. The boys were also instructed not to stand the irrigation pipe on end, since "there was no reason for it" and "[t]hat's not the proper way to handle them." Kaiser stated that the boys appeared to understand his instructions regarding the handling of pipe, and he did not see or know of any violation of his instructions. Whelan also testified that he and the other boys were instructed on more than one occasion not to lift pipe on end around power lines.

Finding animals in irrigation pipes was a common occurrence. Kaiser testified that the normal procedure for removing animals was to remove the plugs on the end of the sections of pipe and then to flush water through the pipe. This was the most practical method since it also removed dirt and foreign matter from the pipe. Kaiser had never seen any other procedure used to remove animals. According to Kaiser, the boys were instructed in the normal procedure and always followed the instructions. Whelan also testified that he had always used the flushing method to remove animals from irrigation pipe.

The power line that ran along the right-of-way was under the control of the Missoula Electric Cooperative ("Cooperative") and served 200 to 230 customers. About 200 miles of the Cooperative's 1200 miles of power lines were in the vicinity of irrigated fields. Norman Walker, assistant engineer for the Cooperative, stated that it was against Cooperative policy for its customers to place protective boots over power lines or to do any work on the lines. The Cooperative had company workers and equipment available to deenergize power lines when necessary. Normally a power line would be deenergized before a boot was placed on the line. However, in an emergency a boot could be installed "hot."

Walker testified that the Cooperative allowed a line to be shut off for a house move or for bridge construction. However, he was not aware of any instance when deenergization of power lines was requested by a customer for purposes of moving irrigation pipe. Walker did not know whether such a request would be granted by the Cooperative. Walker emphasized that it was the Cooperative's policy to keep power on for its customers without interruption or "with the very slightest interruption we can tolerate." Walker noted that an interruption of electrical service would cause customers' irrigation pumps to stop, and the customers would have to restart their pumps when service was restored.

Walker testified that three accidents had occurred in the area in the last five years that involved contact of irrigation pipe with power lines. One of these accidents involved an animal stuck in the irrigation pipe. Walker did not have personal knowledge of these accidents; he learned about them through safety meetings and in newspaper accounts.

II.

Judge Cronin concluded that the Secretary established a prima facie violation of section 5(a)(1) of the Act. The judge found that recognition of

the hazard of electrical shock resulting from contact with an energized 7,200 volt power line by an irrigation pipe was proved by Little Beaver's instructions to its employees not to stand lengths of pipe on end, particularly when in the vicinity of energized power lines, and by the water-flushing method used by Little Beaver to remove animals from the pipe. The death of Marvin Fowler and the serious injuries sustained by two other employees established that the hazard was likely to cause death or serious physical harm to employees. The judge also found that it was feasible to eliminate the hazard by prohibiting employees from standing pipe on end within contact distance of a power line.

The judge further concluded that the worksite was not free of hazards because Little Beaver's employees had struck an electric power line while placing a section of irrigation pipe on end. He also found that the Secretary established a prima facie showing of employer knowledge. The judge imputed to Little Beaver the knowledge of Fowler, whom the judge found to be a supervisory employee. Fowler was found to have knowledge of the violative condition based upon his participation in raising the pipe on end to remove the gopher.

The judge, however, concluded that Little Beaver's instructions and workrules concerning the cited hazard rebutted the Secretary's prima facie showing of employer knowledge. The judge pointed to Little Beaver's instructions to its employees not to raise pipes on end in the vicinity of power lines and to follow the flushing procedure for removing animals. The judge found it significant that there was no evidence that the boys had deviated from the employer's instructions prior to the incident. The judge also relied upon Whelan's testimony that he understood foreman Kaiser's instructions not to raise irrigation pipe in the vicinity of power lines.

Judge Cronin found that the young ages of Little Beaver's workers did not necessitate additional instructions. The judge pointed out that the work

involved was a simple operation that had been performed by the employees hundreds of times previously. Further, the judge found it significant that there was no evidence that the employees because of their youth did not understand the employer's instructions or failed to appreciate the hazard involved.

The judge also concluded that the Secretary had failed to prove that it was feasible to eliminate the hazard by deenergizing the power line or insulating the line with a boot. He pointed out that the power line was in the exclusive control of the Cooperative and that it was the Cooperative's policy not to disrupt customer service by deenergizing a distribution line or by insulating a "hot" line with a boot. The judge concluded that a request to the Cooperative to interrupt power service would be a useless act.

III.

The Secretary contends that Little Beaver's safety training and supervision were inadequate and that therefore Little Beaver should be found in violation of section 5(a)(1). The Secretary maintains that Little Beaver's general instructions to its employees "not to have anything to do with" power lines and not to turn pipes on end were insufficient to protect Little Beaver's employees from the cited electrical hazard. The Secretary also argues that Little Beaver's communication and enforcement of its safety rules were deficient. The Secretary asserts that the participation of Little Beaver's supervisor Fowler in the upending of irrigation pipe on the morning of the accident is strong evidence that Little Beaver's implementation of its safety policy was lax. The Secretary further contends that the judge erred in concluding that, despite the young ages of Little Beaver's employees, additional safety instructions to the employees were not necessary.

Even assuming that Little Beaver's safety program was adequate, the Secretary contends that a section 5(a)(1) violation should be found based on

Little Beaver's failure to deenergize or insulate the power line. According to the Secretary, the feasibility of deenergizing the power line was established by the Cooperative's history of honoring requests from private parties to deenergize lines under certain circumstances, such as bridge construction or a house move, and by testimony that the Cooperative had the necessary equipment and trained employees available to deenergize the line. The Secretary further maintains that deenergization or insulation of the power line should not be found to be infeasible since Little Beaver never asked the Cooperative to deenergize or insulate the line.

With respect to the adequacy of its safety program, Little Beaver argues that Judge Cronin's findings and conclusions are supported by a preponderance of the evidence and that in consequence his rulings should not be disturbed by the Commission. Citing Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474 (1951), and Accu-Namics, Inc. v. OSHRC, 515 F.2d 828 (5th Cir. 1975), cert. denied, 425 U.S. 903 (1976), Little Beaver asserts that the Commission has no authority to substitute its interpretation of the evidence for that of the judge. As for its failure to deenergize or insulate the power line, Little Beaver contends that the burden was on the Secretary to prove that this was a feasible means of abatement and that the Secretary did not carry his burden.[4/]

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4/ Little Beaver also maintains that the Secretary's petition for review failed to plainly and concisely indicate the issues on review and to properly cite the record, which Little Beaver asserts is required by the Commission Rules of Procedure. Little Beaver refers to former Commission Rule 91a(c), 29 C.F.R. § 2200.91a(c) (1977), which was in effect when this case was directed for review. It states, in pertinent part:

> (c) Each issue [in the petition for discretionary review] shall be separately numbered and plainly and concisely stated, and shall be supported by citations to

(Continued)

IV.

Section 8(a)[5/] of the Administrative Procedure Act provides that an agency's review of the decisions of its administrative law judges may extend to all issues squarely raised by the record as a whole. Therefore, the Commission's review authority includes the authority to decide all issues it could have decided as the initial decision maker. The Commission is not limited to the role of a reviewing court that must sustain factual findings of administrative agencies if such findings are supported by substantial evidence. The ultimate responsibility for decision is placed in the Commissioners to discharge the function of administering the Act.

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4/ (Continued)

> the record when assignments of error are based on the record, and by citations to statutes, regulations, or principal authorities relied upon.

Little Beaver contends that, because the Secretary's petition did not comply with this requirement, Little Beaver was "left to guess . . . the basis upon which review is sought."

This contention is groundless. The Commission has held that, notwithstanding any possible noncompliance with its rules governing petitions for discretionary review, the issues stated in the direction for review are properly before the Commission. United States Steel Corp., 81 OSAHRC 28/C2, 9 BNA OSHC 1641, 1981 CCH OSHD ¶ 25,282 (No. 76-5007, 1981). Further, we find that the Secretary's petition for review was sufficient to place Little Beaver on notice of the basis upon which review was sought.

5/ Section 8(a) of the APA, 5 U.S.C. 557(b), provides in pertinent part:

> When the agency did not preside at the reception of the evidence, the presiding employee . . . shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings, unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues or by rule.

(emphasis added)

Accu-Namics, Inc. v. OSHRC, supra; Stevens Equipment Co., 73 OSAHRC 17/A2, 1 BNA OSHC 1227, 1971-73 CCH OSHD ¶ 15,691 (No. 1060, 1973). Accordingly, Little Beaver's argument that we may not disturb the judge's disposition in this case is without merit.

In order to establish a section 5(a)(1) violation, the Secretary must prove: (1) the employer failed to render its workplace free of a hazard, (2) the hazard was recognized either by the cited employer or generally within the employer's industry, (3) the hazard was causing or was likely to cause death or serious physical harm, and (4) there was a feasible means by which the employer could have eliminated or materially reduced the hazard. Baroid Division of NL Industries, Inc. v. OSHRC, 660 F.2d 439 (10th Cir. 1981); St. Joe Mineral Corp. v. OSHRC, 647 F.2d 840 (9th Cir. 1981); National Realty & Construction Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973); Whirlpool Corp., 79 OSAHRC 32/A14, 7 BNA OSHC 1356, 1979 CCH OSHD ¶ 23,552 (No. 9224, 1979), rev'd on other grounds, 645 F.2d 1096 (D.C. Cir. 1981); see United States Steel Corp. No. 77-1796 (June 30, 1982).

A recognized hazard is a condition or practice in the workplace that is known to be hazardous either by the industry in general or by the employer in particular. Beaird-Poulan, A Division of Emerson Electric Co., 79 OSAHRC 21/D11, 7 BNA OSHC 1225, 1979 CCH OSHD ¶ 23,493 (No. 12600, 1979); see Continenetal Oil Co. v. OSHRC, 630 F.2d 446, 448 (6th Cir. 1980), cert. denied, 101 S. Ct. 1481 (1981). In this case, the judge correctly determined that contacting an energized 7,200 volt power line with a length of irrigation pipe is a hazard likely to cause death or serious physical harm and that Little Beaver recognized this electrical hazard. The judge also correctly concluded that Little Beaver's employees were exposed to this hazard and that it was feasible to protect against this hazard by prohibiting employees from raising a pipe on end within contact distance of a power line.

We disagree, however, with Judge Cronin's conclusion that Little Beaver should not be found in violation of section 5(a)(1) because its safety program was adequate with respect to the handling of irrigation pipe in the vicinity of power lines. We find that several factors, in combination, lead to the conclusion that Little Beaver's safety program was inadequate.[6/] Therefore, we hold that Little Beaver failed to render its worksite free of the cited hazard.

First, the judge underestimated the significance of the young age of the employees in his evaluation of Little Beaver's safety program. While the judge correctly pointed out that the work of moving pipe was routine, apparently he did not consider that high-school-aged employees may not appreciate the danger of workplace hazards such as power lines and may be prone to disregard safety rules. Certainly, more explicit and frequent safety instructions are necessary for employees of such age and experience than for older and more experienced employees. Danco Construction Co., 77 OSAHRC 189/B1, 5 BNA OSHC 2043, 1977-78 CCH OSHD ¶ 22,280 (No. 12847, 1977), aff'd, 586 F.2d 1243 (8th Cir. 1978) ("Danco").[7/]

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6/ When elimination of a particular hazard requires employees to follow certain procedures, the employer must take the steps necessary to assure that employees follow those procedures. General Dynamics Corp., Quincy Shipbuilding Div. v. OSHRC, 599 F.2d 453, 458 (1st Cir. 1979); National Realty & Constr. Co., supra; Western Massachusetts Elec. Co., 81 OSAHRC 63/B13, 9 BNA OSHC 1940, 1981 CCH OSHD ¶ 25,470 (No. 76-1174, 1981). An employer's safety program is adequate if it includes workrules designed to prevent the violation at issue, those rules are effectively communicated to employees, the employer takes steps to discover violations, and the employer effectively enforces the rules when violations are discovered. Western Massachusetts Elec. Co., supra.

7/ In Danco, the Commission rejected the employer's defense of unpreventable employee misconduct and found the employer in violation of the standard at 29 C.F.R. § 1926.550(a)(15)(i) (operation of crane within 10 feet of energized power line prohibited). The Commission in Danco found it significant that two

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Moreover, Little Beaver's instructions to employees to "stay away from power lines" and to have "nothing to do with power" were insufficient to apprise the employees of the required conduct. Specific safety instructions and workrules concerning hazards peculiar to the job being performed are the essential foundations of an adequate safety program. Iowa Southern Utilities Co., 77 OSAHRC 32/C10, 5 BNA OSHC 1138, 1977-78 CCH OSHD ¶ 21,612 (No. 9295, 1977). In this case the employees were not told how far to keep the irrigation pipe away from power lines, nor were they informed of the magnitude of the danger of contacting pipe with the power lines. While one employee, Pat Whelan, testified that he understood his foreman's safety instructions, there is no evidence that Whelan or the other employees who were exposed to the hazard were told of the rationale underlying Little Beaver's safety rules or were informed about the severity of the electrocution hazard. As the Commission reiterated in New England Telephone & Telegraph Co., 80 OSAHRC 54/A2, 8 BNA OSHC 1478, 1490, 1980 CCH OSHD ¶ 24,523 at p. 30,000 (No. 76-3010, 1980), "Rules are more likely to be observed if their rationale is understood and it is made clear that they are not just arbitrary pronouncements but are grounded in practical reasons of safety." See also Martin Painting & Coating Co., 77 OSAHRC 181/E8, 5 BNA OSHC 1946, 1977 CCH OSHD

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7/ (Continued)

employees who were approximately 18 years old had not been given specific safety instructions concerning electrical hazards. The Eighth Circuit, in affirming the Commission's decision, found that there was substantial evidence supporting the Commission's conclusion that the employer could have prevented the violation. The court pointed out that "[t]he company left unsupervised a young, inexperienced, and largely untrained crew working in close proximity to a dangerous power source." 586 F.2d at 1247.

The judge distinguished Danco from this case on the basis that the work involved in this case was not complex. However, the work performed by the youthful work crew in Danco, the unloading of steel pipe from a truck and stacking the pipe on skids, also was not complex in nature.

¶ 22,239 (No. 15923, 1977), aff'd, 629 F.2d 437 (6th Cir. 1980), cert. denied, 449 U.S. 1062 (1980).

Finally, the participation of two employees, including Fowler, the employee in charge at the time,[8/] in the lifting of irrigation pipe near the power lines indicates that Little Beaver's implementation of its safety program was inadequate. It is significant that more than one employee felt free to disregard the workrule. Moreover, while safety instructions were given at some time, Little Beaver's foreman Kaiser was uncertain whether safety instructions prohibiting the lifting of pipe near power lines were given on the day of the incident. We therefore conclude that Little Beaver's safety instructions were not sufficiently communicated to employees so that the employees could be expected to follow the rules and perform their work safely. See Danco Construction Co., supra; Chapman & Stephens Co., 77 OSAHRC 77/A2, 5 BNA OSHC 1395, 1977-78 CCH OSHD ¶ 21,802 (No. 13535, 1977).[9/]

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8/ Judge Cronin's finding that Fowler was a supervisory employee for purposes of the Act was not challenged by either party on review. As the Court of Appeals for the District of Columbia Circuit noted in National Realty & Constr. Co., supra at 1267 n. 38, the fact that a supervisor feels free to breach a company safety policy is strong evidence that implementation of that policy is lax.

9/ We reject Little Beaver's argument that the three cases it cited in support of the judge's decision are persuasive in this case. One of the cases it cited, Norman Franzen d/b/a Norm's Trailer Sales, 74 OSAHRC 38/C13, 2 BNA OSHC 3066, 1973-74 CCH OSHD ¶ 17,798 (No. 3710, 1974), is an unreviewed administrative law judge's decision and, thus, lacks precedential value and is not binding on the Commission. Leone Constr. Co., 76 OSAHRC 12/E6, 3 BNA OSHC 1979, 1975-76 CCH OSHD ¶ 20,387 (No. 4090, 1976). Another administrative law judge's decision on which Respondent relied, Martin Painting & Coating Co., 77 OSAHRC 181/E8, 1976-77 CCH OSHD ¶ 20,808 (No. 15923, 1976), was subsequently reversed by the Commission, and the Commission's decision was affirmed by the court of appeals. 5 BNA OSHC 1946, 1977-78 CCH OSHD ¶ 22,239 (1977), aff'd, 629 F.2d 437 (6th Cir. 1980), cert. denied, 449 U.S. 1062 (1980). The final case cited by Respondent, Norman R. Bratcher Co., 73 OSAHRC 7/C2, 1 BNA OSHC 1152, 1971-73 CCH OSHD ¶ 15,501 (No. 83, 1973), is dissimilar from the present case in that in Bratcher a painting

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Although we conclude that Little Beaver's safety program was inadequate, we agree with Little Beaver's argument that insulating or deenergizing the power line was not feasible.[10/] Insulating or deenergizing the power line would have caused an interruption of power to the 200 to 230 customers served by the line.[11/] Little Beaver's field was adjacent to the power line, and irrigation pipes in the field were frequently, if not constantly, being moved. Therefore, requiring insulation or deenergizing of the line every time pipes in its vicinity were moved would cause frequent power outages and would require other customers with irrigated fields to restart their electric pumps when service was restored. Moreover, the policy of the Missoula Electric Cooperative, which owned the line, was to keep power on without interruption or "with the very slightest interruption [the Cooperative] can tolerate." Thus, it is hardly conceivable that the Cooperative would permit, or its customers would tolerate, the frequent power interruptions that would be necessary if the line were insulated or deenergized every time irrigation pipes were moved in its vicinity.

Moreover, it was possible for employees to do their work without lifting the pipes more than 4 feet off the ground, and the power line was at a height

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9/ (Continued)

contractor's employees' use of an aluminum ladder near a power line some distance from the building to be painted was held to be an unforeseen occurrence and hence not a violation of § 5(a)(1); in this case Respondent knew that its employees were moving pipes near the power line.

10/ The citation also charged Little Beaver with failure to provide insulated gloves. However, this issue was not litigated at the hearing, and the judge properly concluded that a violation could not be found on this basis.

11/ Except in an emergency, a power line was deenergized before an insulated boot was placed on it. Thus, insulating a power line would not avoid the need to interrupt power.

of 24 feet and was several feet beyond the fenced perimeter of the field. Therefore, it was possible for the work to be accomplished safely without deenergizing or insulating the line, if proper work practices were followed.

The Secretary points out that in Chapman & Stephens Co., supra, the Commission found that it was feasible for a power line passing through the employer's citrus grove to be deenergized even though the line was under the control of a power company. However, Chapman & Stephens is factually distinct from the present case. In Chapman & Stephens an employee pulled a bent twenty-foot sprinkler pipe from its base and contacted an overhead power line 10 1/2 feet away. The removal of the pipe was to repair the bend in the pipe and was not a routine event. The number of customers served by the line was not shown. Unlike the present case, requiring the power line in Chapman & Stephens to be deenergized every time a sprinkler pipe below it was removed would not have necessitated frequent power outages, because removal was not routine. Also, since the number of customers on the line was not shown, it was unclear whether deenergizing the line would have caused much inconvenience to others. Additionally, the pipe was much closer to the power line than that in the present case and, thus, the pipe probably could not have been removed safely, even with proper work practices, unless the line was deenergized. Thus, the Commission's decision in Chapman & Stephens does not compel a finding that it would have been feasible to deenergize or insulate the power line in this case.

V.

For the foregoing reasons, Judge Cronin's vacation of the citation is reversed. The critera for a section 5(a)(1) violaton of the Act have been met, and hence the citation is affirmed. Considering the gravity of the violation

and Little Beaver's size, good faith and prior history, we assess a penalty of $540.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: JUN 30 1982

ROWLAND, Chairman, dissenting:

I dissent from the majority's opinion insofar as it concludes that Little Beaver's safety program was insufficient to render the worksite free from the cited hazard. Accordingly, I would affirm Judge Cronin's decision to vacate the citation for an alleged violation of section 5(a)(1).

The obligation imposed on each employer by section 5(a)(1) to furnish a workplace "free from" recognized hazards does not make the employer an insurer or guarantor of his employee's safety. National Realty & Construction Co. v. OSHRC, 489 F.2d 1257, 1265-66 (D.C. Cir. 1973); see Brennan v. OSHRC (Raymond Hendrix) 511 F.2d 1139, 1144-45 (9th Cir. 1975), Brennan v. Butler Lime & Cement Co., 520 F.2d 1011, 1017 (7th Cir. 1975). An employer satisfies his duty under section 5(a)(1) if he takes all reasonably necessary precautions, such as implementing safety rules, to prevent reasonably predictable exposure to recognized hazards. General Dynamics Corp., Quincy Shipbuilding Division v. OSHRC, 599 F.2d 453, 458 (1st Cir. 1979). Consequently, an allegation by the Secretary that the workplace was not "free from" a recognized hazard cannot be sustained when the evidence shows that the employer issued unambiguous and well-communicated safety rules, which were directed toward the hazard and which the employer reasonably expected the employees to follow. Jones & Laughlin Steel Corp., No. 76-2636 (June 25, 1982); United States Steel Corp., 81 OSAHRC 28/C2, 9 BNA OSHC 1641, 1981 CCH OSHD ¶ 25,282 (No. 76-5007, 1981) cited at n. 4, supra.

Based on the evidence in the record, Judge Cronin vacated the alleged violation of section 5(a)(1) because Little Beaver repeatedly communicated specific safety instructions, warning the employees of the overhead power lines, admonishing the employees against inverting the irrigation pipes, and directing the employees to flush the gophers from the pipes with water. The majority rejects Judge Cronin's

conclusion that Little Beaver's safety program was adequate. 12/ I disagree.

The majority reasons that Judge Cronin underestimated the significance of the "young" age of the employees. However, the judge fully took into account the age of the employees when assessing the adequacy of Little Beaver's work rules. Judge Cronin explained that additional safety instructions were not needed, despite the age of the boys, because moving irrigation pipes and removing gophers were simple tasks which the employees had correctly performed numerous times before. The judge's reasoning is supported by the uncontradicted testimony of foreman Kaiser, who stated that the employees were experienced in moving irrigation pipes and had moved "many, many hundreds of them." As Judge Cronin noted, the evidence shows that the employees had never deviated from Little Beaver's safety procedures when transporting pipes and removing gophers, in contrast to the majority's speculation that the "young" employees "may be prone to disregard safety rules." Contrary to the assertion of the majority that Judge Cronin failed to consider whether the high-school-age employees would "appreciate the danger" of contacting the power lines, Judge Cronin accepted as true the uncontradicted testimony of Pat Whelan, one of the high-school-age employees. Whelan stated at the hearing that he was aware of the power lines and that he knew from foreman Kaiser's instructions that he should not tilt pipes on end to remove gophers, especially in the vicinity of power lines. The judge specifically determined that Whelan's testimony showed Whelan knew and <u>understood</u> the safety rules. 13/ The judge's implicit determination that Whelan's testimony

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12/ Judge Cronin concluded that the evidence establishing the adequacy of Little Beaver's safety instructions sufficiently negated the Secretary's allegation of employer knowledge. I note that the evidence showing that Little Beaver's safety program was sufficient, and that the employees unexpectedly deviated from the workrules, establishes both that Little Beaver rendered its workplace "free from" the hazard and that Little Beaver lacked knowledge of employee exposure to the hazard.

13/ The majority relies on <u>Danco</u>, p. 11 <u>supra</u>, in which the Commission and the Court of Appeals mentioned the young age of the workcrew. However, both the Commission and the Court of Appeals emphasized that the employees

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was credible should not be disturbed on review. See, e.g., Kus-Tum Builders, Inc., 81 OSAHRC 97/B2, 10 BNA OSHC 1128, 1981 CCH OSHD ¶ 25,738 (No. 76-2644, 1981). Since Commission precedent holds an employer's safety rules are adequate if they are understood and previously followed by the employees, the judge correctly determined that Little Beaver's safety program was not rendered inadequate by the age of the workers. United States Steel Corp., supra, 9 BNA OSHC at 1644, 1981 CCH OSHD at pp. 31,251-52.

The majority further concludes that the instruction to have "nothing to do with power" was not sufficiently precise. But, as the judge noted, the employees were also told not to stand the pipes on end and to flush the animals from the pipes with water. Kaiser warned the employees of the existence and location of the power lines, thus suggesting that the employees were aware of the rationale behind Little Beaver's safety rules. Indeed, the OSHA compliance officer admitted that the accident would not have occurred but for a deviation from Little Beaver's specific instructions, which the compliance officer aptly summarized as a rule "not to invert irrigation pipe because of the hazard involved of the overhead power lines."

Nor do I agree with the majority's contention that the rules were not adequately implemented. The majority emphasizes that more than one employee, including Fowler, violated the rules and that the foreman Kaiser was not sure if he communicated the workrules on the day of the accident. I do not find that evidence

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13/ (Continued)

in Danco had not been given specific safety instructions on a regular basis. Conversely, the employees here were issued specific instructions on numerous occasions and understood those instructions. Moreover, Little Beaver's employees were experienced, unlike the inexperienced workers in Danco. See 586 F.2d at 1247. Accordingly, I agree with Judge Cronin that this case is distinguishable from Danco.

dispositive. It is undisputed that Little Beaver issued the safety instructions on numerous occasions, and that Whelan, the only high-school-age employee who testified at trial, understood those rules. Although foreman Kaiser could not specifically remember, he assumed that he reiterated Little Beaver's safety program on the day of the accident, based on his habit of repeatedly communicating the safety instructions to the employees. More importantly, the employees, including Fowler, had never disregarded the workrules previously and had been observed correctly following the safety procedures immediately before the accident. See National Realty & Construction Co., supra, at 1266 (an employer is not responsible under section 5(a)(1) for unexpected, idiosyncratic deviations from his safety program). Therefore, contrary to the majority's contention, the record supports the judge's conclusion that Little Beaver implemented adequate safety instructions which Little Beaver could reasonably expect would be followed by the employees.

In light of Little Beaver's safety program, I conclude that Little Beaver freed its workplace from the hazard of contacting energized, overhead power lines with irrigation pipes. Because an alleged violation of section 5(a)(1) cannot be sustained when the Secretary does not establish that the employer failed to render its workplace "free from" the recognized hazard, I would affirm the judge's vacation of the citation.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>LITTLE BEAVER CREEK RANCHES, INC.,<br>Respondent. | OSHRC DOCKET NO. 77-2096 |

APPEARANCES:

Ann M. Noble, Trial Attorney, U. S. Department of Labor, for the Complainant,

Sam E. Haddon, Esq., Boone, Karlberg & Haddon, Missoula, Montana, for the Respondent.

DECISION AND ORDER

Cronin, Judge, OSHRC:

As a result of an investigation of an accident fatality occurring on June 10, 1977 at a respondent worksite, the Secretary of Labor issued respondent, Little Beaver Creek Ranches, Inc., a citation alleging a serious violation of Section 5(a)(1) of the Occupational Safety and Health Act (29 U.S.C. §654(a)(1)). A penalty of $540.00 was proposed.

The alleged violation is described in the citation as follows:

> Section 5(a)(1) of Public Law 91-596: The employer failed to furnish to each of his employees a place of employment which was free from recognized hazards that were likely to cause death or serious physical harm to his employees in that the storage and handling of irrigation water pipes were not at a safe distance from power transmission lines; insulated rubber gloves were not provided; a protective insulated boot was not placed over power transmission lines, nor were the power transmission lines deenergized.

Section 5(a)(1) of the Act provides:

> Each employer--
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

## ISSUES

Little Beaver Creek challenges Commission jurisdiction by specifically denying it is engaged in a business affecting commerce. Little Beaver Creek also denies the allegations of violation and additionally defends on the ground that the power lines in question were under the exclusive ownership, possession, and control of the Missoula Electric Cooperative, Inc. Lastly, Little Beaver Creek contends in its brief the complaint should be dismissed because it is based on information obtained by a warrantless search.

The issues to be determined are:

(1) Whether Little Beaver Creek is an employer engaged in a business affecting interstate commerce?

(2) Does the Secretary's failure to obtain a warrant before conducting his investigation or inspection require vacation of the citation?

(3) Did Little Beaver Creek commit the alleged violation June 10, 1977, and if it did, what penalty is appropriate?

## JURISDICTION

Little Beaver Creek employs 11 persons and raises cattle for future sale as breeding stock throughout the United States and overseas (Tr. 56, 105-106). On these facts, Little Beaver Creek clearly engages in a business affecting interstate commerce and is an "employer" as that term is defined in Section 3(5) of the Act. Jurisdiction, therefore, is conferred on this Commission.

## WARRANTLESS SEARCH

Respondent cites Empire Steel Manufacturing Co. v. Marshall, No. CV 77-48 - BLG (U.S. District Court, District of Montana, September 1, 1977) in support of its contention that the warrantless search by the compliance officer requires vacation of the citation. Respondent's reliance on that case is misplaced. There, the Court held that the Fourth Amendment prohibits warrantless non-consensual inspections under the Act. Here, respondent did not resist or object to the inspection of its worksite; General Manager Hubman cooperated fully, and accompanied the compliance officer on his four hour inspection of the accident site on June 15, 1977 (Tr. 97). Because the search was purely consensual, the principles enunciated in Empire Steel are inapposite. By permitting the inspection, respondent now cannot complain it was conducted without a warrant. See Lake Butler Apparel Co. v. Secretary of Labor, 519 F.2d 84 (5th Cir., September 15, 1975).

## FINDINGS OF FACT

Upon the credible evidence of record the following facts are found; proposed findings of facts submitted by the parties inconsistent therewith are denied.

1. Respondent, Little Beaver Creek Ranches, Inc., a corporation, engages in cattle ranching, and employs 11 persons. Little Beaver Creek's cattle are sold as breeding stock throughout the United States and overseas (Tr. 56, 105-106).

2. On June 10, 1977, Little Beaver Creek had in its employ four "boys", Marvin Fowler, Robert Dewald, Guy Nuesse, and Pat Whelan. These employees, under the supervision of respondent's foreman, Curtis Kaiser, were engaged in moving irrigation pipe lines from one pasture area to another. Foreman Kaiser supervised the work from 8:00 a.m. until 9:45 a.m. when he left the field and returned to the ranch to receive instructions on how to operate a new tractor backhoe (Tr. 57, 59).

3. The pasture or hayfield in question borders the north side of Interstate 90 right-of-way, west of Frenchtown, Montana. At this location, the right-of-way runs in an east to west direction. The south line of the hayfield and the north line of the highway right-of-way is marked by a fence constructed of woven and barbed wire, approximately four and one-half feet high.

4. The Huson west distribution power line of the Missoula Electric Cooperative runs in an east-west direction within the boundaries of the highway right-of-way, south of the pasture. The poles for the three phase line are located 8 feet south of the fence dividing the right-of-way and the pasture. The poles are equipped with an eight foot long crossarm with an energized wire attached to each end, and center, of the arm. From each phase to ground the total voltage is 7,200 volts, and from phase to phase it measures 12,500 volts. The phase wire nearest to the pasture is located 24 feet over a point in the right-of-way, four feet south of the fence line; the center phase wire is 26 feet above the ground. This distribution power line was installed approximately 7 years ago and is not obscured from view (Tr. 13-22, 26-26; Exhibit C-1).

5. The Huson west line serves approximately 200 to 250 customers and is under the exclusive control of the Missoula Electric Cooperative. Missoula Electric, as a matter of policy, would not permit the de-energizing of this power line and interruption of service to 200 plus customers for the purpose of moving irrigation pipe (Tr. 33).

Missoula Electric does not permit anyone other than its own employees to work on its power lines or to place facilities on these lines. When irrigation pipe is moved, it is not the policy of Missoula Electric to permit facilities, such as a protective insulated boot, to be placed on the power lines (Tr. 33-36).

6. Prior to June 10, 1977, Little Beaver Creek, through its foreman and manager, had instructed the four boys concerning the movement and handling of irrigation pipe, and on numerous occasions had told the

boys to stay away from all power lines. "They was told that they was there and not to have anything to do with any power." They were specifically instructed not to stand an irrigation pipe on end (Tr. 62, 64, 117). Although Foreman Kaiser assumes he also so instructed the boys on June 10th, he does not recollect it (Tr. 62). Pat Whelan, age 16, confirms that he previously has been instructed not to stand a pipe on end in the vicinity of a power line (Tr. 81-82, 87).

7. It is a common occurrence on respondent's ranch for animals, such as gophers, to get into the irrigation pipes, and Little Beaver Creek has adopted a standard procedure to remove them. The lines are laid out on the ground and flushed out with water (Tr. 75-76). Prior to June 10th, the four boys had been instructed in, and had followed, this procedure (Tr. 76-77). The foreman had never seen them deviate from this procedure (Tr. 77). Pat Whelan confirmed he had received instructions concerning flushing animals out of a pipe, and prior to June 10th had never seen anybody stand a pipe on end to get an animal out of a pipe (Tr. 88).

8. Three of the four employees working on June 10th had been under Foreman Kaiser's supervision for about a month. The fourth employee, Marvin Fowler, had worked for respondent the previous summer, and was considered by respondent "senior" to the other three boys. If foreman Kaiser wanted the boys to perform any task he, "more or less", would relay instructions to the three boys through Marvin Fowler (Tr. 74-75). Pat Whelan considered Marvin Fowler to be in charge when Foreman Kaiser was absent (Tr. 88).

9. The four employees working on June 10th were experienced in handling and moving irrigation pipe, and previously had moved hundreds of pieces of pipe. Some of this handling and movement of pipe had been carried out in the same field. On June 10th, the trailer on which the pipe was being loaded for transportation to the other part of the field consisted of a two-wheeled frame, towed by a pickup truck. The frame of the trailer was approximately three and one-half feet high. The pipe to be loaded was approximately thirty feet in length. The method adopted and followed by respondent in loading the pipe is for two workmen to each pick up an end of a length of pipe, lift it approximately three and one-half feet above the ground and place it on the pipe trailer. Workmen are instructed not to stand a pipe on end, and to flush animals out of the pipe when discovered. The four employees working on June 10th had received and understood the instructions given to them by their supervisors for handling and use of irrigation pipe, and none of them had been observed deviating from any of these instructions prior to June 10, 1977. (Tr. 62, 64, 76-77, 81-82, 87-88, 117.)

10. On June 10th, a part of the pipe to be loaded had been laid out on the ground in the field north of the fence separating the field from the right-of-way. The four boys were working approximately ten to twenty feet from the fence, inside respondent's property, as they loaded the pipe. There was no danger of the boys contacting the power line as the pipe was loaded if the pipe was loaded in accordance with respondent's procedure and instructions.

11. When loading pipe on the trailer on June 10th, Robert Dewald discovered a gopher inside a length of pipe. Marvin Fowler and he shook the gopher out and loaded the length on the pipe trailer. They continued to load pipe; Marvin Fowler then discovered another gopher in another length of pipe that had been loaded on the trailer. Pat Whelan took the length of pipe off the trailer, and "they" then stood the pipe up on end to shake the gopher out. The pipe, 31 feet 6 inches in length, came into contact with the energized power line closest to the property line and the center line, causing electrical shock to all four employees. Marvin Fowler was fatally injured (Tr. 19-20, 97-103, 115-116; Exhibits C-1, 3, 4, 5).1/

12. Removing animals from irrigation pipe is an employment task respondent assigns its employees. The employees' actions, however, leading to the pipe's contact with the power line on June 10th, were the result of negligent conduct by the employees standing the pipe up on end, were contrary to respondent's specific instruction, were unnecessary to achieve removal of the gopher from the pipe, and were unforeseeable.

13. Prior to June 10, 1977, the respondent, initiated and conducted a practical safety program capable of preventing its employees from coming into contact with energized power lines.

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1/ Exhibit C-3 was offered in evidence without objection, and has been made part of the record (Tr. 99).

## DISCUSSION

The citation for serious violation of 29 U.S.C. §654(a)(1) will be vacated.

To establish a violation of the so-called "general duty" clause or section of the Act, the Secretary of Labor must prove, "(1) that the employer failed to render its workplace 'free' of a hazard which was (2) 'recognized' and (3) 'causing or likely to cause death or serious harm.'" National Realty & Construction Company v. OSHRC and Secretary of Labor, 489 F.2d 1257 (D.C. Cir. 1973).

Unquestionably, the evidence introduced at the October 27, 1977 hearing establishes that contacting an energized 7200 volt power line with a length of irrigation pipe is a hazardous practice likely to cause death or serious physical harm, and that respondent so recognizes it. The potential of this practice for death or serious physical injury, of course, is made plain by the tragic death of Marvin Fowler and the serious injuries suffered by two other respondent employees on June 10th. That respondent recognizes such conduct as hazardous was shown by respondent's instructions to its employees not to stand lengths of pipe on end, particularly when in the vicinity of energized power lines, and by the water flushing method adopted and used by respondent to remove animals from the pipes.

Respondent's duty, however, is to eliminate only "preventable" instances of the recognized hazardous practice of contacting an energized power line with a length of pipe; and the Secretary has the burden of demonstrating the feasibility and likely utility of the particular measures

he alleges respondent did not use to prevent the hazard, National Realty, supra. The Secretary's citation alleges, in effect, that the hazard associated with contacting an energized power line could have been totally eliminated if respondent had deenergized the power line or insulated it by means of an insulated boot.2/ The evidence, however, fails to show the feasibility or practicality of these procedures.

The power line in question is outside of respondent's leased property and under the exclusive control and possession of the Missoula Electric Cooperative; respondent, thus, cannot be expected to deenergize or insulate the line. Respondent also cannot be held liable for failing to request Missoula Electric to deenergize or insulate. Missoula Electric's policy is not to disrupt customer service by deenergizing a distribution line, and not to insulate a "hot line", when irrigation pipe is being relocated in the vicinity of its power lines. Under the circumstances, a request to Missoula would constitute a futile and useless act.

However, the record does establish an obvious safety precaution available to respondent to preclude employee contact with energized power lines - simply prevent employees from standing the lengths of irrigation pipe on end within contact distance of a power line. The adequacy and efficacy of this method was raised, put in issue by respondent, and tried by the parties. This method is practical, and would eliminate contact with power lines.

Therefore, when respondent employees stood the pipe on end and contacted the power line on June 10th, respondent's worksite clearly was not "free" from a "preventable" recognized hazard. If an employer,

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2/ The citation also cites respondent for failure to provide insulated rubber gloves. But the record contains no mention of gloves; and no evidence was introduced to establish that such gloves were not provided or that the gloves would protect employees from serious harm when a length of pipe contacts an energized power line.

however, lacks either actual or constructive knowledge of a condition which contravenes either a standard or the general duty clause, he cannot be expected to prevent that condition, and, therefore, cannot be held in violation of the Act. Cf. Packerland Packing Co. of Texas, No. 13315, November 17, 1977, citing Green Construction Company & Massman Construction, 76 OSAHRC 134/D9, 4 BNA OSHC 1808, 1976-77 CCH OSHD para. 21,235 (No. 5356, 1976).

The Commission has held that the Secretary can carry his burden and made a prima facie case of employer knowledge by showing that a "supervisory" employee had either actual or constructive knowledge of the violative condition. Ocean Electric Corp., 75 OSAHRC 6/C14, 3 BNA OSHC 1705, 1975-76 CCH OSHD para. 20,167 (No. 5811, 1975). The employer then may rebut the prima facie case by showing he has exercised reasonable diligence by taking all reasonable steps to prevent the violation. Ocean Electric Corp., supra; Horne Plumbing & Heating Co. v. OSHRC, 528 F.2d 564 (5th Cir., 1976).

A prima facie case of respondent knowledge, and, therefore, of a respondent violation,was established by the Secretary. Marvin Fowler was ostensibly in charge of the three other boys in the absence of Foreman Kaiser. And it is reasonble to conclude that Mr. Fowler was vested with sufficient authority to assure that the pipe moving operation was completed successfully, safely, and in accordance with prescribed procedure. See Iowa Southern Utilities, 77 OSAHRC 32/C10, 5 BNA OSHC 1138, 1977-78 CCH OSHD para. 21,612 (No. 9295, 1977). Certainly, Marvin Fowler (as well as the other boys) had knowledge

of the violative condition. He was present and an active participant in raising the pipe on end in order to remove the gopher from the pipe. Because he was acting in a supervisory role, his knowledge is imputable to respondent.

The crucial question, is: Does the evidence rebut the Secretary's prima facie case? This Judge believes it does.

Respondent issued specific instructions (not general, as contended by the Secretary) on numerous occasions to its employees not to raise pipes on end in the vicinity of power lines, and instructed these employees to follow the non-hazardous procedure of flushing the pipe lines whenever animals were encountered. These instructions were adequately communicated and had been carried out by these employees prior to June 10th. There is no indication that the employees had ever disobeyed or deviated from these instructions. Pat Whelan, age 16, and the only member of the group involved in the June 10th accident to testify, acknowledged he understood from Foreman Kaiser's instructions that he "shouldn't be lifting pipe up on end around power lines" (Tr. 82, 87). He also agreed that he had been instructed to flush out animals whenever he saw one (Tr. 88).

Because specific safety instructions and workrules concerning the hazard peculiar to the task being performed had been issued by respondent to Marvin Fowler, the "senior" employee, and to the other three boys, and Foreman Kaiser had not observed any infractions of these rules, this Judge is persuaded that respondent established by a preponderance of the evidence that it had implemented, prior to June 10th,

an adequate safety program with respect to handling irrigation pipe in the vicinity of power lines. Respondent, therefore, did not violate the general duty clause. See Ira Holliday Logging Co., Inc., 73 OSAHRC 16/A2, 1 BNA OSHC 1200, 1971-73 CCH OSHD para. 15, 688 (No. 237, 1973).

Citing Danco Construction Co., 1977-1978 OSHD para. 22,280, (No. 12847, October 25, 1977) the Secretary contends that the young ages of the workers necessitated additional instructions. But this was a simple not a complex operation that had been performed by these boys hundreds of times. More importantly, there is no indication that any of these boys, because of their youth, were incapable of understanding the specific instructions which would have totally eliminated the hazard, or were unaware of the attendant hazards if these instructions were disregarded. To the contrary, Pat Whelan testified he understood the import of the instructions.

For the foregoing reasons, the citation and proposed penalty must be vacated.

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in a business affecting interstate commerce.

2. The Secretary of Labor's inspection of June 15, 1977, did not contravene respondent's Fourth Amendment rights.

3. On June 10, 1977, respondent was not in violation of 29 U.S.C. §654(a)(1).

## ORDER

Based on the foregoing findings, conclusions of law, and the entire record, it is ORDERED:

1. The citation issued to respondent on June 24, 1977, and the proposed penalty based thereon, is VACATED.

James A. Cronin, Jr.

James A. Cronin, Jr.
Judge, OSHRC

Dated: January 9, 1978

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

June 30, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Chesapeake Operating Company

OSHRC DOCKET NO. 78-1353

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR EMPLOYEES

-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

OFFICE OF THE JUDGES'
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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>CHESAPEAKE OPERATING COMPANY,<br><br>Respondent. | OSHRC Docket No. 78-1353 |

## DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

The Secretary of Labor ("the Secretary") issued to Chesapeake Operating Company ("Chesapeake") a citation alleging that Chesapeake had willfully violated two longshoring safety standards. Administrative Law Judge Joseph L. Chalk vacated one item of the citation and affirmed the other as a non-serious, rather than willful, violation. The Secretary petitioned for review of the judge's decision as to both items, and Commissioner Cleary directed review under 29 U.S.C. § 661(i), section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), on all issues raised in the Secretary's petition, including:

> 1. Whether the administrative law judge erred by concluding that the standard at 29 CFR §1918.32(b) does not apply to cargo stowed on the deck of a ship; and
>
> 2. Whether the administrative law judge erred by concluding that Chesapeake Operating Company did not commit a willful violation . . . because the failure to comply with the standard at 29 CFR §1918.105(a) was caused by a non-supervisory employee.

I

The first item of the citation alleged a willful violation for failure to comply with 29 C.F.R. § 1918.32(b), which states:

> § 1918.32 Stowed cargo and temporary landing platforms.
>
> * * *
>
> (b) When an edge of a hatch section or of stowed cargo more than 8 feet high is so exposed that it presents a danger of an employee falling, the edge shall be guarded by a safety net of adequate strength to prevent injury to a falling employee, or by other means providing equal protection under the existing circumstances.

Chesapeake, a stevedoring company operating in Baltimore, Maryland, had two gangs of nineteen employees each loading parts of modular homes onto a ship. Since the employees had filled all the holds on the ship that would accommodate the modules, they were loading them on the deck. The slanted roofs of the modules were covered with snow and ice, and Chesapeake had employees working on top of the modules clearing away the snow. At the time of the alleged violation, these employees had no fall protection; an employee could have fallen from the roof of one of the modules to the pier or the water 40 feet or more below.

After the hearing, Chesapeake submitted a motion to supplement the record with a copy of a letter written by Edward C. March of the Office of Maritime Standards of OSHA to an official of the Oregon Area Accident Prevention Committee, Pacific Maritime Association. The letter stated in part:

> This is in response to your letter of June 22, 1977 relative to the intent of Sections 1918.32(b) and 1918.54(f) of 29 CFR Part 1918. Frankly, we are surprised at the need for such advice at this time as these regulations have been in effect for many years and a record search indicates only one prior instance in the case of each of these rules when some sort of interpretation was required.
>
> Section 1918.32(b) was developed to handle circumstances when men were required to work either at the edge of a partially opened hatch section or of a block or unit of stowed cargo in a hold under the circumstances described. It is meant to apply only to those "hold" situations, and not to deck cargo situations, that matter specifically coming under section 1918.33.
>
> * * *

This reply has been coordinated with our Directorate of Compliance who are responsible for the dissemination of interpretations, and who concur.

A

Judge Chalk found that the standard does not apply to deck cargo and vacated this item. He held that section 1918.33 1/ governs cargo carried on the deck, while section 1918.32 applies only to cargo stowed below decks. The judge denied Chesapeake's motion to supplement the record even though the Secretary had not objected to it. He reasoned that, because the question could be resolved without the proffered evidence, 2/ it was more expeditious to deny the motion than to reopen the hearing to afford the Secretary an opportunity to object to the letter or to submit rebuttal evidence.

The Secretary argues that the judge erroneously interpreted the standard and that section 1918.32(b) does apply to cargo on deck as well as in the hold. Chesapeake argues that the judge's interpretation is correct and is consistent with the maritime industry's understanding of the term "stowed cargo." Citing Mr. March's letter, Chesapeake maintains that the applicability of section 1918.33

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1/ That section provides:

§ 1918.33 Deck loads.

(a) Employees shall not be permitted to pass fore and aft over or around deck loads unless there is a safe passage.
(b) Signalmen shall not be permitted to walk over deck loads from rail to coaming unless there is a safe passage. If it is necessary to stand at the outboard or inboard edge of the deckload where less than 24 inches of bulwark, rail, coaming, or other protection exists, any signalman shall be provided with a suitable means of protection against falling from the deck load.

2/ The judge relied on the plain wording of the standard. In addition to concluding that cargo on deck is expressly governed by section 1918.33, he read section 1918.32(b) together with section 1918.32(c), which refers to employees working on different levels "in the same hatch." Accordingly, he concluded that the entire section 1918.32 is intended to apply only to cargo stowed in the holds of ships.

to deck loads indicates that section 1918.32 does not apply to deck loads, and argues that under both the Occupational Safety and Health Act and the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), section 1918.32(b) has consistently been interpreted to apply only to hold cargo.

B

After Judge Chalk issued his decision, the Commission fully considered this issue in Seattle Crescent Container Service, 79 OSAHRC 91/A2, 7 BNA OSHC 1895, 1979 CCH OSHD ¶ 24,002 (No. 15242, 1979), and unanimously interpreted section 1918.32(b) as applicable to cargo carried on the deck of a ship. That decision is controlling here.

In Seattle Crescent, a copy of the letter by Mr. March was submitted to the Commission while the case was on review, and the Commission denied the employer's motion to supplement the record. Here, the letter was submitted to the judge, who denied the motion because he found the letter unnecessary to his conclusion. In this case, however, we are confronted with a Commission precedent that is contrary to the judge's interpretation. Chesapeake has in effect renewed its motion by referring to the March letter in its brief in opposition to the Secretary's petition and in its brief on review. The Secretary has not objected to Chesapeake's references to the letter even though he moved to strike statements made in Chesapeake's reply brief, and he has not sought the opportunity to present evidence to rebut Mr. March's letter. We will therefore consider the motion to admit the letter.

Motions to reopen the record and receive additional evidence are not precisely covered by the Federal Rules of Civil Procedure. See Caracci v. Brother International Sewing Machine Corp., 222 F. Supp. 769 (E.D. La. 1963), aff'd per curiam, 341 F.2d 377 (5th Cir. 1965); 6A Moore's Federal Practice ¶ 59.04[13] (1979). Professor Moore has observed:

> In passing on the motion, the time when the motion is made, the character of the additional testimony, and the effect of granting the motion are pertinent factors for consideration.
>
> * * *
>
> A [trial] court, then, should consider a motion to reopen to take additional testimony in light of all the surrounding circumstances and grant or deny it in the interest of fairness and substantial justice.

6A Moore's Federal Practice, at pp. 59-33, 59-36. We are of the opinion that the interests of fairness, substantial justice, and adjudicative efficiency would be better served by our considering the letter now, rather than fostering the uncertainty and litigation that could ensue if we awaited a case in which the letter was admitted.

Mr. March's interpretation conflicts with that of the Secretary in this case and in Seattle Crescent. Mr. March did not state that the term "stowed cargo" was used in any particular sense, and he supplied no reasons or authority for his interpretation. His letter constitutes merely an informal advisory opinion, which is not binding on either the Secretary or the Commission. See Bethlehem Steel Corp., 81 OSAHRC 108/A2, 10 BNA OSHC 1264, 1981 CCH OSHD ¶ 25,839 (No. 16067, 1981). Cf. Holman Erection Co., 77 OSAHRC 196/A2, 5 BNA OSHC 2078, 1977-78 CCH OSHD ¶ 22,318 (No. 13529, 1977)(opinions of compliance officers cannot bind Secretary or Commission). Having considered Mr. March's letter, we find nothing in it that convinces us to change our fully-considered interpretation in Seattle Crescent.

Nor are we persuaded by the argument that deck cargo is governed exclusively by section 1918.33. Although the caption of section 1918.33 indicates that it applies to deck cargo, we look primarily to the standard itself rather than its caption to determine its scope. See Wray Electrical Contracting, Inc., 78 OSAHRC 78/A2, 6 BNA OSHC 1981, 1978 CCH OSHD ¶ 23,031 (No. 76-119, 1978), aff'd, 633 F.2d 220 (6th Cir. 1980). Section 1918.33 has a very narrow scope. Neither part of section 1918.33 applies to the working condition cited here: Chesapeake's employees were not signalmen and are therefore not covered by section 1918.33(b);

and section 1918.33(a) does not apply because the employees were on the modules working to clear away ice and snow, not traveling over or around them. Because no more specific standard applies to the working condition cited here, section 1918.32(b) applies. See 29 C.F.R. § 1910.5(c); Brown & Root, Inc., 81 OSAHRC 44/A2, 9 BNA OSHC 1833, 1981 CCH OSHD ¶ 25,366 (No. 76-190, 1981); Bristol Steel & Iron Works, Inc. v. OSHRC, 601 F.2d 717 (4th Cir. 1979). We therefore reaffirm Seattle Crescent's holding that section 1918.32(b) applies to cargo carried on the deck of a ship.

C

Although Commissioners Cleary and Cottine find that the standard applies, Commissioner Cleary concludes that this item of the citation should nevertheless be vacated. 3/ Commissioner Cleary finds that Mr. March's letter gives credence to Chesapeake's argument that the maritime industry was not aware that section 1918.32(b) applied to cargo stowed on deck when the violation occurred. Due process of law requires that an employer must have notice of what is required by a standard before a violation can be found. See Diebold, Inc. v. Marshall, 585 F.2d 1327, 1335-37 (6th Cir. 1978). Commissioner Cleary finds that Chesapeake lacked sufficient notice of the requirements of section 1918.32(b). He therefore votes to vacate this item. Commissioner Cleary emphasizes that this disposition does not relieve employers from their obligation to comply with section 1918.32(b), since the Commission has held that the standard applies to cargo stowed on deck. Id. at 1338.

Chairman Rowland also votes to vacate this item. For the reasons stated in his separate opinion, he agrees with Judge Chalk's finding that section 1918.32(b)

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3/ Commissioner Cottine's individual views on the proper disposition of this item are set forth in his separate opinion.

does not apply to the cited working conditions. The judge's vacation of this item is therefore affirmed. 4/

II

The second item of the citation alleged a willful violation of 29 C.F.R. § 1918.105(a), which requires that employees be protected by protective hats. 5/ When the compliance officer arrived at the site, he noticed three employees working without hardhats. The judge found a violation but concluded that it was not willful. The Secretary petitioned for review of the judge's finding that the violation was not willful. Chesapeake concedes that there was a violation but argues that it was not willful. We agree.

A

When work began on the morning of the inspection, one of Chesapeake's crews was seven employees short. At the gang leader's request, Chesapeake requested that seven more workers be sent from the union hiring hall. When these workers arrived, sometime between nine and ten o'clock that morning, none of them had a hardhat. The gang leader realized that the employees needed hardhats, so he went to the ship foreman, Dave Bogdan, to request hardhats.

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4/ The Secretary argues in his brief that if the cited standard does not apply, the pleadings should be amended under Rule 15(b) of the Federal Rules of Civil Procedure to allege a violation of § 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1). Because a majority of the Commission holds that the standard does apply, amendment to § 5(a)(1) is inappropriate. Brisk Waterproofing Co., 73 OSAHRC 30/E1, 1 BNA OSHC 1263, 1973-74 CCH OSHD ¶ 16,345 (No. 1046, 1973). Accordingly, we need not reach Chesapeake's argument that the amendment to § 5(a)(1) may not be granted because it was not raised before the judge. Cf. Commission Rule 92(d), 29 C.F.R. § 2200.92(d)(Commission review ordinarily limited to issues raised below).

5/ That standard provides:

> § 1918.105 Head protection.
>
> (a) Employees shall be protected by protective hats meeting the specifications contained in the American National Standard Safety Requirements for Industrial Head Protection, Z89.1 (1969).

Bogdan replied that he would get the hardhats but instructed the employees to work without them in the meantime. When the compliance officer arrived about 1:30 p.m., the employees still had not been given hardhats. The compliance officer asked Bogdan why he had not gotten hardhats for the employees, and Bogdan replied that he had not had time.

The compliance officer testified that he had been at the marine terminal the two days immediately before the inspection for another purpose and had not then inspected Chesapeake's workplace. On both days, however, he had noticed Chesapeake employees working without hardhats and had stopped at Chesapeake's offices each day to relate his observations. The compliance officer also testified that Chesapeake had received two prior citations for violating section 1918.105(a), both of which had become final orders.

The witnesses generally agreed that longshoremen resist wearing hardhats and that the requirement to do so is difficult to enforce. Chesapeake has numerous signs posted around its work areas reminding employees to wear hardhats, frequently reminds its supervisors to enforce Chesapeake's hardhat rule and has sent employees home for refusing to wear hardhats. Every Chesapeake supervisor is given a copy of the OSHA regulations and is told to enforce them.

Chesapeake presented evidence that Bogdan had recently been hired as a foreman through the union, which apparently selected Bogdan because he was the senior applicant for the position. Bogdan was still in his probationary period at the time of the inspection and was restricted to supervising the work on the dock because Chesapeake did not trust him on the ship. On board the loading was supervised by Bogdan's superior, the ship superintendent, who immediately ordered hardhats for the employees when he was informed of the situation.

A week or two before the inspection, Bogdan had attended a meeting of all supervisory personnel at which the hardhat rule and problems with its enforcement were discussed. During that meeting, the gang leader who would later ask Bogdan

to get hardhats for the employees inquired, "[I]f I send a man home for not wearing a hardhat, who would pay this man when he came back— . . . When the union delegate comes to me and says I've got to pay this man, who's going to back me up?" He was told that, "Yes, the company would back him to the fullest." At the end of his probationary period, Bogdan was fired, largely for, among other things, his poor safety record, including the incident in question here.

B

The judge found that Bogdan was "not a foreman in the ordinary sense of the word," but was a "trainee-foreman." He held that Bogdan's conduct could not be imputed to Chesapeake because Bogdan was not the supervisory employee in charge of the worksite. Judge Chalk found that the ship superintendent had no actual knowledge of the violation but that he had constructive knowledge because he could have observed the situation with the exercise of reasonable diligence. However, he determined that the ship superintendent's conduct was not willful in nature.

On review, the Secretary argues that Bogdan's actions should be imputed to Chesapeake because he was a supervisor. In order to defend on the ground that a supervisor's misconduct was unforeseeable, the Secretary asserts, the employer must prove that the supervisor was adequately trained and supervised on matters of safety. The Secretary argues that Chesapeake should be held responsible because its workrule was inadequately enforced, asserting that an employee caught without a hardhat would merely be told to wear the hardhat without being subject to any punishment. According to the Secretary, an employee would be disciplined only if he refused to obey such an instruction from a supervisor, and the Secretary further claims that no supervisor had ever been punished for failing to enforce the rule. Finally, the Secretary asserts that Bogdan's misconduct should be imputed because Chesapeake's hiring practices were inadequate, in that Bogdan was hired and placed in charge of 40 to 50 employees with no check

on his past work history. The Secretary does not dispute the judge's conclusion that the violation cannot be found willful based on the conduct of the ship superintendent.

Chesapeake argues that Bogdan's actions should not be imputed because he was not a true foreman and had limited responsibility in view of his probationary status. Chesapeake also contends that Bogdan's conduct in any event was unforeseeable behavior for which Chesapeake cannot be held responsible. Chesapeake maintains that longshoremen resist wearing hardhats, that the requirement is difficult to enforce, and that Chesapeake has made diligent efforts to obtain compliance with its rule requiring hardhats to be worn. 6/

C

For the reasons below, we affirm Judge Chalk's finding that the violation was not willful. We find that, even if Bogdan had been a supervisor and even if his conduct had been willful, Chesapeake did not commit a willful violation because it did everything it could to enforce its workrule requiring that hardhats be worn.

Conduct is considered willful if it was done with either intentional disregard or plain indifference to the requirements of the Act. Lukens Steel Co., 81 OSAHRC 96/A2, 10 BNA OSHC 1115, 1981 CCH OSHD ¶ 25,742 (No. 76-1053, 1981). The Commission has held that a supervisor's willful violation will be imputed to his employer unless the supervisor's behavior was contrary to a consistently and adequately enforced workrule. See Constructora Maza, Inc., 78 OSAHRC 6/E2, 6 BNA OSHC 1309, 1312, 1977-78 CCH OSHD ¶ 22,487, p. 27,115 (No. 13680, 1978).

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6/ Because we find that Chesapeake adequately enforced its rule requiring that hardhats be worn, it is unnecessary here for Chairman Rowland to examine whether Commission precedent is correct insofar as it requires employers to enforce as well as communicate work rules. For a discussion of whether an employer should be required to do anything more than instruct employees on safety procedures, see General Electric Co. v. OSHRC, 540 F.2d 67, 69 (2d Cir. 1976); Borton, Inc., 82 OSAHRC _____, 10 BNA OSHC 1462, 1982 CCH OSHD ¶ 25,983 (No. 77-2115, 1982)(dissenting opinion).

The record shows that Bogdan's behavior was untypical of Chesapeake's supervisory personnel. Chesapeake had a rule requiring the use of hardhats, communicated it by signs around the workplace, reminders in the pay envelopes and other means, and vigorously enforced it in the face of the employee opposition. The gang leader for example, respected the rule, for he attempted to obtain hardhats for the employees as soon as they reported to him. Bogdan was aware that the company expected its supervisors to enforce its hardhat rule and would stand behind them. His behavior on this occasion was not shown to be common among Chesapeake's supervisors. Bogdan was disciplined for this incident in that his dismissal was based partly on this misconduct. 7/ Although Chesapeake might have checked Bogdan's work record before placing him in charge of so many employees, this hardly shows, in view of the other evidence, that Chesapeake intentionally disregarded or was plainly indifferent to the requirements of the Act. Accordingly, the judge's vacation of the "willful" characterization of the violation is affirmed.

D

In his petition for discretionary review, the Secretary moved to amend the pleadings under Federal Rule 15(b) to allege that the violation was repeated if it is not found to be willful. The motion was renewed in his brief.

At the hearing the compliance officer testified that Chesapeake had received two prior citations at this terminal for noncompliance with section 1918.105(a). This testimony was presented to show that Chesapeake was aware of the requirements of the standard, which is relevant to the willful characterization. Chesapeake introduced copies of these two prior citations for the purpose of showing that

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7/ The Commission has considered evidence of discipline imposed after an inspection in determining whether an employer has effectively enforced its workrules. See R. Zoppo Co., 81 OSAHRC 18/A2, 9 BNA OSHC 1392, 1396 n.7, 1981 CCH OSHD ¶ 25,230, p. 31,184 n.7 (No. 14884, 1981); Asplundh Tree Expert Co., 78 OSAHRC 77/E12, 7 BNA OSHC 2074, 1980 CCH OSHD ¶ 24,147 (No. 16162, 1979).

hardhat violations have previously been cited as other than serious and that no penalty or a small penalty has been proposed for them in the past. No allegation was made before or during the hearing that the violation was repeated within the meaning of section 17(a), and there is no indication that the parties considered the evidence to relate to matters other than willfulness.

Under these circumstances, Chairman Rowland would deny the motion to amend. In his view, it is enough to note that the parties did not recognize at the hearing that they were trying the issue of whether the violation was repeated. See Crawford Construction Co., 82 OSAHRC 16/A2, 10 BNA OSHC 1522, 1527, 1982 CCH OSHD ¶ 25,984, p. 32,607 (No. 79-928, 1982)(dissenting opinion). As Chairman Rowland has stated:

> A litigant has the right to fair notice of the issues to be tried, so that he can adequately prepare and present his case. Pleadings may therefore be amended under Rule 15(b) only when the parties recognize that they are trying unpleaded issues. "[I]t cannot be fairly said that there is any implied consent to try an issue where the parties do not squarely recognize it as an issue in the trial." 3 Moore's Federal Practice ¶15.13[2] at 992 (2d ed. 1974), quoted in Usery v. Marquette Cement Manufacturing Co., 568 F.2d 902, 907 (2d Cir. 1977). See Vicon Corp., 81 OSAHRC 98/C4, 10 BNA 1153, 1158, 1981 CCH OSHD ¶25,749, p. 32,160 (No. 78-2923, 1981)(concurring opinion), appeal filed, No. 81-2359 (8th Cir. December 10, 1981).
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> * * *
>
> [I]n my view it is unrealistic and unfair to expect an employer to anticipate every unpleaded charge which the Secretary might subsequently attempt to inject into the case. It is equally unfair to require the employer to attempt to limit the purpose for which evidence is adduced in order to avoid the implication of consent to try issues raised after the close of the hearing.

Snyder Well Servicing, Inc., 82 OSAHRC 10/C5, 10 BNA OSHC 1371, 1380-81, 1982 CCH OSHD ¶ 25,943, pp. 32,515-16 (No. 77-1334, 1982)(dissenting in part).

Commissioner Cleary would also deny the motion to amend. He notes that to establish that a violation is repeated, the Secretary must show that the employer had previously been cited for substantially similar violation and that the earlier citation had become a final order before the violation in question

occurred. See Potlatch Corp., 79 OSAHRC 6/A2, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294, p. 28,171 (No. 16183, 1979). The Secretary can establish substantial similarity by showing that the prior and the current violation resulted from noncompliance with the same standard. Once this prima facie showing has been made, the burden of rebutting that showing shifts to the employer. See Chapman Construction Co., 80 OSAHRC 122/D9, 9 BNA OSHC 1175, 1177, 1981 CCH OSHD ¶ 25,024, p. 30,928 (No 76-2677, 1980).

Pleadings are to be amended under Rule 15(b) if an unpleaded issue has been tried with either the express or the implied consent of the parties. The Commission has held that consent will be implied where the party opposing the amendment will not be prejudiced by the amendment and has either introduced evidence relevant to the unpleaded issue or failed to object to such evidence. If the amendment would not be prejudicial, it makes no difference that the evidence is relevant both to the unpleaded issue and to a pleaded issue. See Crawford Construction Co., 10 BNA OSHC at 1525, 1982 CCH OSHD at pp. 32,605-06 (lead opinion).

Although the two prior citations and the present citation all allege a violation of the same standard, Commissioner Cleary cannot say that the parties focused on substantial similiarity. The two prior citations indicate that the conditions cited took place in the holds of ships, while the violation here occurred on the pier. The record does not disclose what the cargo was at the time of the prior violations or whether the cargo was being loaded or unloaded. Except that one of the prior citations alleged that employees were exposed to "falling debris," there is no evidence as to what hazards of head injury Chesapeake's employees were exposed to. Given the sparseness of the record on the issue of substantial similarity, the parties' failure to focus on the issue, and the prospect that additional evidence might have been presented if the repeated allegation had been pleaded, Commissioner Cleary cannot say that Chesapeake would not be prejudiced. Cf. Mississippi Power & Light Co., 79 OSAHRC 109/D12,

7 BNA OSHC 2036, 2040-41, 1980 CCH OSHD ¶ 24,146, pp. 29,341-42 (No. 76-2044, 1979)(parties did not recognize issue during hearing and did not present evidence; prejudice found).

Finally, under the circumstances here, Commissioner Cleary would not remand this case to cure any possible prejudice. He notes that only the characterization of the violation and the amount of the penalty would be affected. Because of the policy favoring finality in adjudication he would decline to remand. See Daniel Construction Co., 81 OSAHRC 71/A2, 9 BNA OSHC 2002, 2007, 1981 CCH OSHD ¶ 25,553, p. 31,864 (No. 13874, 1981), quoting Texaco, Inc., 80 OSAHRC 68/A2, 8 BNA OSHC 1677, 1679, 1980 CCH OSHD ¶ 24,574, p. 30,146 (No. 77-2014, 1980). He would therefore deny the motion to amend.

Accordingly, the Secretary's motion to amend the pleadings to allege a repeated violation is denied.

III

Judge Chalk considered the factors mandated by section 17(j) of the Act, 29 U.S.C. § 666(i), and found that a penalty of $50 was appropriate for the hardhat violation. Neither party has disputed that $50 is an appropriate penalty if the violation is not found to be willful, and the assessment appears to be appropriate.

Accordingly, item 1 of the citation, is vacated. Item 2 is affirmed as an other than serious violation; a penalty of $50 is assessed.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: JUN 30 1982

ROWLAND, Chairman, concurring in part and dissenting in part:

I agree with the finding in Part II C of the lead opinion that Chesapeake did not willfully violate the hardhat standard and with the denial in Part II D of the Secretary's motion to amend the pleadings to allege that the hardhat violation was repeated. I also join with Commissioner Cleary in vacating the citation alleging a violation of section 1918.32(b), but I do so for a different reason. I agree with Judge Chalk that section 1918.32(b) does not apply to cargo carried on deck, and I further agree with the judge that the issue of applicability may be decided without regard to the letter of Mr. March. Therefore, I do not join in Part I B of the lead opinion regarding the admissibility and evidentiary value of the letter.

Although the term "stowed cargo" is not defined in Part 1918, section 1918.32 and other provisions of Part 1918 plainly indicate that "stowed cargo" does not refer to deck loads. First, the sense of section 1918.32 itself is that stowed cargo is cargo carried below deck. Section 1918.32 addresses two matters: stowed cargo (in paragraphs (b) and (c)) and temporary landing platforms (in paragraph (a)). Inasmuch as paragraph (c) deals only with fall protection with respect to cargo carried below deck, I agree with Judge Chalk that when paragraphs (b) and (c) are read together, the inference is raised that the stowed cargo provisions refer to cargo carried below deck.

Second, it is evident from reading the maritime standards together that they use maritime terminology and words in their maritime senses. This is understandable, for the standards were written for maritime employers to comprehend and follow. I therefore find it significant that the only definition of "stow" referring specifically to cargo in R. Kerchove, International Maritime Dictionary 795 (2d ed. 1961), is "to arrange compactly the goods or cargo in a ship's hold, and 'tween decks." The other definitions ("to furl or roll up as a

sail, an awning, and so forth" and "to put anything away for sea[; t]o put gear in its proper place") are more general, do not deal with cargo, and are therefore less pertinent. I also note that in L. Probst & K. DeGross, Transportation Dictionary 106 (1979), "stowage" is defined as "a marine term referring to the loading of freight into a vessel's hold." Indeed, the majority's broader definition in Seattle Crescent makes the word "stowed" superfluous, for all cargo is somehow put away on a ship and transported.

Third, Judge Chalk pointed out here what the Commission overlooked in Seattle Crescent: There is a standard in Part 1918 specifically dealing with the hazard of falling from deck loads--section 1918.33, which is entitled "Deck loads." That section 1918.33 deals specifically with falling from deck loads signifies that section 1918.32 does not, since the use of different terminology in the standards is evidence that the Secretary made an intentional distinction. See Lankford v. LEAA, 620 F.2d 35 (4th Cir. 1980); United States v. Wong Kim Bo, 472 F.2d 720 (5th Cir. 1972). The majority's interpretation makes section 1918.33 superfluous and gives unintended breadth to section 1918.32.

The majority's reasons for dismissing the importance of section 1918.33 are specious. That section 1918.33 does not require fall protection in the particular circumstances of this case is beside the point. What is critical here is that section 1918.33 addresses the subject of falling from deck loads; whether it is sufficiently stringent to cover this case is not an appropriate inquiry. John T. Brady & Co., 82 OSAHRC 9/D10, 10 BNA OSHC 1385, 1386-7 n.7, 1982 CCH OSHD ¶ 25,941, p. 32,503 n.7 (No. 76-2894, 1982)(view of Chairman Rowland). See also Daniel Construction Co., 82 OSAHRC 23/A2, 10 BNA OSHC 1549, 1555, 1982 CCH OSHD ¶ 26,027, p. 32,675 (No. 16265, 1982). Section 1918.33 represents the considered judgment of the Secretary, arrived at after receiving the views of safety experts and affected persons, that protection from the hazard of falling

from deck loads is warranted in some circumstances and unwarranted in others. See Daniel International, Inc., 82 OSAHRC 23/D3, 10 BNA OSHC 1556, 1558-59, 1982 CCH OSHD ¶ 26,033, p. 32,683 (No. 78-4279, 1982); A. Prokosch & Sons Sheet Metal, Inc., 80 OSAHRC 96/A2, 8 BNA OSHC 2077, 2082, 1980 CCH OSHD ¶ 24,840, pp. 30,629-30 (No. 76-406, 1980). To stretch section 1918.32 to cover gaps deliberately left by the Secretary is to negate that judgment. It is for the Secretary, not the Commission, to determine whether and how the gaps ought to be filled. Improvements to employee safety and health should not be accomplished by a strained interpretation of a standard. See Berglund-Cherne General Contractors, 82 OSAHRC 25/D9, 10 BNA OSHC 1644, 1646, 1982 CCH OSHD ¶26,039, p. 32,696 (No. 79-4374, 1982).

It was stated in Seattle Crescent that the emergence of containerized cargo has caused major adjustments in cargo transportation and longshoring operations since this standard was originally adopted under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901-950. If this is so, the standard may need revision. But it is not the role of the Commission to modernize the Secretary's standards. "The responsibility to promulgate clear and unambiguous standards is upon the Secretary." Bethlehem Steel Corp. v. OSHRC, 573 F.2d 157, 161 (3d Cir. 1978). I would therefore overrule Seattle Crescent and vacate this item of the citation.

COTTINE, Commissioner, dissenting in part:

I would affirm a violation of §1918.32(b) in this case and would find that Chesapeake's hardhat violation was willful.

I

The admission of Mr. March's letter in evidence does not warrant a different result in this case than in Seattle Crescent Container Service, 79 OSAHRC 91/A2, 7 BNA OSHC 1895, 1979 CCH OSHD ¶24,002 (No. 15242, 1979), where the Commission unanimously affirmed a violation. Administrative agencies are not estopped from protecting the public interest because of the past mistakes of their agents. University of Pittsburgh, 80 OSAHRC 12/C11, 7 BNA OSHC 2211, 2218 n. 32, 1980 CCH OSHD ¶24,240, p. 29,502 n. 32 (No. 77-1290, 1980); Udall v. Oelschlaeger, 389 F.2d 974 (D.C. Cir.), cert. denied, 392 U.S. 909 (1968); Spencer v. Railroad Retirement Bd., 166 F.2d 342 (3d Cir. 1948); N.L.R.B. v. Baltimore Transit Co., 140 F.2d 51 (4th Cir.), cert. denied, 321 U.S. 795 (1944). Thus, the Secretary is not estopped from enforcing an otherwise valid standard according to its terms because of a mistaken interpretation issued by one of his agents. Of course, a party who has actually relied in good faith on a mistaken interpretation should not be penalized, though compliance with the law must be required. See General Electric Co., 81 OSAHRC 42/A2, 9 BNA OSHC 1722, 1729, 1981 CCH OSHD ¶25,345, p. 31,455 (No. 13732, 1981) (Cottine, Commissioner, concurring in part and dissenting in part)(monetary penalties are inappropriate where the employer lacks knowledge of a violation, though an abatement order may be entered.) However, there is no evidence that Chesapeake knew about Mr. March's letter or the opinions expressed in it until after the hearing when Chesapeake submitted the

letter to the judge. Thus, there is no evidence that Chesapeake actually relied on Mr. March's letter in any way at the time of the alleged violation. As a result, Mr. March's letter does not affect this case.

There is no other due process bar to our applying the cited standard here as we did in Seattle Crescent. The standard is reasonably clear in its application to cargo stored on deck when read in light of the remedial purposes of the Act. The only maritime dictionary definitions of the word "stow" that have been urged in opposition to this view actually are consistent with it. See Seattle Crescent, supra.[1/] Thus, standing alone, §1918.32(b) gives a constitutionally adequate warning of its requirements.

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1/ Chairman Rowland's reliance on maritime dictionaries to support his concurrence in this case is mistaken, just as was the employer's reliance on them in Seattle Crescent. The Chairman quotes from R. de Kerchove, International Maritime Dictionary 795 (2d ed. 1961), but one of the three definitions of "stow" there is "to put anything away for sea." This definition is consistent with applying the term to deck cargo, as we stated in Seattle Crescent. The term "stowage" is a different term whose connotations do not control the meaning of the word "stow." Thus, the definition of "stowage" in L. Probst & K. De Gross, Transportation Dictionary 106 (1979), quoted by Chairman Rowland, does not necessarily limit the meaning of "stow." Also, that definition contrasts with the definition of "stowage" in the International Maritime Dictionary:

> Stowage is that important branch of the art of seamanship which applies to the loading of a vessel and has for its aims the handling, placing and packing of goods, in such a manner as to ensure the preservation of crew and ship from danger and injury arising from the manner in which the cargo is stowed . . . .

Id. at 796. Nothing in that definition limits "stowage" to cargo below deck. It is erroneous to adopt a restrictive interpretation of the term "stow" where another reasonable interpretation is more consistent with the remedial purposes of the Act. See Seattle Crescent, supra.

Nor do any other factors preclude applying the standard to Chesapeake. The only factor cited by Commissioner Cleary is that "Mr. March's letter gives credence to Chesapeake's argument that the maritime industry was not aware that section 1918.32(b) applied to cargo stowed on deck when the violation occurred." Slip op., Part IC. However, Commissioner Cleary has not cited, and we have not found, any reference to this argument on review or before the judge. Furthermore, any argument that Chesapeake, or a reasonable person similarly situated, lacked fair notice of the standard's applicability to deck cargo is undermined by the fact that Chesapeake never raised that issue until after the hearing in this case when it submitted Mr. March's letter to the judge. Chesapeake's failure to raise the issue before becoming aware of the letter tends to indicate that the standard provided adequate notice of its requirements to Chesapeake. I would affirm the citation.

II

I would also conclude that the hardhat violation was willful. Bogdan, the ship foreman, had been placed in charge of 40 or more employees. He ordered some of the employees to work without head protection, knowing it to be a violation of the standard. This constitutes willful misconduct by a supervisor, and it is imputable to Chesapeake in this case.

A.

It is clear that Bogdan was a supervisor. The fact that he was still in his probationary period and had limited responsibilities does not outweigh the fact that Chesapeake placed him in charge of 40 to 50 employees. Although Bogdan was not the supervisor in charge of the entire worksite, he was nevertheless the sort of managerial employee whose acts and knowledge may be imputed to his employer. See Safeway

Stores, Inc., 77 OSAHRC 209/A13, 6 BNA OSHC 1176, 1977-78 CCH OSHD ¶22,400 (No. 14173, 1977)(produce manager was a supervisory employee); Georgia Electric Co., 77 OSAHRC 30/A2, 5 BNA OSHC 1112, 1977-78 CCH OSHD ¶21,613 (No. 9339, 1977)(assistant project manager and job superintendent both warned foreman of danger but foreman's willful disregard imputed to employer), aff'd, 595 F.2d 309 (5th Cir. 1979).

Chesapeake's reliance on the limited nature of the ship foreman's responsibilities is similar to that of the employer in Iowa Southern Utilities Co., 77 OSAHRC 32/C10, 5 BNA OSHC 1138, 1977-78 CCH OSHD ¶21,612 (No. 9295, 1977). There, the Commission held that a "temporary working foreman" who had some degree of authority over the other crew members, including the power to order those steps necessary to complete the job properly, was a supervisor. The Commission stated, "It is the substance of the delegation of authority over other employees that is of primary importance, and not the title of the employee to whom the authority is given." 5 BNA OSHC at 1139, 1977-78 CCH OSHD at p. 25,945. The ship foreman alone was entrusted with the responsibility for the loading operation being performed on the pier and is therefore a supervisor.

The ship foreman's conduct was willful. Under Commission precedent willfulness is established by conscious, intentional conduct that shows disregard for or plain indifference to the requirements of the Act. Kus-Tum Builders, Inc., 81 OSAHRC 97/B2, 10 BNA OSHC 1128, 1981 CCH OSHD ¶25,738 (No. 76-2644, 1981). Chesapeake knew of the standard's requirements because it previously had been cited under it and had been warned about noncompliance on other occasions. Chesapeake gave all of its supervisors, including the ship foreman, copies of the standards and communicated

the hardhat requirement in meetings, on signs throughout the workplace and in other ways. Also, it is clear that Bogdan knew that the law requires hardhats to be worn when he ordered the employees to begin working without them after the gang leader had requested additional hardhats. The record is replete with references to the opposition among longshoremen to wearing hardhats and to the controversy in the longshoring industry engendered by OSHA's enforcement of the hardhat requirement. As the senior applicant for the foreman's job, Bogdan was an experienced longshoreman familiar with the hardhat requirement.

B.

The willful misconduct of a supervisor is imputed to his employer unless the employer shows that the misconduct was contrary to a consistently and adequately enforced workrule. Constructora Maza, Inc., 78 OSAHRC 6/E2, 6 BNA OSHC 1309, 1977-78 CCH OSHD ¶22,487 (No. 13680, 1978). The majority erroneously focuses on whether Chesapeake, taken as a corporate entity, engaged in willful misconduct. It implicitly requires the Secretary to show that Bogdan's misconduct was a common occurrence among Chesapeake's supervisors. Inasmuch as Bogdan was a supervisor, the question is whether Bogdan's misconduct was willful and, if so, whether Chesapeake has shown that his misconduct should not be imputed to it.

Chesapeake has established that it had a workrule requiring that hardhats be worn and that it had adequately communicated the rule by a number of methods. However, the record indicates that the rule was not effectively enforced. Longshoremen regularly failed to wear hardhats. Nevertheless, the evidence indicates that Chesapeake did not discipline the longshoremen unless they were specifically ordered to wear hardhats and refused. This indicates inadequate enforcement as does the conduct

of the ship foreman. When Bogdan was informed by the gang leader that employees did not have hardhats, he issued instructions for the employees to begin work anyway. The majority nevertheless finds that Chesapeake's hardhat requirement was "vigorously enforced . . . in the face of employee opposition," citing the gang leader's conduct as demonstrating that Chesapeake's workrule was effectively communicated and enforced. It is much more significant, however, that the gang leader's superior felt free to instruct the employees to go ahead and violate the Act. "That a foreman feels free to breach a company safety policy is strong evidence that implementation of the safety policy is lax." Bill C. Carroll Co., 79 OSAHRC 87/C13, 7 BNA OSHC 1806, 1811, 1979 CCH OSHD ¶23,940, p. 29,033 (No. 76-2748, 1979). The fact that an employee in a position of responsibility thought that deviation from a safety workrule was acceptable conduct is persuasive evidence that a requirement to comply with the rule was not effectively enforced by the employer. See Western Massachusetts Electric Co., 81 OSAHRC 63/B13, 9 BNA OSHC 1940, 1945, 1981 CCH OSHD ¶25,470 at p. 31,766 (No. 76-1174, 1981).

Chesapeake argues that the ship foreman's lax behavior was not characteristic of its other supervisors' conduct. However, Chesapeake hired Bogdan for the job without any substantial check of his credentials. When Chesapeake finally inquired into his background, it received unfavorable reports. Chesapeake has not shown effective enforcement of safety rules where the record shows it hired a supervisor (even on a probationary basis) without determining his ability to perform the duties of his job, which include the enforcement of workrules designed to promote employee

safety.[2/] See National Realty & Construction Co. v. OSAHRC, 489 F.2d 1257, 1266-67 n. 37 (D.C. Cir. 1973). In view of this evidence, I cannot agree with the majority's finding that the rule was consistently and adequately enforced. Accordingly, because Chesapeake has not proven that the ship foreman's willful misconduct was unpreventable, that conduct is properly imputed to Chesapeake and the violation should be affirmed as willful.

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2/ Chesapeake argues that because Bogdan was referred by the union, Chesapeake should therefore not be responsible for Bogdan's misconduct. In its reply brief on review, Chesapeake asserts that under its contract with the union involved, its foremen are selected by the union. The record does not reveal whether Chesapeake is contractually required to employ any individual selected by the union. However, even if the contract so provided, Chesapeake could not be permitted to contract away its legal obligations under the Act. Central of Ga. R.R. v. OSAHRC, 576 F.2d 620, 624 (5th Cir. 1978). An employer has responsibility for providing a safe and healthful workplace and delegation of that responsibility to employees is inconsistent with the purposes and policies of the Act. PBR, Inc., v. Sec'y of Labor, 643 F.2d 890, 895 (1st Cir. 1981); Empire Detroit Steel Division v. OSHRC, 579 F.2d 378, 385 (6th Cir. 1978); Atlantic & Gulf Stevedores, Inc. v. OSHRC, 534 F.2d 541, 553-54 (3rd Cir. 1976). Chesapeake was responsible for the adequacy of the ship foreman's safety training and for his conduct on the job.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR | : | |
| Complainant | : | |
| v. | : | DOCKET NUMBER 78-1353 |
| CHESAPEAKE OPERATING COMPANY | : | |
| Respondent | : | |

APPEARANCES

Agnes Johnson-Wilson, Esq.
For Complainant

William R. Dorsey, III, Esq.
James W. Bartlett, III, Esq.
For Respondent

DECISION AND ORDER

Chalk, Judge

The inspection of Respondent's Pier 4, Locust Point Marine Terminal worksite in Baltimore, Maryland, conducted after 1:00 p.m. on March 9, 1978, was occasioned by a telephone complaint of an employee earlier that day to the area director's office that some of Respondent's employees were in danger of falling and injuring themselves because they were working without the benefit of fall protection on ice and snow covered roofs of modular homes stowed on the deck of a ship. A two item willful citation was thereafter issued alleging violations of 29 U.S.C. 654(a)(2), as follows:

> "29 CFR 1918.32(b): The edge of a hatch section or of stored cargo, more than 8 feet high, presented the danger of employee(s) falling and was not guarded by a safety net of adequate strength to prevent injury to a falling employee or other means providing equal protection:

"M/V "Fort Calgary," Pier 4, Locust Point - Men were working on top of cargo (modular homes) that was covered with ice and snow above hatches 2, 3, 4, and 5."[1]

and

"29 CFR 1918.105(a): Employee(s) were not protected by protective hat(s) meeting the specification(s) contained in the American National Standards Safety requirements for Industrial Head Protection 289.1 (1969):

"M/V "Fort Calgary," Pier 4, Locust Point - Three (3) men, working on the pier adjacent to hatch #4 of the vessel attaching gear straps to modular home drafts, were not wearing hard hats."[2]

Penalties of $10,000 each were proposed for these charges, and immediate abatement was ordered.

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1/ This standard provides:

"When an edge of a hatch section or of stowed cargo more than 8 feet high is so exposed that it presents a danger of an employee falling, the edge shall be guarded by a safety net of adequate strength to prevent injury to a falling employee, or by other means providing equal protection under the existing circumstances."

2/ This standard provides:

"Employees shall be protected by protective hats meeting the specifications contained in the American National Standard Safety Requirements for Industrial Head Protection, Z89.1 (1969)."

I

One issue initially raised in these proceedings in Respondent's notice of contest relates to "the procedures of the inspection." This issue was expanded upon in Respondent's answer to the complaint to include the compliance officer's failure to present his credentials, to conduct opening and closing conferences, to afford walkaround rights, and to furnish Respondent with a copy of the employee complaint. Later, in a motion to suppress the evidence, Respondent argued that the inspection was conducted without Respondent's consent and without a search warrant prescribed by the United States Supreme Court in Ray Marshall, Secretary of Labor, et al. v. Barlow's, Inc., 98 S.Ct. 1816 (1978).

In connection with this motion, Respondent requested a separate hearing; but I denied the request. Instead, I directed that evidence on the motion as well as on the merits be taken at the same hearing, assuring Respondent at the same time that its objection would be preserved and not waived by its participation in such procedure.

Another issue raised before and during the hearing goes to the merits of the case, as the parties were diametrically opposed as to whether the willful aspects of Complainant's charges were sustained by the evidence.

A final issue was raised by Respondent for the first time in its brief filed subsequent to the hearing. Relying upon the Judge's decision in Secretary v. Seattle Crescent Container Service, Docket Number 15242, May 16, 1977, Respondent asserts that the first charge must be vacated because the standard cited relates solely to cargo stowed in holds of ships, whereas the instant charge relates to cargo stowed on deck.

II

The modular homes in question are clearly depicted in four photographs taken by Compliance Officer Ellis from the pier after he arrived there to investigate the complaint (Exhs. C-1 to C-4). All four show some of these homes stowed lengthwise and in rows, one behind the other, on the deck adjacent to the pier below, with the downward slopes of the roofs all pointing to the edge of the deck. Three of the photographs each additionally show an employee on the roof of one of the homes in the first row adjacent

to the deck's edge (Exhs. C-1 to C-3). This first row appears to be stowed at the edge or very close to the edge of the deck. Additionally, two photographs collectively show three employees of the pier gang who were not wearing protective hard hats (Exhs. C-4, C-5).

Ellis arrived at the Locust Point Terminal about 1:15 p.m. to investigate the complaint received during the noon hour by his office. As the terminal was owned by the Maryland Port Authority, he gained admittance by reporting to the Port Authority's gate guard, showing this individual his credentials and explaining his mission. The guard offered to notify a Port Authority representative of the complaint and inspection, and such a representative later joined Ellis at the ship's berth.

The Port Authority rented space to the various stevedoring companies, including Respondent, that serviced the owners. Specifically, Respondent rented Pier 3, where it also had a warehouse facility housing its office. The "Pier 4 - Pier 5 complex" was rented by "Baltimore Stevedore" (Tr. 239). However, the head berth at the west side of Pier 4 "was a public berth and any stevedore [could] work there" (Tr. 240). The ship involved in the charges was located at this public berth at Pier 4.

Ellis testified that he saw both the employee slipping and sliding on ice and snow on the roof of a home stowed on deck and the three employees working on the pier without hard hats as he alighted from his car that he parked at the pier. There was no fall protection device in use to prevent the employee on the roof from sliding off and falling about 40 feet to the concrete pier below which, in Ellis' opinion, would have resulted in serious injury or death. The employees without hard hats were working around and even under the homes on the pier and the gear of the crane used to load the homes under such circumstances that they could have sustained head injuries.

According to Ellis, after determining that the ship foreman was one David Bogdon whom he knew from past employment, he approached Bogdon on the pier, showed him his credentials, pointed to the employee on the roof who was still slipping and sliding, and told Bogdon of the complaint that had been received. He asked Bogdon to stop the employee from doing what he

was doing and to order him off the roof. When Bogdon told him he did not have the authority to stop the work, he asked Bogdon to send word to the assistant general superintendent, a Mr. Amann, to come to the pier.

While awaiting the arrival of Amann, Ellis determined that the employees on the pier had been working without hard hats since early that day when Bogdon told them to start work and promised to furnish hats later, a promise that he had not kept. Later, Bogdon admitted these facts and told Ellis that he had been "busy and just didn't have time" (Tr. 21). When Ellis thereafter encountered Mr. Amato, the ship superintendent, who was serving in the capacity of ship foreman that day, and informed him of the hard hat problem, Amato immediately took action that resulted in the employees being promptly furnished hard hats.

Respondent's assistant vice president in charge of terminal and stevedoring operations, Mr. Hodski, Amann's superior, responded to Ellis' request that Amann come to the pier. According to Ellis, he showed Hodski his credentials, told him of the complaint, pointed out the ongoing operation on the roofs and asked him to remove the man from the roof. The reply, continued Ellis, was that there was no other way to clear the ice and snow from the roof. Ellis admitted that he did not suggest any alternate method of neutralizing the hazard that would permit the work to continue. He denied that he shouted or spoke in loud tones with Hodski during this encounter. On the contrary, he inferred that Hodski's tone "changed" and that he (Ellis) remained "firm but calm" (Tr. 84). At this point, Ellis expressed the desire to call his office, so he, Hodski, and the Port Authority representative proceeded to a nearby office.

Ellis spoke to Mr. Hill, the acting area director, over the telephone and told him that the complaint was a valid one. Then, at Hodski's request, he turned the telephone over to Hodski who immediately complained to Hill of Ellis' "attitude", stating that Ellis was "arrogant" (Tr. 85, 86). Ellis inferred from the conversation that followed between Hill and Hodski that Hill suggested the use of safety lines held by others on the deck. In any event, this method of abatement that would allow the work to proceed was agreed upon by Hill and Hodski; and Hill then directed Ellis to return to the ship to

see that the plan was carried out. There was no evidence of any further exposure of employees to the roof hazard after Hodski returned to the ship and his orders respecting the use of the safety lines were implemented.

Ellis testified that he recommended that the roof charge be alleged as willful because both Bogdon and Hodski refused "to abate or correct" the situation (Tr. 42). Several factors caused him to make a similar recommendation as to the hat charge. First when he was at the terminal on March 7, 1978 and again on March 8, 1978, on a matter not involving Respondent, he observed several of Respondent's employees working in the warehouse loading or unloading a truck and moving material around who were not wearing their hard hats (Tr. 46). He admitted, however, that these employees were "really" not exposed to any danger (Tr. 46, 47). He also admitted that stevedore employers had difficulty enforcing the hard hat rule, as employees did not like to wear the hats and they frequently removed them as soon as their supervisors were out of sight. In any event, on both occasions, he went to Respondent's office and gave Amann, on the first occasion, and Amann and Hodski, on the second occasion, a "friendly warning," and told them that no citation would be issued (Tr. 45). On the second occasion when Hodski was present, he refused to give Hodski the names of the employees so that he could fire them. He told Hodski that he did not "want to get anybody in trouble" (Tr. 67). Finally, he also considered the fact that Respondent had been cited twice before, in 1973 and 1975, for hard hat violations that had become final orders.

Ellis recommended a $10,000 proposed penalty for the roof charge and a $9,000 proposed penalty for the hard hat charge. However, according to Mr. Hill, the acting area director at the time, the hard hat proposal was increased to $10,000 because all willful charges emanating from his office had to propose such maximum penalty. He further explained:

> "These are orders that we have laid down for us first by the Area Director and then further on up. That part of it is out of my hands from that point. I just have to go by the rules and regulations that are laid down for me. . ." (Tr. 162).

Corroborating Ellis' testimony, Respondent adduced evidence that many employees did not like to wear hard hats and that they resisted wearing them. It also adduced extensive evidence that it strictly enforced its hard hat rule by sending employees home if they refused to wear hard hats, that signs reminding employees of the rule were posted in various places, that meetings attended by gang carriers, foremen, superintendents and higher officials, during which all supervisors were reminded of their duty to enforce the rule, were held every 4 to 6 weeks, and that some of the employees had in the past violently resisted the efforts of supervisors to get them to put on their hats (Exhs. R-9a thru 9f). In two safety meetings which the area director attended, one during August 1977, the other during January 1978, that official threatened willful charges and proposed penalties from $1,000 to $10,000, although he acknowledged the difficulty in enforcing the rule.

Amann and Amato both testified that the night before the inspection, they agreed on the use of lines tied to employees on the roofs and held by employees on the deck, when they started placing the homes on the deck the following morning. Amato also testified that he procured such lines that night, placed them in the sand box on the pier, and told both gang carriers that they were there and were to be used when needed. It was one of these gang carriers who phoned the complaint to the area director's office and it was unexplained as to why he did not use the lines or whether he know about them at the time. Finally, Amato testified that Ellis said nothing to him about the roof situation when he and Ellis met in the pier and Ellis showed him the men not wearing hard hats. Regarding the work on the roofs, he did not realize that the ropes were not in use as fall protection, as he told the gang carriers the night before to use them when it became necessary.

Amann testified that during the noon hour on the day of the inspection, he received a telephone call from someone who identified himself as Ellis who told him of the complaint.[3/] When he told this individual that they

3/ Ellis denied making the call.

were going to use sand on the roofs, the individual replied that such a measure should make the work safe but that he was coming to the pier to follow through on the complaint. Amann had talked to Ellis face to face on prior occasions and the individual sounded like Ellis. Amann also admitted that Bogdon should have furnished hard hats to the employees who did not have them and that Bogdon should have contacted Amato, who was on board the ship, when Ellis asked him to remove the employee from the roof.

It appears from the testimony of Amann and Hodski that Respondent's foremen are members of the union and that vacancies are filled from that source only, that Bogdon was a relatively new employee who was the senior member of the union who applied for the vacancy, that Respondent really had no background information on Bogdon when he was hired on a 90-day trial basis for the vacancy, and that he was subsequently discharged at the end of his probationary period when his conduct and efficiency deteriorated, apparently from the use of drugs. Amato had placed Bogdon on the pier to oversee the movement of the homes to the pier for loading on board the ship because he was "a new man and we couldn't trust him on the ship" (Tr. 270). According to Amato, Bogdon did not have the authority "to knock off the ship" (Tr. 270).

Hodski testified that when he entered his office on March 8, 1978, Ellis was there informing Amann of the men in the shed without hard hats. Hodski thought that Ellis' attitude on that occasion was improper, as he was sitting in a chair in "a slouched position" and greeted him (Hodski) rudely when he entered by asking "Who are you?" (Tr. 258). When he asked Ellis for the names of the two employees in the shed so that he could fire them "right now," Ellis' reply was that he was "not a bad guy" and that he "was not going to tell (Hodski) who the people were" (Tr. 259).

Concerning the day of the inspection, Hodski testified that when Bogdon came in the office and told Amann that Ellis wanted to see him at the pier "right now," Bogdon indicated that Ellis practically shouted those words. As Amann was busy at the time, Hodski went instead. As he approached Ellis, Ellis loudly proclaimed that he was "going to knock the ship off" (Tr. 243). At this point, Hodski, according to his testimony, had

said nothing and did not know what the problem was. The conversation between them grew into a shouting match.[4/] When Hodski became aware of the problem, he asked both Ellis and the Port Authority representative if they could suggest some means of protecting the employees short of stopping the work. When he received no reply, he suggested the use of lines, as discussed by the other witnesses. Ellis did not respond, but the Port Authority representative stated "Well, you are the expert" (Tr. 246).

Hodski's version of the telephone call did not differ materially from that of Ellis, except that Hodski testified that he, not Hill, suggested the use of the safety lines and that Hill agreed with the plan. He then returned to the ship and explained wha he desired to Amato. Up until this time, he was unaware of the prior plan of Amann and Amato to use safety lines.

III

Respondent's objections to the inspection in this case fall into two broad categories - failure to obtain either consent to search or a search warrant pursuant to Barlow's, supra, and failure to comply with the inspection procedures of 29 U.S.C. 657. The weight of authority does not support either objection.

Ellis gained access to the terminal premises by obtaining the permission of the gate guard, a representative of the owner, after explaining his mission and showing his credentials to him. In light of the rule that consent to search may be obtained from anyone who exercises control over the premises and is capable of giving consent, and that evidence obtained during the search that follows may be used against another, (United States v. Matlock, 415 U.S. 164, 94 S. Ct. 988 (1974)), Respondent lacks standing to complain on this ground.

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4/ Amato observed the two on the pier from his position on the ship. While he could not hear what was said, he testified: "All I seen was hands going in the air and Joe pointing this way - - - Blah, blah, blah; I don't know what they were talking about" (Tr.279).

This was the same objection faced by the 8th Circuit in Marshall v. Western Waterproofing Company, Incorporated, 560 F.2d 947 (1977), wherein the Court stated:

> "We agree with the Commission that '[t]he compliance officers obtained permission to go onto the roof, the 5th floor mezzanine, and the attorney's office from persons who controlled those areas and were capable of giving such consent.' Accordingly, Western lacks standing to raise Fourth Amendment claims since valid consent to entry upon the relevant areas had been given by others who were in control."

As Ellis was lawfully on the premises and both of the conditions that served as the basis for the charges he recommended were in his full view as he alighted from his parked car, before he had the opportunity to encounter any of Respondent's representatives, the second prong of Respondent's objection is equally without merit (see generally Secretary v. Environmental Utilities Corp., 77 OSAHRC 40/A2). In any event, assuming that Ellis' actions constituted noncompliance with the inspection requirements of the Act, the citations in this case will not be vacated in the absence of prejudice to Respondent (Accu-Namics, Inc., v. Occupational Safety and Health Rev. Comm., 515 F.2d 828 (5th Cir., 1975); Marshall v. Western Waterproofing Co., Inc., supra). I am satisfied that no such prejudice has been demonstrated.

Lastly, Respondent argues for reversal because it was not furnished a copy of the employee complaint during the inspection. 29 U.S.C. 657(f)(1) does indeed provide for such a copy to be given the employer no later than at the time of the inspection. The statute also provides for eliminating from the employer's copy the name of the complaining employee, if the employee so requests.

In my judgement, however, these provisions of the statute are not addressed to the type of situation involved in this case where the area director responds to a telephone call reporting a condition that has every earmark of being an imminent danger situation that the area director would be remiss in not investigating forthwith. At most, the area director could not have had anything more than his own memorandum of the substance of the telephone call, the gist of which Ellis verbally made known to

Respondent's representatives at the time of the inspection. To argue that more was required by the statute in order to affirm the charges is to elevate form over substance to reach a result I am sure the Congress never intended. This I am not prepared to do; hence, the argument is rejected.

IV

Respondent's post hearing argument that the standard (29 C.F.R. 1918.32(b)) involved in item 1 of the citation is inapplicable to deck stowed cargo presents an important issue that was addressed by the late Judge Garl Watkins in Seattle Crescent, supra, a decision that was called for review by the Commission where it is still pending. Judge Watkins held for the employer in that case.[5/] In connection with its argument, Respondent has also filed a motion "FOR SUPPLEMENTATION OF THE RECORD" for the purpose of introducing in evidence a copy of a letter dated July 11, 1977 from an official of the Occupational Safety and Health Administration to a private organization which purports to espouse that Administration's view that this same standard historically has been deemed applicable only to cargo stowed in holds of ships, rather than on their decks.

Complainant has not responded in any way to the argument of Respondent nor to its motion (29 C.F.R. 2200.37). While Complainant's inaction tends to reflect a lack of interest in expressing a view on the legal question raised, I do not consider that it confers authority in me to grant Respondent's motion without reopening the record, and indeed reconvening the hearing to allow Complainant the opportunity to object of rebut the proffered evidence (see Secretary of Labor v. Occupational Safety and Health Review Commission et al, 492 F.2d 1027 (2d Cir., 1974)), a course of action that would only delay a prompt disposition of the case, one that I choose not to follow. Rather, I find that the legal question is readily resoluble on the present record without the evidence tendered by Respondent. Accordingly, Respondent's motion is denied and the proffered evidence will not be considered.

5/ I do not rely on Judge Watkins decision in that case, as it was motivated by considerations not present herein.

29 C.F.R. 1918.32 is entitled "Stowed cargo and temporary landing platforms", and subpart (b) has already been set forth verbatim earlier in this decision. Although subpart (a) of the standard appears to furnish no insight into the legal question involved, subpart (c) thereof reads as follows:

> "When two gangs are working in the same hatch on different levels, a safety net shall be rigged and securely fastened so as to prevent men or cargo from falling."

A reading of subparts (b) and (c) together tends to raise the inference that the entire standard was intended to apply only to cargo stowed in the holds of ships. However, the inquiry need not end there.

An important rule of statutory construction is that the meaning of words may be determined by other words with which they are associated in order to avoid the giving of unintended breadth to acts of Congress (Third National Bank in Nashville v. Impac, Ltd., Inc. et al, 97 S. Ct. 2307,___U.S.___, (1977); John T. Jarecki et al, v. G.D. Searle & Co. et al, 81 S. Ct. 1579, 367 U.S. 303 (1961)). While of course a standard promulgated by Complainant, which is not inconsistent with the enabling statute, is not an act of Congress, it has the force of law and is subject to the same construction and interpretation as those applicable to statutes (Rucker v. Wabash Railroad Co., 417 F.2d 146 (7th Cir., 1969)).

29 C.F.R. 1918.33 is entitled "Deck loads" and reads as follows:

> "(a) Employees shall not be permitted to pass fore and aft over or around deck loads unless there is a safe passage.
>
> "(b) Signalmen shall not be permitted to walk over deck loads from rail to coaming unless there is a safe passage. If it is necessary to stand at the outboard or inboard edge of the deckload where less that 24 inches of bulwark, rail, coaming, or other protection exists, any signalman shall be provided with a suitable means of protection against falling from the deck load."

As is apparent, this standard deals specifically with hazards incidental to employees mounting cargo stowed on decks of ships. Unfortunately, its wording is such that it does not encompass the factual situation involved in this case. Stated otherwise, the employees in this case were not using the roofs of the modular homes as passageways,[6/] nor were they working on the roofs in the capacity of signalmen.

In viewing these two standards together, I conclude that the former relates only to cargo stowed below decks. As the latter standard is the one intended to cover deck stowed cargo and it falls short of proscribing a hazard related to the situation observed by Ellis, item 1 of the citation must be vacated.

V

The apparent disagreement between the parties on the hard hat charge, as far as its merits are concerned, is whether it was willful, as I find no serious challenge by Respondent to the fact that the violation existed at the time of the inspection. In fact, Respondent's witness Amato conceded the fact.

Before discussing this charge, however, I am constrained to note my disturbance over some aspects of the evidence which may have played some part in the decisional process in connection with the preference of both charges. In particular, I refer to the area director's comments about future hard hat charges at Respondent's prior safety meetings, the policy that a maximum penalty was recommended on all willful charges emanating from this particular office, including those in this case, and Hodski's allegations concerning Ellis' conduct the day before and the day of the inspection. As to these allegations against Ellis, I find no reason to resolve the conflict between Hodski, and Ellis who denied them. I do, however, conclude, without assessing blame, that the inspection was fraught with dissension and thus not conducted in an atmosphere conducive of rational judgments by the participants.

6/ I am not even convinced that 29 C.F.R. 1918.33(a) is in any way related to fall protection equipment.

In any event, Bogdon, according to Ellis, played an important role in Ellis' recommendation that both charges be alleged as willful, because Bogdon admitted to Ellis his role in the hard hat violation, and declined to accede to the latter's demand that the work on the roofs be stopped forthwith.

Although Bogdon was described as a foreman, the evidence is clear that he was not a foreman in the ordinary sense of the word. Rather, he was only recently employed by Respondent on a trial basis for the position of foreman,[7/] and in fact, was later fired for incompetence and irrational conduct at the end of his probationary period. Moreover on the day of the inspection, Amato, his immediate superior, assigned him what Amato inferred was a simple task on the pier, as he was too "new" and could not be "trusted" with more formidable tasks normally assigned to one in that position. Bogdon was therefore a trainee-foreman in every sense of the word.

As Bogdon actually created the hard hat violation by ordering the employees to start work without them and then not supplying them as promised, two questions must be resolved - first, whether Respondent was chargeable with that violation, and second, if the answer to the first is in the affirmative, whether the evidence supports the willful allegation of that charge.

An employer is generally responsible for violations created by or within the actual or constructive knowledge of its supervisory personnel in charge of the particular worksite (see Secretary v. Interstate Roofing Co., Inc., 78 OSAHRC 52/A2). Thus, in Secretary v. Ocean Electric Corporation, 75 OSAHRC 6/C14, the majority, in imputing the act of a foreman to the employer, noted that the foreman "was Ocean Electric's highest ranking employee on the site." Also, when Ocean Electric was before the Fourth Circuit, that Court noted that "Ocean cannot disavow the acts of its

7/ It is of interest to note that Respondent apparently is limited to hiring foremen from the union ranks.

foreman, Watson, for at the time of the accident he was the Company's representative at the jobsite" (Ocean Electric Corp., v. Secretary of Labor et al, No. 76-1060, August 2, 1977). Willfulness, too, is ordinarily imputed from the senior representative at the worksite to the employer:

> ". . . under the circumstances and in view of [the foreman's] authority over the worksite, [the foreman's] willful conduct may be imputed to Respondent" (Secretary v. C.N. Flagg and Co., 74 OSAHRC 66/A2). (Emphasis added) 8/

In light of these precedents, I answer the first question in the affirmative. However, Respondent must bear responsibility for the hard hat violation not through Bogdon but through Amato, the superintendent who was on board the ship all through the day, except for short absences, filling in for an absent foreman (Tr.273). Not only is it clear from the evidence that the very nature of his work on deck clearly permitted him to oversee the activities on the pier, but his testimony shows that from his position on deck, he saw Ellis on the pier shortly after he arrived (Tr. 275-277), that he encountered Ellis on the pier thereafter when Ellis pointed out the hatless employees, a situation he immediately corrected (Tr. 277), and that he later observed the encounter between Ellis and Hodski on the pier after he returned to the deck of the ship (Tr. 278). Thus, Amato was in charge of the worksite, not Bogdon.

As the employees worked without hard hats all morning, Amato, through the exercise of reasonable diligence, could have detected the violation and corrected it long before Ellis arrived for the inspection (Secretary v. Minnotte Contracting and Erection Co., 78 OSAHRC 15/D4). Hence, Amato's constructive knowledge of the existence of the hard hat violation must be imputed to Respondent.

The second question, however, must be answered in the negative, as there is no evidence remotely suggesting that Amato had previously detected the violation and had willfully failed to correct it before Ellis appeared to inspect. As Amato was present on the scene and was

8/ See also Secretary v. Western Waterproofing Co., Inc., 77 OSAHRC 25/A2, where the foreman whose willful act was imputed to the employer was the employer's senior representative at the worksite.

was Respondent's agent in charge of the worksite, Bogdon's willful act, if such it was, is not imputable to Respondent (Secretary v. C.N. Flagg and Co., supra and Western Waterproofing Co., Inc., supra).

Finally, I have carefully considered all of the evidence of record in connection with Respondent's safety program dealing with the wearing of hard hats and its measures to implement it, and find nothing in the nature of a defense that would relieve Respondent of responsibility for that violation (see Secretary v. Western Waterproofing Co., Inc., supra).

VI

As the willful allegation of the hard hat charge is not sustained, and the citation did not characterize the violation as serious, a determination must be made as to what type of charge can and should be affirmed. I conclude that the hard hat violation must be affirmed as other than serious.

A willful charge that does not characterize the violation as serious may nevertheless be affirmed as a serious charge where the record shows that the serious nature of the violation was tried by the express or implied consent of the parties. (Secretary v. Toler Excavating Co., 75 OSAHRC 76/C8; Secretary v. Environmental Utilities Corp., 77 OSAHRC 40/A2). The elements of a serious charge are that the hazard presents a substantial probability that death or serious bodily harm could result therefrom, and that the employer knew, or through the exercise of reasonable diligence, could have known of the existence of the hazard (id.).

Although Ellis testified that the hatless employees could receive head injuries in the course of their work with the modular homes on the pier, he never expressed any opinion that such injuries could be serious or result in death. Moreover, the remaining evidence of record pertaining to this charge does not otherwise support such a finding. Hence, I am precluded from affirming the hat charge in any degree higher than an other than serious violation.

VII

In fulfilling my responsibility under 29 U.S.C. 666(j) to assess penalties that are appropriate under the facts of the case, I find that the gravity of the hard hat violation was relatively low and that a penalty of $50 is appropriate.

VIII

After reviewing the entire record and considering the briefs and arguments of the parties, I reach the findings and conclusions that follow.

FINDINGS OF FACT

1. That at the time and place alleged, Respondent entered the worksite with the permission of the owner of the property;

2. That Ellis observed the conditions that he thought constituted violations from a place where he had obtained the owner's permission to be and prior to the time he encountered any of Respondent's employees;

3. That there was no evidence that Respondent was prejudiced in any way by any failure on the part of Ellis to comply with the inspection requirements of 29 U.S.C. 657;

4. That Respondent was verbally informed of the substance of the complaint that served as the basis for the inspection and there was no evidence that Respondent was prejudiced in any way by Ellis' failure to comply with 29 U.S.C. 657(f)(1);

5. That Bogdon permitted the three employees on the pier to commence work that day without wearing hard hats and had allowed these employees to continue to so work until Ellis called the matter to Amato's attention during the course of the inspection at some time after 1:00 p.m.

6. That Bogdon was a trainee-foreman who was later discharged for both incompetence and incapacity, and that he was not in charge of the worksite which included the activities on the pier as well as on board the ship;

7. That the employees were furnished hard hats and required to use them within a reasonable time after the matter was called to Amato's attention;

8. That although Amato, through the exercise of reasonable diligence, could have detected the hard hat violation earlier that day, there was no evidence that he had done so and failed to take corrective action;

9. That although the evidence raises a reasonable inference that the employees who were not wearing hard hats could have sustained a head injury by reason thereof, there was no evidence that such injury might have been serious or have resulted in death; and

10. That the modular homes involved in the first charge were stowed on the deck, rather than in a hold of the ship

## CONCLUSIONS OF LAW

1. That this Commission has jurisdiction over the proceedings;

2. That the inspection in this case was not conducted in violation of the Fourth Amendment or any of the provisions of 29 U.S.C. 657;

3. That 29 C.F.R. 1918.32(b) pertains solely to cargo stowed in the hold of a ship and that 29 C.F.R. 1918.33, the standard applying to deck stowed cargo, does not contain any provision which could serve as a basis for the allegations contained in item 1;

4. That Respondent did not violate 29 U.S.C. 654(a)(2) by not complying with 29 U.S.C. 1918.32(b);

5. That Respondent was in violation of 29 U.S.C. 654(a)(2) by not complying with 29 C.F.R. 1918.105(a), but such violation was other than serious rather than willful; and

6. That a penalty of $50 is appropriate for item 2.

IX

Item 1 of Citation number 1 for willful violations is vacated, whereas item 2 of said Citation, modified to alleged an other than serious violation, is affirmed. A penalty of $50 is assessed for item 2.

So ORDERED.

JOSEPH L. CHALK
Judge, OSHRC

Dated: 12 FEB 1979
Hyattsville, Maryland

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

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UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

June 30, 1982

**IN REFERENCE TO SECRETARY OF LABOR v.**

DAVIS METAL STAMPING, INC.

OSHRC DOCKET NO. 78-5775

**NOTICE IS HEREBY GIVEN TO THE FOLLOWING:**

**FOR THE SECRETARY OF LABOR**

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**FOR EMPLOYEES**

-

OF COMMISSION DECISION
REMAND

To wit: See attached.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

- Louis G. LaVecchia
  Judge, OSHRC
  Federal Building, Room 7B11
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  Dallas, Texas 75242

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>DAVIS METAL STAMPING, INC.,<br>Respondent. | OSHRC Docket No. 78-5775 |

DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge Louis G. LaVecchia is before the Commission for review pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). In his decision, Judge LaVecchia granted a motion by Respondent, Davis Metal Stamping, Inc., to dismiss the complaint filed in this case and also the citations issued against it by the Secretary of Labor ("the Secretary"). The judge concluded that the inspection warrant purportedly authorizing the inspection by the Secretary that led to the issuance of these citations was invalid because that warrant was sought and obtained ex parte. Specifically, the judge determined that the first regulation to be published at 29 C.F.R. § 1903.4 1/ did not

1/ The regulation at issue, the original 29 C.F.R. § 1903.4, provided in pertinent part as follows:

> Upon a refusal to permit a Compliance Safety and Health Officer, in the exercise of his official duties, to enter without delay and at reasonable times any place of employment . . . he shall immediately report the refusal and the reason therefor to the Area Director. The Area Director shall immediately consult with the Assistant Regional Director and the Regional Solicitor, who shall promptly take appropriate action, including compulsory process, if necessary.

(Footnote cont'd)

empower the Secretary to obtain ex parte warrants. The Secretary petitioned for review of the judge's decision and Commissioner Cottine directed review of all of the issues raised by the Secretary's petition. For the reasons stated herein, the Commission reverses the judge's decision.

I

Respondent operates a metal-stamping facility in Dallas, Texas. Occupational Safety and Health Administration ("OSHA") compliance officer Ronald Sarnacki attempted to inspect this workplace on September 18, 1978. Upon Sarnacki's arrival, Respondent's president and vice-president met with Sarnacki, who explained the purpose of his visit. Respondent's vice-president told the compliance officer that the mechanical power presses in the plant were unguarded. He added that Respondent could not afford to stay in business if it were required to guard the machines. Respondent's officers then refused to permit an inspection.

In an ex parte proceeding on September 27, 1978, Sarnacki applied to a United States magistrate for a warrant to inspect Respondent's facility. The magistrate reviewed a supporting affidavit that noted (a) the scheduling of the initial inspection "on a high hazard industry basis," (b) Respondent's refusal to permit an inspection, and (c) the stated reasons for the refusal. He found probable cause for an inspection and issued an inspection warrant.

On the next day, September 28, the compliance officer returned to the worksite, presented the warrant, and inspected Respondent's facility. As a result of the inspection, the Secretary issued to Respondent citations for willful, serious, and other-than-serious violations of the Act that alleged noncompliance with machine guarding and electrical standards and recordkeeping regulations.

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(Footnote 1 cont'd)

Since the inspection in this case, the regulation has been amended twice, as described subsequently in this decision. Nevertheless, it is the regulation as stated above that is at issue in this proceeding because it was that regulation which was in effect at the time the warrant was obtained.

The proposed penalty amounted to more than $6,000. Respondent timely contested the citations.

On May 2, 1979, Respondent filed a pre-hearing motion to dismiss on the ground that the inspection that led to the citations was based on an illegal inspection warrant. Specifically, it asserted that the warrant was illegal for two reasons: (1) OSHA violated its own regulations in obtaining the warrant ex parte, and (2) the warrant was not supported by a showing of probable cause. On May 14, 1979, Administrative Law Judge Henry F. Martin, Jr., denied Respondent's prehearing motion to dismiss the complaint and citation, but he did so without prejudice to the Respondent's right to present evidence in support of its contentions. Subsequently, the judge held a two-day hearing that was limited solely to Respondent's warrant challenges.

In an August 27, 1979 order, the judge again denied Respondent's motion to dismiss. He concluded, on the basis of the evidentiary record, that the Secretary's inspection warrant was based on probable cause. In addition, the judge rejected Respondent's second challenge to the warrant, i.e., that the inspection warrant was illegal because it was obtained ex parte and the Secretary failed to notify Respondent of the date that the warrant would be executed. The judge expressly disagreed with Respondent's argument that the Secretary was not authorized to obtain ex parte warrants. On Respondent's motion, the judge certified his August 27 order for interlocutory appeal. The Commission subsequently dismissed the appeal as improvidently granted and remanded the case.

Following reassignment of the case, Administrative Law Judge Louis G. LaVecchia held a three-day hearing on the merits of the alleged violations. On May 8, 1980, while the case was pending before the judge for a decision on the merits, Respondent filed a renewed motion for dismissal based on the ground that the warrant was obtained ex parte. Respondent did not revive the probable cause challenges that had been decided by Judge Martin in his August 27, 1979 order. Judge LaVecchia took the renewed motion under advisement. He later granted Respondent's motion in his decision now on review.

In granting Respondent's motion to dismiss, the judge held that the original regulation at 29 C.F.R. § 1903.4 did not empower the Secretary to seek warrants ex parte. He relied on the reasoning of the United States Court of Appeals for the Third Circuit in Cerro Metal Products, Division of Marmon Group, Inc. v. Marshall, 620 F.2d 964 (3d Cir. 1980), aff'g 467 F. Supp. 869 (E.D. Pa. 1979) ("Cerro"). Consequently, the judge dismissed the complaint and vacated the citations because, in his view, they were based on an illegal inspection. He did not reach the merits of the alleged violations.

II

The Secretary initially asserts on review that the Commission is not empowered to review warrant challenges. The Secretary argues that, by reviewing the validity of a warrant, the Commission in effect violates the constitutional separation of powers doctrine by reviewing a judicial decision on warrant issuance. The Secretary specifically rejects the contrary reasoning in Sarasota Concrete Co., 81 OSAHRC 48/A2, 9 BNA OSHC 1608, 1981 CCH OSHD ¶ 25,360 (No. 78-5264, 1981), appeal filed, No. 81-5621 (5th Cir. June 23, 1981) ("Sarasota Concrete"), and in Babcock & Wilcox Co. v. Marshall, 610 F.2d 1128 (3d Cir. 1979) ("Babcock & Wilcox"). According to the Secretary, this case presents his first opportunity to address this issue before the Commission because the issue was beyond the scope of the direction for review in Sarasota Concrete. The Secretary specifically urges that, by reviewing the search warrant issue in the instant case, the Commission improperly reviews the magistrate's implicit finding that the Secretary is empowered to seek warrants ex parte.

We reject the Secretary's contentions. In Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) ("Barlow's"), the United States Supreme Court held that the Act violates the fourth amendment to the extent that it purports to authorize warrantless, nonconsensual searches. Before the Court's May 23, 1978 Barlow's holding, the Commission refrained from reviewing fourth amendment challenges to warrants because it lacked authority to rule on the constitutionality of section 8(a) of

the Act, 29 U.S.C. § 657(a). With the Barlow's decision, however, the Court removed any impediment to Commission determination of warrant challenges. Consequently, in Chromalloy American Corp., 79 OSAHRC 55/D11, 7 BNA OSHC 1547, 1979 CCH OSHD ¶ 23,707 (No. 77-2788, 1979) ("Chromalloy"), the Commission asserted its authority to address inspection warrant challenges. Subsequently, the United States Courts of Appeals for the First, Third, Fifth, Eighth, and Ninth Circuits held that, in challenging executed warrants, employers must first exhaust their administrative remedies before the Commission. 2/ These courts determined that Commission review in the first instance does not violate employer rights because Commission decisions are subject to review in the courts of appeals. Furthermore, this approach avoids duplicative judicial proceedings by making unnecessary the development of a factual record in a district court review of the warrant determination that is separate from the Commission's proceedings.

Several of these courts also have rejected the argument that Commission review violates the separation of powers doctrine. For example, in Babcock & Wilcox, the Court of Appeals for the Third Circuit rejected the employer's contention that the Commission, an executive branch agency, is not authorized to review the validity of warrants issued by magistrates of the judicial branch. According to the court, the Commission does not "sit in direct review of the decision of the magistrate." 610 F.2d at 1136. Instead, the Commission decides "whether to use the evidence obtained from the inspection." Id. The Commission subsequently adopted the Babcock & Wilcox view in its decision in Sarasota Concrete, when it reaffirmed its holding in Chromalloy that it has the authority to review warrant challenges. Having considered the Secretary's arguments in this case, we adhere to our position as stated in Chromalloy and in Sarasota Concrete.

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2/ In re Quality Products, Inc., 592 F.2d 611 (1st Cir. 1979); Babcock & Wilcox Co. v. Marshall, supra; Marshall v. Whittaker Corp., Berwick Forge & Fabricating Co., 610 F.2d 1141 (3d Cir. 1979); Baldwin Metals Co. v. Donovan, 642 F.2d 768 (5th Cir. 1981); Marshall v. Central Mine Equipment Co., 608 F.2d 719 (8th Cir. 1979); In re J.R. Simplot Co., 640 F.2d 1134 (9th Cir. 1981).

In any event, we observe that the Commission is clearly competent to consider the interpretative question that is presented in this case, i.e., whether the Secretary exceeded his authority under section 1903.4. The Commission has jurisdiction to determine whether the Secretary exceeds his statutory or regulatory authority. See Willamette Iron & Steel Co., 81 OSAHRC 59/A2, 9 BNA OSHC 1900, 1981 CCH OSHD ¶ 25,427 (No. 76-1201, 1981); Newport News Shipbuilding & Drydock Co., 80 OSAHRC 119/A2, 9 BNA OSHC 1085, 1980 CCH OSHD ¶ 25,003 (No. 76-171, 1980). Indeed, the Commission has frequently determined whether the Secretary violated his own regulations. E.g., Accu-Namics, Inc., 74 OSAHRC 35/A2, 1 BNA OSHC 1751, 1973-74 CCH OSHD ¶ 17,936 (No. 477, 1974), aff'd, 515 F.2d 828 (5th Cir. 1975), cert. denied, 425 U.S. 903 (1976). Accordingly, the Secretary's argument that the Commission is impermissibly reviewing the magistrate's determinations is rejected here.

III

The Secretary further maintains that, even if the Commission is empowered to review warrant challenges, the issue in this case is prematurely before the Commission because the judge erred by failing to first decide the case on its merits before reaching the warrant validity question. According to the Secretary, an initial decision on the merits expedites Commission proceedings by avoiding delay and "needless review and remand." The Secretary relies on the principle, frequently stated by the Commission, that judges usually should defer ruling on a motion to dismiss until the evidentiary record is complete. E.g., Harrington Construction Corp., 77 OSAHRC 7/B3, 4 BNA OSHC 1471, 1976-77 CCH OSHD ¶ 20,913 (No. 9809, 1976).

We reject the Secretary's suggestion that judges are required to decide the merits of a case before resolving warrant validity questions. We do not agree with the Secretary's assertion that it is efficient to first fully decide the merits of alleged violations and then consider whether the inspection warrant was invalid. The judge here heard all of the evidence on the merits before deciding

the warrant issue, thereby preserving the record in the event of reversal on review. We therefore conclude that he acted properly by ruling on Respondent's dismissal motion without first ruling on the merits. 3/

IV

The Secretary's principal contention is that the judge erred in holding that the original section 1903.4 did not authorize the Secretary to obtain ex parte inspection warrants and that the Secretary therefore acted improperly in securing the warrant without notifying Respondent. We agree that the judge erred. Both the language and history of section 1903.4 and the policy considerations underlying the Act support the Secretary's position.

A.

The purpose of the Act is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." Section 2(b) of the Act, 29 U.S.C. § 651(b). To achieve this purpose, Congress authorized the Secretary "to enter without delay and at reasonable times" any workplace and "to inspect and investigate during regular working hours and at other reasonable times." Section 8(a) of the Act, 29 U.S.C. § 657(a). In addition, in section 8(g)(2) of the Act, 29 U.S.C. § 657(g)(2), Congress directed the Secretary to prescribe rules and regulations he deems necessary to carry out his responsibilities under the Act, including rules and regulations "dealing with the inspection of an employer's establishment."

Within one week of the Act's effective date, in Part 1903 of his regulations (29 C.F.R. Part 1903), the Secretary set forth policies for inspections and investigations. After comment, the Secretary adopted these regulations, including the original section 1903.4, the provision in effect when the Secretary obtained the ex parte warrant here. 29 C.F.R. § 1903.4 provided in pertinent part that,

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3/ The Secretary also advances the "familiar principle" that constitutional questions should not be decided if a case can be resolved on other grounds. However, this case presents an issue of regulatory interpretation rather than a constitutional question.

if an employer refused to permit an inspection, the Secretary's agents were to "promptly take appropriate action, including compulsory process, if necessary" to secure entry. The key term "compulsory process" was not defined.

Nevertheless, the Secretary interpreted section 1903.4 in his operations manuals, which are compilations of internal guidelines directed to the Secretary's compliance personnel. In 1972, the first Compliance Operations Manual (COM), published only a few months after the adoption of section 1903.4, included a section on inspection warrants and employer refusals to permit inspections. Paragraph [f] of that section required compliance officers to obtain warrants before attempting an inspection if the officer expected employer refusal. Paragraph [i] prohibited, except in "unusual circumstances" approved by Regional Solicitors, advance warning to an employer "of the fact either that a warrant has been secured or that inspection will take place pursuant to the warrant." These provisions accordingly not only indicated the Secretary's view that he was authorized to obtain ex parte warrants but also stated a clear preference for the use of ex parte warrants. The 1974 Field Operations Manual (FOM) retained these provisions.

In the 1976 FOM, however, the Secretary deleted paragraph [f] on pre-refusal warrants. The Secretary retained the advance warning prohibition, but it was renumbered paragraph [8] and reworded. Thus, the Secretary dropped the word "warrant" and substituted the term "compulsory process." Accordingly, paragraph [8] provided that, with the exception previously noted, "there shall be no advance notice to the employer concerning compulsory process or pending inspection." The Secretary thereby retained his stated preference for the use of ex parte warrants in cases where entry is initially refused.

This 1976 revision of the FOM was consistent with the Secretary's pre-Barlow's legal position that he was authorized under section 8 of the Act to inspect workplaces without resort to compulsory process, particularly inspection warrants requiring a showing of probable cause. To preserve this position, in 1976 the

Secretary began seeking orders compelling entry in adversary proceedings rather than seeking warrants ex parte. This policy apparently was adopted in an effort to avoid the probable cause showing needed in the ex parte warrant proceeding; the Secretary customarily relied solely on his section 8(a) authority as support for orders compelling entry. However, practice was inconsistent in the regions. Some of the Secretary's agents continued to obtain warrants ex parte even though Regional Solicitors frequently approved adversary proceedings as a departure from the FOM's advance notice prohibition under the "unusual circumstances" proviso in FOM paragraph [8].

In presenting the Secretary's case in Barlow's, the submissions of the Solicitor General were ambiguous on whether the term "compulsory process" in section 1903.4 included ex parte warrants. Indeed, the Solicitor General seemed to urge the extreme position that, if the Secretary could not inspect workplaces without a warrant, employers were entitled to an adversary proceeding before issuance of a warrant. See Cerro, 620 F.2d at 976-78. Nonetheless, both the Secretary's jurisdictional statement and his brief in Barlow's indicated his view that obtaining ex parte warrants before an inspection was an option open to him. In addition, during the argument, the Solicitor General noted that search warrants are customarily issued ex parte.

In rejecting the Secretary's position in Barlow's, the Court referred to section 1903.4. According to the Court, the efficacy of the Act is not endangered by a time lapse while an inspector obtains compulsory process after an employer refuses an initial inspection request. The Court specifically noted that "the kind of process . . . apparently anticipated by the regulation [1903.4] provides notice to the business operator." 436 U.S. at 318. Further, the Court said that, "if this safeguard endangers efficient administration of OSHA, the Secretary should never have adopted it, particularly when the Act does not require it." 436 U.S. at 319. If "procedures were available" for the Secretary to seek ex parte warrants and to reappear without further notice, the Court continued, then

the advantage of surprise would not be lost if the employer refused entry. Despite its recognition that the Secretary could provide for ex parte warrant authority, the Court suggested in dictum that the Secretary was not empowered to seek warrants ex parte under the original section 1903.4:

> Insofar as the Secretary's statutory authority is concerned, a regulation expressly providing that the Secretary could proceed ex parte to seek a warrant or its equivalent would appear to be as much within the Secretary's power as the regulation currently in force and calling for "compulsory process."

436 U.S. at 320 n.15.

In November 1978, just six months after the Barlow's decision, the federal district court decision in the Cerro case was issued. The court entered an injunction prohibiting the Secretary from obtaining warrants ex parte. In concluding that the Secretary was not authorized to obtain ex parte warrants, the court relied upon the dictum in Barlow's that section 1903.4 "apparently anticipated" that the Secretary would notify employers before obtaining process.

In December 1978, three months after the inspection in the case now before us, acting partly in response to the Cerro decision, the Secretary amended section 1903.4 by adding a definition of the term "compulsory process" to mean "the institution of any appropriate action, including ex parte application for an inspection warrant or its equivalent." 43 Fed. Reg. 59,838, 59,839 (Dec. 22, 1978)(29 C.F.R. § 1903.4(d)(1979)). In explaining this change, the Secretary indicated that he had always intended "compulsory process" to include ex parte warrants and that his agents routinely had sought and received warrants ex parte before Barlow's. 43 Fed. Reg. 59,839. In addition, the Secretary stated that he considered notice and comment rulemaking unnecessary for this "interpretative rule." Id.

After this amendment had been promulgated, the appellate court decision in the Cerro case was issued. The Court of Appeals for the Third Circuit affirmed the district court's holding that the Secretary was not empowered to seek ex

parte warrants under the original regulation. Rather than defer to the Secretary's interpretation of section 1903.4, the court followed the Barlow's dictum on the regulation as a matter of "sound judicial policy." The court found that, although the Barlow's discussion of section 1903.4 was technically dictum, that dictum was "integral" to the Supreme Court's constitutional holding. The court reasoned in effect that the Secretary had deliberately adopted a litigation strategy in Barlow's of interpreting section 1903.4 to require an adversary proceeding before compulsory process is obtained and further that the Supreme Court had accepted this interpretation as a basis for its decision. Furthermore, the court rejected the Secretary's "opportunistic" interpretation of section 1903.4 in the proceeding before it. The court noted changes that it viewed as inconsistencies in the COM and FOM over the years, and concluded that the interpretation of section 1903.4 as authorizing ex parte warrants was neither "consistent" nor "longstanding." It also determined that the interpretation of the original section 1903.4 in the preamble to the 1978 amendment to the 1971 regulation was not "contemporaneous." For these reasons, the Cerro court refused to defer to the Secretary's interpretation of the regulation. 4/

Similarly, in Marshall v. Huffhines Steel Co., 488 F. Supp. 995 (N.D Tex. 1979), aff'd, 645 F.2d 288 (5th Cir. 1980)("Huffhines"), the lower court held that the Secretary had no authority to seek warrants ex parte based on Barlow's. Unlike the Cerro court, the Huffhines court concluded that the Barlow's dictum on section 1903.4 was not necessarily integral to the constitutional holding. However, it noted the Supreme Court's view that advance notice would not frustrate the purposes of the Act. The Court of Appeals for the Fifth Circuit affirmed without opinion the district court decision in Huffhines.

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4/ As a result of this adverse decision, the Secretary amended § 1903.4 a second time in 1980, in this instance following notice and comment rulemaking. In his notice of proposed rulemaking, the Secretary reiterated his view that § 1903.4 had always been intended to authorize ex parte warrants. 45 Fed. Reg. 33,652-33,656 (May 20, 1980).

B.

Respondent on review argues, based on Cerro and Huffhines, that the Secretary lacked the authority to obtain inspection warrants ex parte under the original section 1903.4. The Secretary responds that the original section 1903.4 authorized him to obtain ex parte warrants. We agree with the Secretary.

We conclude that the Secretary was authorized by the language of section 1903.4 to obtain ex parte warrants. We further conclude that the Secretary's interpretation is more consistent with the statute and regulations promulgated under it than is the Cerro-Huffhines approach and also that it better effectuates congressional intent. In addition, a number of Courts of Appeals have considered this issue and a majority agrees with this interpretation. Marshall v. Seaward International, Inc., 510 F. Supp. 314 (W.D. Va. 1980), aff'd without published opinion, 644 F.2d 880 (4th Cir. 1981)("Seaward International" ); Rockford Drop Forge Co. v. Donovan, 672 F.2d 626 (7th Cir. 1982)("Rockford Drop Forge"); Stoddard Lumber Co. v. Marshall, 627 F.2d 984, 989 (9th Cir. 1980)("Stoddard Lumber"); Marshall v. W & W Steel Co., 604 F.2d 1322, 1325-26 (10th Cir. 1979) ("W & W Steel").

The alleged inconsistency in the Secretary's interpretation, according to Cerro, is found in the shifts in the Secretary's use of ex parte warrants vis-a-vis orders to compel entry. This analysis, however, overlooks the consistency in the Secretary's practice of using both ex parte warrants and orders to compel entry as enforcement tools. It is undisputed that at all times prior to Barlow's, both before and after the Secretary's 1976 FOM and policy changes, the Secretary relied on section 1903.4 to obtain both types of compulsory process. Only the relative "mix" of the two types of process changed over the years. Indeed, the term compulsory process ". . . is sufficiently broad as to include ex parte application procedure." Seaward International, 510 F.Supp at 317. See Stoddard Lumber, 627 F.2d at 990, citing Cerro (C.J. Seitz, dissenting opinion). The Secretary's practices throughout the history of the Act's enforcement prior to Barlow's

strongly indicate that he interpreted the term "compulsory process" as including both ex parte warrants and orders to compel entry and that he interpreted section 1903.4 as authorizing him to obtain either form of process. The Secretary's interpretation therefore has been both consistent and longstanding. Moreover, that interpretation is virtually contemporaneous. The Secretary's first Compliance Operations Manual was published only a few months after the promulgation of section 1903.4. In his interpretation of section 1903.4 in that manual, the Secretary expressly prohibited his agents from giving advance notice that a warrant was being sought unless the agents obtained authorization from a Regional Solicitor under extraordinary circumstances. This prohibition, supported by sections 2(b)(10), 8(a)(1) and 17(f) of the Act, 29 U.S.C. §§ 651(b)(10), 657(a)(1) and 666(f), 5/ was retained in all pre-Barlow's versions of the Secretary's operations manuals.

The Secretary's position also is consistent with the congressional intent and the statutory framework of the Act. The Act does not require notification to employers before an inspection. To the contrary, under sections 2(b)(10) and 17(f) of the Act, 29 U.S.C. §§ 651(b)(10), and 666(f), the Act provides for an enforcement program that "include[s] a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition." Indeed, ex parte warrants are necessary to preserve the element of surprise that Congress deemed essential to OSHA inspections. E.g., 116 Cong. Rec. 38,709 (1970)

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5/ Under section 2(b)(10) of the Act, an enforcement program must "include a prohibition against giving advance notice of any inspection and sanctions for any individual violating this prohibition."

Under section 8(a)(1) of the Act, the Secretary is authorized "to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer . . ." [emphasis added]

Finally, under section 17(f) of the Act, "[a]ny person who gives advance notice of any inspection to be conducted under this Act, without authority from the Secretary or his designees, shall, upon conviction, be punished by a fine of not more than $1,000 or by imprisonment for not more than six months, or by both."

(remarks of members of Congress Galifianakis and Steiger). See Rockford Drop Forge, supra. Thus, the Court of Appeals for the Fifth Circuit, for example, has determined that Congress added the language directing the Secretary to enter worksites "without delay" in section 8(a) of the Act "to preserve the element of surprise deemed essential to inspections" that would be lost in an adversary proceeding. Marshall v. Shellcast Corp., 592 F.2d 1369, 1371-72 n.5 (5th Cir. 1979), quoting Marshall v. Gibson's Products, Inc., of Plano, 584 F.2d 668, 672-73 (5th Cir. 1978). Moreover, the Shellcast court concluded that "Congress, desiring an enforcement scheme based on surprise and undelayed searches, would very much prefer immediate execution of duly-issued ex parte warrants to the litigation-ladened delays" resulting from any procedure that provides notice to employers. Marshall v. Shellcast Corp., 592 F.2d at 1372. Similarly, the Court in Barlow's recognized that the Act contemplates surprise searches, particularly noting the statutory provision imposing penalties for giving advance notice of an inspection at section 17(f) of the Act, 29 U.S.C. § 666(f), and the Secretary's regulation prohibiting advance notice of inspections at 29 C.F.R. § 1903.6.

The inevitable effect of an adversary proceeding requirement would be to "undermine the efficient and speedy implementation of the Act" contemplated by Congress, Marshall v. Shellcast Corp., 592 F.2d at 1372, and to require an unwarranted "consumption of enforcement energies" that would "exceed manageable proportions." Barlow's, 436 U.S. at 321. Ex parte warrants help preserve administrative and judicial resources while adversary proceedings delay inspections and may lead to lengthy litigation. 6/ See, e.g., Marshall v. Chromalloy American Corp., 589 F.2d 1335 (7th Cir. 1979) (warning against turning simple warrant requests into full-blown hearings).

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6/ In addition, several courts have recognized that advance notice to an employer is unnecessary because an employer has several means of protecting its right of privacy without participating in the warrant application proceeding. First, the employer may move before the district court to

In addition, as we noted previously, of those Circuit Courts of Appeals that have considered either the regulation in question or the 1978 amended version of the regulation, a majority has rejected either directly or implicitly the contention that the original section 1903.4 did not authorize the Secretary to obtain inspection warrants ex parte. 7/ Seaward International, supra; Rockford Drop Forge, supra; Stoddard Lumber, supra; W & W Steel, supra. Moreover, in both Stoddard Lumber and Seaward International the courts emphasized the consistency in the Secretary's position, particularly as reflected in the provisions of his internal manuals prohibiting advance notice that a warrant was being obtained, while de-emphasizing the impact of the Barlow's Court's pronouncements on an issue that, in their view, was not before the Court. In Rockford Drop Forge the court expressly stated its agreement with the reasoning of the Stoddard Lumber and Seaward International courts as well as the reasoning of others that have reached the same conclusion.

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(Footnote 6 cont'd)

quash the warrant before its execution. E.g., Pelton Casteel, Inc. v. Marshall, 588 F.2d 1182 (7th Cir. 1978). Second, an employer may challenge an assertedly invalid warrant in our proceedings. Commission orders are reviewable by the Courts of Appeals under § 11(a) of the Act, 29 U.S.C. § 660(a). In re Quality Products, Inc., 592 F.2d at 615 n.7. Third, the employer may refuse entry to an inspector with a warrant and then challenge the warrant before the district court when the Secretary brings a civil contempt proceeding. Blocksom & Co. v. Marshall, 582 F.2d 1122, 1124 (7th Cir. 1978). See generally Rockford Drop Forge, supra.

7/ Several other considerations also support our conclusion that the original section 1903.4 authorized the Secretary to obtain ex parte inspection warrants. As the Court observed in Barlow's, ex parte inspection warrants are not prohibited by the fourth amendment. 436 U.S. at 320 (warrant may issue "with or without prior notice"). See also Franks v. Delaware, 438 U.S. 154, 169 (1978)(criminal warrants are necessarily ex parte to prevent destruction or removal of evidence); Stoddard Lumber, supra. Similarly, the fifth amendment does not prohibit ex parte inspection warrants as violative of due process. Heller v. United States, 413 U.S. 483 (1973); Matter of Carlson, 580 F.2d 1365, 1373-74 (10th Cir. 1978). Moreover, the Act itself does not preclude the use of ex parte warrants; accordingly, the Barlow's Court and even the appellate court in Cerro recognized that the Secretary may provide for ex parte warrant authority under the statute. In addition, the regulation at issue, by using the broad term "compulsory process," is written in a manner that encompasses the use of such warrants.

For these reasons, we conclude that the Secretary did not exceed his authority by obtaining an ex parte warrant under the original section 1903.4. 8/

V

On review, Respondent argues that the Commission is bound to follow the holding of the Court of Appeals for the Fifth Circuit in Huffhines that the Secretary lacked ex parte warrant authority under the original section 1903.4. Respondent warns that it will appeal an adverse Commission decision in the Fifth Circuit, where "the disposition of the appeal would be a foregone conclusion in light of Huffhines." In Respondent's view, administrative tribunals must follow the law of the circuit where an action occurs. It cites and relies on cases such as Jones & Laughlin Steel Corp. v. Marshall, 636 F.2d 32, 33 (3d Cir. 1980)(the court held that its law binds "all tribunals and litigants," including federal administrative agencies, in its jurisdiction); Allegheny General Hospital v. NLRB, 608 F.2d 965 (3d Cir. 1979); and NLRB v. Gibson Products Co., 494 F.2d 762, 766 (5th Cir. 1974). The Secretary takes the contrary position that the Commission is not bound by the decision in Huffhines.

We reject Respondent's arguments. Commissioner Cleary will follow circuit law in some situations, where, for example, precedent in the circuit is clear to the point that reversal appears certain, and it would be unreasonable to require one of the parties to expend resources and monies to obtain a pro-forma reversal of the Commission. However, Commissioner Cleary finds that the disposition of an appeal in the Court of Appeals for the Fifth Circuit in this case is not a "foregone conclusion" under Huffhines. Huffhines is distinguishable from this case because it concerned a motion to quash an ex parte warrant before its execution. The Huffhines court did not reach the question of how to remedy an invalid inspection. Consequently, the Fifth Circuit may invalidate the Secretary's

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8/ In light of our conclusion that the Secretary acted within the scope of his authority under the regulation, we need not address the various arguments raised by the parties concerning the appropriate remedy for an illegal inspection.

ex parte warrant on appeal under Huffhines, but the question of whether the court will afford Respondent a remedy such as suppression of the Secretary's evidence is open. In United States v. Williams, 622 F.2d 830 (5th Cir. 1980), several judges hearing a criminal case en banc stated in a separate opinion that evidence is not to be suppressed under the exclusionary rule when discovered by officers in the course of actions that are taken in the good faith, though mistaken, belief that they are authorized. The judges' discussion of the exclusionary rule in that case was technically dicta, as other judges on the panel noted, because the search in question was found to be valid. Here, however, the Fifth Circuit would presumably find that the search was invalid and it would necessarily have to reach the question of whether a remedy would be appropriate. In view of the fact that twelve judges on the twenty-four judge panel in United States v. Williams joined in the endorsement of the good faith exception to the exclusionary rule, Commissioner Cleary cannot assume that the Fifth Circuit will necessarily rule in favor of Respondent on appeal.

Commissioner Cottine rejects Respondent's arguments based on his adherence to the Commission's often-stated position that Congress established the Commission to achieve uniformity in adjudications involving national occupational safety and health law and that, while the Commission gives deference to the views of the circuit courts of appeals, it is not bound to acquiesce in the views of the circuits that conflict with those of the agency. E.g., Raybestos Friction Materials Co., 80 OSAHRC 111/E14, 9 BNA OSHC 1141, 1980 CCH OSHD ¶ 24,910 (No. 80-2793, 1980); Farmer's Export Co., 80 OSAHRC 66/A2, 8 BNA OSHC 1655, 1980 CCH OSHD ¶ 24,569 (No. 78-1708, 1980); S & H Riggers & Erectors, Inc., 79 OSAHRC 23/A2, 7 BNA OSHC 1260, 1979 CCH OSHD ¶ 23,480 (No. 15855, 1979), rev'd on other grounds, 659 F.2d 1273 (5th Cir. 1981). Commissioner Cottine notes that, in view of the split among courts of appeals on the ex parte warrant authority question, the Commission is authorized and, indeed, obligated to independently consider this issue of first impression before the Commission. See Raybestos Friction Materials Co., supra.

For the reasons noted in part IV, we find that the judge erred in concluding that the Secretary's ex parte inspection warrant was invalid. Accordingly, we reverse the judge's decision dismissing the Secretary's complaint and vacating the citations at issue and remand the case for findings and conclusions on the merits of the alleged violations.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.
Ray H. Darling, Jr.
Executive Secretary

DATED: JUN 30 1982

ROWLAND, Chairman, Dissenting in Part:

I join in Parts II and III of the lead opinion in which the majority concludes that the Commission is empowered to rule on the issue presented in this case and that the procedural posture of the case warrants consideration of the issue at this time. I dissent from Parts IV and V in which the majority concludes that the Secretary acted properly in obtaining the inspection warrant against Respondent ex parte.

Notwithstanding footnotes 6 and 7 of the majority opinion and its extensive discussion regarding the "congressional intent and statutory framework of the Act," the issue before us is not whether ex parte warrants are permissible under the Constitution and the Act, nor are we asked in this case to decide the wisdom or desirability of ex parte warrants as an enforcement mechanism. Rather, as the majority itself concedes in Part II, the question presented here is a very narrow one--whether, regardless of the legality and propriety of ex parte warrants as a general proposition, the Secretary's procedure in this case was contrary to his own regulation. I would follow the holdings of the two courts of appeals which held that the Secretary's procedural regulation in effect at the time in question here, 29 C.F.R. § 1903.4, did not authorize the Secretary to obtain inspection warrants ex parte. Cerro Metal Products, Division of Marmon Group, Inc. v. Marshall, 620 F.2d 964 (3d Cir. 1980); Donovan v. Huffhines Steel Co., 645 F.2d 288 (5th Cir. 1980), aff'g Marshall v. Huffhines Steel Co., 488 F. Supp. 995 (N.D. Tex. 1979). I am not persuaded by the contrary holdings of other courts of appeals on which the majority relies because I do not find those opinions well-reasoned.

As the majority opinion indicates, the decisions in Cerro and Huffhines were essentially predicated on the same factors. Both courts emphasized the Secretary's conscious litigation strategy before the Supreme Court in Marshall v. Barlow's, Inc., 436 U.S. 307 (1978), in which the Secretary contended that warrantless inspections were proper because an employer's rights could be protected in an adversary proceeding with notice to the employer in the event the employer failed to consent to a warrantless inspection. The appellate courts noted that the statements of the Supreme Court--albeit in dicta--that the regulation in question did not contemplate an ex parte proceeding were based upon the Secretary's representations before the Court as well as on the fact that the inspection in Barlow's took place pursuant to a court order issued after an adversary hearing. As the majority explains, the court in Cerro further relied on the Secretary's change in his internal operating manuals by which the word "warrant" was deleted from the provision precluding advance notice to employers.

The majority concludes, however, that ex parte proceedings were still contemplated under the Secretary's regulation authorizing "compulsory process." The majority reasons that, notwithstanding the Supreme Court's statements to the contrary, the Secretary in Barlow's preserved a position that ex parte warrants were an available option. As further support for its conclusion, the majority claims that the Secretary's practice of applying for ex parte warrants and his interpretation of his regulation as authorizing such process were both consistent and of long duration. Finally, the majority relies on those courts of appeals which have issued opinions contrary to Cerro and Huffhines. For the reasons that follow, I disagree with the majority's reasoning as well as with the judicial authority on which its decision in this case is based.

Insofar as the significance of the Barlow's decision is concerned, the Secretary in his jurisdictional statement before the Court conceded that in civil practice commonly "a show cause order [i.e., an order giving the employer an opportunity to appear and defend] issues before compulsory process may be obtained." See Huffhines, 488 F. Supp. at 998 n.2. Similarly, at oral argument before the Court, the Secretary acknowledged that compulsory process is an adversary proceeding, as distinguished from an ex parte warrant. 9/ Although the Cerro and Huffhines courts drew slightly different conclusions from the oral argument, 10/ both emphasized that the Secretary was in effect representing to

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9/ The transcript of the oral argument is quoted extensively in both the Cerro and Huffhines opinions. However, a few brief excerpts will be illustrative:

> MR. McCREE: Now, as a matter of practice, the Regional Inspectors have then gone to the court to obtain an order requiring the proprietor to submit to the inspection.
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> * * *
>
> And the court in this case issued an order to show cause which permitted the employer to appear and assert any objection he might have.
>
> QUESTION: So that is more than the equivalent of a search warrant . . . .
>
> MR. McCREE: Considerably more, because it is an adversary proceeding and the search warrant, of course, is ex parte.
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> * * *
>
> [T]here are regulations which forbid giving advance notice of the intent to inspect, and there are even penalties on the employees for disclosing the intention of inspecting. . . . The regulation affords notice once the court is asked to issue such an order. That is the rare case . . . where he [the inspector] has been turned down [denied entry by the employer]. . . .

See Huffhines, 488 F. Supp. at 998 n.2; Cerro, 620 F.2d at 976-77 n.33.

10/ Cerro concluded that the government had characterized the regulation as providing for adversary process; Huffhines found it uncertain whether the Solicitor General was referring to the requirements of the regulation or to the Secretary's practice under it.

the Court that the employer would have notice that the Secretary desired entry for an inspection. It is not the province of this Commission to dispute, as does the majority, the Court's conclusions drawn from these representations. 11/ As the court stated in Huffhines:

> This issue [the Secretary's interpretation of his authority] was, however, resolved in a fashion binding on a district court when the Supreme Court ruled in Barlow's. To paraphrase Mr. Justice White in Barlow's, if the Secretary's practice did not reflect the limits of his authority, he should never have led the Court so to believe.

488 F. Supp. at 999.

Although the majority characterizes the Secretary's practice of obtaining warrants ex parte as "consistent," it nevertheless concedes that the Secretary also sought orders to compel entry and, indeed, that prior to the Barlow's decision the latter had become the Secretary's primary method for obtaining nonconsensual entry for inspection. The Secretary himself so conceded in Cerro, for in his brief in that case he stated:

> The Secretary's practice with respect to providing employers notice that he was seeking compulsory process was not uniform. Process was at first obtained in the form of ex parte warrants,

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11/ Nor does the Secretary's brief in Barlow's indicate a view that the regulation in question contemplates ex parte warrants. In addressing his concerns regarding the undesirability of affording an employer notice that the Secretary intended to inspect, the Secretary made no mention of ex parte warrants:

> The fact that current agency regulations (29 C.F.R § 1903.4) provide that the Secretary will, as a matter of self-restraint, obtain a court order if the inspector is initially refused entry does not detract from our argument that a warrant requirement would interfere with the administration of the Act. . . . While an employer may, under the Secretary's regulations, claim an alleged right to refuse entry to an inspector and thereby put him to the burden of seeking a court order to enforce his statutory right of entry, a decision by this Court that no warrant is required would presumably reduce an employer's incentive to do so.

Brief for Appellants at 39 n.20.

> . . . but the Secretary subsequently began to seek orders compelling entry with notice when confronted with a refusal.

Brief at 24 n.24, quoted in 620 F.2d at 976 n.32. Similarly, despite the majority's statement that the Secretary's prohibition against advance notice of a warrant application was retained in all pre-Barlow's versions of the Secretary's operations manuals, the 1976 version of the manual merely provides that no advance notice shall be given of "compulsory process." As indicated above and as the Secretary himself conceded in Barlow's, compulsory process unlike a warrant application is normally an adversarial procedure since the court will customarily afford the employer an opportunity to be heard through the issuance of a show cause order. Therefore, the Secretary's prohibition against advance notice of such a proceeding means nothing more than that the Secretary will not duplicate the notice to an employer which as a matter of course would be furnished by the court. Accordingly, this change in language from the previous version of the operations manual supports the view of the Cerro court that the Secretary now intended that employers would have advance notice if the Secretary wished to enter without consent. 12/

Of the decisions of the four circuit courts of appeals on which the majority relies, only two, Marshall v. Seaward International, Inc., 510 F. Supp. 314 (W.D. Va. 1980), aff'd without published opinion, 644 F.2d 880 (4th Cir. 1981) and Stoddard Lumber Co. v. Marshall, 627 F.2d 984 (9th Cir. 1980), present any extended discussion of the issue. 13/ In Stoddard, the court agreed that

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12/ This conclusion is supported by the fact that the Secretary also deleted that portion of his operations manual authorizing warrant applications in certain situations even before inspectors attempted to enter a workplace.

13/ Marshall v. W & W Steel Co., 604 F.2d 1322 (10th Cir. 1979) involved an ex parte warrant issued after the 1978 amendment to the Secretary's regulation, at which time the Secretary specifically stated that the term "compulsory process" was intended to include ex parte warrants. The court did not express a view regarding the validity of an ex parte warrant issued prior to the amendment.

(Continued)

the Secretary had taken the position before the Supreme Court that a warrant was unnecessary because those who refused to permit inspection upon request were entitled to notice of compulsory process initiated by the Secretary. It noted as well the Secretary's deletion of his previous authorization of pre-refusal warrants 14/ and, finally, conceded that the Secretary "perhaps unwisely" altered his manual to reflect his belief that nonconsensual warrantless inspections were constitutional. The sole basis for the conclusion of this court and the court in Seaward that nevertheless the Secretary retained authority to obtain ex parte warrants was the view that the prohibition against "advance notice" of "compulsory process" necessarily contemplates ex parte warrants. Both Stoddard and Seaward also determined that such a conclusion is not inconsistent with the Supreme Court's opinion in Barlow's for the reason that the Supreme Court's comments regarding notice to employers must be read in the context of the type of process employed by the Secretary in that case.

I do not find this reasoning persuasive. As explained above, the fact that the Secretary amended his operations manual to proscribe advance notice of "compulsory process" does not indicate that he thereby intended an ex parte warrant procedure. By the same token, the fact that the Secretary had in Barlow's obtained an inspection order after the employer had an opportunity

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13/ (Continued)

Similarly, the court in Rockford Drop Forge Co. v. Donovan, 672 F.2d 626 (7th Cir. 1982), which also involved a warrant issued after the 1978 amendment, simply relied on the amendment without further elaboration.

14/ See note 12, supra.

to appear and defend supports rather than weakens the conclusion that this was the type of process contemplated by the Secretary. Indeed, Stoddard acknowledges that the Barlow's opinion "can be read as assuming that no ex parte warrant procedure was authorized by the regulations." 627 F.2d at 990.

Accordingly, I conclude that the Secretary's use of an ex parte warrant in this case is contrary to the Secretary regulation in effect at the time, 29 C.F.R. § 1903.4. The question then is what remedy should be applied. 15/ Respondent contends that the Commission should affirm the judge's decision to dismiss the Secretary's citations and complaint. The Secretary, asserting that the judge's order is equivalent to the suppression of evidence, argues that because the warrant in this case was issued prior to the federal district court order in Cerro, suppression of evidence here would be an impermissible retroactive application of the exclusionary rule.

As I have stated infra, this case does not present any issue relating to the validity of agency action under either the Constitution or the Act. Therefore, this issue whether evidence may be excluded as the remedy for an illegal inspection need not be addressed in the circumstances of this case. United States v. Caceres, 440 U.S. 741, 754-55 (1979). See Miller v. United States, 357 U.S. 301 (1958). 16/

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15/ In view of its disposition, the majority does not reach this issue. See note 8 of the lead opinion.

16/ Additionally, insofar as the Secretary's argument based on retroactivity is concerned, the warrant in this case was applied for and issued subsequent to the Barlow's decision in which the Supreme Court stated its view of Secretary's authority under his regulation. Furthermore, I note that the Court has recently articulated a new rule governing retroactivity of remedy in Fourth Amendment cases. United States v. Johnson, 50 U.S.L.W. 4742 (U.S. June 21, 1982) (No. 80-1608)

Concerning the "good faith" exception to the exclusionary rule, the Commission has previously considered the significance of the Fifth Circuit's en banc decision in United States v. Williams, 622 F.2d 830 (5th Cir. 1980). Noting that the court was divided on the application of the "good faith" principle in that

(Continued)

Rather, this case is governed by the well-established rule that an agency is bound by its own regulations and agency action may be invalidated if it fails to comply with agency rules. Service v. Dulles, 354 U.S. 363 (1957); Bray v. United States, 515 F.2d 1383 (Ct. Cl. 1975); Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959), cert. denied, 376 U.S. 915 (1946). The question, then, is whether such a remedy should be applied in this case. In a prior decision involving a challenge to the manner in which the Secretary conducted his inspection, the Commission ruled that the employer was entitled to relief for the Secretary's failure to afford the employer's representatives the right to accompany the inspection, as required by the Act and the Secretary's own rules. Western Waterproofing Co., 76 OSAHRC 64/A2, 4 BNA OSHC 1301, 1976-77 CCH OSHD ¶ 20,805 (No. 1087, 1976). The Commission reasoned that such "walkaround accords employers a substantive right which benefits the utility of inspections under the Act by aiding in voluntary abatement of hazardous working conditions and preventing unnecessary contests. The same may be said for the procedure contemplated by the Secretary's regulation at issue here. Providing an employer the opportunity to be heard in opposition to the Secretary's application

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16/ (Continued)

case, the Commission characterized the court's analysis as "of questionable precedential value." Sarasota Concrete Co., 81 OSAHRC 48/A2, p. 14, n.10, 9 BNA OSHC 1608, 1614 n.10, 1981 CCH OSHD ¶ 25,360 at 31, 533 n.10 (No. 78-5264, 1981), appeal filed, No. 81-5621 (5th Cir. June 23, 1981). In any event, assuming that the exclusionary rule is even relevant in this case, I would find it difficult to characterize the Secretary's conduct in this case to have been in good faith in view of the Secretary's practice prior to Barlow's and his representations to the Supreme Court in that case.

to enter for an inspection similarly could result in more efficient application of the Secretary's enforcement resources as well as prevent or reduce the issuance of baseless citations and consequent litigation. 17/ Indeed, the Secretary himself represented to the Supreme Court that giving the employer notice and opportunity to appear would protect the rights of the employer in the event the employer would not consent to inspection. Accordingly, in the circumstances of this case, I conclude that the judge acted properly in vacating the citations and dismissing the complaint for failure of the Secretary to act in accordance with his regulation. See United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954); Bridges v. Wixon, 326 U.S. 135 (1945).

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17/ While it may be true, as the majority contends, that other policy considerations would justify an ex parte warrant procedure, the Commission's inquiry here is limited to the notice procedure intended by the regulation in existence at the time this case arose.

I note that the Commission decision in Western Waterproofing, supra, was reversed on appeal. Marshall v. Western Waterproofing Co., 560 F.2d 947 (8th Cir. 1977). The court followed a prior decision in another circuit, Accu-Namics, Inc. v. OSHRC, 515 F.2d 828 (5th Cir. 1975), which held that an employer would not ordinarily be entitled to relief from denial of the right to accompany the inspector because the employer would be able to defend against any resulting citations through cross-examination of the inspector and presentation of its own evidence. I do not agree with the reasoning of the Fifth and Eighth Circuits on this issue. I think the Commission's decision in Western Waterproofing states the better rule.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, Complainant, | ( ) | OSHRC |
| v. | ( ) | Docket No. 78-5775 |
| DAVIS METAL STAMPING, INC., Respondent. | ( ) | |

For the Complainant: Max A. Wernick, Esquire

For the Respondent : Ronald L. Gaswirth, Esquire
Jane A. Matheson, Esquire

## DECISION AND ORDER

This matter is before me on a renewed motion by respondent to dismiss the complaint and vacate the citations which are the basis for the hearings heretofore held on preliminary matters and on the merits.

As grounds for the motion the respondent renews its argument that the citations were invalid since they were based on an inspection made pursuant to an *ex parte* inspection warrant.

There is no Commission precedent on the precise question presented, and the Circuit Courts of Appeal which have considered the issue are divided in their opinions.

The Third Circuit, in Cerro Metal Products v. Marshall, 620 F.2d 964, (decided April 24, 1980), CCH OSHD ¶24,411 (1980), held that 29 CFR 1903.4 did not permit and authorize ex parte inspection warrants. The Tenth Circuit, in W and W Steel Company, Inc. v. Marshall, 604 F.2d 1322, (decided August 28, 1979), CCH OSHD ¶23.807 (1979) had held that ex parte warrants issued under that section were valid. The Ninth Circuit, in Stoddard Lumber Co. v. Marshall, 627 F.2d 984 (decided September 18, 1980), CCH OSHD ¶24,790 (1980) has also held that ex parte warrants issued under similar circumstances were valid. The conflict between the circuits has not yet been resolved.

I am persuaded that the reasoning of the court in the Cerro case is correct, i.e., that the ex parte warrant issued in the case at bar on September 27, 1978 (prior to the amndment of 29 CFR 1903.4 by rule-making proceeding) was not valid. I must respectfully disagree with the reasoning of the courts in W and W Steel Company, Inc., (supra) and Stoddard Lumber Co. (supra). Accordingly, I will dismiss the complaint and vacate the citations herein. In view of this disposition I do not reach the merits of the case.

ORDER

The respondent's renewed motion to dismiss the complaint and vacate the citations in this matter, filed on May 8, 1980, is granted. The complaint is dismissed and the citations are vacated.

So ORDERED.

Louis G. LaVecchia
Judge, OSHRC

Dated: May 28, 1981

Dallas, Texas.

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

June 30, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Cincinnati Gas and Electric Co.

OSHRC DOCKET NO. 79-5974

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF ORDER

To wit: See attached.

FOR THE SECRETARY OF LABOR

- Counsel for Regional Litigation
  Office of the Solicitor, USDOL
  200 Constitution Ave., NW. - Rm. S-4014
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- William S. Kloepfer, Esq.
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- Katherine A. Keller, Esq.
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FOR EMPLOYEES

- Michael E. Gilligan, Business Mgr.
  Local Union 1347, IBEW
  4100 Colerain Ave.
  Cincinnati, Ohio 43223

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

- Judge Cecil L. Cutler, Jr.
  OSHRC
  1365 Peachtree Street, NE
  Room 240
  Atlanta, GA 30309

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>CINCINNATI GAS & ELECTRIC COMPANY,<br><br>Respondent,<br><br>and<br><br>INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, IBEW, LOCAL 1347,<br><br>Authorized Employee Representative. | ) | OSHRC DOCKET NO. 79-5974 |

ORDER

The Commission grants the joint motion to decline review and affirms the judge's decision, according it the precedential value of an unreviewed judge's decision. Abbott-Sommer, Inc., 76 OSAHRC 21/A2, 3 BNA OSHC 2032, 1975-76 CCH OSHD ¶ 20,428 (No. 9507, 1976; Leone Construction Co., 76 OSAHRC 12/E6, 3BNA OSHC 1979, 1975-76 CCH OSHD ¶ 20,387 (No. 4090, 1976) appeal withdrawn, No. 76-4070 (2d Cir., May 17, 1976). In light of the decision to grant the motion to decline review, the Commission need not address the Respondent's alternative motion for extension of time to file a review brief. Commissioner Cottine concurs. See Cargill, Inc., 79 OSAHRC 90/A2, 7 BNA OSHC 2045, 1979 CCH OSHD ¶ 23,981 (No. 78-2862, 1979)(Cottine, Commissioner, concurring).

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

Dated: JUN 30 1982

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
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| | | |
|---|---|---|
| SECRETARY OF LABOR, | ) | |
| Complainant, | ) | |
| v. | ) | OSHRC Docket No. 79-5974 |
| CINCINNATI GAS & ELECTRIC CO., | ) | |
| Respondent, | ) | |
| and | ) | |
| INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, IBEW, LOCAL 1347, | ) | |
| Authorized Employee Representative. | ) | |

APPEARANCES:

William S. Kloepfer, Esquire, Associate Regional Solicitor, U. S. Department of Labor, Cleveland, Ohio, by Bruce C. Heslop, Esquire, for complainant.

Kathleen M. Brinkman, Esquire, Cincinnati Gas & Electric Company, Cincinnati, Ohio, for respondent.

Robert Hauck, Business Manager, International Brotherhood of Electrical Workers, Cincinnati, Ohio, for the authorized employee representative.

## DECISION AND ORDER

Cutler, Judge:

Following an inspection of its workplace, respondent, Cincinnati Gas and Electric Company, (hereinafter CG&E), was issued a willful citation on October 11, 1979, pursuant to section 9(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, et seq., hereinafter the "Act").

The citation is comprised of four items with a penalty of $8,000 proposed for each. Under Item 1, respondent is charged with violating section 5(a)(1) of the Act, the general duty clause,[1/] as follows:

> "The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or were likely to cause death or serious physical harm to employees, in that:
>
> There was no safe work practices program to protect employees handling, storing and transferring line distribution capacitors which contained polychlorinated biphenyls (PCB's) in the basement of the material and repair building. The safe work practices program shall include, but not be limited to:
>
> a) Formulating and enforcing written safe operating procedures on the storage, handling and transferring of capacitors containing PCB's. These operating instructions shall include a description of the appropirate (sic) safe personal protective equipment to be worn by employees to prevent dermal, oral, inhalation and ocular exposures.
>
> b) Instructing present and newly hired employees on the chemical and physical properties of PCB's and training them in the health hazards associated with exposure to PCB's. The health hazard training shall include review of the acute and chronic toxic effects that could result from contact with PCB's.
>
> c) Regulating the access of the work areas where employees could come into contact with PCB's and posting warning signs to define such areas.
>
> d) Storing capacitors containing PCB's in tightly closed containers in an area provided with adequate fresh air ventilation and diking and inspecting the area daily for leaks and spills.

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1/ Under this provision each employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

e) Instructing present and newly hired employees to remove themselves from the work area if their personal protective clothing or devices become contaminated with PCB's and to remove the contaminated articles, disposing of them properly, washing contaminated parts of the body with soap and water for a minimum of 15 minutes. All employees working in regulated PCB areas shall shower on completion of work in the area(s).

f) Establishing PCB emergency spill procedure and training employees in the procedures so that accidental spills and leaks can be safely handled. These procedures shall include provisions to evacuate all non-essential personnel from the area, furnishing the necessary personnel entering the spill area with appropriate personal protective equipment, adequately ventilating the contaminated area to prevent the accumulation of vapors, and collecting and disposing of the spillage."

Item 2 of the citation charges respondent with failure to comply with the provisions of 29 C.F.R. § 1910.132(a)[2/] as follows:

"Protective equipment was not used where it was necessary by reason of hazards encountered in a manner capable of causing injury or impairment of the function of any part of the body:

The employer did not require employees to wear impervious personal protective equipment, i.e., full body covering and gloves and shoe coverings, when personnel were working with capacitors containing polychlorinated biphenyls in the basement of the material and repair building."

---

2/ This section (29 C.F.R. § 1910.132(a)) reads:

"Application. Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact."

Under Item 3, two violations are alleged. Item 3a charges a failure to comply with the provisions of 29 C.F.R. § 1910.133(a)(1)[3/] as follows:

"Protective eye and face equipment was not required where there was a reasonable probability of injury that could be prevented by such equipment:

The employer did not require employees to wear eye and face protection when personnel were handling and transferring capacitors containing polychlorinated biphenyls in the basement of the material and repair building."

Item 3b, citing 29 C.F.R. § 1910.151(c)[4/] states:

"Where employees were exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body were not provided within the work area for immediate emergency use:

The employer did not provide an eye wash and body shower to employees handling and transferring capacitors containing PCB contaminated oil in the basement of the material and repair building."

---

3/ This (29 C.F.R. § 1910.133(a)(1)) states:

"General. (1) Protective eye and face equipment shall be required where there is a reasonable probability of injury that can be prevented by such equipment. In such cases, employers shall make conveniently available a type of protector suitable for the work to be performed, and employees shall use such protectors. No unprotected person shall knowingly be subjected to a hazardous environmental condition. Suitable eye protectors shall be provided where machines or operations present the hazard of flying objects, glare, liquids, injurious radiation, or a combination of these hazards."

4/ This section (29 C.F.R. § 1910.151(c)) reads:

"Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use."

Under Item 4 of the citation, respondent was charged with failure to comply with the provisions of 29 C.F.R. § 1910.134(a)(2)[5/] requiring certain procedures and practices in connection with use of respirators when such equipment was necessary to protect the health of employees. At the hearing, respondent moved to dismiss this item. The Government conceded that air levels measured on the date of the inspection did not exceed the limits set in 29 C.F.R. § 1910.1000, Table Z(1). The Government's position was that, even though respirators were not required to be worn, when respondent chose to provide them safe procedures must be followed (Tr. 8-10, 88-89).

The gravamen of the violation charged is that respiratory equipment was necessary to protect the health of employees. The Government conceded the air level measurements were within permissible limits. Thus, employees were not exposed to an inhalation hazard and protective equipment was not necessary.[6/]

The motion to dismiss Item 4 by respondent was granted. This also included the reference to inhalation protection set forth in Item 1a (Tr. 90-91).

---

5/ This (29 C.F.R. § 1910.134(a)(2)) states:

> "Respirators shall be provided by the employer when such equipment is necessary to protect the health of the employee. The employer shall provide the respirators which are applicable and suitable for the purpose intended. The employer shall be responsible for the establishment and maintenance of a respiratory protective program which shall include the requirements outlined in paragraph (b) of this section."

6/ Corbin Lavoy dba Empire Boring Co., 76 OSAHRC 57/A2, 4 BNA OSHC 1259, 1974-75 CCH OSHD ¶ 19,056 (No. 792, 1974); Dick Corp., 79 OSAHRC 101/E8, 1976-77 CCH OSHD ¶ 21,296 (No. 16193, 1976). In both cases, the Commission did not address this issue upon review.

Hearings were held in Cincinnati, Ohio, in this case on June 10 and 11, 1980, and July 29, 1980.

Having requested and been given party status, Robert Hauck, Business Manager, Local 1347, International Brotherhood of Electrical Workers, participated in the proceedings.

There is no issue as to jurisdiction in that respondent, in its answer, concedes it is an employer engaged in a business affecting interstate commerce.

I

Following an employee complaint, respondent's work facility at 2004 Dana Avenue, Cincinnati, Ohio, was the subject of an inspection from August 31 through September 17, 1979, by the Secretary. The specific complaint concerned the adequacy of procedures for handling equipment and materials containing polychlorinated biphenyls (PCB).

On the first day of the inspection, Timothy Grabenstein and Steve Messinger, industrial hygienists for the Secretary, inspected the basement of the Material and Repair (M & R) Building located at the Dana Avenue facility. In diked areas of the basement, line capacitors of varying sizes removed from service are stored pending disposal. Some of the capacitors are stored in 55-gallon drums or plastic bags. Others are stored without any type of container or cover. As required by the Environmental Protection Agency (EPA), the steel drums and capacitors are labeled with caution signs indicating that they contain PCB (Ex. C-1; Tr. 22-30).

According to the evidence, the handling operation of capacitors in preparation for disposal is performed one or two times a month, requires three to four hours to complete, and involves three or four employees (Tr. 330-331, 466-467). Employees would remove the capacitors from banks or racks, record the serial

number, place them in containers for disposal. Smaller units would be placed in 55-gallon drums while larger ones were put in four-foot square steel boxes (Ex. C-7; Tr. 22-23, 64-69, 329-332). Approximately 15% of the capacitors leaked oil (Tr. 465).

Sampling to determine the presence of PCB and the levels of employee exposure thereto was performed on August 31 and September 17. Although employees were not engaged in handling capacitors on the earlier date, Mr. Messinger took a wipe sample of oily material on the floor adjacent to a plastic bag containing a leaking capacitor in storage (Ex. C-1, p. 2, bottom photograph; Ex. C-2, sample sheet 3, Wipe #1; Tr. 138-140). Analysis of that sample by the OSHA Laboratory determined that it contained 77 milligrams (mg) of PCB (Ex. C-2, C-6; Tr. 141, 369-371).

On September 17 Mr. Grabenstein performed wipe sampling and air sampling of employees engaged in the capacitor handling operation (Ex. C-3, C-4; Tr. 31-51). Wipe samples to determine the amount of PCBs on a particular surface area were taken with Whatman filters which were then placed in a plastic vial, identified by a sample number, and employee sampled were recorded on a sampling data sheet (Ex. C-3; Tr. 43-46). Air sampling to determine the levels of employee exposure to airborne PCBs was performed with respect to four employees working in the basement area. The sampling was performed using personal sampling pumps which drew air at a specified flow rate through florisil tubes placed in the breathing zone of each employee (Tr. 32-33). To insure that the sampling pumps were drawing air at the proper flow rate, the pumps were calibrated by Mr. Grabenstein before and after sampling (Tr. 33-35). On completion of each sample, the florisil tubes were identified by a sample number and sealed (Tr. 52). Pertinent sampling data such as

the name and job description of the employee sampled, the sampling number, sampling time, volume sampled, and pump calibration data were recorded on sampling data sheets (Ex. C-4; Tr. 46-50).

Following the inspection, the air and wipe samples were forwarded to the OSHA Laboratory, Salt Lake City, Utah, for analysis to determine the levels of PCBs in each sample (Tr. 53-54). The samples were received by the lab with the seals intact and assigned to chemist John Lay for analysis (Tr. 361-364). The wipe and florisil samples were analyzed by gas chromotography (Ex. C-23, R-4; Tr. 359-366). The results of analysis for each sample were recorded on the sampling data sheets and thereby reported to the Cincinnati Area Office (Ex. C-4, C-4; Tr. 56, 368).

Sampling on September 17, and the analysis of those samples, revealed the following with respect to employees engaged in the handling and disposal of line capacitors:

a) Gary Smith, construction helper, was removing capacitors from a capacitor bank and attaching them to the fork lift sling for transport and placement in a container. Air sampling in his breathing zone revealed that he was exposed to airborne PCBs at levels of 0.02 milligrams per cubic meter ($mg/m^3$) over a period of 71 minutes and 0.04 $mg/m^3$ over a period of 102 minutes. A wipe sample of his arm during the work shift revealed 8.5 micrograms (ug) of PCBs and a wipe sample of his hands and arms at the end of the work shift revealed PCBs at a level of 17 ug. Furthermore, a wipe sample of oil on the side of a capacitor which he was working on revealed 32 milligrams of PCBs (Tr. 44, 64-65; Ex. C-3, wipe samples 2, 3, 6, Ex. C-4, samples GS-1, GS-2, Ex. C-7, page 1, Ex. C-6).

b) Ernie Hall, mechanic A, was removing capacitors from capacitor banks and placing a capacitor contained in a plastic bag into a steel container. Air sampling disclosed that Mr. Hall was exposed to airborne PCBs of 0.03 $mg/M^3$ over a period of 74 minutes and 0.03 $mg/m^3$ over a period of 102 minutes. A wipe sample of his hands at the end of the work shift revealed a PCB concentration of 2.7 ug. (Tr. 45-46, 67-69; Ex. C-3, wipe sample 4, Ex. C-4, samples EH-1, EH-2, Ex. C-7, p. 3 bottom photo, p. 4 bottom photo, p. 5 top photo, Ex. C-6).

c) Pat McWilliams, fork truck operator, was operating the fork truck to move large capacitors from the storage area to the disposal containers. Air sampling revealed that he was exposed to PCBs at a level of 0.02 $mg/m^3$ for 49 minutes and 0.03 $mg/m^3$ over a period of 97 minutes (Tr. 66, Ex. C-4, samples PMW-1, PMW-2, Ex. C-7, p. 3 middle photo, Ex. C-6).

d) Greg Timme, construction helper, was removing capacitors from a capacitor bank and attaching them to the fork lift sling. Air sampling disclosed that he was exposed to 0.03$mg/m^3$ of PCBs over a period of 66 minutes and 0.04 $mg/m^3$ for a 102-minute period (Tr. 60, 64-65, 69; Ex. C-4 samples GT-1, GT-2, Ex. C-7 p. 1 bottom photo, p. 5 top photo, Ex. C-6).

Evidence presented by respondent was to the effect that, since 1978 when EPA storage and disposal requirements became effective, the procedures for handling and storing capacitors was proper (Ex. C-14; Tr. 344-345, 468). At the time of the OSHA inspection, CG&E provided its employees handling the capacitors on a voluntary basis plastic aprons, leather work gloves, rubber gloves, masks, face

shields, safety goggles and respirators (Tr. 179, 469). Supervisory personnel discussed the health effects of PCBs with employees. Employees were advised to wear the personal protective equipment, to avoid getting PCB fluid on clothes or skin, to wash the skin if there was contact, and to change clothes if necessary. Employees were cautioned to wash before eating if they handled PCB and they were given the opportunity to shower and wash (Tr. 336-338A, 467-469).

Concerning the specific operation involved with the treatment of capacitors in the Dana Avenue facility, leaking capacitors were stored only in containers or in a diked area (Tr. 470). Spills of PCB fluid did not exceed a couple of tablespoons (Tr. 480) and were cleaned up promptly with Speedy Dry, solvent and rags (Tr. 472). No open vats or splashable amounts of the fluid were handled by employees (Tr. 472) and the practice of puncturing or cutting capacitors or breaking off bushings was ordered stopped in 1977-78 (Tr. 340, 470). A fork lift was used to move leaking capacitors from the diked area to containers and employees were not required to manually lift or grasp capacitors which showed evidence of leakage on their cases (Tr. 343). The only type of PCBs which were detected leaking during the inspection was 42% chlorine PCB (Ex. C-6; Tr. 124).

Respondent also challenged the accuracy of the sampling performed by Mr. Grabenstein. For example, Mr. Grabenstein failed to change gloves between taking samples of a capacitor and of employees (Tr. 100, 102, 482, 483). Mr. Messinger testified that changing gloves was good industrial hygiene practice to prevent contamination of a second sample by the first (Tr. 177). Also, the filters used by Mr. Grabenstein were moistened with water when hexane should have been used (Tr. 115, 374).

Other factors could have affected the testing. Pesticides and petroleum products which are chlorinated or contain sulfur could cloud the analysis for presence of PCBs (Tr. 374). Soap or other products used to clean the skin, if chlorinated, also might interfere with analysis (Tr. 412).

II

Item 1 of Citation 1 alleges a number of willful violations under section 5(a)(1) of the Act. In order to establish a violation of the general duty clause, the Secretary must prove that (1) the employer failed to render its workplace free of a hazard, (2) which was recognized, and (3) which was "causing or likely to cause death or serious physical harm." (National Realty & Construction Co., Inc., 489 F.2d 1257 (D.C. Cir. 1973).

Complainant's position is that PCBs are a suspected carcinogen presenting a serious human health hazard and that there is no safe level of exposure. Accordingly, the development of a safe work practices program to reduce employee exposure to the lowest extent feasible is required. This, the Secretary avers, respondent's failure to implement and enforce a safe work practices program, as specified in Item 1, constitutes a recognized hazard likely to cause death or serious physical harm.

According to complainant, the hazards presented by PCBs to the environment and human health have been widely recognized and publicized. By passage of Section 6e of the Toxic Substances Control Act of 1976 (TSCA), Congress regulated the manufacture, processing, distribution in commerce, and use of PCBs (Ex. C-13). Rules concerning the disposal and marking of PCBs were issued by EPA and published in the Federal Register (Ex. C-14, C-15, C-16). The Electric Power Research Institute, Inc., (EPRI), of which CG&E is a member, published a series of

reports concerning the disposal of PCBs and PCB-contaminated materials (Ex. C-17; Tr. 165). The National Institute for Occupational Safety and Health (NIOSH) issued various reports on the subject (Ex. C-8, C-11, C-12).

Dr. Renate D. Kimbrough, M.D., a toxicology expert, testified concerning extensive research on the effects of PCBs upon certain animal species (Ex. C-24; Tr. 490-501). Based upon these studies, Dr. Kimbrough determined that PCBs are a carcinogen in animals and, therefore, must be considered a suspected carcinogen in humans (Tr. 501-503).

Nothwithstanding the reliance upon the NIOSH criteria document, the Toxic Substances Control Act, USEPA regulations, etc., the objective evidence does not sustain complainant. Dr. Kimbrough testified only that PCBs "'may' be a carcinogen in people" (Tr. 502). She was not asked whether the PCB exposure allegedly experienced by CG&E employees was "likely to produce death or serious physical harm." She was asked if it presented "a human health risk" and her reply was that "It would add to the body burden of PCBs and in that respect, it would increase the risk. On the other hand, it's difficult to determine from just those numbers how much PCB would actually be absorbed, since we don't have . . . the surface area" (Tr. 507).

Dr. Kimbrough's research with PCBs consisted of animal feeding studies involving 54% and 60% PCBs (Tr. 499-500). She could not determine if the effects of 42% PCBs would be different from the effects of 54% and 60% PCBs because it is not known which isomers are responsible for the toxic effects (Tr. 503).

Dr. R. Emmet Kelly, a medical doctor with 35 years' experience evaluating employees exposed to PCBs in an occupational setting, testified to a reasonable medical certainty that exposure to PCBs in a capacitor-handling operation, even as

frequently as two or three times a week, with skin contact of 17 micrograms, would not create a substantial probability that death or serious physical harm could result (Tr. 534-539). The only harm which could result might be eye irritation from eye contact from splash or PCB-contaminated gloves and this would be only "de minimis" (Tr. 531, 539). Dr. Kelly performed tests in which PCBs were put into the eyes of rabbits. The effect of 100% PCB solution after two minutes in the eye were found by him to be equivalent to the effect of a 20% Ivory soap solution in the eye (Tr. 531). Dr. Kelly's experience was with employees of Monsanto Chemical who were "at a magnitude of ten or 100 times more seriously exposed" (Tr. 538).

With respect to Dr. Kimbrough's findings, Dr. Kelly testified that he had evaluated her studies and disagreed with her conclusions. Her slides were reviewed by Dr. Pavis Paou, a pathologist at the Epply Institute for Cancer, University of Nebraska, and he disagreed with her findings of liver carcinoma (Ex. R-7; Tr. 540-541). And, according to Dr. Kelly, Monsanto's own animal PCB feeding studies of rats and dogs at three levels revealed no tumors (Ex. R-8; Tr. 540). Finally, subsequent to Dr. Kimbrough's report, the National Cancer Institute performed a rat feeding study with 54% PCBs and found PCBs were not carcinogenic (Ex. R-9; Tr. 548).

Considering the overall evidence, complainant has not established that employees of CG&E, at the times and places here in question, were exposed to a hazard likely to produce death or serious physical harm as required under section 5(a)(1) of the Act so as to mandate the work practices set forth in Item 1 of the citation.

Although unnecessary to resolve in view of the foregoing, respondent aptly points out that there is a specific standard for 42% PCB exposure set forth in 29

C.F.R. § 1910.1000(e) Table Z-1 (listed under chlorodiphenyls 42%). CG&E was in compliance with both the inhalation and dermal standards for 42% PCBs (Secretary's Response #4 to Request for Admissions). Chairman Cleary pointed out the well settled doctrine in Tolar Construction Co., (74 OSAHRC 85/F4, 2 BNA OSHC 1385, 1974-75 CCH OSHD ¶ 19,078 (No. 1329, 1974)): "Citing a respondent under the general duty requirement of the Act is not appropriate where there exists a specific occupational safety and health standard covering the conduct at issue."

III

Under Item 2, respondent is charged with a willful violation of 29 C.F.R. § 1910.132(a) in that CG&E did not require its employees to wear certain protective equipment, i.e., full body covering and gloves and shoe coverings. CG&E did not require the use of employees of the personal protective equipment, but it was provided on a voluntary bases.

As previously discussed in connection with Item 1, the Secretary has not established that a hazard exists from dermal contact with PCBs for the amount of exposure given in this case. CG&E was in compliance with the dermal standard for 42% PCBs. And, there is no evidence of record that any CG&E employee suffered any injury for dermal contact with PCBs.

Considering all of the evidence, I do not find the respondent in violation of 29 C.F.R. § 1910.132(a).

In view of the above finding, it is unnecessary to address respondent's arguments that the cited section was improperly promulgated or that the term "provide" does not mean "require the use of."

IV

Item 3a charges respondent with failing to comply with the provisions of 29 C.F.R. § 1910.133(a)(1) relating to protective eye and face equipment.

In view of the previous findings, the issue of eye protection need only be addressed here. According to Dr. Kelly, the only harm which could result from eye contact with PCB would be irritation which he described as de minimis. He did not consider the substance corrosive (Tr. 531) and Dr. Kimbrough admitted it was not in the sense that it would cause severe ulceration (Tr. 510). A violation is properly characterized as de minimis when it has only a negligible relationship to safety and health and where it is inappropriate to require that the violation be abated or to assess a penalty. National Rolling Mills Co., 76 OSAHRC 121/D7, 4 BNA OSHC 1719, 1976-77 CCH OSHD ¶ 21,114 (No. 7987, 1976); Hood Sailmakers, Inc., 77 OSAHRC 212/C12, 6 BNA OSHC 1206, 1977-78 CCH OSHD ¶ 22,422 (No. 13996, 1977).

Under the circumstances, the failure to require employees to use eye protection was, at most, a de minimis violation.

Under Item 3b, respondent is charged under 29 C.F.R. § 1910.151(c) with failing to provide eye wash and body shower facilities in the work area for quick flushing or drenching of eyes and body. CG&E did provide eye wash and shower facilities within one minute's walking distance of the basement capacitor handling area (Tr. 472-473).

Since the evidence was not established that a hazard from PCB dermal contact existed under the facts here and that eye contact would cause more than minor irritation, no necessity appears to require that such facilities be made available right in the work site. Accordingly, the citation must fail.

V

I reach the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Respondent is a utility company doing business in the Cincinnati, Ohio, area. In the basement of its Material and Repair Building at Dana Avenue,

Cincinnati, line capacitors removed from service are stored pending disposal. The capacitors of varying sizes, containing polychlorinated biphenyls (PCBs), are stored in diked areas. Some capacitors are contained in 55-gallon drums or plastic bags and some are stored without any type of container or cover.

2. The handling operation of capacitors in preparation of disposal is performed one or two times a month, requires three to four hours to complete, and involves three or four employees. On one occasion during the inspection, 15% were found by the compliance officer to be leaking oil.

3. Sampling to determine the presence of PCBs and the levels of employee exposure to PCBs was performed on August 31 and September 17, 1979.

4. Air levels measured during the inspection did not exceed the limits set forth in 29 C.F.R. § 1910.1000, Table Z(1).

5. Wipe samples were taken from capacitors in the area and from two emloyees which upon testing revealed presence of 42% PCB. Results of wipe samples from two other employees showed no PCB contact. The dermal exposure of the employees with positive tests did not exceed the limits set forth in 29 C.F.R. § 1910.1000(e) Table Z-1 (listed under chlorodiphenyls 42%).

6. At the time of the inspection, CG&E provided its employees on a voluntary basis plastic aprons, leather work gloves, rubber gloves, masks, face shields, safety goggles and respirators. Employees were advised to wear personal protective equipment, avoid getting PCB on clothes or skin, to wash the skin if there was contact, and to change clothes if necessary. Employees were cautioned to wash before eating if they handled PCBs and they were given the opportunity to shower and wash. Eye wash and shower facilities were provided which were within one minute's walking distance from the work area.

7. The probative evidence of record does not establish that the exposure of CG&E employees to the levels of 42% PCBs reflected by tests in this case would create a hazard likely to produce death or serious physical harm.

8. The probative evidence does not establish that impervious personal protective equipment, i.e., full body covering and gloves and shoe coverings, should be required to be used by employees when handling capacitors containing PCBs.

9. The probative evidence does not establish that protective eye and face equipment should be required to be used by employees when handling capacitors containing PCBs.

10. The probative evidence does not establish that eye wash and body shower facilities be provided in the immediate work area for employees handling capacitors containing PCBs.

11. There existed a remote possibility of employees having eye contact with PCBs from splashes or gloves, but such contact would result only in minor eye irritation.

## CONCLUSIONS OF LAW

1. Respondent is engaged in a business affecting commerce within the meaning of the Act and this Commission has jurisdiction over the subject matter and parties to this action.

2. Respondent at the times and place in question was not in violation of section 5(a)(1) of the Act.

3. Respondent at the time and place in question was not in violation of section 5(a)(2) of the Act by failing to comply with the provisions of 29 C.F.R. § 1910.132(a), 29 C.F.R. § 1910.133(a)(1) (relating to face equipment), 29 C.F.R. § 1910.151(c), and 29 C.F.R. § 1910.134(a)(2).

4. The respondent failed to comply with the provisions of 29 C.F.R. § 1910.133(a)(1) as to eye protection; however, the violation was de minimis.

## ORDER

Based upon the foregoing findings of fact and conclusions of law, Citation 1 is vacated except as to Item 3a relating to eye protection which is affirmed as a de minimis violation only.

SO ORDERED.

Dated this 12th day of November, 1980.

CECIL L. CUTLER, JR.
Judge

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

June 30, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Smith Steel Casting Company

OSHRC DOCKET NO. 80-2069 & 80-2822

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

REMAND

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR EMPLOYEES

-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

- Edwin G. Salyers
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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket Nos. 80-2069 & 80-2322 |
| SMITH STEEL CASTING COMPANY, | : | |
| Respondent. | : | |
| | : | |
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 80-2775 |
| COMPRESSOR ENGINEERING CORP., | : | |
| Respondent. | : | |
| | : | |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

These cases concern ex parte warrants obtained by the Secretary of Labor in early 1980 to inspect the workplaces of Smith Steel Casting Company in Marshall, Texas, and Compressor Engineering Corporation in Houston, Texas. The Secretary made the ex parte applications under his regulation at 29 C.F.R. § 1903.4 as amended in December 1978.[1/] The Respondents contend

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1/ The regulation at issue, 29 C.F.R. § 1903.4, as amended in 1978, provides in pertinent part as follows:

(continued on next page)

that this regulation is invalid and moved that the evidence gathered during the inspections be suppressed. Judge Edwin G. Salyers in Docket Nos. 80-2069 and 80-2322 (Smith Steel Casting Company) and Judge E. Carter Botkin in Docket No. 80-2775 (Compressor Engineering Corporation), upheld the Respondents' contentions, relying on Donovan v. Huffhines Steel Co., 645 F.2d 288 (5th Cir. Unit A, 1981). See also Cerro Metal Products v. Marshall, 620 F.2d 964 (3d Cir. 1980). But see Marshall v. Seaward International, Inc., 644 F.2d 880 (4th Cir. 1981) (table), aff'g 510 F. Supp. 314 (W.D. Va. 1980); Rockford Drop Forge Co. v. Donovan, 672 F.2d 626 (7th Cir. 1982); W & W Steel Co. v.Marshall, 604 F.2d 1322 (10th Cir. 1979). The Secretary's petitions for review in both cases were granted.[2/]

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1/ (continued)

§ 1903.4 Objection to inspection

(a) Upon a refusal to permit a Compliance Safety and Health Officer, in exercise of his official duties, to enter without delay and at reasonable times any place of employment or any place therein, to inspect, . . . [he] shall endeavor to ascertain the reason for such refusal, and shall immediately report the refusal and the reason therefor to the Area Director. The Area Director shall consult with the Regional Solicitor, who shall take appropriate action, including compulsory process, if necessary.

* * *

(d) For purposes of this section, the term compulsory process shall mean the institution of any appropriate action, including ex parte application for an inspection warrant or its equivalent.

2/ The cases are before the Commission for review pursuant to 29 U.S.C. § 661(i). Commissioner Cottine granted the Secretary's petition in Docket Nos. 80-2069 and 80-2322. Commissioner Cleary granted the Secretary's petition in Docket No. 80-2775. Because the cases present the same issue, the Commission has consolidated them for purposes of review. Commission Rule 9, 29 C.F.R. § 2200.9.

The Commission has held that the Secretary had authority under section 1903.4 as amended in 1978 to obtain ex parte warrants. Roberts Consolidated Industries, Inc., OSHRC Docket Nos. 80-2423 and 80-2860 (June 30, 1982). See also Davis Metal Stamping, Inc., OSHRC Docket No. 78-5775 (June 30, 1982). This Commission precedent controls the disposition of these cases. The Secretary was authorized to obtain the ex parte warrants and the inspections conducted under the warrants were valid. Furthermore, for the reasons set forth in Davis Metal Stamping, Inc., we do not read the opinion in Donovan v. Huffhines Steel Co., supra, to require the Commission to reach a contrary result in the disposition or remedy in this case. We therefore set aside the judges' decisions[3/] and remand the cases to the respective judges for further proceedings consistent with this opinion.[4/] SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: JUN 30 1982

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3/ Chairman Rowland concludes that the Secretary improperly obtained the warrants in these cases and would vacate the Secretary's citations for the reasons stated in his dissenting opinions in Roberts Consolidated Industries and Davis Metal Stamping.

4/ Docket No. 80-2775 (Compressor Engineering Corporation) is hereby severed from Docket Nos. 80-2069 and 80-2322 (Smith Steel Casting Company). Commission Rule 10, 29 C.F.R. § 2200.10.

UNITED STATES OF AMERICA
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| | | |
|---|---|---|
| SECRETARY OF LABOR, | ) | |
| Complainant, | ) | |
| v. | ) | OSHRC Docket Nos. |
| SMITH STEEL CASTING COMPANY, | ) | 80-2069 & 80-2322 |
| Respondent. | ) | |

APPEARANCES:

Robert A. Fitz, Esquire, Office of the Solicitor, Dallas, Texas, on behalf of the complainant.

Robert D. Moran, Esquire, Washington, D. C., on behalf of the respondent.

Ernest F. Smith, Esquire, Marshall, Texas, on behalf of the respondent.

## DECISION AND ORDER

SALYERS, Judge: On January 22, 1980, Industrial Hygienist Jack M. Matthews, Jr., an employee of the Occupational Safety and Health Administration, conducted a walk-around inspection of Smith Steel Casting Company (hereinafter respondent) in Marshall, Texas. The purpose of the inspection was to determine if respondent's employees were exposed to excessive levels of noise and air contaminates in contravention of the Occupational Safety and Health Act (29 U.S.C. § 651, et seq.). The respondent offered no resistance to this initial inspection. Matthews was accompanied on the walk-around by respondent's Vice-President, Ms. Geraldine Mauthe.

Matthews first visited the core-making area where sand is mixed for use in respondent's operations and noticed visible quantities of silica dust had accumulated on the person and clothing of employees working in this area (Tr. 48–49). He then moved to the floor molding area where he observed employees making molds using a sand ramming tool and concluded these employees were potentially exposed to high levels of silica dust (Tr. 55). The next area where Matthews noted a potential hazard was in the furnace area. There he noticed a great deal of noise was created when electric arcs were lowered into the furnace to initiate the melting process (Tr. 58). Using a sound level meter he also determined potential excess noise levels in the finishing area (Tr. 61). He further noted in the finishing area an employee using an electric arc welding machine with a copper coated electrode, and concluded this could cause a potential for excess levels of copper fumes (Tr. 62).

At the completion of the walk-around inspection, Matthews conferred with respondent's Vice-President and informed her of his findings. He explained his preliminary conclusions indicated employee exposure to excessive noise levels, silica dust and copper fumes. However, to confirm his suspicions, he further advised it would be necessary for him to return the following day to conduct additional testing (Tr. 79).

The following day, January 23, 1980, an associate of Matthews, Mr. Thornhill,[1/] returned to respondent's establishment for the purpose of conducting additional testing for excessive noise levels. Upon his arrival, he was advised by Ms. Mauthe and Mr. Gerald Smith, respondent's President, that continuation of the

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1/ Matthews was unavailable on this date since he had been summoned for jury duty.

inspection would not be permitted. At that point, Mr. Thornhill left the premises and returned to his office (Tr. 95).

On February 25, 1980, the Secretary of Labor (hereinafter Secretary) applied for an inspection warrant to the United States District Court, Eastern District of Texas, Tyler Division. While the Secretary supported his request with an affidavit of his hygienist, the proceeding was ex parte. United States Magistrate Houston Abel issued the requested warrant and it was upon the basis of this ex parte warrant that the Secretary conducted a further inspection of respondent which has become the subject matter of this case.

Counsel for respondent has vigorously maintained throughout this proceeding that the use of an ex parte warrant by the Secretary was an illegal act and that all evidence obtained by use of this warrant should be suppressed.

Section 8(g)(2) of the Act [2/] empowers the Secretary to promulgate such "rules and regulations" needed to carry out inspections under the Act. However, Congress did not specifically provide the Secretary in the statute with authority to conduct a search of an employer's place of business. In keeping with the mandate of the statute, the Secretary adopted and promulgated a regulation to deal with a situation where an employer refuses to permit inspection. On September 4, 1971, the Secretary published 29 C.F.R. § 1903.4 [3/] which empowered his agents to take "appropriate action" in such cases including "compulsory process." The term "compulsory process" was not defined.

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2/ Section 8(g)(2) of the Act states:
"The Secretary and the Secretary of Health, Education and Welfare shall each prescribe such rules and regulations as he may deem necessary to carry out their responsibilities under this Act, including rules and regulations dealing with the inspection of employer's establishment."

3/ 29 C.F.R. § 1903.4 states:

This regulation came under attack in 1978 when the Supreme Court decided Marshall v. Barlow's, Inc., 436 U.S. 307 (1978). In addressing the Secretary's argument that effective enforcement of the Act required warrantless searches, the Court stated:

> "Indeed, the kind of process sought in this case and apparently anticipated by the regulation provides notice to the business operator. [Footnote omitted.] If this safeguard endangers the efficient administration of OSHA, the Secretary should never have adopted it, particularly when the Act does not require it. Nor is it immediately apparent why the advantages of surprise would be lost if, after being refused entry, procedures were available for the Secretary to seek an ex parte warrant and to reappear at the premises without further notice to the establishment being inspected. [The Court then states in a footnote: "Insofar as the Secretary's statutory authority is concerned, a regulation expressly providing that the Secretary could proceed ex parte to seek a warrant or its equivalent would appear to be as much within the Secretary's power as the regulation currently in force and calling for "compulsory process."] (436 U.S. at 318–320; emphasis supplied.)"

While the foregoing quotation is dictum since it was not directed to the specific issue in the case (i.e. warrantless searches), it was, apparently, taken seriously by the Secretary. On December 22, 1978, shortly after the Barlow's

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3/ 29 C.F.R. § 1903.4

"Upon a refusal to permit a Compliance Safety and Health Officer, in the exercise of his official duties, to enter without delay and at reasonable times any place of employment or any place therein, to inspect, to review records, or to question any employer, owner, operator, agent, or employee, in accordance with § 1903.3, or to permit a representative of employees to accompany the Compliance Safety and Health Officer during the physical inspection of any workplace in accordance with § 1903.8, the Compliance Safety and Health Officer shall terminate the inspection or confine the inspection to other areas, conditions, structures, machines, apparatus, devices, equipment, materials, records, or interviews concerning which no objection is raised. The Compliance Safety and Health Officer shall endeavor to ascertain the reason for such refusal, and he shall immediately report the refusal and the reason therefor to the Area Director. The Area Director shall immediately consult with the Assistant Regional Director and the Regional Solicitor, who shall promptly take appropriate action, including compulsory process, if necessary."

decision, the Secretary amended 29 C.F.R. § 1903.4 by defining the term "compulsory process" to include "ex parte application for an inspection warrant." 42 Fed. Reg. 59, 839 (December 22, 1978). This amendment, however, was made without prior notice and the opportunity to comment as required by the Administrative Procedures Act, 5 U.S.C. § 553. This section provides an exemption for "interpretive rules" which the Secretary asserts was his intention in adopting the amendment. 4/

It is well established that regulations which are properly issued in accordance with the Administrative Procedures Act have the force and effect of law. However, interpretive rules are not binding on the Courts and while Courts may defer to them "they are always free to choose otherwise." Joseph v. U.S. Civil Service Commission, 554 F.2d 1140 at 1154 n. 26 (D.C. Cir. 1977).

Conflicting views on the effect of the Secretary's 1978 amendment of 29 C.F.R. § 1903.4 have emerged in various District Court and Appellate decisions. The law is presently far from settled.

Both the Ninth and Tenth U. S. Circuit Courts of Appeal have agreed with the

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4/ 5 U.S.C. § 553(b) states in pertinent part:

> "General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—
>
> (1) a statement of the time, place, and nature of public rule making proceedings;
>
> (2) reference to the legal authority under which the rule is proposed; and
>
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
>
> Except when notice or hearing is required by statute, this subsection does not apply—
>
> "(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice . . ."

Secretary's position that his 1978 amendment of 29 C.F.R. § 1903.4 to include ex parte warrants was an interpretive rule not subject to the rule making process of the Administrative Procedures Act. Thus, they have held that ex parte warrants issued after the amendment were a valid exercise of the Secretary's authority. Marshall v. W. W. Steel Co., Inc., 604 F.2d 1322 (10th Cir. 1979); Stoddard Lumber Co., Inc., 627 F.2d 984 (9th Cir. 1980). See also, Amoco Oil Co., 469 F. Supp. 1234 (S.D. Tex. 1979), 1980 CCH OSHD ¶ 24,789.

On the other hand, the Third Circuit and, most recently, the Fifth Circuit, have taken contrary views. In Cerro Metal Products v. Marshall, 620 F.2d 964 (3rd Cir. 1980), the Court held that the Secretary's attempt to amend the regulation in 1978 by characterizing the change as an "interpretive rule" (and thereby exempt how the rule making process of the Administrative Procedures Act) rather than a "legislative rule" was a nullity, although the Court recognized the Secretary had "the delegated power to issue a legislative rule on the matter." The Court in Marshall v. Huffhines Steel Co., 488 F. Supp. 995 (D.C. N.D. Tex. 1979) followed the reasoning of Cerro. This District Court decision was affirmed by the Fifth Circuit. Donovan v. Huffines Steel Co., 652 F.2d 288 (5th Cir. May 15, 1981). 5/

The rationale of the Huffines case is controlling in this matter since the case at hand is venued in the Fifth Circuit. The undersigned is constrained to conclude that the Secretary's use of an ex parte warrant at a time prior to legally amending the regulation to include such a procedure was an invalid act. The evidence in this case will, therefore, be suppressed and the Secretary's Complaint will be dismissed.

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5/ As pointed out in Judge Rubin's concurring opinion, the question has now become moot. On October 3, 1980, the Secretary, after following the rule making processes of the Administrative Procedures Act, changed the regulations to include ex parte warrants. 45 Fed. Reg. 65, 916-24.

SO ORDERED:

Dated this 25th day of August, 1981.

Edwin G. Salyers

EDWIN G. SALYERS
Judge

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| Docket No. | Case Name | Date of Decision | Coordinates |
|---|---|---|---|
| 80-2423 & 80-2860 (consolidated) | ROBERTS CONSOLIDATED INDUSTRIES, INC. | 6/30/82 | 38/A2 |
| | (Judge's decision) | | 38/A9 |
| 80-2775 | COMPRESSOR ENGINEERING CORP. [remand] | 6/30/82 | 38/E7 |
| | (Judge's decision) | | 38/E11 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

June 30, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Roberts Consolidated Industries, Inc.

OSHRC DOCKET NO. 80-2423 & 80-2860

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>ROBERTS CONSOLIDATED INDUSTRIES, INC.,<br><br>Respondent. | OSHRC Docket Nos. 80-2423 & 80-2860 |

DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge James D. Burroughs is before the Commission for review pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). In his decision, Judge Burroughs denied a motion by Respondent, Roberts Consolidated Industries, Inc., to suppress evidence obtained as the result of an allegedly illegal search of Respondent's facility conducted by the Secretary of Labor ("the Secretary"). The judge rejected Respondent's contention that the search warrant purportedly authorizing the Secretary's inspection was invalid because the warrant was sought and obtained on an ex parte basis. He concluded that the warrant was obtained pursuant to the Secretary's regulation at 29 C.F.R. § 1903.4, as amended in December 1978, and that the amendment "was effective and in force on the date when the warrant was issued in the present case." 1/ Both

1/ The regulation at issue, 29 C.F.R. § 1903.4, as amended in 1978, provides in pertinent part as follows:

§ 1903.4 Objection to inspection

(a) Upon a refusal to permit a Compliance Safety and Health Officer, in exercise of his official duties, to enter without delay and at reasonable times any place of employment or any place therein, to inspect, . . . [he] shall endeavor to ascertain the reason

parties petitioned for review of differing aspects of the judge's decision. Commissioner Cottine granted Respondent's petition in part, specifically limiting review to the following issue:

> Whether the judge erred in denying the Respondent's motion to suppress evidence on the ground that the Secretary properly obtained an ex parte warrant, despite the Respondent's advance request for notice and opportunity to be heard at the warrant hearing.

For the reasons stated below, we uphold the judge's determination that the warrant here was validly issued.

I

In November 1979, Occupational Safety and Health Administration ("OSHA") compliance officers attempted to inspect a workplace operated by Respondent, a manufacturer of adhesives, in Dayton, Ohio. The compliance officers were denied entry by Respondent's plant manager, who explained that it was company policy not to allow an inspection without a search warrant. The following day, the plant manager telephoned one of the OSHA compliance officers to advise him that Respondent wished to have its attorneys present whenever OSHA attempted to obtain a warrant. 2/ In April 1980, the Secretary sought and obtained a warrant to inspect Respondent's premises. Representatives of Respondent were not informed

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(Footnote 1 cont'd)

> for such refusal, and shall immediately report the refusal and the reason therefor to the Area Director. The Area Director shall consult with the Regional Solicitor, who shall take appropriate action, including compulsory process, if necessary.
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> * * *
>
> (d) For purposes of this section, the term compulsory process shall mean the institution of any appropriate action, including ex parte application for an inspection warrant or its equivalent.

2/ Respondent also wrote to the U.S. Magistrates in Dayton and Cincinnati, Ohio, requesting that it be permitted to appear at any proceeding scheduled as a result of OSHA's application for a search warrant to inspect the Dayton facility.

that a warrant was being sought, and none were present at the hearing concerning the issuance of the warrant. The Secretary subsequently served the warrant on Respondent, inspected the plant, and issued two separate citations alleging Respondent's failure to comply with various occupational safety and health standards. 3/

II

The regulation at issue, 29 C.F.R. § 1903.4 as amended in 1978 without formal rulemaking proceedings, authorizes the Secretary by its express terms to seek and obtain search warrants on an ex parte basis. The issue before us is whether the regulation itself is invalid, thereby rendering invalid the warrant issued under the regulation. Resolution of this issue turns on the question of whether the Secretary's 1978 amendment of 29 C.F.R. § 1903.4 was an interpretative rule, as argued by the Secretary and concluded by the judge, or an improperly promulgated substantive change of the pre-existing rule, as argued by Respondent. See Marshall v. Huffhines Steel Co., 488 F. Supp. 995, 1000 (N.D.Tex. 1979), aff'd, 645 F.2d 288 (5th Cir. 1981).

The regulation originally published at 29 C.F.R. § 1903.4 instructed the Secretary's agents "to promptly take appropriate action, including compulsory process, if necessary" whenever an employer refused to permit a compliance officer to conduct an inspection. The key term "compulsory process" was not defined. In December 1978, the Secretary amended section 1903.4 by adding a definition of the term "compulsory process" to mean "the institution of any appropriate action, including ex parte application for an inspection warrant or its equivalent." 43 Fed. Reg. 59,838, 59,839 (Dec. 22, 1978)(29 C.F.R. § 1903.4(d) (1979)). In

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3/ Following Respondent's filing of a separate notice of contest as to each citation, the two cases were assigned docket numbers 80-2423 and 80-2860, respectively. The cases were ordered consolidated prior to the hearing before Judge Burroughs. At the beginning of the hearing, Respondent moved to suppress the evidence on the ground that the search warrant was invalid. The judge reserved ruling on the motion, which he subsequently denied in his decision. Accordingly, the case was fully litigated and decided on the merits of the alleged violations. In his decision, Judge Burroughs affirmed the citation in Docket No. 80-2423 and affirmed in part and vacated in part the citation in Docket No. 80-2860. The judge's disposition of these citations on the merits is not before us.

explaining this change, the Secretary indicated that he had always intended "compulsory process" to include ex parte warrants and that his agents in the past routinely had sought and obtained warrants in ex parte proceedings. 43 Fed. Reg. at 59,839. The Secretary therefore stated that notice and comment rulemaking was unnecessary for this "interpretative rule." Id. 4/

Respondent's argument in this case that the 1978 amendment was invalid is based on the reasoning and the holdings of the courts in Marshall v. Huffhines Steel Co., supra, and in Cerro Metal Products v. Marshall, 620 F.2d 964 (3rd Cir. 1980). Both courts concluded, contrary to the Secretary's assertion, that the original 29 C.F.R. § 1903.4 did not authorize the Secretary to obtain ex parte warrants. Accordingly, they further concluded that the 1978 amendment was not an interpretation of the term "compulsory process" as it was used in the original regulation. Instead, the courts viewed the amendment as a substantive change in the law that could be accomplished only through notice and comment rulemaking.

III

We reject Respondent's contention that we should adopt the position of the courts in Cerro Metal Products and Huffhines Steel. In Davis Metal Stamping, Inc., OSHRC Docket No. 78-5775 (June 30, 1982), we recently interpreted the original regulation at 29 C.F.R. § 1903.4, which is the predecessor to the regulation that

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4/ The Administrative Procedure Act provides in pertinent part, at 5 U.S.C. § 553(b):

> General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—
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> (1) a statement of the time, place, and nature of public rule making proceedings;
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> * * *
>
> Except when notice or hearing is required by statute, this subsection does not apply—
>
> (A) to interpretative rules . . . .

is now before us. We concluded that the Secretary was authorized under the original regulation to seek and obtain search warrants on an ex parte basis. In reaching this conclusion, we expressly considered and declined to follow the reasoning of the Cerro Metal Products and Huffhines Steel courts with respect to the proper interpretation of the original section 1903.4. Accordingly, having previously rejected the premise of those courts that the Secretary had no authority under the original regulation to obtain ex parte warrants, we now reject their conclusion that the 1978 amendment constituted a substantive change in the law. We accept the Secretary's characterization of the 1978 amendment as an interpretative rule based on our own conclusion that the amendment merely stated expressly what was already implicit in the regulation, i.e., that the Secretary was empowered to obtain search warrants in an ex parte proceeding. Davis Metal Stamping, Inc., supra. 5/ In addition, we note that our determination in this case is supported by the holdings of a majority of those United States courts of appeals that have considered the validity of the regulation at issue. Rockford Drop Forge Co. v. Donovan, 672 F.2d 626 (7th Cir. 1982); Marshall v. Seaward International, Inc., 510 F. Supp. 314 (W.D. Va. 1980), aff'd without published opinion, 644 F.2d 880 (4th Cir. 1981); Marshall v. W & W Steel Co., 604 F.2d 1322, 1325-6 (10th Cir. 1979). 6/

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5/ For the reasons stated in his dissenting opinion in Davis Metal Stamping, Inc., Chairman Rowland agrees with the holdings of the Third and Fifth Circuits in Cerro Metal Products and Huffhines Steel that the Secretary's original regulation did not authorize him to obtain warrants ex parte. Accordingly, in the Chairman's view those courts also properly held that the Secretary's 1978 amendment purporting to interpret his authority under that regulation was without force and effect.

Chariman Rowland also observes that, as in Davis Metal Stamping, the appropriate remedy is vacation of the Secretary's citations for failure of the Secretary to comply with his own regulation rather than suppression of the evidence obtained thereby.

6/ Our conclusion as to the validity of the ex parte warrant is not altered because of the Respondent's advance request for notice and an opportunity to be heard at the warrant hearing. A similar contention by an employer in Rockford Drop Forge Co. v. Donovan, supra, was rejected. The court

For the reasons stated, we affirm Judge Burroughs' holdings that the regulation at issue and the search warrant issued under it were valid. We further affirm his denial of Respondent's motion to suppress evidence.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

Dated: JUN 30 1982

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(Footnote 6 cont'd)

referred to statements in Marshall v. Barlow's, Inc., 436 U.S. 307, 316, 319-20 (1978), indicating that advance notice of a warrant application is not required, and to the prohibitions against advance notice of inspections contained in section 2(b)(10) of the Act, 29 U.S.C. § 651(b)(10), as well as the OSHA Compliance Operations Manual and Field Operations Manual. See also Marshall v. Seaward International, Inc., supra; Matter of Worksite Inspection of S.D. Warren, 481 F. Supp. 491, 495 (D.Me. 1979).

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| SECRETARY OF LABOR, | ) | |
| Complainant, | ) | |
| v. | ) | OSHRC Docket Nos. |
| ROBERTS CONSOLIDATED INDUSTRIES, INC., | ) | 80-2423 and 80-2860 |
| Respondent, | ) | (Consolidated) |
| and | ) | |
| UNITED AUTOMOBILE WORKERS, LOCAL 888, | ) | |
| Authorized Employee Representative. | ) | |

## DECISION AND ORDER

APPEARANCES:

Michael A. Alaimo, Esquire, Office of the Solicitor, U. S. Department of Labor, Detroit, Michigan, on behalf of complainant

Richard A. DiRose, Esquire, and Robert A. Rapp, Esquire, Dayton, Ohio, on behalf of respondent

Mr. Paul L. Bogan, President, Local 888, on behalf of authorized employee representative

BURROUGHS, Judge: Roberts Consolidated Industries, Inc., a manufacturer of adhesives, contests a serious citation issued to it on April 18, 1980 (Docket No. 80-2423), alleging a violation of 29 C.F.R. § 1910.134(d)(2)(ii), and a serious citation

issued to it on April 23, 1980[1/] (Docket No. 80-2860), alleging a violation of fourteen separate safety standards.

This action arises out of an inspection conducted by representatives of the Occupational Safety and Health Administration ("OSHA") from April 2 through April 7, 1980, pursuant to an ex parte warrant issued by a United States Magistrate. Respondent argues that OSHA did not have authority to obtain a warrant ex parte. As relief, respondent requests that the April 1980 search be declared unconstitutional and that evidence obtained during the search be suppressed. Additionally, respondent seeks to have the evidence suppressed for complainant's failure to allow a closing conference at the completion of the inspection. A motion to suppress was filed by respondent at the commencement of the hearing. The motion was taken under advisement and evidence received on the issue, since the Commission has authority to decide questions concerning the validity of individual inspection warrants. Chromalloy American Corp., 79 OSAHRC 55/D11, 7 BNA OSHC 1547, 1979 CCH OSHD ¶ 23, 707 (No. 77-2788, 1979).

## MOTION TO SUPPRESS

### A. Ex Parte Warrant

In October 1979 the Cincinnati, Ohio, OSHA office received a complaint concerning possible violations of safety and health standards at respondent's plant located on 220 Janney Road, Dayton, Ohio. On November 20, 1979, Industrial Hygienist David Zwolak and three compliance officers attempted to conduct an

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1/ Respondent also contested an "other" citation issued to it on April 23, 1980, but withdrew its notice of contest to that citation during the course of the hearing (Tr. II, 24). The "other" citation alleged a violation of 29 C.F.R. § 1910.178(a)(6).

inspection at the Janney Road plant. Upon identifying themselves to George Stockham, the plant manager, they were advised that it was company policy to decline to allow an inspection without a search warrant. Zwolak and the three compliance officers voluntarily left the premises but indicated they would return with a search warrant (Tr. II, 132, 136-137).[2/]

On November 21, 1979, upon the advice of counsel, Stockham telephoned Zwolak to advise him that respondent wanted their attorneys present whenever OSHA attempted to obtain a warrant (Tr. II, 136-137). The Cincinnati, Ohio, OSHA office referred the matter to the Solicitor's Office for assistance in obtaining the warrant (Tr. II, 132, 135, 137). Representatives of respondent were not informed that a warrant was being sought, and none were present during the hearing on the issuance of the warrant (Tr. II, 137-138). Armed with the warrant, Compliance Officers James Zucchero and Paula Moore and Industrial Hygienist James Sweeney commenced an inspection of respondent's plant on April 2, 1980.

Respondent argues that 29 C.F.R. § 1903.4, both as originally promulgated and as amended, does not authorize the Secretary to apply for OSHA inspection warrants ex parte. It asserts that the Supreme Court's decision in Marshall v. Barlow's, Inc., 436 U. S. 307 (1978), stated that 29 C.F.R. § 1903.4, as it existed at the time of the decision, did not authorize the Secretary to obtain ex parte warrants and that the subsequent amendment of section 1903.4 was invalid since it was not issued in accordance with the notice and comment procedures of section 4 of the Administrative Procedures Act. Respondent relies principally upon the decision and the reasoning of the court in Cerro Metal Products v. Marshall, 620

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2/ The hearing was held on September 8 and 9, 1980. For some unexplained reason, each day's transcript commences with page one. The reference to "Tr. I" is used to refer to the transcript for September 8, 1980. The use of "Tr. II" refers to the transcript for September 9, 1980.

F.2d 964 (3rd Cir. 1980). The Third Circuit, in affirming the District Court's granting of a preliminary injunction prohibiting OSHA from obtaining ex parte warrants to inspect the employer's workplace, placed great weight upon the Supreme Court's dictum in Barlow's that "the kind of process . . . apparently anticipated by . . . regulation [§ 1903.4] provides notice to the business operator." 436 U. S. at 318. The Third Circuit recognized that the Supreme Court's interpretation of section 1903.4 may well be technically categorized as dictum but chose to follow it "as a matter of sound judicial policy" and concluded that section 1903.4, as originally promulgated, "did not empower OSHA to seek ex parte warrants." 620 F.2d at 979.

There is no congressionally enacted statute specifically authorizing the Secretary to conduct a search of an employer's place of business. However, section 8(g)(2) of the Act [29 U.S.C. § 657(g)(2)] states that the Secretary shall prescribe rules and regulations dealing with the inspection of an employer's establishment.[3/] Pursuant to section 8(g)(2), the Secretary, in 1971, after notice and comment, promulgated 29 C.F.R. § 1903.4,[4/] which outlined the steps to be followed by a compliance officer when an employer refused him entry.

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3/ Section 8(g)(2) of the Act in its entirety is as follows:

> The Secretary and the Secretary of Health, Education, and Welfare shall each prescribe such rules and regulations as he may deem necessary to carry out their responsibilities under this Act, including rules and regulations dealing with the inspection of an employer's establishment.

4/ Section 1903.4 of 29 C.F.R., as promulgated in 1971, provided that, upon refusal of a company to permit a compliance officer to enter or to permit a representative of the employees to accompany him on an inspection, the officer was to terminate the inspection or to confine the inspection to areas where no objection was raised. In the event of a refusal, the officer was to try and determine the reason for refusal and immediately report to his area director. The area director was required to consult with the Assistant Regional Director and the Regional Solicitor, "who shall promptly take appropriate action, including compulsory process, if necessary."

The Supreme Court rendered its opinion in Marshall v. Barlow's, Inc., supra, in January of 1978. The Court dealt at length with 29 C.F.R. § 1903.4 and, in the final analysis, concluded that the Act was unconstitutional insofar as it purported to authorize inspections without a warrant or its equivalent. 436 U. S. at 325. The Court indicated that "the kind of process sought in this case and apparently anticipated by the regulations [§ 1903.4] provides notice to the business operator." 436 U. S. at 318. The Court indicated in a footnote that a regulation expressly providing for ex parte warrants would be within the Secretary's statutory authority.[5/] Following the opinion of the Court in Barlow's, the Secretary, effective December 22, 1978, amended 29 C.F.R. § 1903.4, without notice and comment, to define the term "compulsory process" appearing in that regulation to include ex parte warrants.[6/] The rulemaking process provided by the

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5/ Note 15 set forth in 436 U. S. at 320 states:

> Insofar as the Secretary's statutory authority is concerned, a regulation expressly providing that the Secretary could proceed ex parte to seek a warrant or its equivalent would appear to be as much within the Secretary's power as the regulation currently in force and calling for "compulsory process."

6/ Section 1903.4(d) states:

> For purposes of this section, the term compulsory process shall mean the institution of any appropriate action, including ex parte application for an inspection warrant or its equivalent.

Administrative Procedures Act, 5 U.S.C. § 553, was not followed in the adoption of the amendment. The Secretary considered the amendment an interpretative rule exempt from rulemaking by 5 U.S.C. § 553(b).[7/]

Under the 1978 amendment to 29 C.F.R. § 1903.4, the Secretary may apply, ex parte, for the issuance of an inspection warrant and legal notice need not be given the employer before such issuance. The warrant in this case was issued April 1, 1980, some fifteen months after the amendment. Respondent argues that the 1978 amendment was not properly promulgated for failure to comply with the notice and comment procedures of the Administrative Procedures Act and, in thus arguing, relies on Cerro Metal Products v. Marshall, supra, and Marshall v. Huffhines Steel Co., 478 F.Supp. 986 (N. D. Tex. 1979), appeal filed, No. 80-1017 (5th Cir. January 7, 1980).

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7/ 5 U.S.C. § 553(b) states in pertinent part:

> General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—
>
> (1) a statement of the time, place, and nature of public rule making proceedings;
>
> (2) reference to the legal authority under which the rule is proposed; and
>
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
>
> Except when notice or hearing is required by statute, this subsection does not apply—
>
> (A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice . . . .

Contrary to the opinion of the Third Circuit in Cerro Metal Products, other courts have found 29 C.F.R. § 1903.4(d) to be an interpretative rule whereby the term "compulsory process" was defined to include ex parte warrants and have held ex parte warrants to be valid. Marshall v. W & W Steel Co., Inc., 604 F.2d 1322 (10th Cir. 1979); Amoco Oil Co., 469 F.Supp. 1234, 1980 CCH OSHD ¶ 24,789 (S. D. Tex., 1979); Stoddard Lumber Co., Inc., 627 F.2d 984, 1980 CCH OSHD ¶ 24,790 (9th Cir. 1980). In W & W Steel Co., Inc., the Court stated (604 F.2d at 1325-1326):

> By its own terms the rule-making requirements of 5 U.S.C. § 553 do not apply to an interpretative rule, general statements of policy, or rules of agency organization, procedure or practice. We agree with the Secretary that 29 C.F.R. § 1903.4(d) was an interpretative rule whereby the term "compulsory process" was defined to include ex parte warrants. Such being the case, the 1978 amendment, § 1903.4(d), was effective and in force on the date when the warrant issued in the present case. (Footnote omitted)

The decision of the Court in W & W Steel Co., Inc. is considered logical and reasonable in light of the congressional mandate given to the Secretary to carry out the objectives of the Act.

The Supreme Court in Barlow's never specifically focused its attention on whether ex parte warrants were authorized. It merely addressed the "compulsory process" that the Secretary indicated he was using, and which did not involve the use of a warrant. The Third Circuit in Cerro Metal Products read more into the opinion than was intended. The Fourth Amendment does not preclude ex parte warrants, and the Supreme Court recognized in its Barlow's decision that "surprise searches" were authorized by the Act and contemplated by the regulations. 436 U. S. at 317. Nothing in the Act requires notice to the employer before acquiring a warrant. Indeed, an adversary hearing on a warrant would eliminate any element of surprise and would have the practical affect of affording an employer additional time in which to correct all violations prior to an inspection. An employer under

such circumstances would not have to worry about the day-to-day compliance expected of employers under the Act. An employer would only have to make certain conditions were in compliance on the day the inspection was conducted by warrant.

The amendment of 29 C.F.R. § 1903.4 was an interpretative rule whereby the term "compulsory process" was defined. The 1978 amendment was effective and in force on the date when the warrant was issued in the present case. Accordingly, the ex parte warrant was validly issued.

B. Closing Conference

The inspection concluded on the afternoon of April 7, 1980. At approximately 3:00 p.m. on April 7, 1980, the inspecting officers were ready to hold a closing conference pursuant to 29 C.F.R. § 1903.7(e).[8/] Respondent's plant manager, George Stockham, indicated that he was planning to tape record the closing conference. Zucchero requested that he not tape the closing session, but Stockham refused to relent. Zucchero consulted with his area director and was advised not to conduct a full closing conference if the respondent insisted on recording the conference (Tr. I, 60; Tr. II, 73-74, 138-139). Zucchero explained to Stockham and Jim Minor, the plant engineer, that the company had certain rights under the Act

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8/ Section 1903.7(e) of 29 C.F.R. provides:

> At the conclusion of an inspection, the Compliance Safety and Health Officer shall confer with the employer or his representative and informally advise him of any apparent safety or health violations disclosed by the inspection. During such conference, the employer shall be afforded an opportunity to bring to the attention of the Compliance Safety and Health Officer any pertinent information regarding conditions in the workplace.

and left a copy of a pamphlet which advised of the right to contest, right to request an informal conference, posting requirements, etc. There was no discussion of possible violations or abatement dates.

Prior to leaving the site, Zucchero advised Stockham that it would be possible to hold a closing conference by phone and that representatives of respondent could come to Cincinnati to hold a settlement conference. Zucchero made attempts to contact Stockham by phone on April 17 and April 18, but he was unavailable. The citations were issued on April 18 and April 23, 1980 (Tr. I, 60-61; Tr. II, 74-76). The next communication between OSHA and respondent was on May 5, 1980, when Stockham called and requested a conference (Tr. I, 61; Tr. II, 76). The violations and abatement dates were discussed with Stockham during the telephone conference held on May 5, 1980 (Tr. I, 61; Tr. II, 76).

Since closing conferences are expressly required by section 1903.7(e), respondent argues that the Secretary must not be permitted to "disregard its legally mandated obligations arbitrarily." It contends that OSHA is not excused from its responsibility of holding a closing conference "merely because the company wants to accurately preserve the contents of the closing conference by recording it." Complainant argues that respondent has not shown it was prejudiced by the failure to hold a closing conference and that in any event there was substantial compliance with 29 C.F.R. § 1903.7(e) since Compliance Officer Zucchero discussed the alleged violations with Stockham by phone on May 5, 1980. This last argument ignores the basic purpose of a closing conference which is to allow an employer the opportunity to confer with the compliance officer before a citation is issued.

Area Director William Murphy gave the following explanation for not permitting the recording of closing conferences (Tr. II, 139):

> I think what it does — it creates an atmosphere wherein both the Compliance Officers, the employees and the employers representatives are not really able to talk about abatement methods, talk about solutions of those problems, and do that in a comfortable atmosphere. It creates a kind of situation where the Compliance Officer for the most part will want to go strictly by the book and that — that gets to be a very stiff collared position that most employers don't particularly like. I don't like to see it done because I think it hinders our efforts to try to establish good relations with the employers and employees.

While Compliance Officer Zucchero testified that the Field Operations Manual prohibited the use of recorders in closing conferences, no specific part of the manual has been alluded to by the complainant (Tr. II, 73-74).

The demand for an accurate record of the closing conference fortifies rather than stultifies the objectives of OSHA which must also be to reach the truth. It would appear elementary that OSHA can hardly be prejudiced by the making of an accurate record of the closing conference. The recording of the conference presented no obstacle to the achievement of all proper objectives of OSHA. Where an employer has not tried to control, direct or interfere in the inspection and has exhibited a spirit of cooperation, there would appear to be no reason that the closing conference should not be recorded.[9/]

While closing conferences are important, the failure to hold one will not result in the vacating of a citation unless the employer has been prejudiced. The Commission in Kast Metals Corp., 77 OSAHRC 173/B11, 5 BNA OSHC 1861 at 1862-63, 1977-78 CCH OSHD ¶ 22,165 (No. 76-657, 1977), commented as follows on the requirement of 29 C.F.R. § 1903.7(e):

> This procedural regulation is intended to promote the orderly conduct of safety inspections. Unless prejudicial, the relaxation or modification of such a procedural regulation does not warrant an invalidation of an

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9/ It is possible that a tape recording of a closing conference might vary from the recollection of witnesses testifying under oath. Under such circumstances, questions might be raised as to the accuracy of the recording.

invalidation of an agency's action. See Sun Oil Company v. Federal Power Commission, 256 F.2d 233, 239 (5th Cir. 1958), cert. denied, 358 U. S. 872 (1958). Moreover, technical and harmless violations of inspection procedures should not be allowed to deter the Act's primary purpose to assure safe and healthful working conditions. Cf. Accu-Namics, Inc. v. OSAHRC, 515 F.2d 828, 833 [3 OSHC 1299] (5th Cir. 1975). In the instant case, the respondent's failure to demonstrate how it was specifically prejudiced by the failure to hold a closing conference is fatal to the respondent's contention on this matter.

Since there has been no showing of prejudice, respondent's arguments are without merit.

The motion to suppress evidence filed by respondent at the hearing is denied.

DOCKET NO. 80-2423

Item 1 - Alleged Violation of 29 C.F.R. § 1910.134(d)(2)(ii)

Respondent, at the time of the inspection, owned and operated three oil-lubricated compressors at its Janney Road facilities. The compressors were used to supply breathing air to employees whenever they were inside a confined space or vessel to perform repair work. The compressors did not have a high-temperature or carbon monoxide alarm. Respondent did not test for carbon monoxide whenever breathing air was provided by the compressors.

The compressors were not in use during the time the inspection was conducted. However, the evidence is uncontroverted that they were used on March 26, 1980, when a maintenance mechanic made a "drop" into one of respondent's mixers. The mechanic was supplied breathing air by the compressors while he was inside the vessel. He spent approximately 20 to 25 minutes inside the vessel.

Complainant submits that respondent was in violation of 29 C.F.R. § 1910.134(d)(2)(ii).[10/] The standard requires an oil-lubricated compressor be equipped with a high-temperature or carbon monoxide alarm, or both. It is uncontroverted that the three oil-lubricated compressors were not so equipped.

Respondent concedes that "there was not literal compliance with the standard." However, it argues that the use of the compressors to supply breathing air to employees during vessel entries was closely monitored. Whenever a vessel entry was made, Plant Engineer Jim Minor and another employee stood at the edge of the tank and monitored the individuals working inside. Respondent also states that another employee was stationed at the compressor which supplied the breathing air whenever a vessel entry was made.[11/] For these reasons, respondent submits that employees were not exposed to any hazard and that the procedure utilized was at least as safe as that contained in the standard.

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10/ Section 1910.134(d)(2)(ii) of 29 C.F.R. provides:

> The compressor for supplying air shall be equipped with necessary safety and standby devices. A breathing air-type compressor shall be used. Compressors shall be constructed and situated so as to avoid entry of contaminated air into the system and suitable in-line air purifying sorbent beds and filters installed to further assure breathing air quality. A receiver of sufficient capacity to enable the respirator wearer to escape from a contaminated atmosphere in event of compressor failure, and alarms to indicate compressor failure and overheating shall be installed in the system. If an oil-lubricated compressor is used, it shall have a high-temperature or carbon monoxide alarm, or both. If only a high-temperature alarm is used, the air from the compressor shall be frequently tested for carbon monoxide to insure that it meets the specifications in paragraph (d)(1) of this section.

11/ The evidence indicates that an employee was not always present at the compressors when an entry was being made. William Lake, one of respondent's maintenance mechanics, testified that an employee was not always stationed at the compressor (Tr. I, 47). His testimony was supported by Paul Bogan, president of the union (Tr. II, 98).

The requirement for a high-temperature or carbon monoxide alarm is prefaced by the word "shall." Therefore, the requirement is mandatory and the mere monitoring of vessel entries is insufficient to satisfy the standard. Moreover, respondent's vessel entry program failed to provide the degree of protection provided by a high-temperature or carbon monoxide alarm. The air from the compressor was never tested for carbon monoxide, and the evidence indicates that an employee was not always present at the compressors when a vessel entry was made. Even when an employee was present at the compressors, the gauges on the compressors did not test for carbon monoxide in the breathing air being supplied to the employee. The violation has been established.

In order to establish a serious violation, the Secretary need only show that an accident is possible and that such an accident will most likely result in serious injury. Communications, Inc., _____ OSAHRC _____, 7 BNA OSHC 1599, 1979 CCH OSHD ¶ 23,759 (No. 76-1924, 1979). "The proper inquiry is the probability that the resulting harm will be death or serious physical harm." Automatic Sprinkler Corporation of America, _____ OSAHRC _____, 8 BNA OSHC 1385, 1980 CCH OSHD ¶ 24,495 (No. 76-5089, 1980). Carbon monoxide is recognized as a colorless and odorless gas that can cause bodily harm or death. Accordingly, the violation is deemed to be of a serious nature.

Penalties recommended by the Secretary are merely advisory. Long Mfg. Co., 554 F.2d 903 (8th Cir. 1977). The Commission, in assessing penalties, must take into consideration the employer's history, its good faith, the size of its business and the gravity of the violation. Turner Welding & Erection Company, _____ OSAHRC _____, 8 BNA OSHC 1561, 1980 CCH OSHD ¶ 24,553 (No. 16235, 1980). As to gravity, the following elements must be considered: (1) the number of employees subjected to the hazard, (2) the duration of exposure, (3) the

precautions taken against injury, and (4) the degree of probability that an injury would occur. Morrison-Knudsen & Associates, _____OSAHRC _____, 8 BNA OSHC 2231, 1980 CCH OSHD ¶ 24,953 (No. 76-1992, 1980).

One employee was lowered into a vessel which was filled with toxic fumes. He remained in the vessel for 20 to 25 minutes. Prior to the employee being lowered into the vessel, respondent stationed employees at the point of vessel entry and near the compressors to watch the pressure gauges. Respondent also tested the air for combustible gases. While none of these steps protected against carbon monoxide poisoning from the air supplied by the compressors, the employee working in the vessel could have been hoisted to safety in the event some problem developed. A penalty of $200 is assessed for the violation.

DOCKET NO. 80-2860

Item 1 - Alleged Violation of 29 C.F.R. § 1910.22(a)(1)

Complainant alleges three specific factual situations which he claims are violations of the general housekeeping standard contained in 29 C.F.R. § 1910.22(a)(1).[12/] Two of the alleged violations are based on the fact that there were buckets and tote pans stored at the platform edge adjacent to the No. 14 and 15 mixers and at the platform edge adjacent to the No. 3 and 4 mixers. The third alleged violation concerns the placing of two skids in the aisle adjacent to the northwest corner of the mixing area. The skids had 5-gallon and 55-gallon drums stacked on them.

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12/ Section 1910.22(a)(1) of 29 C.F.R. states:

> Housekeeping. All places of employment, passageways, storerooms, and service rooms shall be kept clean and orderly and in a sanitary condition.

Compliance Officer Zucchero testified that he observed buckets, tote pans and cans stored in a "helter skelter hazardous manner" on the platform adjacent to the No. 14 and 15 mixers (Tr. I, 62). The photograph introduced as Exhibit 1 shows two metal containers, one inside the other, lying on their side over the platform toeboard. The platform was approximately 12 feet above the pit floor. Employees were observed using the platform and the work area below.

Buckets and tote pans are used during the manufacturing process. Employees carry raw materials in the buckets onto the platform. Respondent represents that the buckets were stacked in the corner of the platform adjacent to the mixers and argues that the buckets are prevented from falling from the platform by a toeboard, a center railing and a top railing. The toeboard, midrail and top rail serve as a restraint for those buckets stacked in an upright manner. However, the two buckets in question were lying over the toeboard and between the toeboard and midrail.

A pan and a piece of pipe were protruding over the toeboard at the platform edge adjacent to the No. 3 and No. 4 mixers. The pan and pipe were located between the toeboard and the midrail. The photograph introduced as Exhibit 4 clearly supports these factual determinations. The tote pans weigh approximately five pounds.

The aisle adjacent to the northwest corner of the mixing area was obstructed with empty and filled 5-gallon and 55-gallon containers sitting on skids (Ex. 5). The skids had been placed in the aisle so that containers of adhesive product could be loaded and eventually transported to the warehouse. While the aisle was obstructed, it was not completely blocked as contended by complainant. There was sufficient room to walk between two of the skids.

Section 1910.22(a)(1) states that places of employment, passageways, storerooms and service rooms shall be kept clean and orderly. The evidence fully supports a determination that all three areas referred to in the citation were not kept clean and orderly. The violation has been established.

Respondent states that the buckets and tote pans were stored in the corner of the work platforms and presented no tripping hazard to employees working on the platforms. However, the buckets, tote pans and pipe lying over the toeboards presented a hazard to any employee who might pass underneath. There is evidence to suggest that tote pans and buckets could fall from the platform as a result of the vibration produced by the nearby mixers (Tr. II, 101). The buckets and tote pans were also subject to being bumped by an employee.

Complainant alleges that the violations were serious within the meaning of section 17(k) of the Act. This determination is based on the possibility of employees tripping and falling over debris on the work platforms and by the possibility of employees underneath the platforms being struck by falling objects (Tr. I, 68). Since the buckets and tote pans were stored alongside the guardrails, there is no reason to assume that a tripping hazard is presented to employees on the platforms. The width of the platforms and amount of obstruction on the platforms are not indicated. There has also been no allegation that the platform passageways were obstructed. The real hazard is that presented to employees working underneath the platforms.

The tote pans weigh approximately five pounds. The platforms were located approximately 12 feet above the pit floor. Assuming an individual was standing on the pit floor and was 6 feet tall, the tote pan would fall only 6 feet prior to striking the employee. This is not considered sufficient to present a serious injury or to

cause the death of an employee.[13/] The location of the skids, buckets and drums in the aisle is also not considered to be a serious violation. If an employee was tripped by the skids, buckets or drums, he would simply hit the floor.

The exposure to the hazard of falling objects appears to have been rather infrequent. Employees were not constantly working in the pit underneath the edge of the platform. A penalty of $50 is assessed for the nonserious violation.

Item 2 - Alleged Violation of 29 C.F.R. § 1910.23(a)(8)(ii)

A drainage ditch located at the southwest corner of the mixing area had its covers removed. The uncovered opening was approximately 10 feet in length, 11 inches wide and approximately 8 inches deep. The ditch was not being attended by anyone nor was there any other type of guarding provided. The surrounding floor was uneven and a concrete pit, approximately 4 feet deep, was located behind the ditch. The cover had been removed in order to clean the ditch. The employee assigned to clean the ditch was cleaning in the pit. He was approximately 75 feet from the uncovered ditch.

Complainant alleges that the removal of the grate was in violation of 29 C.F.R. § 1910.23(a)(8)(ii),[14/] which requires a floor hole cover of standard strength

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13/ Paul Bogan, the union representative, testified that three to seven employees had been hit by a tote pan or board falling off the platforms (Tr. II, 100-101). There was no evidence to indicate that any of them had been seriously injured.

14/ Section 1910.23(a)(8)(ii) of 29 C.F.R. provides:

> A floor hole cover of standard strength and construction that should be hinged in place. While the cover is not in place, the floor hole shall be constantly attended by someone or shall be protected by a removable standard railing.

and construction be hinged in place. Respondent points out that the ditch was exposed only because the grate was being cleaned. However, whenever the grate is not in place, the standard requires constant attention to the floor hole by someone or the hole must be protected by a removable standard railing.

There was one employee observed in the area. Since he was located 75 feet from the ditch, he could not constantly attend to the ditch. The opening was not protected by a standard railing. The violation has been established.

The removal of the grate from the ditch raised the spectre of a possible tripping hazard to employees passing through the area. The seriousness of the violation was compounded by the fact a concrete pit was located approximately 15 inches from the edge of the drainage ditch. The pit was 4 feet deep. An employee tripping over the unprotected ditch could lose his footing and fall head first into the pit. Admittedly, this is an unlikely scenario but such was possible and must be considered in determining whether the violation was serious. The violation was serious.

In arriving at a penalty, complainant points out that as many as twenty persons a day frequented the area where the grate was removed. There was only one employee in the area at the time of the inspection, and he was engaged in cleaning operations in the pit. There is no indication as to how long the grate was removed or how many employees were in the area while the grate was removed. A penalty of $150 is assessed for the violation.

Item 3 - Alleged Violation of 29 C.F.R. § 1910.106(b)(3)(iv)(a)

The east yard area of respondent's facilities contained vent pipe outlets from underground tanks. The tanks contained adhesives that were of a Class I flammable nature. Compliance Officer Zucchero testified that one of the vent pipes used for

an underground tank was completely blocked or plugged by solidified adhesive (Tr. I, 86-87). This conclusion was reached by him after he personally inspected the vent opening (Tr. II, 86). A photograph (Ex. 8) was taken to show the condition of the vent.

Complainant alleges that the blocked vent pipe constituted a violation of 29 C.F.R. § 1910.106(b)(3)(iv)(a).[15/] The specific allegation by complainant concerns the fact that the vent outlet was blocked. Respondent submits that the standard is inapplicable to the facts. It is pointed out that the standard applies to the location and design of vent pipes. Respondent's vent pipes met all requirements of the standard in that the pipes were constructed at the proper height above adjacent ground level and dispersed vapors in an upward direction.

Complainant appears to place emphasis on that part of the standard which states: "[v]ent pipes shall discharge only upward in order to disperse vapors."[16/]

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15/ Section 1910.106(b)(3)(iv)(a) of 29 C.F.R. provides:

> Location and arrangement of vents for Class I liquids. Vent pipes from tanks storing Class I liquids shall be so located that the discharge point is outside of buildings, higher than the fill pipe opening, and not less than 12 feet above the adjacent ground level. Vent pipes shall discharge only upward in order to disperse vapors. Vent pipes 2 inches or less in nominal inside diameter shall not be obstructed by devices that will cause excessive back pressure. Vent pipe outlets shall be so located that flammable vapors will not enter building openings, or be trapped under eaves or other obstructions. If the vent pipe is less than 10 feet in length, or greater than 2 inches in nominal inside diameter, the outlet shall be provided with a vacuum and pressure relief device or there shall be an approved flame arrester located in the vent line at the outlet or within the approved distance from the outlet.

16/ It is presumed that complainant would argue that blockage of the vent pipe prevents the vapors from discharging upward. However, complainant's brief skips over the point as to why the standard is specifically applicable.

However, this particular requirement pertains to the manner in which vent pipes are to be located; i.e., in a horizontal position to allow vapors to escape upward. There has been no showing that the location or design of the vent pipe at issue violates the cited standard. The vent pipe was constructed to discharge and disperse vapors in an upward position. There is no dispute over this fact.

The standard also states that "[v]ent pipes 2 inches or less in nominal inside diameter shall not be obstructed by devices that will cause excessive back pressure." Complainant makes no reference to this requirement, and it is assumed that he does not consider it applicable to the facts of this case. In any event, there is no evidence to indicate the inside diameter of the vent pipe and solidified adhesive would hardly qualify as a "device." Since the standard is inapplicable to the facts of this case, the alleged violation is vacated.

Item 4 - Alleged Violation of 29 C.F.R. § 1910.106(b)(3)(v)(b)

The underground tanks in the east yard had 4-inch diameter pipes extending approximately 30 inches above the ground. The pipes were used for manual gauging. At the time of the inspection, at least three of the pipes were uncapped and had manual sticks in them. Complainant alleges that the uncapped vents were in violation of 29 C.F.R. § 1910.106(b)(3)(v)(b),[17/] which requires that openings for manual gauging be provided with a liquid-tight cap or cover.

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17/ Section 1910.106(b)(3)(v)(b) of 29 C.F.R. states:

> Openings for manual gaging, if independent of the fill pipe, shall be provided with a liquid-tight cap or cover. If inside a building, each such opening shall be protected against liquid overflow and possible vapor release by means of a spring loaded check valve or other approved device.

The photographs introduced as Exhibits 9, 10 and 11 show three uncapped manual gauging pipes. A gauging stick is in each of the pipes. Compliance Officer Zucchero testified that he saw an employee manually gauging one of the tanks during the time he was in the yard (Tr. II, 41-42). A vent cap is depicted on the ground in Exhibit 11 (Tr. I, 94). Exhibit 12 shows other pipes used for manual gauging that have a proper cap on them.

The evidence indicates that three gauging pipes did not have their liquid-tight caps in place during the inspection (Exs. 9-11). In each instance, a manual gauging stick had been inserted into the pipe opening. Since Zucchero observed an employee manually gauging the tank shown in Exhibit 11 (Tr. II, 41-42), there is no dispute over the fact that an employee was in the process of measuring the tanks. The caps had to be removed to manually gauge the tanks. Furthermore, Exhibit 11 shows the cap lying near the pipe. Respondent had acquired liquid-tight caps for all the pipes (Tr. II, 151). Under the circumstances, it is concluded that the liquid-tight caps had been temporarily removed for manually gauging the tanks. There is no evidence to indicate that the caps for the pipes had been permanently missing. The alleged violation is vacated.

Even if the liquid-tight caps had been permanently removed from the pipes prior to the inspection, the evidence is insufficient to establish a violation. The pertinent part of the standard states:

> Openings for manual gaging, <u>if independent of the fill pipe</u>, shall be provided with a liquid-tight cap or cover . . . . (underlining added)

There is no evidence to indicate that the openings were independent of the fill pipes.

Item 5 - <u>Alleged Violation of 29 C.F.R. § 1910.106(d)(6)(iv)</u>

A large number of 55-gallon drums of Class I, II and III liquids were stored in respondent's west yard area. Rows of drums were stored within inches of bails of

wastepaper and cardboard which were also stored in rows. There was also a growth of weeds in the yard area. These conditions are reflected in Exhibits 13 and 14. Complainant submits that these conditions violated the requirements of 29 C.F.R. § 1910.106(d)(6)(iv),[18/] which requires a storage area be "kept free of weeds, debris and other combustible material not necessary to the storage."

Respondent does not dispute the fact that it was not in compliance with the terms of the standard. It argues that the violation was not serious and that no penalty should be assessed. Respondent submits that the "[s]toring of cardboard adjacent to 55-gallon drums of adhesive did not make an accident which could cause death or serious injury any more probable than if the 55-gallon drums had been stored separately." According to respondent, "[t]he baled cardboard was not more likely to ignite than the barrels of adhesive." However, the liquid stored in the drum is protected from sparks by the metal drum. The wastepaper and cardboard would have been much easier to ignite than the liquid in the sealed metal drums. Once the wastepaper and cardboard ignited, the heat from the fire would have presented a real hazard to the liquid in the drums. The violation was serious.

Respondent points out that the yard area was fenced to keep out trespassers and that employees were not permitted to smoke in the storage yard. It is also pointed out that the inspection was conducted in the Spring and that there was little danger of the wastepaper and cardboard igniting from spontaneous combustion. The chance of a fire breaking out in the yard is considered remote. There

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18/ Section 29 C.F.R. § 1910.106(d)(6)(iv) provides:

> Security. The storage area shall be protected against tampering or trespassers where necessary and shall be kept free of weeds, debris and other combustible material not necessary to the storage.

was only one employee observed in the yard at the time of the inspection. For these reasons, a penalty of $100 is assessed for the violation.

Item 6 - Alleged Violation of 29 C.F.R. § 1910.106(h)(5)

A tank vehicle-loading station was located at the southeast corner of the plant. Flammable materials were transferred into tank trucks at the loading station. The valve in the fill line was manually opened and closed. There was no device on the fill line which would limit the amount of material being pumped into the tank vehicle. Complainant alleges that respondent was in violation of 29 C.F.R. § 1910.106(h)(5),[19/] since the valve used for the final control for filling tank vehicles was not of the self-closing type.

Section 1910.106(h)(5) requires that tank vehicles and tank car-loading and unloading operations "shall comply with appropriate portions of paragraph (f)(3) of this section." Paragraph (f)(3)[20/] requires valves used for the final control for

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19/ Section 1910.106(h)(5) states as follows:

> Tank vehicle and tank car loading and unloading. Tank vehicle and tank car loading or unloading facilities shall be separated from aboveground tanks, warehouses, other plant buildings, or nearest line of adjoining property which may be built upon by a distance of 25 feet for Class I liquids and 15 feet for Class II and Class III liquids measured from the nearest position of any fill stem. Buildings for pumps or shelters for personnel may be a part of the facility. Operations of the facility shall comply with the appropriate portions of paragraph (f)(3) of this section.

20/ Section 1910.106(f)(3)(iii) of 29 C.F.R. states:

> Valves. Valves used for the final control for filling tank vehicles shall be of the self-closing type and manually held open except where automatic means are provided for shutting off the flow when the vehicle is full or after filling of a preset amount.

filling tank vehicles to be of the self-closing type. The valve in the line being used for final control at the loading station was manually opened and closed. There was nothing to limit the amount of adhesive or other material being pumped to the tank vehicle. The violation has been established.

While respondent does not dispute the fact that a violation existed, it contends the violation should be reduced to a nonserious violation and the proposed penalty eliminated. Complainant argues that there was a likelihood of a spill of flammable liquids which could have resulted in a fire and explosion. It is pointed out there was evidence of previous spills and that tank vehicles were filled at night which made it more difficult to gauge the amount of adhesive in the tank vehicle. However, the use of a self-closing type valve does not guarantee that accidental spills will not occur. Zucchero conceded that spills could occur from the pipe being misdirected by the employee (Tr. II, 50-51).

Zucchero stated that the intent of the standard was to require an employee to be present during filling operations to prevent a tank overflow (Tr. II, 51). There is no evidence that employees left the area while tank vehicles were being filled. The possibility of an overflow would arise only if the operator forgot to close the valve when the tank was filled or left the area unattended during filling operations. There is no evidence that a possible ignition source existed at the vehicle-loading area. The violation was nonserious.

The number of employees exposed to the hazard and the duration of exposure are unknown. A penalty of $50 is assessed for the violation.

Item 7 - Alleged Violation of 29 C.F.R. § 1910.106(h)(8)(iii)

Several uncovered containers filled with combustible solid material and flammable liquids were located in the pit area. The wood and combustible solid

materials had been removed from the pit. The containers located in the south area of the pit area had been in the pit in excess of one week. Those located in the north area of the pit had been in the same condition for approximately three weeks. An open 5-gallon container of flammable liquid was located adjacent to the No. 14 fill pipe in the northwest corner of the mixing room. The container had been open all during the morning of the inspection.

Complainant alleges that the combustible materials and flammable liquids in the containers were in violation of 29 C.F.R. § 1910.106(h)(8)(iii).[21/] Respondent points out that the combustible materials and flammable liquids in the uncovered containers in the pit area had resulted from a cleaning up of a spill in the pit area. In respondent's view, it is unreasonable to cite an employer for a violation of a standard while it is in the process of correcting the condition. The standard requires that combustible waste material and residues be stored in closed metal waste cans and disposed of daily. The evidence indicates that the metal containers in the pit area had been in the same condition from one to three weeks. The materials were not stored in closed waste cans and were not disposed of daily. The violation as to the uncovered containers in the pit area has been established.

The standard applies to combustible waste materials and residues. Respondent states that the wood and rags in the containers were used in cleaning up the spill of Class II and Class III liquids. It argues that complainant has failed to prove that the materials were "waste materials" as that term is used in the standard. Since the wood and rags were used to clean up the spill, respondent

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21/ Section 1910.106(h)(8)(iii) of 29 C.F.R. states:

> Waste and residues. Combustible waste material and residues in a building or operating area shall be kept to a minimum, stored in closed metal waste cans, and disposed of daily.

contends they were not waste materials. One definition of waste materials would include materials being thrown away by a person or business as worthless or useless to it. The materials in the containers certainly fall within this definition and were correctly categorized as waste materials.

The open 5-gallon metal container of flammable liquid adjacent to the No. 14 fill line in the northwest corner of the mixing room is not covered by 29 C.F.R. § 1910.106(h)(8)(iii), which applies only to waste and residues. A 5-gallon metal container of flammable liquid would not be properly classified as a residue. The alleged violation of 29 C.F.R. § 1910.106(h)(8)(iii), as it applies to the 5-gallon container of liquid, is vacated.

Complainant alleges that the violation was serious. He reasons that a fire could result in severe burns or death to employees. Since there was no evidence to show a possible source of ignition, there is no evidence to show how the materials might have been ignited. Accordingly, the violation is deemed to be nonserious.

The number of employees working in the pit area and the duration of their exposure is unknown. A penalty of $50 is assessed for the violation.

Item 8 - Alleged Violation of 29 C.F.R. § 1910.178(m)(1)

During the inspection, Compliance Officer Zucchero interviewed an employee in front of a workbench at the compressor filling station. While he was conversing with the employee, another employee drove a forklift up in front of them and deposited an empty skid. There was approximately 2 feet between the end of the skid and the workbench. The driver sounded no warning.

Respondent argues that the testimony of Compliance Officer Zucchero should be given absolutely no probative value on this issue. It is pointed out that the citation states that the forklift operator drove up to an empty skid to remove it,

whereas Zucchero testified that the forklift operator was driving up to leave a skid. Any confusion on the facts was cleared up by the testimony of Kirk Temple, the forklift operator involved in the incident. He testified that he made a trip to the compressor filling station area to pick up a skid with a broken board, dropped it off at another location, and returned to the compressor filling station area with a new skid. When he returned with the new skid, the compliance officer noticed him as he approached the bench and later talked to him about the incident (Tr. II, 125-127, 130). The evidence is clear that the particular incident for which respondent was cited occurred when a new skid was placed in front of the workbench.

Complainant alleges that these facts establish a violation of 29 C.F.R. § 1910.178(m)(1)[22/] since the forklift was driven up to an employee standing in front of the bench. Respondent places emphasis on the words "up to" and argues that there is no evidence indicating how close the skid was placed to the group of individuals talking in front of the bench. However, Zucchero testified that there was approximately 2 feet between the skid and the workbench (Tr. I, 116). A photograph of the skid, as it was placed by the operator of the forklift, is reflected in Exhibit 19. The photograph supports the testimony of Zucchero. The standard uses the expression "up to" in lieu of specifying distances. The placing of the skid within 2 feet of the bench while an employee was standing in front of the bench certainly meets the "up to" criteria set forth in the standard.[23/] The violation has been established.

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22/ Section 1910.178(m)(1) states:

> Truck operations. (1) Trucks shall not be driven up to anyone standing in front of a bench or other fixed object.

23/ The expression "up to" is a colloquial expression having relative meaning depending upon the sense in which the words are used and understood.

Respondent also argues that the violation should be vacated because "it was caused by the OSHA inspection itself." It is correctly pointed out that the employee was in front of the workbench at that particular time because Zucchero chose to interview her at that location. The employee normally works at the end of the workbench, but her duties also require her to be in the area between the workbench and the skids. The workbench is located in a recessed area within the wall. The employee sets up empty cans on the bench and fills them with latex. Once the cans are filled, the employee moves around the table, places lids on the cans and then stacks them on the skids (Tr. II, 127-128). Thus, at any given time her duties could require her to be in front of the workbench.

The interview conducted by Zucchero did not create the hazard. The actions of the forklift operator caused the hazard. Temple testified that he saw the persons in front of the bench (Tr. II, 126-127). Yet, he chose to place the skid while they were in front of the bench.

Respondent submits that the violation, if one occurred, resulted from an "isolated employee mistake." In order to establish this affirmative defense, an employer must prove that the employee's action constituting noncompliance with a standard was a departure from a work rule which the employer had uniformly and effectively enforced and the employer had neither actual nor constructive knowledge of the departure. B-G Maintenance Management, Inc., 76 OSAHRC 60/A2, 4 BNA OSHC 1282, 1976-77 CCH OSHD ¶ 20,744 (No. 4713, 1976). "The defense falls where there is no evidence of work rules, safety instructions, or employee training designed to prevent employee exposure to a cited hazard." Turner Welding & Erection Company, _____ OSAHRC _____, 8 BNA OSHC 1561, 1980 CCH OSHD ¶ 24,553 at 30,035 (No. 16235, 1980).

The evidence in this case fails to establish that the operator had been provided any training in operating a forklift. Temple testified that he had been provided no training but that the driving of a forklift "was more or less just using common sense." (Tr. II, 130) He had been instructed by his supervisor to drive the forklift even though he had no previous training in operating forklifts (Tr. II, 124). In support of its defense, respondent relies on the statement by Temple that it was common sense to not do what he had done (Tr. II, 59-60). However, an employer cannot escape liability under the Act by relying on the judgment of an employee who is inadequately trained in safe work procedures for his assigned job. The employer has a duty to ensure that the employee understands proper safety procedures. Turner Welding & Erection Company, supra. The isolated employee mistake defense is without merit.

Complainant alleges that the violation was serious. The forklift weighed approximately 2 1/2 tons and had a speed between five to ten miles per hour (Tr. II, 129). In the event of an accident where the forklift pinned an employee between it and the bench or ran over an employee, the likely result would have been death or serious injury. The violation was serious.

The incident involved one employee for a short duration of time. The possibility of an accident occurring must be considered remote. A penalty of $150 is assessed for the violation.

Item 9 - Alleged Violation of 29 C.F.R. § 1910.212(a)(1)

The filling room contained three conveyor lines that ran in an east-west direction. Cans that had been previously filled and labeled would be placed on the conveyor lines. A metal lid would be loosely placed on the cans. Each of the lines had a lid compressor unit on it. The unit contained a series of metal rollers

approximately 1 1/2 inches in diameter that became progressively lower until they compressed the lid onto the container. As the cans moved along the conveyor and through the compressor unit, the lids would be sealed on the cans.

The compressor units on the latex and solvent lines were guarded by a heavy steel wire boxlike structure that completely enclosed the unit except for entrance and exit openings. Complainant alleges that respondent violated 29 C.F.R. § 1910.212(a)(1)[24/] because the openings were large enough to permit an employee to accidentally contact the metal pressure rolls. A pinch point was created between the rollers and the lids of the cans. There is no dispute over the fact that the compressor units were guarded. The dispute centers on whether the guards were effective to prevent exposure to injury.

The openings on the guard over the compressor unit on the latex line were approximately 7 inches wide by approximately 9 inches high. The openings were designed large enough to accommodate quart and gallon cans as they moved through the compressor unit (Tr. II, 155). The opening at the entrance was approximately 5 1/2 inches from the first pinch point created by the rollers and the top of the can. The exit opening was approximately 3 inches from the pinch point at the last roll.

An employee was standing several feet from the entrance to the compressor unit. She was placing lids on the top of the cans and then placing the cans on the conveyor so they could travel through the compressor. According to Zucchero, the

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24/ Section 1910.212(a)(1) of 29 C.F.R. states:

> Machine guarding—(1) Types of guarding. One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are—barrier guards, two-hand tripping devices, electronic safety devices, etc.

employee travelled up and down the line beyond the entrance and exit openings to the compressor unit (Tr. I, 125). Zucchero did not observe the employee place her hand inside the openings in the guard. Paul Bogan, president of the local union, testified that he had observed employees placing their hands through the openings (Tr. II, 112). According to him, employees placed their hands into the entrance and exit openings to manually replace lids that had fallen off or were crooked and needed to be straightened (Tr. II, 112-113). However, there is no evidence to indicate when these incidents allegedly occurred.

Respondent's plant engineer, Jim Minor, testified that the latex line compressor unit was not in operation at the time of the inspection. The company was merely using the conveyor that day to move the cans from the labeler to the point where they went up the elevator (Tr. II, 154-155, 180). Zucchero testified that the line was in operation during the inspection but could not recall if only the conveyor was being used (Tr. II, 61). Even if the compressor unit was not operated at the time of the inspection, there is nothing to indicate that it would not be operated in the future. Moreover, Bogan testified that he had seen the line in operation and had observed employees placing their hands inside the entrance and exit openings (Tr. II, 113).

The solvent filling line was almost identical to the latex filling line. The same type of guard had been constructed over the compressor unit, and the same type of entry and exit openings existed (Tr. I, 127). There is no evidence as to the location of the employee in relation to the compressor unit. However, Bogan testified that he had observed employees placing their hands into the entrance and exit openings (Tr. II, 113).

The Dierks filler line in the mixing room was similar to the latex and solvent filling lines. It had a conveyor and lid compressor unit that was guarded in the

same manner as the latex and solvent compressors. Again, complainant argues that the entrance and exit openings were too large and allowed employees to come in contact with the nip point created by the can and the rollers of the lid compressor. The entrance and exit openings were several inches larger than the cans passing through the unit. The entrance was approximately 9 1/2 inches high and 7 inches wide. The opening at the exit end was approximately 10 inches high and 7 inches wide. The entrance opening was approximately 6 inches from the hazardous components of the compressor. The exit was approximately 2 inches from the hazardous components.

Section 1910.212(a)(1) requires guarding to protect the operator and other employees in the machine area from hazards such as those created by point of operation, rotating parts, flying chips and sparks. The standard does not specify any particular type of guarding method. However, the standard must be interpreted to effectuate and not hinder the statutory purpose of employee protection. The Commission has held that "inasmuch as subsection (a)(1) both introduces and summarizes the import of the entire section 1910.212, it should be construed in light of, and consistently with, the balance of the section." Hughes Brothers, Inc., 78 OSAHRC 65/A2, 6 BNA OSHC 1830 at 1833, 1978 CCH OSHD ¶ 22,909 (No. 12523, 1978). In order to prove a violation, the Secretary must prove that the point of operation, ingoing nip points or rotating parts is unguarded and that the method of operation exposes an employee to injury. Hughes Brothers, Inc., supra.

The pressure points of the lid presses were inside the area covered by the heavy metallic guards. The only openings were for the cans to enter and exit the compressor units. In order for an employee to reach the pressure rolls, he would have to deliberately reach through the openings into the machine. There is nothing

about the normal operation of the latex, solvent and Dierks filling lines that exposes an employee to injury. The employee merely places lids on the cans at a point some distance from the compressor unit. The conveyor moves the cans along the lines and through the compressor units. The employee is not involved in placing the cans in the compressor unit. This is not a "feed" type operation on the part of the employee. The conveyor belt carries the cans through the lid press automatically.

Plant engineer Minor testified that he had never seen employees place their fingers inside the compressor units while they were running. He has observed the compressor units being turned off while cans were inside the units and needed some adjustment (Tr. II, 159). There is no necessity for employees to place their hands inside the compressor units since the cans automatically move through the units by means of conveyors (Tr. II, 160). Each of the metal guards has a sign on the side that cautions employees to not operate the compressor without the guards (Exs. 21, 26-27). In addition, another sign appears on the side of the guard that has the word "Danger" in large white letters with a red background and the warning to "Keep hands clean of moving machinery." (Exs. 21, 26-27) The barrier guards are painted bright yellow and are highly visible.

The heavy metallic guards enclosing the compressor units fully protected employees from accidental contact with the pressure rolls. Since the employee is not involved in a "feed" operation, he is not required to place his hands near the entry or exit openings. Moreover, closing the openings to the size of the individual cans or moving the openings further from the pressure rolls, as suggested by the compliance officer, would still leave an opening through which an employee could place his hands while the compressor unit is running. The alleged violation is vacated.

There is some reference to accidents having occurred during the operation of the latex, solvent and Dierks lines. However, those accidents occurred prior to the heavy metallic guards being installed. Since those guards were installed, no employee has been injured by placing his hands inside the guards (Tr. II, 183).

A Wells horizontal metal cutting band saw was located in the maintenance shop. The unused portion of the saw blade was not guarded. The saw was used on a regular basis. Respondent concedes this violation but states that the penalty should not exceed $50. The violation must be classified as serious since amputation of fingers could easily be the result of any accident.

While the saw was used on a regular basis, the exact amount of its use is unknown. There is no evidence as to whether the saw is operated by one person or several different persons. There is also no evidence as to the skill or experience of the operator or operators. Accordingly, a penalty of $150 is assessed for the violation.

Item 10 - Alleged Violation of 29 C.F.R. § 1910.212(a)(3)(ii)

The "A" and "B" Microway fillers had lid compressors to seal the lids on containers. The lid compressors were guarded by a heavy wire boxlike structure similar to that guarding the latex and solvent line compressor units. The metal guards had entry and exit openings large enough to accommodate 5-gallon containers.

During the operation of the Microway fillers, empty containers are placed on a roller conveyor by an employee and filled with an adhesvie. After the lid is placed on the container, a switch is actuated and the container is automatically fed through the opening of the guard and positioned under the ram of an air-operated press. The ram descends and seals the lid on the container. The ram descends in

approximately 1.3 seconds and applies a force of 90 p.s.i. After the can is sealed, another container is then placed on the conveyor and filled. A lid is placed on the container, and the employee operating the filling unit again trips the switch which causes that particular container to move into the press while the sealed can is pushed out the exit opening in the guard.

Complainant alleges that the operation of the Microway fillers was in violation of 29 C.F.R. § 1910.212(a)(3)(ii)[25/] because the entrance and exit openings of the guard were too large to prevent employee contact with the point of operation of the ram. The standard requires point of operation guarding where the operation of the machine exposes an employee to injury. In order to prove a violation of the standard, the Secretary must prove that the point of operation is unguarded and that the method of operation exposes an employee to injury. Hughes Brothers, Inc., 78 OSAHRC 65/A2, 6 BNA OSHC 1830, 1978 CCH OSHD ¶ 22,909 (No. 12523, 1978). The dispute centers on whether the guards in use were effective in preventing exposure of employees to injury when the ram descends.

Complainant alleges that the large openings in the guards would allow the employee to reach into the point of operation. The openings at both ends of the guards were approximately 17 inches high by 14 inches wide. Zucchero testified that he observed employees reaching through the openings at the exit ends of the guards (Tr. II, 6-7). However, there is no evidence to indicate that employees are required to reach through the barrier guard openings to perform their job.

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25/ Section 1910.212(a)(3)(ii) of 29 C.F.R. provides:

> The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

The Microway fillers do not involve a "feed" operation on the part of the employees. There is no part of the job function which requires the employee to place his hands through the openings while the machinery is operating. Employees are not required to manually push the containers through the press. The containers are automatically fed into the press and automatically ejected (Tr. II, 160). There is no necessity for an employee to push a container into the press or to pull a container from the press. Employees are not required to have any part of their body in the danger zone during the operating cycle. The alleged violation is vacated.

Item II - Alleged Violation of Section 110-17(b), National Electrical Code, NFPA 70-1971, as Adopted by 29 C.F.R. § 1910.309(a)

Two switches for the operation of fans were mounted on the north wall of the mixing room. They were located approximately 4 feet above the floor. An aisleway was located adjacent to the north wall. The aisleway was used by powered industrial trucks. One of the switches and the wall showed damage from contact with the powered industrial trucks operated along the aisleway. Complainant submits that these conditions constituted a violation of section 110-17(b) of the National Electrical Code, NFPA 70-1971.[26/]

Respondent submits that it was not in violation of section 110-17(b), which requires enclosures or guards wherever "electrical equipment would be exposed to physical damage." The switches protrude out from the wall, and the wall is

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26/ Section 110-17(b) states:

> In locations where electrical equipment would be exposed to physical damage, enclosures or guards shall be so arranged and of such strength as to prevent such damage.

immediately adjacent to the aisleway. The wall shows evidence that it has been scraped. The damage to the wall resulted from powered industrial trucks striking it (Tr. II, 11). Since the wall has been struck, the switches were certainly exposed to possible physical damage. The violation has been established.

Respondent argues that the facts do not constitute a serious violation of the Act as alleged by the Secretary. Complainant classified the violation as serious because Class I flammable materials were being processed in the room. According to complainant, a spark could cause a fire or explosion. Unfortunately, no facts exist to support such a conclusion. There is no evidence to indicate that the mixing room or any other area of the plant had a flammable atmosphere (Tr. II, 65-66). If a flammable atmosphere did not exist, there would be no catalyst to cause a fire or explosion. The violation was of a nonserious nature. No penalty is assessed for the violation.

Item 12 - Alleged Violation of Section 501-3(b)(1), National Electrical Code, NFPA 70-1971, as Adopted by 29 C.F.R. § 1910.309(a)

Two battery-charging units in the flammable materials warehouse were set up to charge the batteries on forklifts used in the plant. The units were standard Gould battery chargers and did not bear approval for use in Class I locations. The warehouse was a Class I, Division 2 location. The charging units contained make-and-break contacts.

Complainant alleges that the location of the battery chargers in the flammable materials warehouse was in violation of section 501-3(b)(1) of the

National Electrical Code, NFPA 70-1971.[27/] Respondent submits that complainant has failed to sustain his burden of proof on this issue by failing to establish that a Gould battery charger is one of the items required by the standard to be in an enclosure approved for Class I locations.

Compliance Officer Zucchero testified that he cited respondent for a violation of section 501-3(b)(1) because the battery chargers did not bear an approval for use in Class I locations (Tr. II, 18-19). The cited section clearly states that it applies to "meters, instruments and relays." Assuming a battery charger is classified as an instrument, the section still does not automatically apply. There must be a showing that certain other conditions have not been met. Complainant emphasizes the first part of section 501-3(b)(1) which says enclosures approved for Class I locations shall be required but ignores the remainder of the section which qualifies the approved enclosure requirement. The section contains the following qualifying conditions:

> . . . [u]nless general-purpose enclosures are provided, and current-interrupting contacts are (1) immersed in oil, (2) enclosed within a chamber hermetically sealed against the entrance of gases or vapors, or (3) in circuits which under normal conditions do not release sufficient energy to ignite a specific hazardous atmospheric mixture.

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27/ Section 501-3(b)(1) provides:

> Class I, Division 2. In Class I, Division 2 locations, meters, instruments and relays shall conform to the following:
>
> (1) Contacts. Switches and circuit breakers, and make-and-break contacts of pushbuttons, relays, and alarm bells or horns, shall have enclosures approved for Class I locations, unless general-purpose enclosures are provided, and current-interrupting contacts are (1) immersed in oil, (2) enclosed within a chamber hermetically sealed against the entrance of gases or vapors, or (3) in circuits which under normal conditions do not release sufficient energy to ignite a specific hazardous atmospheric mixture.

Since there is no evidence to indicate that none of the above conditions existed, complainant has failed to sustain his burden of proof. The alleged violation is vacated.

Item 13 - Alleged Violation of Section 501-4(b), National Electrical Code, NFPA 70-1971, as Adopted by 29 C.F.R. § 1910.309(a)

Thin-walled electrical conduit with screw type fittings was used in the permanent wiring that was supplying power to the battery chargers. The conduit was purchased and installed by William Lake, a maintenance mechanic for respondent. He testified that the company told him to order whatever he needed to install the wiring (Tr. II, 122).

Complainant alleges that the use of the thin wall conduit was a violation of section 501-4(b)[28/] of the National Electrical Code, NFPA 70-1971. Respondent does not contest the violation but submits that it should not be classified as a serious violation.

The wiring was located in the flammable materials warehouse. Zucchero testified that he classified the violation as serious because of the possibility of fire and explosion. There is no evidence to indicate that the atmosphere of the

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28/ Section 501-4(b) provides:

> In Class I, Division 2 locations, threaded rigid metal conduit or Type MI, MC, ALS or SNM cable with approved termination fittings shall be the wiring method employed. Type MI, MC, ALS or SNM cable shall be installed in a manner to avoid tensile stress at the termination fittings. Boxes, fittings and joints need not be explosion-proof except as required by Sections 501-5(b)(1) and (b)(2). Where provision must be made for limited flexibility, as at motor terminals, flexible metal fittings, flexible metal conduit with approved fittings, liquidtight flexible metal conduit with approved fittings, or flexible cord approved for extra-hard usage and provided with approved bushed fittings shall be used. An additional conductor for grounding shall be included in the flexible cord unless other acceptable means of grounding are provided.

warehouse was flammable. Even if a spark or explosion occurred within the conduit, there is nothing to show how it could cause a fire. There is no evidence of any explosive vapors. The violation was nonserious. No penalty is assessed for the violation.

Item 14 - Alleged Violation of Section 501-5(a)(1), National Electrical Code, NFPA 70-1971, as Adopted by 29 C.F.R. § 1910.309(a)

The two switches on the north wall of the mixing room did not have seals in the fittings. The switches had been installed by an outside contractor. Respondent assumed the contractor was correctly doing the job and made no independent check of his work. Complainant alleges the conditions were in violation of section 501-5(a)(1) of the National Electrical Code, NFPA 70-1971.[29/]

Respondent does not contest the violation but submits it should not be classified as a serious violation. For the reasons previously set forth under item 11, which involves the same two switches, the violation is classified as nonserious. No penalty is assessed for the violation.

## FINDINGS OF FACT

1. Respondent is a corporation engaged in the manufacture of adhesives. It maintains an office and place of business at 220 Janney Road, Dayton, Ohio (Para. II, Complaints and Answers).

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29/ Section 501-5(a)(1) states:

> In Class I, Division 1 locations, seals shall be located as follows:
>
> (1) In each conduit run entering an enclosure for switches, circuit breakers, fuses, relays, resistors or other apparatus which may produce arcs, sparks or high temperatures. Seals shall be placed as close as practicable and in no case more than 18 inches from such enclosures. There shall be no junction box or similar enclosure in the conduit run between the sealing fitting and the apparatus enclosure.

2. In October 1979 the Cincinnati, Ohio, area office for OSHA received a complaint concerning several alleged violations in respondent's plant. An inspection was attempted in November 1979, but the respondent refused to allow an inspection without a warrant. The matter was referred to the Office of the Solicitor, U. S. Department of Labor, for purposes of obtaining a warrant. The warrant was obtained on April 1, 1980 (Tr. II, 132, 134, 136-137).

3. When representatives of respondent denied the compliance officer the right to inspect in November 1979, they also advised him that they wanted to be present at the hearing to determine if a warrant should be issued (Tr. II, 137). The OSHA office did not inform any representatives of respondent that a warrant was being sought (Tr. II, 138).

4. On April 2, 1980, Industrial Hygienist James Sweeney commenced an inspection of respondent's facilities located at 220 Janney Road, Dayton, Ohio (Tr. I, 10, 12; Tr. II, 26). He was accompanied by Compliance Officers James Zucchero and Paula Moore (Tr. II, 57). The inspection concluded on April 7, 1980 (Tr. I, 12, 60; Tr. II, 26).

5. Upon arrival at respondent's facilities, Compliance Officer James Zucchero served a warrant upon George Stockham (Tr. I, 12, 58; Tr. II, 26).

6. Stockham informed Zucchero that he was protesting the inspection because the warrant had been obtained without any representatives of respondent being present, but he allowed the inspection to proceed (Tr. I, 12; Tr. II, 26-27).

7. Respondent employed approximately 500 persons at the time of the inspection (Tr. I, 82).

8. Respondent had previously been inspected on four different occasions (Tr. I, 83).

9. Respondent was using three oil-lubricated compressors at the time of the inspection. The three compressors were hooked in a series. The compressors did not have a high-temperature or carbon monoxide alarm (Tr. I, 13-15, 40-42; Tr. II, 97-98).

10. The compressors were used to supply breathing air to employees while they were inside a confined space to perform repair work (Tr. I, 14). The air from the compressor was not tested for carbon monoxide when it was being used to supply breathing air (Tr. I, 14-15).

11. On March 26, 1980, one week prior to the inspection, the oil-lubricated compressors were used to supply air inside a 3,500-gallon mixing tank while an employee was performing maintenance inside the tank (Tr. I, 15, 25-26, 39-40). The compressors were located approximately 75 feet from the tank (Tr. I, 40-41). The employee was inside the tank for approximately 20 to 25 minutes (Tr. I, 43).

12. Respondent has two maintenance mechanics who perform vessel entries (Tr. I, 17). On the average, two or three vessel entries are performed each year (Tr. I, 17).

13. When employees are inside a vessel, an employee is sometimes but not always stationed near the compressors to keep an eye on the compressors while the employee is inside the tank[30/] (Tr. I, 20-21, 33, 47; Tr. II, 98). Two persons are also generally stationed near the entrance to the vessel while the entry is in progress (Tr. I, 22).

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30/ Paul Bogan testified that the air compressors are monitored for approximately 30 percent of the vessel entries (Tr. II, 98).

14. Combustible gas meter readings are taken before an entry is made into any vessel (Tr. I, 23-24, 32). There is no periodic testing for carbon monoxide (Tr. I, 42).

15. Respondent no longer uses the compressors to supply breathing air. It now uses bottled breathing air (Tr. II, 147).

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16. The platform between and adjacent to the No. 14 and No. 15 mixers had two metal containers, one inside the other, lying on their side and protruding over a toeboard (Exs. 1-2; Tr. I, 62-63).

17. The platform was approximately 12 feet above the adjacent pit floor (Tr. I, 64). It was in use on a regular basis by employees (Ex. 2; Tr. I, 64). An employee was noticed underneath the platform on one occasion during the inspection (Ex. 3; Tr. I, 66).

18. A pan and a piece of pipe were protruding over the toeboard at the platform edge adjacent to the No. 3 and No. 4 mixers (Ex. 4; Tr. I, 68-69).

19. The platform was approximately 10 to 12 feet above the lower level and was used on a regular basis (Tr. I, 70). Employees had occasion to go underneath the platform (Tr. I, 71).

20. The aisle adjacent to the northwest corner of the mixing area was obstructed by 5-gallon cans and 55-gallon drums that were being filled. Some of the cans and drums had already been filled (Ex. 5; Tr. I, 71-72). The material had been in the aisle for approximately 3 1/2 hours at the time it was observed by Compliance Officer Zucchero (Tr. II, 82-83).

21. A drainage ditch located at the southwest corner of the mixing area had its covers removed (Ex. 6; Tr. I, 75-77). The uncovered opening was approximately

10 feet in length, 11 inches wide, and approximately 8 inches deep and made of concrete (Tr. I, 75-76). No type of guarding was provided while the ditch was uncovered (Tr. I, 76).

22. The floor around the drainage ditch was uneven. The uneven floor was due to the adhesives that had solidified on the floor adjacent to the ditch (Tr. I, 76).

23. The pit area of the mixing room, which is approximately 50 inches in depth, was located directly behind the uncovered ditch. The pit was made of concrete and was located approximately 15 inches from the edge of the ditch. Employees were working in the area where the uncovered ditch was located (Ex. 6; Tr. I, 77-78; Tr. II, 102).

24. The cover had been removed in order to clean the ditch. The employee assigned to clean the ditch was cleaning in the pit area. He was approximately 75 feet from the uncovered ditch (Tr. I, 81).

25. The east yard area of respondent's facilities contained pipe openings located above ground level. The tanks were located underground (Exs. 7-8; Tr. I, 84-86, 88). The tanks contained adhesives that were of a Class I flammable nature (Tr. I, 88-89). The pipes were for the purpose of venting flammable vapors from the tanks during the filling and withdrawal operations (Tr. I, 87).

26. One of the vent pipes was blocked by solidified adhesive (Ex. 8; Tr. I, 87; Tr. II, 85). Employees were working in the vicinity of the blocked vent pipe (Tr. I, 89-90).

27. The east yard area of respondent's facilities contained 4-inch diameter pipes, which extended approximately 30 inches above the ground, used for manual gauging of tanks which did not have covers in place. The pipes had manual gauging sticks in them (Exs. 9-11; Tr. I, 91-92, 94; Tr. II, 41).

28. The covers prevent flammable vapors from rising out of the tanks when they are being filled or when the substance in the tank is being withdrawn (Tr. I, 95).

29. Some of respondent's pipes used for manual gauging had proper vent caps on them (Ex. 12; Tr. I, 97).

30. Employees were observed manually gauging the tanks in the east yard at the time of the inspection (Tr. 99; Tr. I, 41-42).

31. Class I, II and III liquids in 55-gallon drums were stored in the west yard area of respondent's facility. The liquids were stored next to bails of wastepaper and cardboard. There was also a growth of weeds in the area (Exs. 13-14; Tr. I, 100-101; Tr. II, 43-46, 152-153). The cardboard and wastepaper were stored within inches of the 55-gallon drums (Tr. II, 87).

32. An employee was operating a forklift in the west yard area (Tr. I, 102-103).

33. A tank vehicle-loading station was located at the southeast corner of the plant. Flammable materials were transferred into tank trucks at the loading station. The valve in the fill line was manually opened and closed (Ex. 15; Tr. I, 104-105; Tr. II, 49-50). Employees were not observed using the filling operation (Tr. I, 107). There was no self-closing valve or metering device to limit the amount of material pumped to the tank vehicle to prevent an overflowing of the vehicle (Tr. I, 106; Tr. II, 48-49).

34. Adhesives were observed on the wall and ground area surrounding where the materials were actually placed into tank vehicles (Ex. 15; Tr. I, 105-106).

35. There were two 5-gallon metal containers and one 55-gallon metal containers in the south area of the mixing room pit area filled with materials of a combustible solid and flammable liquid nature that were uncovered or were not

kept in covered containers (Exs. 16-17; Tr. I, 109-110; Tr. II, 52). The 55-gallon metal containers contained wood and combustible solid materials that had been removed from the pit (Exs. 17-18; Tr. I, 110; Tr. II, 52-53).

36. The cans had been in the pit in excess of one week (Tr. I, 110).

37. The north end of the pit area in the mixing room contained one 55-gallon steel container and four cardboard drums which contained combustible solid debris; e.g., timber, paper, rags. The containers were uncovered (Ex. 18; Tr. I, 110-111). The containers had been in the pit in the same condition for approximately three weeks (Tr. I, 111).

38. The materials had been placed in the containers while employees were cleaning up a spill in the pit area (Tr. II, 111-112).

39. An open 5-gallon metal container of a flammable liquid was located adjacent to the No. 14 fill pipe in the northwest corner of the mixing room (Ex. 5; Tr. I, 113-114). The open container had been at the location all during the morning of the inspection (Tr. I, 113).

40. Several employees worked on a regular basis within the particular area where the 5-gallon metal container was located (Tr. I, 114).

41. While Compliance Officer Zucchero was interviewing an employee in front of a workbench at the compressor filling station, another employee drove a forklift up to the compressor filling station for the purpose of placing an empty skid in front of the workbench. Another employee was at the workbench at the time the forklift approached and ended up located between the workbench and the skid (Ex. 19; Tr. I, 115-118, Tr. II, 54, 125-127). There was approximately 2 feet between the end of the skid and the workbench (Tr. I, 116). The workbench was constructed of wood and angle iron (Tr. II, 128).

42. The forklift driver sounded no warning (Tr. I, 116-117). He had no training in the operation of a forklift (Tr. II, 130).

43. The filling room contained three filling lines operated by conveyors. The latex line had a lid compressor unit on it that sealed the lids on previously filled cans by steel pressure rolls as the cans moved through it. The machinery was guarded by a steel wire boxlike structure that contained entry and exit openings (Exs. 21-22; Tr. I, 121-123, 126).

44. The openings in the guard were approximately 7 inches wide and 9 inches high. At the entrance end of the opening, the first pinch point created by the can and the rollers was approximately 5 1/2 inches from the entrance. At the exit, there was a distance of approximately 3 inches to the pinch point created by the rollers and the can (Tr. I, 123-124).

45. The lid compressor unit was composed of a series of metal rolls approximately 1 1/2 inches in diameter that became progressively lower until they compressed the lid onto the container (Tr. I, 123).

46. An employee was standing several feet from the entrance to the lid compressor unit. She was placing lids on the cans and placing them on the conveyor so they could pass through the compressor unit (Ex. 22; Tr. I, 124). The employee moved back and forth in the area of the machine (Tr. I, 125).

47. The conveyor on the latex line was in operation during the inspection, but the compressor was not being operated (Tr. II, 60-61, 154).

48. The solvent filling line was almost identical to the latex filling line. The same type of entry and exit openings existed in the metal guard around the machinery used to press the lid on previously filled cans (Tr. I, 126-127).

49. A horizontal metal cutting band saw located in the maintenance shop had no guarding for the unused portion of the saw blade (Ex. 23; Tr. I, 128). The right

side of the saw had a 2 1/2-inch opening, and the left side had a 1 1/2-inch opening (Tr. I, 128-129).

50. The band saw was used on a regular basis (Tr. I, 133-134).

51. The Dierks filler unit in the mixing room had a compressor unit to seal lids on the cans. The compressor unit was guarded by a boxlike metal structure that had entry and exit openings (Exs. 24-26; Tr. I, 134-135).

52. One-gallon containers, approximately 8 inches high and 7 inches in diameter, were used on the Dierks filler line. Quart cans, approximately 4 inches in diameter and 5 inches high, were also used on the line (Tr. I, 136).

53. The entry and exit openings in the guard on the Dierks filler unit were several inches larger than the cans passing through the unit. The entrance was approximately 9 1/2 inches in height and 7 inches wide. The entrance was approximately 6 inches from the hazardous components of the machinery (Exs. 24-25; Tr. I, 136-137). The opening at the exit end was approximately 10 inches high by 7 inches wide. The exit was approximately 2 inches from the hazardous components (Tr. I, 137).

54. The Dierks line was not operating at the time of the inspection but was a regular part of respondent's operation (Tr. I, 137; Tr. II, 63).

55. A fabricated piece of metal was lying near the compressor unit. The metal piece had been fabricated to use as an additional guard on the machine (Exs. 26-27; Tr. I, 138; Tr. II, 63-64).

56. The "A" and "B" Microway fillers had lid compressor units to seal the lids on containers. The compressors were guarded by a heavy wire boxlike structure that had entry and exit openings (Exs. 29-30; Tr. II, 4-5).

57. Employees removed the cans from the roller conveyor at the exit end of the machinery and carried them a few feet to a skid (Ex. 30; Tr. II, 5, 88-89). On

one occasion an employee reached inside the guard at the exit end to remove the container (Tr. II, 7).

58. Empty containers are placed on a roller conveyor by an employee and filled with an adhesive mixture. A lid is then placed on the container and a switch actuated to feed the container through the entrance opening of the guard. A ram descends while the can is inside the guard and seals the lid on the container (Tr. I, 6). The movement of the containers through the sealing mechanism is automatic. There is no manual shoving or pushing needed on the part of any employees (Tr. II, 64-65, 160).

59. The entry and exit openings in the metal guard were approximately 17 inches high by 14 inches wide (Ex. 30; Tr. I, 6-7).

60. Two switches for fans were mounted on the north wall of the mixing room approximately 4 feet above the floor. An aisleway was located adjacent to the north wall and was used by powered industrial trucks. One of the switches and the wall showed damage from contact with the industrial trucks (Exs. 31-32; Tr. II, 10-12, 65).

61. Class I flammable materials were being processed in the mixing room (Tr. II, 14). There was no evidence that a flammable atmosphere existed in the mixing room or any other area of the plant (Tr. II, 65-66).

62. At least eight employees were working in the mixing room in the general proximity of the north wall (Tr. II, 15).

63. Two battery-charging units in the flammable material warehouse were set up to charge the batteries on forklifts used in the plant. The units were standard Gould battery chargers and did not bear approval for use in Class I locations. The units contained make-and-break contacts (Tr. II, 18-19).

64. There were one or two employees working in the vicinity of the battery chargers (Tr. II, 20).

65. Thin-walled electrical conduit with screw type fittings was used in the permanent wiring that was supplying power to the battery chargers located in the flammable materials warehouse (Ex. 33; Tr. II, 21-23, 121-122).

66. The employee that installed the conduit was told to order what he needed (Tr. II, 122).

67. The two switches located on the north wall of the mixing room did not have seals in the fittings (Tr. II, 15-16).

68. The switches were installed by an electrical contractor, and respondent assumed he knew what he was doing (Tr. II, 71-72, 161).

## CONCLUSIONS OF LAW

1. Respondent, at all times material hereto, was engaged in a business affecting commerce within the meaning of the Act.

2. Respondent, at all times material hereto, was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of the parties and the subject matter herein.

3. Respondent was in violation of 29 C.F.R. § 1910.134(d)(2)(ii) for using oil-lubricated compressors which did not have a high-temperature or carbon monoxide alarm to supply air to employees while they worked inside vessels. The violation was serious. A penalty of $200 is assessed for the violation.

4. Respondent was in violation of 29 C.F.R. § 1910.22(a)(1) for failure to keep two separate platform areas and an aisle adjacent to the northwest corner of the mixing area in a clean and orderly manner. The violation was nonserious. A penalty of $50 is assessed for the violation.

5. Respondent was in violation of 29 C.F.R. § 1910.23(a)(8)(ii) for failing to protect a drainage ditch, which had its grate removed, by a removable standard railing or to provide constant attention to the ditch by someone to prevent employee exposure to a tripping hazard. The violation was serious. A penalty of $150 is assessed for the violation.

6. Respondent was not in violation of 29 C.F.R. § 1910.106(b)(3)(iv)(a) since the standard is inapplicable to the facts.

7. Respondent was not in violation of 29 C.F.R. § 1910.106(b)(3)(v)(b). The liquid-tight caps or covers had been temporarily removed to gauge the tanks. There is also no evidence to indicate that the openings were independent of the fill pipes.

8. Respondent was in violation of 29 C.F.R. § 1910.106(d)(6)(iv) for failing to keep the storage area free of weeds and other combustible material. The violation was serious. A penalty of $100 is assessed for the violation.

9. Respondent was in violation of 29 C.F.R. § 1910.106(h)(5) for failure to provide a self-closing type valve as the final control in the line at the truck filling operation. The violation was nonserious. A penalty of $50 is assessed for the violation.

10. Respondent was in violation of 29 C.F.R. § 1910.106(h)(8)(iii) for failure to store combustible waste materials in closed metal cans and to dispose of it daily. It was not in violation of the standard for having a 5-gallon container of liquid in the mixing room with its lid removed. The violation was nonserious. A penalty of $50 is assessed for the violation.

11. Respondent was in violation of 29 C.F.R. § 1910.178(m)(1) as a result of a forklift operator driving within 2 feet of an employee while the employee was

standing in front of a bench at the compressor filling station. The violation was serious. A penalty of $150 is assessed for the violation.

12. Respondent was in violation of 29 C.F.R. § 1910.212(a)(1) for failure to safeguard the unused portion of the blade on a horizontal metal band saw located in the maintenance shop. The violation was serious. A penalty of $150 is assessed for the violation.

13. Respondent was not in violation of 29 C.F.R. § 1910.212(a)(1) in regard to the existing guards on the latex and solvent filling lines in the filling room and the Dierks filler unit in the mixing room. The guards adequately protected employees.

14. Respondent was not in violation of 29 C.F.R. § 1910.212(a)(3)(ii) since the existing guard on the "A" and "B" Microway fillers adequately protected employees from any point of operation hazard.

15. Respondent was in violation of section 110-17(b) of the National Electrical Code, NFPA 70-1971, for failure to protect two electrical switches on the north wall of the mixing room from physical damage. The violation was nonserious. No penalty is assessed for the violation.

16. Respondent was not in violation of section 501-3(b)(1) of the National Electrical Code, NFPA 70-1971. Complainant has failed to sustain his burden of proof on the issue.

17. Respondent was in violation of section 501-4(b) of the National Electrical Code, NFPA 70-1971, for using thin-walled electrical conduit on the east wall of the warehouse. The violation was nonserious. No penalty is assessed for the violation.

18. Respondent was in violation of section 501-5(a)(1) of the National Electrical Code, NFPA 70-1971, for failure to have seals in two switches located on the north wall of the mixing room. The violation was nonserious. No penalty is assessed for the violation.

## ORDER

Based upon the findings of fact and conclusions of law, it is

ORDERED: (1) That the serious citation issued to respondent on April 18, 1980 (Docket No. 80-2423), is affirmed and a penalty of $200 assessed for the violation;

(2) That items 3, 4, 10 and 12 of the serious citation issued to respondent on April 23, 1980 (Docket No. 80-2860), and the penalties proposed for the alleged violations, are vacated in their entirety;

(3) That item 7 of the serious citation issued to respondent on April 23, 1980, is vacated as to the open 5-gallon container in the mixing room and is affirmed as a nonserious violation with regard to the remaining allegations;

(4) That item 9 of the serious citation issued to respondent on April 23, 1980, is affirmed insofar as it pertains to the band saw but is vacated as to the remaining allegations;

(5) That items 2, 5 and 8 of the serious citation issued to respondent on April 23, 1980, are affirmed;

(6) That items ., 6, 11, 13 and 14 of the serious citation issued to respondent on April 23, 1980, are modified to affirm the allegations as being of a nonserious nature;

(7) That the following penalties are assessed for the violations determined in Docket No. 80-2860:

| Item No. | Assessed Penalty |
|---|---|
| 1 | $ 50 |
| 2 | $150 |
| 5 | $100 |

| Item No. | Assessed Penalty |
|---|---|
| 6 | $ 50 |
| 7 | $ 50 |
| 8 | $150 |
| 9 | $150 |

(8) That the "other" citation issued to respondent on April 23, 1980, is affirmed.

Dated this 24th day of March, 1981.

James D. Burroughs

JAMES D. BURROUGHS
Judge

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

June 30, 1982

**IN REFERENCE TO SECRETARY OF LABOR v.**

COMPRESSOR ENGINEERING CORP.

**OSHRC DOCKET NO.** 80-2775

**NOTICE IS HEREBY GIVEN TO THE FOLLOWING:**

**OF** COMMISSION DECISION

REMAND

**To wit:** See attached.

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**FOR EMPLOYEES**

-

**FOR THE COMMISSION**

Ray H. Darling, Jr.

**RAY H. DARLING, JR.**
**EXECUTIVE SECRETARY**

- E. Carter Botkin
  Judge, OSHRC
  Federal Building, Room 7B11
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  Dallas, Texas 75242

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket Nos. 80-2069 & 80-2322 |
| SMITH STEEL CASTING COMPANY, | : | |
| Respondent. | : | |
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 80-2775 |
| COMPRESSOR ENGINEERING CORP., | : | |
| Respondent. | : | |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

These cases concern ex parte warrants obtained by the Secretary of Labor in early 1980 to inspect the workplaces of Smith Steel Casting Company in Marshall, Texas, and Compressor Engineering Corporation in Houston, Texas. The Secretary made the ex parte applications under his regulation at 29 C.F.R. § 1903.4 as amended in December 1978.[1/] The Respondents contend

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1/ The regulation at issue, 29 C.F.R. § 1903.4, as amended in 1978, provides in pertinent part as follows:

(continued on next page)

that this regulation is invalid and moved that the evidence gathered during the inspections be suppressed. Judge Edwin G. Salyers in Docket Nos. 80-2069 and 80-2322 (Smith Steel Casting Company) and Judge E. Carter Botkin in Docket No. 80-2775 (Compressor Engineering Corporation), upheld the Respondents' contentions, relying on Donovan v. Huffhines Steel Co., 645 F.2d 288 (5th Cir. Unit A, 1981). See also Cerro Metal Products v. Marshall, 620 F.2d 964 (3d Cir. 1980). But see Marshall v. Seaward International, Inc., 644 F.2d 880 (4th Cir. 1981) (table), aff'g 510 F. Supp. 314 (W.D. Va. 1980); Rockford Drop Forge Co. v. Donovan, 672 F.2d 626 (7th Cir. 1982); W & W Steel Co. v.Marshall, 604 F.2d 1322 (10th Cir. 1979). The Secretary's petitions for review in both cases were granted.[2/]

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1/ (continued)

§ 1903.4 Objection to inspection

(a) Upon a refusal to permit a Compliance Safety and Health Officer, in exercise of his official duties, to enter without delay and at reasonable times any place of employment or any place therein, to inspect, . . . [he] shall endeavor to ascertain the reason for such refusal, and shall immediately report the refusal and the reason therefor to the Area Director. The Area Director shall consult with the Regional Solicitor, who shall take appropriate action, including compulsory process, if necessary.

* * *

(d) For purposes of this section, the term compulsory process shall mean the institution of any appropriate action, including ex parte application for an inspection warrant or its equivalent.

2/ The cases are before the Commission for review pursuant to 29 U.S.C. § 661(i). Commissioner Cottine granted the Secretary's petition in Docket Nos. 80-2069 and 80-2322. Commissioner Cleary granted the Secretary's petition in Docket No. 80-2775. Because the cases present the same issue, the Commission has consolidated them for purposes of review. Commission Rule 9, 29 C.F.R. § 2200.9.

The Commission has held that the Secretary had authority under section 1903.4 as amended in 1978 to obtain ex parte warrants. Roberts Consolidated Industries, Inc., OSHRC Docket Nos. 80-2423 and 80-2860 (June 30, 1982). See also Davis Metal Stamping, Inc., OSHRC Docket No. 78-5775 (June 30, 1982). This Commission precedent controls the disposition of these cases. The Secretary was authorized to obtain the ex parte warrants and the inspections conducted under the warrants were valid. Furthermore, for the reasons set forth in Davis Metal Stamping, Inc., we do not read the opinion in Donovan v. Huffhines Steel Co., supra, to require the Commission to reach a contrary result in the disposition or remedy in this case. We therefore set aside the judges' decisions[3/] and remand the cases to the respective judges for further proceedings consistent with this opinion.[4/] SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: JUN 30 1982

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3/ Chairman Rowland concludes that the Secretary improperly obtained the warrants in these cases and would vacate the Secretary's citations for the reasons stated in his dissenting opinions in Roberts Consolidated Industries and Davis Metal Stamping.

4/ Docket No. 80-2775 (Compressor Engineering Corporation) is hereby severed from Docket Nos. 80-2069 and 80-2322 (Smith Steel Casting Company). Commission Rule 10, 29 C.F.R. § 2200.10.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>COMPRESSOR ENGINEERING CORP.,<br><br>Respondent. | OSHRC DOCKET NO. 80-2775 |

Appearances:

Donald W. Hill, Esquire
Dallas, Texas

For the Complainant.

Arthur Val Perkins, Esquire
Houston, Texas

For the Respondent.

DECISION AND ORDER

BOTKIN, Judge:

As a result of an inspection conducted on April 29, 1980, of respondent's place of business located at 5440 Alder, Houston, Texas, a citation was issued to respondent on May 2, 1980, alleging a serious violation of § 5(a)(2) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq. ("the Act"). On August 13, 1980, an order was issued that (i) the Secretary's failure to file a complaint had resulted in a waiver to file that pleading and (ii) the contested action would stand as his allegations in the case. Thereafter, respondent timely filed an answer. Among other defenses, it alleged that the

inspection violated its Fourth Amendment rights as it arose out of an inspection warrant which was issued ex parte. It demanded a hearing, prior to a hearing date on the merits, to determine whether its constitutional rights had been violated. Thereafter, on September 29, 1980, the undersigned issued an order to respondent to show cause why such a hearing was necessary since the issue of the legality of an ex parte warrant appeared to be solely an issue of law. In its response, respondent agreed that the warrant issue was solely an issue of law. However, it felt that oral presentation by the parties of their respective contentions was preferable due to the complexity of the issue. In addition to said hearing, it demanded that the warrant be quashed and the citation be vacated. A ruling was delayed due to the Review Commission decision in the case of Asarco, Inc., El Paso Division, 80 OSAHRC _____, 1980 CCH OSHD ¶ 24,838 (No.79-6850, 1980), which held that the filing of a complaint by the Secretary is mandatory. Therefore, the order, dated August 13, 1980, was vacated and the parties were given an opportunity to submit written statements on whether the action should be dismissed. Ultimately, the Secretary's motion to file a complaint out of time was granted. Respondent timely filed its answer thereto. Once again, it raised the Fourth Amendment defense, renewed its demand for a preliminary hearing, and a order dismissing the complaint and vacating the citation. Thereafter, respondent's request for a preliminary hearing on the constitutional issue was denied. Hearings scheduled on March 4 and April 8, 1981 were cancelled due to the parties' desire to submit the case for decision based on a written stipulation of facts. A stipulation of facts, governing the case, was filed on April 27, 1981. Respondent has also filed proposed conclusions of law and brief in support thereof.

The stipulation of facts reveals that on April 8, 1980, one of the Secretary's compliance officer's appeared at respondent's workplace for a general schedule safety inspection. Officials of respondent informed him that entry to the workplace would not be allowed without a warrant. It further discloses that, on April 23, 1980, an inspection warrant authorizing a general schedule inspection of respondent's workplace was issued by a United States Magistrate without any notification to respondent. On April 29, 1980, a compliance officer presented the inspection warrant to respondent's president. The compliance officer was allowed entry to the respondent's workplace and subsequently conducted a wall to wall inspection. As a result of his inspection findings, a citation was issued to respondent.

In its brief, respondent continues to press its argument that (i) the citation, issued on May 2, 1980, was invalid since it was based on an inspection made pursuant to an ex parte inspection warrant, and (ii) the citation must be vacated and the complaint dismissed. It's proposed conclusions of law are consistent therewith.

In a recent decision, Sarasota Concrete Co., No. 78-5264 (Rev. Comm. April 28, 1981), the Review Commission held the exclusionary rule applicable to OSHA proceedings in the context of a violation of Fourth Amendment rights. Respondent has not filed a motion to suppress the evidence obtained as a result of the inspection in this case. However, it raised a defense in its answer that the citation was invalid since it was based on an inspection made pursuant to an ex parte inspection warrant and it repeatedly demanded a preliminary hearing to determine whether its Fourth Amendment rights had been violated. In essence, respondent's demands amounted to a motion to

supress the evidence obtained as a result of the inspection. The ends of justice would not be served by holding otherwise.

The precise issue presented has not been resolved by the Review Commission. The Circuit Courts of Appeal are divided in their opinions. In Cerro Metal Products v. Marshall, 620 F. 2d 964 (3d.Cir.1980), the Third Circuit held that 29 CFR 1903.4 does not permit and authorize ex parte inspection warrants. In the most recent decision, the Fifth Circuit arrived at the same decision. It affirmed the decision of the District Court without comment. Marshall v. Huffines Steel Company, _____F.2d _____(5th Cir. 1981). The Tenth Circuit,in Marshall v. W and W Steel Company, Inc., 604 F.2d 1322 (10th Cir.1979), held that ex parte warrants issued under said section were valid. In Stoddard Lumber Co., Inc. v. Marshall,627 F.2d 984 (9th Cir.1980), the Ninth Circuit also held that ex parte warrants issued under similar circumstances were valid.

I find the reasoning of the courts in the Cerro and Huffines cases to be persuasive and rely thereon in making this decision. I, therefore, find that the ex parte warrant issued in this case on April 23, 1980 (prior to the amendment of 29 CFR 1903.4 by APA rule making proceedings) was not valid. As a result thereof, the evidence resulting from the inspection conducted on April 29, 1980 must be suppressed. Consequently, I will dismiss the complaint and vacate the citation. Accordingly, I do not reach other arguments related to the validity of the inspection warrant raised by the respondent or the merits of the case.

**ORDER**

The complaint is dismissed and the citation is vacated.

So ORDERED.

E. Carter Botkin

E. CARTER BOTKIN
Administrative Law Judge

Dated: June 29, 1981

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

TABLE OF CITATIONS

| OSHRC Docket No. | OSAHRC Reports* | BNA OSHC | CCH OSHD |
|---|---|---|---|
| 1 | 73/15/A2 (2/1318) | 1:1219 | 15,047, 15,687 |
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| 4 | 72/1/B10 (1/33) | 1:1001 | 15,032 |
| 5 | 73/30/A2 (3/1077) | 1:1250 | 15,052 |
| 6 | 73/38/F2 (4/607) | 1:1309 | 15,056, 16,538 |
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| 8 | 72/2/B4 (1/115) | 1:3135 | 15,031 |
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(A) - Notes a case presently under appeal to a U.S. Circuit Court of Appeals.
(D) - Notes a case in which a decision has been issued by a U.S. Circuit Court of Appeals.

* Citations for OSAHRC Reports are listed according to microfiche cites. When applicable citations for the printed volumes of OSAHRC Reports are listed in parentheses.

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

Secretary of Labor v. Volk Construction, Inc.
OSHRC Docket No. 81-2669 S

1. Enclosed is a copy of my decision. It will be filed with the Commission on June 1, 1982, and will become the final order of the Commission on July 1, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is July 1, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

James A. Cronin, Jr.
Judge, OSHRC

Date: May 12, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR<br><br>Complainant,<br><br>v.<br><br>VOLK CONSTRUCTION, INC.,<br><br>Respondent | OSHRC DOCKET NO. 81-2669S |

APPEARANCES:

James L. Abrams, Esquire, of Denver, Colorado,
For the Complainant,

Roy D. Volk, President, Volk Construction, Inc.,
of Great Falls, Montana,
For the Respondent.

DECISION AND ORDER

As a result of an inspection on November 19, 1981, by the Occupational Safety and Health Administration (OSHA), the respondent, Volk Construction, Inc. (Volk), was cited by the Secretary of Labor for a violation of 29 C.F.R. §1926.451(c)(6)--failure to erect posts of a tube and coupler scaffold on suitable bases. No penalty was proposed for this citation.

The citation describes the violation as follows:

> "Tube and coupler scaffold posts were not erected on a suitable base:
>
> (a) A sill was not used to support scaffold post on disturbed ground at the south side of the building."

29 C.F.R. §1926.451(c)(6), as promulgated, provides:

> (6) Posts shall be accurately spaced, erected on suitable bases, and maintained plumb.

§1926.452(b)(32) defines "Tube and coupler scaffold" as:

> An assembly consisting of tubing which serves as posts, bearers, braces, ties, and runners, a base supporting the posts, and special couplers which serve to connect the uprights and to join the various members.

Volk's notice of contest, dated December 1, 1981, contended the the violation was "incorrect" because the scaffold was erected and rested upon "compacted in place backfill" not "disturbed ground". Subsequently Volk amended its notice of contest to include the following statement:

> "It was discussed and duly recorded after indepth conversation with our project foreman, on the particular project in question, the OSHA inspector stated the only reason he gave us a citation was to justify he was on our project that particular day."

At the conference/hearing held on April 7, 1982, at Great Falls, Montana, Volk's President, Ray Volk, admitted the violation but continued to question the motive of the OSHA inspector and the Secretary of Labor's policy in issuing the citation (Tr. 24). He further contended that bases on the scaffold's posts were unnecessary on November 19, 1981, because the scaffold's posts were erected on frozen ground. Mr. Volk also filed a post-hearing statement in which he claimed that because the standard's phrase "suitable base" is "very vague, misleading and can have different interpretations," the issuance of the citation was "unwarranted and unjustified."

## Discussion

A de minimis violation, with no penalty, will be affirmed.

Section 9(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. §651 et seq) authorizes the Secretary of Labor to prescribe procedures for the issuance of a notice in lieu of a citation with

respect to de minimis violations which have no direct or immediate relationship to safety or health. A notice of this type, and not a citation, would have been more appropriate in this case. Unfortunately, the Secretary has never prescribed procedures for the issuance of notices for de minimis violations in lieu of citations.

Volk obviously violated the standard at §1926.451(c)(6), but not for the reasons alleged in the citation. By definition a "tube and coupler scaffold" includes "a base supporting the posts". See §1926.452(b)(32). And §1926.451(c)(6) requires posts to be erected on "suitable bases". Clearly, therefore, the term "bases" relates to those metal bases into which the scaffold posts or legs are customarily inserted and on which the posts rest, and not to the ground, floor, or other types of foundations on which an entire scaffold may rest. (Tr. 15-16; See also §1926.451(d)(4)). Because Volk's scaffold posts were not set on individual bases, a violation of §1926.451(c)(6) was committed. The citation's reference to the absence of a sill, however, is irrelevant. The standard at issue here does not reference or require sills or other foundations for scaffolds. The requirement for sills, in addition to bases, is found at §1926.451(d)(4).

Although Volk failed to comply with the requirements of the cited standard, the record establishes that the violation, when committed, had only a negligible relationship to employee safety. According to the Secretary's compliance officer, the standard's "suitable base" requirement is to prevent the posts from punching into the soil and causing displacement of the scaffold. (Tr. 14, 17-18) At the time of the inspection, however, the compliance officer observed no punching into the ground and he found "no fault" with the soil on which the scaffold rested. (Tr. 20-21)

The scaffold also was only five feet off the ground and rested on frozen ground. (Tr. 31) This evidence supports a finding that the safety of Volk's two employees on the scaffold was not diminished by Volk's failure on November 19, 1981, to have bases for the scaffold's posts. Therefore, the violation is found to be de minimis. See Continental Oil Co., 79 OSAHC 42/C3, 7 BNA OSHC 1432, 1979 CCH OSHD ¶23,626 (No. 13750, 1979).

Although unnecessary to a resolution of this matter, Volk's charge against the compliance officer deserves a brief discussion. Volk originally charged that the compliance officer "stated" at the time of inspection that the only reason he gave Volk a citation was to justify his inspection of the Volk worksite. The record, however, fails to support this charge. Indeed, Mr. Super, Volk's project supervisor, testified and conceded that the compliance officer made no direct statement to the effect that he had to issue a citation in order to justify his inspection of Volk, and admitted that it was simply Mr. Super's personal impression that this was the compliance officer's motive for issuing the citation. (Tr. 32-34) Moreover, there is nothing in this record that reflects adversely on the compliance officer's conduct of the November 19, 1981, inspection.

Finally, an observation--issuance of a citation is not always necessary or appropriate. In this case, a warning and immediate abatement would have been sufficient.

## ORDER

Based upon the entire record, it is ORDERED:

1. A de minimis violation of 29 C.F.R. §1926.451(c)(6) is AFFIRMED, and no penalty assessed.

James A. Cronin, Jr.
Judge, OSHRC

Dated: June 1, 1982

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1515 Broadway, Room 3800
New York, New York 10036

## NOTICE OF DECISION

Secretary of Labor v. ACE DIE CUTTING CO., INC.
OSHRC Docket No. 81-1335

1. Enclosed is a copy of my decision. It will be filed with the Commission on June 7, 1982, and will become the final order of the Commission on July 7, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is July 7, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

DAVID G. ORINGER
JUDGE, OSHRC

Date: May 18, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>ACE DIE CUTTING CO., INC.,<br>Respondent. | OSHRC DOCKET<br>NO. 81-1355 |

JUDGE'S DECISION JUN 7 '82 RECEIVED

FINAL ORDER ON JUL 7 '82

Appearances:

FOR THE SECRETARY OF LABOR

Francis V. LaRuffa, Regional Solicitor;
Barnett Silverstein, Esq., of Counsel
U. S. Department of Labor
1515 Broadway, Room 3555
New York, New York 10036

FOR THE RESPONDENT

Robert T. Anker, Esq.
295 Madison Avenue
Suite 700
New York, New York 10017

DECISION AND ORDER

ORINGER, JUDGE: This is a proceeding under Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq., (hereinafter referred to as "the Act"), to review citations issued by the Secretary of Labor (hereinafter referred to as "Complainant") pursuant to Section 9(a) and a proposed assessement of penalties thereon issued, pursuant to Section 10(a), of the Act.

The Secretary charged the Respondent in Citation 1 with a serious violation of the standard set forth at 29 CFR 1910.95 (b)(3) and proposed a penalty of $720.00 therefor. The Complainant charged the Respondent in Citation No. 2 with a willful violation of the standard set forth at 29 CFR 1910.95(b)(1) and proposed a penalty of $7,200.00 therefor.

The case was originally assigned on October 1, 1981, to Judge Cerbone, who no longer is with this tribunal. On January 5, 1982, the case was re-assigned to the undersigned. On March 23, 1982, a pre-trial conference was held in the case and the Respondent stated that it would attempt certain measures of abatement which would be inspected by the compliance officer. This tribunal gave them one month in which to see whether abatement could and would be accomplished.

On May 4, 1982, a further hearing was held in the instant cause. At the call of the calendar, counsel asked for time to confer.

Thereafter, at 10:11 A.M., the Secretary's representative stated in open tribunal that the parties had worked out an amicable settlement and both parties wanted to read it into the record so that the entire proceeding could be concluded.

The Secretary de facto moved to modify the proposed penalties and the appropriate paragraphs of the complaint so as to reflect a total aggregate proposed penalty of $25.00.

Respondent certified that all violations alleged in the complaint have been abated; that it will comply with the Act in futuro; that it tendered the modified proposed penalty of $25.00 to the Secretary. The compliance officer testified in open court that the abatement was now completed.

Based on these allegations, in open court, of the Secretary's representative as well as the Respondent, the Respondent's motion to withdraw its notice of contest to the citations and the modified proposed penalty, is GRANTED.

Citation No. 1, alleging a serious violation by this Respondent of the standard set forth at 29 CFR 1910.95(b)(3), is AFFIRMED. Citation No. 2, alleging a willful violation of the standard set forth at 29 CFR 1910.95(b)(1), is similarly AFFIRMED. A total aggregate penalty of $25.00 is ASSESSED herein.

SO ORDERED.

DAVID G. ORENDER, JUDGE, OSHRC

Dated: June 7, 1982
New York, New York

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1114 MARKET STREET, ROOM 608
ST. LOUIS, MISSOURI 63101
(314) 425-5071

# NOTICE OF DECISION

Secretary of Labor v. J. S. Alberici Construction Co., Inc.

OSHRC Docket No. 81-1847

1. Enclosed is a copy of my decision. It will be filed with the Commission on June 8, 1982, and will become the final order of the Commission on July 8, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is July 8, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Paul E. Dixon

Date: May 19, 1982

Paul E. Dixon, Judge, OSHRC

Enclosures

OSHRC FORM NO. 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant<br><br>v.<br><br>J. S. ALBERICI CONSTRUCTION CO., INC.,<br><br>Respondent | OSHRC DOCKET 81-1847 |

JUDGE'S DECISION
JUN 8 '82
RECEIVED

FINAL ORDER ON
JUL 8 '82

APPEARING ON BEHALF OF COMPLAINANT:

KEITHLEY F. T. LAKE, ESQ., U. S. Department of Labor, Office of the Solicitor, 911 Walnut Street, Room 2106, Kansas City, Missouri 64106

APPEARING ON BEHALF OF RESPONDENT:

GREGORY F. HOFFMANN, ESQ., Millar, Schaefer & Hoffmann, 818 Olive Street, Suite 430, St. Louis, Missouri 63101

Hearing held December 1, 1981, St. Louis, Missouri, Judge F. Daley Abels presiding.

## STATEMENT OF THE CASE

Paul E. Dixon, Judge:

Following the hearing in the foregoing matter and prior to the receipt of briefs of the parties, Judge F. Daley Abels became unavailable for Decision, having been affected by reduction in force by this agency and his employment by another agency. The above-styled case was thereupon assigned to the undersigned Administrative Law Judge for Decision.

Upon complete review of the various pleadings, the transcripts, all post-hearing briefs and motions, Judge Abels' trial notes, and discussions with Judge Abels, the following Decision is made.

As a result of a complaint on June 29, 1981, compliance officer Thomas McGrath conducted an inspection of respondent's worksite at the Union Electric Meramec Plant at Oakville, Missouri, where respondent was engaged in construction activities in the area of Fan Unit 1A.

At the construction site, McGrath met with Lyn R. Farley, respondent's project manager, who advised him that a boilermaker had fallen in a sky climber due to a cable parting. The cable had been removed from the jobsite.

The sky climber was a single-point suspension scaffold made by the Hi-Lo Power Scaffolding Company (Exhibit C-1).

A single cable is hung from a structural part of the jobsite and hooked to the equipment, which in turn is driven by a 3/4-inch drill motor which raises and lowers the cage on the cable. The cage provides employees with access to workareas within parts of the structure.

The structure being worked on was determined from the drawings to be 79 feet high.

Exhibit C-2 demonstrates the area where the cable had been tied off for the scaffold.

McGrath, on June 30, 1981, went to the St. Louis Testing Laboratories and viewed and took photographs and measurements of the cable (Exhibit C-3).

McGrath was unable to develop any definite evidence as to where the Hi-Lo was located at the time the cable parted, but as a result of his investigation felt that there had been a violation of 29 CFR 1926.28(a) (personal protective equipment); i.e., safety belt, lifeline, rope grab, which he recommended based on past experience in using scaffolds aboveground.

Thereafter, prior to the matter coming on for hearing, complainant by motion moved to amend the citation and complaint to violation of 29 CFR 1926.451 (k)(8). This motion was granted.

THE STANDARD

"29 CFR 1926.451--Scaffolding
(a) General requirements
(1) Scaffolds shall be erected in accordance with requirements of this section.

***

(i) (Swinging scaffolds) two-point suspension
(8) On suspension scaffolds designed for a working load of 500 pounds, no more than two men shall be permitted to work at one time. On suspension scaffolds with a working load of 750 pounds, no more than three men shall be permitted to work at one time. Each employee shall be protected by an approved safety life belt attached to a lifeline. The lifeline shall be securely attached to substantial members of the structure (not scaffold), or to securely rigged lines, which will safely suspend the employee in case of a fall. In order to keep the lifeline continuously attached, with a minimum of slack, to a fixed structure, the attachment point of the lifeline shall be appropriately changed as the work progresses. [Emphasis supplied]

***

(k) Single-point adjustable suspension scaffolds
(8) Suspension methods shall conform to applicable provisions of paragraphs (h) and (i) of this section." [Emphasis supplied]

## THE EVIDENCE

Through interviews with other employees, the compliance officer determined that no personal protective equipment had been used by the injured employee who was estimated to have fallen between 30 and 38 feet when the cable separated.

McGrath described the lifeline as an independent rope which had a rope grab which attached to the lifeline and to the employee's safety belt, so that if the employee would fall the grab rope would arrest the employee's fall. The lifeline would be attached to a separate structural member apart from the cable used to hoist the Hi-Lo.

McGrath testified that he optioned to cite 29 CFR 1926.28(a) for purposes of clarity, after having originally determined to cite respondent under 29 CFR 1926.451(k)(8).

McGrath felt that the referring back to subsections (h) and (i), which expressly require the use of lifeline and safety belts, was not as clear as section 28(a).

McGrath further determined that the injured employee Stephens was hospitalized and was to undergo major surgery, and based upon this, recommended the issuance of the serious citation, and through the utilization of the complainant's penalty assessment formula determined a proposed penalty in the amount of $420.

Joseph C. Osborne, a boilermaker by trade and ex-employee of respondent, was on the jobsite at the time of the occurrence.

At the time he was helping run a cable out of the sky climber preparatory to he and Stephens going up to rig lugs to weld.

He described the sky climber as a tubular cage with 5/16-inch cable to carry the employees up and down to build scaffolds.

The power was supplied by a drill motor.

Both Osborne and a co-employee were pulling cable to check for bad spots.

A hang line had been dropped to pull the cable for securing, and it was Osborne's estimate that the cable was tied off at the 79 to 80-foot elevation.

Osborne was experienced in the use of the sky buggy and described it's operation, noting that when the buggy was rigged, the employees would tie off to the buggy and after arriving at the elevation they would tie the safety line to the buggy itself; or alternatively, they would let the safety line hang loose until they got to the point to perform work and then tie the buggy.

Osborne has used a grab rope in his work experience, but not on the job in question.

The day of the occurrence was the first day of use of the sky buggy. Osborne was working on the still preparing to weld when the cable broke. He did not see the occurrence.

Osborne rode the elevator down and observed the injured employee Stephens to be in pain and complaining of pain. Osborne did not see that Stephens was wearing a lifeline or a rope grab.

There was a lifeline available for the use of the employees, but the practice at the jobsite was to tie the lifeline to the hoisting unit itself.

James Williamson, a boilermaker at the worksite on the day of the occurrence, identified complainant's Exhibit C-1 as the sky buggy in use at the time, and expressed his familiarity with its operation and observation of it in use on June 20, 1981.

He described that after the buggy's fall the remaining cable hung in the air with a piece of rope hanging next to it, which he assumed to be a

lifeline or safety line, although he did not know how it was used.

He described the usual practice of having a lifeline on the buggy, and after the buggy gets into position utilizing the lifeline to tie the buggy off.

He assumed the rope he saw was the rope used as a tie-off for the buggy.

Williamson described the use of lifelines on other situations, describing that a cable and buggy is rigged up to go to the worksite and a lifeline dropped. A wrap is usually taken on the buggy, and as the buggy goes up the rope is wrapped around a piece of metal on the buggy, so that in the event of a fall the rope would slow the descent and the employee could grab the rope to stop the fall.

At the work position, Williamson noted that should a welder accidentally cut the cable, the rope tying off the buggy would hold the buggy, although he felt that a better method was described in a brochure in the utilization of a rope grab.

Williamson described a rope grab as an item that slides up a 7/8 or 3/4-inch rope and is attached to the safety belt of the employee, not to the buggy, so that if the buggy fell the man would be hanging by the rope.

The operator would have nothing to do, as the rope grab would stop him from falling.

Williamson described the rope grab as being a little more difficult to operate with, in that it has to be adjusted as the buggy rises, but in his opinion was a safer work practice.

Williamson accompanied Stephens to the hospital, where he was advised by the physician that Stephens had a broken pelvis, a broken hip, some vertebra in his back and injuries to his hand and leg.

To the best of Williamson's knowledge, Stephens was not wearing a safety belt or a rope grab, noting that rope grabs were not provided on the particular jobsite.

Williamson was the union steward on the jobsite and was involved with safety meetings with respondent every Monday morning. The meetings are held weekly and Williamson did not mention rope grabs to the company until after the accident, when Williamson urged the company not to use buggies until rope grabs were provided.

Williamson did not recall the exact tie-off point, but estimated that Stephens fell approximately 35 to 40 feet.

Frederick C. Laird, boilermaker for respondent in June of 1981, testified that he had used the sky bucket according to need, sometimes on a daily basis.

Laird used a lifeline in the operation of the buggy, which he described as usually tied to the beam at the highest point and run down through the buggy more or less free of the buggy, with a half-hitch around some portion of the buggy so that the buggy could go up freely.

As the buggy rises, the lifeline hangs free. Laird described wearing a safety belt at times and at other times not wearing a safety belt.

A rope grab was not provided for use with the safety belt.

Laird used the safety belt, so that if he would have to change cables or walk the iron or maneuver on narrow beams he would tie off the beams so he could do his work.

The safety belt was used for work outside of the buggy.

Laird knew the function of a rope grab, and has used them in his past work experience, but testified that no rope grabs were provided by respondent

prior to June 29, 1981.

He was told that there were no rope grabs.

Laird knew the injured employee Stephens was working below him at the time of the occurrence, and to his knowledge Stephens was not using a rope grab on the day of the occurrence, nor was a safety line attached to him.

Compliance officer Joseph Enright, with a Master in Industrial Safety, Bachelor of Science in Trade and Industrial Education to teach safety and fire protection from Oklahoma State University, and Associate Degree in Fire Protection, Oklahoma State University, and attached to the St. Louis area office of OSHA, testified on behalf of complainant.

Enright has been involved in 200 to 250 investigations of construction activity over the course of a six and-a-half year period, and he usually runs across sky buggies on the majority of the inspections, noting that individual contractors use either a single-point suspension scaffold or a two-point suspension scaffold, with about maybe 60 or 70 percent of them using the single-point suspension.

During the course of his investigations, Enright investigates the operation practices involving the single-point suspension scaffolds, and was familiar with the scaffolds demonstrated by complainant's Exhibit C-1.

In Enright's opinion the use of the particular single-point scaffold requires the use of lifeline and other safety related equipment, such as safety belt and the grab hook.

He described that when the employee is standing in the basket, the lifeline is tied off separately from the basket and from the connection where the basket is attached.

The lifeline hangs over away from the center point scaffold.

The employee attaches his grab hook onto the lifeline to his safety belt.

Should the employee fall off of the basket or the basket separate from the employee the employee does not follow the basket down.

In describing the operation of the safety equipment, Enright noted that with one hand the employee would hold onto the control to operate it to go either up or down, and with the other hand he would reach over, grab onto the grab hook, hold it as he would go up, raising the grab hook as he raises the basket or perform the reverse if the basket is descending.

Should the basket fall, the employee would not go any further than the length from the grab hook to the safety belt, and would remain suspended.

With the grab hook about shoulder height as he is being elevated, he would not go more than 3 feet.

It was Enright's opinion that if the lifeline is used to tie off the sky buggy, it does not serve its function as a lifeline and is not an acceptable safety practice, but is no more than a line securing the basket to the work position; nor would it protect the employee if he should fall from the basket.

It is Enright's practice to issue citations for lack of safety belt, grab rope and lifelines under 29 CFR 1926.451(k)(8), and its subparagraphs (h) and (i).

Enright had never operated a sky buggy similar to the one in use by respondent, and was of the opinion that the operator would have to stand either beneath or adjacent to the overhead bar.

Enright described the lifeline as being usually a manila rope 3/8-inch thick or the equivalent with the same strength, and that the use of safety belt, rope grab and lifeline is the recommended safety practice, and has found

that the use of the equipment runs about 50-50 in the construction industry.

Lyn Farley, respondent's project manager with a Bachelor of Science in Civil Engineering and a licensed professional engineer in the State of Missouri, testified on behalf of respondent.

Respondent, at the time of the occurrence, was engaged in installing additional precipitators for union Electric at the power plant, and in the process of tying in the new facility into an old facility and was in the process of finishing up the project.

Farley expressed familiarity with the single-point suspension basket in use at the time, identifying it as a Hi-Lo basket and describing the various views of the basket as represented by respondent's Exhibits R-1 through R-8.

He described the operator as standing under a bale facing a drill motor with the size of the basket being 3 1/2 feet high.

The basket is hoisted by the use of a 5/8-inch drill chuck, which attaches to a shaft to the gear box, the drill driving the drill box, which in turn operates a cable which is looped within the box and goes out the bottom, with the basket hanging plumb and activated by the operator squeezing the drill trigger.

The operator also holds a manual catch in an up position as he squeezes the drill trigger with his other hand, and in Farley's opinion could not fall out by virtue of holding onto the equipment.

Prior to the accident, it was respondent's practice to hang 3/4 to 1-inch manila lifeline adjacent to the cable, through the buggy with a half-hitch on the buggy frame.

It was Farley's opinion that if a man was tied off to a lifeline and was operating the buggy with both hands and the cable would separate, the

bale would come directly down on the operator or adjacent to his neck and shoulder area while the man would be handling his lifeline. Farley was of the opinion that the buggy would not peel away from the employee enough so as to not hurt him seriously by either breaking his neck or rib cage.

Respondent obtained 5/8-inch poly probe rope grabs after the visit from the compliance officer.

Farley opined respondent's election to use its described method of lifeline attachment as opposed to rope grabs on the basis that an employee would be trapped in the buggy with the weight of the buggy holding onto him, and felt that its system was as safe as the lifeline system provided that slack is out of the rope.

Farley was of the opinion that the basket weighed in the neighborhood of 300 pounds, so that with the weight of the employee it would make a total of approximately 500 pounds.

At the time of the occurrence respondent was utilizing a 1-inch manila rope which was attached to the basket, with Farley's opinion that if the safety line remained taut and the cable broke the basket would only fall a couple of feet and while it would not be hanging plumb the manila rope would hold the basket and man until they could be retrieved.

When the cable broke at the time of the occurrence, the safety line was not attached.

It was Farley's opinion that if the safety line was not taut and had slack in it, that the weight of the buggy and the operator would be significant enough to break the manila rope.

Farley was also of the opinion that if a rope grab had been utilized it would have broken the operator's neck.

Farley was referred to the Safety, Operating, Maintenance and Parts Manual, which was in the possession of Farley and respondent as a user of Hi-Lo equipment (Exhibit C-4), and had his attention directed to the second page of the exibit wherein it states that it is unsafe to operate this equipment without the use of fall protection equipment being worn at all times, and has in parenthesis "safety belts, rope grabs and lifelines".

Farley, in response to a series of questions about the recommended safety practices of the Hi-Lo Manufacturing Company, responded with a series of evasive and unresponsive answers, although he did concede that the use of a rope grab would not impede the operation of the unit but merely slow it down.

## ADDENDUM

It will be noted that the language of the craftsmen differs with respect to the protective equipment; i.e., lanyard-lifeline; safety line-lifeline; basket, bucket-sky buggy; grab hook, rope grab-grab rope.

## DISCUSSION

The evidence is undisputed that respondent, in its operations at the Union Electric Power Plant utilized a Hi-Lo one-point suspension scaffold, which was suspended from a cable without benefit of the utilization of lifeline, grab rope or safety belt by its employee.

Respondent, in its brief, raises three basic issues in defense of its position; namely, that the standard at 29 CFR 1926.451(k) deals solely with the hanging of the scaffold itself and does not provide provisions for the protection of the employee; that respondent's practice was in accordance with the general industry practice; and, that the use of the lifeline as required by 29 CFR 1926.451(k) would diminish the employee's safety.

Respondent's argument as to the interpretation of the standard is without

merit and is rejected. The standard specifies divisible requirements, among which each employee must be protected by a safety belt. (See Secretary v. A. C. Gonzalez Painting Contractors, Inc., Docket 4319, 76 OSHRC 47/D9, 4 BNA OSHC 1143, CCH OSHD ¶17,778, 20,622, April 14, 1976 (majority decision))

So too, with respondent's contention that use of a lifeline as required by this standard would diminish the employee's safety. The attachment of the lifeline to a part of the scaffold clearly does not comport with the requirements of the standard. (See Secretary v. Mel Jarvis Construction Company, Inc., Docket 77-2100, 81 OSHRC 89/B13, 10 BNA OSHC 1052, CCH OSHD ¶25,713, September 30, 1981):

> "By prohibiting the attachment of lifelines to any part of the platform or its supporting structure, the standard creates a dual protective purpose: to protect employees from falling from the platform and to protect employees from falling with the platform and its supporting structures should the entire system fail."

Respondent's selection of the alternative means of attachment of the lifeline to the scaffold is demonstrated by the unfortunate facts of this case to be a proven failure.

So too, its argument that the requirements of the statute were prohibited by the respondent's use of two hands in the operation of the scaffold. Even the questionable testimony of respondent's own representative Farley demonstrates that under respondent's practice it was necessary for the employee to adjust the slack of the lifeline within the scaffold as the scaffold is raised or lowered, which is no different than the requirement of the employee to adjust the grab rope as the platform raises or lowers.

Respondent's reliance upon "industry practice" is incorrectly placed. Respondent was in violation of a specific standard and not a general standard.

The fact that the compliance officer testified that 50 percent of industry utilizes the statutory method of personal protective device and 50 percent did not, merely demonstrated that 50 percent of the industry is out of compliance with a specific standard.

The fallacy of respondent's argument is clearly shown in the language of the Seventh Circuit (Faultless Division, Bliss & Laughlin Industries, Inc., a Corp. v. Secretary of Labor and OSHRC, Docket 81-1740, __F.2d__ (7th Cir., 1982), Pg. 17):

> "...Faultless' argument for reliance on industry practice would permit employees to avoid compliance with specific safety mandates by relying on the (perhaps equally objectionable) practices of their peers. Cf. Voegele Co. v. OSHRC, 625 F.2d 1075, 1078-79 (3rd Cir., 1980) (even those courts that consider industry custom and practice do not ignore reasonable person test because to do so would allow entire industries to avoid liability for unsafe conditions). Nothing in the OSH Act or its legislative history requires or permits the Secretary to await an industry consensus about unsafe conditions before moving to enforce. See Bristol Steel & Iron Works, Inc. v. OSHRC, 601 F.2d 717 (4th Cir., 1979)"

Respondent clearly knew of the warning of the manufacturer that closely parallels the mandate of the standard and elected to employ another system which was not protective to the employee. Respondent was in serious violation of 29 CFR 1926.451(k)(8).

The gravity of the violation was severe. The proposed penalty of the complainant is appropriate and should be affirmed.

A careful and considerate evaluation of the record herein, and the applicable law, leads to the following findings of fact and conclusions of law.

## FINDINGS OF FACT

1. Respondent, J. S. Alberici Construction Co., Inc., is a corporation with a principal office and place of business at 2150 Kienlen Avenue, St. Louis, Missouri.

2. At all times relevant to this proceeding, respondent maintained a workplace at Union Electric Meramec Plant, Oakville, Missouri, where it was engaged in construction.

3. Respondent utilizes goods, equipment and materials from outside the State of Missouri and is engaged in a business affecting commerce.

4. Respondent employed approximately 150 employees at the aforesaid workplace at the Union Electric Meramec Plant in Oakville, Missouri, and is an employer within the meaning of the Act.

5. As a result of an inspection by an authorized representative of the complainant on or about June 29, 1981, respondent was issued a citation for serious violation together with a proposed penalty of $420 pursuant to section 9(a) of the Act.

6. Respondent received the citation and proposed penalty on July 17, 1981. On July 22, 1981, respondent notified the Area Director of the Occupational Safety and Health Administration, St. Louis Area Office, of its intent to contest said citation and penalty pursuant to section 10(c) of the Act.

7. On or about June 23, 1981, respondent's employees were working on Unit 1A fan housing using a single-point Hi-Lo power scaffolding, Model DA-100.

8. The Hi-Lo scaffold works off a single steel cable. The cable is hung from a structural point on the structure and hooked to the Hi-Lo scaffold's gear box which is operated by a 3/4-inch drill motor which causes the scaffold to be raised or lowered.

9. On June 23, 1981, William Stephens was using said Hi-Lo scaffold, where

it was tied off by means of a cable to the top of Unit 1A fan housing approximately 79 feet above the ground.

10. The single steel cable used to tie off the Hi-Lo scaffold separated, causing the scaffold to fall to the ground approximately 30-40 feet, seriously injuring Stephens.

11. Stephens was not wearing any lifeline, safety belt or rope grab at the time of the occurrence.

12. The manufacturer's instructions for the use of the Hi-Lo scaffolding provided for the use of lifeline, safety belt and rope grab while operating the scaffold.

13. Respondent was aware of the manufacturer's instructions concerning the fall protection.

14. The lifeline is tied off independent from the basket, and the operator attaches his rope grab to the lifeline and to his safety belt.

15. The protection is so designed so that if the operator falls out of the scaffold or if the scaffold separates from the employee it will prevent the operator from falling.

16. Respondent utilized a security line tie-off, which was in contravention and in violation of the standard and contrary to the express directions of the manufacturer of the scaffold.

## CONCLUSIONS OF LAW

1. Jurisdiction of this matter is conferred upon the Occupational Safety and Health Review Commission under section 10(c) of the Act.

2. Respondent, J. S. Alberici Construction Co., Inc., is an employer within the meaning of the Act.

3. Respondent is engaged in a business affecting commerce.

4. On or about June 23, 1981, respondent permitted one of its employees to operate a Hi-Lo power scaffold in violation of section 5(a) of the Act and the regulations promulgated under the Act, specifically 29 CFR 1926.451(k)(8), by permitting its employee to operate the Hi-Lo scaffold without proper suspension methods; to wit, approved safety life belt attached to the lifeline securely attached to a substantial member of the structure.

5. Respondent knew employees were not using a lifeline, safety belt and rope grab in the operation of the Hi-Lo scaffold.

6. Employees in the operation of the Hi-Lo scaffold without lifelines, life belts and grab ropes were exposed to serious injury.

DECISON AND ORDER

It is hereby ORDERED that amended citation 1 for serious violation of 29 CFR 1926.451(k)(8) and the proposed penalty of $420 are affirmed.

DATE: June 8, 1982

Paul E. Dixon, Judge, OSHRC

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

Secretary of Labor v. GENERAL MOTORS CORP., WAREHOUSING & DISTRIBUTION DIV.
OSHRC Docket No. 81-2388

1. Enclosed is a copy of my decision. It will be filed with the Commission on June 10, 1982, and will become the final order of the Commission on July 12, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is July 12, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

R. M. Child
Judge, OSHRC

Date: May 21, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR<br><br>Complainant,<br><br>v.<br><br>GENERAL MOTORS CORPORATION,<br>(WAREHOUSING & DISTRIBUTION DIVISION),<br><br>Respondent<br>- - - - - - - - - - - - - - - - - - - - -<br><br>LOCAL UNION NO. 431,<br>UNITED AUTO WORKERS,<br><br>Authorized Employee<br>Representative. | OSHRC DOCKET NO. 81-2388 |

APPEARANCES:

For the Complainant:
Jerry R. Atencio, Esquire, Denver, Colorado
Donald R. McCoy, Esquire, Denver, Colorado

For the Respondent:
Alice McCann Osburn, Esquire, Detroit, Michigan

For the Affected Employees:
Jerry L. Jackson, Northglenn, Colorado
Charles A. Harrison, Northglenn, Colorado

## DECISION AND ORDER

Child, R. M., Judge, OSHRC:

### Statement of the Case

This matter is before the Occupational Safety and Health Review Commission (the Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et seq., (the Act). Complainant seeks affirmance of item 1 of Citation No. 1, issued to respondent September 23, 1981,[1/] and of the penalty proposed therefor.

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1/ A description of the alleged violation and the standards involved:

CITATION

29 CFR 1904.2(a): A log of all recordable occupational injuries and illnesses, (OSHA Form No. 200 or Equivalent), was not maintained at the establishment: e.g., the log for illness and

The Citation charged the violation to be other than serious and proposed a penalty in the sum of $100.00. After the timely filing of a notice of contest by the respondent, the complainant in due course filed Complaint wherein he sought to amend the Citation to characterize the violation to be willful and proposed a penalty of $1,000.00. In its answer respondent challenged complainant's right to so amend the Citation.

The matter came on for hearing before the undersigned judge at Denver, Colorado on February 24, 25, and 26, 1982. Affected employees were represented at said hearing by Jerry L. Jackson, Chairman of the Shop Committee, Local Union 431, United Auto Workers, and Charles A. Harrison, President of said Local Union.

The parties have filed post-hearing briefs and the respondent has included proposed Findings of Fact and Conclusions of Law. To the extent said proposed Findings and Conclusions are consistent with this decision they are adopted; to the extent they are inconsistent with those set forth herein, they are rejected.

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1/ Continued

injuries (OSHA-200) for year 1980 did not include the following lost workday injuries:

(a) 01/24/80, Milton Gaddis, 1 day lost;
(b) 02/05/80, Robert Mack, 3 days lost;
(c) 06/24/80, Don Pettera, 28 days lost (shown as restricted work activity on General Motor's OSHA-200 log;
(d) 09/08/80, Homer Harris, 4 days lost;
(e) 10/16/80, Robert Ponikiski, 6 days lost;
(f) 10/17/80, Corlis Waits, 4 days lost;
(g) 10/23/80, George Marshall, 2 days lost.

STANDARD

§1904.2 Log and summary of occupational injuries and illnesses.

(a) Each employer shall, except as provided in paragraph (b) of this section, (1) maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment; and (2) enter each recordable injury and illness on the log and summary as early as practicable but no later than 6 working days after receiving information that a recordable injury or illness has occurred. For this purpose form OSHA No. 200 or an equivalent which is as readable and comprehensible to a person not familiar with it shall be used. The log and summary shall be completed in the detail provided in the form and instructions on form OSHA No. 200.

With the exception of respondent's challenge to complainant's attempt to amend the Citation (which challenge was raised at the hearing and though ruled upon (Tr. 25, 26) is raised again in respondent's post-hearing submission), complainant made no reference and offered no testimony at the hearing or in its post-hearing submittals with regard to miscellaneous affirmative defenses set forth in its answer. With the exception of the challenge to complainant's attempt to amend the Citation, the affirmative defenses set forth in respondent's answer are presumed to have been waived. Issues:

The issues to be determined are:

1. Will the amendment of the Citation to "willful" and the proposed penalty to $1,000.00 be permitted to stand?

2. Was the respondent in violation of the standard at 29 C.F.R. §1904.2(a) as alleged in the Citation?

3. What would be the proper characterization of such violation if any?

4. What penalty, if any, would be appropriate?

## The Evidence

Respondent operates an auto parts warehousing and distribution facility in Denver, Colorado. Jerry L. Jackson, an employee at that facility, was Chairman of the Shop Committee of United Auto Workers Local 431. As such, Mr. Jackson was furnished a copy of Occupational Safety and Health Administration (OSHA) form Number 200 (OSHA-200) at about the time it was prepared for posting each year. As prepared by the respondent soon after the first of each year, said form purported to show the recordable job related accidents and illnesses for the preceding year and related information.

The form dated January 2, 1979, and prepared by respondent was objected to by Mr. Jackson. That OSHA-200 showed only two injuries and no lost workdays in 1978. (Tr. 42; Exhibit E-1) As a result of Mr. Jackson's objection, the general foreman of the facility contacted Dr. Cash, respondent's divisional medical director, in Flint, Michigan. An amended OSHA-200 dated February 23, 1979, was furnished to Mr. Jackson and posted by the respondent, which showed eleven recordable job related injuries, fourteen lost workdays and four days of restricted work activity in 1978. (Tr. 45; Exhibit E-2)

In early 1981 Mr. Jackson was furnished with a copy of the respondent's OSHA-200 which showed no lost time accidents at the facility in 1980. Mr. Jackson protested to Al Green, respondent's general superintendent at the facility. A few days later Mr. Green advised Mr. Jackson that the matter had been discussed with Dr. Cash who said the records were correct and would not be changed.

OSHA-200 dated January 22, 1981, was received in evidence and bears caption "Revised - Annual" for calendar year 1980. (Tr. 67, Exhibit C-1)

On January 23, 1981, Mr. Jackson filed employee grievance No. 739003 protesting ". . . management's falsification of 1980 OSHA annual summary." (Tr. 46; Exhibit R-12) The protest and demand for correction were denied at the local level and appealed to higher level. While that appeal was pending, Mr. Jackson registered a complaint with OSHA and thereafter on May 20, 1981, the grievance procedure was terminated with both sides agreeing to be guided by the final disposition of the pending or anticipated OSHA review. (Tr. 46)

In the course of processing the grievance, Mr. Jackson was told by Al Green that every accident reported at the Denver facility was relayed to Dr. Cash, who in turn determined whether it would be recordable or not. (Tr. 50)

In the summer of 1981 Mr. Jackson discussed OSHA-200 for the year 1980 with Dr. Cash at Reno, Nevada. He gave Dr. Cash names of employees whom he felt had been injured and some examples of injuries and time lost. (Tr. 51, 52) Dr. Cash's response was to question the credibility of the employee reporting the alleged injury and to suggest the injured person may still have been able to do light duty work. Mr. Jackson advised Dr. Cash that the employees he was talking about were not offered light duty. (Tr. 52, 53)

The local union agreement provides that Mr. Jackson as Chairman of the Shop Committee would be notified if any employee were given light duty work. This notice would be given shortly after the employee was assigned to light duty. To his knowledge, D. Pettera was never offered light duty work. (Tr. 53) Mr. Pettera was shown on respondent's OSHA-200 for 1980 as having 28 days of restricted work activity. (Exhibit C-1)

Peggy Schaffler, OSHA Compliance Safety and Health Officer, conducted an inspection at respondent's facility commencing May 18, 1981. She reviewed the OSHA-200 log (Exhibit C-1) and was furnished W Workmen's Compensation forms for 1980. She was informed that Dr. Cash, respondent's Division Medical Director in Flint, Michigan, would make the decision whether an accident should be recorded on the OSHA-200. (Tr. 293-295) Ms. Schaffler was later furnished by respondent with copies of employee medical passes and copies of General Motors accident report form GM212. She also discussed the situation via telephone with Dr. Cash and interviewed various employees. (Tr. 303)

Dr. Cash did not appear as a witness. However, his superior in the hierarchy of respondent, Dr. Richard W. Prior, did testify that in all but one of the instances set forth in the citation he agreed with Dr. Cash that the incidents were nonrecordable. Dr. Prior presents excellent credentials. (Tr. 211-216) He is responsible for supervising, development and implementation of corporate programs and policies. This includes consulting with respondent's various plants on government regulations, including the recordability of occupational injuries and illnesses. (Tr. 217) As an administrator concerned with health and safety of employees he attempts to direct attention to those areas in the plants where the biggest problems with regard to injuries and illnesses exist. Both over-recording and under-recording hinder this task. (Tr. 220, 284) In his judgment the employer would in no way benefit by failing to report all injuries or illnesses with the possible exception of avoiding an OSHA inspection. (Tr. 284) In answering a question from the bench whether his work of visiting plants and of determining problem areas might not be frustrated by selective recording by someone who had already screened out according to what he thought to be recordable, thus depriving him of the whole picture, Dr. Prior answered:

> A. Except I also look at the tally sheets for the medical departments too.
>
> * * *
>
> A. It's a running log of the number of people that whould come in, the type of treatment that you would give.
>
> * * *
>
> A. . . . if we had 40 fractures on the tally sheet and none on the recordability, I'd ask questions. (Tr. 285, see also Tr. 273).

Dr. Prior testified that neither the OSHA-200 form nor the standard covers every conceivable occurrence in a plant. He therefore takes a look at all of the facts available. He looks at the incident, the diagnosis, how the diagnosis was reached--does it make medical sense to him, the time sequence, the credibility, were restrictions preventative or really therapeutic. Having looked at the whole picture he tries to make a decision on recordability based upon his professional judgment. (Tr. 220) As an example, in a situation giving rise to a claimed back complaint he would be influenced by whether there were objective findings as compared with merely subjective findings. (Tr. 258)

In each of the incidents referred to in the Citation the employee claimed an on-the-job mishap giving rise to an injury and was referred by his foreman or supervisor to Dr. Becky, a private physician who operates a "free-standing" industrial clinic. (Tr. 234, 235)

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As to those individuals complainant alleges respondent should have reported and failed to report on its OSHA-200 for 1980, the evidence is as follows:

Milton Gaddis has been employed at General Motors Corporation approximately twenty-five years, fifteen of which he has been employed as a tractor driver in the receiving department at Denver, Colorado (Tr. 102). On January 23, 1980, he was injured while working at the plant at the receiving rail dock area. (Exhibit R-1) An accident occurred between 9:00 a.m. and 10:30 a.m. while he was unloading a box car loaded with fleet truck side panels into a flat truck. He testified he stepped backward with his left leg down between the rail car and

dock. Mr. Gaddis reported the accident and injury to his foreman, Carol Thorpe, who issued a medical pass authorizing him to see Dr. Becky. (Tr. 102-103; Exhibit R-1) Dr. Becky took x-rays and diagnosed the injury as a "strain and contusion of the pelvis and left hip." (Exhibit R-1, R-9)[2/] Mr. Gaddis testified that Dr. Becky prescribed medication and ice packs for the injured areas and sent him home. (Tr. 103, 107) Mr. Gaddis reported to Dr. Becky at 9:00 a.m. on January 24, 1980, (Exhibits R-1 and R-9) at which time he was released to return to work with no restrictions. (Tr. 108, 109; Exhibit R-1)

Dr. Prior supported the decision of Dr. Cash not to record this incident on OSHA-200 for 1980 on the basis that Mr. Gaddis returned to work on the day following the incident. In his judgment since the employee was able to return to work on the day following an incident giving rise to strain and contusion of the pelvis and hip, it was properly viewed as "first aid" and not recordable. (Tr. 252)

Robert Mack has been employed by respondent at its Denver plant for approximately fifteen years. (Tr. 198) On February 5, 1980, Mr. Mack was employed on the early shift of 6:00 a.m. to 3:00 p.m. He testified he climbed a hook ladder to pick a radiator weighing approximately twenty-seven pounds. On his way down the ladder with the part, he lost his balance and twisted his back. Mr. Mack reported the accident to his supervisor, Harold Lear, and received a pass to see Dr. Becky. (Tr. 199) Dr. Becky took x-rays and diagnosed the injury as a lumbosacral sprain and further indicated that the employee was prevented from working from February 5, 1980, through February 10, 1980. Dr. Becky

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[2/] In a summary prepared for Dr. Cash a few days before the hearing, (Exhibit R-9) Dr. Becky indicated the "right" hip.

further indicated in his report that the disabling injury was due to his on-the-job accident. Dr. Becky released Mr. Mack to return to work on February 11, 1982. (Exhibit C-6(b))

Dr. Prior testified in support of Dr. Cash's decision not to record Mr. Mack's injury based upon the information before him at the time. (Tr. 253) However, in preparing to testify at this hearing, Dr. Prior discovered in the course of discussing the matters with Dr. Becky two days before testifying that the physician had made an objective finding of point tenderness or muscle injury of the left paraspinal muscles. (Tr. 253) Dr. Prior has now directed the local facility that Mr. Mack's injury and lost time should be recorded (presumably on OSHA-200 for 1980) based upon this newly acquired information. (Tr. 254)

Donald Pettera has worked for General Motors Corporation since April, 1969. On June 24, 1980, at approximately 11:30 a.m. Mr. Pettera was unloading some carts. This required the use of a forklift. While standing on the pallet which was resting on the forks of the Drexel tractor, he turned around and put his gloved hand on top of the mast of the forklift. As his hand was resting on top of the mast the driver started lowering the forks and Mr. Paterra's gloved hand was pulled into the chained mast which resulted in crushing his right middle finger to the first joint. (Tr. 112, 116)

Mr. Pettera's foreman, Cecil Tiggins, transported him to Dr. Becky's office for medical treatment. (Tr. 116) Dr. Becky examined the crushed finger, x-rayed the right hand and provided emergency care only and then referred Mr. Pettera to Robert J. Hoehn, M.D. The x-rays showed an

avulsed compound fracture of the terminal tuft of the middle finger. (Exhibit R-9) Mr. Peterra was told by Dr. Hoehn that the crushed finger would take about six weeks to heal. After leaving the Doctor's offices on June 24, 1980, Mr. Pettera took papers which had been furnished to him back out to General Motors plant. On one occasion while he was off work he went to the plant to see the insurance representative. While he waited in the office, Al Green spoke to him casually and asked, "When do you feel you're going to be ready to come back to work?" He was off work for 28 days, returning about August 1, 1980. During this time he received Workmen's Compensation benefits. (Tr. 118-121)

Mr. Pettera had no restrictions with respect to his left hand during that period. (Tr. 126) He was not told during this period that he could not perform light work. (Tr. 127) On about June 20, 1980, Dr. Hoehn gave him permission to use his left hand in helping with the harvest on his brother's farm in Kansas. During the six week period, the company did not reassign him to a job that had light duty. (Tr. 128) Dr. Hoehn had indicated on the form he completed that he expected Mr. Pettera to be able to return to work approximately August 1, 1980. During the time he was off work no member of management and no doctor ever told him he was entitled to light duty work. (Tr. 134)

Respondent listed the Pettera incident on its OSHA-200 for 1980, but showed 28 days of "restricted work activity". (Exhibit C-1) Complainant objects to respondent failing to declare 28 days "away from work" and to check the column indicating that the injury involved days away from work.

Homer Harris has been employed by General Motors Parts Division in Denver, Colorado for approximately seventeen years. (Tr. 189) On

September 8, 1980, Mr. Harris was working the 6:00 a.m. to 3:00 p.m. shift when he had an accident. (Tr. 190) He bumped his right elbow on one of the metal rods of the basket bin where the part was stacked. He informed his supervisor of the injury and subsequently obtained a medical pass to see Dr. Becky. (Tr. 191) X-rays were taken and Dr. Becky diagnosed the condition as contusion of the right elbow. He was treated by Dr. Becky on September 8, 9, 12 and 16, 1980, according to a report over the signature of Dr. Becky, dated September 17, 1980. In that report Dr. Becky stated that Mr. Harris was totally disabled from September 8, 1980, to and including September 14, 1980, and was able to return to work September 15, 1980. He also there stated that in his opinion the patient's disability was caused by his work and was an "on-the-job accident". (Exhibit C-4(c)) Mr. Harris was off work following his visit to Dr. Becky on September 8, 1980, until he returned to work on September 15, 1980.

In support of Dr. Cash's determination not to record the incident or time lost involving Mr. Harris, Dr. Prior stated that a large inflamed bursa of the elbow is ". . . difficult to relate to the incident the day before." In his opinion it would not develop in 24 hours. (Tr. 249, 250) He relied on Dr. Becky's letter to Dr. Cash dated February, 1982, for reference to a bursa. (Tr. 250; Ex. R-9) Any other evidence of record over the signature of Dr. Becky regarding Mr. Harris's injury describes only contusion or pain of the right elbow. (Exhibits C-4(a), C-4(b), and C-4(c))

Robert Ponikiski has been employed by General Motors at the Denver Warehouse facility since 1968 (Tr. 76) On October 16, 1980, he was lifting a thirty-five pound hub when he pulled his back. The accident occurred on a Thursday. He informed his supervisor, Harold Lear,

shortly after the accident at about 9:45 a.m. (Tr. 76-78) Mr. Ponikiski testified that after reporting the accident to Mr. Lear he returned to work the remainder of his shift on October 16, 1980, as well as his shift on October 17, 1980. He did not require medical attention until October 20, 1980, the Monday following the accident, when he requested to see Dr. Becky at 11:00 a.m. (Tr. 78)

Dr. Becky's diagnosis of Mr. Ponikiski's injury was a lumbosacral sprain which required medical treatments on October 20, 21, 22, 23, and 24, 1980. Dr. Becky also was of the opinion that Mr. Ponikiski was prevented from working from October 20, 1980, through October 26, 1980, due to this on-the-job injury. Mr. Ponikiski was released by Dr. Becky to return to full duty on Monday, October 27, 1980. (Exhibits C-8(b) and C-8(c)).

On cross-examination Mr. Ponikiski acknowledged that he had picked up hubs and other parts on and off over the course of his employment since 1968 (Tr. 98). He also testified that he had back surgery which involved removing a ruptured disc and fusing the bone back together in approximately 1969. (Tr. 98-99) Mr. Ponikiski further testified that over the course of the years, he has occasionally pulled his back. (Tr. 99) The employee also testified that his hobby is dune buggy racing. (Tr. 99)

Dr. Prior testified that in his opinion this incident was correctly determined to be non-recordable. He based his decision on the man's long-standing back problem. The late reporting caused him to question that there was an incident, and there were little or no objective findings. (Tr. 248)

Ms. Corlis Waits has worked for General Motors Corporation intermittently since 1975 and has held various job positions at the Denver facility. (Tr. 155) On Friday, October 17, 1980, Ms. Waits was working the first shift as a stocker. (Tr. 155-156). At about 9:30 a.m. she climbed a ladder with a box of parts and strained or pulled a muscle in her back. (Tr. 156-157) At that time she reported the incident and injury to her foreman, Ken Ray. (Tr. 157; 163) She was not clear on when she saw Dr. Becky for this condition. (Tr. 157) Dr. Becky's report indicates she was examined and treated for the first time on October 20, 1980. Dr. Becky saw Ms. Waits on October 20, 22, 23, 24, and 26, 1980, and diagnosed the injury as a dorsal and cervical sprain and sprain of the right foot. The medical and diagnostic procedures performed on Ms. Waits included an x-ray of the cervical spine and dorsal spine and right foot and ultrasonic therapy. Dr. Becky further indicated that Ms. Waits' disability was due to work-related accident. He reported her to be totally disabled and prevented from working from October 20th through October 26th. She was released to return to work on October 27, 1980, by Dr. Becky. (Exhibits C-5(c) and R-9)

Whereas Ms. Waits testified that she felt pain in her back and neck while lifting parts on October 17, 1980, Dr. Becky's report, Exhibit C-5(c) indicates he treated her for cervical and dorsal sprain and sprain of the right foot reportedly stemming from lifting parts on October 16, 1980. (Tr. 156, 157; Exhibits C-5(c) and R-9) Ms. Waits testified that she saw Dr. Becky on Monday, October 20, and returned to work that day and that she also worked October 21. On Wednesday,

October 22, Dr. Becky restricted her to light duty. However she was sent home because her foreman told her there was no light duty work for her to perform. (Tr. 158) She thought Dr. Becky was supposed to have taken her off work on Monday when she first reported to him, but the forms he sent back with her didn't specify that. (Tr. 159) The record doesn't disclose when she returned to work, but she received Workmen's Compensation for approximately three days and was ". . . on the clock for a couple . . ." of days. (Tr. 160) Dr. Becky's report indicates she was totally disabled and prevented from working from October 20 to October 26, inclusive. (Exhibit C-5(c))

On cross-examination Ms. Waits was asked if all she reported to her foreman was back strain and she answered, "Maybe my foot hurt." (Tr. 164) She also stated that the incident of injuring herself occurred in the morning of October 17 and that she reported it to her foreman immediately. (Tr. 166) Pink slips produced by the respondent indicate that Ms. Waits left work on October 17 at 10:30 a.m. and that she returned to work on Monday, October 20, 1980, at 10:19 a.m. The reason given was "ill and Court". (Exhibit R-3) Also Ms. Waits gave as the reason for her absence on Tuesday, October 21, 1980, according to pink slip produced by the respondent "Dentist". (Exhibit R-4) According to the pink slip given for absence from 3:30 p.m. October 22, 1980, through October 27, 1980, Ms. Waits gave as the reason for said absence "Sprang (sic) foot" (Exhibit R-5)

Dr. Prior, in support of Dr. Cash's decision not to record Ms. Waits' incident on OSHA-200 for 1980, was impressed with the discrepancy

as to the time of the incident; the diagnosis where at the plant it was a back injury and at the doctor's office it was a back and foot; and his review disclosed no objective findings. Under the circumstances, Dr. Prior considered this to be at most a first aid and therefore not recordable. (Tr. 244, 246)

George Marshall has been employed by respondent for seventeen years. On October 23, 1980, Mr. Marshall was working the first shift, 6:30 a.m. to 3:00 p.m. (Tr. 136, 137) At about 8:30 a.m. he was handling an automobile hood part, weighing approximately seventy to eighty pounds (Tr. 146) with a fellow worker when he pulled his back. (Tr. 138) Mr. Marshall was given a medical pass to see Dr. Becky. Dr. Becky informed Mr. Marshall, after completing a urinalysis, that Mr. Marshall had a kidney infection, and prescribed triacycline. Dr. Becky also took x-rays of the back and diagnosed "dorsal and lumbosacral sprain". Mr. Marshall was seen at the office of Dr. Becky on October 23, 24, 27, and 31, 1980, and was treated with ultrasound. Dr. Becky determined Mr. Marshall to be totally disabled and prevented from working from October 23, 1980, to and including October 27, 1980, and gave his opinion that said disability was caused by a work related accident. (Exhibits C-7(a) and R-9) Assuming respondent's work force did not work on Fridays and Saturdays, Mr. Marshall would have thus missed three workdays including the day of the incident. (Tr. 140, 141)

Dr. Prior testified that he agreed with Dr. Cash that this incident was not recordable. In effect he renounced the diagnosis of Dr. Becky and was of the opinion that the kidney infection fully explained Mr. Marshall's back complaint. (Tr. 256-258)

## Discussion

Respondent urges that professional medical judgment is required to make a determination of recordability. Not one case is advanced by respondent in support of this novel proposition, which is here rejected. Here each of the employees claiming a job connected injury was sent to an independent medical practitioner of respondent's choosing. In each instance that' practitioner of industrial medicine made a diagnosis of work related injury giving rise to disability rendering the employee unable to work for a designated period of time. Each employee was seen by the physician on more than one occasion as a result of the incident, and all were subjected to x-rays. All missed work days as a result of their work related incident.

In the face of such medically supported data it ill behooves the respondent to follow a policy of allowing its Division Medical Directors to second-guess and even ignore the findings of the treating physician. That which must be recorded on OSHA-200 is determined by the standard at 29 C.F.R. 1904.2(a), the definitions of "Recordable occupational injuries or illnesses" found at 29 C.F.R. 1904.12 and the form and instructions on form OSHA No. 200 (Exhibit C-9)

Milton Gaddis: Dr. Prior testified this incident was nothing more than first aid and therefore not recordable. "First Aid" is defined at 29 C.F.R. 1926.12(e). Here x-rays were taken, medicine prescribed, and strain and contusion of the left hip was diagnosed. This is more than "First aid" as defined. Furthermore, Mr. Gaddis was not released to return to work until after his 9:00 a.m. appointment with Dr. Becky on the day following the incident. The incident is therefore recordable under the instruction found at columns 2 and 9 of OSHA No. 200 and the standard at 29 C.F.R. 1904.12(f).

Robert Mack: Notwithstanding Dr. Becky's notation on Exhibit C-6(b), dated February 12, 1980, that there were objective findings of lumbosacral strain, Dr. Cash elected not to record this incident on OSHA-200 for 1980. In Dr. Becky's summary report to Dr. Cash dated February 1, 1982, a history of degenerative disease was noted, including back surgery ten years earlier. Dr. Becky there indicates that following medication and rest Mr. Mack "was OK'd for full duty . . ." six days after the incident. (Exhibit R-9) Dr. Prior allowed that this incident was properly recordable. He based this on his conversation with Dr. Becky 1 or 2 days before testifying, wherein Dr. Becky reported that there were certain objective findings. There is no reason to believe that Dr. Cash could not have availed himself of the same detail before electing not to record the incident. The objective finding was ever present. It was not "new evidence" as suggested by Dr. Prior. (Tr. 275, 279)

Donald Pettera: This employee was away from work for 28 days as the result of a work related accident. Although the incident was reported on OSHA-200 for 1980, the 28 days were listed under column 5 as days of restricted work activity. Respondent attempts to justify this mis-reporting on the grounds that since only the right middle finger was crushed, the employee still had a good left hand and two healthy feet, and indeed assisted his brother at harvest time.

The fact remains that Mr. Pettera did not work for respondent for 28 workdays. He received Workmen's Compensation for that period. No evidence was presented that Mr. Pettera was ever offered light duty work by the respondent or that he engaged in any restricted work activity whatsoever. The incident should properly have been recorded to show 28 days away from work.

Homer Harris: In justifying Dr. Cash's determination that this incident was unrecordable, Dr. Prior opined that a large inflamed bursa would not ordinarily develop within 24 hours of a triggering incident. However, there was no evidence that Dr. Cash was so influenced at the time he made his determination. Reference to a bursa first appears in Dr. Becky's summary report of February 1, 1982. The fact remains that the treating physician found and reported to respondent all of the essentials of a work related incident, causing seven lost work days. Dr. Cash had no basis for not recording the incident. Dr. Prior's opinion is a self-serving position based upon semantics taken in opposition to a clear record made by the treating physician. The incident should properly have been recorded.

Robert Ponikiski: The decision not to record Mr. Ponikiski's reported and treated injury was totally unjustified. Dr. Prior supported this decision on the basis of the employee's long standing back problem, the delay between the claimed incident and seeing the doctor, and the lack of objective findings. It is apparent to any informed person that a history of back problems would indicate such a person would be predisposed to back injury or complaint arising from relatively minor triggering mechanisms.

It is also easy to understand that such a person upon detecting a back response to a lifting incident would quickly report the incident in order to protect himself should the injury prove to develop into something serious.

On cross-examination respondent brought out from this employee that his hobby was dune buggy racing. However, no evidence was produced to suggest that this employee was engaged in dune buggy racing on October 18 or October 19 before seeing Dr. Becky on October 20, 1980. The evidence is that Mr. Ponikiski felt a pull in his back while lifting

a thirty-five pound auto part on October 16, 1980. He informed his supervisor shortly thereafter at about 9:45 a.m. on that day. He worked the remainder of that day and Friday, October 17. On Monday, October 20, 1980, he saw Dr. Becky whose report compels viewing this as a recordable incident involving lost work days.

Dr. Cash's determination not to record the incident is without foundation and Dr. Prior's attempt to support Dr. Cash's failure to report the incident is without merit.

Corlis Waits: In support of Dr. Cash's decision not to record this incident Dr. Prior opined that at most this was a "first aid." Once again, however, this does not fall within the definition of "first aid" set forth in the standard and the OSHA No. 200. Ms. Waits received x-rays and ultrasonic therapy. As evaluated by the treating physician who saw this employee on six visits in a seven day period, she sustained disability which rendered her incapable of working as a result of work related accident. Admittedly, Ms. Waits testified only that she pulled her back and "maybe my foot hurt." Her absence pink slip for October 22, 1980, through October 27, 1980, gives as reason for absence "Sprang (sic) foot." Nevertheless both conditions were found to exist by Dr. Becky and diagnosed as arising from the incident of October 17, 1980. Dr. Becky was engaged by respondent and reported to it. There is a failure of evidence to justify the decision of Dr. Cash to ignore Dr. Becky's report which on its face required recording of the incident.

George Marshall: In support of Dr. Cash's decision not to record this incident, Dr. Prior expressed his opinion that Mr. Marshall's complaints were consistent with kidney infection and that a "negative urinalysis" was the only objective finding. (Tr. 258)

It was not explained at the hearing on what basis Dr. Cash determined this incident to be unrecordable. The only references to kidney infection came from Mr. Marshall in his testimony. In his summary report to Dr. Cash dated February 1, 1982, Dr. Becky first mentioned in passing that Mr. Marshall ". . . also had a history of GU problems." (Exhibit R-9) There is no evidence of record that Dr. Cash was aware of a kidney infection coinciding with Mr. Marshall's back complaints at the time he elected not to record the work related incident complained of by Mr. Marshall.

There is no reason why Mr. Marshall could not have experienced both a kidney infection and a back sprain resulting from a work related incident at one and the same time. Dr. Becky, who observed and treated Mr. Marshall, so found. The incident was clearly recordable and illustrates a push on the part of respondent to under-record work related injuries.

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Respondent argues in its brief on appeal that the amendment to the Citation set forth in the complaint and permitted at the hearing should be stricken as improper. This argument is rejected. It is true that complainant gave only a minimal explanation in the complaint as to his reason for seeking the amendment.

Here the amendment sought to change the Citation from alleging an other than serious violation to a willful violation and increase the penalty from $100.00 to $1,000.00.

The Commission has ruled that where an amended charge set forth in the complaint arose out of the same occurence as the original charge set forth in the Citation, it will be permitted absent prejudice to the

non-moving party. P.A.F. Equipment Co., 79 OSAHRC 18/A2, 7 BNA OSHC 1209, 1979 CCH OSHD ¶23,421, and cases there cited, affirmed 637 F. 2d 741 (10th Circuit 1980). Respondent has not demonstrated prejudice here. The complaint was filed herein and served upon the respondent more than three months prior to the hearing and respondent had ample time to prepare its defense against the charge of willful.

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Instructions set forth on each OSHA No. 200 are clear as to what entries must be made on the form. Respondent is well aware of the record-keeping requirements of 29 C.F.R. 1904 since it had access to and utilized the OSHA publication, "What Every Employer Needs to Know about OSHA Recordkeeping." (Exhibit J-1, Tr. 269-271) Respondent heretofore litigated the issue of recordability having to do with its determination not to record work related illnesses on OSHA No. 200 in the face of medical evidence to the contrary. The Commission there ruled against the respondent and advised that the legislative history of the Act ". . . shows a clear Congressional intent that this reporting requirement be interpreted broadly in order to develop information for future use." Secretary v. General Motors Corp. (Inland Division) 1980 CCH OSHD ¶24,743, p. 30,469, again at page 30,470, the Commission stated:

> Respondent has argued that it was only responsible to record illnesses which it found were directly caused by the occupational environment. We reject this narrow interpretation of the recording obligation. . . . Under this interpretation of the statute and regulations, OSHA and NIOSH would be significantly restrained from fulfilling their statutory obligation of making the workplace healthier.

Respondent reacted affirmatively to an objection raised by the representative of affected employees to the sufficiency of the OSHA-200 for 1978. However, when that representative objected to the sufficiency of

recording on its OSHA-200 for 1980, respondent manifested a determination to remain married to the recording concepts from which the Commission had advised it to divorce itself in the Inland Division case, supra.

By persisting in this view of its recording obligation, respondent tends to frustrate the purpose of the Act and recording regulations as stated at 29 C.F.R. 1904.1.

Respondent's decisions not to record those work related incidents giving rise to injuries and lost workdays properly found herein to be recordable were conscious, deliberate, intentional and voluntary and fall within the definition of "willful" recited by the Commission in Tri-City Construction Company, 1980 CCH OSHD ¶24,557 at page 29,433:

> . . . that regardless of venial motive, willfulness is established by a conscious, intentional, deliberate decision and may be characterized by a careless disregard of the requirements of the Act . . . (quoting from Titanium Metals Corporation of America, 1980 OSHD ¶24,199)

See also Kent Nowlin Construction Company v. OSHRC, 593 F. 2d 368, 372, where the Tenth Circuit Court held:

> The failure to comply with a safety standard under the Occupational Safety and Health Act is willful if done knowingly and purposely by an employer who, having a free will or choice, either intentionally disregards the standard or is plainly indifferent to its requirement. An omission or failure to act is willfully done if done voluntarily and intentionally.

Respondent's violation of the recording standard complained of here was willful and the amended proposed penalty in the sum of $1,000.00 is appropriate considering the factors set forth in Section 17(j) of the Act.

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Having considered the Citation, the Notice of Contest, the Complaint and Answer, and having considered the Exhibits received in evidence, the testimony of the witnesses and having observed their demeanor and weighed the credibility thereof, and having considered the post-hearing memoranda of the parties, there are hereby entered the following:

## Findings of Fact

1. Respondent is a corporation with a place of business located at 4355 Kearney Street, Denver, Colorado, where it engages in the operation of warehousing and distributing auto parts.

2. Respondent employs a number of people at said place of business and uses materials or equipment which have crossed state lines.

3. Respondent is engaged in a business affecting commerce and is an employer within the meaning of the Act.

4. The respondent's Denver facility does not have an in-house medical staff. Employees with medical complaints or problems are referred by respondent to Dr. Becky, a private practitioner of industrial medicine who operates an independent clinic and accepts referrals from other industries and businesses in addition to respondent.

5. The OSHA-200 form is completed at respondent's facility under the direction of respondent's Divisional Medical Director, Dr. Cash, whose office is in Flint, Michigan.

6. An employee at the Denver facility contacts Dr. Cash by telephone and relays all available information concerning alleged accidents and injuries reported by the employees in the warehouse, and Dr. Cash determines whether the incident is recordable.

7. Dr. Cash, in making his determination, refers to OSHA guidelines.

8. As to each of the incidents listed on the Citation, Dr. Cash, without personally examining the employee determined the incident to be non-recordable or in the instance of Don Pettera that it was recordable as restricted work.

9. The information upon which Dr. Prior determined that the incident involving Robert Mack was properly recordable was not new information and could have been available to Dr. Cash had he made reasonable inquiry prior to making the determination not to record said incident.

10. Those findings of fact expressed elsewhere in this decision as though again set forth at this point.

11. The incident involving Milton Gaddis involved lost work and medical treatment beyond first aid and was recordable.

12. The incident involving Robert Mack was recordable and respondent's acknowledgement of that fact at the hearing was not the result of new evidence, but only respondent's belatedly availing itself of evidence which was always available to it upon making reasonable inquiry.

13. Robert Pettera was never offered or required to perform restricted work. Robert Pettera never engaged in restricted work activity but in fact missed 28 workdays as a result of work related injury. Said 28 days should properly have been recorded as days away from work.

14. The incident concerning Homer Harris involved lost work and medical treatment to a job related injury giving rise to a contusion of the right elbow and should properly have been recorded.

15. The incident regarding Robert Ponikiski involved lost workdays and medical treatment and should properly have been recorded.

16. The incident concerning Corlis Waits involved lost workdays and medical treatment beyond first aid and should properly have been recorded.

17. The incident involving George Marshall caused back injury requiring medical treatment and resulted in lost workdays. The incident should have been recorded.

18. Respondent experienced no prejudice as a result of the amendment to the Citation changing the characterization of the violation from other than serious to willful and increasing the proposed penalty.

19. Respondent exercised conscious intentional and deliberate conduct in arriving at its voluntary and repeated decisions not to record the job related incidents complained of.

20. Respondent's conduct manifested a push to under-recording of job related injuries pursued on an organization and policy basis.

21. When under-recording was called to its attention, respondent continued to disregard the requirements of the Act concerning recording.

22. An appropriate penalty is the sum of $1,000.00.

## Conclusions of Law

1. The Commission has jurisdiction of the parties and of the subject matter of these proceedings.

2. The amendment of the Citation to allege a willful rather than other than serious violation of the Act and to propose a penalty of $1,000.00 rather than $100.00 as allowed at the hearing will stand.

3. Respondent was in violation of the standard at 29 C.F.R. §1904.2(a) as alleged in the Citation.

4. Respondent's violation of the standard was willful.

5. Item 1 of Citation No. 1, issued to the respondent September 23, 1981, should be affirmed as a willful violation of the Act and a penalty of $1,000.00 should be assessed.

ORDER

Item 1 of Citation No. 1, issued to respondent September 23, 1981, is AFFIRMED as a WILLFUL violation of the standard at 29 C.F.R. §1904.2(a) and a penalty of $1,000.00 is ASSESSED.

R. M. Child
Judge, OSHRC

Dated: June 10, 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
John W. McCormack Post Office and Courthouse, Room 420
Boston, Massachusetts 02109

NOTICE OF DECISION

Secretary of Labor v. FANTONI COMPANY, INC.
OSHRC Docket No. 81-2651

1. Enclosed is a copy of my decision. It will be filed with the Commission on June 14, 1982, and will become the final order of the Commission on July 14, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is June 14, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Foster Furcolo

FOSTER FURCOLO
JUDGE, OSHRC

Date: May 26, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant<br>v.<br>FANTONI COMPANY, INC.,<br>Respondent | OSHRC DOCKET NO. 81-2651 |

APPEARANCES:

Robert J. Murphy, Esq., for Complainant

Leo S. McNamara, Esq., for Respondent

DECISION AND ORDER

This case arose under 29 USC, sec. 651 et seq. of the Occupational Safety and Health Act of 1970 (the Act). As a result of an inspection by the Occupational Safety and Health Administration [OSHA] of the Respondent's premises on August 27 to November 2, 1981, Citation #1 was issued on or about November 13, 1981, charging that the Respondent violated sec. 5(a)(2) of the Act by the serious violation of the standard at 29 CFR 1926.651(c).

On November 27, 1981, the Respondent filed Notice of Contest to the Citation and the penalty proposed therefor.

The pertinent sections of the Act and the standard are appended to this decision under appropriate titles.

## BACKGROUND

The jobsite, an excavation about 60 feet long, 40 feet wide, and 10 - 15 feet deep (herein called the accident excavation) was adjacent to or connected by a passageway with another unshored excavation (herein called the first excavation) some 150 feet long by 120 feet wide and 28 to 32 feet deep. Both excavations were composed of substantially the same material: peat for several feet of depth and then clay or sandy silt.

The first excavation had been dug in March, 1981, and the second one was begun in August, 1981. On August 26, 1981, the Respondent's employee, Cordeiro, was killed when the eastern wall of the second excavation collapsed, burying him. He had been working in that eacavation for about 30 minutes that day...Tr. 104, 108.

## ISSUES

Since the Respondent stipulated that there was no shoring system (Tr. 92), the only issues are:

1. Was there a danger from moving ground?

2. Were the walls of the accident excavation adequately guarded by sloping or some other equivalent means?

3. Did the Respondent have knowledge of any hazardous condition of the accident excavation?

## EVIDENCE

Webster, who worked for the Nahant Water Department, testified that the jobsite was in a "marshland" and the walls of the accident excavation were "vertical"...Tr. 25, 26, 39, 50.

Waters, a policeman, testified that the jobsite was "marshy", the walls of the accident excavation were "vertical", and they were not shored or sloped or supported...Tr. 72, 78, 79, 91, 92.

Murphy, the Respondent's backhoe operator, testified that the wall that collapsed was "slightly sloped", "not 2 to 1", and the accident excavation was "sloppy"...Tr. 108, 142.

La Marre, an inspector for the Department of Labor of the Commonwealth of Massachusetts, testified that the immediately adjacent first excavation was unshored but safe...Tr. 150 - 152.

Yanovitch, the Compliance Officer, testified that the day after the accident, he took a soil sample from the eastern wall of the accident excavation that was representative of the soil in that area. He said the soil was "very, very soft" and had "no stability at all" and was "very unstable...like a garden material"...Tr. 195 - 203, Exh. C-45.

Hoxie, the well-qualified expert, testified that the sample (Exh. C-45) was peaty soil with "no strength, no stability, no structure"; and that, in the conditions here, "moving ground is expected"...Tr. 292, 323, 326.

Carvalho, the Respondent's backhoe operator, testified that the walls of the accident excavation were "all peat" without any clay, sand, or silt...Tr. 361, 362.

Miguel, the Respondent's foreman, testified that the accident excavation was being sloped but "not two to one"; and that the material removed from it was "peat...roots and stuff like that"...Tr. 383 - 389.

Leonard, the Respondent's project engineer, testified that the first excavation, which was next to the excavation where the accident occurred, had had no movement of peat or failure of its peat walls although it had been maintained from March through December, 1981, without shoring; and, during that time, heavy vehicles and earth equipment were pounding the ground so hard that the earth could be seen moving and felt shaking...Tr. 416, 428 - 430.

## DISCUSSION

I find that the walls of the excavation were virtually "vertical". I base that finding on the testimony of two disinterested witnesses [Webster and Waters] to that effect while the strongest evidence that the Respondent could present to the contrary was testimony of its own employees [Murphy, Carvalho, and Miguel] tending to establish that the walls were "slightly sloped" and "not two to one".

I find that the wall that collapsed was composed mostly of peat. The testimony of the expert, Hoxie, to that effect was corroborated by the Respondent's employees Carvalho and Miguel.

I find that the material in the wall that collapsed was unstable. The testimony of the experienced Compliance Officer (Yanovitch) and the well-qualified expert (Hoxie) to that effect was not contradicted by any witness. Moreover, it was corroborated by the soil sample itself (Exh. C-45). The very happening of the accident is additional corroboration, although I make no finding based on that alone or as corroboration.

The Respondent's employee was exposed to the danger of the collapse of a wall of the excavation. He was in the excavation for at least half an hour before buried by the wall's collapse. Supervisory personnel of the Respondent

knew he was working in the excavation.

## DEFENSE

The Respondent contended that the adjoining excavation was deeper, had more vertical walls, and had been subjected to the pounding of heavy equipment for several months. Its main defense seemed to be that, if the walls of the adjoining excavation had not collapsed under such conditions, the jobsite in question was certainly safer or, at the very least, the Respondent obviously had no knowledge of the possible hazard.

That defense does not prevail. The mere fact that no accident occurred in the adjoining excavation does not mean the jobsite in question was not hazardous. As concerns the pounding by heavy equipment, that factor could tend to establish a hazard as consistently as it might be interpreted to negate one. The Respondent would not be justified in assuming that the excavation in question was safe merely because the adjoining excavation had not collapsed. Its supervisory employees knew, or should have known, that the walls of the excavation where the accident occurred were composed of unstable material that was likely to move if not shored or adequately sloped or otherwise guarded.

## FINDINGS OF FACT

Having heard the testimony, observed the witnesses, and examined the exhibits, the following Findings of Fact are made:

1. At all times concerned, the Respondent regularly received, handled or worked with goods which had moved across state lines.

2. As concerns Citation #1, an exployee was explosed to danger from moving ground in an excavation wall that was not guarded by a shoring system, sloping of the ground, or other equivalent means.

3. The conditions described in Citation #1 exposed the Respondent's employees to sustaining serious or fatal harm because of the hazard of collapse of the wall.

4. One or more officers or supervisory personnel of the Respondent knew of the hazardous conditions described herein and knew that employees were exposed to such hazard.

## CONCLUSIONS OF LAW

1. At all times concerned, the Respondent was an employer engaged in a business affecting commerce within the meaning of the Act; and the Occupational Safety & Health Review Commission has jurisdiction over the subject matter and the parties.

2. At all times concerned, the Respondent knew, or with the exercise of due diligence should have known, of the alleged violation.

3. On the date in question, the Respondent was not in compliance with the standard at 29 CFR 1926.651(c) and the Complainant has sustained the burden of proving the Respondent violated sec. 5(a)(2) of the Act (sec. 654).

## BRIEFS AND PROPOSED FINDINGS

I have considered the parties' briefs and proposed findings and conclusions. To the extent shown above, they are adopted; otherwise, they are rejected as not being supported by the evidence or law.

## ORDER

The whole record having been considered, and due consideration having been given to 29 U.S.C., sec. 666(j) and the fact that the adjoining

excavation's walls had not collapsed, it is ordered:

1. Citation #1 is affirmed, and a penalty of $50 assessed therefor.

SO ORDERED.

Foster Furcolo

FOSTER FURCOLO
JUDGE, OSHRC

Dated: June 14, 1982
Boston, Massachusetts

## APPENDIX

### THE ACT

Section 654 [section 5(a)(2)] Employer "...shall comply with occupational safety and health standards..."

Section 666 [section 17(b)] "...employer who has received a citation for a serious violation...of this Act...shall be assessed a civil penalty of up to $1,000 for each such violation."

Section 666 [section 17(j)] "...assess all civil penalties...giving due consideration to...the size of the business...gravity of the violation, the good faith of the employer, and the history of previous violations."

Section 666 [section 17(k)] "...a serious violation shall be deemed to exist...if there is a substantial probability that death or serious physical harm could result...unless the employer did not, and could not...know of the presence of the violation."

### THE STANDARD

1926.651(c): "The walls and faces of all excavations in which employees are exposed to danger from moving ground shall be guarded by a shoring system, sloping of the ground, or some other equivalent means."

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

July 19, 1982

**IN REFERENCE TO SECRETARY OF LABOR v.**

SYNTRON, INC.

OSHRC DOCKET NO. 81-1491

**NOTICE IS HEREBY GIVEN TO THE FOLLOWING:**

OF COMMISSION DECISION AND REMAND

To wit: See attached.

**FOR THE SECRETARY OF LABOR**

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**FOR EMPLOYER**

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  Houston, Texas 77019

**FOR EMPLOYEES**

-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

- Louis G. LaVecchia
  Judge, OSHRC
  Federal Building, Room 7B11
  1100 Commerce Street
  Dallas, Texas 75242

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>SYNTRON, INC.,<br><br>Respondent. | OSHRC Docket No. 81-1491-S |

**ORDER OF REMAND**

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

The Secretary of Labor issued to Syntron, Inc. two citations alleging a violation of the machine guarding standard at 29 C.F.R. § 1910.212(a)(1) and violations of sections 1903.2(a)(1)(OSHA poster) and 1904.2(a)(injury log). Judge LaVecchia's decision vacated the first citation because "an alleged photograph of the saw . . . was shown to be a saw other than the one operated by [Syntron], and was apparently photographed in a different machine shop. This constitutes a fatal flaw in the government's case." The judge alternatively held that "evidence submitted by [Syntron] with respect to its saw operation indicated that the operator normally has his body or extremities at least one foot away from the point of operation." The judge vacated the other citation because it was not addressed at the hearing. The Secretary has advanced several arguments that the judge's decision was wrong. We decline to resolve the Secretary's arguments at this time.

An administrative law judge's decision must include findings of fact, conclusions of law and a statement of the reasons or bases for the decision. 1/

---

1/ See 29 U.S.C. § 659(c), section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"); 5 U.S.C. § 557(c), section

(cont'd)

The judge's decision does not explain why the introduction of an inapposite exhibit constitutes a "fatal flaw" in the Secretary's case or why the fact that the operator normally stands a foot away from the point of operation is dispositive. The decision also lacks specific findings on whether, under section 1910.212(a)(1), there was a point of operation hazard and whether a method of machine guarding was not provided to protect the operator and other employees in the machine area. We therefore remand this aspect of the case for the filing of a new decision. 2/

We also remand for further consideration of the posting and injury log citation. The Secretary has argued to the Commission that the notice of contest did not put these matters in issue. The judge should consider whether the second citation was contested.

Accordingly, the judge's decision is vacated and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: JUL 19 1982

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(Footnote 1 cont'd)

8(b) of the Administrative Procedure Act, 5 U.S.C. § 551 et seq.; Commission Rules 66(i), 90(a) and 208(a), 29 C.F.R. §§ 2200.66(i), 2200.90(a) and 2200.208(a). See generally P & Z Co., 77 OSAHRC 211/F5, 6 BNA OSHC 1189, 1192, 1977-78 CCH OSHD ¶ 22,413, p. 27,025 (No. 76-413, 1977).

2/ On remand, the judge should resolve two other matters. Exhibits R-1 and R-2 were introduced by Syntron, but are not in the official file. The originals or duplicates of the exhibits should be obtained. In addition, a videotape that was played at the hearing to depict the operation of the cited machine was not identified as an exhibit, introduced into evidence, or included in the official file. The status of this videotape must be clarified. Judge LaVecchia should determine whether it is to be considered evidence in this case. If it is evidence, the judge should include the videotape in the record, or, if it is not available, include a summary of the matters it depicts in the record.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, Complainant, | ) | |
| | ) | OSHRC |
| v. | ) | Docket No. 81-1491S |
| | ) | |
| SYNTRON, INC., Respondent. | ) | |

Appearances:

For the Government: Ronnie A. Howell, Atty.

For the Respondent: Henry McCreight, Atty.

DECISION

The respondent was cited for allegedly violating the machine guarding provisions of 29 CFR 1910.212(a)(1). A metal cut-off (band saw) saw was said to be operated by the respondent without a guarding device. An alleged photograph of the saw (Ex. C-1) was shown to be a saw other than the one operated by the respondent, and was apparently photographed in a different machine shop. This constitutes a fatal flaw in the government's case.

In the alternative, evidence submitted by the respondent with respect to its saw operation indicated that the operator normally has his body or extremities at least one foot away from the point of operation.

Citation No. 2 was not addressed.

In the circumstances the citations must be vacated.

ORDER

Citations Nos. 1 and 2 are vacated.

Louis G. LaVecchia,
Judge

Dated: February 26, 1982

Dallas, Texas.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant | : | |
| v. | : | OSHRC DOCKET NO. 78-5805 |
| CONSOLIDATED RAIL CORPORATION, | : | |
| Respondent | : | |

JUDGE'S DECISION
JUN 23 '82
RECEIVED
FINAL ORDER ON
JUN 23 '82

ORDER

Respondent, Consolidated Rail Corporation (Conrail), was cited on November 13, 1978, for failure to comply with the safety standard, 29 C.F.R. §1910.23(c)(1),[1/] concerning an inspection pit or platform at Conrail's car repair facility in Allston, Massachusetts. On December 28, 1978, Conrail moved to dismiss the citation and the complaint on the ground that the Federal Railroad Administration (FRA), by its March 1978 policy statement, had exercised its statutory authority to regulate inspection pits, thereby exempting Conrail from OSHA's safety standard in accordance with section 4(b)(1), 29 U.S.C. §653(b)(1), of the Occupational Safety and

1/ 29 C.F.R. §1910.23(c)(1), reads in relevant part:

> (c) Protection of open-sided floors, platforms, and runways. (1) Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides except where there is entrance to a ramp, stairway, or fixed ladder....

Health Act of 1970 (the Act).[2/] Addressing the relationship between the respective jurisdictions of FRA and OSHA, the policy statement states in pertinent part:

> OSHA regulations concerning working surfaces deal with such matters as ladders, stairways, platforms, scaffolds and floor openings. Generally, these regulations are applicable in railroad offices, shops, and other fixed workplaces. There are three principal exceptions to the rule. First, they would not apply with respect to the design of locomotives and other rolling equipment used on a railroad, since working conditions related to such surfaces are regulated by FRA as major aspects of railroad operations.
>
> Second, as the agency which has exercised jurisdiction over railroad operations, FRA is responsible for the safe movement of rolling stock through railroad repair shops. OSHA requirements for general industry are in some respects inconsistent with the optimum safety of employees in this unique environment where hazards from moving equipment predominate. Therefore, OSHA regulations on guarding of open pits, ditches, etc., would not apply to inspection pits in locomotive or car repair facilities.... (Emphasis added.)

43 Fed. Reg. 10583-10590 (March 14, 1978). Accepting Conrail's contention, Commission Judge Ben Worcester entered an order on January 30, 1979, dismissing the Secretary's complaint. On January 30, 1981, a majority of the Commission, reversing Judge Worcester's order, held that the FRA's March 1978 policy statement is not a standard or regulation under section 4(b)(1) of the Act and does not preempt OSHA's authority to issue the citation against Conrail.

---

2/ Section 4(b)(1), 29 U.S.C. §653(b)(1), reads in relevant part:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies...exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

The case was remanded for a hearing on the merits. Consolidated Rail Corp., 9 BNA OSHC 1258, 1981, CCH OSHD ¶25,172 (Nos. 78-5805 et al., 1981) (Conrail I).[3/]

A hearing on the merits of the case has been postponed on several occasions at the request of the parties so that an experiment could be conducted for the purpose of determining whether guarding around inspection pits and platforms was "appropriate." In the interim, the Commission had occasion to reconsider its position announced in Conrail I. In Consolidated Rail Corp., 10 BNA OSHC 1577, 1982 CCH OSHD ¶26,044 (No. 79-1277, April 30, 1982) (Conrail II), a majority of the Commission overruled Conrail I, stating that the March 1978 FRA policy statement regarding pits and platforms associated with locomotive or car repair facilities is an exercise of the FRA's statutory authority that gives rise to an exemption under 4(b)(1) of the Act.[4/] On June 9, 1982, Conrail renewed its motion to dismiss, relying on Conrail II.

The principle set down in Conrail II is controlling and calls for dismissal of the Secretary's case. Accordingly, it is

ORDERED that Conrail's motion to dismiss the November 13, 1978, citation is granted. It is further

ORDERED that the complaint is dismissed and the citation is vacated.

Richard DeBenedetto
RICHARD DeBENEDETTO
Judge, OSHRC

Dated: June 23, 1982
Boston, Massachusetts

---

3/ On June 17, 1981, the Court of Appeals for the First Circuit dismissed Conrail's petition for appellate review on the ground that the Commission's order vacating and remanding to the Judge for fact-finding was non-reviewable.

4/ In his brief, the Secretary asks us to draw a distinction between an open-sided platform located over an inspection pit--the condition cited in the instant case--and an open inspection pit. The distinction is superficial and unsound.

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| 82-0337-E | SECRETARY OF LABOR AND HEINTZ DIVISION-KELSEY-HAYES CO. | 7/28/82 | 40/C5 |
| 77-2911 | CONSOLIDATED RAIL CORPORATION | 7/29/82 | 40/C12 |
| | (Judge's decision) | | 40/D2 |
| 77-4143 | DILLINGHAM TUG & BARGE CORPORATION | 7/29/82 | 40/D6 |
| | (Judge's decision) | | 40/F4 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

July 27, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

BROWN & ROOT, INC.

OSHRC DOCKET NO. 77-2553

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

- Counsel for Regional Litigation
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FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br>v.<br><br>POWER PLANT DIVISION, BROWN & ROOT, INC.,<br>Respondent. | OSHRC Docket No. 77-2553 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Review Commission Judge Dee C. Blythe is before the Commission for review under section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). The principal issue in this case is whether the perimeter guarding standard for construction work at 29 C.F.R. § 1926.500(d)(1) is applicable to the working conditions in question. 1/ In particular, we must determine whether the judge correctly held that a flat surface inside a large air duct that was being constructed was an "open-sided floor" within the meaning of the standard. We conclude that the Secretary of Labor ("the Secretary") established that the cited standard is applicable here and we affirm the administrative law judge's finding of a violation.

---

1/ 29 C.F.R. § 1926.500(d)(1) provides:

> § 1926.500 Guardrails, handrails, and covers.
>
> * * *
>
> (d) Guarding of open-sided floors, platforms and runways.
> (1) Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f)(1)(i) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a standard toeboard wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard.

I

At the time of the Secretary's inspection, Respondent, Power Plant Division, Brown & Root, Inc., was engaged in the construction of a power plant in Thompson, Texas. In the course of construction, Respondent installed a large inverted-U-shaped air duct. The duct was fabricated on the ground in sections, which were then raised into position by crane and welded together into a configuration that created an elevated flat surface inside the crook of the inverted "U", approximately 6 to 8 feet below the flattened top of the duct. This elevated flat surface, which was approximately 12 feet long and 12 feet wide, separated two parallel vertical shafts, each with an opening that was also approximately 12 feet square. The other two sides of the flat surface were connected to the bulkhead created by the interior of the air duct.

During the assembly process, it had been necessary for employees to be inside the duct on the elevated flat surface in order to guide the sections into position. Accordingly, at the time of the inspection, the remains of some scaffolding, apparently used by those employees, still were welded to the surface in question. In addition, a doubled wire rope was strung parallel to and above one edge of the surface. This edge was adjacent to the opening into one of the vertical shafts and approximately 43 feet above the base of that shaft. The record indicates that Respondent had installed the wire in anticipation of workers' entering the duct as part of final clean-up activity which, at the time of the inspection, was still to come. It is undisputed that this wire, which was 38-1/2 inches above the elevated flat surface, did not constitute a standard guardrail.

Approximately 1-1/2 months after the duct was installed, Respondent's supervisors located a "pin-hole" in the duct's metal plate as a result of a defective weld. The "pin-hole" was in the bulkhead, some 3 feet from the edge of the flat surface where the wire rope had been installed. After they had inspected the "pin-hole" from the vantage point of the elevated surface inside

the duct, the supervisors assigned two welders to patch the weld. Although the record indicates that the welding could have been done on the outside, one of the welders entered the duct alone through an existing temporary access hole cut in the bulkhead, apparently in order to see the light shining through the defective weld. But for the temporary access hole cut in the bulkhead, there was no source of light in the duct. The welder was later found dead at the bottom of the duct shaft that was adjacent to the edge of the surface where the wire rope had been strung.

On review, Respondent charges that Judge Blythe erroneously determined that the elevated flat surface at issue was a "floor" within the meaning of the cited standard. As in its post-hearing arguments, Respondent cites an unreviewed judge's decision regarding a standard pertaining to steel erection as sole authority for its contention that there is a difference in the degree of employee protection required for temporary flooring as opposed to that required for permanent flooring and that section 1926.500(d)(1) applies only to the latter. 2/ Because the surface in question was not a permanent floor, it continues, the judge erred in concluding that the cited standard was applicable. Instead, the judge should have accepted Respondent's contentions that the conditions were

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2/ In San Jose Crane & Rigging, Inc., 73 OSAHRC 26/D1, 1 BNA OSHC 3069, 1971-73 CCH OSHD ¶ 15,791 (No. 1740, 1973), appeal dismissed, No. 73-2662 (9th Cir. 1974), the judge noted that there was no provision in the regulations relating to steel erection work specifying the time or stage of construction when a standard railing, pursuant to 29 C.F.R. § 1926.500(d)(1), is required rather than a single wire rope railing, pursuant to 29 C.F.R. § 1926.750(b)(1)(iii). He also noted that § 1926.750(b)(1)(iii), a more specific standard with respect to temporary-planked floors than the broad provision in § 1926.500(d)(1), specifically approves a single wire rope "around the periphery of all temporary-planked floors" such as that in the case before him. Therefore, he concluded that § 1926.500(d)(1) only applies to open-sided, permanent floors. In the case before us, the evidence clearly indicates that the surface in question was a permanent, and not a temporary, surface within the meaning of San Jose Crane. Moreover, there is no contention that Respondent was engaged in steel erection here. Accordingly, the cases are distinguishable.

governed by 29 C.F.R. § 1926.28(a) [3/] and that it was not in violation of that standard because the deceased employee's failure to use personal protective equipment was the result of his own unpreventable misconduct. Respondent summarizes its position as follows: it evaluated the hazard presented and selected a "mode of compliance"--safety belts and lifelines. The Secretary, in hindsight, determined that another means of compliance was better, while admitting that Respondent's chosen means would have eliminated the hazard. Accordingly, in Respondent's view, the citation should be vacated.

II

It is well settled that the burden of proving that a particular standard applies to the cited working conditions is on the Secretary. Howard Barthelmass Painting Company, Inc., 81 OSAHRC 84/E1, 9 BNA OSHC 2160, 1981 CCH OSHD ¶ 25,637 (No. 78-5450, 1981). Here, the cited standard is applicable to every open-sided floor or platform 6 feet above adjacent floor or ground level. It is not disputed that this elevated flat surface was more than 6 feet above adjacent floor or ground level; thus the sole remaining question is whether it was a "floor" or "platform" within the meaning of the standard.

In his decision, Judge Blythe noted the absence of a definition of "floor" in the Secretary's standards or in Commission decisions. Consequently, the judge resorted to the dictionary. He noted that Webster's Third New International Dictionary contains numerous definitions of "floor," including: "the bottom or lower part of any room: the part of a room upon which one stands"; "the lower inside surface of any hollow structure . . ."; and "the surface or the platform of a structure on which to walk, work or travel . . . ." The judge determined

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3/ 29 C.F.R. §1926.28(a) provides:

§ 1926.28 Personal protective equipment.

(a) The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

that it would be unrealistic to apply a restrictive definition of "floor" to a structure such as the generating plant here. Therefore, he opted for a broad definition compatible with the remedial purpose of the Act. He concluded that, because work had been and remained to be done from and on this surface, it was a working-walking surface and, thus, a "floor" within the meaning of the cited standard, which required that standard guarding be installed on its open sides.

The record clearly establishes that the surface at issue was a working-walking surface. The evidence indicates that, weeks before the fatal accident, Respondent had used the surface during the process of assembling the air duct and had erected the line in the duct in anticipation of its employees' performing clean-up activities, such as removing the remains of the scaffold erected on the surface. Respondent's supervisors entered the duct on the morning of the accident to inspect the defective weld. They then directed the deceased to patch the hole and he, too, tread upon the surface in order to perform that assignment. We conclude, therefore, that Respondent's employees used the surface at issue in the performance of their work and were entitled to the fall protection which the cited standard is intended to provide. Commissioner Cleary agrees with the judge's conclusion that the working surface was a floor. 4/ Commissioner Cottine finds that the surface

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4/ Commissioner Cleary does not agree with the dissenting opinion that his position in this case is inconsistent with the positions he took in Globe Industries, Inc., 82 OSAHRC __, 10 BNA OSHC 1596, 1982 CCH OSHD ¶ 26,048 (No. 77-4313, 1982), and in Arkansas Rice Growers Cooperative Association, 82 OSAHRC __. 10 BNA OSHC 1616, 1982 CCH OSHD ¶ 26,049 (No. 77-3974, 1982) (dissenting opinion). In his opinion, he has followed a consistent policy of broadly construing the Secretary's standards on falling hazards so as to effectuate their clear remedial purpose, so long as the application of the standards would not deprive employers of their right to adequate notice of the proscribed conduct. The ultimate question in each case is whether, in light of these two factors, the Secretary's enforcement action is reasonable. See Globe Industries, Inc., supra.

In the case now before the Commission, the public interest in applying the standard is strong, while any problems of adequate notice are minimal. This was equally true in Arkansas Rice Growers. Accordingly, in both cases Commissioner Cleary concluded that the citation should be affirmed. In both cases, the Secretary's enforcement action effectuated the intent of the cited standard and the purposes of the Act. Here employees were exposed to a 43-

was a platform under the definition in 29 C.F.R. § 1926.502(e) and thus finds it unnecessary to determine whether it also was a floor. 5/

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(Footnote 4 cont'd)

foot fall from a surface that can only be described as hazardous. In Arkansas Rice Growers, employees were exposed to the hazard of falling 83 feet 9 inches through an opening in a surface that was used by employees as a walking and working surface. Moreover, in neither case did the application of the standard create a significant notice problem. Here a construction standard is being applied to an employer engaged in construction work. In this context, Commissioner Cleary sees no notice problem in characterizing a surface as a floor because it was in fact used and it was intended to be used as a floor during the construction process. In Arkansas Rice Growers, a general industry standard was applied to an employer engaged in a production operation. It was therefore appropriate to look to the function the surface was designed and intended to serve on a permanent basis. Because the record established that the surface was designed and intended to be used for two purposes on a permanent basis, and one of those uses was as a floor, Commissioner Cleary saw no notice problem in classifying the surface as a floor.

On the other hand Commissioner Cleary joined in vacating the citation in Globe Industries. It is distinguishable from Arkansas Rice Growers and the case on review. In Globe Industries, the Secretary's enforcement action contributed little to the objective of improving employee safety. The surface was a broad, flat surface only 5 feet 3 inches off the ground. A safe means of access was provided, and the single employee who went onto the surface for brief periods of time performed his functions from the center of the surface. Application of the standard would have created significant notice problems because it would have stretched the terms of the standard beyond their plain meaning and the common understanding of their meaning. The employer could not have anticipated that the surface, which was used and intended to be used only as a conveyor, would be classified as a "platform" because incidental maintenance work was performed on it on an infrequent basis to enable its continuing operation as a conveyor.

5/ In Globe Industries, Inc., 82 OSAHRC ____, 10 BNA OSHC 1596, 1599, 1982 CCH OSHD ¶ 26,048, p. 32,719 (No. 77-4313, 1982)(dissenting opinion), Commissioner Cottine noted the long-standing Commission precedent defining a "platform" to generally include surfaces on which employees actually work that are raised above the surrounding floor or ground. The definition of "platform" applicable to this citation is "a working space for persons, elevated above the surrounding floor or ground, such as a balcony or platform for the operation of machinery and equipment." 29 C.F.R. § 1926.502(e). The same definition applies under the general industry standard at 29 C.F.R. § 1910.21(a)(4), which was involved in Globe Industries, Inc., supra.

Here, the open-sided working surface was raised above the surrounding ground approximately 43 feet. In addition to its use as a working surface by the deceased employee, a welding foreman testified that it had been used by Brown & Root's employees previously and had a partial guard in the form of a wire rope strung along one side. The general welding foreman testified that he used the surface to determine what welding needed to be performed and that the welding could have been performed from this surface. Thus, the surface was actually used on several occasions as a working surface by Brown & Root's employees with its foremen's knowledge. Though this was a

Respondent also asserts in effect that the Secretary acted arbitrarily in concluding that the working conditions were governed by the cited standard rather than 29 C.F.R. § 1926.28(a). However, the standard at section 1926.500(d)(1) is more specific than that at section 1926.28(a), and therefore takes precedence. See Tri-State Roofing and Sheet Metal Co., 77 OSAHRC 208/A2, 6 BNA OSHC 1152, 1977-78 CCH OSHD ¶ 22,409 (No. 16121, 1977)(lead opin.). Therefore, the citation properly alleged noncompliance with section 1926.500(d)(1). Respondent further asserts that its mode of compliance--safety belts and lifelines--would have eliminated the hazard, but for the isolated incident of employee misconduct by the deceased, who failed to use his safety belt. We also reject this contention. The Commission has held that safety belts are not "equivalent protection" to guardrails within the meaning of section 1926.500(d)(1). Warnel Corp., 76 OSAHRC 41/C5, 4 BNA OSHC 1034, 1975-76 CCH OSHD ¶ 20,576 (No. 4537, 1976). Moreover, Respondent's argument that its employee's failure to tie off his safety belt was unpreventable employee misconduct does not establish a defense to a cita-

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(Footnote 5 cont'd)

construction site and the employees were not on the surface on a regular and predictable basis, in Commissioner Cottine's view the surface meets the definition of a platform under the construction standard at § 1926.502(e).

Commissioner Cottine also notes that Judge Blythe incorrectly concluded that the Commission has limited the definition of "platform" to structures erected for the purpose of performing work. The judge relied on the lead opinion in Otis Elevator Co., 77 OSAHRC 80/A2, 5 BNA OSHC 1429, 1977-78 CCH OSHD ¶ 21,821 (No. 13140, 1977). However, that opinion reflected the views of only one Commissioner. The controlling Commission precedent is discussed in Globe Industries, Inc., supra.

tion where, as here, the violation alleged is the lack of a standard guardrail around an open-sided floor. See Wander Iron Works, Inc., 80 OSAHRC 40/A2, 8 BNA OSHC 1354, 1980 CCH OSHD ¶ 24,457 (No.76-3105, 1980).

Accordingly, we affirm the citation and, in light of the penalty criteria specified in section 17(j) of the Act, 29 U.S.C. § 666(i), and the parties' stipulation, we assess a penalty of $300.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: JUL 27 1982

ROWLAND, Chairman, Dissenting:

I dissent from the majority's conclusion that the standard cited in this case, 29 C.F.R. § 1926.500(d)(1), was shown to be applicable to the working conditions in question. Since I would also find that Respondent did not know nor reasonably could have known that the deceased employee would fail to use the required safety belt, I would conclude that Respondent did not violate the personal protective equipment standard at 29 C.F.R. § 1926.28(a). Accordingly, I would vacate the citation.

At the outset, I find it instructive that the majority in this case is divided on the proper characterization of the surface at issue. Although both Commission members rely on the use of the surface for the performance of work, each draws a different conclusion from that fact. Commissioner Cottine finds the surface to be a "platform" because that term is expressly defined as "a working space for persons." Commissioner Cleary expresses agreement with the judge's conclusion that the surface is a "floor" within the dictionary definition of a floor as a surface on which work is performed. 6/ The fact that members of this Commission, who must interpret the Secretary's standards, disagree on the proper terminology and definitions to be applied in determining Respondent's obligation is a strong indication that the language of the standard in question is imprecise.

Indeed, the Commission has previously recognized that a similar guardrail standard, section 1910.23(c)(1), 7/ must be interpreted in a reasonable manner

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6/ See note 12 infra.

7/ 29 C.F.R. § 1910.23(c)(1), which applies to employers in general industry, is virtually identical to the standard at issue in this case, which imposes guarding requirements for employers engaged in construction work. See note 5 of the lead opinion.

in order to afford an employer fair notice of its obligations under the standard. In a case substantially similar to this, Globe Industries, Inc., 82 OSAHRC , 10 BNA OSHC 1596, 1982 CCH OSHD ¶ 26,048 (No. 77-4313, 1982), the Commission considered whether under section 1910.23(c)(1) guardrails were required along the open sides of the tops of two conveyor belts. In concluding that these surfaces did not come within the definition of a platform as "a working space for persons," the Commission relied on the fact that the conveyor tops were used as a work surface only during a maintenance operation, when the normal manufacturing process was not in operation. It therefore held that to consider the conveyor belts "platforms" would exceed the plain meaning of that term and conflict with the common understanding of what constitutes a "platform." In so holding, the Commission expressly adopted the reasoning of the court in General Electric Co. v. OSHRC, 583 F.2d 61, 64 (2d Cir. 1978):

> We do not read this definition [of "platform"] to apply to every flat surface . . . upon which employees may someday stand while performing some task related to their employment and the operations of their employer. An elevated flat surface does not automatically become a "working space" and a "platform" merely because employees occasionally set foot on it while working.

Under this precedent, applicability of these standards to surfaces on which employees work depends upon a number of factors, including the nature of the surface in question and the frequency and regularity with which employees go onto the surface in the performance of their assigned duties. It is not sufficient to find section 1926.500(d)(1) applicable, as the majority does in this case, solely on the basis that Respondent's employees used the surface in question in the performance of their work without regard to the regularity or predictability of such use.

The record demonstrates that the surface in question, which formed an interior portion of a large prefabricated section of ductwork, was neither designed nor intended to function as a working surface for employees. Although employees ultimately did perform some work from the interior surface once the ductwork had been elevated by crane into a vertical position, 8/ it is quite clear that such work was only for completion of the ductwork installation. Upon completion, the opening in the ductwork which permitted access to the interior surface was to have been sealed. As Commissioner Cottine correctly observes in note 5 of the majority opinion, the performance of work by Respondent's employees from within the duct was neither recurrent nor predictable. 9/ It is undisputed that during the one and one-half to two-month period which elapsed between installation of the ductwork and detection of the hole by Respondent's supervisors, no employee had entered the ductwork for any purpose. Indeed, the work operation which resulted in the employee's death and eventually in the citation at issue would not have been performed at all were it not for the incidental discovery of an improper weld.

On these facts, a reasonable employer would not conclude that the interior surface of a large metal structure which forms part of a building's ventilation system is a "working space" requiring the provision of guardrails simply because employees worked from that surface while installing the ductwork. This conclusion is consistent with the design and configuration of

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8/ The ductwork was originally assembled on the ground in a horizontal configuration. At that time, the surface now claimed to be a working surface was vertical, so that in relation to Respondent's employees it formed a side or wall of the duct.

9/ The surface was to be used primarily for inspection and final clean-up. Although some tack welding had also been performed from the surface, the record does not indicate that this welding was conducted either frequently or regularly.

the duct surface as well as the fact that its use as a work surface is neither regular nor predictable. Although the majority characterizes the surface as flat, its open sides are curved, thus forming a gradual roll or drop-off. The cited standard requires that the employer provide "a standard railing, or the equivalent," which is defined at section 1926.502(k) as a "vertical barrier erected along exposed edges . . . ." The standards, however, give no guidance by which an employer can determine where the "edge" exists on a sloped or curved surface. The compliance officer himself testified that he had never seen similar ductwork equipped with guardrails. Accordingly, in view of the infrequency and irregularity of use, the evident unsuitability of the curved surface for the installation of guardrails, 10/ and the absence of evidence to show that guardrails are customarily used by the industry in such circumstances, Respondent cannot be said to have fair notice that the cited standard is applicable to it in this case. See Faultless Division, Bliss & Laughlin Industries, Inc. v. Secretary of Labor, 674 F.2d 1177, 1192-93 (7th Cir. 1982) (dissenting opinion), citing B&B Insulation, Inc. v. OSHRC, 583 F.2d 1364 (5th Cir. 1978); Borton, Inc., 82 OSAHRC 17/E13, 10 BNA OSHC 1462, 1982 CCH OSHD ¶ 25,983 (No. 77-2115, 1982) (dissenting opinion). Indeed, the language of the Commission decision in Globe Industries, supra, is

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10/ The Secretary's standard which expressly provides for fall protection for employees on sloped surfaces, section 1926.451(u)(3), requires that employees use safety belts attached to a lifeline if they are not otherwise protected by a parapet or catch platform. This requirement is predicated on the Secretary's conclusion that a sloping surface itself presents a fall hazard. Hamilton Roofing Co., 78 OSAHRC 57/C1, 6 BNA OSHC 1771, 1978 CCH OSHD ¶ 22,856 (No. 14968, 1978). As discussed infra, Respondent required its employees to use tied-off safety belts in the circumstances presented here.

equally appropriate here: "In view of the totality of the facts . . . acceptance of the Secretary's position . . . would stretch that term ['platform'] beyond its plain meaning and lead to results that conflict with the common understanding of what a 'platform' is." 10 BNA OSHC at 1598-99, 1982 CCH OSHD ¶ 26,048 at 32,719. 11/

The same conclusion applies even if we consider the issue before us, as Commissioner Cleary states, to be whether the surface in question constitutes a "floor." Under the Commission precedent I have discussed, the application of the standard depends not on the incidental selection of terminology but on the reality of the nature of the surface in question and the extent to which it is used by the employer. Clearly, it is no more reasonable to construe the interior surface of Respondent's ductwork as a "floor" based on irregular or infrequent use by employees than it is to consider the surface a "platform" on the same basis. 12/ Cf. Arkansas Rice Growers Cooperative Association, 82 OSAHRC , 10 BNA OSHC 1616, 1620 n.6, 1982 CCH OSHD ¶ 26,049 at

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11/ Because the facts indicate that the duct surface was not erected and designed for use by employees while operating machinery or equipment, I would also conclude that it cannot be considered a "platform" for the reasons stated by former Commissioner Moran in Allis-Chalmers Corp., 76 OSAHRC 50/F8, 4 BNA OSHC 1227, 1975-76 CCH OSHD ¶ 20,666 (No. 5210, 1976). See Globe Indus., supra, 10 BNA OSHC at 1599 n.7, 1982 CCH OSHD ¶ 26,048 at 32,719 n.7; General Electric Co., 81 OSAHRC 97/D6, 10 BNA OSHC 1144, 1981 CCH OSHD ¶ 25,736 (No. 76-2879, 1981).

12/ I do not mean to suggest that the terms "platform" and "floor" are synonymous. However, in the circumstances of this case it is unnecessary to consider whether these terms are intended to refer to different components of a building or structure, or whether they may be differentiated in any other way. In this regard, I note that the definitions on which the judge relied, which are quoted in the lead opinion, offer no guidance for distinguishing a "floor" from a platform as the latter term appears in the Secretary's standards. Indeed, one of three definitions of "floor" quoted by the judge itself uses the term "platform."

32,724 n.6 (No. 77-3974, 1982) (cases holding that the roof of a building is not a "floor" under section 1926.500(d)(1) necessarily imply that it is not a "platform" as well). 13/

As the judge properly observed, Respondent had a work rule requiring that employees use safety belts when working at heights. The judge, concluding that Respondent had tried by consent the issue of a violation of the general protective equipment standard at 29 C.F.R. § 1926.28(a), held that nevertheless Respondent's safety program with respect to the use of safety belts was inadequate. Because Respondent does not except to the judge's ruling regarding trial by consent, the issue of whether Respondent violated section 1926.28(a) is before us at this time. For the reason that follow, I do not agree with the judge's conclusions on this issue.

In a case such as this, where an employee commits an act contrary to a workrule established by the employer, the Secretary must establish that the employer either knew or with reasonable diligence could have known of the violation. Capital Electric Line Builders of Kansas, Inc. v. Marshall, No. 80-1711 (10th Cir. May 12, 1982); Marson Corp., 82 OSAHRC , 10 BNA OSHC 1660 (No. 78-3491, 1982) (dissenting opinion). 14/ The Secretary presented no evidence to show that Respondent had actual knowledge that the deceased employee was not wearing a belt when the work commenced. On the other hand, both

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13/ In his dissenting opinion in Arkansas Rice Growers, supra, Commissioner Cleary concluded that the roof in question was a "floor" under the standard because it was used by employees for the performance of work on a regular, recurring, and frequent basis. In this case, however, he concludes that a floor existed because some work was performed on the duct surface without regard to the infrequency and irregularity of that work.

14/ Although the judge concluded that Respondent's foremen with the exercise of reasonable diligence should have known that the deceased employee was not wearing a safety belt at the time in question, his decision otherwise refers to the "affirmative defense" of "employee misconduct." As explained in my dissenting opinion in Marson, supra, this "affirmative defense" impermissibly avoids placing the burden on the Secretary to establish what

(Continued)

of Respondent's two supervisors who assigned the work stated that Respondent's employees including the deceased customarily wore belts when required.

The record, furthermore, demonstrates that Respondent's employees were informed that violation of Respondent's work rule was cause for termination, that supervisors regularly inspected the job for compliance with safety rules, and that employees have in fact been terminated for failure to follow safety instructions including the failure to tie off where required. The deceased employee was regarded as an experienced and competent worker, and he never had had to be reprimanded for a safety belt infraction. Finally, Respondent maintained a program of installing lifelines, to which employees could tie off, both automatically as the work progressed and on request from any supervisor. Therefore, even assuming, without deciding, that an employer is required to enforce as well as communicate safety instructions to employees, Respondent could not have foreseen that the deceased employee would violate its safety rule, and it cannot be held in violation of 29 C.F.R. § 1926.28(a). 15/

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14/ (Continued)

is in reality an essential element of his case. Therefore, while arguably consistent with Commission precedent, the judge's characterization of the issue before him under section 1926.28(a) is in my view erroneous.

15/ In finding Respondent's safety program inadequate, the judge reasoned that Respondent's safety rule was not sufficiently specific, and he further found that in any event whether to comply with the rule was left to the discretion of individual employees. As Respondent correctly points out in its brief before us, its safety rule is at least as specific as section 1926.28(a), which is a general protective equipment standard. The judge's additional finding is premised on an evident misreading of the testimony of Respondent's foreman, who stated that whether to discipline employees for infractions of safety rules is left to the discretion of the foreman. The foreman, however, also stated that his superiors would "make it hard on me" if he consistently failed to terminate employees for violation of safety rules. In any event, even assuming the judge had correctly read the testimony, the fact that compliance with a safety rule is left to the judgement of an experienced employee is not necessarily indicative of a poor safety program. See Capital Electric, supra, slip op. at 8.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>POWER PLANT DIVISION,<br>BROWN & ROOT, INC.,<br>Respondent. | OSHRC DOCKET NO. 77-2553 |

## DECISION AND ORDER

Appearances:

James F. Gruben, Esq., of Dallas, Texas, for the complainant.

William L. Bedman, Esq., of Houston, Texas, for the respondent.

## STATEMENT OF THE CASE

BLYTHE, Judge:

This is a proceeding brought before the Occupational Safety and Health Review Commission ("the Commission") pursuant to §10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651, et seq. ("the Act"), contesting one citation issued by the complainant, the Secretary of Labor ("the Secretary"), to the respondent, Power Plant Division, Brown & Root, Inc., under authority vested in the Secretary by §9(a) of the Act.

As the result of an inspection conducted on July 15, 1977, of a workplace at W. A. Parrish Generating Station, Thompsons, Texas, where respondent was constructing a steam power plant, one citation was issued to respondent on August 4, 1977, alleging that it violated §5(a)(2) of the Act in that it failed to comply with a safety standard promulgated by the Secretary, codified at 29 CFR 1926.500(d)(1). Respondent gave timely notice of contest August 8, 1977, and thereafter a complaint and an answer were filed with the Commission.

A hearing was convened at Houston, Texas, on November 15, 1977. No affected employee or representative of affected employees participated in this proceeding. Both of the parties have submitted post-hearing briefs.

Respondent admitted the jurisdictional allegations of the complaint and stipulated (Tr. 5) that, if it should be found in violation, the proposed penalty of $300 is appropriate. The only issue remaining to be determined is whether respondent was in violation of 29 CFR 1926.500(d)(1). This subsumes the issue of whether a flat surface inside a large air duct was a floor or platform within the meaning of the cited standard.[1]

## OPINION

The inspection which resulted in the citation here involved was triggered by a fatal accident in which Billy Parrish, a welder employed by

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[1] 29 CFR 1926.500(d)(1):

Every opensided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f)(i) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. . .

respondent, fell 43 feet inside a large air duct which, at that point, was in the shape of a flattened, inverted U. Parrish apparently had gone inside the duct to inspect a crack which he and another welder had been instructed to repair. The crack was located on a bulkhead about 1 1/2 feet above a 12' x 12' flat steel surface and about the same distance from the rounded-off edge of this surface.[2]

A doubled wire rope[3] was strung between the bulkheads (Tr. 64) about 38 1/2 inches above the edge of the flat surface (Tr. 19).

There was no midrail at the time of the accident but by the time of the inspection, the next day, the doubled-back portion of the top rail had been strung through newly-installed pad eyes 17 1/2 inches off the deck (Tr. 46).

The citation and complaint allege only that the open side was guarded by a "single rail". Paragraph (f)(1) of §1926.500 requires that a standard railing, as used in paragraph (d)(1), shall have a top rail approximately 42 inches above the floor or platform and an intermediate rail halfway between

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[2] The evidence is somewhat conflicting regarding the latter distance. Gary Godwin, respondent's chief structural steel welding foreman, said it was about 3 feet (Tr. 63), while Cecil B. Minor, Jr., a foreman under him who actually found the crack, said it was 12 to 15 inches (Tr. 101). This distance is not critical, but I find Minor's estimate the more convincing since it is borne out by a photograph, Exhibit C-2, and since he seemed more familiar with the site than Godwin.

[3] Respondent refers to this wire rope as a "lifeline" and contends it was there for the purpose of permitting employees to attach their safety belts and lanyards.

the top rail and the floor or platform. Paragraph (f)(1) also contains rather detailed specifications which need not be repeated here except that the supports must be no more than 8 feet apart and where, as here, wire rope is used the top rail must be able to withstand a pressure of 200 pounds "with a minimum of deflection." Here the supports were 12 feet apart and there is some evidence (to be discussed later) that the top rail was not taut.

The duct was fabricated in sections on the ground, then the sections were hoisted into position and welded together. This welding was accomplished from the outside, but it was necessary for employees to go inside the duct to guide the sections into position (Tr. 105). This phase of the construction was completed about 1 1/2 or 2 months before the accident (Tr. 73). Thereafter there were few occasions for employees to enter that portion of the duct, though Foreman Minor said work had been done there before (Tr. 92) and that he had been there several times (Tr. 106) and had made many trips in and out of the duct (Tr. 103). Aside from the task in which Parrish was engaged when he was killed, all that remained to be done on the 12' x 12' surface was "clean-out", including removal of steel scaffolding which was welded to it (Tr. 69, 81).

Access to the 12' x 12' surface was gained through a 2' x 3' hole cut in the bulkhead (Tr. 68). This hole was temporary and was to be closed permanently after the scaffolding was removed and the duct's interior had been cleaned out (Tr. 52). There was no artificial lighting in the duct, and the only light came through the access hole (Tr. 78). Compliance Officer Donovan S. Donnelly testified that the interior was so dark it took time for

one's eyes to accommodate to it (Tr. 29), but Foreman Godwin testified he could see the "lifeline" about 3 feet to the left when he stuck his head inside (Tr. 53, 63).[4]

After Foreman Minor located the crack (actually a gap in the welding of a seam), he and Foreman Godwin looked at it together from the inside of the duct and then told Parrish and another welder, Dennis Kowalik, to weld it (Tr. 88). The procedure to be used was left up to the welders (Tr. 66). They could have welded it from the inside (Tr. 66), but it was more logical that they would do it from the outside where the original welding was done (Tr. 75). Although the crack could be seen from the outside, it was more visible from the inside since the inside was dark and the outside was light (Tr. 78). Parrish may have decided to inspect the crack from the inside to see whether it ran under some flanges (Tr. 100). Kowalik did not go into the duct with him; nobody saw Parrish fall to his death. When found at the bottom of the duct, his body had on no safety belt (Tr. 79).

Respondent's contentions are: (1) That the surface from which Parrish fell was not a "floor or platform" so as to make applicable the guardrail provisions of 29 CFR 1926.500(d)(1); (2) that the applicable standard is 29 CFR 1926.28(a),[5] under which Parrish should have been protected by a safety belt

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[4] Respondent was not alleged to have violated the illumination standard, 29 CFR 1926.56(a).

[5] 29 CFR 1926.28(a) provides:

The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

and lanyard tied off to a lifeline; and (3) that Parrish's failure to wear a safety belt was an isolated act of employee misconduct.

The applicability of §1926.500(d)(1) depends upon whether the 12' x 12' surface from which Parrish fell was an "opensided floor or platform" within the meaning of that standard.

"Floor" is not defined by the standards, but "platform" is defined by §1926.502(e) as

> A working space for persons, elevated above the surrounding floor or ground, such as a balcony or platform for the operation of machinery.

From the foregoing summary of the facts, it might appear that the 12' x 12' surface was a "working space for persons" and therefore a "platform." Certainly work had been and remained to be done therefrom. However, the Commission has construed the definition of "platform" as being restricted to a structure that is erected for the purpose of performing work therefrom. Otis Elevator Co., 77 OSAHRC 80/A2, 5 BNA OSHC 1429, 1977-78 CCH OSHD ¶21,821. Thus it seems clear that the surface here involved was not a "platform," since it was not erected for the purpose of performing work therefrom but was an integral part of the power plant structure.

There remains the question of whether this surface was a "floor" within the meaning of §1926.500(d)(1). It definitely was not in the sense that it was to be a permanent floor in the finished structure; in fact, the temporary hatch providing access to it was to be closed permanently during construction.

No case quite in point has been cited by the parties. Respondent cites the unreviewed decision of Judge Burchmore in San Jose Crane & Rigging, Inc., 3 OSAHRC 760, 1971-73 CCH OSHD ¶15,791 (No. 1740, 1973), Secretary's appeal dismissed January 3, 1974 (No. 73-2662, 9th Cir.); Langer Roofing & Sheet Metal, Inc., v. Secretary of Labor and OSHRC, 524 F. 2d 1337 (7th Cir., 1975); and Diamond Roofing Co., Inc., v. OSHRC, 528 F. 2d 645 (5th Cir. 1976).

In San Jose, as respondent points out, Judge Burchmore held that §1926.500(d)(1) applied only to"open sided, permanent floors." However, the problem in that case was when a temporary floor installed under a steel erection standard, §1926.700(b)(1)(iii)—which requires only a single wire rope safety railing—became permanent enough to come under the more stringent requirements of §1926.500(d)(1), requiring top rail, intermediate rail and toeboards. The quoted language from this decision is taken out of context and has no relevance here.

Langer and Diamond, though followed by the Commission majority in Central City Roofing, Inc., 76 OSAHRC 61/A2, 4 BNA OSHC 1286, 1976-77 CCH OSHD ¶20,761 (No. 8173, 1976), in holding that a flat roof is not a "floor," as the latter term is used in §1926.500(d)(1), likewise are of little assistance, since their rationale was founded on the existence of other standards dealing with safeguarding employees on roofs, leading to the conclusion that flat roofs were not intended to be covered by the guardrail standards. There is no such parallel here. It is a non sequistur to say that since a flat roof is not a floor neither is a surface such as is here involved.

In the absence of a definition of "floor" in the standards or in Commission decisions, resort may be had to the dictionary. Webster's Third New International Dictionary contains numerous definitions of "floor," including:

> 1: the bottom or lower part of any room: the part of a room upon which one stands
> 2a: the lower inside surface of any hollow structure . . .
> 4: the surface or the platform of a structure on which to walk, work or travel . . .

It should be kept in mind that the structure here involved was not a conventional building but a large generating plant. To apply a restrictive definition of "floor" to such a structure would be unrealistic and defeat the remedial purpose of the Act. The broader dictionary definition is more compatible with this purpose. The surface involved was, at the time of the fatal accident and of the inspection, a working-walking surface. Work remained to be done from and on this surface. Respondent recognized the fall hazard by erecting a single wire rope at the approximate height of a standard toprail (which it now insists was a "lifeline" for attaching safety belts and lanyards). I find that at the pertinent times the surface involved was a "floor" and that its open side should have been guarded by a standard guardrail under §1926.500(d)(1).

Respondent does not contend that a standard guardrail was provided. There was no midrail, the top rail was 5 1/2 inches lower than standard, and the supports were further apart than required. The Compliance Officer, on the basis of a photograph which showed a kink in the top rail on the day of the

inspection, opined that it was not taut (Tr. 46). He had not tested it to see whether it met the requirement of §1926.500(f)(1)(iv) that it

> . . . be capable of withstanding a load of at least 200 pounds applied in any direction at any point on the top rail, with a minimum of deflection.

In view of Foreman Godwin's testimony (Tr. 74) that this rail was taut, it must be concluded that the Secretary has not met his burden of proof on this point.

If I should be held in error in holding that §1926.500(d)(1) is applicable to the facts of this case, it will be necessary to determine whether, as respondent contends, §1926.28(a) is applicable and, if so, whether it complied therewith. Since the matter was raised by respondent and fully litigated without objection, amendment of the citation and complaint to conform to the evidence, to allege a violation of 28(a), would be proper under Rule 15(b), F.R.C.P. Warnel Corporation, 76 OSAHRC 41/C5, 4 BNA OSHD 1034, 1975-76 CCH OSHD ¶20,576 (No. 4537, 1976).

In contending that §1926.28(a) is the applicable standard, respondent does not rely on the provision of §1926.500(d)(1) that the "equivalent" of a standard railing may be substituted therefor, and it is well established that safety belts are not such an equivalent. Warnel Corporation, supra. Instead, respondent maintains that safety belts were superior to guardrails in the situation presented. This ignores the well-known tendency of employees (here well illustrated) not to wear or use safety belts, as well as the injuries that an employee using a tied-off safety belt might sustain in a 6-foot fall to the end of his lanyard, as the compliance officer testified (Tr.34, 39). A standard

guardrail, which does not depend on human behavior or employee compliance for its effectiveness, offers fall protection superior to that afforded by safety belts in the open-sided floor situation here presented [6]. Incidentally, Welding Foreman Minor admitted that Parrish probably would not have fallen if the open side had been guarded by a standard railing (Tr. 101).

Assuming that §1926.28(a) is applicable, there remains the question of whether respondent complied with it. As stated, the deceased employee, Parrish, did not have on a safety belt when his body was found. Respondent claims this was an isolated act of employee misconduct in disobeying its work rule requiring the use of safety belts by employees working at heights.

The essential elements of the isolated incident defense are set forth in Weatherhead Co., 76 OSAHRC 61/E7, 4 BNA OSHC 1226, 1976-77 CCH OSHD ¶20,784 (No. 8862, 1976), where the Commission majority said at p. 24,922 of CCH:

> The existence of an "isolated incident," or perhaps more accurately an unpreventable occurrence, is an affirmative defense wherein the employer bears the burden of proving that the actions constituting non-compliance with the standard were: (a) unknown to the employer and (b) contrary to both the employer's instructions and a company work rule which the employer had uniformly enforced. [Citations omitted]

"Work rule" was further defined in J. K. Butler Builders, Inc., 77 OSAHRC 26/A2, 5 BNA OSHC 1075, 1977-78 CCH OSHD ¶21,585 (No. 12354, 1977), as

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[6] Cf., B. C. Crocker dba Crocker Cedar Products, 76 OSAHRC 132/B6, 4 BNA OSHC 1775, 1976-77 CCH OSHD ¶21,179 (No. 4387, 1976).

. . . an employer directive that requires or proscribes certain conduct, and that is communicated to employees in such a manner that its mandatory nature is made explicit and its scope clearly understood.

Additionally, the work rule must be the equivalent of the standard the respondent is accused of violating. Kansas Power & Light Co., 77 OSAHRC 39/A2, 5 BNA OSHC 1202, 1977-78 CCH OSHD ¶21,696 (No. 11015, 1977). Rod T. Seals, respondent's safety supervisor[7], testified that each new employee was told to wear safety belts and to tie off "any time he is off the ground on a structure," or face a penalty of immediate termination (Tr. 113, 114). There is no direct evidence that this work rule was communciated to Parrish, but Welding Foreman Godwin testified that it was "customary" to wear safety belts on the job and he never saw Parrish without one (Tr. 79). Welding Foreman Minor testified that Parrish was good about wearing his safety belt but couldn't say whether Parrish had one on when he directed him and another welder to weld the crack in the duct (Tr. 88, 90). Minor said welders usually wore their safety belts under their loose-fitting shirts with the shirttails out to avoid providing a pocket that might catch sparks or molten metal (Tr. 89). Minor also testified that it was "left up to you to use your own discretion" when to tie off one's safety belt (Tr. 107).

Seals testified that 39 employees had been terminated for infractions of safety rules in a one-year period (Tr. 114) but did not say whether any of these terminations involved non-use of safety belts.

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[7] He was one of 3 field inspectors on the job at the time of the inspection but had never inspected the duct here involved.

It is apparent from the foregoing summary of the evidence that the requirements of Weatherhead, J. K. Butler and Kansas Power & Light have not been met. The claimed work rule was to some extent discretionary in its application, and it was not the equivalent of §1926.28(a). The two welding foremen, in the exercise of reasonable diligence, should have known that Parrish did not have on his safety belt when they sent him aloft to weld the duct. Respondent has not sustained its burden of proving this affirmative defense.

## FINDINGS OF FACT

On the basis of the stipulations and the credible evidence of record, the following findings of fact are made:

1. The respondent, Power Plant Divison, Brown & Root, Inc., is an employer engaged in a business affecting commerce who has employees.

2. On July 14, 1977, respondent was engaged in the construction of a large power plant, known as W. A. Parrish Generating Station, at Thompsons, Texas. A large air duct, which at the point here involved was in the shape of an inverted U, had an interior horizontal metal surface, measuring approximately 12' x 12' with rounded edges on two sides, on the bottom of the inside top of the inverted U. A temporary hatch measuring about 2' x 3' had been cut in the side of the duct to provide access. A doubled wire rope, fastened to pad eyes 12 feet apart at a height of about 38 1/2 inches, was on the left side as one entered the duct through the temporary hatch. There was no midrail or toeboard, but no toeboard was necessary since

no employees were working below. The next level was 43 feet below the 12' x 12' surface where the duct made a 90 degree bend. The duct's interior was not artificially lighted, and the only illumination was dim light coming from the open hatch.

3. The duct had been fabricated in sections on the ground, and the sections had been hoisted into position and welded together. During this process it was necessary for employees to work on and from the 12' x 12' surface to align the sections for welding. At the time of the inspection, the only work remaining to be done on the 12' x 12' surface was clean-up work, including removal of steel scaffolding welded thereto.

4. On July 14, 1977, Welding Foreman Minor, inspecting the interior of the duct for leaks, found a gap in a welded seam and showed it to his superior, Welding Foreman Godwin. Minor instructed two welders, Parrish and Kowalik, to repair same. The gap in the weld was in the side of the duct about 15 inches above the 12' x 12' surface and about the same distance from the rounded edge. About 38 1/2 inches above this edge was a doubled wire rope strung between pad eyes welded to the bulkheads, which were 12 feet apart.

5. The welding procedures were left to the discretion of Parrish and Kowalik. It was logical that the welding be done from the outside, since the original seam was welded in that manner. However, it was also logical, and not contrary to instructions, for Parrish to enter the duct to inspect the gap from the inside preparatory to the welding. Parrish entered the duct alone through the temporary hatch opening onto the 12' x 12' surface. He was

not wearing a safety belt. He fell from the rounded edge above which the wire rope was strung and was fatally injured.

6. The 12' x 12' surface in the duct, while not destined to become a permanent floor in the power plant structure, was on July 14, 1977, a floor on and from which respondent's employees were required to perform various tasks, including inspection, clean-out, and removal of scaffolding welded thereto.

7. Said floor had an open side which was not protected by a standard guardrail, since there was no midrail, the single rail was 5 1/2 inches lower than standard, and the supports were more than 8 feet apart. At least 3 of respondent's employees were exposed to or had access to this hazard.

## CONCLUSIONS OF LAW

On the basis of the foregoing findings of fact, as amplified in the opinion, it is concluded that:

1. The Commission has jurisdiction of the parties and of the subject matter of this proceeding.

2. On July 14, 1977, respondent was in serious violation of §5(a)(2) of the Act and 29 CFR 1926.500(d)(1).

## ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Item 1 of citation 1 for serious violation of 29 CFR 1926.500(d)(1) be and it hereby is affirmed and that a penalty of $300 be and it hereby is assessed.

2. This proceeding be and it hereby is terminated.

DEE C. BLYTHE
Administrative Law Judge

Date: February 15, 1978

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| IN THE MATTER OF: | : | |
| UNITED AUTO WORKERS LOCAL 834 | : | |
| Objector | : | OSHRC |
| | : | DOCKET NO. 82-0337-E |
| V. | : | |
| SECRETARY OF LABOR | : | |
| and | : | |
| HEINTZ DIVISION - KELSEY-HAYES CO. | : | |
| Respondents | : | |

JUDGE'S DECISION JUN 28 '82 RECEIVED

FINAL ORDER ON JUL 28 '82

ORDER

This matter arises under the provisions of the Occupational Safety and Health Act of 1970 (the Act) 29 U.S.C. 651 et seq., upon the objection of Local 834 of the United Auto Workers Union (Union) to an "Informal Settlement Agreement" entered into by the Secretary of Labor through the Area Director for the Occupational Safety and Health Administration for the Philadelphia, Pennsylvania Region (OSHA-Respondent) and the Heintz Division of the Kelsey-Hayes Company, also of Philadelphia, Pennsylvania, (Respondent).

The official Commission Docket File of this case reveals the following:

During the period from January 13, 1982 to February 10, 1982, OSHA inspected a plant operated by Heintz located in Philadelphia, Pennsylvania (R.p. 1).1/

As a result of this inspection, and pursuant to Sections 9 and 10 of the Act, 29 U.S.C. 658 and 659, on February 25, 1982 OSHA issued a one-Itemed Serious Citation to Heintz alleging a violation of Section 5(a)(2) of the Act, U.S.C. 654(a)(2) and the Occupational Safety and Health Standard set forth at 29 C.F.R. 1910.217(b)(10) in that there was water in the pneumatic controlling systems of mechanical power presses in Building 18, Aircraft Department which created a hazard of failure of the controlling systems on these presses. This Citation ordered abatement of this condition by March 15, 1982 and proposed a $500 penalty. (R.p. 1).

On March 9, 1982, within the 15 working day contest period provided for in Section 10(a) of the Act, 29 U.S.C. 659(a), an "informal conference" was held at which representatives of OSHA, Heintz and the Union participated. During this conference the representatives from both Heintz and the Union represented that, as of this conference date, the condition which was the subject of the Citation had been corrected. (R.p. J-2, the OSHA statement filed pursuant to Commission Rule 35, 29 C.F.R. 2200.35

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1/ References herein are as follows:

R.p. 1 - The first numbered document in Docket file No. 82-337-E prior to assignment of this case to the undersigned.

R.p. J-1 - The first numbered document in this Docket file after assignment to the undersigned.

and an Order entered in this matter on April 13, 1982 (R.P. J-1).

During this "informal conference" on March 9, 1982, the OSHA Area Director Mr. Dillon and the representative of Heintz entered into and executed an "Informal Settlement Agreement", under which the originally proposed penalty of $500 was reduced to $250. (See "Exhibit B", attached to OSHA's Statement, R.p. J-2).

Evidently as a result of this "Informal Settlement Agreement", Heintz did not contest this Citation within the 15 working day contest period, which expired on March 19, 1982.

However, within this contest period, on March 15, 1982, the Union did object to this "Informal Settlement Agreement", alleging that, ". . . the abatement date should have been immediately.", and further, ". . . that OSHA has arbitrarily reduced the penalty from $500 to $250, without allowing the Union time to appeal this decision." (See R.p. 3).

Thereafter this case was referred to and docketed by the Review Commission (R.p. 4) and assigned to the undersigned for determination (R.p. 5).

In its statement filed pursuant to Commission Rule 35 and the Order dated April 13, 1982, the Union states, inter alia;

* * *

> Local 834, United Auto Worker's is contesting the above citation in the matters of abatment [sic] date and penalty. The matter of the abatement date is moot because the citation has been corrected.
>
> We disagree with the reduction of penalty from $500 to $250 which took place in an informal conference in the Philadelphia area office. The reason for our objection is that this condition had occurred numerous times before and has occurred since the citation.

* * *

(R.P. J-3).

## I S S U E

Since the Union readily admits that the question of the reasonableness of the abatement period has become moot because the alleged violative condition has been corrected, the issue presented by this case is whether the Union has the right under Section 10(c) of the Act, 29 U.S.C. 659(c)[2/] to contest the reduction of the penalty in this case.

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2/ If an employer notifies the Secretary that he intends to contest a citation issued under section 9(a) or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 9(a), any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

This question has been authoritatively answered in the negative by the United States Court of Appeals for the Third Circuit, in Secretary of Labor v. Sun Petroleum Products Co. et al, 622 F.2d 1176 (3rd Cir., 1980), cert. den., 449 U.S. 1061 (1980).

In that case, involving inter alia, a settlement between OSHA and an employer, the Court held:

* * *

> The Act provides that the Commission is required to afford an opportunity for a hearing upon the happening of either of two events: (1) if the employer notifies the Secretary that he intends to contest a citation, or (2) if "any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable." 29 U.S.C. § 659(c). If settlement is reached after either of these events occurs, but prior to the scheduled hearing, the ALJ would have jurisdiction to review the settlement, but only for the limited purpose of entertaining objections from the employee or employees' representative that the abatement period proposed by the settlement is unreasonable.
>
> If [sic] follows, then, that if the ALJ had jurisdiction in this case, the Review Commission would have jurisdiction for this same limited purpose-to review the settlement as provided in 29 C.F.R. §§ 2200.91 and 2200.91a. Accordingly, we hold that if no employer notice of contest has been filed, or if an employee or his representative has not filed a notice to challenge the abatement period prior to the time when a settlement is entered into between the Secretary and the cited employer, then the Commission has no jurisdiction to review the settlement; but once either notice has been properly filed, the ALJ and, later, the Review Commission would have jurisdiction to review the settlement to a limited extent, to-wit, to determine whether the time fixed in the citation for the abatement of the violation is unreasonable.
>
> (at 1185)

* * *

Under our interpretation we also reject the union's contention that affected employees have a right to be heard on matters other than the reasonableness of the abatement period. The Senate Committee Report makes clear that section 10(c) "gives an employee or representative of employees a right, whenever he believes that the period of time provided in a citation for abatement of a violation is unreasonably long to challenge the citation on that ground.[17] Moreover, the legislative history discloses no support for the union's position. Indeed, any evidence of congressional intent on this point contradicts the union's assertion that it is entitled to be heard on matters other than the abatement period.[18] We therefore conclude that any challenge advanced by an employee is limited to an attack on the reasonableness of the abatement period.

17/ Legislative History, supra note 6, at 155.

18/ For example, Senator Williams succinctly defined the right of employees to appeal from the issuances of a citation and proposed penalty: "Employees are also given appeal rights when they believe that an unreasonably long period of time has been allowed for abatement of a violation." Legislative History, supra note 6, at 414.

(at 1186)

In this case, the Union admits that the alleged violative condition has been corrected and accurately concludes that thus there is no longer any outstanding issue involving the reasonableness of the abatement period.

Under the binding precedent of the Sun Petroleum case supra,[3] the Union's objection to the reduction in penalty effected in the Settlement Agreement in this case must and the same is, hereby, DENIED.

Because there are no remaining issues, this case is terminated.

SO ORDERED.

William E. Brennan
WILLIAM E. BRENNAN
Judge, OSHRC

Dated: June 28, 1982
New York, New York

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3/ Since the litigants in this case are located within the geographical limits of the Third Circuit Court of Appeals, that Court's precedent binds the Review Commission and its Judges.
See; Jones & Laughlin Steel Corp., v. Secretary of Labor et al; 636 F.2d 32, 33 (3rd Cir., 1980); Allegheny General Hospital v. NLRB et al., 608 F.2d 965 (3rd Cir., 1979).
Thus, the decision of the United States Court of Appeals for the District of Columbia in Oil, Chemical and Atomic Workers Int'l. Union, and Locals 3-499 et al v. OSHRC, 671 F.2d 643 (D.C Cir., 1982), which is in conflict with the Sun Petroleum case supra, is not the controlling precedent in this case.

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

July 29, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Consolidated Rail Corporation

OSHRC DOCKET NO. 77-2911

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR EMPLOYEES

-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

- Office of the Judge
  Occupational Safety & Health
  Review Commission
  1515 Boradway, Room 3800
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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 77-2911 |
| CONSOLIDATED RAIL CORPORATION, | : | |
| Respondent. | : | |

DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge Edward V. Alfieri is before the Commission under section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 ("the Act"). Judge Alfieri found that Consolidated Rail Corporation ("Conrail") was exempt from the recording and reporting requirements of 29 C.F.R. §§ 1904.2, 1904.4, and 1904.5 and therefore was not required to give a compliance officer of the Occupational Safety and Health Administration ("OSHA") access to any records pursuant to 29 C.F.R. § 1904.7,[1/]

---

1/ 29 C.F.R. § 1904.7 provides, in pertinent part:

> Each employer shall provide, upon request, records provided for in §§ 1904.2, 1904.4, and 1904.5, for inspection and copying by any representative of the Secretary of Labor. . . .

Conrail was cited under the 1977 version of this standard, which was substantially the same as the current version set forth here. Section

(continued on next page)

including the safety and health records Conrail kept for the Federal Railway Administration ("FRA").

The Secretary petitioned for review of Judge Alfieri's decision and Commissioners Cleary and Cottine granted the Secretary's petition. We affirm Judge Alfieri's decision to vacate the citation in this case but hold that railroad industry employers must comply with the OSHA recording and reporting requirements and must make their records available to OSHA compliance officers.

In Southern Pacific Transportation Co., 74 OSAHRC 83/A2, 2 BNA OSHC 1313, 1974-75 CCH OSHD ¶ 19,054 (No. 1348, 1974), aff'd, 539 F.2d 386 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977) ("Southern Pacific"), the Commission held that the Department of Transportation's (FRA's) regulations requiring the reporting of accidents exempted railroad employers from all OSHA recordkeeping regulations under section 4(b)(1) of the Act.[2/] However, in Consolidated Rail Corp., 82 OSAHRC , 10 BNA OSHC 1706, 1982 CCH OSHD ¶ 26,082 (No. 80-3495, 1982), the Com-

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1/ (continued)

1904.2 requires employers to maintain a log and summary of all recordable occupational injuries and illnesses. An employer may use OSHA form No. 200 or an equivalent. Section 1904.4 requires employers to maintain a supplementary record for each injury or illness, in the detail prescribed in OSHA form No. 101. Again, an employer may use an equivalent form, such as a workmen's compensation form. Section 1904.5 requires employers to post an annual summary of injuries and illnesses using OSHA form No. 200.

2/ Section 4(b)(1), 29 U.S.C. § 653(b)(1), provides in pertinent part,

> Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

mission specifically overruled this aspect of Southern Pacific. The Commission held that employers in the railroad industry must comply with OSHA recordkeeping requirements and must afford the Secretary's representatives access to the records they are required to maintain. Thus, by failing to do this, Conrail failed to adhere to section 1904.7.

However, it would be unfair to hold Conrail in violation of the cited regulation in this case since Southern Pacific was the relevant Commission precedent at the time of the alleged violation. See Consolidated Rail Corp., supra. We therefore affirm Judge Alfieri's vacation of the citation but reemphasize that Conrail and other railroad industry employers must maintain suitable records and make them available to OSHA representatives.[4/] SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: JUL 29 1982

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4/ Chairman Rowland would adhere to the holding of Southern Pacific that railroad employers are not required to comply with OSHA recordkeeping requirements. Consolidated Rail Corp., 10 BNA OSHC at 1708 n. 7, 1982 CCH OSHD at p. 32,828 n. 7. The remaining issue presented by this case is whether a railroad employer must afford the Secretary access to the records it maintains for the FRA. In Consolidated Rail Corp., the majority addressed this issue, holding that 29 C.F.R. § 1904.7 requires that railroad employers make available to the Secretary either OSHA records or the equivalent of OSHA records. Thus, the issue has already been decided by the Commission majority. Regardless of how he would decide the issue, Chairman Rowland believes it would be unfair to find Conrail in violation of § 1904.7 in this case, and therefore concurs in the vacation of the citation. Because the Commission majority has already decided the issue and the outcome of the case would not be affected, Chairman Rowland does not decide whether § 4(b)(1) precludes the Secretary from obtaining access to the FRA accident and illness records maintained by a railroad employer.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>CONSOLIDATED RAIL CORP.,<br><br>Respondent. | OSHRC DOCKET<br><br>NO. 77-2911 |

Appearances:

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Att: William R. Johnston, Esq.

## DECISION AND ORDER

Edward V. Alfieri, Judge

## STATEMENT OF THE CASE

This is a proceeding under section 10 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*) contesting

an other than serious citation issued on July 7, 1977, by the Secretary against the Respondent under the authority vested in the Secretary by section 9(a) of the Act (29 U.S.C. 658(a)).

Respondent is alleged to have failed to comply with regulation 29 CFR 1904.7 entitled Access to Records. In pertinent part it reads:

> Records provided for in §§ 1904.2, 1904.4, and 1904.5 shall be available for inspection and copying by Compliance Safety and Health Officers of the Occupational Safety and Health Administration, U.S. Department of Labor during any occupational safety and health inspection provided for under Part 1903 of this chapter and section 8 of the at . . . .

Respondent's infraction is described as follows:

> Records provided for in 29 CFR 1904.2, 1904.4, and 1904.5 were not available for inspection and copying by the compliance safety and health officer of the Occupational Safety and Health Administration: (Emphasis added)

At the hearing the parties agreed upon the following statement of facts.

On June 29, 1977 compliance officer Eugene Drager appeared at the Respondent's office located at 466 Lexington Avenue, New York City, New York. Drager asked to see the records relating to occupational safety and health. Respondent refused to show its records (Tr. 16-17).

It was further agreed that if called to testify Respondent's chief clerk, Agnes Robb, would have testified that such records are kept pursuant to Federal Railroad Administration Rules (Tr. 17-18).

## DISCUSSION

The Commission has ruled that the railroad industry is subject to the Federal Railroad Administration Accident/Incident reporting requirements[1/] and is, therefore, not subject to equivalent Occupational Safety and Health Administration Rules.[2/] Secretary v. Southern Pacific Transportation Company,[3/] 2 OSHC 1313 (OSAHRC Docket No. 1348, 1974).

In view of that ruling Respondent is not required to have available for the Secretary records provided for by specific OSHA regulations from which Respondent is exempt. Accordingly, the citation must be vacated.

It is not foreign to this case to observe that the Respondent is not charged with failing to have accessable to the Secretary, records that are equivalent to OSHA records. Had that been the basis for the citation there would have been more merit to the Secretary's right to examine the records for statistical and information purposes (Secretary's brief, p.11).

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1/ FRA Regulation 49 CFR 225.
2/ OSHA Regulation 29 CFR 1904, et seq.
3/ Dissent by Commissioner Cleary.

## CONCLUSIONS OF LAW

1. Respondent is, and at all times material hereto was, engaged in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act.

2. Respondent is exempt from the recording and reporting occupational injuries and illnesses regulations 29 CFR 1904, *et seq*.

3. Respondent is not required to comply with 29 CFR 1904.7.

## O R D E R

The citation is vacated.

EDWARD V. ALFIERI
JUDGE, OSHRC

Dated: April 25, 1978
New York, New York

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

July 29, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Dillingham Tug & Barge Corporation

OSHRC DOCKET NO. 77-4143

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 77-4143 |
| DILLINGHAM TUG AND BARGE CORPORATION, | : | |
| Respondent. | : | |

DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

Following an accident that resulted in the death of one of Dillingham Tug & Barge Corporation's seamen, the Secretary of Labor cited Dillingham for allegedly violating section 5(a)(1)[1/] of the Occupational Safety and Health Act of 1970[2/] ("the Act" or "the OSH Act"). Dillingham contends that the Secretary lacks jurisdiction over the working conditions of seamen, and that pursuant to section 4(b)(1) of the Act,[3/]

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1/ Section 5(a)(1), 29 U.S.C. § 654(a)(1), provides:

> Sec. 5.(a) Each employer—
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

2/ 29 U.S.C. §§ 651-678.

3/ Section 4(b)(1), 29 U.S.C. § 653(b)(1), provides in pertinent part:

> Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

the Secretary was precluded from issuing the citation by virtue of Coast Guard regulation of the cited working condition. Administrative Law Judge Jerry W. Mitchell rejected Dillingham's arguments and affirmed the citation.[4/] Dillingham filed a petition asking the Commission to review the judge's decision. Pursuant to section 12(j) of the Act, 29 U.S.C. § 661(1), former Commissioner Barnako directed review on the following issue:

> Whether the administrative law judge erred in concluding that the U. S. Coast Guard did not exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health respecting the working conditions involved herein, and therefore that Respondent Dillingham Tug & Barge Corporation was not exempt from the requirements of the Act.

For the reasons that follow, we reverse the judge's decision and vacate the citation.

I

Dillingham provides towboat services to vessels in the navigable waters surrounding Hawaii. On July 3, 1977, two towboats owned and operated by Dillingham, the MAPU and the MA'A, were assigned to help moor an oil tanker, the AEGEAN ISLAND, at an anchorage approximately two miles offshore from Barbers Point, Oahu, Hawaii.

To accomplish the mooring operation, the towboats had to run lines from the AEGEAN ISLAND to certain mooring buoys located in the anchorage. Some of the mooring lines were secured without difficulty. Two of the lines, however, proved to be too short to reach the appropriate buoys.

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4/ Dillingham and the Secretary entered into a partial settlement agreement by which, if Dillingham's arguments relating to the Secretary's authority to issue the citation were rejected, the citation would be affirmed.

To secure these lines, the MAPU pushed the buoys toward the MA'A, which held the lines that ran from the AEGEAN ISLAND. A seaman on board the MAPU, Francis Kane, then boarded the buoys to assist the crew of the MA'A to secure the lines. After the lines were secured, the MAPU proceeded to the final buoy so that Kane could again come on board. When the MAPU was near the buoy, Kane lost his balance, fell from the buoy, and was crushed between the MAPU and the buoy. The Coast Guard investigated the incident and found no evidence that it involved any violation of law or regulation. The Secretary also conducted an investigation and cited Dillingham for allegedly violating section 5(a)(1) of the OSH Act.

II

In Puget Sound Tug & Barge, 81 OSAHRC 50/A2, 9 BNA OSHC 1764, 1981 CCH OSHD ¶ 25,373 (No. 76-4905, 1981),[5/] a divided Commission rejected the argument that section 4(b)(1) precludes the Secretary of Labor from citing an employer for alleged violations of the OSH Act that involve the working conditions of seamen aboard vessels on navigable waters. The majority viewed this argument as seeking an "industry-wide exemption" from the Act and rejected the argument on the basis of precedent holding that "section 4(b)(1) was not designed to create industry-wide exemptions, but rather exemptions only over those working conditions that have been the subject of an exercise of another agency's statutory authority to regulate occupational safety and health." 9 BNA OSHC at 1775, 1981 CCH OSHD at p. 31,595. The majority cited, among other

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5/ Appeals filed, Nos. 81-7405 and 81-7406 (9th Cir. June 26, 1981); No. 81-4243 (5th Cir. June 24, 1981).

cases, Southern Pacific Transportation Co. v. Usery, 539 F.2d 386 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977), and Southern Railway Co. v. OSHRC, 539 F.2d 335 (4th Cir.), cert. denied, 429 U.S. 999 (1976). Thus, although acknowledging that the Coast Guard possessed broad statutory authority to issue regulations promoting safety on navigable waters and that the Coast Guard had issued regulations pursuant to this authority, the majority concluded that the Coast Guard's exercise of authority did not entirely exempt from the Act the working conditions of seamen aboard vessels on navigable waters. Instead, the majority concluded that section 4(b)(1) only precluded the Secretary from citing those specific working conditions that were the subject of applicable Coast Guard regulations. In dissent, Commissioner Cleary rejected what he referred to as the majority's "nook and cranny" theory. He believed that the Coast Guard's regulations affecting the working conditions of seamen were so comprehensive that it would impair, if not destroy, the fabric of the Coast Guard's regulatory scheme to apply OSHA standards to situations for which the Coast Guard lacked applicable regulations. 9 BNA OSHC at 1782, 1981 CCH OSHD at p. 31,601.

We have reconsidered the Commission's holding in Puget Sound.[6/] We conclude that section 4(b)(1) in certain circumstances can create industry-wide exemptions from the OSH Act. Having examined the manner in which the Coast Guard has exercised its statutory authority to regulate the health

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6/ Puget Sound involved vessels inspected and certificated by the Coast Guard, while the vessel in this case, the tugboat MAPU, was not so inspected and certificated. As pointed out later in this opinion, however, the Coast Guard has issued regulations directed at the protection of seamen for uninspected vessels as well as for vessels it inspects and certificates. Thus, there is no distinction between uninspected vessels and inspected and certificated vessels for the purpose of this case.

and safety of seamen aboard vessels operating on navigable waters, we conclude that section 4(b)(1) precludes the Secretary from enforcing the OSH Act with respect to such working conditions. We overrule Puget Sound to the extent it is inconsistent with this holding.

III

Coast Guard regulations applicable to maritime operations are found in 46 C.F.R., Chapter I. These regulations were promulgated pursuant to the Coast Guard's statutory authority to promote safety on the navigable waters of the United States. See Puget Sound, 9 BNA OSHC at 1773-74, 1981 CCH OSHD at pp. 31,593-94. Chapter I contains a number of subchapters, some of which apply to specific types of vessels and some of which apply to other subjects. The following list of the subchapter titles generally illustrates the Coast Guard's regulatory scheme.

| Subchapter | Title |
|---|---|
| A | Procedures Applicable to the Public |
| B | Merchant Marine Officers & Seamen |
| C | Uninspected Vessels |
| D | Tank Vessels |
| E | Load Lines |
| F | Marine Engineering |
| G | Documentation and Measurement of Vessels |
| H | Passenger Vessels |
| I | Cargo and Miscellaneous Vessels |
| I-A | Mobile Offshore Drilling Units |
| J | Electrical Engineering |
| L-M | Reserved |

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|---|---|
| N | Dangerous Cargoes |
| O | Certain Bulk Dangerous Cargoes |
| P | Manning of Vessels |
| Q | Equipment, Construction, and Materials: Specifications and Approval |
| R | Nautical Schools |
| S | Reserved |
| T | Small Passenger Vessels (under 110 gross tons) |
| U | Oceanographic Vessels |
| V | Marine Occupational Safety and Health Standards[7/] |

As noted above, Dillingham's tugboat, the MAPU, was not inspected and certificated by the Coast Guard. The regulations in Subchapter C, entitled "Uninspected Vessels," apply to all vessels except those covered by the other subchapters of 46 C.F.R., Chapter I. 46 C.F.R. § 24.05-1(a) and accompanying Table 24.05-1(a). The only exceptions are vessels operating exclusively on inland waters which are not navigable waters of the United States, vessels while laid up and dismantled and out of commission, and certain vessels with title vested in the United States and used for public purposes. 46 C.F.R. § 24.05-1(a). Thus, any vessel not owned by the United States and operating on navigable waters is covered by Coast Guard regulations under either Subchapter C or some other subchapter of 46 C.F.R., Chapter I.[8/]

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7/ This subchapter applies to commercial diving operations.

8/ Relying on Coast Guard statements, in a Memorandum of Understanding with OSHA and in an advance notice of proposed rulemaking for diving standards, that the Coast Guard has statutory authority to regulate the working conditions of employees on vessels subject to Coast Guard inspection and

(Continued on next page)

An examination of the regulations in Subchapter C indicates that the Coast Guard has made provision for protection against a variety of hazards that may arise in the operation of uninspected vessels. Among

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8/ (Continued)

certification, the dissenting opinion suggests that the Coast Guard itself recognizes OSHA jurisdiction over uninspected vessels. We do not draw the same conclusion from these statements.

The Coast Guard unquestionably has specific statutory authority to inspect and certify certain types of vessels and to issue regulations governing such vessels. See 46 U.S.C. §§ 361-436. Various subchapters of 46 C.F.R., Chapter I deal exclusively with inspected and certificated vessels. However, the Coast Guard's reliance on its authority over inspected vessels to undertake certain regulatory activities does not imply that it believes it has no authority over uninspected vessels. The Coast Guard has statutory authority to "promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department . . . ." 14 U.S.C. § 2. The Coast Guard's general statutory authority thus extends to all vessels in navigation. Cf. Foremost Insurance Co. v. Richardson, 50 U.S.L.W. 4778, 4780-81 (June 23, 1982) (Coast Guard regulations designed to prevent collisions on navigable waters apply to all vessels without regard to their commercial or noncommerical nature). Moreover, the reference in the Memorandum of Understanding to the Secretary's maritime jurisdiction may simply be in recognition of the undisputed fact that the Secretary has jurisdiction over certain types of maritime work, such as longshoring and shipbuilding. See Atlantic & Gulf Stevedores, Inc. v. OSHRC, 534 F.2d 541 (3d Cir. 1976) (application of OSHA standard to longshoring operation); Bethlehem Steel Corp., 82 OSAHRC , 10 BNA OSHC 1673, 1982 CCH OSHD ¶ 26,083 (No. 77-1807, 1982) (application of OSHA shipbuilding standards).

The dissent also suggests that our decision renders a nullity an agreement between the Coast Guard and OSHA concerning the enforcement of OSHA diving standards. This case does not involve diving standards and we have no occasion to consider whether or under what circumstances OSHA can enforce such standards. The dissent takes note of cooperation between the Coast Guard and OSHA, and suggests that this mechanism for resolving 4(b)(1) conflicts will be threatened by our decision. We note that if any significant degree of cooperation existed between agencies on the matters at hand, we would expect the Commission to be so advised. Since neither agency has advised the Commission of any such understanding, we must assume that recently developed memoranda of understanding are irrelevant to this litigation. In any event, it is our statutory responsibility to decide whether private employers have violated the Act as alleged by the Secretary, and agreements or cooperation between OSHA and other agencies cannot detract from an employer's right to have its section 4(b)(1) claim adjudicated by the Commission.

the subjects regulated are navigation; ventilation; fire protection equipment; life preservers and other lifesaving equipment; the design, construction, and testing of boilers and machinery; liquified petroleum gas; backfire flame arrestors for gasoline engines; safety orientation and emergency instructions; and pilot ladders. In addition, various provisions of other subchapters, such as Subchapter P - entitled "Manning of Vessels" - apply to uninspected vessels as well as to other types of vessels. Moreover, the Coast Guard's authority to investigate maritime accidents and to enforce its regulations applies to uninspected vessels, as illustrated by the Coast Guard investigation that followed the accident involved in this case. See 33 C.F.R. § 1.07-10. Thus, the Coast Guard has prescribed, and it enforces, regulations that govern the working conditions of seamen aboard both inspected and uninspected vessels operating on navigable waters.

IV

Prior to the OSH Act's passage, Congress had given authority to regulate particular working conditions to federal agencies other than the Secretary of Labor.[9/] Congress believed that it would be beneficial to employee safety and health if agencies that had specialized expertise in regulating particular working conditions continued to do so. Thus, Congress intended that other agencies that had been given statutory authority to regulate occupational safety and health would be the

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9/ For example, prior to the passage of the OSH Act, Congress had enacted the Federal Coal Mine Health and Safety Act of 1969 and the Federal Metal and Nonmetallic Mine Safety Act, both of which were administered by the Department of the Interior. These statutes have since been superseded by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801-960, which is administered by the Department of Labor.

dominant agencies in their particular areas, with the OSH Act applying only insofar as the other agencies had not exercised their statutory authority. See Southern Pacific Transportation Co. v. Usery, supra, 539 F.2d at 391-92.

As discussed above, the Coast Guard has issued extensive regulations applicable to all vessels operating on navigable waters except certain vessels owned by the United States. The Coast Guard regulations are directed at protecting the health and safety of seamen. Taylor v. Moore-McCormick Lines, Inc., 621 F.2d 88 (4th Cir. 1980); Clary v. Ocean Drilling and Exploration Co., 609 F.2d 1120 (5th Cir. 1980). Thus, employers of seamen, such as Dillingham, must look to the Coast Guard regulations for the requirements they must comply with to protect their employees. Under the approach of the majority in Puget Sound, such employers would also be required to compare the Coast Guard regulations with OSHA regulations, determine which conditions of the work environment are not addressed by Coast Guard regulations, and comply with OSHA requirements directed at those working conditions. This approach necessarily assumes that the Coast Guard regulations are insufficient to provide adequate protection to seamen aboard vessels on navigable waters. It is thus inconsistent with the established rule that section 4(b)(1) does not permit an inquiry into the stringency of another agency's exercise of authority. "Once another Federal agency exercises its authority over specific working conditions, OSHA cannot enforce its own regulations covering the same conditions. Section 4(b)(1) does not require that another agency exercise its authority in the same manner or in an equally stringent manner." Mushroom Transportation Co., 73 OSAHRC 51/E10, 1 BNA OSHC 1390, 1392, 1973-74 CCH OSHD ¶ 16,881 at p. 21,591 (No. 1588, 1973).

See also Northwest Airlines, Inc., 80 OSAHRC 87/B5, 8 BNA OSHC 1982, 1990, 1980 CCH OSHD ¶ 24,751 at p. 30,489 (No. 13649, 1980); Pennsuco Cement and Aggregates, Inc., 80 OSAHRC 47/A2, 8 BNA OSHC 1378, 1980 CCH OSHD ¶ 24,478 (No. 15462, 1980).

The Puget Sound majority's approach also places an unreasonable burden on employers to determine the requirements with which they must comply. As Commissioner Cleary stated in his separate opinion:

> Such an approach also creates a regulatory labyrinth for employers who must review two sets of federal regulations in detail to determine where there are voids in one set of regulations which are susceptible to application of a standard from another set of regulations. In the ensuing uncertainty the goal of providing employees with a safe and healthful workplace can only suffer.

9 BNA OSHC at 1782, 1981 CCH OSHD at p. 31,601.

This case involves an alleged hazard to a seaman arising out of activities aboard a vessel operating on navigable waters. The Coast Guard, an agency with special expertise in maritime hazards, has exercised its statutory authority to prescribe standards and regulations governing the working conditions of seamen. Thus, the Secretary is precluded from enforcing the OSH Act with respect to those working conditions. Moreover, we note that the Coast Guard investigated the incident that led to this case and determined that it did not involve any violation of law or regulation. Nevertheless, the Coast Guard investigation resulted in the recommendation of measures intended to avoid similar incidents in the future.[10/] Thus, the dominant agency in maritime safety

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10/ The dissenting opinion suggests that the Coast Guard's investigation may have been an exercise of its deepwater port jurisdiction rather than its jurisdiction over uninspected vessels. However, the fact that the Coast Guard was able to address the broader problem that the fatal incident revealed does not suggest that it lacks jurisdiction over the cited working condition. If anything, it demonstrates that the Coast Guard is better able than OSHA to focus on the overall problem of safety on navigable waters due to its broad statutory authority over the subject.

has taken remedial action. Permitting the Secretary to also seek remedial measures through an enforcement action arising out of the same incident would thus result in the very duplication of federal agency effort that section 4(b)(1) is designed to avoid. See Southern Railway Co. v. OSHRC, supra, 539 F.2d at 339; Organized Migrants in Community Action, Inc. v. Brennan, 520 F.2d 1161, 1167 (D.C. Cir. 1975).

The section 5(a)(1) citation is vacated. SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: JUL 29 1982

COTTINE, Commissioner, dissenting:

Section 4(b)(1) of the Act, 29 U.S.C. § 653(b)(1),[1/] provides that OSHA is without authority to regulate working conditions covered by another agency when the other agency exercises its "statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health." Until recently,[2/] the Commission has consistently required that the standards and regulations promulgated by another federal agency address the particular cited working conditions and have the "force and effect of law" in order to preempt OSHA jurisdiction.[3/]

As I noted in my separate opinion in Consolidated Rail Corp., OSAHRC , 10 BNA OSHC 1577, 1982 CCH OSHD ¶26,044 (No. 79-1277, 1982), petition for review filed, No. 82-3302 (3d Cir. June 28, 1982),

> Congress did not envision a perfunctory preemption of the Act's application under section 4(b)(1). It was well aware that there were other federal agencies concerned with safety and intimately familiar with the regulated industry. Nonetheless, Congress delegated authority for safety and health to OSHA in the absence of an exercise by a sister agency. Congress also provided the Commission with a statutory rule to assess the existence of another agency's exercise.

10 BNA OSHC at 1583, 1982 CCH OSHD at p. 32,711. I further noted that

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1/ Section 4(b)(1) states, in pertinent part, the following:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies. . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

2/ See Consolidated Rail Corp., OSAHRC , 10 BNA OSHC 1577, 1982 CCH OSHD ¶26,044 (No. 79-1277, 1982), petition for review filed, No. 82-3302 (3d Cir. June 28, 1892).

3/ E.g., Puget Sound Tug & Barge Co., 81 OSAHRC 50/A2, 9 BNA OSHC 1764, 1981 CCH OSHD ¶25,373 (Nos. 76-4905 et al., 1981), appeals filed, No. 81-7406 (9th Cir. June 26, 1981)(OSHRC Docket No. 76-4905), No. 81-7405 (9th Cir. June 26, 1981)(OSHRC Docket No. 76-5515), and No. 81-4243 (5th Cir. June 24, 1981)(OSHRC Docket No. 78-617) ("Coast Guard cases"); Northwest Airlines, Inc., 80 OSAHRC 87/B5, 8 BNA OSHC 1982, 1980 CCH OSHD ¶24,751 (No. 13649, 1980), appeal dismissed, No. 80-4222 (2d Cir. Mar. 31, 1981).

Congress recently reiterated its understanding of section 4(b)(1):

> OSHA's standards do not apply when another agency issues standards which affect occupational safety and health and which have the force and effect of law.
>
> House Comm. on Gov't Operations, Occupational Safety and Health Protection for Aviation Industry Employees--The Conflict Between FAA and OSHA, H.R. REP. No. 393, 97th Cong., 1st Sess. 2 (1981)(Emphasis added).

10 BNA OSHC at 1583 n., 1982 CCH OSHD at p. 32,711 n.

The burden of establishing a section 4(b)(1) exemption rests with the party claiming its application. See Puget Sound Tug & Barge Co., 81 OSAHRC 50/A2, 9 BNA OSHC 1764, 1981 CCH OSHD ¶25,373 (Nos. 76-4905 et al., 1981), and cases cited. The Respondent has not shown that the Coast Guard has the statutory authority to prescribe or enforce standards or regulations with respect to working conditions of employees aboard uninspected vessels other than certain specific conditions regulated by statute,[4/] none of which are relevant to the cited condition in this case. Furthermore, the Coast Guard's general authority to investigate marine casualties does not constitute prescription or enforcement of "standards" or "regulations" within the meaning of section 4(b)(1). Puget Sound Tug & Barge Co., supra. Accordingly, my colleagues err in concluding that pursuant to section 4(b)(1) of the Act OSHA is precluded from enforcing the Act with respect to any working conditions aboard vessels in general and the cited working conditions on this vessel in particular.

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4/ See note 7, infra.

In recognition of their overlapping authority, the Coast Guard and OSHA have established a cooperative relationship to resolve jurisdictional conflicts. See Part I, infra. The Commission reorders that relationship and leaves certain employees without the protection of any federal safety program in direct conflict with the Act's stated policy of assuring "so far as possible every working man and woman in the nation safe and healthful working conditions," 29 U.S.C. § 651(b).

I

A.

My colleagues improperly rely on 14 U.S.C. § 2 as support for their conclusion that the Coast Guard has general regulatory authority over uninspected vessels. Since its inception in 1915 the Coast Guard has gradually acquired responsibilities previously assigned to other departments and agencies, including those vessel inspection duties once performed by the Bureau of Marine Inspection and Navigation. See 14 U.S.C.A. § 2 (1956)(Historical Note). Until it was abolished in 1946 the Bureau of Marine Inspection and Navigation conducted statutorily required inspections of vessels. Pacific Shrimp Co. v. United States Dept. of Transportation, 375 F.Supp. 1036, 1040 (W.D. Wash. 1974). Since that time, vessel inspections have been conducted by the Coast Guard. In 1949, Congress for the first time set forth a codification of the primary functions and responsibilities of the Coast Guard. 14 U.S.C. § 2 lists these primary duties. Id. The purpose of 14 U.S.C. was "to have outlined in general terms in one section the broad scope of the functions of the Coast Guard." Id. However, it is Title 46 of the U.S. Code that contains the "comprehensive pattern of federal legislation designed to insure the safety of marine equipment" and defines the vessels covered by its provisions. United States v. Gahagan Dredging Corp., 289 F.2d 639, 642 n. 6

(2d Cir. 1961). "As is apparent on the face of the legislation . . . the purpose of the federal inspection statutes is to insure the seagoing safety of vessels subject to inspection." Huron Portland Cement Co. v. City of Detroit, 382 U.S. 440, 445 (1960).[5/]

Federal inspection of steam vessels was begun in 1838 as a result of a series of disastrous boiler explosions. Id.; S. Rep. No. 886, 96th Cong., 2d Sess. 3292, 3293, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 3292, 3393. In 1936, with the enactment of 46 U.S.C. § 367, diesel propelled seagoing vessels of 300 gross tons and over were made subject to the vessel inspection laws. Pacific Shrimp Co. v. United States, 375 F.Supp. at 1040. The vessel involved in this case is a diesel propelled, 33 gross ton tugboat that is not subject to the federal inspection requirements. Cf. Cargo Carriers, Inc. v. Humphrey, 206 F.2d 488 (D.C. Cir. 1953), aff'g Cargo Carriers, Inc. v. Snyder, 104 F.Supp. 258 (D.D.C. 1952). As the D.C. Circuit observed, the purpose of vessel inspection laws is to promote safety at sea and the Coast Guard may properly treat a non-propelled tank barge attached to a 99 ton tugboat as a single unit, so as to impose safety requirements that would be inapplicable to either unit alone. 206 F.2d at 489.

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5/ The Court's recent decision in Foremost Insur. Co. v. Richardson, 50 U.S.L.W. 4778 (U.S. June 23, 1982), deals with a wrongful death action arising from the collision of two private pleasure boats on navigable waters. The Court simply concluded that the cause of action states a claim within the admiralty jurisdiction of the federal courts. None of the Court's references to the federal "Rules of the Road" promulgated by the Coast Guard, the standards adopted under the Motor Boat Act, or the holding that these regulations are universally applicable to commercial and non-commercial vessels, 50 U.S.L.W. at 4780-1, has any relevance to this case.

B.

The parties do not dispute the fact that the vessel involved in this case is not an inspected and certificated vessel. Accordingly, it is unnecessary in this case to reconsider the primary issue in Puget Sound Tug & Barge Co., regarding whether the Coast Guard's exercise of its authority over inspected and certificated vessels is pre-emptive under section 4(b)(1). Nevertheless, my colleagues have overruled Puget Sound and have created an industrywide exemption that is broad enough to encompass even vessels not subject to the Coast Guard's safety regulations for inspected and certificated vessels.

According to a Memorandum of Agreement between OSHA and the Coast Guard on the development of occupational health standards for workplaces aboard inspected vessels,

> The Commandant of the U.S. Coast Guard has statutory authority, under the Marine Inspection Laws, to promulgate and enforce safety and health standards regarding working conditions of employees on vessels subject to Coast Guard inspection and certification.

45 Fed. Reg. 14739 (1980)(Emphasis added). Furthermore, according to the Department of Transportation,

> Under 46 U.S.C. 391, with 46 U.S.C. 375 and 416, the Coast Guard is to issue regulations to ensure that inspected vessels have a "structure suitable for service," and "suitable accommodations" for passengers and crew and are, "in a condition to warrant the belief she may be used in navigation * * * with safety to life." . . . Therefore diving regulations for inspected vessels under these mandates would include rules for equipment and working conditions.

41 Fed. Reg. 29151, 29152 (1976)(advance notice of proposed rulemaking for commercial diving from vessels and structures that are under Coast Guard jurisdiction)(Emphasis added). However, according to the Commission majority in this case,

> The Coast Guard has prescribed, and it enforces, regulations that govern the working conditions of seamen aboard both inspected and uninspected vessels operating on navigable waters. (Emphasis added.)

My colleagues' holding assigns to the Coast Guard a much wider authority with respect to vessel safety than the Coast Guard has actually asserted.[6/]

According to the Department of Transportation,

> The Coast Guard has extensive authority to regulate safety of life and property on vessels certified by the Coast Guard. . . Vessels under Coast Guard jurisdiction include vessels required to be certificated by the Coast Guard, regardless of their geographic location, including mobile offshore, semi-submersible drilling units. Facilities [under Coast Guard jurisdiction] include deepwater ports . . . .

40 Fed. Reg. 33681 (1975)(advance notice of proposed rulemaking for marine occupational safety and health standards for vessels and facilities under Coast Guard jurisdiction)(Emphasis added); see also 41 Fed. Reg. 29151, 29152 (1976)(DOT advance notice of proposed rulemaking for commercial

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6/ In determining the extent of an agency's statutory authority to regulate the safety and health of employees, the Commission must give deference to the agency's reasonable interpretation of its own enabling legislation. Northwest Airlines, Inc., 8 BNA OSHC at 1988, 1980 CCH OSHD ¶24,751 at p. 30,487. Although in Puget Sound the Coast Guard claimed it was vested with "regulatory jurisdiction over inspected vessels", Coast Guard Brief at 5, it specifically disavowed sole regulatory jurisdiction over other vessels. At the oral argument in the Puget Sound case on April 17, 1979, the following dialogue was recorded:

> CHAIRMAN CLEARY: Would you claim sole jurisdiction over safety and health on all vessels?
>
> LT. WOEPPEL: No. As I started out, inspected vessels are solely what I'm dealing with --
>
> CHAIRMAN CLEARY: Inspected vessels.

Transcript at 66. The Coast Guard representative further stated, with respect to the Coast Guard's interpretation of its regulatory authority:

> LT. WOEPPEL: . . . [I]t doesn't involve a lot of statutory interpretation or the agency or the Department doesn't have to do a lot of work in order to determine if these vessels are subject to regulation. The statutes are clear on what they cover in terms of types of vessels.

Transcript at 58.

diving from vessels and structures that are under Coast Guard jurisdiction). Nevertheless, my colleagues conclude the following:

> [t]he Coast Guard has issued extensive regulations applicable to all vessels operating on navigable waters except certain vessels owned by the United States. [Emphasis added.]

In a "Memorandum of Agreement on Occupational Health Standards for Workplaces Aboard Inspected Vessels" issued jointly by OSHA and the Coast Guard, the agencies stated:

> Because both USCG and OSHA have statutory authority within the maritime industry, cooperation between the agencies is essential in the area of health standards development.

45 Fed. Reg. 14739 (1980). However, according to the Commission majority,

> The Coast Guard, an agency with special expertise in maritime hazards, has exercised its statutory authority to prescribe standards and regulations governing the working conditions of seamen. Thus, the Secretary is precluded from enforcing the OSH Act with respect to those working conditions.

In Puget Sound, the Commission accepted the Coast Guard's amicus argument that pursuant to its statutory authority the Coast Guard has developed its own regulatory scheme to promulgate and enforce standards regarding working conditions on vessels subject to Coast Guard inspection and certification.[7/] The Coast Guard cases involved inspected and certificated vessels. This case does not involve an inspected and certificated vessel and, according to the Coast Guard's statement of authority and its enforcement activity, the vessel is not subject to the Coast Guard's general safety inspection and enforcement program.[8/]

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7/ The uninspected vessel regulations in 46 C.F.R. Chap. 1, subchap. C do not derive from the Coast Guard's general authority to prescribe regulations for promotion of "safety to life" under 46 U.S.C. §§ 391 & 395. Rather, they apply a limited number of specific uniform boating standards for all vessels pursuant to the Congressional directives set forth in the Federal Boat Safety Act of 1971, 46 U.S.C. §§ 1451-1489, and the Motorboat Act of 1940, as amended, 46 U.S.C. §§ 526-526(t), that certain specific conditions be uniformly regulated for all vessels, e.g. fire protection and lifesaving appliances. See 46 C.F.R. §§ 24.01-1 and 24.01-10.

8/ See Puget Sound Tug & Barge Co., supra; 45 Fed. Reg. 13739 (1980); 41 Fed. Reg. 29151, 29152 (1976); 40 Fed. Reg. 33681 (1975).

II

The narrow question presented by this case is whether the casualty and accident reporting requirements for uninspected vessels set forth at 33 C.F.R. Part 173 and the Coast Guard's general authority to investigate fatalities under 49 U.S.C. § 239 are preemptive "standards or regulations affecting occupational safety or health" within the meaning of section 4(b)(1).

The Coast Guard's post-accident authority to investigate marine casualties does not constitute prescription or enforcement of "standards" or "regulations" having the force and effect of law within the meaning of section 4(b)(1).[9/] Puget Sound Tug & Barge Co., supra; see Consolidated Rail Corp., supra (Cottine, Commissioner, dissenting in part and concurring in part); Northwest Airlines, Inc., supra.[10/] Furthermore, it is anomalous to conclude that Congress intended the Act's enforcement to be preempted by a sister agency's limited authority to investigate the cause of injuries or fatalities at a worksite and recommend safety measures when "the goal of the Act is to prevent the first accident, not to serve as a source of consolation for the first victim or his survivors." Mineral Industries & Heavy Constr. Group v. OSHRC, 639 F.2d 1289, 1294 (5th Cir. 1981), cited in Faultless Div., Bliss & Laughlin Indus., Inc., No. 81-1740, slip op. at 12 (7th Cir. Mar. 30, 1982).

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9/ Contra Dunlop v. Avondale Shipyards, Inc., No. 75-1874 (E.D.La. 1976)(3 BNA OSHC 1950, 1975-76 CCH OSHD ¶20,415); see Taylor v. Moore-McCormack Lines, Inc., 621 F.2d 88 (4th Cir. 1980); Clary v. Ocean Drilling & Exploration Co., 609 F.2d 1120 (5th Cir. 1980.

10/ The majority concludes that the investigation following the fatality in this case illustrates that the Coast Guard's authority to investigate accidents and enforce regulations applies to uninspected vessels. However, my colleagues fail to note that the Respondent did not participate in the investigation beyond the filing of the accident report. It is just as likely that the Fourteenth Coast Guard District was exercising its deep-water port safety jurisdiction, see 41 Fed. Reg. 29151, 29152 (1976); 40 Fed. Reg. 33681 (1975), over the HIRI Anchorage in the Pacific Ocean off Barbers Point, Oahu, Hawaii. See 33 C.F.R. §§ 3.70, 110.236.

(Continued on next page)

III

A.

The mere potential for duplicative or conflicting enforcement activity does not preempt OSHA jurisdiction. Instead, other mechanisms exist for cooperative resolution of conflicts resulting from overlapping jurisdiction and apparently have been employed by OSHA and the Coast Guard on more than one occasion. For example, in recognition of OSHA's general safety and health authority under the Act and the Coast Guard's authority under the Marine Inspection Laws over vessels subject to inspection and certification, the two agencies entered into a "Memorandum of Agreement on Occupational Health Standards for Workplaces Aboard Inspected Vessels." 45 Fed. Reg. 14739 (1980). Second, appended to OSHA's Emergency Temporary Standard on Diving Operations, 29 C.F.R. § 1910.401 (1977), 41 Fed. Reg. 24272 (1976), was a Memorandum of Understanding between OSHA and the Coast Guard providing for joint inspection of inspected vessels, enforcement of OSHA diving standards pursuant to the Act, joint rulemaking procedures for permanent standards, and termination of the Memorandum of Understanding upon the effective date of Coast Guard diving standards. Id. at 24291 app. 11/ On July 22, 1977, OSHA published its final commercial diving standards. 42 Fed. Reg. 37668 (1977).

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10/ (Continued)

The record in this case indicates that the focus of the Coast Guard investigation was the moorings at the HIRI anchorage. Following the fatality a meeting on safety measures at the moorings was held by the Coast Guard Marine Safety Division and attended by HIRI representatives. Subsequently, the Coast Guard Commandant corresponded with the operator of the moorings and HIRI's parent company, Pacific Resources, Inc., recommending safety measures and changes in mooring procedures. There is no indication in this record that Dillingham even received a copy of the Coast Guard investigation report.

11/ If, as my colleagues maintain, an industrywide exemption under section 4(b)(1) existed with respect to all vessels in navigation, the Act would have been unenforceable and the Memorandum of Understanding would be a legal nullity. See also congressional discussion of diving standards in Part III-B, infra.

On November 16, 1978, the Coast Guard published "regulations governing commercial diving operations from vessels and facilities including vessels required to have a Certificate of Inspection." 43 Fed. Reg. 53678 (1978). In the preamble the Coast Guard acknowledged a conflict between the two agencies on decompression chamber requirements and stated:

> [T]he Coast Guard agrees with the general philosophy of the commentators regarding a single Federal standard for the same marine activity and has been discussing the subject with OSHA to resolve the issue.

43 Fed. Reg. at 53680.

Clearly, the Coast Guard is aware of its jurisdictional overlap with OSHA and recognizes that OSHA regulations are enforceable unless and until the Coast Guard regulations addressing the particular working conditions are effective. The Coast Guard's understanding of the application of section 4(b)(1) is consistent with the Commission's view in Puget Sound. For example, OSHA diving regulations are no longer applicable to inspected vessels and other facilities that are subject to Coast Guard diving regulations. However, they are applicable to uninspected vessels and facilities not regulated by the Coast Guard. The Coast Guard apparently views cooperation between the two agencies with statutory jurisdiction as the appropriate means of resolving conflicts. Furthermore, as is discussed in part III-B, infra, Congress has the same understanding. Under the majority's view in this case any conflict would be resolved by eliminating OSHA jurisdiction, whether or not the Coast Guard regulations are enforceable with respect to the working conditions involved.

B.

The cooperative efforts between the Coast Guard and OSHA in the development of standards for vessels and activities not highly regulated

by the Coast Guard were reported to the Commission by the Coast Guard in its amicus brief in Puget Sound, the only proceeding in which the Commission invited Coast Guard amicus participation. This interagency cooperation and the need to continue the same was noted in the House report on the Outer Continental Shelf Lands Act Amendments of 1978:

> The committee determined that special provision should be be made as to worker's safety regulation and enforcement on the OCS. Section 4(e) [33 U.S.C. § 1333(e)] of the OCS Act of 1953 provided that the Coast Guard had the responsibility for the safety of any person, which would include occupational safety on OCS facilities and in adjacent waters.
>
> The Occupational Safety and Health Act (29 U.S.C. 651) provides authority for the Secretary of Labor, through the Occupational Safety and Health Administration, to prepare interim worker's safety regulations and standards and, unless ousted by another agency or department, permanent standards, for all areas including the Shelf.
>
> The committee is aware of a continuing controversy as to whether OSHA or the Coast Guard should exercise regulatory authority over OCS worker's safety and health.
>
> Some witnesses suggested that OSHA, within the Department of Labor, be given sole responsibility, or at least lead agency authority as to worker's safety. Others opposed any agency other than Coast Guard being involved.
>
> Representatives of Coast Guard and OSHA detailed to the committee their cooperative efforts to promulgate and enforce worker's safety rules. For example, Coast Guard and OSHA have recently worked together to prepare final standards on commercial diving operations, applicable to OCS and non-OCS activities. 41 Fed. Reg. 37650-37674 (July 22, 1977). These standards were formally promulgated by the Department of Labor.
>
> As a practical matter, both OSHA and the Coast Guard will continue to function on the OCS. OSHA has prepared not only divers standards but also numerous general industry and construction standards currently in force in the OCS. OSHA and the Coast Guard have each trained diving inspectors. OSHA will maintain responsibility for health standards, even if final safety standards are promulgated by Coast Guard. OSHA administers a comprehensive health and safety law which establishes a "general duty" to maintain a safe place of work and there is no corresponding responsibility under Coast Guard enabling legislation. OSHA will always be in the position of filling in the gaps in the regulatory effort of the Coast Guard.
>
> Subsection (c)(2) intended to avoid possible interagency conflict and duplication of effort. Specifically, by overruling the "ousting language" of the Occupational Safety and Health Act, OSHA and Coast Guard are to coordinate activity to prepare and enforce regulations so as to avoid duplication and maximize employee protection. Without such a provision, duplication and conflict might occur.

> For example as to diving operations, Coast Guard could by existing law regulate safety and OSHA health; yet as a practical matter, in the field, health and safety often merge in a single operation. Similarly under existing law, Coast Guard would protect the safety of divers below the surface and OSHA protect the deck crew.
>
> The committee believed that the best way to resolve this problem is not the status quo which has led to confusion, litigation and employee resistance. Rather it is to give clear direction to the administration to develop interagency cooperative arrangements and resolve all jurisdictional conflicts. Thus, this subsection was included, not giving lead agency responsibility to OSHA, not infringing on Coast Guard jurisdiction, but providing authority for both to work together.

H. Rep. No. 590, 95th Cong., 2d Sess. 157-8 (1978), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 1450, 1563-4.

The Outer Continental Shelf Lands Act of 1953 contained an internal conflict between the safety responsibilities of the Coast Guard, set forth at 33 U.S.C. § 1333(e), and that of the Department of Labor, set forth at 33 U.S.C. § 941. The statute was amended in 1958 so as to grant sole authority to the Coast Guard as to matters within the scope of 43 U.S.C. §1333(e). See Pure Oil Co. v. Snipes, 293 F.2d 60, 66-8 & n. 8-12 (1961). Subsequently, the Occupational Safety and Health Act of 1970 was enacted, assigning to the Department of Labor general authority to provide employees with safe and healthful workplaces. In its review of the background to OCS related legislation, the 1978 House report noted:

> The Department of Labor and the Department of Health, Education, and Welfare. - Both Departments have responsibilities under the Occupational Safety and Health Act of 1970. HEW makes evaluations of working conditions and provides technical assistance to employers. The Labor Department is responsible for establishing and enforcing interim and some final rules established to provide employees with a safe working environment. OSHA retains jurisdiction over issues which are not specifically regulated by the U.S. Coast Guard or U.S. Geological Survey. OSHA has no regulations which pertain solely to the OCS, but it does have a new diving standard, still subject to modification, which does directly affect operations in this area. All OSHA General Industry, Construction, and Maritime Standards have general applicability on the OCS. Currently OSHA, USGS and USCG are attempting to clarify overlapping jurisdictions and regulations.

H. Rep. No. 590, supra, at 61, reprinted in 1978 U.S. CODE CONG. & AD. NEWS at 1468.

With respect to general OCS safety responsibility and overlapping OSHA-Coast Guard authority, the House Conference Report on the Outer Continental Shelf Lands Act Amendments noted the following:

> In adopting the language providing for OCS workers' safety regulations to be promulgated by the Coast Guard, and also providing for the existing authority of the Secretary of Labor (through the Occupational Safety and Health Administration) as to workers' safety to be retained, the Conferees clearly intend neither to reduce, nor to add to existing OSHA authority, under section 466(1) [sic] of the Occupational Safety and Health Act.
>
> This section merely requires the Coast Guard to undertake expedited action where it deems it necessary to regulate hazards currently unregulated by the Government. Under its existing authority, and section 4(b)(1) of the Occupational Safety and Health Act, the Coast Guard may take any appropriate action necessary to regulate any hazard, and may over time displace the applicability of OSHA standards to other working conditions through exercise of appropriate rulemaking actions. However, the conferees intend that consultation with OSHA in standards development and administration, and opportunity for participation by interested parties in any such Coast Guard action, will assure that employees receive no less protection than under existing standards. Consistent goals contained in recent OSHA-Coast Guard agreements - maximizing the safety and health protection of employees, avoiding duplication of effort, and avoiding undue burden on the maritime industry - are also endorsed by the conferees.

H. Conf. Rep. No. 1474, 95th Cong., 2d Sess. 110, reprinted in 1978 U.S. CODE CONG. & AD. News 1674, 1709.

There is no doubt that Congress recognizes existing overlapping jurisdiction, recognizes that OSHA authority is preempted only by a Coast Guard exercise of authority over specific working conditions, and endorses the ongoing cooperative efforts of OSHA and the Coast Guard to resolve jurisdictional conflicts while providing for the safety and health of employees. It is also clear that Congress views continued OSHA jurisdiction over unregulated safety and health matters to be preferred over the type of industrywide exemption my colleagues have endorsed by their decision in this case.

IV

The administrative law judge below concluded "that the preemptive provisions of section 4(b)(1) of the Act do not apply to the instant conditions." ALJ slip op. at 15. He based his holding on his conclusion that the "Coast Guard has not promulgated and does not enforce regulations and standards governing safe working conditions for a seaman working on an uninspected tugboat." ALJ slip op. at 19. The judge's decision should be affirmed.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>DILLINGHAM TUG & BARGE CORPORATION,<br>Respondent. | **DECISION AND ORDER**<br>OSHRC DOCKET NO. 77-4143 |

Appearances:

Alan Raznick, Esquire, San Francisco, California for Complainant.

John R. Lacy, Esquire, Honolulu, Hawaii for Respondent.

JERRY W. MITCHELL, Judge

This proceeding involves the following issues:

1. Whether the Secretary of Labor (the Secretary) has jurisdiction under the Occupational Safety and Health Act of 1970 (the Act) over crew members on an uninspected towboat;
2. Whether the Secretary's jurisdiction over towboat activities of Dillingham Tug & Barge Corporation (Dillingham) is preempted in favor of the Coast Guard by reason of the provisions of Section 4(b)(1) [29 U.S. C. §653(b)(1)] of the Act;
3. Whether Dillingham's plea of Nolo Contendere should be accepted with respect to the citation at issue here;

4. Whether Dillingham violated the General Duty Clause [Section 654(a)(1)] of the Act on 3 July 1977 when a Dillingham seaman on a towboat was permitted to jump from a towboat to the top of a mooring buoy, and vice versa; and

5. The amount of penalty, if any, to be assessed in connection with any proven violation.

Issues 1 and 4 are answered in the affirmative, Issues 2 and 3 are answered in the negative, and a penalty of $245 is Assessed.

## STATEMENT OF THE CASE

This is a proceeding before the Occupational Safety and Health Review Commission (the Commission) pursuant to Section 659 of the Act in which Dillingham is contesting a citation, including the proposed penalty and abatement date, issued to Dillingham by the Secretary. Trial was held at Honolulu, Hawaii on 18 April 1978.

## FINDINGS OF FACT

1. On 3 July and 28 September 1977 and at all times material hereto, Dillingham Tug & Barge Corporation (Dillingham) was an Hawaiian corporation engaged in providing maritime towboat services to vessels navigating Hawaiian waters from interstate, intrastate, and foreign ports. During the year preceding

3 July 1977, Dillingham had gross revenues in excess of one million dollars. During calendar year 1977, Dillingham had a daily average of 188 employees and provided the only towboat service available in the state of Hawaii. (File, Answer; Dillingham's Responses to the Secretary's Interrogatories and Requests for Admissions; and Stipulated Agreed Facts.)

2. On 3 July 1977 Dillingham owned and operated the towboat (tug) MAPU, a steel hulled, oil screw, towing vessel 47.1 feet in length, of 33 Gross and 23 Net tons. Prior to and on 3 July 1977, MAPU was not licensed by the U.S. Coast Guard, nor was she inspected or required to be inspected by the U.S. Coast Guard. Although not required to be inspected by the Coast Guard MAPU was required, while underway, to be under the actual direction and control of a person licensed by the Coast Guard to operate her in that particular geographic setting. (Dillingham's Responses to the Secretary's Requests for Admission; Merchant Vessels of the United States, U.S. Coast Guard Publication #408, 1973 Edition; 46 U.S.C. §§361, 405(b)(1)(D), and 405(b)(2); 46 CFR 24.05-1; and Report of Coast Guard Investigation.)

3. On the morning of 3 July 1977 the tanker M/V AEGEAN ISLAND was arriving at the Hawaiian Independent Refinery, Inc. Anchorage (HIRI Anchorage) from the foreign port of Brunei with a cargo of crude oil. (Stipulated Agreed Facts.)

4. The HIRI Anchorage, an open roadstead with a number of mooring buoys for securing large tankers, was located about

two miles off-shore from Barbers Point, Oahu, Hawaii. (Stipulated Agreed Facts; and Report of Coast Guard Investigation.)

5. On 3 July 1977, Francis Michael Kane was certified as a merchant seaman. He had previously been issued "Z" card (Merchant Mariner's Document) number Z-1297359 which carried an endorsement as "Ordinary Seaman" and was currently valid on that date. Kane was a member of the Inland Boatmen's Union of the Pacific, a maritime union, and had been employed by Dillingham for nine years as an Ordinary Seaman. During those nine years he had been assigned at various times to work on all of Dillingham's towboats.

Kane was aboard MAPU as a deckhand when she departed from Honolulu at about 0800 on 3 July, assigned to assist in mooring M/V AEGEAN ISLAND in the HIRI Anchorage. Kane's regularly assigned duties as a deckhand aboard MAPU included the stowing of lines, operation and inspection of equipment aboard the towboat and responding to orders given by the towboat operator. The duties of a deckhand during a mooring operation such as that involving M/V AEGEAN ISLAND on 3 July include, but are not limited to, securing mooring lines from the tanker being assisted to the mooring buoys so as to secure the tanker in the anchorage.

(Affidavit of Joseph Keane; Dillingham's Responses to the Secretary's Requests for Admissions; Dillingham's Responses to the Secretary's Interrogatories; and Stipulated Agreed Facts.)

6. Mooring of the tanker M/V AEGEAN ISLAND in the HIRI Anchorage began at about 1115 on the morning of 3 July and was completed a little more than two hours later. The Dillingham towboats MAPU and MA'A were assigned as mooring boats to run mooring lines from the tanker to the buoys. The bow and stern lines were run out and secured without incident. The mooring wire for Buoy No. 4 was then taken on the deck of MA'A and pulled towards the buoy, but MA'A could not quite reach the buoy because the wire was too short. MAPU came to her assistance by pushing Buoy No. 4 towards MA'A and by Kane going from MAPU to the top of the buoy to assist MA'A's deckhands in securing the wire on the buoy. After this task was successfully completed, MA'A returned to the tanker to pick up the wire for Buoy No. 3 and MAPU went alongside Buoy No. 4 and picked up Kane.

MAPU then proceeded to Buoy No. 3, which was located on the windward side of M/V AEGEAN ISLAND, to assist MA'A as necessary. MA'A took some of the mooring wire on deck and proceeded towards Buoy No. 3. Even though all available wire was run out from the tanker, MA'A was unable to reach the buoy because of the shortness of the wire. MAPU again assisted by pushing Buoy No. 3 to MA'A and Kane boarded the buoy to assist MA'A's deckhands in placing the wire on the buoy's mooring hook. When this was accomplished, MA'A departed for the tanker and MAPU started backing down to the buoy to pick up Kane. Kane, who was standing at the edge of the buoy in readiness to jump to

MAPU, apparently lost his balance and fell from the top of the buoy. During the fall, he caught himself on a lifting pad at the edge of the buoy. At this time the stern of MAPU was no more than six feet from the buoy. The astern motion of MAPU, with her engines in neutral, carried her to the buoy and crushed Kane between her stern and the buoy. Even though the other deckhand instantly went to Kane's aid, Kane was crushed twice more before he could be lifted aboard MAPU or the tow-boat could clear the buoy on full ahead engines. Medical assistance was immediately requested, but Kane was deceased by the time such help was reached.

(Stipulated Agreed Facts; and Report of Coast Guard Investigation.)

7. At the time of Kane's injury, the weather was partly cloudy skies with winds of 15 to 25 knots (17 to 29 miles per hour) from the East-North-East and good visibility. The water was rough with 3 to 5 foot choppy seas from the North-East and 6 to 9 foot swells from the North-East. Small craft warnings were in effect. (Report of Coast Guard Investigation.)

8. Because Kane's death occurred as part of a marine casualty involving loss of life, an officer from the U.S. Coast Guard Marine Safety Office in Honolulu informally investigated the accident pursuant to the authority set forth in 46 U.S.C. §239(a). The report of that investigation, which was completed on 2 February 1978, was given final approval by the Commandant

of the Coast Guard on 28 February 1978. (Report of the Coast Guard Investigation.)

9. The Coast Guard did not conduct a "formal" investigation of the 3 July 1977 accident involving Kane. (Tr. pgs 20-21.)

10. The Coast Guard did not, during or following the informal investigation, take any action against or with respect to Dillingham. The corrective action suggested by the Coast Guard was directed to the operators of the HIRI Anchorage in a special meeting which did not involve or include any Dillingham representative. At that special meeting, the Coast Guard reccommended to the operators of the HIRI Anchorage that certain modifications of the buoys be made so as to provide safer working conditions on the buoys. (See Report of Coast Guard Investigation, ltr from Moreau to Pacific Resources, Inc. and 18 July 1977 Johnson memorandum to the File.)

11. The Coast Guard treated the comments and recommendations of the operator of MAPU as an account of the mooring and, therefore, considered that they were not safety measures. (See Item 19 on page 4 of the Report of the Coast Guard Investigation.)

12. The Coast Guard did not exercise any enforcement authority with respect to the 3 July accident involving Kane. (Tr. pg 21.)

13. Regulations promulgated by the Coast Guard with respect to seamen are directed towards setting qualifications

standards which an individual must meet in order to be issued and hold a seaman's document. The Coast Guard has not promulgated regulations or standards governing the safety of a seaman while working or how he does his work. Nor has the Coast Guard promulgated any general or specific regulations or standards with respect to a seaman going from a towboat to a buoy or vice versa. (Tr. pgs 12-13, 15-18, 23-36, and 28.)

14. The regulation set forth in 33 CFR 110.236 controls and refers to the safety of vessels and facilities in the HIRI Anchorage, the risk of oil pollution, and the fouling of submerged pipe lines. Nothing in the section refers to or provides for, employment safety. (33 CFR 110.236.)

15. On 28 September 1977, a representative of the Secretary of Labor investigated Kane's fatal accident. Following that inspection, Citation No. 1 was issued to Dillingham on 16 November 1977. Citation No. 1 alleged a Serious violation of Section 5(a)(1) (the General Duty Clause) of the Act and proposed a penalty of $490. Dillingham contested the citation, proposed penalty, and abatement date in a timely manner by letter dated 1 December 1977. (File.)

## LAW AND OPINION

SECRETARY'S MOTION TO STRIKE DOCUMENTS --

The Secretary has filed a motion to strike the following two documents which were attached to Dillingham's "Memorandum

of Points and Authorities in Support of Motion to Dismiss for Lack of Jurisdiction and Acceptance of Plea of Nolo Contendere" when that document was filed on 18 May 1978:

1. "Affidavit of Lieutenant Commander James F. VanVranken" - This affidavit was not discussed or mentioned at any time during the trial or off the record discussions that occurred on the day of trial. Dillingham did not request opportunity to offer such a document, nor reserve any general right to offer further evidence following the closing of the record at the conclusion of the trial on 18 April 1978.

The parties were clearly advised on the record during that trial that it was their responsibility to offer, and have included in the record, everything they wanted considered in making the decision. See the following comments from the trial transcript.

> "Everything said during the hearing will be recorded verbatim unless I direct otherwise. I'll only direct that we go off the record if one of you moves for it and it becomes apparent that we need to. And the reason for this is that the decision will be made based upon the record, and I want everything said recorded." (Tr. pgs 3-4.)
>
> * * * *
>
> "At the same time you want to think about it and be sure you get in everything that you wish me to consider. I've only re-opened one out of 150 cases to permit additional evidence. So ordinarily it would not come in; if you don't get it today, you've had it." (Tr. pgs 4-5.)

In view of this warning during the trial and because of the failure of Dillingham to mention the affidavit during the trial or reserve the right to offer additional evidence at a later date, the affidavit is STRICKEN and DISREGARDED.

An additional reason for striking the affidavit is that offering the document after the trial completely precludes the testing of the veracity of the evidence contained in the affidavit through the medium of cross-examination. This facet becomes very important when the affidavit is compared with the testimony given by Captain Ewels during the trial. He was VanVranken's superior officer in the chain of command. His testimony was tested and clarified through cross-examination so that it became clear and definite. There is a direct conflict between Captain Ewels' testimony given under oath while subject to full cross-examination, and the information contained in the affidavit. Captain Ewels' testimony clearly disagress with the contents of the affidavit in that his testimony is that there are no Coast Guard regulations governing working conditions on mooring buoys or of towboat seamen. On the other hand, the affidavit is worded in rather broad general terms which do not specifically establish the existence of any Coast Guard jurisdiction over Dillingham's working conditions or of any Coast Guard regulation of mooring operations involving towboat crewmembers working on or in conjunction with mooring buoys. Consequently, even if the affidavit was found to be admissible, it would not add any cognizable proof to this proceeding.

2. "M/V MAPU--Investigation into the death of Francis Michael Kane on 3 July 1977"-

The first three pages of this document were attached to and submitted with Dillingham's "Memorandum of Points and

Authorities in Support of Motion to Dismiss" filed on 7 April 1978. During off the record discussions at the beginning of the trial on 18 April, the undersigned Judge requested that a full copy of the document be furnished for the record. At that time Dillingham undertook to do so. There was no objection from the Secretary. Because of that request and the lack of an objection from the Secretary, the entire investigation report and its attachments are ADMITTED in evidence.

The Secretary's objections based upon Rule 12(f) of the Federal Rules of Civil Procedure are without merit because the proffered documents are not part of any pleadings and, thus, are not covered by that Rule.

DILLINGHAM'S MOTION TO DISMISS --

Shortly before the trial in this matter, Dillingham filed a "Memorandum of Points and Authorities in Support of Motion to Dismiss" but did not file the actual Motion at that time, nor at any subsequent time. However, in spite of this oversight, all of the participants obviously understand the grounds and purpose of the motion. The motion was a major subject of discussion and argument at the time of the trial and has been renewed and vigorously argued in the post-trial briefs. The thrust of the argument supporting the motion is two-fold:

1. That the Occupational Safety and Health Act of 1970 (the Act) and the standards and regulations promul-

gated thereunder are not applicable to vessels or to seamen working on vessels; and/or

2. That under the provisions of Section 4(b)(1) of the Act [29 U.S.C. §653(b)(1)] the Coast Guard has pre-empted OSHA jurisdiction over vessels and seamen generally.

1. Applicability of the Act to seamen --

Dillingham insists that this first theory should be treated as a threshhold issue which, when properly resolved, will dispose of the entire case without need to consider the second point of its argument. In short, Dillingham urges that since the circumstances at issue here involve a seaman working on a towboat, exclusion from coverage under the Act is automatic. Dillingham argues that this exclusion occurs solely because the deceased Dillingham employee was a seaman working on a towboat and, thus, was not covered by the Act.

Dillingham bases this argument on the fact that seamen are entitled to the benefits of the Jones Act and, that as a consequence of that coverage, together with the alleged Coast Guard responsibility for regulating the safety of a seaman's working conditions, seamen are automatically excepted from the coverage of OSHA. This Dillingham argument is in direct contravention of the purpose and policy enunciated by Congress and set forth in Section 2(b) of the Act [29 U.S.C. §651(b)], i.e.,

> "...to assure so far as possible every working man and woman in the Nation safe and healthful working conditions..."

Applying Dillingham's theory to the situation here would, in the absence of Coast Guard regulation (see discussion below and Findings 12, 13, and 14), deny Dillingham's employees protection in their work environment.

The Jones Act, which is concerned with the private rights of an injured seaman with respect to his employer, does not provide protection equivalent to, or even approaching, that which accrues to employees through OSHA workplace safety and health standards. OSHA safety standards are applicable to the work environment at all times and without regard to the actual occurrence of an injury. On the other hand, the Jones Act only gives the seaman a cause of action for redress from his employer after he has been injured. This Jones Act right does nothing towards improving the safety of working conditions in the work place.

The foregoing discussion leads to the conclusion that Dillingham's argument is fallacious. The fact that the deceased employee was a seaman and that the workplace in question was a morring operation involving a towboat and buoy, taken alone, does not automatically exclude OSHA coverage.

The second portion of this Dillingham threshhold theory which asserts that the Coast Guard has responsibility for a seaman's safe working conditions is also without merit. The evidence in this record clearly shows that the Coast Guard does not have, or exercise, any direct authority over the working conditions of seamen on towboats. See discussion of this topic below in the portion of this decision dealing with the Section

4(b)(1) argument. The threshhold issue raised by Dillingham is, thus, without any merit. It must, and does, FAIL.

2. Section 4(b)(1) preemption --

This section of the Act provides that, "Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, ..., exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health."

The Review Commission and the courts have uniformly held that this section of the Act does not provide an industry wide exception. At the same time these decisions have required that the other federal agency must actually be exercising a power to regulate safety conditions in order to preempt OSHA. Southern Pacific Transportation Co., 74 OSAHRC 83/A2, 2 OSHC 1313 (BNA) 1974-75 OSHD 19,054 (CCH) (Docket No. 1348); Marshall v. Northwest Orient Airlines, Inc., 574 F.2d 119, 122 (2nd Cir. 1978); Southern Pacific Transportation Co. v. Usery, 539 F.2d 386 (5th Cir. 1976); Southern Railway Company v. OSHRC,539 F.2d 335 (4th Cir. 1976); and Baltimore and Ohio Railroad Company v. OSHRC, 548 F.2d 1052 (D.C. Cir. 1976).

Dillingham urges that Section 4(b)(1) of the Act [29 U.S.C. §653(b)(1)] preempts OSHA in favor of Coast Guard jurisdiction. In order for such preemption to come into effect in this instance, Dillingham must show that the Coast Guard has authority for promulgating such work safety standards and, further, that

the Coast Guard has actually exercised that authority by promulgating and enforcing such safety standards.

As noted earlier, the evidence in this record does not support Dillingham's argument. In fact, the evidence is exactly to the contrary. The senior Coast Guard witness, Captain Ewels, clearly testified that the Coast Guard has not promulgated any regulations or standards governing the safety of a seaman while working, or the conditions and methods existing in the work environment. He also testified that the Coast Guard has not promulgated any general or specific standards or regulations with respect to a seaman going from a towboat to a mooring buoy, or vice versa. Further, he specifically testified that the Coast Guard did not exercise any enforcement authority with respect to the accident on 3 July 1977 which resulted in the death of the Dillingham employee.

An additional crucial aspect of this particular set of circumstances is the fact that MAPU was an uninspected towboat which was not licensed by the Coast Guard and was not required to be inspected by the Coast Guard. In short, she was not under the jurisdiction of the Coast Guard.

The evidence in this record, thus, fully supports a holding that the preemption provisions of Section 4(b)(1) of the Act do not apply to the instant circumstances. It is concluded here that OSHA had jurisdiction over the work conditions and situation existing aboard MAPU and on the mooring buoy on 3 July 1977.

DILLINGHAM'S PLEA OF NOLO CONTENDERE --

During the trial, and in briefs filed following the trial, Dillingham has sought to enter a plea of "Nolo Contendere" to the citation if, and only if, jurisdiction is found to exist under the Act. Dillingham's contention seems to be that the filing of such a plea would assist it in avoiding possible liability to survivors of the deceased seaman.

The definition of "Nolo Contendere" set forth in the Revised Fourth Edition of Black's Law Dictionary reads, "Nolo Contendere. Lat. I will not contest it. The name of a plea in a criminal action, having the same legal effect as a plea of guilty, so far as regards all proceedings on the indictment, and on which the defendant may be sentenced." (Emphasis added.) Black's Law Dictionary 1198 (Revised 4th Ed. 1968).

Research of this issue has failed to reveal a single instance where such a plea has been accepted in a civil case. All of the cases and writings on this subject are in connection with criminal proceedings. There are no cases, or suggestions from legal scholars, that the plea of "Nolo Contendere" is applicable to a civil case. This aspect of the plea is stressed here because these proceedings are not, in any sense of the word, criminal in nature.

As Dillingham concedes, the acceptance of a plea of "Nolo Contendere" is within the sole discretion of the Court. (Dillingham's Memo of Points and Authorities filed on 18 May

at pg 15; "Plea of Nolo Contendere" at 89 A.L.R.2d 540.) Accordingly, since there is discretion in the Court as to whether to accept the plea and because the plea is only recognized in criminal proceedings, Dillingham's tender of the plea of "Nolo Contendere" is rejected in these proceedings which are totally civil in nature.

DILLINGHAM'S MOTION TO STRIKE THE SECRETARY'S PROPOSED CONCLUSIONS OF LAW 5 AND 6 and ORDER --

Dillingham moves to strike these proposals on the grounds that they do not conform to the Settlement Agreement signed by the parties on 20 April, two days after the trial, to become effective if the finding here should be that Dillingham is subject to OSHA jurisdiction.

Proposals filed by the parties following a trial are for the sole purpose of assisting the trier of fact in formulating the findings, conclusions, and Order to be entered in the matter. They may be used or discarded by the Judge and are not binding upon him. In this case, as in others, the proposals of the parties have been thoroughly considered in arriving at those entered here. Any proposals that are not included, in whole or in part, in the findings, conclusions, and Order entered here, are deemed to have been rejected. Dillingham's motion to strike is, thus, denied with respect to any objected to portion of the Secretary's proposed conclusions of Law and Order which appear in this Decision and Order.

THE SETTLEMENT AGREEMENT --

Following the trial, the parties entered into a Settlement Agreement which was to take effect only if the finding in this proceeding was that Dillingham is subject to jurisdiction under the Act. Since that eventuality has occurred, it is now necessary to determine the effect of the concessions made by the parties in reaching that agreement so as to avoid further costs of litigation.

In the Settlement Agreement the parties agree to a reduction of the proposed penalty from $490 to $245. They also agree to the entry of an Order making the citation and amended penalty a final Order of the Occupational Safety and Health Review Commission. At the same time, Dillingham stipulates that the violation alleged in Serious Citation No. 1 has been abated in that Dillingham has taken affirmative steps by ordering its employees to stay off the buoys. Each of these concessions appear to be reasonable in nature and consistent with the positions of the parties.

The foregoing Findings of Fact and discussion of the law and evidence, as well as the contents of the Settlement Agreement executed by the parties, support the following:

## CONCLUSIONS OF LAW

1. At all times material hereto, Dillingham Tug & Barge Corporation, was an employer engaged in furnishing the only

towboat services available in the state of Hawaii in a business affecting commerce within the meaning of Section 652 of the Occupational Safety and Health Act of 1970. On 5 December 1977, Dillingham filed a letter contesting the citation and proposed penalty involved here. Dillingham thereby brought itself and the subject matter of these proceedings within the jurisdiction of the Occupational Safety and Health Review Commission pursuant to Section 659 of the Act.

2. The affidavit of Lieutenant Commander James F. Van-Vranken is not admissible because it was not offered before the trial record was closed.

3. The complete report of the Coast Guard Investigation into the death of Francis Michael Kane, requested by this Judge during the trial and not objected to by the Secretary at that time, is admissible in evidence.

4. Working conditions involving seamen working on an uninspected towboat are not automatically excluded from the coverage of the Occupational Safety and Health Act of 1970 simply because seamen are involved.

5. The Coast Guard has not promulgated and does not enforce regulations and standards governing safe working conditions for a seaman working on an uninspected towboat.

6. The Dillingham workplace and working conditions involving the towboat MAPU and the mooring buoys to which the vessel M/V AEGEAN ISLAND was being moored on 3 July 1977 are

subject to the provisions of the Occupational Safety and Health Act of 1970.

7. A plea of "Nolo Contendere", which is only applicable to criminal proceedings, is not acceptable in these civil proceedings.

8. Since the agreed condition precedent to entry of the Settlement Agreement signed by the parties to this proceeding is affirmatively found herein to exist, the remaining issues of the case will be disposed of in accordance with the agreement of the parties as set forth in that Settlement Agreement.

## ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and for good cause shown, it is

ORDERED that:

1. The Settlement Agreement be, and hereby is, APPROVED; and
2. Citation No. 1 and the amended proposed penalty of $245 be, and hereby are, AFFIRMED.

Jerry W. Mitchell

JERRY W. MITCHELL
Judge, OSHRC
Burlingame, CA

DATED: 10 May 1979

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| 77-699 | KAISER ALUMINUM AND CHEMICAL CO. | 7/30/82 | 41/B1 |
| | (Judge's decision) | | 41/C4 |
| 78-238 | CONSOLIDATED RAIL CORP. | 7/30/82 | 41/D3 |
| | (Judge's decision) | | 41/E9 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 240

ATLANTA, GEORGIA 30309

# NOTICE OF DECISION

**SECRETARY v. V.I.P. DEVELOPMENT, INC.**

**OSHRC Docket No. 80-7113**

1. Enclosed is a copy of my decision. It will be filed with the Commission on June 29, 1982, and will become the final order of the Commission on July 29, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N. W., Suite 601
   Washington, D. C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is July 29, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Edwin G. Salyers

EDWIN G. SALYERS
Judge

Date: June 9, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

| | | |
|---|---|---|
| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 80-7113 |
| | ) | |
| V.I.P. DEVELOPMENT, INC., | ) | |
| | ) | |
| Respondent. | ) | |

APPEARANCES:

Patrick M. Zohn, Esquire, Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, on behalf of complainant

Roger L. Sabo, Esquire, Columbus, Ohio, on behalf of respondent

## DECISION AND ORDER

SALYERS, Judge: This matter arises under the provisions of the Occupational Safety and Health Act (29 U.S.C. § 651, et seq.). The respondent, V.I.P. Development, Inc., has been charged by the Secretary of Labor with several violations of the Act and the standards promulgated thereunder, including willful and serious violations. The parties have resolved all violations with the exception of the three that comprise the subject matter of this decision.[1/]

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1/ The parties have prepared and signed a partial stipulation and settlement agreement disposing of all other matters. This document is in the record as Exhibit J-21 and is hereby incorporated in this decision.

The case was tried before Judge Jess D. Ewing in Cincinnati, Ohio. Before Judge Ewing could render a decision in this case, he transferred to another agency and this case was reassigned to the undersigned Administrative Law Judge by order of the Commission dated February 8, 1982. The undersigned will decide this case based upon the record as presently constituted.[2/]

The respondent, V.I.P. Development, Inc., is a construction contractor engaged in the business of sewer line, water line and street construction for residential subdivisions, condominium development and commercial building sites. At the time of the Secretary's investigation, respondent was engaged in constructing sewer line excavations in Butler County, Ohio, at the Woodland Hills development site Job #204. The inspection was prompted by an accident that occurred near the excavation known as Manhole #4.

On the afternoon of October 9, 1980, William J. Wilkerson, an industrial hygienist with the Cincinnati OSHA office, and his supervisor arrived at the Woodland Hills project and conferred with Mr. Robert Broshear, the company foreman and job superintendent (Tr. 16). Mr. Wilkerson advised Mr. Broshear that he was there as a result of a complaint received by his office that on the previous day an accident had occurred involving injuries to two employees (Tr. 18). That complaint dealt with exposure to electrical power lines. Mr. Broshear alleges that he was led to believe the investigation would relate solely to the accident (Tr. 150). Mr. Wilkerson admits such a statement was made to Mr. Broshear but that he

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2/ After reassignment of this case, the undersigned afforded the parties the alternatives of (1) retrying the case ab initio, (2) having a supplimentary hearing to take testimony in those areas where credibility was a factor, or (3) deciding the case on the constituted record (See Ex. J-23). Complainant preferred the latter choice and respondent, while not agreeing to any of the proposed alternatives, did not choose to "engage in further litigation" (Ex. J-24).

qualified the statement by informing Mr. Broshear he would inspect anything else in "plain view" if it appeared "to be a serious hazard" (Tr. 76, 129).

Since the citations remaining for decision are unrelated to the electrical accident, the respondent urges its Fourth Amendment rights have been violated and that all the evidence in this case should be suppressed, citing Sarasota Concrete Co., 81 OSAHRC 9 BNA OSHC 1608, 1981 CCH OSHD ¶ 25,360 (No. 78-5264, 1981), and Marshall v. Barlow's, Inc., 436 U. S. 307 (1978).

Respondent's argument that the Secretary exceeded his authority in citing matters during the course of the inspection not related to the specific complaint is without merit. In Barlow's, Inc., supra, the Supreme Court ruled that to the extent that the Act allowed warrantless nonconsential inspections, the Act violated the Fourth Amendment rights of those so inspected. Both Barlow's, Inc., supra, and Sarasota Concrete Co., supra, present situations where an employer had refused entry to the Secretary for purposes of inspecting the employer's private property. While the Fourth Amendment guarantees the right to privacy, that right can only exist where there is reasonable expectation of privacy. Nothing in this record reflects that the respondent's work site was walled in or cordoned off from the public nor is there any showing that respondent made any attempt to assert the right of privacy at the time of the inspection. On the contrary, the inspection was made with respondent's consent and with respondent's understanding that serious hazards would not be ignored if they were in plain view. The inspector has cited only those matters which were in plain view. See Environmental Utilities Corporation, 77 OSAHRC 40/A2, 5 BNA OSHC 1195, 1977-78 CCH OSHD ¶ 21,709 (No. 5324); Laclede Gas Company, 79 OSAHRC 94/E13, 7 BNA OSHC 1875, 1979 CCH OSHD ¶ 24,007 (No. 76-3241); Accu-Namics, 515 F.2d 828 (5th Cir. 1975); and

Ackermann Enterprises, Inc., _____ OSAHRC _____, _____ BNA OSHC _____, _____ CCH OSHD _____ (No. 80-4971).

The issues remaining to be determined in this case are as follows:

1. Did the respondent seriously violate the provisions of 29 C.F.R. § 1926.602(a)(9)(ii)[3/] by (a) operating a Caterpillar 977L loader in reverse gear without having an audible alarm in operable condition and (b) operating a Bucyrus Erie 350 excavator in reverse with no audible signal?

2. Did respondent willfully violate the provisions of 29 C.F.R. § 1926.651(c)[4/] by exposing employees to moving ground in an excavation which was not shored or sloped as required by the standard?

3. If violations have occurred, what penalty is appropriate?

Alleged Violation of 29 C.F.R. § 1926.602(a)(9)(ii)

The evidence is uncontradicted that during the course of his investigation, Mr. Wilkerson observed a Caterpillar 977L loader in use by one of respondent's employees for transporting piping in connection with the construction operation moving in reverse gear. While this loader was equipped with a reverse signal alarm,

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3/ 29 C.F.R. § 1926.602(a)(9)(ii) provides:

> (ii) No employer shall permit earthmoving or compacting equipment which has an obstructed view to the rear to be used in reverse gear unless the equipment has in operation a reverse signal alarm distinguishable from the surrounding noise level or an employee signals that it is safe to do so.

4/ 29 C.F.R. § 1926.651(c) states:

> (c) The walls and faces of all excavations in which employees are exposed to danger from moving ground shall be guarded by a shoring system, sloping of the ground, or some other equivalent means.

more commonly referred to as a backup alarm, the alarm system was inoperable at the time Mr. Wilkerson observed this instance (Tr. 27). It is also undisputed that the machine in question is a bidirectional machine within the meaning of the standard. It is further uncontradicted in the record that the operator of this loader has a clear and unobstructed view to the rear and, in all instances, when operating in reverse, will look to the rear while moving (Tr. 89, 144, 158-159, 196, 213; Exs. R-1, R-2, R-3). Since the Government has failed to prove an essential element of the standard; i.e., the earthmoving equipment in question which "has an obstructed view to the rear," this citation must be vacated.

The Secretary advances the argument that, while this piece of equipment did not have an obstructed view to the rear, "the operator's view is obstructed by operation" (Tr. 90). The Secretary makes a plausible argument that obstruction by operation means that the operator of a loader, while working the controls which are all located in front of him, may not be able to devote his full attention to the area to his rear when operating in a reverse direction. Thus, an audible backup alarm is needed not just for those times when there are physical obstructions to the rear, but also those times when the operator is distracted from devoting his full attention to the rear when backing up. This is the dual rationale requiring the use of backup alarms. They are to warn people behind the equipment that it is operating in a reverse direction (Secretary's Brief, p. 12). Under this theory, all bidirectional earthmoving equipment would be required to have backup alarms. It may well be that this requirement would be in the best interest of safety, but this is not what the Secretary has recited in the standard. If it were the Secretary's intention to require all bidirectional earthmoving equipment to have backup alarms, the standard should so reflect that intention by deleting the qualifying language.

Regulations cannot be construed to mean what an agency intended but did not adequately express. Kent Nowlin Construction Co. v. O.S.H.R.C., 593 F.2d 368 (10th Cir. 1977); Diamond Roofing Co. v. O.S.H.R.C., 528 F.2d 645 (5th Cir. 1976).

I also find that the Secretary has failed to establish respondent violated the cited standard in the case of the Bucyrus Erie 350 excavator. This machine is as depicted in Secretary's Exhibit C-2. The operator's cabin and the operational components are mounted on treads or tracks and the equipment has a 360-degree swing radius (Tr. 155). When in operation, the operator can and does swing the cabin around and face the direction in which he is moving (Tr. 35, 156). There is some question in the record that this machine ever moves in a reverse direction (Tr. 155, 197). The common and usual practice is for the operator to rotate the cabin in the direction that the machine moves (Tr. 155, 198, 214). Because of this machine's unique capacity to swivel the operator's cabin, and the fact that the operator swivels the operator's cabin to face the direction in which the machine moves, it appears this is not a bidirectional machine as contemplated by the standard. This conclusion is further bolstered by the fact that excavators are not listed in the standard itself as the type of machine to which the cited standard applies. Indeed, even Mr. Wilkerson seems to concede at one point in the transcript that a backup alarm would not be necessary on an excavator except in unusual circumstances (Tr. 40-41). The United States Court of Appeals for the Second Circuit under similar facts found that a scraper, which performed its function primarily in a forward gear, was not subject to the standard. S. J. Groves & Sons v. O.S.H.R.C., 648 F.2d 95 (2nd Cir. 1981). Accordingly, the citation, as it relates to the excavator, will be vacated.

## Alleged Violation of 29 C.F.R. § 1926.651(c)

During the course of his inspection, Mr. Wilkerson observed an excavation referred to in the record as Manhole #4. His inspection of the manhole revealed that the excavation was being dug in what he considered to be average soil (Tr. 49). The south, east and west walls of the manhole were vertical to the base of the excavation and were neither sloped nor shored (Tr. 52, 56). Mr. Wilkerson took measurements of the excavation which revealed that the manhole was 9 feet deep,[5/] 9 feet wide, and 15 to 15 1/2 feet long (Tr. 45). He then determined by interviewing employees that laborers had worked in the hole on the previous day. Due to the composition of the soil and the fact that the sides of the excavation were neither shored nor sloped, Mr. Wilkerson determined that respondent had willfully violated the provisions of 29 C.F.R. § 1926.651(c).

The respondent first argues that the Secretary has charged respondent under the wrong standard. Respondent urges that the Secretary should have cited 29 C.F.R. § 1926.652(a),[6/] the trenching standard, rather than § 1926.651(c), the standard dealing with excavations. Both terms are defined at 29 C.F.R. § 1926.653 as follows:

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5/ Respondent and its witnesses attempted to show that the depth was seven feet but took no actual measurements. Since Mr. Wilkerson actually measured the depth, his version will be accepted.

6/ 29 C.F.R. § 1926.652(a) provides as follows:

> (a) Banks more than 5 feet high shall be shored, laid back to a stable slope, or some other equivalent means of protection shall be provided where employees may be exposed to moving ground or cave-ins. Refer to Table P-1 as a guide in sloping of banks. Trenches less than 5 feet in depth shall also be effectively protected when examination of the ground indicates hazardous ground movement may be expected.

(f) "Excavation"—Any manmade cavity or depression in the earth's surface, including its sides, walls, or faces, formed by earth removal and producing unsupported earth conditions by reasons of the excavation. If installed forms or similar structures reduce the depth-to-width relationship, an excavation may become a trench.

* * *

(n) "Trench"—A narrow excavation made below the surface of the ground. In general, the depth is greater than the width, but the width of a trench is not greater than 15 feet.

The definition of "excavation" is sufficiently broad to include all "trenches." Since the excavation in question does not satisfy the depth-to-width test to qualify as a trench; i.e., depth the same as and not greater than the width, the Secretary has applied the proper standard.

Respondent further urges that the excavation standard is so vague and imprecise that it fails to advise an employer what is required for compliance citing Lloyd C. Lockrem, Inc. v. O.S.H.R.C., 609 F.2d 940 (9th Cir. 1979), Kent Nowlin Construction Co., Inc. v. O.S.H.R.C., 593 F.2d 368 (10th Cir. 1977), and other cases. This argument has long since been laid to rest by the Review Commission. In a consistent line of cases commencing with D. Federico Co., Inc., 76 OSAHRC 13/A2, 3 BNA OSHC 1970, 1975-76 CCH OSHD ¶ 20,422 (No. 9879), aff'd on other grounds, 558 F.2d 614 (1st Cir. 1977), the Commission has upheld the validity of the excavation standard. See also Connecticut Natural Gas Corp., 78 OSAHRC 60/B3, 6 BNA OSHC 1796, 1978 CCH OSHD ¶ 22,874 (No. 13964); Terra Motus Co., Inc., 77 OSAHRC 152/B1, 5 BNA OSHC 1696, 1977-78 CCH OSHD ¶ 22,040 (No. 14154); and M. J. Lee Construction Co., 79 OSAHRC 12/A2, 7 BNA OSHC 1140, 1979 CCH OSHD ¶ 23,330 (No. 15094). Where Commission precedent is clear and consistent, the undersigned is bound to follow the precedent.

Respondent advances a powerful argument that the Secretary has experienced a failure of proof in regard to this citation. This standard specifically requires that

there be a showing employees are exposed to the hazard of "moving ground." This argument is three-pronged: (1) Mr. Wilkerson, the Secretary's inspector, did not have the training or experience to render an expert opinion on the question of soil composition; (2) the Secretary conducted no test of the soil to determine its composition nor did the Secretary present any evidence to show unusual circumstances existed in the area which might cause the ground to move;[7/] and (3) the testimony of respondent's employees and its expert clearly establishes that the walls of the excavation were stable and not subject to collapse. After careful consideration of all the evidence in this case, I must concur with the respondent.

Mr. Wilkerson is an industrial hygienist employed by the Occupational Safety and Health Administration. He has a degree in chemistry and would ordinarily never make an inspection of a construction site.[8/] He did not make any scientific tests of the soil at the site and readily admits that he has neither the expertise nor the training to make such tests.[9/] In fact, Mr. Wilkerson had never before inspected a jobsite of the type here involved. He determined the composition of the soil "by sight and by texture" as he walked on it (Tr. 53).

In contrast to Mr. Wilkerson's somewhat nebulous testimony, the respondent offered the testimony of Daniel G. Longo, who holds a bachelor's degree in civil

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7/ There was some testimony that the excavation contained some water on its floor and had a fissure in its wall, but this evidence was never sufficiently developed to establish a hazardous condition.

8/ At the time the accident occurred, no other inspectors were available in the area office (Tr. 128).

9/ I do not hold that such tests must be made in every instance. Where the instability of the soil is obvious to a layman's eye and can be adequately described in his testimony, there is no need for such testing.

engineering and a master's degree in soil engineering (Tr. 225). Mr. Longo has a considerable background in soil engineering and was readily qualified as an expert at the hearing (Tr. 227-228). On the morning of the hearing, Mr. Longo, together with some employees of respondent, went to the site in question and conducted an inspection of the soil which included a close examination of its composition by Mr. Longo (Tr. 228-229). Using a backhoe, he dug two pits adjacent to Manhole #4 (Tr. 232). He describes the first soil removed from the pits as "laminated shale and sandstone rock" (Tr. 233). At the four-foot level the backhoe encountered resistance because of the hard and compact nature of the soil, and he characterizes this as soil which has become rock by compression (Tr. 233-234). A careful study of the photographic exhibits (Exs. C-10, C-11, C-12, C-13, C-14) denigrates a conclusion that the walls of the excavation were composed of solid rock but does support a conclusion that the soil was tightly compressed and, therefore, stable as alleged by Mr. Longo (Tr. 237). While I am not inclined to accept Mr. Longo's testimony that the soil at Manhole #4 was "solid rock", I do accept his opinion that the soil involved showed no signs of instability and did not present a danger of moving ground in this area. This opinion is supported by the testimony of Robert J. Broshear, the job superintendent, who testified that he observed no sloughing off in the excavation nor any danger of moving ground (Tr. 153-154). Likewise, Jeff Chandler Gaston, an employee who actually worked in the excavation, said he would not have gone into the excavation had he considered it unsafe and noticed no instability of the soil (Tr. 211).

The Secretary has failed to prove that the conditions existing in Manhole #4 at the time of the inspection constituted a hazard of "moving ground." Since this is an essential element in establishing a violation of the standard, the citation will be vacated. See Carl E. Widell & Son, 77 OSAHRC 31/F8, 5 BNA OSHC 1163, 1976-77

CCH OSHD ¶ 21,015 (No. 15185); Seaward Construction Co., Inc., 77 OSAHRC 75/C5, 5 BNA OSHC 1422, 1977-78 CCH OSHD ¶ 21,803 (No. 8684); Richard G. Mugler Company, Inc., 75 OSAHRC 8/A13, 3 BNA OSHC 1771, 1975-76 CCH OSHD ¶ 20,074 (No. 12921); and C.T.M., Inc. v. O.S.H.R.C., 572 F.2d 262 (10th Cir. 1978).

## FINDINGS OF FACT

1. Respondent, V.I.P. Development, Inc., is a construction contractor engaged in the business of sewer line, water line and street construction at various subdivisions. At the time in question, respondent was engaged in sewer line excavations in Butler County, Ohio, at the Woodland Hills development site.

2. Respondent has employees who receive, handle, or otherwise work on goods or materials that have been moved in interstate commerce and/or employees who are engaged in the production of goods for shipment in interstate commerce.

3. During the course of the inspection at respondent's work site, William J. Wilkerson, the Secretary's agent, observed a Caterpillar 977 loader in use by respondent which did not have an audible reverse signal alarm in operative condition. While moving in reverse, the operator of the loader had a clear and unobstructed view in all directions and routinely looked in the direction in which the loader was moving.

4. Mr. Wilkerson also observed a Bucyrus Erie 350 excavator in use without an audible reverse signal alarm. This excavator, however, has a cabin with a 360-degree swing radius. When in operation, the operator can and does swing the cabin to face the direction in which the excavator is moving. The excavator is not a bidirectional piece of equipment within the meaning of the standard.

5. During the course of his inspection, Mr. Wilkerson observed an excavation referred to in the record as Manhole #4. This manhole was 9 feet deep, 9 feet wide and 15 to 15 1/2 feet long. The south, east and west walls of the manhole were vertical to the base of the excavation and were neither sloped nor shored. The composition of the soil was laminated shale and sandstone rock. A preponderance of the evidence reflects this soil was stable and did not present a hazard of moving ground.

## CONCLUSIONS OF LAW

1. The Commission has jurisdiction of the parties and subject matter in this case.

2. The respondent did not violate the provisions of 29 C.F.R. § 1926.602(a)(9)(ii).

3. The respondent did not violate the provisions of 29 C.F.R. § 1926.651(c).

## ORDER

It is ORDERED:

1. In accordance with the partial settlement agreement of the parties, which is hereby adopted and incorporated as a part of this decision, the settlement is approved and civil penalties in the amount of $380 are assessed in accordance with the agreement.

2. Serious Citation No. 1, item 5, is vacated.

3. Willful Citation No. 1 is vacated in its entirety.

Dated this 29th day of June, 1982.

Edwin G. Salyers

EDWIN G. SALYERS
Judge

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

July 30, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Kaiser Aluminum and Chemical Company

OSHRC DOCKET NO. 77-699

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

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- Benjamin G. Usher
  Judge OSHRC

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>KAISER ALUMINUM AND CHEMICAL CORP.,<br><br>Respondent,<br><br>UNITED STEELWORKERS OF AMERICA, LOCAL 5668,<br><br>Authorized Employee Representative. | OSHRC Docket No. 77-699 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

The sole issue in this case is whether a violation of 29 C.F.R. § 1910.132(a) [1/] by Respondent, Kaiser Aluminum and Chemical Corporation ("Kaiser"), stemming from its failure to protect its employees from exposure to polychlorinated biphenyls, should be characterized as serious within the meaning of 29 U.S.C.

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1/ Section 1910.132(a) provides:

§ 1910.132 General requirements.

(a) Application. Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

§ 666(j), section 17(k) of the Occupational Safety and Health Act of 1971, 29 U.S.C. §§ 651-678 ("the Act"). 2/ We conclude that the violation should be characterized as serious and reverse the judge's decision in part.

I

A polychlorinated biphenyl ("PCB") is one of a group of substances that consist of two phenyl molecules bonded together with one to ten chlorine atoms. Thus, a tetrachlorobiphenyl has four chlorine atoms on its basic biphenyl structure. Aroclor 1016 is a mixture of various PCB's manufactured by Monsanto Industrial Chemicals Company that is used as a conductive material in capacitors at Kaiser's Ravenswood, West Virginia facility. The capacitors weigh approximately 100 pounds and are stacked in rows on three different levels. Occasionally a capacitor's steel casing ruptures and the Aroclor 1016 spills out. Because of their relatively small size (they are 18 inches high, 6 inches wide and 24 to 30 inches long), their weight and location, the capacitors are difficult to remove when they rupture. They must be "manhandled" out by Kaiser's employees. During this operation, the Aroclor 1016 may spill onto the employee handling the capacitor.

During one such operation on October 17, 1976, Aroclor 1016 flowed onto the clothing and soaked the shirt of DeVilbiss, an electrician for Kaiser. Some of the Aroclor 1016 also entered his mouth. DeVilbiss, who was not wearing any

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2/ Section 17(k), 29 U.S.C. § 666(j), states:

> For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

type of personal protective equipment, also received 10 or 12 less severe exposures to Aroclor 1016 over a 5 or 6 month period before and after the day of this large spill. Other employees working with capacitors were also exposed. See note 11, infra. The amount of Aroclor 1016 released in all of the exposures was estimated by DeVilbiss to range from as much as a quart, which made his clothes stick to his body, to as little as a tablespoon. DeVilbiss testified that he experienced a foul taste in his mouth and noticed a reddening of his skin as a result of these exposures. DeVilbiss also testified that beginning in mid-October, 1976, he requested information from his foreman regarding the health hazards of PCB contact and the need for protective equipment. Despite almost daily requests, he received no response. DeVilbiss then contacted OSHA and was advised to use protective equipment, including a respirator if ventilation was not adequate. He reported this information to his foreman. After two more weeks of inaction by his foreman, DeVilbiss contacted his union. As a consequence, the worksite was inspected by OSHA in January 1977.

The Secretary issued a citation alleging that Kaiser had failed to comply with 29 C.F.R. § 1910.132(a) in that personal protective equipment was not used and maintained in a sanitary and reliable condition where employees were exposed to "PCB-type oil (Askarel) during replacement and clean-up of certain ruptured capacitors." The citation also alleged that the violation was "serious" within the meaning of section 17(k).

Lawrence J. Fine, M.D., assistant professor of occupational medicine at the Harvard School of Public Health, testified for the Secretary on the basis of his research into the literature on PCB's. Dr. Fine characterized Aroclor 1016 as a suspected carcinogen because it is similar in composition to other PCB mixtures, such as Aroclor 1254 and Aroclor 1260, that are associated with cancer in animals. Dr. Fine stated that the similarity among PCB mixtures is determined by the

number of chlorine atoms on the basic biphenyl molecule. He also testified that twenty-three or twenty-one percent of the same PCB components is found in both Aroclor 1016 and Aroclor 1254, and that Aroclor 1242 is made up of 88% of the same PCB components as Aroclor 1016. 3/

Dr. Fine stated that tumors of the skin and internal organs that could arise from an exposure to Aroclor 1016 "such as . . . the exposure that occurred

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3/ The table partially reproduced below is from Kaiser's exhibit B, Lloyd et. al., Polychlorinated Biphenyls, 18 J. Occup. Med. 109, 110 (1976). It has been rearranged slightly and the columns of overlaps between Aroclors have been added. Although the data in the table may not have formed the basis of Dr. Fine's testimony, the similarities between the mixtures in the table are nearly identical to Dr. Fine's figures. The Aroclor 1016 used in Kaiser's capacitor is somewhat different from the Aroclor 1016 described in the table; the Aroclor 1016 used by Kaiser contains 39.5% chlorine by weight.

Description of PCB Mixtures.

| | Aroclor 1242* | Overlap between Aroclors 1242 & 1016 | Aroclor 1016* | Overlap between Aroclors 1242 & 1254 | Aroclor 1254* |
|---|---|---|---|---|---|
| Approximate Chlorine Content | 42% | | 42% | | 54% |
| Components | | | | | |
| Biphenyl | 0.1 | 0.1 | 0.1 | 0.1 | 0.1 |
| Monochlorobiphenyls | 1 | 1 | 1 | 0.1 | 0.1 |
| Dichlorobiphenyls | 16 | 16 | 20 | 0.5 | 0.5 |
| Trichlorobiphenyls | 49 | 49 | 57 | 1 | 1 |
| Tetrachlorobiphenyls | 25 | 21 | 21 | 21 | 21 |
| Pentachlorobiphenyls | 8 | 1 | 1 | 1 | 48 |
| Hexachlorobiphenyls | 1 | 0.1 | 0.1 | 0.1 | 23 |
| Heptachlorobiphenyls | 0.1 | 0 | 0 | 0 | 6 |
| | | Total Overlap 88.2% | | Total Overlap 23.8% | |

*Weight-weight percent.

in [this case] . . . in 1976" might not appear for fifteen to thirty years after an exposure. He noted that PCB's are absorbed through the skin and that a melanoma caused by cutaneous exposures to PCB's could be metastasized throughout the body. 4/ He testified that the reddening of the skin experienced by DeVilbiss was the earliest sign of skin toxicity of PCB's. Chloracne, which he characterized as a "painful" and "very serious" form of skin eruption known to persist at least several months after exposure, was the next stage of skin toxicity of PCB's. 5/ Dr. Fine testified that PCB-induced cancer could develop 15 or 30 years after an initial exposure without evidence of acute toxicity such as skin reactions. Dr. Fine noted that in terms of carcinogenicity, toxicity cannot be measured without many years of observation. He therefore recommended that all skin exposures to Aroclor 1016 should and could be avoided through the use of nonporous personal protective equipment. 6/

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4/ Dr. Fine also noted that the pancreatic cancer observed in a Mobil Oil Co. study of PCB exposed workers was probably due to both skin absorption and inhalation, resulting in PCB transportation through the bloodstream and storage in the pancreas. Liver and fatty tissue accumulation occur in the same manner.

5/ Dr. Fine identified other toxic effects of PCB exposure as: upper respiratory tract and mucous membrane irritation, stinging of the eyes, repugnant odor of the body; from ingestion by humans: blindness, central nervous system symptoms, nausea, loss of appetitie, and stillbirths and abnormal pigmentation of infants; in animals: lessened ability of birds to form eggs and decreased litter size.

6/ A Kaiser corporate memo of April 30, 1976 (Complainants' Exhibit F) states with respect to PCB's: "Their acute toxicity is low, chronic toxicity is high." The memo lists known toxic effects to include "acne-like skin eruption, pigmentation of the skin and nails, excessive eye discharge, swelling of eyelids and distinctive hair follicles." The memo also states that standard safety precautions were required, including eye protection, non-porous gloves and aprons, and "any skin area contacted should be thoroughly washed with water as soon as possible." A Monsanto guide on the handling of PCB's (Respondent's Exhibit A) also states that "prolonged or repeated skin contact" should be avoided "because of the possible occurence of a condition called chloracne." Monsanto also provided a sample caution label to be placed on containers of PCB solutions and transformers in which PCB solutions are used.

Dr. Fine acknowledged that the studies he relied on in reaching his conclusion regarding the health hazards of exposure to Aroclor 1016, principally a Japanese study of a 1968 outbreak of PCB poisoning in Japan due to ingestion of PCB contaminated rice oil and a report on a Mobil study of PCB exposed employees, did not involve exposure to the exact biphenyl compound in this case. Exposed populations in the Japanese study exhibited the following symptoms: chloracne, brown pigmentation of the skin and nails, distinctive hair follicles, increased eye discharge, swelling of eyelids, transient visual disturbance, systemic gastrointestinal symptoms including jaundice, low birth weights and skin discoloration in infants born to poisoned mothers. In addition, two stillbirths were reported. In some patients symptoms persisted for three years after PCB exposure terminated. Lloyd et al., Polychlorinated Bipenyls, 18 J. Occupational Med. 109 (1976)(Respondent's Exhibit B). 7/ The record in this case does not identify the exact PCB mixture involved in the Japanese poisoning. The Mobil PCB study involved 92 workers exposed to Aroclor 1254 and observed eight cancers in seven workers, including malignant melanomas and cancer of the pancreas. The study was reported in a letter to the editor in the New England Journal of Medicine on August 19, 1976. Former NIOSH Director Finklea reported these PCB developments in the American Industrial Hygiene Association Journal in October, 1976 (Respondent's Exhibit C). Dr. Finklea noted that although the Mobil study was the first to suggest a correlation between animal or human PCB exposure and skin or pancreatic cancer, hepatomas and hepatocellular carcinomas had been reported in laboratory animals fed Aroclor 1254 and 1260. Dr. Fine also testified that although the exposures in this case are probably lower than those

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7/ The Lloyd article also noted reported instances of digestive disturbances, face and head edema, burning of the eyes, impotence and hematurea related to human PCB exposure.

reported in the Mobil study, the skin exposure in this case had already caused mild toxicity. Dr. Fine also noted that the Japanese study suggested that the "minimum toxic dose" for humans is between 0.5 and 2 grams, which, he stated, is at least equivalent to 0.5 to 2 cc of PCB ingested. 8/ He testified that for the purpose of comparison there are 242 cc in a cup. In his view the exposures in this case "can be compared with the levels of exposure" discussed in the literature on PCB toxicity.

Judge Usher found that Kaiser failed to comply with 29 C.F.R. §1910.132(a). He found that the Secretary had failed to prove the violation was serious because the Secretary's expert witness, Dr. Fine, "did not testify with any specificity concerning what level of exposure to Aroclor 1016 would, or even might, have a carcinogenic effect upon humans, although he warned that cutaneous exposure . . . should be avoided completely . . . ." He stated that Dr. Fine had failed to "state an informed opinion" that there is a substantial probability that death or serious physical harm could result from the exposures of DeVilbiss to Aroclor 1016 on 10 or 12 occasions during the five or six-month period in question. The judge cited Usery v. Hermitage Concrete Pipe Co., 584 F.2d 127 (6th Cir. 1978).

The Secretary filed a petition for review of this portion of the judge's decision. The petition was granted by Commissioner Cottine.

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8/ The term "minimum toxic dose" was not defined by Dr. Fine. The National Institute of Occupational Safety and Health's ("NIOSH") 1978 Registry of Toxic Effects of Chemical Substances xxiii (1979) defines "Toxic Dose Low" (TDLo) as:

> --the lowest dose of a substance introduced by any route, other than inhalation, over any given period of time and reported to produce any toxic effect in humans or to produce carcinogenic, neoplastigenic, teratogenic, or mutagenic effects in humans or animals.

The PCB mixture ingested in Japan was evidently Kanechlor 400, which is 48% chlorine. The 1978 Registry lists a TDLo for toxic effects on skin of 28 mg/kg of body weight by oral ingestion for Kanechlor 400. If DeVilbiss weighed 70 kg. (154 lbs.), then the TDLo for him would be 1.96 grams.

II

Before the Commission the Secretary argues that Dr. Fine's testimony establishes that there is no safe level of exposure to PCB's and that there is a substantial probability that death or serious physical harm could result from exposure to PCB's. He relies on the Sixth Circuit's decision in Hermitage Concrete. He further argues that where a single exposure to a toxic substance would not give rise to serious physical harm, but chronic exposure would, the Commission should, in the absence of evidence of chronic exposure, presume that the measured overexposure was representative of long-term exposure. The Secretary argues that the Commission should characterize Kaiser's failure to comply with the standard as serious because DeVilbiss was exposed to levels of PCB's that if experienced regularly could result in serious physical harm or death.

Kaiser maintains that all the Secretary has shown is that death and serious physical harm could result from exposure to certain levels of PCB's, but not that death or serious physical harm could result from the conditions shown to exist at Kaiser's plant. Kaiser contends that the Secretary's argument amounts to a claim that any exposure to a PCB is serious. Kaiser maintains that the Secretary disavowed this approach in his brief to the court of appeals in Hermitage Concrete and that the Commission has repeatedly rejected it.

The authorized employee representative, the United Steelworkers of America, Local 5668 ("Union"), also is a party to this proceeding. The union argues that the Secretary has established that as a result of the exposures in this case, employees could, if left unprotected, contract the illnesses associated with PCB exposure. The union maintains that the failure of Kaiser to comply with section 1910.132(a) constitutes a serious violation of the Act because the contraction of virtually all forms of cancer and the more severe forms of skin eruption and eye irritation create a substantial probability that death or serious physical harm could result.

III

With respect to violations of safety standards, the Commission has consistently held that an accident need not be shown to be substantially probable in order to hold that a violation is serious. The record need only show that an accident could have resulted and that, if an accident occurred, death or serious physical harm was substantially probable. See, e.g., Frank Swidzinski Co., 81 OSAHRC 4/E14 9 BNA OSHC 1230, 1981 CCH OSHD ¶ 25,129 (No. 76-4627, 1981). Court decisions have also been consistent on this point. See, e.g., East Texas Motor Freight v. OSHRC, 671 F.2d 845, 849 (5th Cir. 1982); California Stevedore & Ballast Co. v. OSHRC, 517 F.2d 986 (9th Cir. 1975).

We have followed a parallel course with respect to violations of health standards. We have not required that contraction of a serious disease be shown to be substantially probable. Instead, we have inquired whether a disease could result from the violative condition and whether there is a substantial probability of death or serious physical harm if the disease does occur. Thus, in Anaconda Aluminum Co., 81 OSAHRC 27A/A2, 9 BNA OSHC 1460, 1474-77, 1981 CCH OSHD ¶ 25,300, p. 31,347-31,349 (No. 13102, 1981), we held that a violation of a specific permissible exposure level for a toxic agent was serious because the level was set to prevent the possible contraction of cancer, a life-threatening disease. The Commission specifically rejected its previous holdings that the Secretary must demonstrate a substantial probability that death or serious physical harm would result from the violative condition. Our approach in Anaconda was consistent with that of the Sixth Circuit in Hermitage Concrete, which pointed out with respect to the contraction of silicosis that the proper inquiry was whether the cited conditions "might" cause unprotected employees to contract silicosis, and "if they might, whether there was a 'substantial probability' that the result would be serious physical harm or death." 584 F.2d at 131-34 & n.5.

Inasmuch as Kaiser has not been found to have violated a standard with a specific exposure level, we must look to the seriousness of the specific hazards to which the employee was exposed. Mahone Grain Corp., 81 OSAHRC 108/B8, 10 BNA OSHC 1275, 1279, 1981 CCH OSHD ¶ 25,836, p. 32,317-2 (No. 77-3041, 1981). Thus, the issue is whether the exposures experienced by Kaiser's employees could cause a disease and, if the disease is contracted, whether there is a substantial probability of death or serious physical harm.

Dr. Fine's unrebutted testimony establishes that Aroclor 1016 is closely related to a number of PCB mixtures that have been associated with human and animal carcinomas. His unrebutted testimony also establishes that malignant tumors of the skin and internal organs could appear in fifteen to thirty years following exposures such as those that occurred in this case, without evidence of acute toxicity. It was for this reason that Dr. Fine stated that cutaneous exposure to Aroclor 1016 should be prevented entirely.

The record further establishes that chloracne could result from the PCB exposures in this case. In examining whether chloracne constitutes serious physical harm, we note that Dr. Fine characterized it as a "painful" and "serious form of skin eruption." He stated that it would be the next stage in skin toxicity after the reddening of the skin experienced by DeVilbiss. In GAF Corp., 81 OSAHRC 29/A2, 9 BNA OSHC 1451, 1981 CCH OSHD ¶25,281 (No. 77-1811, 1981), appeal withdrawn, No. 81-4091 (2d Cir. September 3, 1981), the Commission found an employer in serious violation of the Act for exposing its employees to silver compounds that caused irreversible argyria, a permanent, bluish-black discoloration of the skin and eyes. 9/ The Commission "reject[ed] the notion that a

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9/ We note that the documentary evidence in this case, including Kaiser's own corporate memo, includes skin and nail pigmentation as a toxic effect of PCB exposure.

worker's substantial sacrifice of his or her appearance is anything less than serious." 9 BNA OSHC at 1457, 1981 CCH OSHD at p. 31,246. We find the severity of the harm substantial enough to characterize chloracne as "serious physical harm."

Accordingly, we conclude that the failure to provide any personal protective equipment to protect against employee exposure to PCB is a serious violation of the Act because there is a substantial probability that death or serious physical harm could result from the short- and long-term effects of PCB exposure. 10/ See notes 4-7 and accompanying text, supra, for a general discussion of the evidence on clinical manifestations of PCB exposure. 11/

Judge Usher found that the violation was an other-than-serious violation and assessed a $210 penalty, the same amount that had been proposed by the

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10/ The Secretary requests the Commission to take official notice of the NIOSH publication, Criteria for a Recommended Standard . . . . Occupational Exposure to Polychlorinated Biphenyls (PCBs) (1977), a document evidently not available until after the hearing. The NIOSH document is primarily a compilation of studies and publications, many of which are already part of the record in this case. Because the present record supports the Secretary's characterization, it is unnecessary to take official notice of the document. Accordingly, we decline the Secretary's request.

11/ In Hermitage Concrete Pipe Co., 82 OSAHRC 14/A2, 10 BNA OSHC 1517, 1982 CCH OSHD ¶ 25,975 (No. 4678, 1982), on remand from 584 F.2d 127 (6th Cir. 1978), the Commission addressed the seriousness of a violation involving excessive exposure to a toxic substance. We held that proven exposures at a worksite are presumed to be representative of typical exposures or work conditions in the absence of contrary evidence. The evidence in this case establishes that DeVilbiss received 10 or 12 exposures over a 5 or 6 month period. DeVilbiss also testified that PCB spillage was a regular occurrence when capacitors were moved, exposing not only him but clean-up crews and electricians as well. DeVilbiss stated that as late as January and February of 1977 he observed electricians who worked on the capacitors become contaminated with the same spilled substance. According to DeVilbiss, the electricians he observed in February were wearing "white plastic covered paper suit[s]" that did not prevent the liquid from soaking through. Kaiser stated in its post trial brief that a protective equipment requirement was not adopted at its cited worksite until mid-January, 1977. Accordingly, the evidence establishes continuous employee exposure to a PCB mixture and application of a presumption of representativeness is unnecessary in this case.

Secretary for the alleged serious violation. We conclude that $210 is an appropriate penalty. Accordingly, we characterize the violation as serious with the meaning of section 17(k) and assess a $210 penalty.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: JUL 30 1982

ROWLAND, Chairman, dissenting:

I agree with Judge Usher that the Secretary failed to prove that the violation of section 1910.132(a) was serious. In reaching this conclusion, I do not decide whether the majority's interpretation of section 17(k) of the Act is correct. It is enough to observe that even under the majority view the evidence, particularly the testimony of Dr. Fine, the Secretary's expert witness, does not establish that the exposures received by Kaiser's employee could cause cancer. 12/

First, Dr. Fine's testimony consisted of little more than conclusions he drew from reading the scientific literature on PCB's. Dr. Fine had never conducted any studies on the effects of PCB's or treated any cases of PCB toxicity. Although Dr. Fine briefly referred to one study on Aroclor 1016, which he did not clearly identify, the study was not directed to the toxic effects of Aroclor 1016. Indeed, Dr. Fine testified that he was unaware of any adequate studies of carcinogenesis in animals from Aroclor 1016. With the exception of a brief account in a medical journal of the Mobil study, the record contains none of the literature on any PCB that Dr. Fine relied upon. While this method of introducing

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12/ The Secretary also asks the Commission to take official notice of the NIOSH criteria document for PCB's. See note 10 of the lead opinion. He made the same request of the judge in his post-hearing memorandum. The judge refused to admit the criteria document, noting that the record in the case was closed and the Secretary had not shown good cause for reopening it. The judge was evidently of the view that taking official notice of the criteria document would unduly delay a final adjudication.

Whether to take official notice is a matter within the discretion of the judge. I cannot say that his decision failed to strike the proper balance between the need for a correct decision and the need for finality in litigation, nor does the Secretary claim that the judge abused his discretion. Moreover, many of the numerous studies referred to in the criteria document were in existence before the hearing. The Secretary should have made an effort to determine what information was relevant and introduced it at the hearing rather than waiting until after the hearing to attempt to put in the entire compendium. See Seattle Crescent Co., 79 OSAHRC 91/A2, 7 BNA OSHC 1895, 1898-99, 1979 CCH OSHD ¶ 24,002, p. 29,133 (No. 15242, 1979).

expert opinion may be permissible under Fed. R. Evid. 703, the probative value of Dr. Fine's opinion would have been greater if the literature itself were introduced into evidence or at least described with greater specificity than Dr. Fine described it. In this way, Dr. Fine's conclusions could have been more intelligently evaluated. Cf. Air-Kare Corp., 81 OSAHRC 98/A2, 10 BNA OSHC 1146, 1981 CCH OSHD ¶ 25,758 (No. 77-1133, 1981)(dissenting opinion)(lay opinion testimony).

Second, Dr. Fine's testimony is too indefinite to support the majority's finding. Dr. Fine testified that Aroclor 1016 is similar to Aroclor 1242 and Aroclor 1254, which have been "associated with cancer" in man and animals, because there is a 23% "overlap" between the ingredients of Aroclors 1016 and 1254 and a 88% "overlap" between the ingredients of Aroclors 1016 and 1242. It is apparently for this reason that Dr. Fine concluded that the effects of Aroclor 1016 would be similar to those of the other Aroclors and that exposures such as the ones in this case could cause skin cancer and tumors in fifteen to twenty years. However, Dr. Fine did not testify with any specificity what levels of exposure to Aroclors 1242 and 1254 had resulted in the contraction of cancer. The only study involving employee exposure relied on and identified by Dr. Fine stated that "Aroclor 1254 was used . . . during a nine year period," and that workers were "believed to have been heavily exposed to" it. 295 New England J. Med. 450 (1976). The record evidence, particularly Dr. Fine's testimony, does not afford a basis to compare the exposures in this case with the exposures relied on by Dr. Fine.

Similarly, Dr. Fine's testimony that the exposures received by Kaiser's employees could be compared to exposures in some of the other studies he researched is unconvincing. Dr. Fine noted that 0.5 to 2 cc was equivalent to 0.5 to 2 grams, which he characterized as a "minimum toxic dose" on the basis of a

Japanese study. However, the substance in the Japanese study was evidently not Aroclor 1016. See note 8 supra. In addition, Dr. Fine did not define the term "minimum toxic dose." Assuming as the majority does that the term "minimum toxic dose" may be equated with "toxic dose low," the record still does not show that this dose could have caused serious physical harm. The term "toxic dose low" is defined as "the lowest dose of a substance . . . over any period of time . . . reported to produce any toxic effect." National Institute of Occupational Safety and Health, 1978 Registry of Toxic Effects of Chemical Substances xxiii (1979)(emphasis added). Toxic effect is defined as "any reversible or irreversible noxious effect on the body." Id. at xxii. Thus, even if DeVilbiss received the "toxic dose low," there is no way to know whether his exposure could have resulted in serious physical harm. In addition, there is no indication that cancer was the toxic effect suffered in the Japanese exposures. Furthermore, those exposures to PCB were caused by rice oil that was contaminated with PCB's and ingested over a period of months. By contrast, although an unspecified quantity of Aroclor 1016 entered DeVilbiss' mouth on one occasion, there is no evidence of the amount of PCB that he might have swallowed or otherwise ingested. The long-term ingestion noted in the Japanese study is clearly not equivalent to the ingestion, if any, by DeVilbiss. Accordingly, it would be difficult to reach any conclusion as to the effect of exposure to Aroclor 1016 from such data.

Dr. Fine's recommendation of a zero exposure limit for skin exposure is also lacking in probative value. The recommendation was based more on the ease with which nonporous personal protective equipment can be used than on the toxicity of PCB's. Dr. Fine stated, "I would think zero exposure should be the recommendation [for skin exposure], since personal protective equipment can always be used to reach that objective."

In view of these facts and the Secretary's failure to elicit from Dr. Fine testimony that fully explains the significance of the similarities among PCB's or that compares the exposures received in this case with exposures that resulted in the contraction of cancer, I must agree with the judge that Dr. Fine "did not testify with any specificity concerning what level of exposure to Aroclor 1016 . . . might have a carcinogenic effect upon humans" and that he did not state "an informed opinion." Accordingly, I conclude that the evidence does not support the conclusion that the exposures received by Kaiser's employee could cause cancer.

The majority's conclusion with respect to chloracne is similarly unsupported. Dr. Fine's testimony as to chloracne was very limited. He stated, without explanation, that chloracne is a painful and "very serious form of skin eruption," that "looks like teenage acne." Dr. Fine never explained what he meant by the conclusory term "very serious" nor did he testify as to the degree of pain experienced during this sort of skin eruption. On the whole, Dr. Fine did not describe chloracne with sufficient specificity to enable the Commission to make an informed judgment on the severity of chloracne. In sum, the record fails to show that chloracne causes the sort of discomfort or deprivation of bodily function contemplated by section 17(k). See GAF Corp., 81 OSAHRC 29/A2, 9 BNA OSHC 1451, 1459, 1981 CCH OSHD ¶ 25,281, p. 31,248 (No. 77-1811, 1981)(dissenting opinion), appeal withdrawn, No. 81-4091 (2d Cir. September 3, 1981).

Accordingly, I conclude that Kaiser's failure to comply with 29 C.F.R. § 1910.132(a) was not shown to be serious within the meaning of section 17(k). I also conclude that the judge's penalty assessment of $210 was correct, and I note that Kaiser does not except to this assessment. Judge Usher's decision should therefore be affirmed.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR | : | |
| Complainant | : | |
| v. | : | OSHRC DOCKET NO. 77-699 |
| KAISER ALUMINUM AND CHEMICAL CORPORATION | : | |
| Respondent | : | |
| UNITED STEELWORKERS OF AMERICA: LOCAL 5668 | | |
| Authorized Employee Representative | : | |

## DECISION AND ORDER

Appearances:

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Office of the Regional Solicitor
U.S. Department of Labor
Philadelphia, Pennsylvania
for Complainant

Stephen H. Booth, Esq.
Labor Counsel
Kaiser Aluminum and Chemical Corporation
Oakland, California
for Respondent

Mr. A. L. King
Mr. Harold E. Rose
Middleport, Ohio
for Local Union

USHER, Judge:

These proceedings, initiated by the Secretary of Labor, United States Department of Labor, pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, et seq. ("the Act"), involve a January 28, 1977, Citation charging a "serious" violation of Section 5(a)(2) of the Act because of Respondent's alleged failure to comply with the

requirements of the safety standard promulgated by Complainant and codified at 29 CFR 1910.132(a). Complainant seeks affirmance of that Citation, which resulted from an inspection of Respondent's Ravenswood, West Virginia, plant in January 1977, and seeks the assessment of a $210 penalty.

Respondent's Notice of Contest placed the alleged violation in issue; a Complaint and Answer followed in conformance with the Commission's Rules of Procedure; and the issues were tried before me at Charleston, West Virginia on August 8 and 9 and October 18, 1977. Employee representatives appeared, elected party status, and participated fully.

The parties entered stipulations concerning Respondent's corporate status, its engagement in interstate commerce, and the jurisdiction of this Commission. Goods processed at the work site, valued in excess of $100,000, are shipped on an interstate basis, and approximately 3,200 persons are employed there.

Complainant and Respondent have submitted post-trial briefs. The Union has not.

The Issues.

The pleadings, evidence adduced by the parties, arguments of counsel, and post-trial briefs have served to raise the following basic issues:

1. Whether Respondent committed the violation alleged by Complainant;

2. If Respondent violated the Act, as charged, whether that violation is properly characterized as a "serious" violation, as defined in Section 17 of the Act; and

3. If Respondent violated the Act, what penalty, if any, should be assessed.

The Ancillary Issues.

In its brief, filed subsequent to the trial of the issues, Respondent raised several ancillary issues, viz.:

1. Whether the cited standard is "unenforceably vague";

2. Whether the Citation was issued "with reasonable promptness" as required by Section 9(a) of the Act;

3. Whether the Citation is defective because of its issuance more than six months after the alleged violation occurred (Section 9(c) of the Act);

4. Whether Complainant can amend the Citation "to add shoe coverings to the list of personal protective equipment specified in the Citation";

5. Whether an alleged violation, which was not observed by Complainant's agent, can be charged in view of the provisions of Complainant's Field Operations Manual, Chapter X, subparagraph D(1).

Discussion.

The cited safety standard (29 CFR 1910.132(a)) is not "unenforceably vague." See McLean Trucking Company v. OSHRC, et al., 503 F.2d 8 (4th Cir. 1974).

The Citation, issued initially on January 28, 1977, refers on its face to a violation discovered during the period January 6 to January 27, 1977. That Citation was amended on February 14, 1977, as follows:

The violations [sic] described in this citation are [sic] alleged to have occurred on or about October 17, 1976.[1/]

Respondent contends in its Answer that the Citation "was issued in violation of Section 9(c) of the Act." Section 9 of the Act provides, in pertinent part:

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1/ On July 29, 1977, 10 days prior to the commencement of the trial, Complainant moved to amend his Citation and complaint (for the second time) to charge:

> On or about October 17, 1976, and on several other occasions between October 17, 1976 and January 12, 1977, Respondent was in serious violation of 29 U.S.C. §654(a)(2) and 29 CFR 1910.134(a) [sic] at its Ravenswood, West Virginia plant in that protective equipment, such as impervious gloves, impervious aprons, goggles, and respirators was not utilized and maintained in sanitary and reliable condition where it was necessary [by] reason of employee exposure to PCB-type oil (askarel) in the basement area, at control panels for induction furnaces, during replacement and cleanings of certain ruptured capacitors.

The motion was granted only insofar as it amended the Citation to charge a violation "on or about October 17, 1976 and on or about January 12, 1977." The motion to amend the Citation to charge a violation (or violations) "on several other occasions between October 17, 1976 and January 12, 1977" was denied.

See Transcript, pp. 314, 315.

> Sec. 9. (a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of section 5 of this Act, of any standard, rule or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, he shall with reasonable promptness issue a citation to the employer....
>
> * * *
>
> (c) No citation may be issued under this section after the expiration of six months following the occurrence of any violation.

The Citation, dated January 28, 1977, (as amended) charges a violation which is alleged to have occurred on either October 17, 1976, or January 12, 1977 (or on both dates). Six months did not elapse between the earlier of the two alleged violation dates and the issuance date. The July 29, 1977, amendment relates back to the date of the issuance of the Citation, and Respondent has demonstrated no prejudice resulting from the amendment. Rule 15(c), Federal Rules of Civil Procedure, governs. See Southern Colorado Prestress Co. v. OSHRC, et al., ____ F.2d ____, 6 BNA OSHC 2032, CCH OSHD para. 23,247, (10 Cir., November 6, 1978). Thus, the Section 9(c) issue has not been properly raised.

The Commission has frequently addressed the "reasonable promptness," requirement of Section 9(a) of the Act. It is now settled that that defense is an affirmative one; it must be raised by Respondent, and its elements must be proved by Respondent. Lack of "promptness" in its issuance will support the avoidance of a Citation only if the delay was "so unreasonable as to be unconscionable," or if Respondent "was prejudiced as a result of the delay" Secretary of Labor v. Par Construction Co., Inc., OSHRC Docket No. 11092, CCH OSHD para. 21,216 (and cases cited therein). Respondent has attempted to prove neither of these facts; thus its asserted defense must fall.

Complainant's "motion to amend the citation to conform to the evidence and add shoe coverings to the list of personal protective equipment that has been set forth on the Citation, as amended" (Tr. p. 538) is well founded in fact, and it is granted.

Respondent has moved for dismissal of the Complaint and vacation of the Citation because "it was issued in violation of the [Complainant's] Field Operations Manual [which requires that] 'working conditions that allegedly violate [the Act]...shall be cited only when observed by a CSHO during an inspection.'" The record discloses that the Compliance Safety and Health

Officer ("CSHO") did not, in this instance, observe the alleged violation as described by employee witnesses at the trial. Nevertheless, Respondent's point is not well taken. See Secretary of Labor v. H-30, Inc., OSHRC Docket No. 76-752, CCH OSHD para. 22,050, and cases cited therein. If the violation alleged by Complainant is proved by credible and substantial evidence, it matters not whether the CSHO actually observed the conditions which are alleged to have been violative of the Act. "Noncompliance with instructions in the manual is therefore not a basis for invalidating a citation." H-30, Inc., supra.[2/]

The Alleged Violation.

The alleged violation concerns Section 5(a)(2) of the Act and the safety standard promulgated by Complainant and codified at 29 CFR 1910.132(a) which requires:

> Protective equipment, including personal protective equipment for eyes, face, head and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

Complainant has charged that

> [p]rotective equipment was not used and maintained in a sanitary and reliable condition where it was necessary by reason of hazards encountered in a manner capable of causing injury or impairment in the function of any part of the body:
>
> (a) basement area, at control panels for induction furnaces, where employees were exposed to PCB-type oil (Askarel) during replacement and clean-up of certain ruptured capacitors.

Capacitors[3/] containing "Aroclor 1016," a PCB-type[4/] oil, are located in the casting department building at the basement level below the induction furnaces. These capacitors fail from time to time and the failure frequently

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2/ The Field Operations Manual has since been reworded (in August 1978) to eliminate the apparent dilemma faced by Compliance Safety and Health Officers who are informed of violations which they do not actually observe.

3/ Devices, about 18 inches by 5 inches by 24 to 30 inches consisting of conducting plates separated by insulating material, used for the storage of electrical charge.

4/ Polychlorinated Biphenyls

involves a rupture of the steel casing and the spilling of its contents. Deactivation of the circuits, physical removal of the damaged capacitors, and their replacement are the assigned job duties of electricians. Maintenance employees later clean the area of the spilled material. The capacitors weigh approximately 100 pounds, and two employees working together lift them from the cabinets in which they rest while in operation. No mechanical devices of any kind are provided for their removal. They have to be "manhandled." Depending upon the location of the capacitor to be removed (higher or lower in the cabinet) it may have to be "tilted forward...which causes the oil inside...to pour out...[and to] run down [the] arms and the rest of [the] body" of the employee.[5/] Asked if the contents of the capacitors come in contact with the employee as he removes it, Complainant's witness, Charles De Vilbiss, replied, "That was usually the case."

Mr. De Vilbiss has been removing and replacing capacitors since he began his employment at Respondent's Ravenswood plant on July 27, 1976, and from that time until October of that year he removed an estimated five or six. From about the middle of October 1976, and for the next four weeks he removed another five or six. During that period Respondent did not furnish him with impervious gloves, aprons, or other such clothing or equipment. He was not required to wear goggles or other eye protection.[6/] Admittedly, Respondent did not adopt "a protective equipment requirement...at Ravenswood...for employees who were working with failed capacitors...until January 13, 1977" (post-trial brief, pp. 3, 4). Beginning in about mid-October of 1976, Mr. De Vilbiss inquired of his foreman on an almost daily basis regarding the need for such protective equipment. Specifically, he asked his foreman to "look into" the possibility of a health hazard resulting from his physical contact with the polychlorinated biphenyls substance.

On October 17, 1976, according to the testimony, Mr. De Vilbiss and another electrician removed five capacitors, as instructed, and the PCB liquid spilled on his shirt and pants.[7/] His "shirt was saturated with it" and it

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5/ Tr. p. 325, 327.

6/ Tr. p. 328.

7/ On direct examination the witness referred to "a quart of oil...possibly [being] doused down"; on cross-examination he estimated that 4 to 8 ounces of the oil were spilled on October 17, 1976.

soaked through the clothing onto his skin. He also got some in [his] mouth...[and] rinsed [it] out." Two days later, on "about the 19th [of October, 1976]," Mr. De Vilbiss witnessed the clean-up employees cleaning the spilled fluid from the floor. They were not wearing protective gloves or other such clothing.

Summary and Evaluation of the Evidence.

The record fully substantiates Complainant's allegation that Respondent's employees' duties necessitated their having body contact with a fluid containing a compound which is generally known as a polychlorinated biphenyl (PCB).[8/] The evidence likewise supports the allegation (as admitted by Respondent) that personal protective equipment to prevent body contact with the fluid was not provided, used, and maintained by Respondent at its Ravenswood plant at the time of the alleged violation. Its use was first required on or about January 13, 1977.

Respondent argues correctly that Complainant must prove employee exposure to a "substance [which is] chemically hazardous" and must prove further that the exposure was "in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact," citing Secretary of Labor v. Imco Container Company, OSHRC Docket No. 79, 1 BNA OSHC 1266. In Imco the Commission vacated the citation because Complainant failed to prove "a crucial fact [viz.] prolonged or repeated exposure." The allegedly offending substance in that case, "Stoddard solvent," was adjudged to be not a "skin irritant," but one with which only "frequent or prolonged contact" was to be avoided.

The offending chemical being considered here is a part of the chemical family known as polychlorinated biphenyls (PCBs), and there are differing views concerning what, if any, exposure to that agent is safe. The manufacturer, Monsanto Company, has advised in its bulletin (Exhibit R-A) that "prolonged contact" with the skin "may lead to drying and chapping of the skin...[but] no serious skin irritation will occur as the result...if [it is accidentally spilled on the hands]." (Emphasis added.) In the same vein, Monsanto's bulletin advises, "Prolonged or repeated skin contact...must be avoided by the use of gloves and protective garments."

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8/ Also known as "Askarel" and marketed under the trade name "Aroclor 1016."

The U.S. Congress has recognized at least the potentially dangerous characteristics of PCBs by providing for the control of its manufacture, use, and disposal.[9/]

The testimony of Lawrence J. Fine, M.D., was most enlightening and convincing. Doctor Fine, a Board-certified internist, is Assistant Professor of Occupational Medicine at the School of Public Health, Harvard University. He is also Board certified in occupational medicine. See Exhibit C-J.

The doctor stated that he conducted research in public literature concerning polychlorinated biphenyls and concluded, "...there are toxic affects, both described on animals and in studies of workers who have been exposed to PCBs." In terms of worker exposures, he said, "there is one reported association of cancer of the pancreas and malignant melanoma." With regard to skin affects, "...chloracne is the toxic skin affect, [and]...there's a description [in the literature he reviewed] of upper respiratory tract and mucous membrane irritation, burning, stinging of the eyes, et cetera." The dire consequences of cancer inducement, he admitted, resulted from exposure to "Aroclor 1254." Respondent's employees were exposed to "Aroclor 1016," a different formulation of PCB, the difference being the number or amount of chlorine atoms in the basic biphenyl molecule. His study of the published materials which have been made available to him has led to his conclusion: "'Aroclor 1016' is a cancer-suspect agent." He stated his reasons for that conclusion in some detail (Tr. p. 420).

Doctor Fine explained that should cancer be the result of exposure to PCBs, it would not be apparent immediately. The "latency period" may be 15 to 30 years.

Having heard the testimony of the employee witness, Doctor Fine regarded the vaguely-described redness of the skin as "the earliest sign of skin toxicity to PCBs...[t]he next stage would be chloracne...a skin disease that has been recognized...for several decades in workers who are exposed to PCBs and other chemicals like them...a very serious form of skin eruption...known to persist for at least several months after exposure to PCBs...painful."

In the doctor's judgment, "...zero exposure [to PCBs]...for the cutaneous route" should be the recommendation. He advised the use of

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9/ Toxic Substances Control Act, 15 U.S.C. 2601; Public Law 94-469, October 11, 1976.

"non-porous personal protective equipment" to avoid skin contact with substances containing PCBs.

Respondent argues that Complainant has failed to show that a reasonable man would have recognized the existence of a hazard in the incident occurring on or about October 17, 1976, citing Secretary of Labor v. Tobin Packing Co., Inc., OSHRC Docket No. 15858, 5 BNA OSHC 1685; Secretary of Labor v. Process Engineering, Inc., OSHRC Docket Nos. 12097 and 12098, 4 BNA OSHC 1771; and Cape and Vineyard Division, etc. v. OSHRC, 512 F.2d 1148 (1st Cir. 1975). The "reasonable man" test has been applied not only by the Review Commission, but also by the Courts of Appeals, in determining when, and to what extent, compliance with this standard's requirements is mandated by the surrounding circumstances. See McLean Trucking Co. v. OSHRC, et al., supra, and Ryder Truck Lines, Inc. v. Brennan, 497 F.2d 230 (5th Cir. 1974).

As in McLean, "...the totality of the foregoing elements was sufficient to convey to [this Respondent] a reasonable understanding of the conduct required of it by 29 CFR 1910.132 [Citation omitted]" (503 F.2d at page 10). The host of informational sources which led Doctor Fine to conclude that protective equipment should be utilized when handling PCBs was equally available to Respondent, and it was available well before October 1976. More specifically, Mr. Robert Kasberger, the industrial hygienist and environmentalist at Respondent's Ravenswood facility (and seemingly the "head" of the "Ravenswood Environmental Control Group"), was specifically alerted to the potentially harmful effects of exposure to PCBs by the Service Sales Engineer, General Electric Company, in a letter dated June 12, 1975. (Complainant's Exhibit H.) Furthermore, Respondent itself issued an advisory bulletin from its corporate headquarters, dated April 30, 1976, regarding the "purchase, handling, use and disposal of...PCBs—Polychlorinated Biphenyls." It was recommended in that bulletin, among other things, "[s]tandard precautions are required—eye protection, non-porous gloves and aprons"—in the handling of PCBs. (Complainant's Exhibit F.) Thus, the totality of the circumstances was sufficient to convey to Respondent's supervisory personnel (at the Ravenswood facility) a reasonable understanding of what was required by the cited standard. Nevertheless, "a protective equipment requirement was not

adopted [there] for employees who were working with failed capacitors [leaking PCBs]...until January 13, 1977...because, in the judgment of the person responsible for implementing such a requirement, Robert Kasberger...the exposure of the persons working with the failed capacitors was not that great" (Respondent's post-trial brief, pages 3, 4).[10/]

It is abundantly clear that Mr. Kasberger's assessment of the cited conditions was erroneous, and his judgment was faulty. The exposure of persons working with the erupted capacitors was sufficient to warrant the required use of protective equipment, including personal protective clothing and equipment for eyes, face, head, body and extremities. The hazard to the exposed employees was capable of causing injury or impairment of bodily function.

Characterization of the Violation; Serious or Other-Than-Serious.

It has long been established that Complainant bears the burden of proving, by a preponderance of the evidence, all necessary elements of the asserted violation. National Realty and Construction Co., Inc. v. OSHRC, et al., 489 F.2d 1257 (D.C. Cir. 1973).

Complainant relies primarily on the testimony of Doctor Fine to prove not only the violation but its seriousness. Doctor Fine characterized PCBs (generally) as suspected cancer-inducing agents; he "believes that [Aroclor] 1016 is a suspected carcinogen;" and he explained that "Aroclor 1260 and Aroclor 1254 have been found to cause cancer in animals." He stated, too, that Aroclor 1254 "has been associated with...cancer inducement" in humans, and Aroclor 1016 "is similar [to] Aroclor 1260 and Aroclor 1254." Significantly, however, the doctor did not testify with any specificity concerning what level of exposure to Aroclor 1016 would, or even might, have a carcinogenic effect upon humans, although he warned that cutaneous exposure to that substance (indeed, all PCBs) should be avoided completely: "...one wants to avoid all exposure to 1016, so if we're talking about exposure through the skin, cutaneous route, then I would recommend the use of personal protective equipment, non-porous personal equipment." The doctor testified about the "Mobile Oil study," but Respondent's Exhibit C indicates that the exposure of employees of Mobile Oil Corporation, who are

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10/ See also Tr. pp. 401-412.

suspected of ha[illegible] contracted cancer as the result o[illegible]rking with PCBs, is unknown. According to a report in The New England Journal of Medicine in 1976 (Respondent's Exhibit E) the studied workers at Mobile were "believed to have been heavily exposed to Aroclor 1254."[11/]

The evidence adduced substantiates the conclusion that Respondent's employee (De Vilbiss) was exposed to Aroclor 1016 on or about October 17, 1976. Between July 27 and October 17, 1976, he may have had such exposure "five or six times" (Tr. pp. 327, 328). During the month following that he may have been exposed to Aroclor 1016 "maybe another half a dozen...a minimum of five or six times." On one occasion about a quart ("no more than a quart") spilled from the ruptured capacitor, but "sometimes...there's not more than a tablespoon or so" (Tr. pp. 335, 336).[12/]

The employee witness saw certain unnamed employees, members of the "cleanup crew," cleaning the spilled fluid from the floor. He did not say, however, that they experienced any skin contact with the offending material.

Complainant's expert witness did not state an informed opinion[13/] on the question before me, viz., whether "there is a substantial probability that death or serious physical harm could result from [the exposure of Respondent's employees to Aroclor 1016 on 10 or 12 occasions during a five or six month period]."[14/] There is no other evidence in the record to support

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11/ General Electric Company advises against only "continued exposure" (Complainant's Exhibit H). Monsanto Industrial Chemicals Company (the manufacturer of Askarel or Aroclor) cautions against "prolonged or repeated [or] excessive skin contact" (Respondent's Exhibit A).

12/ There was another electrician working with Mr. De Vilbiss on October 17, 1976, and seemingly he too had Aroclor 1016 spilled on him (Tr. pp. 333, 334), but the extent of his exposure (amount of oil or number of times) was not explored.

13/ Indeed, it appears from the record that medical science is not yet well enough informed on the subject to allow such a judgment. Years hence, perhaps the doctor's opinion might be different (and this decision may be too! ).

14/ Section 17(k) of the Act:

> (k) For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

such a conclusion. See Secretary of Labor v. Hermitage Concrete Pipe Company, et al., 584 F.2d 127 (6th Cir. 1978).

## FINDINGS OF FACT

A preponderance of the probative evidence of record, taken in its entirety, compels the following findings of fact:

1. Respondent, Kaiser Aluminum and Chemical Corporation, is a corporation which exists by virtue of the laws of the State of Delaware.

2. Respondent employs employees in a business which uses materials and equipment from extra-State sources, and it ships its products in interstate commerce.

3. On October 17, 1976, and on January 12, 1977, Respondent maintained a place of business at Ravenswood, West Virginia, where it employed in excess of 3,000 employees and produced goods valued at $100,000 or more.

4. On or about October 17, 1976, one or more of Respondent's employees at the above-described work site was exposed to the occupational hazard described in Complainant's Citation, dated January 28, 1977.

5. On or about January 12, 1977, Respondent's employees were not exposed to the occupational hazard described in Complainant's Citation, dated January 28, 1977.

6. The exposure of Respondent's employee or employees to the occupational hazard described in Finding of Fact numbered 4 was not such that it posed a substantial probability that death or serious physical harm could result therefrom.

## CONCLUSIONS OF LAW

1. Jurisdiction of the parties and of the subject matter herein is conferred upon the Occupational Safety and Health Review Commission by Section 10(c) of the Act.

2. At all times relevant hereto, Respondent was an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Act, and as such it was subject to the requirements of Section 5(a)(2) of the Act and of the safety and health standard promulgated by Complainant and codified at 29 CFR 1910.132(a).

3. The safety and health standard codified at 29 CFR 1910.132(a) is not unenforceably vague as applied to the facts involved here.

4. Complainant's Citation was timely issued, as required by Sections 9(a) and 9(c) of the Act.

5. Complainant's Citation is not defective by reason of the fact that his agent did not observe the cited violation.

6. Respondent did not violate the provisions of Section 5(a)(2) of the Act on January 12, 1977, by failing to comply with the requirements of the safety and health standard codified at 29 CFR 1910.132(a), as charged by Complainant in the Citation dated January 28, 1977, and as more fully described hereinabove.

7. Respondent did violate the provisions of Section 5(a)(2) of the Act on October 17, 1976, by its failure to comply with the requirements of the safety and health standard codified at 29 CFR 1910.132(a), as charged by Complainant in the Citation dated January 28, 1977, and as more fully described hereinabove.

8. The violation described in Conclusion of Law numbered 7 was "other-than-serious" in nature.

9. Considering the size of Respondent's business, the gravity of the violation, its good faith, and the history of its previous violations, a penalty of $210, as proposed by Complainant, is appropriate.

## ORDER

Upon consideration of the aforegoing findings and conclusions, it is hereby ORDERED that the Citation issued to Respondent by Complainant on January 28, 1977, (and amended on February 14, 1977, and as further amended on July 29, 1977) is AFFIRMED as to the violation on October 17, 1976, (an "other-than-serious" violation), and VACATED as to the alleged violation on January 12, 1977; and a penalty of $210 is ASSESSED.

BENJAMIN G. USHER
Judge, OSHRC

Dated: March 29, 1979
Hyattsville, Maryland

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

JUL 30 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Consolidated Rail Corp.

OSHRC DOCKET NO. 78-238

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

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FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 78-238 |
| CONSOLIDATED RAIL CORPORATION, | : | |
| Respondent. | : | |
| | : | |

DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

In this case, Administrative Law Judge Foster Furcolo held that Respondent, Consolidated Rail Corporation ("Conrail"), violated section 5(a)(1)[1/] of the Act by allowing its employees to ground overhead railway high voltage electrical wires without first pretesting the wires to assure they were deenergized. Judge Furcolo also held that Conrail violated 29 C.F.R. § 1910.132(a).[2/] We affirm Judge Furcolo's decision.

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1/ This case arose under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1), provides:

> Sec. 5.(a) Each employer — (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

2/ 29 C.F.R. § 1910.132(a) provides, in pertinent part,

> Protective equipment, including personal protective equipment for . . . extremities, . . . shall be pro-

(continued on next page)

I

Pursuant to an employee complaint, a compliance officer of the Occupational Safety and Health Administration ("OSHA") inspected Conrail's electrical facilities in Stamford, Connecticut, in November and December, 1977. During his inspection, the compliance officer observed Conrail workers preparing to perform work on 11,000-volt overhead wires. The employees grounded the wires by attaching long wooden poles called "ground sticks" or "shepherd sticks." The employees did not pretest the wires before attaching the ground sticks to see if the wires were still live. The compliance officer feared that grounding the wires without pretesting would expose Conrail employees to burns or electrocution. Therefore, the Secretary cited Conrail for violating section 5(a)(1) of the Act.

The compliance officer also observed that, when the employees attached the ground sticks to the wires, the employees were not wearing protective gloves and that several of the wooden poles in use were worn, in general disrepair, and had shredded insulation. The compliance officer believed this equipment was inadequate for the tasks required. Therefore, the Secretary cited Conrail for violating section 1910.132(a).

II

Before Judge Furcolo, Conrail argued against the two alleged violations on their merits but Conrail also moved to dismiss the citation,

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2/ (continued)

> vided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment . . . encountered in a manner capable of causing injury or impairment. . . .

claiming that OSHA did not have "jurisdiction of the subject matter" of the citation. First, Conrail claimed that OSHA's own electrical standards precluded OSHA jurisdiction. It referred to 29 C.F.R. § 1910.308 (c)(2)(iii),[3/] which states that the OSHA electrical standards will not apply to,

> Installations of railways for generation, transformation, transmission, or distribution of power used exclusively for operation of rolling stock or installations used exclusively for signalling and communication purposes.

Conrail also claimed that a March 14, 1978 policy statement[4/] of the Federal Railway Administration ("FRA") precluded OSHA jurisdiction under section 4(b)(1) of the Act.[5/] In the policy statement, the FRA attempted to delineate the respective jurisdictions of the FRA and OSHA. The policy statement indicates that while OSHA standards apply to working conditions in the railroad industry that are similar to those of any industrial workplace, the FRA regulates health and safety matters directly related to railroad operations, and therefore FRA regulations preclude the applicability of OSHA standards to subjects such as railroad track, roadbed, and associated devices and structures.[6/]

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3/ Since the inspection and citation in this case, the Secretary has promulgated new electrical standards, 29 C.F.R. §§ 1910.301 - 1910.308. See 46 Fed. Reg. 4056 (1981). The exemption to which Conrail referred, formerly 29 C.F.R. § 1910.308(c)(2)(iii), is now found at 29 C.F.R. § 1910.302(a)(2)(iii). In this decision, we will use the old designation.

4/ See 43 Fed. Reg. 10583-10590 (1978).

5/ Section 4(b)(1), 29 U.S.C. § 653(b)(1), provides in pertinent part,

> Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

6/ 43 Fed. Reg. at 10585.

The Secretary argued that neither the language of the electrical standards nor the March 14, 1978 FRA policy statement precluded OSHA authority over the alleged hazards. The Secretary argued that the exclusion at section 1910.308(c)(2)(iii) applies only to specific citations under the OSHA electrical standards. Because Conrail was cited for a section 5(a)(1) violation, the exclusion did not apply. In addition, the section 5(a)(1) citation was proper, according to the Secretary, because there was no specific standard in the OSHA electrical standards for which Conrail could be cited. The Secretary also argued that the FRA policy statement is not a standard or regulation under section 4(b)(1) of the Act, contending that the policy statement is only a general statement of the future intent of the FRA and does not preclude OSHA authority.

III

Judge Furcolo found that neither basis put forward by Conrail precluded the Secretary's authority. The judge stated that section 1910.308(c)(2)(iii) did not apply because,

> In my view, the Respondent's employees were not 'installing' equipment but were maintaining or repairing or operating existing facilities.

Judge Furcolo also noted that the inspection of the Conrail facilities occurred before the March 14, 1978 FRA policy statement. Therefore, the policy statement had no effect on this case. Judge Furcolo went on to conclude that Conrail violated sections 5(a)(1) and 1910.132(a) as alleged.

Conrail petitioned the Commission for review. Commissioner Cottine directed review on all issues raised by the petition including the following questions:

(1) Whether the administrative law judge erred in finding that the Federal Railroad Administration had not exercised its statutory authority to prescribe standards affecting occupational safety and health within the meaning of § 4(b)(1) of the Act, 29 U.S.C. § 653(b)(1), by its policy statement of March 14, 1978, 43 Fed. Reg. 10584.

(2) If the policy statement constitutes an exercise of statutory authority by the Federal Railroad Administration, whether the particular working condition involved in this case is covered by the policy statement.

(3) Whether the administrative law judge erred in finding that the Respondent failed to comply with the occupational safety standard published at 29 C.F.R. § 1910.132(a), and with § 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1).

In its petition, Conrail also reiterated its contention that OSHA jurisdiction was precluded by the language of 29 C.F.R. § 1910.308(c)(2)(iii). On review, the parties make essentially the same arguments they made to the judge.

IV

We agree with Judge Furcolo's conclusion that the policy statement did not preclude OSHA's authority to issue the citation in this case. The inspection was performed and citation was issued several months before the publication of the policy statement. The only FRA action in effect at the time these activities occurred was a notice of proposed rulemaking.[7/] The Commission has held that a notice of proposed rulemaking is not a sufficient exercise of authority under section 4(b)(1)

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7/ See 41 Fed. Reg. 29153 (1976).

to preempt OSHA authority.[8/] Seaboard Coast Line Railroad Co., 75 OSAHRC 11/E14, 3 BNA OSHC 1767, 1975-76 CCH OSHD ¶ 20,185 (No. 11904, 1975), appeal dismissed, 548 F.2d 1052 (D.C. Cir. 1976).

We also agree with Judge Furcolo's conclusion that section 1910.308(c)(2)(iii) did not preclude the Secretary from issuing the citation, but for different reasons than those given by the judge. Under section 6(a) of the Act, 29 U.S.C. § 655(a), the Secretary was authorized to adopt as occupational safety and health standards established federal standards and national consensus standards. S.Rep. No. 1282, 91st Cong. 2d Sess. 6 (1970), reprinted in Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970, at 146 (1971). The two major sources of national consensus standards were the American National Standards Institute and the National Fire Protection Association ("NFPA").

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8/ The Commission has held that the FRA policy statement preempts OSHA authority over those working conditions in the railroad industry that the FRA states fall within its exclusive jurisdiction. Consolidated Rail Corp., 82 OSAHRC , 10 BNA OSHC 1577, 1982 CCH OSHD ¶ 26,044 (No. 79-1277, 1982), appeal filed, No. 82-3302 (3rd Cir. June 28, 1982). However, in Consolidated Rail Corp., both the citation and the inspection occurred after the effective date of the FRA policy statement. See also Consolidated Rail Corp., 82 OSAHRC , 10 BNA OSHC 1564, 1982 CCH OSHD ¶ 26,046 (No. 78-1504, 1982), appeals filed, Nos. 82-3301 & 82-3305 (3rd Cir. June 28, 1982) (the Secretary lacked authority to issue the citation because the FRA policy statement, which indicated that the FRA had exercised exclusive jurisdiction over the working conditions, became effective before the Secretary issued the citation). In this case, the inspection took place and the citation was issued before the policy statement took effect.

Commissioner Cottine notes that, in his view, the FRA policy statement is not a standard or regulation within the meaning of § 4(b)(1) of the Act and therefore cannot under any circumstances operate to preempt the applicability of OSHA standards to railroad operations. See Consolidated Rail Corp., 81 OSAHRC 8/A2, 9 BNA OSHC 1258, 1981 CCH OSHD ¶ 25,172 (Nos. 78-3100 et al, 1981), appeal filed, No. 81-1210 (1st Cir. Apr. 2, 1981), transferred, No. 81-4192 (2d Cir. Oct. 2, 1981) (OSHRC Docket No. 78-3100) & No. 81-2639 (3d Cir. Oct. 2, 1981) (OSHRC Docket No. 78-4881); see also Consolidated Rail Corp., supra (No. 79-1277) (Cottine, Commissioner, dissenting in part and concurring in part).

Id. Promulgation of additional standards, as well as modification of existing standards, was to be achieved through the rulemaking procedures set forth in section 6(b) of the Act, 29 U.S.C. § 655(b).

Pursuant to section 6(a) authority, the Secretary adopted various national consensus and established federal standards in 29 C.F.R. Part 1910, including the Subpart S electrical standards. 36 Fed.Reg. 10466 (1971). The principal source of the electrical standards was the 1968 National Electrical Code ("NEC" or "Code"). Acting under the two-year authority of section 6(a), the Secretary amended the electrical standards by adopting significant portions of the revised 1971 Code. 37 Fed.Reg. 3431 (1972).

Section 1910.308(a) of the OSHA electrical standards, prior to further amendment on January 16, 1981, see note 3 supra, stated:

> Section 1910.309 adopts as a national consensus standard the National Electrical Code NFPA 70-1971; ANSI C1-1971 (Rev. of C1-1968), which is incorporated by reference in this subpart.

The NEC and the OSHA electrical standards that adopted its provisions were designed to cover electrical installations and utilization equipment installed or used within buildings or other designated premises. 29 C.F.R. § 1910.308(c)(1); NEC § 90-2(a). Section 1910.308(b) stated that the Code's purpose was:

> the practical safeguarding of any persons and of buildings and their contents from hazards arising from the use of electricity for light, heat, power, radio, signaling, and for other purposes.

The NEC § 90-2(b) also specifically excluded certain electrical installations from the scope of the Code, including:

> [i]nstallations of railways for generation, transformation, transmission or distribution of power used exclusively for operation of rolling stock or installations used exclusively for signaling and communication purposes.

NEC § 90-2(b)(3). Section 1910.308(c)(2) of the OSHA standards incorporated verbatim the NEC exclusions. The exclusion was preserved in the new electrical standards. See note 3 supra.

There is no question in this case that the overhead wire which was being grounded by Conrail's employees was used to power the railroad. Therefore, by the terms of the electrical standards, OSHA could not apply the standards in sections 1910.308 and 1910.309 to this electrical installation. However, the OSHA exclusions do not represent a determination by the Secretary that the designated electrical installations should not be regulated at all under the Act. Rather, the exclusions are a recognition that the incorporated national consensus standards were not designed to cover the designated installations.[9/] Thus, the exclusions apply only to the standards contained within the subpart.[10/]

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9/ In the preamble to the adoption of the revised electrical standards, 46 Fed. Reg. 4034 (1981), the Secretary specifically discussed one of the exclusions, the utility exclusion, formerly set forth at § 1910.308 (c)(2)(v) and recodified at § 1910.302(a)(2)(v). The Secretary stated:

> As stated by witnesses at the hearing, the scope provision of the standard does not grant exemptions. . . . Instead, the "utility exemption," as it is referred to, is simply a statement of installations which were never intended to be within the scope of the NEC, or of this standard. In other words the standard, like the NEC, does not contain provisions which are appropriate for dealing with utility installations. . . .

46 Fed. Reg. at 4038. Similarly, railway installations were not granted an exemption from the Act's enforcement by the scope provision to the electrical standards. They are simply not regulated by the specific standards included within that subpart.

10/ Exclusions contained in a specific standard apply "only to the detailed requirements contained in that section of the regulations." Faultless Div., Bliss & Laughlin Indus., Inc. v. Secretary, 674 F.2d 1177, 1188 (7th Cir. 1982) (emphasis in original).

The Secretary cannot apply the general duty clause to conditions expressly covered by specific standards. Ted Wilkerson, Inc., 81 OSAHRC 70/D8, 9 BNA OSHC 2012, 1981 CCH OSHD ¶ 25,551 (No. 13390, 1981), and cases cited therein. However, recognizing that specific standards could not be promulgated to cover all hazardous conditions, Congress enacted section 5(a)(1):

> The general duty clause in this bill would not be a general substitute for reliance on standards, but would simply enable the Secretary to insure the protection of employees who are working under special circumstances for which no standard has yet been adopted.

S. Rep. No. 1282, 91st Cong., 2d Sess. 10 (1970), reprinted in Senate Comm. on Labor & Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety & Health Act of 1970, at 150 (1971). Because the standards in Subpart S-Electrical did not apply to the working conditions involved in this case, the Secretary properly cited Conrail for violations of section 5(a)(1)[11/] and section 1910.132(a).[12/] Accordingly, we turn to the merits of these citations.

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11/ Commissioner Cleary is satisfied that the context of the "exclusion" in § 1910.308 is such that there is no standard covering railroad installations, and thus it is appropriate to apply § 5(a)(1). He does not regard this case as permitting § 5(a)(1) to be applied in those instances in which a standard covers working conditions but contains an exclusion, and § 5(a)(1) is employed to effectively negate the exclusion. Similarly, he would not countenance the use of § 5(a)(1) where a hazard is addressed by a standard, see Daniel International, Inc., 82 OSAHRC , 10 BNA OSHC 1556, 1982 CCH OSHD ¶ 26,033 (No. 78-4279, 1982), or where a standard comprehensively regulates to the point that the sense of the standard is that no further regulation is intended, cf. Puget Sound Tug & Barge, 81 OSAHRC 50/A2, 9 BNA OSHC 1764, 1782, 1981 CCH OSHD ¶ 25,373 at p. 31,601 (No. 76-4905, 1981) (concurring and dissenting opinion), appeal filed, No. 81-7406 (9th Cir. June 26, 1981).

12/ See American Smelting & Refining Co. v. OSHRC, 501 F.2d 504 (8th Cir. 1974) (section 5(a)(1) was properly cited for excessive employee lead exposure prior to the effective date of the recently promulgated

(Continued on next page)

V

Because Conrail's employees did not test high voltage overhead wires to determine whether they were energized before attaching grounds, the Secretary alleged that Conrail violated section 5(a)(1). Judge Furcolo affirmed the citation. Conrail argues that the industry does not recognize a need to test lines before grounding them and does not use the fiberglass "glow sticks" suggested by the Secretary. Conrail also argues that the glow sticks are not feasible.

To establish a section 5(a)(1) violation, the Secretary must show that the employer failed to render its workplace free from a hazard that is recognized and likely to cause death or serious physical harm to its employees. See Little Beaver Creek Ranches, Inc., No. 77-2096 (June 30, 1982). The Secretary must also demonstrate that there was a feasible means available to abate the hazard. Id.; National Realty and Const. Co. v. OSHRC, 489 F.2d 1257, 1268 (D.C. Cir. 1973).

The recognized hazard under section 5(a)(1) is a condition or practice in the workplace that is harmful and known to be hazardous by either the industry in general or by the employer in particular. Kansas City Power & Light Co., 82 OSAHRC , 10 BNA OSHC 1417, 1982 CCH OSHD

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12/ (Continued)

lead standard). Also, the Commission and the circuit courts have held that the general machine guarding standard, § 1910.212, is applicable to press brakes notwithstanding the specific exclusion of press brakes from a more specific standard, the mechanical power press guarding standard at § 1910.217. See Faultless Div., Bliss & Laughlin Indus., Inc. v. Secretary, note 10 supra; Diebold, Inc., 76 OSAHRC 3/E5, 3 BNA OSHC 1897, 1975-76 CCH OSHD ¶ 20,333 (Nos. 6767 et al, 1976), rev'd on other grounds, 585 F.2d 1327 (6th Cir. 1978); Irvington Moore, Div. of U.S. Natural Resources, Inc., 75 OSAHRC 45/A2, 3 BNA OSHC 1018, 1974-75 CCH OSHD ¶ 19,523 (No. 3116, 1975), aff'd, 556 F.2d 431 (9th Cir. 1977).

¶ 25,957 (No. 76-5255, 1982); Beaird-Poulan, A Div. of Emerson Electric Co., 79 OSAHRC 21/D11, 7 BNA OSHC 1255, 1979 CCH OSHD ¶ 23,493 (No. 12600, 1979). The Secretary need only show recognition of this hazard, not recognition of the means of abatement. Kansas City Power & Light Co., supra; see Continental Oil Co. v. OSHRC, 630 F.2d 446 (6th Cir. 1980), cert. denied, 101 S.Ct. 1481 (1981); see also General Dynamics Corp., Quincy Shipbuilding Div. v. OSHRC, 599 F.2d 453 (1st Cir. 1979).

The hazard in this case is burns or electrical shock from employee exposure to energized electrical lines during grounding procedures. Judge Furcolo found that Conrail had actual knowledge of this hazard. He relied on evidence showing that supervisory employees knew of flashes of fire several inches to several feet long when employees attached ground sticks to energized lines. Employees had been burned or temporarily blinded as a result. Also, Conrail had a rule requiring testing before working on electrical lines and Conrail had instructed employees to stand upwind and look away when grounding a line. Conrail asserts that the hazard was not recognized but, to a large extent, Conrail focuses not on the hazardous condition or practice of grounding energized lines but on recognition of the abatement method. Conrail argues that the industry did not recognize a hazard from failing to test and did not see a need for glow sticks. However, insofar as Conrail incorrectly defines the hazard in terms of the abatement method, Conrail's arguments are without merit, and a preponderance of the evidence supports the finding that Conrail knew of the hazard. The evidence also shows that an incident was likely to cause death or serious physical harm.

Because employees were grounding electrical lines without first testing to determine if they were energized, the worksite was not free

of the hazard. Also, the record establishes that a feasible means of abatement existed. The Secretary presented evidence that fiberglass glow sticks can warn that a line is energized.[13/] Judge Furcolo found use of these glow sticks infeasible because of Conrail's evidence that the glow sticks are too delicate for use by railroads. However, the record shows that with proper care glow sticks are capable of long term use. In fact, glow sticks are being effectively used by some electric companies. Accordingly, we find that there was a feasible means of abatement. Because all of the elements of a section 5(a)(1) violation are established, we affirm the judge's decision upholding the section 5(a)(1) violation.

Judge Furcolo assessed a penalty of $400 for this violation. Having considered the factors in 29 U.S.C. § 666(j), we conclude that $400 is appropriate for the violation.

VI

Judge Furcolo also affirmed four items charging that Conrail violated section 1910.132(a).[14/] Item 2(a) concerns employee failure to wear rubber gloves while attaching ground sticks. Items 2(d)-(f) concern employee use of ground sticks with defective insulation or frayed grounds. The Secretary alleged that these ground sticks were not properly maintained.

Section 1910.132(a) is a "broadly worded standard that imposes a generalized duty to protect employees by the use of whatever personal protective equipment is necessary by reason of certain hazards, including those of pro-

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13/ In addition to glow sticks, the record also establishes that volt meters and buzz boxes can be used to warn employees if a conductor is energized.

14/ A fifth item was also affirmed but we reverse the judge's decision and vacate this item, item 2(c), because on review the Secretary moves to withdraw subitem 2(c) due to lack of evidence. We grant the Secretary's unopposed motion to withdraw the citation for that subitem.

cesses or equipment." Owens-Corning Fiberglas Corp., 79 OSAHRC 26/D6, 7 BNA OSHC 1291, 1295, 1979 CCH OSHD ¶ 23,509 at pp. 38,491-92 (No. 76-4990, 1979), aff'd, 659 F.2d 1285 (5th Cir. 1981). Its application depends on "whether a reasonable person familiar with the circumstances surrounding an allegedly hazardous condition, including any facts unique to a particular industry, would recognize a hazard warranting the use of protective equipment." Id.

Conrail's assertion that rubber gloves are not used by the railroad industry is without merit. Although evidence of industry custom and practice is relevant in determining whether a reasonable person would perceive a hazard, it is not dispositive. Id. "Nothing in the OSH Act or its legislative history requires or permits the Secretary to await an industry consensus about unsafe conditions before moving to enforce." Faultless Div., Bliss & Laughlin Indus., Inc. v. Secretary, 674 F.2d at 1187, citing Voegele Co. v. OSHRC, 625 F.2d 1075 (3d Cir. 1980), and Bristol Steel & Iron Works, Inc. v. OSHRC, 601 F.2d 717 (4th Cir. 1979).

The evidence establishes that grounding live wires presented a hazard of electrical shock or burns from flashes of fire. Unrefuted testimony establishes that employees did not wear gloves when grounding the wires and that this practice increased the likelihood of injury. As previously noted, Conrail was aware of the numerous instances when employees had been exposed to these hazards.[15/] Furthermore, the frayed and worn condition of the ground sticks increased the chances of accidental injury against which rubber gloves could provide protection. Accordingly, we affirm the judge's decision affirming item 2(a).

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15/ See Consolidated Rail Corp., 10 BNA OSHC at 1567 n.8, 1982 CCH OSHD at p. 32,715 n. 8.

Items 2(d)-(f) involve the use of damaged ground sticks. In Pratt & Whitney Aircraft, Div. of United Technologies Corp. 81 OSAHRC 39/A2, 9 BNA OSHC 1653, 1665, 1981 CCH OSHD ¶ 25,359 at p. 31,512 (No. 13401, 1981), appeal withdrawn, No. 81-4104 (2d Cir. Aug. 3, 1981), the Commission concluded that the personal protective equipment requirements of section 1910.132(a) refer to protective objects that may be worn by employees. The Commission found that the standard is not applicable to the absence of asbestos insulation around hot pipes that employees could contact and from which they could receive burns. Pratt & Whitney is controlling in this case. We therefore reverse the judge's decision and vacate items 2(d)-(f).

The judge assessed $150 for the five instances of violation of section 1910.132(a) which he affirmed. We affirm only one of the five instances and we have carefully considered the penalty appropriate for the one violation remaining. Having considered the factors in 29 U.S.C. § 666(j), we assess $50.

VII

Accordingly, we affirm the judge's decision affirming item 1 of citation 1 alleging a violation of section 5(a)(1) and we assess a penalty of $400. We affirm the judge's decision affirming item 2(a) of citation 1 alleging a violation of section 1910.132(a) for failure to wear rubber gloves and we assess a penalty of $50. We reverse the judge's decision affirming items 2(c)-(f) of citation 1 and vacate those items. SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: JUL 30 1982

ROWLAND, Chairman, dissenting in part and concurring in part:

I disagree with the majority insofar as it concludes that Conrail violated sections 5(a)(1) and 1910.132(a). Consistent with circuit court and Commission precedent, the exclusion at section 1910.308(c)(2)(iii) for railway power installations cannot be circumvented by resort to section 5(a)(1). Furthermore, the Secretary did not prove that Conrail violated section 1910.132(a) with respect to protective gloves. Accordingly, I would reverse the judge's disposition of items 1a and 2a of citation 1, and vacate the alleged violations.

Section 1910.308(c)(2) specifies express exclusions from the Secretary's electrical standards. 15/ One of the exclusions, section 1910.308(c)(2)(iii), explicitly excepts:

> Installations of railways for generation, transformation, or distribution of power used exclusively for operation of rolling stock or installations used exclusively for signaling and communication purposes.

It is undisputed that Conrail's employees were grounding railway power lines. Therefore, as the majority concedes, the terms of the Secretary's own standards on electrical hazards precluded the Secretary from citing Conrail under the specific electrical standards.

The Secretary argues that since there was no specific section in the electrical standards under which Conrail could be cited, he could cite section 5(a)(1). However, no section in the OSHA electrical standards was applicable to this case because of the exemption. 16/ By charging Conrail with a violation under section 5(a)(1) for

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15/ Section 1910.308(c)(2) has been recodified as section 1910.302(a)(2). See note 3, infra. I will use the old designation.

16/ The majority suggests that § 1910.308(c)(2)(iii) is an "exclusion" not an "exemption". However, in an analogous case, the Court of Appeals for the Fifth Circuit explained that flat roofs are "exempted" from the requirements of a standard which by its terms applies only to sloped roofs. R.L. Sanders Roofing v. OSHRC, 620 F.2d 97, 99-100 (5th Cir. 1980) (interpreting 29 C.F.R. § 1926.451(u)(3)). I therefore conclude that § 1910.308(c)(2)(iii) is properly characterized as an exemption.

alleged electrical hazards associated with the railway power installations, the Secretary attempted to circumvent his own exception.

An employer is entitled to fair notice of potential liability under the Act. E.g., Diamond Roofing Co. v. OSHRC, 528 F.2d 645, 649 (5th Cir. 1976). Thus, where the Secretary has adopted standards containing a specific exception, the Secretary cannot defeat the exception by applying section 5(a)(1). Southern Ohio Building Systems, Inc. v. OSHRC, 649 F.2d 456 (6th Cir. 1981); R.L. Sanders Roofing v. OSHRC, 620 F.2d 97 (5th Cir. 1980). See Daniel International, Inc., 82 OSAHRC 23/D3, 10 BNA OSHC 1556, 1982 CCH OSHD ¶ 26,033 (No. 78-4279, 1982); John T. Brady & Co., 82 OSAHRC 9/D10, 10 BNA OSHC 1385, 1982 CCH OSHD ¶25,941 (No. 76-2894, 1982); A. Prokosch & Sons Sheet Metal, Inc., 80 OSAHRC 96/A2, 8 BNA OSHC 2077, 1980 CCH OSHD ¶ 24,840 (No. 76-406, 1980). See generally American Luggage Works, Inc., 82 OSAHRC / , 10 BNA OSHC 1678, 1684, 1982 CCH OSHC ¶ 26,072, p. 32,798 (No. 77-893, 1982) (Rowland, dissenting), appeal filed, No. 82-1572 (1st Cir. July 19, 1982). Because the language in section 1910.308(c)(2)(iii) specifically exempts railway installations, fundamental fairness precluded the Secretary from resorting to section 5(a)(1).

The majority nevertheless reasons that because section 1910.308(c)(2)(iii) incorporates verbatim the NEC railway exclusion, the Secretary only intended to acknowledge the scope of the NEC provisions and did not intend to leave railway electrical installations unregulated. The majority's rationale ignores section 1910.308(b), which explains that the purpose of the incorporated NEC provisions is:

> [T]he practical safeguarding of any persons and of buildings and their contents from hazards arising from the use of electricity for light, heat, power, radio, signaling, and for other purposes. The standards contained therein are occupational safety and health standards to the extent that they safeguard any person who is an employee of an employer.

(Emphasis added.) Significantly, this purpose clause was modified from the NEC purpose clause, so as to state that the electrical standards were intended to protect "any . . . employee." The Secretary's statement of purpose in conjunction with

the railway exclusion suggests the Secretary determined that railway installations need not be regulated in order to practically "safeguard any . . . employee." Nor is the preamble to the Secretary's 1981 revision of the electrical standards necessarily indicative of the Secretary's intent at the time he adopted the NEC standards, because the preamble was issued several years after the electrical standards were originally adopted under section 6(a) of the Act. In light of the Secretary's expressed intent to protect "any" employee and in light of the specific exclusion of railway electrical installations, I cannot conclude that Conrail was fairly apprised of its proported liability under section 5(a)(1).

Moreover, the Secretary's and the majority's position is inconsistent with the rulemaking process contemplated by section 6(b) of the Act. See Daniel International, Inc., supra, 10 BNA OSHC 1559, 1982 CCH OSHD at p. 32,683. I note that the Secretary has excercised his section 6(b) authority to promulgate specific electrical standards for communications installations, which were also exempted by the section 1910.308(c)(2) exclusions. See 29 C.F.R. § 1910.268 (telecommunications standards); 40 Fed. Reg. 13,436 (telecommunications standards promulgated under § 6(b) of the Act). This indicates that the Secretary himself has recognized that he must promulgate specific standards if he wishes to cover the excepted installations. 17/ Since Conrail was exempt from liability by the language of section 1910.308(c)(2)(iii), I would vacate the section 5(a)(1) charge as alleged in citation 1, item 1a.

Nor did the Secretary prove a violation of section 1910.132(a), concerning rubber gloves to protect the employees from an alleged "possibility of electrical shock." As the majority notes, Commission precedent holds that a section 1910.132(a) violation cannot be upheld unless the Secretary shows that "a reasonable person

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17/ Because the inspection and citations occurred prior to the FRA policy statement, I do not address the issue of whether the FRA policy statement would preempt, under section 4(b)(1), any future efforts by OSHA to regulate railway power installations with specific standards. See note 8, infra.

familiar with the circumstances surrounding an allegedly hazardous condition, including any facts unique to a particular industry, would recognize a hazard warranting the use of protective equipment." Owens-Corning Fiberglas Corp., 79 OSAHRC 26/D6, 7 BNA OSHC 1291, 1979 CCH OSHD ¶ 23,509 (No. 76-4990, 1979) (reasonable person), aff'd, 659 F.2d 1285 (5th Cir. 1981) (industry custom or actual knowledge). 18/

The record is devoid of any evidence suggesting that employees in the railway industry customarily use rubber gloves to supplement the insulating properties of the wooden poles when grounding power lines. To the contrary, Mr. Mayer, a Conrail supervisor with over thirty years experience in the railway industry, testified without rebuttal that he has never seen rubber gloves used in conjunction with wooden ground sticks.

The majority concludes that this evidence of industry custom is not dispositive. In the majority's view, Conrail was actually aware of the "numerous instances" of employee exposure to electrical shock warranting the use of rubber gloves. 19/ I disagree.

The record shows that the employees were in no danger of electrical shock as long as the wooden ground sticks retained their insulating properties. Although

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18/ I need not decide whether the majority's reasonable person test or the Fifth Circuit's industry custom/actual knowledge test is more appropriate, because under either test, a section 1910.132(a) violation cannot be sustained when, as here, the only reliable evidence shows that the industry does not customarily use personal protective equipment.

19/ The majority also suggests that Conrail's alleged awareness of burns shows that Conrail perceived the need for rubber gloves. But, the OSHA compliance officer contended that rubber gloves would protect against the "possibility of electrical shock or electrocution," not burns.

the compliance officer criticized the way Conrail handled and maintained the sticks, there is no evidence that the insulating capacity of the sticks was adversely affected. Significantly, none of the employees testified that they had been shocked when attaching the wooden ground sticks. Since the only probative evidence shows that the railway industry does not customarily use protective gloves when grounding power lines with wooden shepherd sticks, the Secretary has not established the violation of section 1910.132(a) alleged in item 2a, citation 1. Therefore, I would reverse the judge's decision.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant<br>v.<br>CONSOLIDATED RAIL CORPORATION,<br>Respondent | OSHRC DOCKET NO. 78-238 |

Appearances:

John Casler, Esq., for Complainant

William P. Jones, Esq., for Respondent

[Michael Broderick, the union's International Representative (IBEW) appeared as a party "in order to get a copy of whatever transpired" at the hearing...Tr. 88]

DECISION AND ORDER

FURCOLO, Judge:

This case arose under 29 USC, sec. 651 et seq. of the Occupational Safety and Health Act of 1970 (the Act). As a result of an inspection of the Respondent's premises on November 15 - December 2, 1977, Citation #1 issued on or about December 22, 1977, charging in items 1(a) and 2 that the Respondent seriously violated sec. 5(a)(1) of the Act and the standard at 29 CFR 1910.132(a). The Respondent was also charged in items 1(b), (c) and 3 of Citation #1 with the serious violation of sec. 5(a)(1) of the Act; and in items 1 and 2 of Citation #2 with the other than serious violation

of the Act by noncompliance with the standards at 29 CFR 1903.2(a)(1) and 1910.151(b), respectively.

On January 11, 1978, the Respondent filed Notice of Contest to all said items of Citations #1 and 2 and the penalties proposed therefor.

The pertinent sections of the Act and the standards are appended to this decision under appropriate titles.

Transcript page references are to the October hearing except where March hearing is indicated.

## Issues

1. Was there a lack of jurisdiction? [Sec. 4(b) of the Act]

2. Were high voltage conductors tested for voltage before grounds were attached? [Sec. 5(a)(1) of the Act]

3. Were employees using proper protective equipment? [1910.132(a)]

4. Were the wooden "sticks" that were being used a proper method of grounding? [1910.132(a)]

## Stipulations and Admissions

It was stipulated that the penalty proposed for item 1(a) is $400; and that decision on the jurisdictional sec. 4(b)(1) defense would be reserved until briefs were filed...Tr. 6, 12-15, 115.

As a result of the stipulations described in Exh. C-1, the Respondent withdrew its Notice of Contest to items 1(b), (c), and 3 of Citation #1, and items 1 and 2 of Citation #2; and the Complainant amended the proposed penalties for Citation #1 to $150 each for items 1(b) and 1(c), and $100 for item 3; and for Citation #2, no penalty for item 1 and $135 for item 2...Tr. 4-6 and Exh. C-1.

By paragraph 3 of its Answer, the Respondent admitted that its employees work on goods that have moved across state lines.

Preliminary Facts

In the course of operating its railroad, crews of the Respondent's employees worked on high voltage electrical lines and conductors at various places on "the New Haven Line" between New Haven, Conn., and New York, New York. Some of the work involved grounding electrical equipment carrying electric power of over 10,000 volts. In the instant case, the method of installing grounds was by using insulating wooden "sticks", often referred to as "shepherds" because they were poles about 7 - 8 feet long with a U-shaped hook at the end and a ground wire attached to the hook. One end of the ground wire would be attached to a good ground and, using the "stick", the other end would be attached to the overhead wire. The "stick" was often made more secure by tying sashboard or clothesline cable or a similar attachment to the hook... Tr. 26, 30, 31, 49, 58 and Exh. C-4. The fiber glass type of insulating "stick" (preferred by the Complainant's witnesses Normand and Edwards) had a clamp (instead of a hook) on the end to be screwed onto the wire by turning the "stick"...Tr. 52, 53.

Knowledge and "Recognized Hazard"

After the hearing on October 20, 1978, the parties were notified the hearing would be re-opened if either party wished to be heard on a contemplated taking of official notice concerning "recognized hazard". On the Respondent's request, such a hearing was held on March 9, 1979, limited to the following question:

"Is it recognized in the railroad industry that it is a hazard likely to cause death or serious physical harm to employees if conductors of 11,000 volts are not pre-tested before grounds are attached?"

At the March 9th hearing, the Respondent's witnesses testified that there was, no such "recognized hazard" in the railroad industry... Tr. 16-18, 29, 30, 38, 46-49. The Complainant's witnesses testified to individual incidents concerning the attaching of grounds before pre-testing such conductors but they presented no testimony bearing on "recognized hazard" ...Tr. 58, 59, 62. All the witnesses for both the Complainant and the Respondent were honest and well-qualified in their positions. In that situation, where the Complainant's witnesses did not contradict the very positive opinions of the Respondent's witnesses, I find that it is not recognized in the railroad industry that it is a hazard likely to cause death or serious physical harm to employees if conductors of 11,000 volts are not pre-tested before grounds are attached.

However, if supervisory personnel of the Respondent knew that such a practice was hazardous to employees, that would constitute a violation even if it were not a "recognized hazard in the railroad industry". [See Brennan v. OSHRC and Vy Lactos, 494 F(2) 460]

Accidents

The presence or absence of injuries may have some bearing on whether conditions are hazardous. As far as the gloves allegations are concerned, the evidence showed one injury in 34 years. As far as the "sticks" allegations are concerned, the evidence showed two injuries in 36 years: one involving a wooden "stick" and one a fiber

glass type...Tr. 63-67, 92, 110-112. The record of injuries tends to corroborate the Respondent's contention that its practices were not hazardous. However, the presence or absence of injuries is not conclusive.

Sec. 5(a)(1) of the Act [Items 1-3 of Citation #1]

Joseph P. Normand, a well-qualified Compliance Officer, testified that he saw employees of the Respondent attach ground wires to lines carrying 11,000 volts without first checking to be sure the lines had been de-energized...Tr. 7-11, 18-25, 31, 79 and Exh. C-2, 3, 10. His testimony was not contradicted by anyone. The hazard was severe burns or electrocution...Tr. 20, 44, 79.

Supervisory personnel of the Respondent were familiar with the need for testing; had observed employees putting shepherd sticks on "hot" wires; knew of accidents that had occurred in this type of situation; knew of problems along the line involving vandalism, weather conditions, and maintenance of equipment; and had worked with crews of employees. In addition, the Respondent had rules that required such testing...Tr. 19, 25, 44, 64, 92-97, 102-107, 110, 111. All those factors indicate the Respondent's knowledge of the hazardous condition.

As concerns item 1(a), I find that the failure to test was a hazard likely to cause death or serious harm from burns or electrical shock; and the Respondent violated sec. 5(a)(1) of the Act.

As concerns items 1(b) and (c), the Respondent withdrew its Notice of Contest; and those items and the assessment proposed became final orders by virtue of sec. 10(a) of the Act.

29 CFR 1910.132(a) [Items 2(a)-(f) of Citation #1]

The allegations of improper protective equipment concerned rubber gloves and the wooden "sticks". Supervisory personnel of the Respondent knew of the conditions and practices pertaining to "sticks" and gloves...Tr. 19, 20, 25, 44, 97-101, 105.

Compliance Officer Normand testified that he saw employees without gloves attaching grounds to high voltage wires...Tr. 11, 26, 31, 68 and Exh. C-2. That testimony was not contradicted by anyone. The hazard was death or serious harm from burns or electrical shock...Tr. 27, 35, 45, 69. I find that the Respondent was not in compliance with the standard at 29 CFR 1910.132(a) as alleged in item 2(a) of Citation #1.

As far as item 2(b) of Citation #1 is concerned, although the Complainant established that the rubber gloves were rated for only 10,000 volts, there was nothing to indicate that they were to be used for higher voltage wires...Tr. 29, 100, Exh. C-11. The Compliance Officer agreed that employees "never grab directly an 11,000 volt piece of apparatus". He did say that..."there are other areas where gloves would be required"; however, he did not describe any such areas...Tr. 29, 57. Since the Complainant has the burden of proof, in this state of the evidence I find that the violation alleged in 2(b) has not been proven.

As concerns items 2(c)-(f) of Citation #1, the Complainant's evidence tended to establish that the wooden "sticks" being used were improper for various reasons: they were not as safe as other types or they were in disrepair or they had not been certified for 75,000 volts... Tr. 27-30, 37-41, 97, 100 and Exh. C-4-8. [No significant reason for the 75,000 volts testimony was advanced.]

Compliance Officer Normand testified that wooden "sticks" were outmoded and should have been replaced by fiber glass "sticks" with a glow filament or a "buzz box" that warned if a line were energized. The Complainant's extremely well-qualified expert witness, Wallace R. Edwards, agreed with him...Tr. 71-76, 80. Normand also described some of the "sticks" as being old, water-soaked, without protective coating, kept in bad weather too long, and having been subjected to hard wear...Tr. 27-30, Exh. C-4-8. He said that in some instances insulation, wires, clamps, and other attachments to the "sticks" were broken, frayed, corroded, crumbling, and otherwise in unsafe condition ...Tr. 37-41, Exh. C-7, 8.

The Respondent contended that "sticks" had to be outdoors in all kinds of weather, were subjected to rough use, and should have facility of connection. The Respondent's engineer for electric traction, Robert W. Walker, said that wooden "sticks" were better than fiber glass for such conditions...Tr. 99-102, 105-107. And the Complainant's expert acknowledgedthat fiber glass "sticks" were "delicate"...Tr. 83, 86. On the question of the condition of the equipment, Walker said that the "sticks" and their attachments were not warped, frayed, unvarnished or otherwise in an unsafe condition; and that weatherbeaten wooden "sticks" would bear up under 50,000 volts...Tr. 97.

The hazard (whether the "stick" is wooden or fiber glass) was sustaining serious or fatal harm from burns or electrical shock. In fact, the only described injury involving a "stick" was incurred by an employee using the fiber glass type...Tr. 65, 70.

Having in mind the uncontradicted testimony that "sticks" must undergo rough use and that, as compared to the wooden, the fiber glass type is "delicate," I find that the Complainant has not sustained the burden of proving that the wooden "stick" is inadequate. The evidence clearly established that both types are subject to comparable hazards if not used properly and kept in good condition... Tr. 56. That being so, and the record of injuries involving "sticks" being at least as favorable for the wooden as the fiber glass, I find that the Respondent's use of properly maintained wooden "sticks" has not been proven to be non-compliance with the standard at 29 CFR 1910.132(a).

However, the testimony of Compliance Officer Normand pointed out that the wooden "sticks" were not maintained in proper condition. I find that some wooden "sticks" or their attachments were so broken or corroded or damaged that they were unsafe. For that reason, I find that the Complainant has proven the Respondent was not in compliance with the standard at 29 CFR 1910.132(a) as alleged in items 2(c)-(f) of Citation #1.

Section 4(b)(1)

In seeking to sustain its burden of proving that there was a lack of jurisdiction because the Federal Railroad Administration [FRA] had exercised its authority over it, the Respondent relied primarily on the standard at 29 CFR 1910.308(c)(2) and the FRA's Policy Statement that appeared in the Federal Register, volume 43, number 50 [Respondent's Post Trial Brief, pg. 4-8].

The standard at 29 CFR 1910.308(c)(2) expressly states that the provisions of that subpart "...do not cover:...(iii) Installations of railways for generation, transformation, or distribution of power used exclusively for operation of rolling stocks..."

The parties differ in their interpretation of the standard at 29 CFR 1910.308(c)(2). In my view, the Respondent's employees were not "installing" equipment but were maintaining or repairing or operating existing facilities. However, whatever may be the proper construction of the word "installations", that standard was not an exercise of authority by the FRA but was a promulgation of other agencies of government, such as the Department of Labor or the Congress. The standard at 29 CFR 1910.308(c)(2) may have some bearing on the merits of whether there was a violation but, whatever the interpretation of its words, the jurisdictional defense of section 4(b)(1) is not established by it.

The Respondent is not helped by the FRA Policy Statement. That statement was apparently not issued until March of 1978 and the alleged violation occurred several months earlier. Even if it were an exercise of FRA authority, it would have come too late to confer jurisdiction in the instant case.

In any event, the FRA Policy Statement is not a rule or regulation or standard of any kind but is merely a narration of FRA "policy". The statement in it that "... FRA will not hesitate to adopt its own standards to assure a safe environment for railroad operations..." certainly does not qualify as an "exercise" of statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health under section 4(b)(1) of the Act.

The FRA Policy Statement also says: "FRA has now exercised its

statutory authority...by actual rulemaking." However, no illustrations are given of how and why it has so "exercised" its statutory authority.

I find that the Respondent has not sustained the burden of proving its section 4(b)(1) jurisdictional defense. The Respondent's motion to dismiss is denied.

## Findings of Fact

Having heard the testimony, observed the witnesses, and examined the exhibits, the following Findings of Fact are made:

1. At all times concerned, the Respondent regularly received, handled or worked with goods which had moved across state lines.

2. The Respondent withdrew its Notice of Contest to items 1(b), 1(c), and 3 of Citation #1; and items 1 and 2 of Citation #2.

3. As concerns item 1(a) of Citation #1, the hazard of severe burns or electrocution from failure to test high voltage conductors before attaching grounds was not a "recognized hazard within the railroad industry"; and the Respondent's employees attached ground wires to lines carrying 11,000 volts without first testing the lines.

4. As concerns item 2(a) of Citation #1, the Respondent's employees without gloves attached grounds to wires carrying 11,000 volts.

5. As concerns item 2(b) of Citation #1, the rubber gloves were rated for 10,000 volts; and there was no evidence to show they were used for lines carrying higher voltage.

6. As concerns items 2(c)-(f) of Citation #1, some wooden "sticks" were in disrepair or had not been certified for 75,000 volts.

7. The Complainant did not prove that properly maintained wooden "sticks" were not as safe as other feasible methods.

8. The conditions described in items 2(a), (c)-(f) of Citation

#2 exposed the Respondent's employees to sustaining harm because of the hazard of electric shock.

9. The conditions described in item 1(a) of Citation #1 exposed the Respondent's employees to sustaining serious or fatal harm because of the hazard of electric shock.

10. One or more officers or supervisory personnel of the Respondent knew of the hazardous conditions described herein and knew that employees were exposed to such hazards.

11. The Respondent's employees were not "installing" equipment but were maintaining or repairing or operating existing facilities.

12. The Federal Railroad Administration had not prescribed or enforced any standards or regulations affecting occupational safety or health, and had not exercised its authority in any way that would deprive the Occupational Safety and Health Review Commission of jurisdiction to hear and decide the citation and complaint in the instant case.

## Conclusions of Law

1. At all times concerned, the Respondent was an employer engaged in a business affecting commerce within the meaning of the Act; and the Occupational Safety & Health Review Commission has jurisdiction over the subject matter and the parties.

2. At all times concerned, the Respondent knew, or with the exercise of due diligence should have known, of the alleged violations.

3. As concerns items 1(a)-(c) and 3 of Citation #1, the Complainant has sustained the burden of proving the Respondent violated sec. 5(a)(1) of the Act; and, not being in compliance with the standard at

29 CFR 1910.178(p)(1), violated sec. 5(a)(2) of the Act [sec. 654].

4. As concerns items 2(a), (c)-(f) of Citation #1, the Respondent was not in compliance with the standard at 29 CFR 1910.132(a). The Complainant has sustained the burden of proving the Respondent violated sections 5(a)(1) and 5(a)(2) of the Act [sec. 654].

5. The Complainant has not sustained the burden of proving the Respondent was not in compliance with the standard at 29 CFR 1910.132(a) insofar as the allegations of item 2(b) of Citation #1 are concerned.

6. On the dates in question, the Respondent was not in compliance with the standards at 29 CFR 1903.2(a)(1) and 1910.151(b) [respectively items 1 and 2 of Citation #2]; and the Complainant has sustained the burden of proving the Respondent violated section 5(a)(2) of the Act [sec. 654].

## Order

The whole record having been considered, and due consideration having been given to 29 U.S.C., sec. 666(j), it is ordered:

1. Items 1(a)-(c) of Citation #1 are affirmed; penalties of $400 for item 1(a), $150 for 1(b), and $150 for 1(c) are assessed.

2. Item 2 of Citation #1 is affirmed as to paragraphs (a), (c)-(f); and a penalty of $150 assessed therefor.

3. Item 3 of Citation #1 is affirmed and a penalty of $100 assessed therefor.

4. Items 1 and 2 of Citation #2 are affirmed and a penalty of $135 assessed for item 2.

5. Item 2 (b) of Citation #1 is vacated.

6. Whether the Respondent uses "sticks" of wood, fiber glass, or other material, it is ordered to maintain such "sticks" in good condition.

SO ORDERED.

Foster Furcolo

FOSTER FURCOLO
Judge, OSHRC

Dated: August 27, 1979
Boston, Massachusetts

## APPENDIX

### The Act

**Section 653** [section 4(b)(1)] "Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies...exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."

**Section 654** [section 5(a)(1)] Employer "...shall furnish...a place of employment...free from recognized hazards... likely to cause death or serious physical harm to his employees;..."

**Section 654** [section 5(a)(2)] Employer "...shall comply with occupational safety and health standards..."

**Section 659** [section 10(a)] If a Notice of Contest is withdrawn, "the citation and assessment...shall be deemed a final order of the Commission..."

**Section 666** [section 17(b)] "...employer who has received a citation for a serious violation...of this Act...shall be assessed a civil penalty of up to $1,000 for each such violation."

**Section 666** [section 17(j)] "...assess all civil penalties...giving due consideration to...the size of the business... gravity of the violation, the good faith of the employer, and the history of previous violations."

**Section 666** [section 17(k)] "...a serious violation shall be deemed to exist...if there is a substantial probability that death or serious physical harm could result... unless the employer did not, and could not...know of the presence of the violation."

### The Standards

29 CFR 1910.132(a): "Protective equipment...shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary..."

29 CFR 1910.308(c)(2): "Not covered. The provisions of this subpart do not cover: ...(iii) Installations of railways for generation, transformation, transmission, or distribution of power used exclusively for operation of rolling stock or installations used exclusively for signaling and communication purposes..."

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

July 30, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Consolidated Rail Corporation

OSHRC DOCKET NO. 78-2546

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

FOR THE SECRETARY OF LABOR

OF COMMISSION DECISION

To wit: See attached.

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FOR EMPLOYEES

FOR THE COMMISSION

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EXECUTIVE SECRETARY

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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 78-2546 |
| CONSOLIDATED RAIL CORPORATION, | : | |
| Respondent. | : | |
| | : | |

DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge Foster Furcolo is before the Commission pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). In his decision, Judge Furcolo found that the Respondent, Consolidated Rail Corporation ("Conrail"), had violated section 5(a)(2) of the Act, 29 U.S.C. § 654(a)(2), by failing to comply with several safety and health staudards. Conrail petitioned for review of the judge's decision, and Commissioner Cottine and former Commissioner Barnako directed review of the issues raised in Conrail's petition. We affirm Judge Furcolo's decision.

I

A

On April 25, 1978, a compliance officer of the Occupational Safety and Health Administration ("OSHA") conducted an inspection of Conrail's

diesel facility in Selkirk, New York. During the inspection, the compliance officer observed a Conrail employee in the diesel engine shop performing maintenance work on a diesel locomotive engine. The engine was running and the employee was not wearing any hearing protection. The compliance officer determined, and Conrail does not dispute, that the employee was exposed to approximately twice the allowable noise under 29 C.F.R. § 1910.95(a).[1/] Also, the employee testified that he had experienced hearing loss and headaches. The employee had asked Conrail for some hearing protection during the several months preceding the inspection but Conrail had not provided him with the protection. The Secretary charged Conrail with failure to comply with the occupational noise exposure standard at 29 C.F.R. § 1910.95(a) by not providing the employee with personal protective equipment.[2/] The violation was alleged to be serious in nature.

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1/ 29 C.F.R. § 1910.95(a) provides in pertinent part:

> § 1910.95 Occupational noise exposure.
>
> (a) Protection against the effects of noise exposure shall be provided when the sound levels exceed those shown in Table G-16. . . .

Table G-16 prescribes the number of hours an employee may be exposed to particular noise levels.

2/ Pursuant to 29 C.F.R. § 1910.95(b)(1), employers must use feasible engineering or administrative controls to protect their employees against excessive noise. Only if such controls are not sufficient to achieve full compliance with the levels of Table G-16 may personal protective equipment be used as a permanent means of protection. See Samson Paper Bag Co., 80 OSAHRC 60/A2, 8 BNA OSHC 1515, 1980 CCH OSHD ¶ 24,555 (No. 76-222, 1980). In this case, however, the Secretary does not allege that Conrail failed to implement feasible engineering or administrative controls. His allegation that Conrail violated § 1910.95(a) is based solely on Conrail's failure to provide personal protective equipment to the employee.

B

At the hearing, Conrail stipulated that its employee was exposed to noise in excess of that permitted by OSHA's occupational noise exposure standard and that, if the standard applied to the cited working condition, it violated the standard. The parties also stipulated that if a violation was found, a $300 penalty would be appropriate. However, Conrail argued that OSHA authority over that working condition had been preempted under section 4(b)(1) of the Act[3/] because the Environmental Protection Agency ("EPA") and the Department of Transportation ("DOT"), through the Federal Railroad Administration ("FRA"), had exercised statutory authority to regulate noise from locomotives under the Noise Control Act of 1972, 42 U.S.C. §§ 4901-18 ("Noise Control Act"). Conrail relied on Railroad Noise Emission Standards promulgated by the EPA and published at 40 C.F.R. Part 201, particularly a standard at 40 C.F.R. § 201.11 establishing a noise emission standard for locomotives operating under stationary conditions. Conrail further relied on FRA regulations, published at 49 C.F.R. Part 210, prescribing the means of compliance with the EPA standards.

The Secretary argued that OSHA's authority was not preempted because the EPA and FRA regulations on which Conrail relied were not intended to protect the health of railroad workers. The Secretary contended that a section 4(b)(1) exemption only arises when regulations of another

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3/ Section 4(b)(1), 29 U.S.C. § 653(b)(1), provides in pertinent part:

> Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

agency have as a policy or purpose the protection of employees. Judge Furcolo agreed with the Secretary's reasoning and found that Conrail had violated section 1910.95(a).

On review, the parties make the same arguments they made before the judge. We conclude that Judge Furcolo properly concluded that the cited working condition was not exempt from the Act.

C

Two questions are relevant in any section 4(b)(1) case: (1) does an agency other than OSHA have the statutory authority to regulate the working conditions affecting the health and safety of certain workers, and (2) has the other agency exercised its statutory authority in such a manner as to exempt the cited working condition from the Act. Northwest Airlines, Inc., 80 OSAHRC 87/B5, 8 BNA OSHC 1982, 1980 CCH OSHD ¶ 24,751 (No. 13649, 1980), appeals dismissed, Nos. 80-4218 and 80-4222 (2d Cir. Feb. 18 and March 31, 1981).

In order to give rise to a section 4(b)(1) exemption, a statute need not be directed exclusively at the safety and health of employees. It is sufficient if the statute is directed at the protection of public safety and health, and employees directly receive the protection the statute is intended to provide. Northwest Airlines, Inc., 8 BNA OSHC at 1987, 1980 CCH OSHD at p. 30,485; Texas Eastern Transmission Corp., 75 OSAHRC 88/D9, 3 BNA OSHC 1601, 1975-76 CCH OSHD ¶ 20,092 (No. 4091, 1975).

The Noise Control Act is this type of statute. In enacting the Noise Control Act, Congress was concerned with the adverse impact of excessive noise on the general public. In a section of the statute entitled "Congressional findings and statement of policy," Congress stated:

> (1) that inadequately controlled noise presents a growing danger to the health and welfare of the Nation's population, particularly in urban areas;
>
> (2) that the major sources of noise include transportation vehicles and equipment, machinery, appliances, and other products in commerce; and
>
> (3) that, while primary responsibility for control of noise rests with State and local governments, Federal action is essential to deal with major noise sources in commerce control of which require national uniformity of treatment.
>
> (b) The Congress declares that it is the policy of the United States to promote an environment for all Americans free from noise that jeopardizes their health or welfare. To that end, it is the purpose of this chapter to establish a means for effective coordination of Federal research and activities in noise control, to authorize the establishment of Federal noise emission standards for products distributed in commerce, and to provide information to the public respecting the noise emission and noise reduction characteristics of such products.

42 U.S.C. § 4901.

The legislative history of the Noise Control Act demonstrates that Congress was concerned with the effects of excessive noise on workers as well as other members of the public. In discussing the adverse effects of noise, the Senate Public Works Committee stated:

> The individual's perception of this process belies its true impact on the delicate mechanism of hearing. Whether the individual is an industrial worker or a member of a hard-rock band, hearing ability following temporary hearing loss due to noise exposure, seemingly returns to normal after a day or so of rest, suggesting to the unwary victim that no permanent damage was incurred.

S. Rep. No. 92-1160, 92 Cong., 2d Sess. (1972), reprinted in 3 U.S. Code Cong. and Adm. News (1972) at p. 4656. The Committee also expressed concern that, "[o]ne study of workers showed men working in noisy conditions to be more aggressive, distrustful and even paranoiac than similar workers in a quieter setting." Id. at 4656-57. In sum, these references

demonstrate that Congress intended workers to be within the class of persons the statute would benefit.

In order to implement the Noise Control Act, Congress authorized the EPA to establish noise emission standards for a variety of sources, including products distributed in commerce,[4] aircraft,[5] and railroad equipment.[6] With regard to railroad operations, the Secretary of Transportation was authorized to promulgate and enforce regulations to insure compliance with the EPA's noise emissions standards.[7] The EPA and FRA rules on which Conrail relies were promulgated pursuant to this authority. We conclude, however, that those rules do not regulate the working condition for which Conrail has been cited in this case and therefore do not exempt that working condition from the operation of the Occupational Safety and Health Act.

The standards that EPA is authorized to promulgate with respect to railroad operations are solely emission standards for equipment. Cf. Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978) (EPA cannot regulate work practices under statutory authority authorizing it to establish emission standards). DOT is empowered to prescribe the manner in which employers in the railroad industry must comply with the EPA emission standards, and if any regulation of working conditions occurs under the Noise Control Act it must result from the FRA regulations promulgated pursuant to the authority granted DOT.

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4/ 42 U.S.C. § 4905.

5/ 42 U.S.C. § 4906.

6/ 42 U.S.C. § 4916(a).

7/ 42 U.S.C. § 4916(b).

II

Both Commissioners Cleary and Cottine agree that the EPA and FRA regulations, in combination, limit the noise that railroad equipment may generate. The legislative history of the FRA regulations indicates that the FRA did not intend its regulations to protect employees under circumstances like those present in this case. As the FRA stated in the preamble to the promulgation of the regulations at 49 C.F.R. Part 210:

> One commenter criticized the EPA standards themselves, stating that they are too high to protect employees from noise related injury. The commenter also stated that there are many sources of railroad noise that might affect an employee's health that are not covered by the EPA standards. The commenters requested that FRA promulgate noise emission standards to protect employees.
>
> The commenter's request is not within the scope of this proceeding. Further related rulemaking could be undertaken in the future, depending upon the nature of any evidence that particular noise emissions are a serious safety problem.

42 Fed. Reg. 42343, 42349 (1977).

A

Commissioner Cleary would note that the Secretary seeks to require Conrail to protect its employee against excessive noise by use of personal protective equipment, not to reduce the noise produced by its locomotives. Since the EPA and FRA regulations only govern the noise emitted by Conrail's locomotives and do not address the question of personal protective equipment, the working condition covered by the citation is not governed by the EPA and FRA regulations and OSHA retains jurisdiction in this case.

Conrail also relies on a policy statement issued by the FRA on March 14, 1978 as demonstrating the FRA's exercise of jurisdiction over the cited working condition. Conrail cites the portion of the policy

statement that provides:

> Second, FRA views the question of occupational noise exposure of employees engaged in railroad operations, during their involvement in such operations, as a matter comprehended by the regulatory fields over which FRA has exercised its statutory jurisdiction. FRA is therefore responsible for determining what exposure levels are permissible, what further regulatory steps may be necessary in this area, if any, and what remedial measures are feasible when evaluated in the light of overall safety considerations. FRA's exercise of jurisdiction in this area is evidenced, in part, by the issuance of noise compliance regulations (42 FR 42343; August 23, 1977, issuing 49 C.F.R. Part 210) which will be utilized by FRA to enforce the Evironmental Protection Agency (EPA) Railroad Noise Emission Standards (40 C.F.R. Part 201). . . .
>
> * * *
>
> As suggested above, maximum permissible noise emission levels for rail equipment have already been determined by EPA in consultation with FRA. These emission levels, measured as set forth in the EPA standards, should be recognized by OSHA as establishing the parameters of "feasible administrative or engineering controls" with respect to rail equipment, including locomotives, when such equipment is situated in a railroad shop or enginehouse. . . .

43 Fed. Reg. 10583, 10588 (1978).

Commissioner Cleary notes that the Commission has held that section 4(b)(1) of the Act precludes the Secretary from applying his standards to the working conditions which the FRA policy statement says fall within the FRA's exclusive jurisdiction. Consolidated Rail Corp., 82 OSAHRC , 10 BNA OSHC 1577, 1982 CCH OSHD ¶ 26,044 (No. 79-1277, 1982), appeal filed, No. 82-3302 (3d Cir. June 28, 1982). He does not, however, believe that is the situation in this case. The FRA policy statement does not totally preclude OSHA from enforcing its noise standard in railroad operations. In addition to the portion relied on by Conrail, the policy statement provides:

> Any review of further remedial measures in the area of occupational noise exposure in locomotive cabs and cabooses must take into account the need to preserve the alertness of employees to rail transportation hazards affecting the employees, passengers and the general public along the right-of-way. Only the primary regulatory agency in the area of railroad safety is equipped to evaluate these considerations and to fashion appropriate solutions. The same considerations apply to employees' exposure to retarder noise and other noise emanating primarily from railroad operations.
>
> * * *
>
> However, FRA believes noise exposure in shop areas and other areas where there are multiple noise sources is a qualitatively different issue, since abatement options will be more varied and noise sources will often include power tools and other industrial implements. Therefore, FRA recognizes the applicability of OSHA standards in shop areas, offices and other settings in which "industrial" noise emissions predominate or where exposure may be limited without the potential disruption of safe transportation activities.
>
> As suggested above, maximum permissible noise emission levels for rail equipment have already been determined by EPA in consultation with FRA. These emission levels, measured as set forth in the EPA standards, should be recognized by OSHA as establishing the parameters of "feasible administrative or engineering controls" with respect to rail equipment, including locomotives, when such equipment is situated in a railroad shop or enginehouse. See 29 C.F.R. § 1910.95(b)(1). FRA will work with OSHA to evaluate the prudence of requiring personal protective equipment to reduce noise exposure in those settings where employees may be subjected to more serious hazards associated with railroad operations.

43 Fed. Reg. at 10588.

Read in its entirety, Commissioner Cleary interprets the policy statement (1) to preclude OSHA from requiring engineering controls on locomotives and other rail equipment for which emission standards have been set by the EPA in consultation with FRA; (2) to preclude OSHA from requiring any remedial measures, including the use of personal protec-

tive equipment, in locomotive cabs and cabooses; and (3) as establishing parameters of feasible administrative or engineering controls [emphasis supplied], but to generally require personal protective equipment to reduce noise exposure in those settings where employees may be subjected to more serious hazards associated with railroad operations. This case involves an employee performing maintenance work in a shop. Although it appears that the primary source of noise was a locomotive rather than general "industrial" noise, there is no reason to believe that limiting the employee's exposure by means of personal protective equipment would in any way disrupt safe transportation activities. Accordingly, Commissioner Cleary concludes that this case falls under the portion of the policy statement in which the FRA recognizes the applicability of the OSHA noise standard.

B

In Commissioner Cottine's view, it is clear that FRA did not contemplate affecting employee working conditions in issuing its regulations. See FRA Railroad Noise Emission Compliance Regulations, 42 Fed. Reg. 42,343, 42,349 (1977). Thus, there was no exercise of authority by FRA or EPA[8/] to

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8/ Commissioner Cottine notes that EPA's comments concerning its railroad noise emission standards, 40 C.F.R. Part 201, show no intent to affect occupational safety and health. See Railroad Noise Emission Standards, 41 Fed. Reg. 2184 (1976); Railroad Noise: Proposed Emission Standards, 39 Fed. Reg. 24,580 (1974). As EPA characterized its approach, "EPA has developed and is now implementing an interstate rail carrier noise control strategy based on section 17 of the [Noise Control] Act that should prove to be effective in reducing environmental noise from railroads in many areas to the levels identified as protective of public health and welfare." 41 Fed. Reg. 2184. The only apparent reference to occupational safety and health was in EPA's response to a comment by the U.S. Department of Transportation that EPA should promulgate a regulation to protect railroad workmen from retarder noise.

(continued on next page)

prescribe or enforce standards or regulations affecting occupational safety or health. No exemption from OSHA standards occurred as a result. See Southern Pacific Transp. Co. v. Usery, 539 F.2d 386 (5th Cir. 1976), cert. denied, 434 U.S. 874 (1977); Union Pacific R.R., 77 OSAHRC 150/A2, 5 BNA OSHC 1702, 1977-78 CCH OSHD ¶ 22,036 (No. 11558, 1977); Consolidated Freightways Corp., 77 OSAHRC 84/A2, 5 BNA OSHC 1481, 1977-78 CCH OSHD ¶ 21,846 (No. 10889, 1977), pet. for review dismissed, No. 77-2515 (9th Cir. Jan. 19, 1979).

Commissioner Cottine further notes that in his view the subsequent FRA policy statement is not a standard or regulation within the meaning of section 4(b)(1) of the Act and therefore cannot operate to preempt the applicability of OSHA standards to railroad operations. He would follow the precedent established in Consolidated Rail Corp., 81 OSAHRC 8/A2, 9 BNA OSHC 1258, 1981 CCH OSHD ¶ 25,172 (Nos. 78-3100 et al, 1981), appeal filed, No. 81-1210 (1st Cir. Apr. 2, 1981), transferred, No. 81-

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8/ (continued)

> For reasons outlined above, the EPA does not presently propose to regulate retarder noise from either the community health and welfare or the occupational health and safety point of view. The latter consideration is specifically under the purview of the Occupational Safety and Health Administration (OSHA) and is properly addressed by that Agency.

Id. at 2186. Thus, EPA recognized the distinction between public health and welfare considerations, which it addressed, and occupational safety and health considerations, which it did not address. EPA did not exercise any authority to prescribe or enforce standards or regulations affecting occupational safety and health when it promulgated its railroad noise emission standards, 40 C.F.R. Part 201. The same is true of its revised noise emission standards, also codified at 40 C.F.R. Part 201, whose effective date is January 15, 1984. See Noise Emission Standards for Transportation Equipment; Interstate Rail Carriers, 45 Fed. Reg. 1252, 1260 (1980); Proposed Noise Emission Standards for Transportation Equipment: Interstate Rail Carriers, 44 Fed. Reg. 22,960 (1979).

4192 (2d Cir. Oct. 2, 1981)(OSHRC No. 78-3100) & No. 81-2639 (3d Cir. Oct. 2, 1981)(OSHRC No. 78-4881); See also Consolidated Rail Corp., (No. 79-1277), supra, (Cottine, Commissioner, dissenting).

C

Accordingly, both Commissioners Cleary and Cottine conclude the standards and regulations promulgated by the EPA and FRA pursuant to the Noise Control Act are not directed at the working condition cited in this case and therefore do not exempt that working condition from the Occupational Safety and Health Act. See American Petroleum Institute v. OSHA, 581 F.2d 493, 510 (5th Cir. 1978), aff'd on other grounds sub nom Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607 (1980); Consolidated Freightways Corp., supra. Both Commissioners agree that OSHA is preempted from requiring engineering controls on railroad equipment to reduce the noise levels below those mandated under the Noise Control Act. However, Conrail violated section 1910.95 in this case by failing to provide its employee with proper personal protective equipment.

III

Later in the inspection, the compliance officer observed two employees cleaning parts of a locomotive engine with a spray alkali cleaner. The workers were not wearing eye protection and one of the workers had red, irritated eyes from the alkali spray. According to the compliance officer's testimony, the employees told the compliance officer that they knew eye protective equipment was available but they decided not to use it because they thought they could not see while wearing it. They also said that Conrail's work rule concerning wearing eye protective equipment was not enforced. Because of the danger of eye injuries

from the alkali solution, the Secretary cited Conrail for an other than serious violation of 29 C.F.R. § 1910.133(a)(1).[9/]

In regard to the failure of its employees to wear protective goggles, Conrail emphasized that it has a comprehensive safety program which requires employees to wear goggles when exposed to any irritants. Conrail enforces this safety program, and the employees in question admitted they knew eye protection was available but chose not to wear it.

The Secretary argued that while Conrail may have had a safety program, the fact that employees chose not to wear eye protection because they believed Conrail did not enforce the wearing of it shows that Conrail did not adequately enforce that program. Again, Judge Furcolo agreed with the Secretary, relying on the compliance officer's testimony. Accordingly, he held that Conrail committed an other than serious violation of section 1910.133(a)(1).

We conclude that Judge Furcolo was correct in finding that Conrail violated section 1910.133(a)(1). The record shows that Conrail's employees were not wearing eye protective equipment where there was a danger

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9/ 29 C.F.R. § 1910.133(a)(1) provides:

> § 1910.133 Eye and face protection.
>
> (a) General. (1) Protective eye and face equipment shall be required where there is a reasonable probability of injury that can be prevented by such equipment. In such cases, employers shall make conveniently available a type of protector suitable for the work to be performed, and employees shall use such protectors. No unprotected person shall knowingly be subjected to a hazardous environmental condition. Suitable eye protectors shall be provided where machines or operations present the hazard of flying objects, glare, liquids, injurious radiation, or a combination of these hazards.

of eye injury. Conrail argues the defense of unpreventable employee misconduct. To establish the defense, the employer must show it had established workrules to prevent the violation, adequately communicated these rules to its employees, and effectively enforced the rules when violations were discovered. Jensen Construction Co., 79 OSAHRC 49/D3, 7 BNA OSHC 1477, 1979 CCH OSHD ¶ 23,664 (76-1538, 1979).

In this case, a company work rule existed, but testimony indicates it was not sufficiently enforced. Specifically, the two Conrail employees using the alkali spray said the workrule requiring proper eye protection was not enforced and admitted that they decided not to wear the protective equipment. Moreover, both of these workers were using the alkali spray in an open area of the plant. This would indicate that the work rule was not adequately enforced. See Maryland Shipbuilding and Drydock Co., 75 OSAHRC 85/E9, 3 BNA OSHC 1585, 1975-76 CCH OSHD ¶ 20,063 (No. 4503, 1975).

IV

Finally, the compliance officer inspected an area of the plant where cylinders of chlorine were stored. The chlorine cylinders were in a "chlorination building." In the nearby "water disposal building," there was a "chin-type" respirator which fits over the face but does not contain its own air supply. Rather, the employee would breathe through the "chin-type" respirator and the contaminated air would be cleansed by the chemical cartridge in the respirator. Because this type of respirator is inadequate for high concentrations of chlorine, Conrail was cited for an other than serious violation of 29 C.F.R. § 1910.134

(e)(2).[10/] In case of a chlorine leak in the chlorination building, the compliance officer testified, an employee would need a respirator with independent air supply to work in that building. Conrail's shop manager testified that the respirator was meant for use in repairing leaks in the chlorination building.

Concerning the allegation that Conrail did not supply its employees with the proper respirator, Conrail argued that the "chin-type" respirator it made available to its employees was appropriate. Conrail emphasized that the compliance officer admitted the respirator was adequate to allow an employee to escape from a room in which there was a chlorine leak. Conrail further contended that the respirator was not intended for any other purpose.

Judge Furcolo found that,

> Since there was chlorine in the area and there was no contradiction of the testimony that the respirator used did not fully protect against it but a self-contained breathing type would, . . . the correct respirator had not been specified as required by the standard at 29 C.F.R. § 1910.134(e)(2).

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10/ 29 C.F.R. § 1910.134(e)(2) provides

> § 1910.134 Respiratory protection.
>
> * * *
>
> (e) Use of respirators.
>
> * * *
>
> (2) The correct respirator shall be specified for each job. The respirator type is usually specified in the work procedures by a qualified individual supervising the respiratory protective program. The individual issuing them shall be adequately instructed to insure that the correct respirator is issued.

Accordingly, Judge Furcolo held that Conrail committed an other than serious violation of the standard.

We affirm Judge Furcolo's conclusion that Conrail violated section 1910.134(e)(2). The standard requires that "the correct respirator . . . be specified for each job." Conrail's shop manager testified that the "chin-type" respirator was located in the water disposal building near the chlorination building so that, if there were a chlorine leak in that building, an employee could obtain a respirator from the water disposal building and enter the chlorination building to repair the leak. Thus, contrary to Conrail's argument, the purpose of the respirator was not limited to escape from the chlorination building. The undisputed testimony of the compliance officer indicated that the "chin-type" respirator would be inadequate for making repairs where an undetermined and possibly large amount of chlorine had accumulated. Therefore, the "chin-type" respirator was not the proper respirator and Conrail violated section 1910.134(e)(2).

Judge Furcolo's decision as to Conrail's violations of 29 C.F.R. §§ 1910.95(a), 1910.133(a)(1) and 1910.134(e)(2) is affirmed. Having considered the factors in section 17(j) of the Act, 29 U.S.C. § 666(i), we assess a $300 penalty for the violation of 29 C.F.R. § 1910.95(a) and no penalty for the violations of §§ 1910.133(a)(1) and 1910.134(e)(2).

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: JUL 30 1982

ROWLAND, Chairman, dissenting in part and concurring in part:

I dissent from the majority's findings that Conrail violated the occupational noise exposure standard at 29 C.F.R. § 1910.95(a) and the eye and face protection standard at 29 C.F.R. § 1910.133(a)(1). However, I concur with the majority's finding that Conrail failed to supply its employees with the proper respirators in violation of 29 C.F.R. § 1910.134(e)(2).

The majority correctly states that the Noise Control Act of 1972 is intended in part to protect workers from excessive noise levels. But the majority concludes that EPA and FRA regulations promulgated pursuant to the Noise Control Act do not affect the working condition in this case. I disagree.

The employee in this case was exposed to noise from a locomotive.[11/] The EPA and FRA standards regulate the amount of noise produced by locomotives. The FRA regulation spells out its applicability.

> The provisions of this part apply to the total sound emitted by rail cars and locomotives operated by a carrier as defined in 45 U.S.C. 22 under the conditions prescribed herein and in 40 C.F.R. Part 201, including the sound produced by refrigeration and air conditioning units which are an integral element of such equipment. . . .[12/]

The EPA regulation has a similar applicability section. See 40 C.F.R. § 201.10. The EPA and FRA regulations also enumerate exceptions to the regulations, none of which apply to this case.

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11/ It is clear from the record that the Secretary's allegation of excessive noise was based on noise from the locomotive and not from any other source or sources.

12/ 49 C.F.R. § 210.3.

By limiting noise from locomotives and other types of railroad equipment, the EPA and FRA regulations afford protection to all persons who are subjected to noise from such equipment, including railroad employees. Section 4(b)(1) therefore preempts the Secretary from enforcing his noise standard in situations where, as in this case, railroad equipment is the source of the allegedly excessive noise. It is irrelevant whether the EPA and FRA regulations provide more or less protection than the OSHA standard. Once another agency exercises its statutory authority over particular working conditions, OSHA is preempted from applying its own standards to those working conditions regardless of the nature or stringency of the other agency's exercise. American Airlines, Inc., 75 OSAHRC 2/C13, 3 BNA OSHC 1624, 1975-76 CCH OSHD ¶ 20,129 (No. 9392, 1975); Mushroom Transportation Co., 73 OSAHRC 51/E10, 1 BNA OSHC 1390, 1973-74 CCH OSHD ¶ 16,881 (No. 1588, 1973).

Moreover, the Secretary cannot apply his standards to the working conditions named in the FRA policy statement over which the FRA has exercised jurisdiction. Consolidated Rail Corp., 82 OSAHRC , 10 BNA OSHC 1577, 1982 CCH OSHD ¶ 26,044 (No. 79-1277, 1982). According to the policy statement:

> FRA views the question of occupational noise exposure of employees engaged in railroad operations, during their involvement in such operations, as a matter comprehended by the regulatory fields over which FRA has exercised its statutory jurisdiction. FRA is therefore responsible for determining what exposure levels are permissible, what further regulatory steps may be necessary in this area, if any, and what remedial measures are feasible when evaluated in the light of overall safety considerations. FRA's exercise of jurisdiction in this area is evidenced, in part, by the issuance of noise compliance regulations (42 FR 42343; August 23, 1977, issuing 49 C.F.R. Part 210) which will be utilized by FRA to enforce the Environmental Protection Agency (EPA) Railroad Noise Emission Standards (40 C.F.R. Part 201). . . .

* * *

> As suggested above, maximum permissible noise emission levels for rail equipment have already been determined by EPA in consultation with FRA. These emission levels, measured as set forth in the EPA standards, should be recognized by OSHA as establishing the parameters of "feasible administrative or engineering controls" with respect to rail equipment, including locomotives, when such equipment is situated in a railroad shop or enginehouse. See 29 C.F.R. § 1910.95(b)(1).

43 Fed.Reg. 10583, 10588 (1978) (emphasis added). Thus, in its policy statement the FRA has exercised exclusive jurisdiction to protect railroad employees against non-industrial noise arising from locomotive operations. The policy statement further explains that OSHA should recognize the emission levels established by the EPA in consultation with FRA as establishing the parameters of feasible administrative or engineering controls and that OSHA's role in the area of protecting workers from non-industrial noise shall be only an advisory one.

> FRA will work with OSHA to evaluate the prudence of requiring personal protective equipment to reduce noise exposure in those settings where employees may be subjected to more serious hazards associated with railroad operations.

Id. Thus, the policy statement demonstrates that the FRA has exercised exclusive jurisdiction over occupational noise exposure from railroad equipment in the railroad industry.

The majority states that its holding is consistent with section 4(b)(1) because it only requires Conrail to give its workers personal protective equipment and does not require Conrail to institute engineering controls to quiet its locomotives. Such a distinction, however, is not appropriate. Engineering controls and personal protective equipment are simply different means of protecting employees against the same

hazard.[13/] To say that the OSHA standard can be applied to require personal equipment because the EPA and FRA regulations only require engineering controls is inconsistent with the principle that the nature or stringency of the other agency's exercise is irrelevant in determining whether a section 4(b)(1) exemption exists. See American Airlines, Inc., supra; Mushroom Transportation Co., supra.

Because both the EPA and FRA have the authority under the Noise Control Act of 1972 to regulate worker safety and health and because these agencies have exercised that authority over the working condition in this case, I would find that OSHA authority over the working condition has been preempted under section 4(b)(1) of the Act.

I would vacate the eye protection item because the Secretary failed to prove that Conrail knew or could have known, with reasonable diligence, that the employees were not wearing protective eye equipment. Such proof is an essential element of the Secretary's case. Marson Corp., OSHRC Docket No. 78-3491 (May 28, 1982) (Rowland, Chairman, dissenting).

It is undisputed that Conrail made appropriate eye protection available and instructed employees to use such equipment. The majority, however, finds Conrail in violation because it did not enforce the use of the equipment, relying on the compliance officer's testimony that the employees involved in the incident told him that the rule was not enforced.

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13/ The OSHA standard requires both methods of protection under certain circumstances. Section 1910.95(b)(1) provides:

> When employees are subjected to sound exceeding those listed in Table G-16, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table.

I disagree with the conclusion that Conrail did not adequately enforce its work rule. The shop manager of Conrail's diesel facility, Mr. Lord, testified that Conrail had an ongoing and comprehensive procedure for enforcing its work rules, including hearings on alleged violations that could lead to disciplinary action. Against this specific testimony, the Secretary offers only uncorroborated hearsay evidence that Conrail did not enforce its work rule. Moreover, the hearsay is particularly unpersuasive in this case because of the exculpatory nature of the statements made by the disobedient employees. In my opinion, Mr. Lord's specific testimony, which was tested by cross-examination, must prevail over the hearsay offered by the Secretary.[14/]

I agree with the lead opinion that Conrail violated section 1910.134(e)(2) by providing an incorrect type of respirator for use in its chlorination building. Conrail contends that the "chin-type" respirator it provided was adequate for purposes of escaping from the chlorination building if a leak should develop. However, Conrail's shop manager testified that the respirator was intended to be used by an employee entering the chlorination building to repair a leak. It is undisputed that the "chin-type" respirator was inadequate for this purpose. Thus, the respirator was not the correct type for its intended use. Accordingly, while I would reverse the judge with respect to the alleged violations of sections 1910.95(a) and 1910.133(a)(1), I agree to affirm his decision with respect to the violation of section 1910.134(e)(2).

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14/ Because I would find that Conrail adequately enforced its work rule, I need not consider whether the Act imposes a duty on employers to enforce safety rules as well as to establish and communicate such rules. See Marson, Inc., slip op. at 17 n. 17; Borton, Inc., 82 OSAHRC , 10 BNA OSHC 1462, 1982 CCH OSHD ¶ 25,893 (No. 77-2115, 1981) (Rowland, Chairman, dissenting).

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant<br>v.<br>CONSOLIDATED RAIL CORPORATION,<br>Respondent | OSHRC DOCKET NO. 78-2546 |

Appearances:

Louis De Bernardo, Esq., for Complainant

John R. Jenchura, Esq., for Respondent

DECISION AND ORDER

This case arose under 29 USC, sec. 651 et seq. of the Occupational Safety and Health Act of 1970 (the Act). As a result of an inspection by the Occupational Safety and Health Administration [OSHA] of the Respondent's premises on March 14 to April 28, 1978, Citations 1 and 2 were issued on or about May 24, 1978, charging that the Respondent violated sec. 5(a)(2) of the Act by the serious violation of the standards at 29 CFR 1910.95(a), .106(d)(4)(v), .106(e)(6)(i) and .106(e)(6)(ii) [respectively items 1, 2a-c of Citation #1]; and the other than serious violation of the standards at 29 CFR 1910.106(d)(7)(iii), .157(a)(1), .133(a)(1), .134(e)(2),

.134(e)(3), and .134(f)(2)(iv), [respectively items 1-6 of Citation #2].

On or about June 6, 1978, the Respondent filed Notice of Contest to Citations 1 and 2 and the penalties proposed therefor.

The pertinent sections of the Act and the standards are appended to this decision under appropriate titles.

## Stipulations and Motions

By motion of the parties, the proposed penalty of $420 for items 2a-c of Citation #1 was amended to $250; and the Respondent withdrew its Notice of Contest to items 1 and 6 of Citation #2...Tr. 3, 4.

Although the Transcript does not specifically indicate it, both parties understood that the Respondent also withdrew its Notice of Contest to items 2(a)-(c) of Citation #1 at the time that the motion to amend the proposed penalty was allowed. That is my very clear recollection and it was confirmed to me in a telephone conference with the parties held on January 30, 1979. Following that conference, both parties sent me letters to that effect, which I have marked in evidence as Exhibits C-10 and R-2. In addition, pages 162 and 167 of the Transcript make it clear that the parties had tried the case on that basis. I find that the Respondent withdrew its Notice of Contest to items 2(a)-(c) of Citation #1.

The Respondent is a large company operating railroads that cross state lines...Tr. 4.

It was agreed by the parties that (unless the Respondent prevails in its jurisdictional defense) the Respondent violated item 1 of Citation #1 and a penalty of $300 is appropriate...Tr. 94.

The Respondent moved to dismiss item #1 of Citation #1 on the grounds that OSHA lacked jurisdiction to regulate noise levels; and the citation and standard were vague and defective. The first ground of the motion was denied on the basis that the Federal Railroad Administration had not exercised its authority in any way that would deprive the Occupational Safety and Health Review Commission of jurisdiction. It was later stipulated that the Respondent would renew its jurisdictional defense in its Brief...Tr. 94, 165.

On the second basis (that the citation and standard were vague and defective) the motion was denied on the grounds that the citation and standard were not vague, the Respondent had discovery procedures available to it, there had been an exchange of information between the parties, and the Respondent had shown no prejudice...Tr. 5-11.

Citation #1, Item #1 [1910.95(a)]

It was stipulated that, other than its Section 4(b)(1) jurisdictional defense, the Respondent was not contesting item #1 of Citation #1 or the proposed penalty of $300...Tr. 94, 165.

Section 4(b)(1)

Citing Section 4(b)(1) of the Act, the Respondent moved to dismiss Item #1 of Citation #1 on the ground that there was a lack of jurisdiction because a federal agency had prescribed or enforced regulations affecting occupational safety or health. At the hearing, the motion was denied on the basis that the Federal Railroad Administration had not exercised its authority in any way that would deprive the Occupational Safety and Health Review Commission of jurisdiction to hear and decide the citation

and complaint in the instant case...Tr. 94.

In support of its position, the Respondent's main reliance has been on the standard at 49 CFR 201.11(a). That standard [which is under Title 40, entitled "Protection of Environment"] is obviously an environmental protection regulation concerning noise levels one hundred feet away from the locomotive. I find that that standard was intended to protect the general environment or the general public rather than the Respondent's employees. It would not qualify as an "exercise" of statutory authority or a regulation "affecting occupational safety or health" under Section 4(b)(1).

In view of the stipulation that the jurisdictional defense was the only one being pressed, I find that the Respondent was not in compliance with the standard at 29 CFR 1910.95(a).

Citation #2, Item 2 [1910.157(a)(1)]

Several uncharged fire extinguishers were in the car shop, adjacent to a combustible liquid storage area. The hazard was that, if one were taken to combat fire, it would give no protection to an employee using it...Tr. 96-98, 117, and Exh. C-5. Representatives of the Respondent said that those extinguishers were not in use but had been collected and placed there to be sent out for charging...Tr. 97, 118. That explanation has not been contradicted in any way, and I find it to be both reasonable and honest. The Complainant has not sustained the burden of proving the Respondent was not in compliance with the standard at 29 CFR 1910.157(a)(1).

Citation #2, Item 3 [1910.133(a)(1)]

In a large open area in the Diesel shop, two employees who were spraying industrial alkali cleaner were not wearing protective glasses when, as the Respondent's shop manager (Lord) admitted, they should have been. The hazard was the possibility of eye injury caused by a splash; and, in fact, one employee had a red and irritated eye from the cleaning fluid...Tr. 100-103, 124, 146.

Adequate personal protective equipment was available and the Respondent had specific written and oral safety rules calling for employees to wear protective glasses under the conditions here...Tr. 138-143 and Exh. R-1. However, both employees told the OSHA Compliance Officer that that safety rule was not enforced...Tr. 125.

Since one general foreman and two line foremen were assigned to the Diesel shop, and the two employees were working in an open area in it, a reasonable conclusion is that the Respondent had knowledge of the violation...Tr. 149.

I find that the Respondent was not in compliance with the standard at 29 CFR 1910.133(a)(1).

Citation #2, Items 4 and 5 [.134(e)(2) and (3)]

Cylinders of chlorine were stored in a "shanty" near the water disposal area building. "Chin-type" respirators, which were kept in the water disposal area building, covered the whole face but were not a self-contained breathing apparatus. The hazard was that chlorine might get into the breathing zone, causing pulmonary edema or eye irritation or death. The condition could be abated by the use of self-contained

breathing apparatus...Tr. 105-115, 131-133, 156, and Exh. C-6 (pages 8, 9, 15), C-7, C-8, and C-9.

The Respondent contended that there had been no need to use a respirator since at least 1975; the water disposal plant operator was trained in the use of the respirator; only one or two employees needed to use it; and there were written instructions in the lid of the respirator container...Tr. 156-160.

Since there was chlorine in the area and there was no contradiction of the testimony that the respirator used did not fully protect against it but a self-contained breathing type would, I find that the correct respirator had not been specified as required by the standard at 29 CFR 1910.134(e)(2).

Concerning the alleged violation of the standard at .134(e)(3), the Compliance Officer apparently intended to testify that employees of the Respondent had said they were not familiar with written procedures concerning the use of respirators...Tr. 115, 116. However, there was never any clear evidence to that effect. On the other hand, the Respondent's employee [Scatko] in charge of that phase of the Respondent's business, testified clearly that adequate instructions in the respirator container were known to employees who would use it...Tr. 159-160. That testimony was not contradicted.

In that state of the evidence, I find that the complainant has not sustained the burden of proving the Respondent was not in compliance with the standard at 29 CFR 1910.134(e)(3).

## Findings of Fact

Having heard the testimony, observed the witnesses, and examined the exhibits, the following Findings of Fact are made:

1. At all times concerned, the Respondent regularly received, handled or worked with goods which had moved across state lines.

2. As concerns Item #1 of Citation #1, the Federal Railroad Administration had not prescribed or enforced any standards or regulations affecting occupational safety or health; and it was stipulated that lack of jurisdiction was the Respondent's only defense to the alleged violation.

3. As concerns Items 2a-c of Citation #1, and Items 1 and 6 of Citation #2, the Notice of Contest was withdrawn.

4. As concerns Item #2 of Citation #2, the fire extinguishers in question were not being "kept" but had been temporarily placed in the car shop awaiting removal to be charged.

5. As concerns Item #3 of Citation #2, two employees were not required to use protective eye and face equipment.

6. As concerns Item #4 of Citation #2, the correct respirator was not specified for each job.

7. As concerns Item #5 of Citation #2, there was insufficient evidence to establish that Respondent's personnel were not familiar with written procedures for the safe use of respirators.

8. The conditions described in Item #1 of Citation #1 exposed the Respondent's employees to sustaining serious harm because of the hazard of impairment of hearing due to excessive noise.

9. The conditions described in Item 3 of Citation #2 exposed the Respondent's employees to sustaining harm because of the hazard of industrial alkali cleaner splashing into the eyes.

10. The conditions described in Item 4 of Citation #2 exposed the Respondent's employees to sustaining harm because of the hazard of chlorine getting into the breathing zone, causing pulmonary edema or death.

11. One or more officers or supervisory personnel of the Respondent knew of the hazardous conditions described herein and knew that employees were exposed to such hazards.

## Conclusions of Law

1. At all times concerned, the Respondent was an employer engaged in a business affecting commerce within the meaning of the Act; and the Occupational Safety and Health Review Commission has jurisdiction over the subject matter and the parties.

2. At all times concerned, the Respondent knew, or with the exercise of due diligence should have known, of the alleged violations.

3. On the date in question, the Respondent was not in compliance with the standards at 29 CFR 1910.95(a); .106(d)(4)(v); .106(e)(6)(i); .106(e)(6)(ii); .106(d)(7)(iii); .133(a)(1); .134(e)(2); and .134(f)(2)(iv); and the Complainant has sustained the burden of proving the Respondent violated sec. 5(a)(2) of the Act (sec. 654).

4. The Complainant has not sustained the burden of proving the Respondent violated the standards at 29 CFR 1910.134(e)(3) and 29 CFR 1910.157(a)(1).

## Order

The whole record having been considered, and due consideration having been given to 29 U.S.C., sec. 666(j), it is ordered:

1. Items 1 and 2a-c of Citation #1 are affirmed, and a penalty of $300 is assessed for Item #1.

2. Items 1, 3, 4, and 6 of Citation #2 are affirmed.

3. Items 2 and 5 of Citation #2 are vacated.

SO ORDERED.

Foster Furcolo

FOSTER FURCOLO
Judge, OSHRC

Dated: March 5, 1979
Boston, Massachusetts

## APPENDIX

### The Act

Section 653(b)(1) [Section 4(b)(1)] "Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies...exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."

Section 654 [section 5(a)(2)] Employer"...shall comply with occupational safety and health standards..."

Section 666 [section 17(b)] "...employer who has received a citation for a serious violation...of this Act...shall be assessed a civil penalty of up to $1,000 for each such violation."

Section 666 [section 17(c)] "...employer who has received a citation for a violation of...this Act...specifically determined not to be of a serious nature, may be assessed a civil penalty of up to $1,000 for each such violation."

Section 666 [section 17(j)] "...assess all civil penalties...giving due consideration to...the size of the business... gravity of the violation, the good faith of the employer, and the history of previous violations."

Section 666 [section 17(k)] "...a serious violation shall be deemed to exist...if there is a substantial probability that death or serious physical harm could result...unless the employer did not, and could not...know of the presence of the violation."

### The Standards

29 CFR 1910.157(a)(1): Portable fire extinguishers "shall be maintained in a fully charged and operable condition, and kept in their designated places at all times when they are not being used."

29 CFR 1910.133(a)(1): "Protective eye and face equipment shall be required...employers shall make conveniently available a type of protector suitable...and employees shall use such protectors..."

29 CFR 1910.134(e)(2): "The correct respirator shall be specified for each job... The individual issuing them shall be adequately instructed... Each respirator permanently assigned to an individual should be durably marked to indicate to whom it was assigned... The date of issuance should be recorded."

29 CFR 1910.134(e)(3): "Written procedures shall be prepared covering safe use of respirators... Personnel shall be familiar with these procedures."

49 CFR 201.11(a): "...no carrier...shall operate any locomotive... which produces sound levels in excess of 93 dB(A)... at 30 meters (100 feet) from the geometric center of the locomotive..."

[This standard is found under Title 40, which is entitled: "Protection of Environment."]

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| 81-1567 | PANELMASTERS INTERNATIONAL, INC. | 7/28/82 | 43/C11 |
| 81-2457 | WACHSBERGER ROOFING | 7/29/82 | 43/C14 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

Secretary of Labor v. FOESCO, INCORPORATED
OSHRC Docket No. 81-944

1. Enclosed is a copy of my decision. It will be filed with the Commission on June 28, 1982, and will become the final order of the Commission on July 28, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is July 28, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

William E. Brennan
WILLIAM E. BRENNAN
Judge, OSHRC
1515 Broadway, Room 3800
New York, New York 10036

Date: June 8, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

JUDGE'S DECISION JUN 28 '82 RECEIVED

FINAL ORDER ON JUL 28 '82

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| | | |
|---|---|---|
| SECRETARY OF LABOR | : | |
| Complainant | : | |
| v. | : | OSHRC Docket No. 81-944 |
| FOESCO, INCORPORATED | : | DECISION AND ORDER |
| Respondent | : | |

- - - - - - - - - - - - - - - - - - - - - - -

APPEARANCES

FOR COMPLAINT

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Brennan, W. E., A.L.J.

## STATEMENT OF THE CASE

This case arises under the provisions of Section 10(c)[1/] of the Occupational Safety and Health Act of 1970 (hereinafter the Act).[2/] There is at issue a six-Itemed Serious Citation issued pursuant to Section 9(a) of the Act[3/] by the Secretary of Labor through the Area Director of the Occupational Safety and Health Administration (OSHA) for Pittsburgh, Pennsylvania, (hereinafter Complainant) to Foseco, Incorporated, Mt. Braddock, Pennsylvania (hereinafter Respondent). Penalties totalling $1,960 were proposed by Complainant pursuant to Section 10(a) of the Act.[4/]

After the filing of a Notice of Contest (R.p. 3)[5/] the perfection of the pleadings, and pre-trial discovery, a four day hearing was held in Pittsburgh, Pennsylvania. No affected employee or representative thereof claimed party status (Tr. 4).

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1/ 29 U.S.C. 659(c).

2/ 29 U.S.C. 651 et seq.

3/ 29 U.S.C. 658(a).

4/ 29 U.S.C. 659(a).

5/ References herein translate as follows:

R.p. 3 The third numbered document in the official Docket File prior to assignment to the undersigned.

R.p. J-3 The third numbered document in the official Docket File after assignment to the undersigned.

Tr. 27 Page 27 of the hearing transcript.
Exh. C-1 Complainant's Exhibit in evidence.
Exh. R-1 Respondent's Exhibit in evidence

This citation arose from an inspection of Respondent's Mt. Braddock plant in Mt. Braddock, Pennsylvania on February 5, 1981.

The Serious Citation alleges the following:

> Item 1
> Section 5(a)(1) of the Occupational Safety and Health Act of 1970:
>
> The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that:
>
> > (a) Management permitted an oil fired furnace to be used, exposing the open flame to the raw material batching area atmosphere, in which fine particles of aluminum dust and powder was liberated.

Abatement was ordered by March 13, 1981 and a $420 penalty was proposed.

> Item 2
> Section 5(a)(1) of the Occupational Safety and Health Act of 1970:
>
> The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that:
>
> > (a) Management permitted the accumulation of aluminum powder and dust on building supports, equipment, electrical fixtures, bundles of news papers and the floor of the Raw Material Batching Area, which are not regularly cleaned during daily operations. This condition exposes employees to possible flash fire and/or explosion.

Abatement was ordered by March 23, 1981 and a $350 penalty was proposed.

Item 3
29 CFR 1910.157(b)(2)(i): Portable fire exinguisher(s) [sic] were not selected for the specific class(es) of harard(s) [sic] to be protected:

(a) Raw Material Batching Area; the extinguishers and extinguishing agents for the protection of Class "D" hazard of aluminum powder and dust generated by the dumping and batching operation.

Abatement was ordered by March 23, 1981 and a $280 penalty was proposed.

Item 4
29 CFR 1910.178(c)(2)(vi):[6/] Non-approved powered-operated industrial trucks were being used in an atmosphere containing hazardous concentrations of metal dust:

(a) Raw Material Batch Area; Allis-Chalmers, Model ACCC-40, fork lift and a Clark towmotor, were being used to transport open end five gallon metal containers of aluminum powder.

Abatement was ordered by March 13, 1981 and a $280 penalty was proposed.

Item 5
29 CFR 1910.309(a) Section 502-4(a), National Electrical Code, NFPA 70-1971, as adopted by 29 CFR 1910.309(a): Wiring method(s) employing threaded rigid metal conduit or type MI cable(s) with termination fitting(s) were not used in Class II Division 1 locations(s): [sic]

(a) Raw Material Batching Area; overhead wiring and receptacles were not in conduit of the approved type.

Abatement was ordered by April 13, 1981 and a $350 penalty was proposed.

---

6/ The Citation as issued alleged in item 4, a violation of the Standard set forth at 29 C.F.R. 1910.178(c)(2)(vii) (R.p. 1). Complainant's written Motion, filed one week before trial, (R.p. J-47), to amend Item 4 to allege a violation of 29 C.F.R. 1910.178(c)(2)(vi), which amendment did not alter the wording of this Item, was granted on the first day of trial, after argument from both parties (Tr. 12-32).

Item 6
29 CFR 1910.309(a) Section 502-6(a)(3), National Electrical Code, NFPA 70-1971, as adopted by 29 CFR 1910.309(a): Fuse(s) switch(es), motor controller(s) and circuit breaker(s) located where dust from magnesium, aluminum, aluminum bronze powders, or other metals of similarly hazardous characteristics were present, were not specifically approved for Class II Division 1 location(s):

(a) Raw Material Batching Area; the electrical board containing 110 and 240 volt disconnect switches and receptacles located along the west wall. (R.p. 1)

Abatement was ordered by April 13, 1981 and a $280 penalty was proposed.

The cited law and OSHA Standards provide as follows:

Section 5(a)(1) of the Act:

Sec. 5. (a) Each employer -
(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

* * *

29 U.S.C. 654(a)(1)

29 C.F.R. 1910.157(b)(2)(i):
Portable Fire Suppression Equipment

* * *

(2) Selection by hazard. (i) Extinguishers shall be selected for the specific class or classes of hazards to be protected in accordance with the following paragraphs.

* * *

29 C.F.R. 1910.178(c)(2)(vi):

(vi)(a) Only approved power operated industrial trucks designated as EX shall be used in atmospheres in which combustible dust is or may be in suspension continuously, intermittently, or periodically under normal operating conditions, in quantities sufficient to produce explosive or ignitable mixtures, or where mechanical failure or abnormal operation of machinery or equipment might cause such mixtures to be produced.

29 C.F.R. 1910.309

National Electrical Code.

(a) The requirements contained in the following articles and sections of the National Electrical Code NFPA 70-1971; ANSI CI-1971 (Rev. of Cl-1968) shall apply to all electrical installations and utilization equipment:

Articles

* * *

502-4. Wiring Methods. Wiring methods shall conform to the following:

(a) Class II, Division 1. In Class II, Division 1 locations, threaded rigid metal conduit or Type MI cable with termination fittings approved for the location shall be the wiring method employed. Type MI cable shall be installed and supported in a manner to avoid tensile stress at the termination fittings.

* * *

502-6. Switches, Circuit Breakers, Motor Controllers, and Fuses.

Switches, circuit breakers, motor controllers and fuses shall conform to the following:

* * *

(3) Metal Dusts. In locations where dust from magnesium, aluminum, aluminum bronze powders, or other metals of similarly hazardous characteristics may be present, fuses, switches, motor controllers and circuit breakers shall have enclosures specifically approved for such locations.

## ISSUES

1. Did the methods used by Respondent in pre-batching (measuring) atomized aluminum powder at its Mt. Braddock plant result in an explosive or ignitable atmosphere or result in the accumulation of aluminum dust layers on the building components, equipment and material stored in the pre-batch area of this building so as to cause a danger of an aluminum flash fire or an explosion?

2. Did the conditions produced by Respondent's pre-batching methods constitute violations of Section 5(a)(1) of the Act, (the General Duty Violations, Items 1 and 2 of the Citation), or the cited Standards, (Items 3 thru 6 of the Citation)?

Both issues are answered in the negative.

## EVIDENCE

The record in this case reveals that the Respondent is part of a British owned company which has operations in Canada, Australia, Japan, and the United States. Its Mt. Braddock, Pennsylvania plant was incorporated in Delaware and this case involves only one of seven major buildings,

the "Prebatch Building", located at this Mt. Braddock facility (Tr. 7, 8, 50, 60, 61). There are an average number of 75 employees working at the Mt. Braddock facility and Respondent conceded that this facility falls under the jurisdiction of the Act (Tr. 9, 10).

At this facility, Respondent is engaged in manufacturing specialty chemical products which it supplies to steel mills and the foundry industry. Ninety percent of its production at this facility consists of insulating boards, the remainder involves blended powder products and "briquets" sold to foundries. The insulating boards, range in size from 1 foot x 1 foot x 1 inch thick to 4 feet x 4 feet x 1 1/2 inch thick and are used by foundries and steel mills to line ingot molds to control the cooling of molten metal which aids in the production of high grade steel. The boards are intended to and are consumed by the molten steel in the molds and thus can be used only once.

The prebatching of atomized aluminum powder, the work practice giving rise to the Citation at issue here, is carried out in Respondent's "prebatch building". This building is a large metal warehouse with a concrete floor. It measures approximately 122 feet in length, 80 feet in width with the roof structure approximately 25 feet above the concrete floor (Exh. R-1). The North end of this building, occupying an area approximately 26 feet deep for the entire 80 foot width of the

building is the prebatch area (Exh. R-1). The rest of the building is used to store material. The prebatch area (worksite) is not separated from the rest of the interior of this building.

Prebatching, as used in this record, essentially means weighing out specified amounts of the various ingredients which go into the fabrication of the insulating boards and other products Respondent manufactures.

The following materials are prebatched at this worksite:

Newsprint, i.e., newspapers, rayon fibers, calcium silicate fiber, synthetic resin in fine powder form, silica sand, and atomized aluminum powder.

Respondent's total daily production amounts to 110,000 pounds plus 40,000 pounds of water which is dried off. The aluminum powder used in fabricating these insulation boards, one of a number of ingredients, amounts to only 0.17 of one percent of the raw material batched at this worksite. The major raw material prebatched at this worksite is the synthetic resin in fine powder form. The insulating boards are fabricated by mixing predetermined, fixed amounts of various powders, fibers and organic ingredients with water to produce a slurry, which is molded into the desired shapes, dried in an oven and then packed for shipment. The measuring out of the specific ingredients to specified quantities is done in the prebatch area. The ingredients are then taken elsewhere at

the facility for the mixing, molding, drying and preparation for shipment functions.

The atomized aluminum powder used by Respondent at its facility, was supplied in 55 gallon metal-lidded drums by either Reynolds Aluminum or the Aluminum Company of America. It consisted of pear shaped particles of 30 micron size having a relatively high bulk density. This powder is dark grey in color and is considered a "heavy" powder, having an "explosibility index number" of between 1.2 and 1.8. The "explosibility index number" is a rating for dusts, developed by the U. S. Bureau of Mines, to rate the propensity of various dusts to explode, when measured against Pittsburgh coal dust, which is rated at 1. The higher the index number the more explosive the dust. Household flour has an index rating of between 5 and 6 (Tr. 600 - 605, Exh. C-8, p. 7, Figure 2).

The prebatching procedures followed by Respondent prior to the inspection of February 5, 1981, from which this case arose,[7/] were as follows:

The 30 micron sized atomized aluminum powder was received by Respondent in 55 gallon metal drums sealed by metal lids. The drums were stored, ready for use in the storage areas in the prebatch building (See Exh. R-1), and normally about 4 sealed drums were kept in storage.

7/ Shortly after this inspection, Respondent terminated its prebatching of aluminum powder and since that time has not used aluminum powder at this facility.

Three or four days per week, there was a need to prebatch the aluminum powder for the fabrication of the insulating boards. As this need arose, an employee, using a propane fueled Allis-Chalmers, Model ACCC-40 forklift truck brought a 55 gallon drum from the storage area to the prebatching area. This drum was clamped securely into a tilting apparatus affixed to this forklift during this transit.

When the forklift truck was positioned near a metal trough in this area, also referred to as a "mortarbox", (See Exh. R-1 on which this trough is represented as a rectangular shape with the work "ALUM." appearing thereon), the drum was elevated 2 or 3 feet above the edge of the trough and the engine of the forklift was turned off. Then the lid of the drum was removed and using the manually operated tilting device, the 600 pounds of aluminum powder in the drum was emptied into the trough.

Two employees were regularly assigned to carry out the prebatching functions performed at this worksite, Messers. Feniello and Bukovac. Each had been employees for approximately 5 years with their major duties consisting of prebatching various raw materials.

Both employees appeared as witnesses, Mr. Feniello for Complainant (Tr. 318 - 393) and Mr. Bukovac for Respondent (Tr. 667 - 703).

No significant discrepencies appear in their testimony. They testified that they are supplied respirators by Respondent

and wear them during their prebatching operations pursuant to a company rule. Similarly, neither smoke during their operations in comformance with another company rule.

The procedure of dumping the drum of aluminum powder produces a small cloud of dust, which rises about 4 feet above the top of the trough, and extends roughly 1 foot on either side of the trough and quickly settles to the floor.

The trough is metal, measures approximately 1 foot in depth and 6 feet long, was purchased and installed at the worksite as a new piece of equipment approximately four years before the inspection and has been painted with a brownish appearing paint.

After the aluminum powder is dumped into this trough, the prebatching employees, using aluminum shovels, transfer the powder into metal pails, filling each pail with 50 pounds of powder, the desired amount. Photographic Exhibits C-1 and C-2 show this operation. The pails are on some type of scale when being filled and when the desired amount of powder is shoveled into the pails, they are placed on pallets and taken by forklift truck to another building at this facility where the powder is added to the slurry for the insulating boards. During this shoveling operation, which takes about one hour, small amounts of the powder drop to the floor. Additionally, a very small dust cloud is produced, (it raises about 3 feet above the pail and is 6 to 8 inches in diameter), which quickly settles out onto the floor. At the end of each days

shift, the prebatch employees clean the prebatch area, removing all scrap material, i.e., empty bags, etc., and sweep up any spilled powder. This trash is put into containers, and removed from the building for later removal from the facility. These two employees have never received any special instructions concerning the prebatching of aluminum powder.

In the Northeast corner of this prebatch area, there is located two vented hoods connected to a dust collecting system. The hoods measure about 6 feet long by 4 feet deep and were located about 4 to 5 feet above the concrete floor. (See Exh. R-1, equipment labeled "Dust Collector"). Although the prebatching employees had been directed to prebatch all materials under these ventilation hoods, they routinely did not prebatch the aluminum powder under the hoods because it was "easier" not to, and because the trough or "mortar box" was positioned some 20 to 30 feet away from the hoods. However, the dust collectors were turned on each morning and remained operative during the work day. Both the fiberglass fibers and the clay ingredients of the insulating boards were batched under the ventilation hoods, essentially because the fiberglass fibers caused the employees some skin irritation if the fibers got onto their skin, they were "itchy".

This large prebatch-warehouse building had two, 10 foot wide garage doors and two "man" doors, i.e., personnel doors.

One garage door boarded the prebatch area in the West wall of the building with one personnel door directly opposite it in the East wall, some 80 feet away. The other garage door was also on the West wall at the South end of the building some 100 feet away from the other garage door. The second personnel door was very near the South garage door in the South wall of the building (See Exh. R-1).

Although the garage door nearest the prebatch area was used to move material in and out of this area, it remained closed the great majority of the time, even in the summertime. The personnel doors were used primarily by the two prebatch employees. Thus, the prebatch area was not subject to constant drafts or winds coming through these doors, and both employees testified that they had never seen the very small clouds of aluminum dust caused by the prebatching operation drift away from the immediate area of the trough or "mortar box".

Approximately 16 feet from the prebatch trough in an Easterly direction, near the North wall of this building, there was located an oil-fired furnace (See Exh. R-1). It had been installed approximately four to six weeks before the inspection herein to provide heat for the two prebatch employees. Although there is some small confusion in the evidence as to whether or not it had ever operated, at any

rate it was not in operation during the February, 1981, inspection from which this case arose.

On the East wall of the prebatch area some 24 feet from the aluminum prebatching trough, approximately ten electric circuit breaker boxes were located (See Exh. R-1, equipment labeled "Elec. Panels"). Seven of these ten boxes were non-operative as the machinery which they had been connected to were not operative and had not been in use for some considerable period. (See Exh. R-1, where the non-operating equipment is shown along the North wall of the prebatch area, labeled "Disregard equipment").

The prebatch area was lighted by overhead lights. The wires to these lights ran from the circuit breaker boxes, thru metal conduits to the overhead fixtures. These metal-clad wires were covered with some type of foam insulating material. Finally, fire extinguishers of either a "B-C" or "A-B-C" classification were located just to the North of the garage door on the West wall and the personnel door on the East wall (See Exh. R-1).

The Respondent produced Mr. Allan Osborne, the Plant Manager of the Mt. Braddock facility who had held that position for approximately five years. He initially began his employment with Foseco in England in 1964 as a chemical analyst, progressing through the positions of

Quality Control Technician, Process Control Manager and Plant Manager in England, while completing his education, finally transferring to the Mt. Braddock facility as its Manager.

Mr. Osborne confirmed in all essential respects, the testimony of the two prebatching employees, Messers. Feniello and Bukovac, and rated them as careful and experienced employees. Further, he testified that there never had been any fire or explosion in either the prebatch area or in the entire facility in any way connected with the prebatching of the atomized aluminum powder. Further, during his five year tenure as Plant Manager, there had never been a malfunction of either the electric circuit breaker boxes or the electric circuitry in the prebatch building.

At Mt. Braddock monthly safety meetings are held with Mr. Osborne, Mr. Tabasco, the Production Manager, and a union member in attendance. Prior to this meeting, Mr. Tabasco tours the entire plant and there is a procedure for employees to complete a safety request form. Any such requests or other safety matters are dealt with in these monthly safety meetings and the minutes of these meetings are posted on bulletin or "notice" boards. No complaints concerning the aluminum prebatching operation have ever been submitted.

Based on his education, which consisted in part, of a major in metallurgy, and long experience with Foseco in

England and particularly as Plant Manager at the Mt. Braddock facility, Mr. Osborne was of the opinion that the prebatching of the atomized aluminum powder as carried on at his plant did not present any hazard because of the manner in which it was handled. He further frankly acknowledged that under "very certain conditions", a spark related to working with aluminum powder can be a hazard, the hazard being a fire or explosion, characterizing such knowledge as "general knowledge about aluminum powder" (Tr. 828, 829). However, such hazards in his view, are not existent at his facility, essentially because the atomized aluminum powder in use was "very dense" and hence there was no realistic possibility that an aluminum dust cloud of sufficient concentration in the air could be generated to support an explosion. Further, although admitting that the prebatching area was a "dusty area", he maintained that the 30 micron sized aluminum powder used did not create aluminum dust clouds of any significance, and he had never seen what small clouds were created, drift away from the immediate vicinity of the aluminum batching trough. In his view, most of the dust in this "dusty area" was caused by the batching of resin, a major powdery material handled in that area (Tr. 745 - 852). Mr. Osborne's testimony, because of its frankness and clarity together with his demeanor, education and long experience with the Respondent company, is fully credible.

## THE INSPECTIONS

The record reveals that this Mt. Braddock facility had its first OSHA general inspection in November, 1980. No citations issued as result of that inspection but, as a consequence thereof, a second OSHA hygiene inspection was made the following month, in December, 1980, by OSHA Industrial Hygienist Voycik. During Mr. Voycik's inspection, air samples were taken of the prebatching area, with sampling devices attached to both Messers. Feniello and Bukovac for a major portion of a normal workday which included prebatching aluminum powder. Hygienist Voycik did not take any wipe samples of any dust which had settled in the prebatch area.

The air samples which were taken resulted in a finding of "silica and nuisance" dust. These samples were not subjected to any analysis to determine if any of the dust which was sampled contained any aluminum dust. The dust which was found and identified as "silica and nuisance" dust in the air samples was determined by weighing the filters before and after sampling. This dust consisted of 50.85 miligrams per cubic foot of air, which converts to .00005 onces per cubic foot of air.[8/] As a result of Mr. Voycik's inspection, citations were issued to this Respondent. Although initially contested by Respondent, that case ultimately was completely settled by the parties. Sec. of Labor v. Foseco Inc., OSHRC Docket No. 81-477. (Tr. 210 - 242; 778).

8/ The significance of these air sampling results is explained *infra*.

As a further consequence of Mr. Voycik's hygiene inspection in December, 1980, a third OSHA inspection was made of Respondent's prebatching operation on February 5, 1981, by OSHA Compliance Officer (C. O.) Seifert. It is this February, 1981 inspection upon which the Citation here determined is based.

C. O. Seifert, upon a referral from Mr. Voycik went to Respondent's Mt. Braddock facility on February 5, 1981 to inspect its prebatching operation because during Mr. Voycik's hygiene inspection, some question arose in Mr. Voycik's mind that there might be either an explosion or fire hazard created by the prebatching of the aluminum powder where there was also present, a source of ignition.[9/]

When Mr. Seifert arrived at the prebatch area, no operations were taking place. He asked the two prebatch employees, Feniello and Bukovac how they prebatched the aluminum powder. There was already some aluminum powder in the trough, so after explaining how the 600 pound drum of powder was emptied into the trough, one of the employees, using an aluminum shovel, put two shovels full of the aluminum powder into a couple of pails. The C. O. photographed this operation (See Exhs. C-1, C-2).

9/ During Mr. Voycik's December inspection, he evidently observed a "salamander" kerosene heater in use in the prebatch area which provided warmth to the two prebatch employees. This is a so-called "smudge pot" type of heater, essentially a round container of kerosene or other type of oil with a metal chimney. Heat is produced by a flame burning the fuel.

Mr. Seifert then observed the oil fired furnace near the North wall of the building which was not operative. The salamander heater, observed by Mr. Voycik in his December hygiene inspection had been removed by Respondent and the furnace installed in its place. C. O. Seifert then observed a propane fueled forklift truck, noted the overhead lights and traced the metal clad conduits to the circuit breaker boxes on the West wall. He further noted the fire extinguishers in place as well as the generally dusty appearance of the building structure itself as well as dust on stacks of newspapers near the aluminum trough (See Exh. R-1 - "Paper Bundles" and "Bin of Paper Bundles").

This C. O. did not take any measurements whatever during his inspection, i.e., of distances of the furnace, overhead lighting and wiring, or circuit breaker boxes from the aluminum trough.

Most importantly, he did not take any air samples during the extremely brief shoveling operation he observed nor any wipe samples of the dust he observed in the prebatch area.[10/] This entire inspection took approximately one hour.

10/ Mr. Seifert testified that he had received so-called "cross-over" training in the taking of environmental samples, so was qualified to at least take wipe samples of the dust he observed so its contents could have been identified (Tr. 150).

From his inspection, Mr. Seifert concluded that an aluminum fire and/or explosion hazard was present at Respondent's prebatch area. He reasoned that the prebatching of the 30 micron atomized aluminum powder created aluminum dust. Further, he concluded that the dust which he observed in this area was aluminum dust. He then found what he considered to be potential sources of ignition, namely, the oil fired furnace, the metal clad wiring to the overhead lights, and the circuit breaker boxes, should they malfunction, and the electrical and exhaust systems of the forklift trucks used in the area, should they malfunction, i.e., backfire, or strike a steel support member of the building. Based on this rationale, he recommended the issuance of the Serious Citation herein (Tr. 63 - 183; 243 - 315; 623 - 664).

Although C. O. Seifert is an experienced and honest Compliance Officer, with nine years of experience in this position with OSHA, having made about 600 OSHA inspections, one third of which involved fire safety, and with a 30 year employment history involving in one form or another, fire protection, the substantial evidence of this record does not support his conclusion as to an aluminum dust hazard at Respondent's prebatching operation as is shown <u>infra</u>.

## THE EXPERT WITNESS' TESTIMONY

Both parties presented the testimony of highly qualified expert witnesses, Mr. John Nagy for Complainant (Tr. 424 - 622), and Mr. Arthur Craven for Respondent (Tr. 853 - 992). There is no significant controversy in their testimony except for their final opinions, Mr. Nagy believing there was an extremely slight possibility of an aluminum fire or explosion at Respondent's prebatch area, essentially based on the testimony of C. O. Seifert and employee Feniello, and Mr. Craven believing there was no aluminum fire or explosion hazard, based on his study of Respondent's prebatch area and practices and the 30 micron atomized aluminum powder used in this process.

Based on an exhaustive study and very careful analysis of this evidence, it is concluded that Mr. Craven's final opinion must be accorded the most weight.

Mr. Nagy, a veteran of 43 years of outstanding Governmental service with the U. S. Bureau of Mines (1936 - 1973) and U. S. Mine Safety and Health Administration (1973 - 1979) has since his retirement, engaged in private consulting work for the past three years. His Governmental service was directed to the study of mining hazards, including gas and dust explosions, carried on in Bureau of Mines laboratories and an experimental coal mine near Pittsburgh, Pennsylvania. He developed test equipment and procedures to evaluate various

parameters associated with various types of dusts, including aluminum dusts. He has authored or co-authored approximately 100 formal publications, 30 of which deal exclusively with industrial types of dust explosions and safe practices. He has served on numerous committees and sub-committees of the National Fire Protection Association. He holds an M.S. Degree in Physics from the Carnegie Mellon Institute awarded in 1936 and numerous awards for his outstanding Governmental service: (See Exh. C-7, Mr. Nagy's Curriculum Vitae).

Mr. Nagy defined a "dust explosion" as, ". . . the ignition of combustible dust so that flame and pressure in a confined or partially confined volume is produced." (Tr. 474, underlined supplied).[11/] He stated that there are a number of factors effecting dust explosions, including aluminum dust explosions, such as, particle size, concentration of particles, oxygen concentration in the atmosphere and the amount of inert particles which may be present in the dust cloud. During his studies of dust he has considered various parameters, such as ignition temperatures, concentration of dust, concentration of oxygen in the atmosphere, the minimum electrical energy required for ignition, susceptibility of material to ignite by frictional sparks, pressure and rates of pressure rise developed in closed laboratory equipment, the effects of

11/ As set forth infra, Mr. Craven's definition of a dust explosion is in essential agreement with Mr. Nagy's.

venting pressure, particle size distribution, and the effects of inert additives to reduce explosibility. In his studies of aluminum dusts, he found that the minimum concentration of 30 micron sized aluminum particles within a dust cloud necessary to produce an explosion was .04 ounces of aluminum particles per cubic foot of air (hereinafter .04 oz./ft.$^3$).[12/] His experiments did not determine the minimum electric spark (electric energy) necessary to ignite the minimum dust cloud concentration. Rather, using an optimum aluminum concentration dust cloud (with a concentration of aluminum dust particles higher than .04 oz./ft.$^3$), and using a continuous electric spark in his laboratory equipment, he deduced that the minimum amount of electric energy (electric spark) necessary to ignite a minimum aluminum concentration cloud (.04 oz./ft.$^3$) would be approximately 200 millijoules, a spark comparable to that produced by an automotive spark plug.

Further, he conducted laboratory experiments utilizing a layer of aluminum dust (the layer was 100 percent aluminum particles) of 30 micron particle size by inserting this layer on a platen into a laboratory furnace. No explosion occurred but the layer burned with an intense glow. From this experiment Mr. Nagy determined that the minimum temperature necessary

12/ Respondent's expert, Mr. Craven, agreed with this figure.

to burn this layer of 100 percent of aluminum dust particles, was approximately 830° C. or about 1500° F.[13/]

Based upon the testimony of C. O. Seifert and employee Feniello (Mr. Nagy had never visited Respondent's facility), Mr. Nagy opinioned that because, ". . . dust clouds were present and that ignition sources were present in the given location . . . there is a probability that an explosion will occur, could occur. An explosion is a rare event, for an explosion to occur a number of factors have to occur simultaneously, otherwise, there would be explosions everyday in the plant. For an explosion to occur, aluminum dust explosion, the aluminum dust must be dispersed, it must be dispersed in the proper concentrations and the explosible concentrations and an igniting source must be present. *** Fortunately, the probability of those events occurring simultaneously is small, - - -"[14/] (Tr. 547 - 548).

Mr. Nagy further opinioned, based on the testimony he had heard of the two witnesses identified above, who preceded his own testimony, that, ". . . there is a probability of an aluminum fire occurring. I would tend to feel that the

13/ It is significant to point out that because Respondent was prebatching numerous dust producing materials at its prebatch area, only a very minor amount being the aluminum powder, any layers of dust in that area could not have been 100 percent aluminum dust particles.

14/ In his pre-trial deposition, Mr. Nagy testified that the probability of an explosion at Respondent's plant was about one in two million (Tr. 610).

probability of an aluminum fire occurring in and around the mixing trough would be lesser than that for an aluminum dust explosion." (Tr. 548).

On cross-examination, Mr. Nagy further testified that in order to ignite an aluminum dust cloud, the source of ignition would have to be within the cloud, and that cloud would have to have a minimum concentration of aluminum dust particles, 30 micron size, of .04 ounces per cubic foot of air. Further, that he had examined the air sampling information resulting from the prior (December, 1980) OSHA industrial hygiene inspection and those samples did not identify any quantity of or indeed identify aluminum dust as part of the samples taken (Tr. 424 - 622).

Mr. Craven, Respondent's expert witness, has had a long and successful career in the industries of the United Kingdom. He was educated in Great Britain earning a "higher" National Certificate in Chemical Technology from the Manchester Institute of Service and Technology (equivalent to a B.S. Degree in this country). After service in the Royal Air Force, in 1952 he associated with the Imperial Chemical Industries and has concentrated his efforts ever since on the causes, effects and prevention of industrial explosions and fire hazards. Based upon his distinguished career in this field, approximately

five years ago he was elevated to a Fellowship in the Royal Institute of Chemistry, and is a member of the American Institute of Chemical Engineers and the Institute of Fire Engineers of the United Kingdom. He has earned the status of a Chartered Chemist, roughly equivalent to a Professional Engineer in this country.

In 1969, he joined the British consulting firm of Dr. J. H. Burgoyne & Partners, which specializes in matters related to fires and explosions, consulting with industry and insurance carriers concerning the causes and preventions thereof. He is now the Senior partner with this firm's Northern Office. During the last ten years of his career, he has personally investigated about 400 industrial fires and explosions and had been administratively involved in three times that number as a Senior Partner of his firm. He has published approximately four papers and is a lecturer at seminars held at Leeds University, the Manchester Institute, and other institutions and associations concerning fire and explosion hazards. He has consulted with industry world-wide, including plants located in Japan, Canada, Australia, the United Kingdom and United States. He has previously qualified and given testimony as an expert witness in the field of fire and explosion hazards and their prevention in the Courts of the United Kingdom, Ireland and the United States.

Before being retained for this case, he had advised the Foseco Company concerning the design of two of its plants, one in Canada, the other in Japan, concerning the explosion hazards associated with "fluidizing" aluminum powder. He explained that "fluidizing" means moving aluminum powder within a closed system by blowing air into the powder.

On October 29, 1981, after being retained in this case, Mr. Craven went to Respondent's Mt. Braddock plant, where, at the prebatching area, employees Feniello and Bukovac conducted a prebatching operation similar to the practices which they had followed prior to the February, 1981 inspection,[15/] including the emptying of the 55 gallon drum of automized aluminum powder into the aluminum trough, (a step not observed by C. O. Seifert during his inspection), and the shoveling of the powder into the metal pails. He attempted to time the period it took the small cloud of dust produced by the shoveling to settle to the ground and found the period to be one to two seconds. What cloud he did observe never drifted away from the immediate area of the pails and did not reach the furnace location or any locations near the other alleged ignition sources. After observing the prebatching operation, Mr. Craven went to the area of the furnace and removed some of the

15/ Since that time, Respondent does no prebatch aluminum powder at this facility.

insulation from the inside surface of the North wall of the building. Additionally, he took a sample of the 30 micron sized aluminum powder. After examining all of the alleged sources of ignition, (noting that the overhead, metal-clad electrical conduits were covered with a foam insulation), he proceeded to conduct two experiments outside of this building.

He took the sample of the aluminum powder and placed it on a piece of cardboard which was positioned on the exterior steps of the building which houses Respondent's laboratory at Mt. Braddock. Using a hand-held Butane gas torch, which produced a flame of about 2000 F., he directed the flame at the small pile of aluminum powder. The aluminum powder did not ignite, or glow or smoke. In fact, there was no reaction in the pile whatever. However, the cardboard around the pile of powder did burn, but the cardboard directly under the pile of powder did not burn, the powder acting as an insulator. Additionally, the flame (under pressure) did not "rouse" (cause to fly about) the small pile of powder.

Secondly, he took the piece of insulation to the laboratory at Mt. Braddock, and tried to ignite one side thereof to see if the flame would travel across the dusty surface of the insulation. It did not. He then shook the insulation over the flame, and again, none of the descending material ignited.

Mr. Craven characterized the 30 micron particle sized atomized aluminum powder used by Respondent as a very, very heavy powder having pear shaped particles, not flaked, dull grey in color, with quite a high bulk density. As mentioned previously, he agreed with Mr. Nagy that for 30 micron aluminum powder, the minimum concentration thereof in a dust cloud necessary to cause an explosion would be .04 ounces per cubic foot of air.

Further, he stated that there are four necessary elements to produce a dust explosion:

1) fuel - a combustible dust.
2) the dust must be mixed with air in quite definite proportions.
3) there must be an ignition source <u>within</u> the mixture, and
4) the cloud must be confined.

If only the first three elements occur, you might produce a flash fire, but not an explosion. In fact, he stated that there are very few substances which will explode without being confined.

Thus, he opinioned that based upon his visit to the prebatching area at Mt. Braddock, watching the prebatching operation conducted, and based upon his experiments as detailed above and his long industrial experience, that there was absolutely no possibility of an explosion of the aluminum powder as used at the Mt. Braddock prebatching area because these operations were not done within an enclosed system but rather in the ambient air and further, none of the <u>potential</u>

sources of ignition (the electric circuitry, furnace, fork-lift trucks) were close enough to the very small dust clouds produced by the prebatching operations to ignite such clouds, even assuming these clouds contained the minimum concentration of aluminum necessary to cause an explosion. (.04 02/ft.$^3$).

Furthermore, it was his opinion that there was no realistic possibility of any fire in any layers of aluminum dust in the prebatch area, (as opposed to dust clouds) because, first, as his experiment conclusively demonstrated, the 30 micron sized atomized aluminum powder is very, very difficult to ignite (he could not ignite a small pile of it using the Butane gas torch) and further, no ignition sources were near the dust layers - whatever the dust layers consisted of.

His observation of the shoveling operation lead him to conclude that it created no hazard because non-sparking, aluminum shovels were used, and the trough was not rusty but painted. Additionally, the forklift trucks, which he examined, could not be a realistic source of ignition because there never had been a report of any electrical malfunction and the exhaust manifolds did not attain a hot enough temperature to ignite any aluminum cloud (Mr. Nagy's 1500° F. would make the manifolds cherry red in color. They were not so colored when examined by Mr. Craven). Further, the electric circuit

breaker boxes were far removed from the aluminum prebatching trough, and because any aluminum clouds produced by the process were relatively heavy, and none had ever been observed migrating to these boxes, the boxes were not a source of ignition. Even if some aluminum particles could get to or into the boxes, these boxes were grounded and thus any malfunction would break these circuits. Further, after examining the overhead, metal clad electric circuitry, he observed that there was no possibility of any aluminum dust ever penetrating the foam insulation which covered these wires. Additionally, because the aluminum dust clouds were relatively heavy, there was no likelihood that any such clouds could "rouse" or migrate upward the 25 verticle feet to either the wires or light bulbs. Thus, if the wires short-circuited or a light bulb exploded, no hazard of an aluminum dust explosion would be created.

As alluded to earlier, because Mr. Craven's opinions are based upon actual observations of the entire aluminum prebatching operations as carried on at Mt. Braddock, and because he examined each alleged ignition source at this facility, and because of his actual experiments with the aluminum powder involved in this case, it is determined that his opinions of a total lack of either an aluminum dust explosion or aluminum fire hazard at the prebatch area involved must be accorded more weight than Mr. Nagy's opinions to the contrary.

## OPINION

In addition to the persuasive expert opinion of Mr. Craven alluded to above, that there was no hazards of an aluminum explosion or fire present at the prebatching area of the Mt. Braddock facility, the Citation herein must be vacated for another reason.

Items numbered 1 and 2 of the Citation herein charge a violation of the General Duty Clause of the Act, 29 U.S.C. 654(a)(1).

The elemental starting point of proving a charge under this clause is the failure of an employer to render its workplace free from "a hazard". National Realty & Construction Co., Inc., v. OSHRC, 489 F.2d 1257 (D.C. Cir., 1973); Empire-Detroit Steel Div., Detroit Steel Corp. v. OSHRC, 579 F.2d 387 (6th Cir., 1978).

A "hazard" has been defined to mean "a condition or practice in the workplace" which introduces an element of danger into the work enviornment. Empire-Detroit Steel Div., Detroit Steel Corp. v. OSHRC, supra; Pratt & Whitney Aircraft, Div. of United Technologies Corp. v. Sec. of Labor et al, 649 F.2d 96 (2nd Cir., 1981); Sec. of Labor v. Royal Logging Co. 645 F.2d 822 (9th Cir., 1981).

Thus, before one reaches the question of whether an existent hazard is "recognized" or not, the evidence must establish the existence of a hazard.

The evidence of this record does not contain sufficient evidence to support a conclusion that Respondent's prebatching of aluminum powder created a hazard of an aluminum explosion or fire.

The evidence does establish that in order to have an aluminum dust explosion, a dust cloud containing a minimum concentration of 4 ounces of aluminum particles per cubic foot of air must be present, and be ignited. During the February 5, 1981 inspection by C. O. Seifert, no air samples of any kind were taken. Thus, even if the ambient atmosphere was cloudy, which it was not, absent air samples reflecting this critical concentration of aluminum dust, an aluminum dust explosion hazard can not be established. Even if we resort to the air samples taken of this area in the earlier hygiene inspection of Industrial Hygienist Voycik, which reflected 50.85 miligrams of "silica and nuisance" dust, and label all of this dust "aluminum dust", converting this total dust sample to ounces per cubic foot, results in .00005 oz./ft.$^3$ of dispersed (aluminum) dust, one thousand times less than Mr. Nagy's critical aluminum dust concentration of .04 oz (aluminum)/ft.$^3$. This is an impermissible exercise however, because these earlier dust samples were not analyzed for aluminum content, if any.

Furthermore, although Respondent frankly admits that the prebatching area was a "dusty" area, C. O. Seifert took no samples of the dust he observed during his February inspection, i.e., wipe samples.

The evidence establishes that numerous dusty materials other than the aluminum powder were prebatched in this area. In fact, the resin materials (very dusty) were prebatched in this area and constituted the single largest volume of material handled, where as the aluminum powder constituted a minor and very small volume of material handled. Thus, absent an analysis of the dust observed in this area, there simply is no possible way to conclude what portion of the dust observed on the building structures and stored material, if any, consisted of aluminum dust.

Because of these elemental and critical voids in the evidence of this record, the Complainant has failed to establish that any hazard of an aluminum dust explosion or fire was caused by Respondent's prebatching operations at its Mt. Braddock facility.

Therefore, Items numbered 1 and 2 of the Serious Citation must be vacated.

The remaining Items (numbered 3 through 6) of the Citation herein also must be vacated because the duty of complying with the cited standards is predicated upon the

existence of a hazardous workplace environment. Since the Complainant has failed to establish such an environment at Respondent's prebatching facility, these Items similarly must be vacated.

## CONCLUSION

The jurisdiction of the Review Commission in this case is not contested and is established by the pleadings and Stipulations pursuant to Sections 3(3), 3(5) and 10(c) of the Act, 29 U.S.C. 652(3), 652(5) and 659(c).

Based upon the foregoing which constitutes the findings of fact and conclusions of law herein, and pursuant to Sections 10(c) and 12(j) of the Act, 29 U.S.C. 659(c) and 661(i), it is hereby,

ORDERED:

That the six Itemed Serious Citation issued to the Respondent herein on March 9, 1981, and the penalties proposed thereon, are VACATED.

William E. Brennan
WILLIAM E. BRENNAN
Judge, OSHRC

Dated: June 28, 1982
New York, New York

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
ROOM 7B11, FEDERAL BUILDING
1100 COMMERCE
DALLAS, TEXAS 75242
FTS 729-5271
COM (214) 767-5271

## NOTICE OF DECISION

Secretary of Labor v. Panelmasters International, Inc.
OSHRC Docket NO. 81-1567

1. Enclosed is a copy of my decision. It will be filed with the Commission on June 28, 1982, and will become the final order of the Commission on 7-28-82, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D. C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is 7-28-82. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92 and 93.

Administrative Law Judge

Date: June 8, 1982

OSHRC Form 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>PANELMASTERS INTERNATIONAL, INC.,<br><br>Respondent. | OSHRC DOCKET NO. 81-1567 |

DECISION AND ORDER

Appearances: Marigny A. Lanier, Esq., of Dallas, Texas, for the complainant.

This matter came on regularly for hearing, pursuant to notice, at Houston, Texas, but the respondent, Panelmasters International,Inc., ("Panelmasters") did not appear. Thereupon, the Secretary of Labor ("the Secretary") moved for default judgment. The hearing was recessed for counsel for the Secretary to telephone Panelmasters, after which she reported that she was informed by Panelmaster's president, W.R. Kendrick, that Panelmasters was in bankruptcy and that, on advice of counsel, he would not attend the hearing.

The file reveals that from April 30, 1981, to May 14, 1981, Panelmaster's workplace at 3026 Berry Road, Houston, Texas, was inspected by a compliance officer of the Occupational Safety and Health Administration ("OSHA"), and as a result of this inspection two citations were issued May 20, 1981, charging Panelmasters with serious and nonserious violations of Section 5(a)(2) of the Occupational Safety and Health Act of 1970 ("the Act") and certain safety

regulations promulgated thereunder. Panelmasters timely filed notice of contest June 16, 1981, but failed to post same as required by the Act for the benefit of affected employees. Panelmasters ignored a Posting and Service Order from the Executive Secretary of the Occupational Safety and Health Review Commission ("the Commission") dated September 23, 1981, and an Order to Show Cause by Chief Judge Paul A. Tenney, dated the same date. On October 27, 1981, Judge Tenney entered an order dismissing the notice of contest except insofar as it pertained to the proposed penalties totalling $ 840. The case was referred to the undersigned November 19, 1981, for a determination of the appropriate penalties.

Thereafter the case was set for hearing, but the setting was cancelled after the parties informed the undersigned that the case was settled. It was rescheduled May 18, 1982, at 1:00 p.m., due to Panelmasters' failure to execute and return the proposed settlement agreement. The default previously related then ensued.

It is apparent that Panelmasters has been given ample opportunity to litigate this case but has failed and refused to do so. It is therefore ORDERED that:

Judgment by default is entered against the respondent, Panelmasters International, Inc., for penalties totalling $ 840 as proposed by the Secretary for the violations for which it was cited May 20, 1981.

DEE C. BLIGHT
Administration Law Judge

Date: June 28, 1982

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1515 Broadway, Room 3800
New York, New York 10036

## NOTICE OF DECISION

Secretary of Labor v. WACHSBERGER ROOFING
OSHRC Docket No. 81-2457

1. Enclosed is a copy of my decision. It will be filed with the Commission on June 29, 1982, and will become the final order of the Commission on July 29, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is July 29, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Jerome C. DiTore
JEROME C. DITORE
JUDGE, OSHRC

Date: June 9, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>WACHSBERGER ROOFING,<br>Respondent. | OSHRC DOCKET<br>NO. 81-2457 |

JUDGE'S DECISION JUN 29 '82

FINAL ORDER ON JUL 29 '82

Appearances:

Francis V. LaRuffa, Regional Solicitor
United States Department of Labor
1515 Broadway, New York, New York 10036
Attorney for Complainant
by William G. Staton, Esq., of Counsel

Gerald V. Dandeneau, Esq.
98 Cutter Mill Road
Suite 355 South
Great Neck, New York 11021

## DECISION AND ORDER

Ditore, J.:

## PRELIMINARY STATEMENT

Respondent contested a citation for a serious violation of 29 CFR § 1926.28(a) and the $350.00 penalty proposed for the alleged violation. During the course of the hearing, held on April 1, 1982, at New York, New York, Complainant, by motions which were granted, withdrew standard 29 CFR § 1926.28(a) and substituted in its place, standard 29 CFR § 1926.451(u)(3).

## ISSUES

1. Whether Respondent on October 6, 1981, violated standard 29 CFR § 1926.451(u)(3), at its workplace.

2. If it did, whether any of Respondent's employees were exposed to the hazard created by the violation.

3. If employees were exposed, whether the violation was serious.

4. If it was serious, whether the proposed penalty is proper and reasonable.

## STATEMENT OF THE EVIDENCE

On October 6, 1981, Compliance Officer Daniel Marra, of the Occupational Safety and Health Administration, inspected a worksite at 154th Place and Riverside Drive, College Point, Queens, where two-story duplexes were under construction. On the pitched roof of one of the buildings, Officer Marra observed two of Respondent's employees doing roofing work. The two workers were about four to five feet (estimated) from the edge of the roof (T. 11, 13, 14, 16, 21, 47; Exh. C-1).

The workers descended from the roof at the request of Officer Marra, who then explained to them the fall hazard they were exposed to while working on the pitched roof without life belts and lifelines. The employees stated that this was the way they always worked. They had no safety belts and lines and

never used any because they feared that would become entangled in the lines. They did have roof brackets which they used on roofs with steeper slopes (T. 21, 25, 26, 27, 49, 50). Officer Marra also spoke with Respondent's secretary, Mr. Kleinfield and with Respondent's job superintendent, John Lacondo. Both men told Officer Marra that their employees would not go back to work on the roof until safety belts were provided (T. 28, 29).

Officer Marra estimated the fall distance from the edge of the pitched roof to be 24 feet. He made no actual measurement. He also stated that the pitch of the roof was five feet in twelve feet or about a 25-degree pitch. He did not know of his own knowledge what the pitch was. He made no measurements to determine the pitch, nor did he consult the building plans. He based his pitch figure on what was told to him by the job superintendent for the general contractor, and believed the job superintendent obtained the information from the construction plans (T. 18, 19, 22, 23, 24; Complainant's brief pp. 2, 4).

On October 7, 1981, Officer Marra returned to the worksite. He did not observe any of Respondent's employees working on any roof but did observe them on the ground wearing life belts. He never asked them how they tied off their life belts (T. 30, 53, 91).

Officer Marra at the hearing, and at an informal conference with Respondent's representatives after the citation was issued,

stated that the violation could be abated by the use of life belts and lifelines with four possible methods for securing the lifelines (T. 33-36, 53, 54-71, 76).

During the course of his duties as a compliance officer, Marra inspected twelve roofs which were flat and not pitched. He never saw any of the abatement methods he suggested used on any roofing operation (T. 45-46, 54). At the informal conference between Respondent's representatives and OSHA's representatives, Respondent maintained that the methods of abatement suggested by Officer Marra and the further suggestions by OSHA, for the use of catch platforms and scaffolding, were not feasible (T. 36, 39, 73, 76).

Officer Marra admitted at the hearing, that standard 29 CFR § 1926.451(u)(3) was the better standard but did not cite Respondent under that standard. He was concerned about immediate abatement and believed it was easier and feasibly quicker to use life belts and lines than build catch platforms as required by 29 CFR 1926.451(u)(3) (T. 43, 44).

At the conclusion of Officer Marra's testimony, Complainant moved, pursuant to Rule 15(b) of the Federal Rules of Civil Procedure, to amend the citation and complaint to allege in the alternative, a violation of 29 CFR § 1926.451(u)(3). Respondent objected to the motion. The motion was granted with the understanding that the Court would grant Respondent a continuance

to prepare its defense to the added charge. Respondent refused the offer and elected to go forward with the case (T. 93, 98, 100, 101).

Complainant called Compliance Officer Raymond Swanson as his next witness. Officer Swanson was qualified as an expert occupational safety and health officer who had experience with pitched roofs. Officer Swanson did not inspect the worksite and his knowledge of the case was obtained from the testimony of Officer Marra, which Swanson heard during the hearing (T. 100-101, 102-109, 111-112), 121).

Based on the testimony of record, Officer Swanson testified that in his expert opinion the use of life belts and lifelines were not feasible on the roof where Respondent's employees were working, and that if life belts and lines were used, they might create a greater hazard (T. 113, 117, 119, 124).

Officer Swanson further stated that if he had inspected the worksite, he would have recommended the use of catch platforms as required by 29 CFR § 1926.451(u)(3) if the pitch of the roof was greater than four inches in twelve inches, or scaffolding if the pitch was four inches in twelve inches or less. In deciding which protective means should apply, Officer Swanson would have read the building plans and would have taken actual measurements to determine the pitch of the roof (T. 113, 129, 130-131).

Complainant rested at the end of Officer Swanson's testimony. Respondent moved to dismiss the citation and complaint, as amended. Decision was reserved on the motion and both sides rested (T. 135, 141-142). Prior to the conclusion of the case, Complainant moved to withdraw that part of the citation and complaint which alleged a serious violation of 29 CFR § 1926.28(a). The motion was granted and decision reserved on that part of Respondent's prior motion relating to 29 CFR § 1926.451(u)(3) (T. 142).

## OPINION

The unrefuted evidence in Complainant's direct case establishes that on October 6, 1981, Respondent was the roofing subcontractor at a worksite in Queens, New York; that two of Respondent's employees were working on a pitched roof at the worksite; that the two employees were about four to five feet from the edge of the roof and were exposed to a fall hazard of approximately 24 feet; and that the two men were not protected from the hazard by either life belts and lines, or any other protective device.

Respondent was initially charged in the citation and complaint, with a serious violation of 29 CFR § 1926.28(a) for its alleged failure to protect its employees from the fall hazard by means of safety life belts and lines. This standard and the life belt and lifeline issue emanating from it, were removed

from the case by Complainant's withdrawal of the standard and the issues relating to it. Complainant during the hearing, elected to proceed on the alternate charge of a serious violation of 29 CFR § 1926.451(u)(3) which requires the use of catch platforms.

Section 1926.451(u)(3) provides as follows:

> (u) Roofing brackets
>
> (1) . . .
>
> (2) . . .
>
> (3) A catch platform shall be installed below the working area of roofs more than 16 feet from the ground to eaves with a slope greater than 4 inches in 12 inches without a parapet. In width, the platform shall extend 2 feet beyond the protection of the eaves and shall be provided with a guardrail, midrail, and toeboard. This provision shall not apply where employees engaged in work upon such roofs are protected by a safety belt attached to a lifeline.

The only issue remaining is whether Respondent on October 6, 1981, violated section 1926.451(u)(3) at its worksite. This determination, since Respondent rested at the end of Complainant's case, is dependent on whether Complainant carried his burden of proof to establish, by a preponderance of the evidence, that Respondent was in violation of the standard.

The evidence establishes that the height from ground level to the eaves of the roof was greater than 16 feet; that the employees were not protected by safety belts and safety lines;

and that there was no parapet at the roof (see Exh. C-1). The one remaining element to be established before a violation can be found, is whether the slope or pitch of the roof was greater than 4 inches in 12 inches. The only evidence as to this element came from the uncorroberated hearsay statement given by Officer Marra, that he was told by the general contractor's job superintendent that the pitch was 5 feet in 12 feet.* Officer Marra had no personal knowledge of his own concerning the pitch of the roof, nor did he make any measurements of his own.

The Commission has held that hearsay statements are admissible in administrative hearings and may have probative value Secretary v. Hurlock Roofing Co., 7 BNA OSHC 1867, 1979 CCH OSHD ¶ 24,006 (No. 14907, 1979), Secretary v. Ultimate Distribution Systems, Inc., 10 BNA OSHC 1565 (No. 79-1269, 1982).

The Commission has also held that uncorroborated hearsay is insufficient to establish a violation. Secretary v. Paramount Plumbing & Heating Company, Inc., 5 BNA OSHC 1459, 1461, 1977-78 CCH OSHD ¶ 21,820 (No. 12652, 1977).

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*Respondent objected to the introduction of this hearsay statement (T. 18). The objection was overruled and the statement admitted on the ground that Complainant's counsel represented he would, through Officer Marra, elicit how the information was obtained by Officer Marra through conversations he had with those supervising the worksite (T. 18-19). No further evidence was elicited on this issue except a repetition of the previous testimony from Marra that he received the information from the general contractor's job superintendent whom he believed consulted the building plans (T. 23-24).

Although the precise measurement of the pitch or slope of the roof was not a necessary element under the original section 1926.28(a) charge, it is an essential and necessary element to the charge that Respondent violated section 1926.451(u)(3). It is Complainant's burden to establish this element of the violation by preponderant evidence which is not only admissible but which has probative value. Complainant's proof on this element was only the hearsay statement of Officer Marra, and is insufficient to meet his burden of proof.

There are no grounds in this record upon which this Court can evaluate the truthfulness of the hearsay statement; nor is the hearsay statement more probative than the evidence of the maker of the statement whom Complainant, with reasonable efforts, could have produced for examination. Finally, to deprive Respondent of its crucial and valuable right of cross-examination on a vital issue of the case, is neither in the interests of justice or within the intent of the Act. For the reasons given, the hearsay statement is accorded no weight.

Respondent's motion made at the end of Complainant's case to dismiss the citation and complaint, as amended, is granted.

The specific findings of fact are set forth in this Opinion.

## CONCLUSIONS OF LAW

1. Respondent is, and at all times material herein was, engaged in a business affecting commerce within the meaning of section 3(5) of the Act (29 U.S.C. § 652(5)).

2. The Occupational Safety and Health Review Commission has jurisdiction over the subject matter and parties to this action.

3. On October 6, 1981, Respondent was not in violation of 29 U.S.C. § 654(a)(2) for failing to comply with 29 CFR § 1926.451(u)(3).

## ORDER

Due deliberation having been had on the entire record, it is hereby

ORDERED that amended citation (No. 1) for a serious violation of 29 CFR § 1926.451(u)(3) and the proposed penalty of $350.00, are vacated.

JEROME C. DITORE
JUDGE, OSHRC

Dated: June 29, 1982
New York, New York

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

Secretary of Labor v. MAJESTIC WILEY CONTRACTORS LIMITED
OSHRC Docket No. 81-2545

1. Enclosed is a copy of my decision. It will be filed with the Commission on July 8, 1982, and will become the final order of the Commission on August 9, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is August 9, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

R. M. Child
Judge, OSHRC

Date:
June 18, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>MAJESTIC WILEY CONTRACTORS LIMITED,<br>Respondent. | OSHRC DOCKET NO. 81-2545 |

APPEARANCES:

For the Complainant:
Keithley F. T. Lake, Esquire, of Kansas City, Missouri

For the Respondent:
John D. O'Reilly, Esquire, of Framingham, Massachusetts

DECISION AND ORDER

Child, R. M. Judge, OSHRC:

Statement of the Case

This matter is before the Occupational Safety and Health Review Commission (the Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et seq., (the Act). Complainant seeks affirmance of item 1 of Serious Citation No. 1,[1/] issued

1. The alleged violation and the standard:

Citation

1.
29 CFR 1926.250(b)(9): Cylindrical material was not stacked and blocked so as to prevent rolling off the blocking:
Sections of 42" pipe, used for the new gas transmission line northeast of Zeeland, North Dakota, were not blocked to prevent rolling off the blocking or skids.

Standard

29 CFR 1926. Subpart H Materials Handling, Storage, Use, and Disposal
§1926.250 General requirements for storage.
* * *
(b) Materials storage
* * *
(9) Structural steel, poles, pipe, bar stock and other cylindrical materials, unless racked, shall be stacked and blocked so as to prevent spreading or tilting.

to respondent October 23, 1981, and of a proposed penalty in the sum of $700.00.

The matter came on for hearing before the undersigned judge at Bismarck, North Dakota, on April 6 and 7, 1982. Except as they may have been called as witnesses, there was no appearance by or on behalf of affected employees.

The parties have filed post-hearing briefs and the complainant has included proposed Findings of Fact and Conclusions of Law. To the extent said proposed Findings and Conclusions are consistent with this decision, they are adopted; to the extent they are inconsistent with those set forth herein, they are rejected. Jurisdiction is not an issue (Answer). The amount of the penalty is not contested. (Tr. 142)

The issues to be determined are:

1. Is enforcement of the citation precluded under Section 4(b)(1) of the Act?

2. Was the respondent in violation of the standard at 29 C.F.R. 1926.250(b)(9)?

## Findings of Fact

Respondent is a pipeline construction contractor. Among its various projects is a "spread" in North Dakota which is a ninety-two mile portion of the Alaskan Pipeline. The eventual purpose of the pipeline is to transmit natural gas from Alaska to distribution points in the United States.

On the project in question respondent is a sub-contractor to Northern Border Pipeline Company. Under its contract respondent is responsible for the entire construction of the pipeline along the "spread." A separate sub-contractor, to wit: Trans-Eastern Inspection Service (Trans-Eastern) is responsible to Northern Border Pipeline Company for pipeline inspection and X-ray inspection of the welds and joints along the line.

The pipeline being constructed was of heavy gauge steel, 42" in diameter, and weighed 318 pounds per square foot. Each forty-foot length of this pipe weighed 22 tons. (Tr. 237)

Respondent's construction of the pipeline proceeded in the following steps: A right of way crew would clear the growth, make cuts and level the ground. A trenching crew would then excavate the ditch. Next the stringing crew delivers the pipe in 80-foot lengths from the yard and places it on the ground along the length of the trench and usually 8' to 10' from the edge. A bending crew then shapes the pipe to accommodate dips or rises in elevation and changes in direction. After the bending crew has passed, a pipe gang lifts the pipe off the ground, sets it on "skids" and accomplishes the first three welding passes. Next a firing line makes the final five welding passes. A tape crew then coats and wraps the pipe and lowers it into the trench. The trench is filled in and the area cleared. Once an employee is assigned to one of the crews, he is fairly well fixed in that position for the duration of the project. (Tr. 306-311)

Generally, the X-ray inspection of the welds is accomplished after the pipe crew and the firing line has passed and before the tape crew arrives. At the time of the incident giving rise to the inspection and issuing of the citation herein, the tape crew of respondent was about 3,000 feet behind and the pipe crew of the respondent was about 5 or 6 miles ahead of the X-ray re-shot crew of Trans-Eastern. (Tr. 312)

Skids are constructed on the scene by the pipe crew of pieces of oak lumber (skid members) approximately 5" x 7" x 48" in dimension laid crosswise in such fashion as to form a crib or pile. (Exhibit C-6) The

function of the skid is to support the pipe off the ground to facilitate welding, X-ray and coating. Skids can be from 6 inches to two feet high depending on the terrain and generally would keep a weld about 18 inches off the ground. (Tr. 292, 293) Generally, one skid is placed per joint unless the terrain calls for more. Here the pipe was in 80-foot lengths and the skids were placed every 75 or 80 feet. (Tr. 294) There was no evidence that the terrain called for more.

The start joint was crotched, and every 5th to 7th skid pile was crotched as is generally the procedure followed in the industry. (Tr. 291) Crotching is accomplished by inserting members into the skids from positions lateral to the pipe in such a manner as to resist sideward movement or rolling of the pipe. (Exhibits C-7 and C-8; Tr. 292-295, 378-380 and 408-413)

It is normal for a pipeline sitting on skids to "crawl." That is, temperature changes resulting in contraction and expansion of the steel can cause the pipe to move as much as 18 inches on the skids. (Tr. 297-298) After the pipe has rested on the skids for a while it is not unusual to see broken members in the skid piles. (Tr. 295) After the pipe is put in the ground the skid members are gathered up. The broken members are not re-used, but are taken to the dump while the remaining members are taken to the front end of the pipeline construction for re-use by the pipe gang. (Tr. 264, 320)

The skids are inspected frequently for integrity. If a member was broken, but the skid pile appeared stable, no action would be taken. If a broken member appeared to affect the stability of the skid pile or if the configuration of the skid pile had altered so as to become ineffective, the skid pile would be reconstructed. (Tr. 322, 332)

In inspecting the pipeline you could sometimes go a mile and see no broken members; another time you might see two broken skid members within a mile. (Tr. 323)

The space between the pipe and the trench is known in the industry as no-man's-land. Employees are told: "If you get over there, do it with extreme caution." When X-ray crews are working they usually avoid working in no-man's land by throwing the tape across the top of the pipe and fishing it back under the pipe with a hook. X-ray crews generally place signs to keep workers and personnel 50 to 75 feet away from X-ray operation in order to avoid radiation. (Tr. 416, 417, and 438-439)

On many occasions Trans-Eastern, the subcontractor to Northern Border Pipeline Company charged with inspection of the welds, would have need to do isolated re-shots to double check a suspect weld or because of difficulties in developing the original shots. Trans-Eastern would indicate to respondent a section of the pipeline which it wanted to re-shoot. Respondent would then perform a bevel cut at the weld at either end of the section of pipe indicated by Trans-Eastern. A bevel cut would in effect remove the pipe approximately 4 inches either side of the weld, leaving a gap of about 8 or 9 inches in the pipeline at either end of the section where the X-ray re-shots are to be performed. Respondent's personnel and equipment would then move the ends of the pipe facing the bevel weld in order to provide an opening and the placing inside the pipe of a remote controlled X-ray machine weighing approximately 80 pounds. (Tr. 301-305, 331)

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At the request of Trans-Eastern, respondent caused bevel cuts to be made on two sections of the pipeline standing on skids during the morning of October 6, 1981. (Tr. 329) (This case concerns one of those two sections of the pipeline, which is described by various witnesses and at points in the record as being 800 feet long (Tr. 26, 36) or 934 feet long, (Respondent's Requests for Admissions and Complainant's Response thereto) or 880 feet long. (Tr. 328) The actual length of the section in question is not of particular consequence. Said section will hereafter be referred to as section X.)

In the afternoon of October 6, 1981, Gary Van Syoc, head of the two-man X-ray re-shot crew, came to where the taping crew was working and requested of William Pedigo, its foreman, that the ends of Section X be moved in order to provide the necessary opening for the X-ray machine. The taping crew on that afternoon was working on the pipeline approximately 3,000 feet southerly of Section X. (Tr. 351, 382)

Mr. Pedigo sent a Caterpillar side boom tractor with operator, Kurt Osterreich, and a laborer, Floyd Aure, from the taping crew to Section X. About 45 minutes later, Mr. Pedigo went to Section X where he observed at the southerly end of that section the tractor boom holding the pipe under the end of which Floyd Aure and Mr. Syoc of Trans-Eastern were fixing the skids for the pipe end to rest on in its new position closer to the trench. Two sets of skids had been moved in order to place the pipe end in this new position. (Tr. 352-357, 374)

Mr. Pedigo, Mr. Aure and the tractor and its operator then went to the north end of section X where they moved the end of the pipe away

from the trench and set it close to the ground held in that position by a ground crotch. The X-ray technician, Mr. Syoc, requested the end of the pipe be placed that way in order to better get his X-ray machine into the pipe. (Tr. 357-358)

The tractor traveled and operated and after completing the movement of the ends of section X was parked at the side of the pipeline away from the trench. (Tr. 403) Mr. Pedigo, Mr. Aure and Mr. Osterreich returned to their work with the taping crew by truck. (Tr. 364, 390)

After returning to their work with the taping crew, Floyd Aure, Kurt Osterreich and William Pedigo remained there working about 3,000 feet from section X until about 45 minutes later, when they learned that section X had rolled into the trench. (Tr. 366-367; 391-392) An employee of Trans-Eastern, member of the X-ray crew, was trapped in the ditch and fatally injured by the falling pipe. Mr. Van Syok, the X-ray technician employed by Trans-Eastern, was also injured. (Tr. 138, 140)

It rained at the worksite during the week preceding October 6, 1981, and .43 inches of rain was measured nearby during the period Sunday night through Monday, October 5, 1981, at 4:00 p.m. On October 6, 1981, winds in the vicinity were gusting from the northwest to 40 mph. There was a five to six degree temperature drop mid-afternoon on October 6. (Tr. 200)

## Discussion

Issue 1: Respondent urges that it is exempt from the provisions of the Act by reason of Section 4(b)(1) thereof. Since it was engaged at all

times in the construction of a natural gas pipeline it claims the Natural Gas Pipeline Safety Act of 1968, 49 U.S.C. §1671 et seq., (Pipeline Safety Act) to preempt the field of regulating the activity in which it was engaged.

It has been determined by the Commission that the Pipeline Safety Act governs individuals engaged in the transportation of gas or in the operation of pipeline facilities, but that it does not cover persons who are contractors engaged in construction or repair of natural gas pipelines or facilities. Texas Eastern Transmission Corp. and Sinapp Co., 1975-76 OSHD 23,899 (1975).

Respondent is here found not to be exempt from the requirements of the Act.

Issue 2: In order to prove that an employer has violated a standard promulgated pursuant to section 5(a)(2) of the Act, the complainant must show (1) the cited standard applies to the facts, (2) there was a failure to comply with the cited standard, (3) employees had access to the violative condition, and (4) the cited employer knew or could have known of the hazardous condition with the exercise of reasonable diligence. Daniel International Corp., 9 BNA OSHC 2027, 1981 CCH OSHD 25,813 (No. 76-181, 1981); Prestressed Systems, Inc., 9 BNA OSHC 1864, 1981 CCH OSHD ¶25,358 (No. 16147, 1981).

(1)

By its terms the cited standard applies only to materials in "storage." Eighty-foot lengths of 42" diameter steel pipe were laid on the ground end to end at the trench site. Perhaps up to that point the lengths of pipe could still be said to be in storage. However, those lengths of pipe were welded together and on the days covered by the inspection and prior had become no longer lengths of "pipe" or "cylindrical material", but

rather one continuous pipeline. On October 6, 1981, a section of that pipeline was cut for inspection of its welds. That section was in excess of 800 feet long and could not be referred to as material in storage. In fact, at the moment it rolled, an X-ray crew was completing the final shot of a series of X-rays taken from within the pipeline section.

Even if one were to allow that an 800-foot section of pipeline temporarily separated from its greater whole was "material in storage," it must readily appear that it was not "racked" as contemplated in 29 C.F.R. 1926.250(b)(9). Since it was not racked the standard, if it applied, required such cylindrical material to be ". . . stacked and blocked so as to prevent spreading or tilting." Here it was manifestly impossible to stack one 800-foot plus section of pipeline. Furthermore one pipeline cannot "spread" nor can a flexible metal pipe 800 feet long or more "tilt" when its entire length rests on supports within two feet of the ground.

The standard which respondent was cited as having violated does not apply to the facts of this case. See Whitcomb Logging Company, OSAHRC Docket No. 1323, 2 OSHC 1419 (1974) and Sierra Construction Corp., OSAHRC Docket No. 13638, 6 OSHC 1278 (1978).

Assuming, however, that the standard were held to apply, complainant has nonetheless failed to meet his burden of proving the remaining elements of a Section 5(a)(2) violation of the Act.

(2)

As a result of the fatality complainant conducted an inspection of respondent's project worksite on October 8 and 9, 1981. The compliance

officer (C.O.) determined that there had been twelve skids under section X. (Tr. 47, 48, 63) However, by reason of the movement of the pipe, said skids were in such a state of disarray that he was unable to determine what their condition was before section X rolled. (Tr. 66; Exhibits C-1 through C-5) Since the same crew had constructed all of the skids, the C.O. looked at the skids under the pipeline immediately north and south and from which section X had been cut in order to determine the construction of the skids which had supported section X before it rolled. (Tr. 64) Complainant claims an inference of improper shoring beneath section X arising from evidence of inadequate skids and crotches beneath the pipe standing on skids immediately adjacent thereto. It is the position of complainant that the alleged improper skidding and crotching of section X serves as the basis for the citation which was issued. (Tr. 98; 161, 220)

Complainant put in evidence photographs of what it claimed to be inadequate skids and crotches observed under the pipe north and south of section X. (Exhibits 6 through 14). At least two of said exhibits were photographs of the same skid pile. (Exhibits 7 & 9; Exhibits 12 & 14)

Respondent's witnesses denied that the conditions depicted in the photographs rendered the skids or crotches inadequate to meet the needs for which they were constructed. (Tr. 418-426)

Mr. Pedigo testified that there were no broken meembers nor anything unusual in the four new skids constructed in the course of moving the two ends of section X. (Tr. 360-361) He further testified that in addition to the ground crotch which he placed at the north end, there were two additional crotches under section X; one about 260 feet from the south end and one about 300 feet from the north end. (Tr. 364) The X-ray crew made no comments regarding the skids, and in traveling slowly

in his truck up and back the full length of section X he looked at the skids and observed no deficiencies in the skid piles under section X. (Tr. 361-62, 371) Mr. Pedigo set skid piles and crotches for seven years as a laborer. (Tr. 371)

The side boom tractor operator testified that he watched while the new skids were erected at either end of section X and while he lowered the pipe onto the new skids. He observed no loose or broken members nor anything unusual. (Tr. 386-90) When asked by counsel for complainant he said he saw nothing unusual about section X, and when asked by counsel for complainant for his opinion as to the manner in which this pipeline was crotched and skidded said " . . . it was skidded at least as good as anything I've been on or better . . . was probably the best job I've ever seen skidding." (Tr. 393, 394)

Finally, uncontroverted testimony of Joe Walters, respondent's job superintendent, was to the effect that in inspecting the skids you could sometimes go a mile and see no broken members and again you may see two broken members within a mile. If one could go a mile and see no broken members, one could certainly expect not to see any in a lesser distance.

The inference relied upon by the complainant is without merit and, if indulged, falls when confronted by direct evidence that the skids and crotches under section X were without structural defect.

Complainant has failed to meet its burden of proving that the respondent failed to comply with the cited standard.

(3)

No evidence was presented that any employee of respondent at any time entered the area referred to as no-man's-land. That area would be

particularly hazardous where the ditch was as wide as it had to be to accommodate this 42-inch pipe.

The C.O. observed no employees exposed to the hazards he claimed to be presented by the alleged inadequate skids or crotches shown in the photographs. (Tr. 161) He did, however, testify that Floyd Aure, an employee of respondent, told him in the course of the inspection that he had to run twenty feet to escape the rolling section X. (Tr. 138)

Mr. Aure was not called as a witness. Mr. Pedigo, foreman of the tape crew in which Mr. Aure worked, and Mr. Osterreich, operator of a tractor within that crew, both testified. Each testified that Mr. Aure had returned with them to the tape crew operation 3,000 feet south of section X after completing the movement and re-skidding and crotching of its ends. Each testified that Mr. Aure remained with them and the tape crew until they learned that section X, which was 3,000 feet away from where they were working, had rolled into the trench. The Compliance Officer's hearsay testimony gives way to the direct testimony of Mr. Pedigo and Mr. Osterreich which was in opposition thereto.

Complainant failed to meet his burden of proving employee exposure.

(4)

Complainant has proved that the skids depicted in the photographs were in the conditon shown. Complainant has placed in evidence photos of each skid or crotch it claimed to be defective. Some of these photos proved to be duplicates of the same pile. At least one of these piles, objected to by the complainant, was out of service since the pipe end had been placed on the ground deliberately. (Tr. 346)

Complainant's witnesses, to wit the Compliance Officer and the Assistant Safety Director of the North Dakota Workmen's Compensation Bureau, had

no experience prior to this incident in the inspection or the construction of pipelines and no knowledge of skidding and crotching procedures prior to this inspection. (Tr. 142) Little credibility can be attached to their opinion and testimony that the skids objected to were in fact hazardous.

Since respondent assumed the task of frequently inspecting the skids and crotches in service along the pipeline, it knew of the condition of which complainant complains. However, respondent's witnesses are given greater weight in their testimony as to the absence of hazard accompanying the conditions objected to by the complainant and shown in the photographs. (Tr. 418-26)

It was the testimony of Donald E. Foster, construction consultant with extensive pipeline construction experience over a 36-year period, that it would be possible for a pipeline properly crotched and skidded to roll if subjected to temperature change, wind conditions and employee actions attendant upon X-ray procedures. (Tr. 434)

The Assistant Safety Director for the North Dakota Workmen's Compensation Bureau appearing as a witness for the complainant in filing his written report listed as mechanical or physical conditions associated with the cause of the accident: (1) Soft ground due to rain (possible), (2) Pipe being buffeted by high winds (probable), and (3) Very heavy material (pipe) having the potential of uncontrolled movement.

Complainant failed to meet its burden of proof that respondent knew of a hazardous condition.

Having considered the Citation, the Notice of Contest and the pleadings herein; and having considered the Exhibits received in evidence and the testimony of the witnesses and having weighed the credibility

thereof; and having considered the post-hearing submittals of the parties; and having made and entered Findings of Fact, there are hereby entered the following:

## Conclusions of Law

1. Respondent is not exempt from the requirements of the Act.

2. The standard at 29 C.F.R. 1926.250(b)(9) does not apply to the activity of the respondent of which complainant complains.

3. Complainant failed to meet its burden of proof that the respondent failed to comply with the standard at 29 C.F.R. 1926.250(b)(9).

4. Complainant failed to meet its burden of proof that employees were exposed to a hazard.

5. Complainant failed to meet its burden of proof that respondent knew of a hazardous condition.

6. Item 1 of serious Citation No. 1, issued to respondent October 23, 1981, should be vacated, as should be the proposed penalty therefor.

## ORDER

Item 1 of serious Citation No. 1, issued to respondent October 23, 1981, is VACATED as is the penalty proposed therefor.

R. M. Child
Judge, OSHRC

Dated: July 8, 1982

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

Secretary of Labor v. ADAMS COUNTY ROOFING, INC.
OSHRC Docket No. 80-5618

1. Enclosed is a copy of my decision. It will be filed with the Commission on July 12, 1982, and will become the final order of the Commission on August 11, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is August 11, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Quentin P. McColgin
Judge, OSHRC

Date: June 22, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | ) | |
| Complainant | ) | OSHRC Docket No. 80-5618 |
| v. | ) | |
| ADAMS COUNTY ROOFING, INC., | ) | |
| Respondent | ) | |

APPEARANCES:

Jerry R. Atencio, Esquire, of Denver, Colorado,
for Complainant

Forrest E. Clark, Jr., Esquire, of Denver, Colorado,
for Respondent

DECISION AND ORDER

Quentin P. McColgin, Administrative Law Judge:

This is a proceeding under §10(c) of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. §659(c) involving an alleged violation of §5(a)(2) of the Act, 29 U.S.C. §654(a)(2).[1/]

This matter arose out of an accident investigation of respondent's workplace, located in Denver, Colorado. As a result of that investigation, respondent was issued a citation charging it with a single violation of a safety standard. Respondent duly contested the citation. Thereafter, a complaint and answer were filed by the parties. In its

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1/ "Each employer--shall comply with the occupational safety and health standards promulgated under this [Act]."

answer respondent admits the allegations contained in the complaint, that it is engaged in a business affecting commerce, and that it is an employer within the meaning of the Act. A hearing was held in this matter January 30, 1981, in Denver Colorado. No appearance was made at such hearing on behalf of the affected employees. At the conclusion of the hearing, parties waived closing argument reserving the right to file briefs. The parties were afforded an opportunity to file briefs; however, neither did so.

Having heard and observed the witnesses and having considered the testimony and other evidence together with the pleadings and arguments presented in this matter, the undersigned hereby issues the findings, conclusions, and order set forth in this decision. To the extent that there are any pending motions that have not been specifically granted herein, such motions are denied.

## Findings of Fact

1. Respondent employs from 26 to 30 persons in its various operations. (Tr. 36)

2. On August 6, 1980, three of respondent's employees were preparing to install insulation and roofing on the roof of a two-story, flat-roofed building being constructed in Denver, Colorado. (Tr. 19, 63)

3. The building comprising respondent's worksite was H-shaped, with the south portion connected at roof level with the north portion by a walkway. (Tr. 100-01)

4. Respondent's employees had access to the south portion of the building at roof level (south roof). (Tr. 60) Respondent's employees did not have access to the north portion of the building at roof level. (Tr. 88)

5. On August 6, 1980, three of respondent's employees were engaged in stacking insulation, two of whom were working on the south roof. (Tr. 56)

6. The roof of the building was twenty-two feet above the concrete floor that was at ground level. (Tr. 29, 89)

7. Flooring had not been installed on the second-floor level; hence, a fall from a floor opening on the roof would result in either a twenty-two foot fall to the concrete ground floor or a fall of approximately half that distance upon the second-level bar joists. (Tr. 28, C-2)

8. On August 6, 1980, one of respondent's employees, Timothy Scigliano, fell through a floor opening on the south roof which was not guarded by standard guardrails nor covered. (Tr. 56-57, 59)

9. The fall occurred while Mr. Scigliano was counting insulation that was stacked on the south roof. While counting he stepped backward into said floor opening, which was 19 inches wide and 3 feet, 8 inches long. (Tr. 21, 70, C-3)

10. As a result of the fall Mr. Scigliano sustained severe injuries including a concussion, broken back, four broken ribs, and three broken vertebrae. (Tr. 64)

11. On the morning of August 6, 1980, there were a number of uncovered floor openings on the south roof. (Tr. 58, 60, 62, 98)

12. These uncovered floor openings were roughly the same size as the one into which Mr. Scigliano fell. (Tr. 85)

13. All such floor openings could have been covered to prevent someone from falling into them by placing plywood sheets over the

openings. (Tr. 35)

14. The general contractor provided a sufficient amount of plywood sheets to cover all the floor openings that existed on the south roof. (Tr. 98, 107)

15. Some, but not all of the floor openings on the south roof were "curbed", which curbing consisted of a parapet wall 18 inches or less in height which bordered the edges of such floor openings. (Tr. 104, 112)

16. The morning of August 6, 1980, respondent's foreman caused to be covered all the floor openings on the south roof except the floor openings that were "curbed". (Tr. 106)

17. The floor openings that were "curbed" were not covered on August 6, 1980. (Tr. 106, accord Tr. 66-67, 69)

18. After causing the floor openings that were not "curbed" to be covered, respondent's foreman inspected the south roof the morning of August 6, 1980, and determined that the floor openings were either covered or "curbed". (Tr. 101-02, 106)

19. The accident involving Mr. Scigliano's fall occurred shortly after lunch, between 12:10 p.m. and 1:00 p.m., on August 6, 1980. (Tr. 75, 102; accord Tr. 75)

20. The floor opening into which Mr. Scigliano fell was not covered nor "curbed". (Tr. 59, 82)

21. Said floor opening was cut into the roof by another subcontractor while respondent's employees were off the roof for lunch. (Tr. 81-82)

22. Unless the "curbed" floor openings 18 inches or less in height are covered, an employee can trip over the curbing and fall into the

floor opening. (Tr. 112)

23. The presence of curbing no more than 18 inches in height around floor openings will provide some fall protection, but it will not prevent someone from falling into the floor openings. (Tr. 114)

24. On the morning of August 6, 1980, respondent's foreman instructed respondent's employees to be careful because of the existence of floor openings in the area in which they were working. (Tr. 62)

## Conclusions of Law

1. Respondent failed to comply with 29 C.F.R. §1926.500(b)(1) in that it caused its employees to be exposed to floor openings located on the roof of respondent's worksite which were not guarded by standard railings or covered, as specified in 29 C.F.R. §1926.500(f)(1) and (f)(5)(ii) respectively.

2. Respondent did not have actual or constructive knowledge of the existence of the floor opening through which one of its employees fell.

3. Respondent had actual knowledge of the existence of "curbed" floor openings that were not guarded by standard guardrails nor covered, which openings were accessible to respondent's employees.

4. Respondent's asserted defense that it neither created nor controlled the noncomplying conditions has not been established in that the proof does not establish that respondent could not control the conditions to the degree that it could not realistically correct such conditions, and for the further reason that the evidence does not show that respondent took steps to cause the responsible contractor to abate the hazards created by such noncomplying conditions.

5. Respondent's affirmative defense not having been established,

respondent violated 29 C.F.R. §1926.500(b)(1).

6. The aforesaid violation was serious in that if a fall were to occur at respondent's workplace as a result of its failure to comply with the cited standard, there is a substantial probability that death or serious physical injury could result.

7. Taking into consideration the statutory factors, the proposed penalty of $280.00 is appropriate.

Discussion

The single charge at issued here is an alleged violation of 29 C.F.R. §1926.500(b)(1) which provides:

> Floor openings shall be guarded by a standard railing and toeboards or cover, as specified in subparagraph (f) of this section. In general the railing shall be provided on all exposed sides, except at entrances to stairways.2/

The specific allegation, as set forth in Citation No. 1, Item No. 1, is:

> 29 C.F.R. 1926.500(b)(1): Floor opening(s) were not guarded by standard railings and toeboards or covers:
>
> (a) 2750 South Wadsworth, Denver, Colorado, 3rd level floor openings, 1 ft, 8 inches wide and 3 ft, 7 inches long was not guarded.

The specific floor opening referred to in the citation is the

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2/ As prescribed by 29 C.F.R. §1926.500(f)(1), a standard railing shall consist of a top rail, intermediate rail, toeboard, and posts, and shall be a vertical height of approximately 42 inches from upper surface of top rail to the floor. The intermediate rail shall be halfway between the top rail and the floor. Floor opening covers are required to be capable of supporting the maximum intended load and so installed as to prevent accidental displacement. 29 C.F.R. §1926.500(f)(5)(ii).

floor opening into which one of respondent's employees fell on August 6, 1980, and sustained severe injuries. The proof establishes that there were several floor openings accessible to respondent's employees the morning of August 6, 1980, at this same worksite. These floor openings consisted of two groups. The first were floor openings which were flat with the surface of the roof. The second group were those which were "curbed". The curbing of this latter group of floor openings consisted of flashing which extended vertically above the edges of the floor openings no higher than 18 inches.

The morning of August 6, 1980, respondent's foreman caused the floor openings which were flush with the surface of the roof to be covered with 4' X 8' sheets of plywood; however, he did not cover the "curbed" floor openings. After taking these protective measures, two of respondent's employees proceeded to stack insulation in various parts of the roof as a prelude to commencing the roofing of the building. The testimony establishes that sometime after lunch, the two employees returned to the roof for the purpose of counting the insulation to determine whether sufficient quantities were there to insulate the roof. While counting the insulation one of the employees fell into the floor opening, particularly described in the citation, and sustained serious injuries.

The evidence establishes that this particular floor opening was not present when respondent's employees went to lunch. It was made by employees of another contractor while respondent's employees were at lunch.

Under these circumstances, it is clear that respondent did not

have actual knowledge of the existence of this particular floor opening. It further appears that, even with the exercise of reasonable diligence, respondent could not have been expected to have known of such opening. Thus, as to the specific violation alleged in the citation, it is found that respondent did not have actual or constructive knowledge of the violative condition. Since actual or constructive knowledge of non-complying conditions is a prerequisite to the establishment of a violation,3/ the specific violation alleged in the citation has not been established.

Nevertheless, the evidence establishes the existence of other violations represented by respondent's failure to protect its employees from the other floor openings which were "curbed". The threshold issue presented here is whether these unpleaded conditions can be a basis for a determination that respondent violated the standard. Fed. R. Civ. P. 15(b) provides in pertinent part:

> When issues not raised by the pleadings are tried by express or implied consent, they shall be treated in all respects as if they had been raised in the pleadings. . . .

In this case, the record clearly shows that these unpleaded issues were tried by the implied consent of the parties. The existence of the "curbed" floor openings and respondent's failure to cover them was established by respondent's direct examination of its foreman. (Tr. 98, 101) This issue was then the subject of extensive cross-examination

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3/ Daniel International Corp., Wansley Project, 9 BNA OSHC 2027, 1981 CCH OSHD ¶25,813 (No. 76-0181, 1981)

which was not objected to by respondent.[4/] (Tr. 106, 110, 112-14) Thus, it is appropriate to treat the issue of the existence of "curbed" floor openings which are not guarded by standard railings or covered as if such issue had been raised by the pleadings.

The evidence establishes that there were an undetermined number of floor openings which were "curbed". They were not guarded by standard guardrails nor where they covered to prevent someone from falling through such floor openings.

It could be argued that the protection afforded by the curbing was equivalent to the provision of a guardrail that was approximately the height of the intermediate rail prescribed by 29 C.F.R. §1926.500(f)(1). Indeed, the curbing might best be described as constituting a toeboard which approached the prescribed height of imtermediate railings. It would effectively prevent the falling of materials through the opening. It would also reduce the likelihood of someone falling into the floor opening, but it would not prevent such occurrence. Indeed, the curbing posed a tripping hazard which could result in someone tripping on the curbing and falling through the floor opening. Since the cited standard applies to those conditions where there is a danger of employees falling through floor openings (29 C.F.R. §1926.550(a)), it is found that

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4/ The single objection made concerning this issue was one of competence (Tr. 113).

respondent failed to comply with an applicable standard[5/] and that respondent, through its representatives, had actual knowledge of the violative condition. Thus, a prima facie violation of the standard has been established.

Respondent's Affirmative Defense

Respondent has raised the defense that it is not responsible for the violative conditions that existed at its worksite for the reason that it did not create nor control such conditions. The proof shows that respondent did not create the violative conditions. Further, it can be assumed that respondent could not realistically be expected to take all the steps necessary to come within literal compliance with the standard. Nevertheless, to establish the asserted defense it must be shown that the employees of a non-creating, non-controlling contractor of a multi-employer worksite were protected by means of realistic alternative measures or that such measures were unavailable. Data Electric Company, 5 BNA OSHC 1077, 1977-78 CCH OSHD ¶21,593 (No. 13122, 1977); Anning-Johnson Co., 4 BNA OSHC 1193, 1975-76 CCH OSHD ¶20,690 (No. 4409, 1976).

Here, respondent provided realistic measures to protect his employees against the floor openings that were flat. It placed plywood over

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5/ Section 1926.500(b) is captioned "Guarding of floor openings and floor holes". It sets forth requirements for such guarding. The definitions that apply to §1926.500(b) are contained in §1926.502. Pursuant to those definitions, the terms "floor hole" and "floor opening" as used in §1926.500(b) refer to specific openings in "any floor, roof, or platform." (emphasis added) Sections 1926.502(a) & (b). For this reason, §1926.500(b) requires the guarding of roof openings in the context of Part 1926.

such openings which constituted a cover. Such placement, by itself, would not prevent the accidental displacement of the covers as required 29 C.F.R. §1926.500(f)(5)(ii); nevertheless, it would prevent a fall through the floor openings absent the accidental displacement of the covers.

No additional protection was provided to protect respondent's workers from the hazard presented by the floor openings that were "curbed". The curbs here were less than 18 inches high, which was roughly equivalent to the protection provided by a guardrail that was even lower than the prescribed height of the intermediate rail. These curbs did provide some protection in that there is somewhat less of a likelihood of someone falling into the floor opening that is so curbed than there is one that is not curbed. Nevertheless, the curbing creates a tripping hazard and does not prevent someone from falling into the floor opening.

Thus, the question presented here is whether respondent realistically could have been expected to do more to protect its employees from the violative condition than it did. The evidence establishes that the answer is--yes! It easily could have covered the curbed floor openings the same as it did those that were not curbed. There were ample materials to do so, and the amount of additional time involved would have been insignificant. This additional action would have provided a significant degree of protection to respondent's employees beyond that which was provided. Having failed to do so, it is found that respondent, a non-creating, non-controlling contractor, did not do what was "realistic" under the circumstances to protect its employees

from the hazard to which the standard is addressed, even though literal compliance with the standard may have been unrealistic.

Even if the proof established that there were no means available by which the employer could have physically protected its employees against the hazard created by the violative condition, which is not the case here, the employer must, nevertheless, take the step of requesting the responsible contractor to abate the hazard. Automatic Sprinkler Corporation of America, 8 BNA OSHC 1384, 1980 CCH OSHD ¶24,495 (No. 76-5089, 1980). Here, the evidence establishes that respondent did not take such step.

The only request made by respondent's representative was the request to the general contractor for plywood. The contractor, in compliance with this request, supplied sufficient plywood to cover the floor openings in the area of the roof in which respondent's employees had access. This request by respondent's representative connotes an assumption of responsibility by him to abate the hazard rather than a request that the responsible contractor abate it. Thus, respondent's defense is rejected, and respondent is found to have violated the cited standard.

In this case there is no question but that the violation was serious in nature. If someone were to fall through one of the curbed floor openings, the same type of serious injuries that were sustained by respondent's employee on August 6, 1980, could be expected to occur.

Complainant proposes a penalty of $280.00 for this violation. Here, it appears that respondent acted on the misapprehension that it was not required to guard the "curbed" floor openings. Thus, it is

found that respondent acted in good faith. It further appears that respondent is a medium-sized employer, with no previous history of violations. Taking these factors into consideration together with the gravity of the violation, it is found that the proposed penalty of $280.00 is appropriate.

ORDER

In view of the foregoing, it is hereby ORDERED that Citation No. 1, Item No. 1, is AFFIRMED, and a penalty of $280.00 is ASSESSED.

Date: July 12, 1982

Quentin P. McColgin
Judge, OSHRC

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 240

ATLANTA, GEORGIA 30309

# NOTICE OF DECISION

Secretary v. LUTHER McGILL, INC.

OSHRC Docket No. 81-2656

1. Enclosed is a copy of my decision. It will be filed with the Commission on July 12, 1982, and will become the final order of the Commission on August 11, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N. W., Suite 601
   Washington, D. C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is August 11, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Paul L. Brady

PAUL L. BRADY
Judge

Date: June 22, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

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| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 81-2656 |
| | ) | |
| LUTHER McGILL, INC., | ) | |
| | ) | |
| Respondent. | ) | |

APPEARANCES:

Debra H. Green, Esquire, Office of the Solicitor, U. S. Department of Labor, Birmingham, Alabama, on behalf of complainant

E. Grady Jolly and James R. Lockard, Esquires, Jackson, Mississippi, on behalf of respondent

## DECISION AND ORDER

BRADY, Judge: This proceeding is brought pursuant to section 10 of the Occupational Safety and Health Act of 1970 ("Act") to contest a citation and proposed penalty issued by the Secretary of Labor ("Secretary") pursuant to section 9(a) of the Act. The central issue in this case is the extent of an employer's responsibility for the conduct of an employee.

The basic facts are not in dispute. Luther McGill, Inc., is engaged in oil field construction and transportation of oil field equipment. On October 13, 1981, oil rigs were hauled by truck for the Well-Tech Company from an oil field in Shannon, Mississippi, to Well-Tech's equipment yard in Laurel, Mississippi. While unloading pipe racks which had been used in the oil field, the gin pole derrick came in contact

with an energized electric power line. One employee was killed and another severely injured.

All items of the citation were subsequently withdrawn except amended item 3 alleging violation of 29 C.F.R. § 1910.181(j)(5)(i)(a). The standard, which pertains to operation of derricks near electric power lines states in pertinent part as follows:

> (i) Except where the electrical distribution and transmission lines have been deenergized and visibly grounded at point of work or where insulating barriers not a part of or an attachment to the derrick have been erected to prevent physical contact with the lines, derricks shall be operated proximate to, under, over, by, or near powerlines only in accordance with the following:
>
> > (a) For lines rated 50 kv. or below minimum clearance between the lines and any part of the derrick or load shall be 10 feet.

The violation is alleged in the amended citation as follows:

> 29 CFR § 1910.181(j)(5)(1)(a) [sic]: A derrick was operated where part of the derrick was within 10 feet of electrical distribution or transmission lines rated 50Kv or below that had not been deenergized and visibly grounded; nor had insulating barriers not a part of, or an attachment to, the derrick been erected to prevent physical contact with the lines:
>
> > (a) On or about October 13, 1981, at the Well Tech Equipment Yard, located at 2848 Industrial Boulevard, Laurel, Mississippi, employees of Respondent, who were helping position a load of oilfield piperacks, being unloaded through the use of an International 20 Ton Tandem derrick truck, under 12, 470 volt a.c. energized power distribution line(s), were exposed to electric shock when the mast of said derrick entered the 10 foot minimum clearance zone.

The evidence shows that on the morning of October 13, 1981, two of respondent's employees were assigned to the equipment yard to unload the pipe racks, and Glynn Douglas was the operator of the tandem truck which was equipped with a gin pole derrick. He had operated the truck used on the morning of the occurrence for approximately two of the three years he had been employed by respondent in that capacity. Testimony shows that he was aware that a distance of

ten feet was to be maintained between energized electrical lines and the gin pole derrick.

After the hoist cable was attached to the pipe racks (illustrated in Exhibit C-2), Douglas drove to the northeast corner of the yard to place them. He was directed, however, by a Well-Tech supervisor to unload the racks in the southeast corner of the yard. Driving to the southeast corner, Douglas began to lower the derrick to allow the racks to be turned lengthwise, as directed, when the derrick made contact with the electric line.

The evidence establishes, and respondent concedes, that there was a failure to comply with the cited standard. It is argued, however, that section 17(k) of the Act relieves an employer from liability for a serious violation if it "did not and could not, with the exercise of reasonable diligence, know of the presence of the violation." Thus, respondent maintains it could not foresee that Douglas, an experienced gin pole operator who was aware of the presence of the electrical lines, would operate the derrick within ten feet thereof.

In addition, respondent states that it could not foresee the factors which caused Douglas to violate the standard; i.e., (1) his partial blindness due to the sun which caused him to misjudge the distance between the derrick and the lines and (2) his following the instructions of the Well-Tech supervisor which caused the poles to be operated within the minimum clearance area.

Under the Act, an employer's knowledge is an element of proof of both serious violations under section 17(k) and nonserious violations, and the burden is on the Secretary to prove existence of that element. Brennan v. Occupational Safety and Health Review Commission, 511 F.2d 1139 (9th Cir. 1975). Clearly, where noncompliance results because of factors beyond the control of the employer, he

should not be found to have committed a violation. However, this line of reasoning is limited in scope to unpreventable occurrences which could not be predicted. Secretary v. Engineers, Inc., 75 OSAHRC 84/E11, 3 BNA OSHC 1537, 1975 CCH OSHD ¶ 20,012 (No. 3551, 1975). It is on this latter basis that respondent's argument must fail.

The record discloses that in May of 1980 an almost identical accident occurred in the same area of the equipment yard with the same truck. Testimony shows at that time an employee was present who directed the driver in operating the derrick, but he misjudged the distance (Tr. 10, 26). Also, testimony revealed that 90 percent of respondent's work areas are in the vicinity of energized lines; thus, accidents of this kind are clearly predictable. Therefore, as a minimum precaution based on this prior experience, an employee should be specifically designated to direct the operators of gin pole derricks at all times. Both of the factors respondent sets forth as causing the violation: (1) the sun causing Douglas to misjudge distance and (2) his following unsafe instructions of the Well-Tech employee, could have been eliminated by a supervised or properly directed work policy governing operation of the gin pole derricks.

While the evidence shows that the gin pole truck operator was experienced and aware of the distance to be maintained from the power lines, respondent was fully aware of the specific conditions for compliance with the standard but had formulated no policy for safe operation of the derricks to ensure such compliance. Respondent chose to leave the safe operation of the gin pole derricks to the personal judgment of the operators without establishing specific rules for their operation even in potentially hazardous areas.

The decision in H. B. Zachry Company v. O.S.H.R.C., 638 F.2d 812, 818, 819 (5th Cir. 1981) regarding the defense of employee misconduct or negligence defense is determinative in this case. The Court stated:

> . . . An employer must demonstrate that (i) all feasible steps were taken to avoid the occurrence of the hazard, General Dynamic v. O.S.H.R.C., 599 F.2d 453, 451 (5th Cir. 1977); Horne Plumbing and Heating Co. v. O.S.H.R.C., 528 F.2d at 571. This includes the training of employees as to the dangers and the supervision of the work site, Horne, 528 F.2d 56 at 569. And (ii) the actions of the employee were a departure from a uniformly and effectively communicated and enforced work rule of which departure the employer had neither actual nor constructive knowledge. See, e.g., General Dynamics, 559 F.2d at 465; Ames Crane and Rental Service, Inc. v. Dunlock, 536 F.2d 123 (8th Cir. 1976) . . . When faced with this defense, reviewing courts have consistently looked at the record evidence of the employer's safety program . . . Although there is substantial evidence that Zachry had a safety program and work rules requiring cranes to maintain a minimum of ten feet clearance from energized power lines, the ALJ and Commission found deficiencies in the communication and enforcement of the rule . . . Thus the company's attempted defense of employee negligent misconduct fails because of the employer's inability to establish to the satisfaction of the factfinder that it effectively communicated and enforced work rules which were necessary to ensure compliance with OSHA standards.

Therefore, respondent's serious violation of the standard was reasonably preventable and could have been predicted with the exercise of reasonable diligence.

The next question for determination concerns the amount of penalty to be assessed for the violation. Under section 17(j) of the Act, the Commission is required to find and give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the assessment of an appropriate penalty. The gravity of the offense is the principal factor to be considered. Nacirema Operating Company, Inc., 72 OSAHRC 9/A2, 1 BNA OSHC 1049, 1971-73 CCH OSHD ¶ 15,032 (No. 4, 1972). The Commission stated in Secretary v. National Realty and Construction Co., Inc., 72 OSAHRC 9/A2, 1 BNA OSHC 1049, 1971-73 CCH OSHD ¶ 15,188 (No. 85, 1971), that the elements to be considered in determining the gravity are: (1) the number of employees exposed to the risk of injury; (2) the

duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury.

Weighing all the foregoing factors in light of the circumstances, including respondent's attempts at compliance, it is concluded that the proposed penalty in the amount of $480 is deemed appropriate.

## FINDINGS OF FACT

1. Luther McGill, Inc., at all times hereinafter mentioned, maintained a place of business at the equipment yard, Exit 29W, Interstate 59 North, Laurel, Mississippi.

2. On October 15 to 23, 1981, authorized representatives of the Secretary conducted an inspection of the aforementioned work site. As a result, respondent was issued a citation with notice of a proposed penalty.

3. On October 13, 1981, respondent operated a derrick near electrical distribution lines which had not been deenergized or grounded nor were insulating barriers erected to prevent plysical contact with the lines.

4. The derrick was operated within ten feet of a 12,470-volt energized line exposing employees to electric shock when it came in physical contact with the line.

5. The operator of the derrick was aware that the minimum clearance between the line and the derrick should be ten feet, but he misjudged the distance due to partial blindness caused by the sun.

6. Ninety percent of the areas within which respondent works are in the vicinity of energized electrical power lines and on May 26, 1980, a similar accident occurred in the same area of the equipment yard.

7. Respondent had no safety policy which was uniformly and effectively communicated and enforced.

8. The accident in this case was a preventable occurrence and foreseeable by respondent in light of the circumstances and its prior experience.

## CONCLUSIONS OF LAW

1. Luther McGill, Inc., at all times pertinent hereto, was an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, and the Commission has jurisdiction of the parties and subject matter herein pursuant to section 10(c) of the Act.

2. Respondent is, and at all times pertinent hereto, required to comply with the safety and health regulations promulgated by the Secretary pursuant to section 6(a) of the Act.

Upon the basis of the foregoing findings of fact and conclusions of law, and the entire record, it is ORDERED:

1. The amended citation is affirmed and a penalty in the amount of $480 is hereby assessed.

Dated this 12th day of July, 1982.

Paul L. Brady

PAUL L. BRADY
Judge

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
John W. McCormack Post Office and Courthouse, Room 420
Boston, Massachusetts 02109

NOTICE OF DECISION

Secretary of Labor v. THE CARBORUNDUM CO., ELECTRO MINERAL DIVISION
OSHRC Docket No. 79-860

1. Enclosed is a copy of my decision. It will be filed with the Commission on July 26, 1982, and will become the final order of the Commission on August 25, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is August 25, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

David J. Knight

DAVID J. KNIGHT
JUDGE, OSHRC
Date: July 6, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant<br><br>v.<br><br>THE CARBORUNDUM CO., ELECTRO MINERAL DIVISION,<br><br>Respondent | OSHRC DOCKET NO. 79-860<br><br>DECISION AND ORDER |

Appearances: For Complainant,
Francis V. LaRuffa, Regional Solicitor
U.S. Department of Labor
1515 Broadway, Room 3555
New York, New York 10036
By: Harry W. Scott, Jr., Esq. and
Diane Zwerling, Atty.

For Respondent,
Walter B. Connolly, Jr., and
Donald R. Crowell, Esqs.
Pepper, Hamilton & Scheetz
1776 F Street, N.W.
Washington, D.C. 20006 and

Robert G. Raymond, Esq.
Carborundum Corporation
Carborundum Center
Niagara Falls, New York 14302

For Affected Employees,
Steven Wodka, International
Representative,
Oil, Chemical and Atomic Workers,
Health & Safety Office, Suite 620,
120 19th Street, N.W.
Washington, D.C. 20036

Ronald K. Graci, President
Local 8 - 12058 O.C.A.W.
110 - 24th Street
Niagara Falls, New York 14303

STATEMENT OF PROCEEDINGS:

By letter dated February 14, 1979, The Carborundum Company, Electro Mineral

Division (respondent) contested[1/] a citation issued[1/] January 22, 1979, by the Occupational Safety and Health Administration of the U. S. Department of Labor (complainant or OSHA) after an inspection over the period November 13 to 17, 1978, at its facility located in Niagara Falls, New York, where it produces silicon carbide (SiC) in an open furnace process. The basis of the citation is an alleged exposure of employees to carbon monoxide (CO) produced during the burning process at the open furnaces. The three items of the citation that respondent is said to have willfully violated are:

1) The general duty clause[2/] in that it failed to provide effective monitoring by use of continuous CO monitors which would sound an alarm and activate a ventilation system when dangerous concentrations are reached. A civil penalty of $6,480 is proposed.

2) The general duty clause is that it failed to instruct employees on the symptoms and hazards of CO overexposure. A civil penalty of $5,040 is proposed.

Or, in the alternative (Tr. 7):

3a) 29 CFR §1910.1000(a)(2)[3/] in that two employees were exposed to

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1/ Under the provisions of the Occupational Safety and Health Act of 1971, 29 U.S.C. §§651, et seq., citations are issued after inspection [§658(a)] and may be contested within a 15 working day period [§659(a)]. A hearing is then afforded to resolve the issues [§659(c)].

2/ 29 U.S.C. §654:

(a) Each employer-
(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

3/ This standard, 29 CFR §1910.1000 Air Contaminants, reads:

(2) Other materials-8-hour time weighted averages. An employee's exposure to any materials in table Z-1, the name of which is not preceded by "C", in any 8-hour shift of a 40-hour work week, shall not exceed the 8-hour time weighted average given for that material in the table.

excessive amounts of CO forbidden by that standard. The permissible exposure is 50 parts of carbon monoxide per million parts of contaminated air by volume at 25 degrees centigrade at 760 millimeters Hg (mercury) pressure (p/m); or 55 milligrams of carbon monoxide per cubic meter of air ($mg/m^3$), according to table Z-1 (see footnote 3);

b) 29 CFR §1910.1000(e)[4/] because feasible administrative or engineering controls were not determined and implemented to bring the levels within the permissible limit required by this standard; and

c) 29 CFR §1910.134(a)(2)[5/] since two employees were not provided with respirators who were exposed to CO as those are required by the standard. For these items [3(a), (b) and (c)], a civil penalty of $7,200 is proposed.

The hearing consumed 12 days within the period of March 25 to June 27, 1980. The affected employees were represented throughout by the Oil, Chemical and Atomic Workers International Union. Respondent admitted the jurisdictional facts alleged in the complaint that it is an employer having employees and affects interstate

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4/ This requires:

(e) To achieve compliance with paragraph (a) through (d) of this section, administrative or engineering controls must first be determined and implemented whenever feasible. When such controls are not feasible to achieve full compliance, protective equipment or any other protective measures shall be used to keep the exposure of employees to air contaminants within the limits prescribed in this section. Any equipment and/or technical measures used for this purpose must be approved for each particular use by a competent industrial hygienist or other technically qualified person. Whenever respirators are used, their use shall comply with §1910.134.

5/ This mandates:

§1910.134 Respiratory protection.
Respirators shall be provided by the employer when such equipment is necessary to protect the health of the employee. The employer shall provide the respirators which are applicable and suitable for the purpose intended.

commerce. I conclude that the Commission has the power to decide this controversy. 29 U.S.C. §652(5) and 653(a). Respondent also agrees that the inspection by the OSHA personnel was proper and consistent with the Act and the complainant's regulations. It also admitted that CO exists in Building 82, the inspection site. (Tr. 3)

Post-hearing proposals and briefs were filed by complainant and respondent by October 8, 1980.

THE ISSUES:

Three main issues are presented essentially to decide the question of willfulness:

1. Whether the level of carbon monoxide exceeds the permissible level in Building 82;

2. Whether respondent's method of ventilating that building represents the current state of the art; and

3. Whether respondent's organization and system permits the working of an effective safety program to avoid endangering employees within Building 82 by exposure to carbon monoxide.

THE PRODUCTION PROCESS: 6/

The process of producing silicon carbide was devised by Edward G. Acheson almost 100 years ago, and the furnaces producing this compound bear his name. A furnace is about 48 feet long and four feet wide with sidewalls six feet high. An electrode is placed at either end. The furnace is filled to a six-foot height with sawdust, sand and coke and running longitudinally through this is a graphite core. Electrical current will pass through this powder and it is the major source of heat. Preparing the furnace to this point requires about 14 hours.

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6/ There is little dispute concerning this operation and this section is taken mainly from respondent's post-hearing memorandum, appendix A thereto.

The current is then turned on and will run for 30 to 35 hours at 1700 to 1760 degrees centigrade. A cylinder of the silicon carbide will form around the graphite core. At the end of this time, the current is shut off and the furnace cools for 12 to 24 hours. The side walls are then removed and the unfused mix falls away allowing the core to cool. This takes 24 to 36 hours. It requires four to six hours to clean all the mix from the cylinder which, in as long a time, is then lifted off by an overhead crane after being broken away from the graphite core. The furnace is next prepared for another load.

This type of furnace is the only one used to produce the product (Tr. 552). Dr. Acheson founded the respondent company which is now the country's largest producer (Tr. 554).

Building 82 is 416 feet long and 92 feet wide with 12 furnaces in three groups, and 34 employees operating them over three shifts. The sides of the building, lined with louvres to allow air in, rise straight up then slant toward each other with a roof monitor (opening) along the apex to the outside. Cool, fresh air drawn in through the louvres is heated over the furnaces and rises out of the building through the monitor. No fans are used to remove the gases coming off the furnaces. These rise with the warmed air and are exhausted through the monitor.

A small room, called the lunch-room, is directly off the furnace area next to the lavatory and is where the employees may take their breaks.

THE ACCIDENT GIVING RISE TO THE OSHA INSPECTION:

Mark Farina worked in Building 82 for six weeks (Tr. 1440) when he reported at 11:30 p.m., November 12, 1978, for the midnight to 7:00 a.m. shift (Tr. 1400). The only other employee with him was Jim Martinkowski who had been working for only three days. No foreman had been assigned that night (Tr. 1401-1402). They

had done various tasks in the furnace room disconnecting number 35, hooking up number 36 from which fumes arose, which Mr. Farina did and Mr. Martinkowski raked down number 37 (Tr. 1400, 1404, 1407).

At about 2:00 or 3:00 a.m., Mr. Farina went into the lunchroom feeling sleepy and closed the door. Mr. Martinkowski was at the other end of the furnace room with the payloader (Tr. 1415, 1417). In a statement Mr. Farina gave prior to the hearing (Exhibit R-7) he told Jim that he had no more work and was going to rest and that if he fell asleep, Jim was not to allow him to sleep too long (Tr. 1450-1452). At about 5:00 a.m. he went for a drink and the next thing he remembers is waking up at the hospital. He doesn't recall seeing Mr. Martinkowski thereafter (Tr. 1417-1418).

Both men were found in the lunchroom at 7:00 a.m. by Homer Green reporting to work for the first shift (Tr. 28). The smell of gas was very strong in the lunchroom (Tr. 29, 31). He called the guards who summoned the ambulance. Mr. Martinkowski was pronounced dead on arrival at the hospital as a result of carbon monoxide intoxication with a blood carbon monoxide saturation of 46.2 percent. Mr. Farina was treated for carbon monoxide poisoning with oxygen and a pressure chamber. At 9:30 a.m. his carboxy hemoglobin (amount of carbon monoxide in his blood) was 55.3 percent (Dr. Gillick, Tr. 122).

THE EVIDENCE:

According to Mr. Farina, his training for work in Building 82 consisted of a five-minute meeting with a foreman (Mr. Kavanaugh) who instructed on the use of safety glasses, shoes and respirators. He learned the actual work on the furances with the crew (Tr. 1389-1390). He was not instructed on the gasses or fumes that occur in the building (Tr. 1391). Other crewmen told him that if he did feel sick or dizzy or had a sweet taste in his mouth to go and stand at the

open doorway and let the air hit him (Tr. 1392). The building is "smoky", "dirty" and "stinky" (Tr. 1394). At safety meetings, he did not recall any mention of fumes or gasses, emergency procedures, nor of any oxygen or air supply available in the area (Tr. 1399-1400). He received no instruction on any precaution to be taken in the lunchroom, specifically whether the door should be open or not and he doesn't remember whether the heater was on (Tr. 1413, 1418). He felt no headache, dizziness or upset stomach during the night of November 12 (Tr. 1424-1425). That night, the weather was damp, cool and felt heavy as were the fumes (Tr. 1459-1460).

Joseph Smith, an OSHA compliance officer, was sent to investigate the fatality on November 13, 1978, and during the course of the inspection was at the facility six or seven times (Tr. 1185-1186). During the opening conference, he was told that in February 1978, four or five employees were overcome by carbon monoxide in the lunchroom and, as a result, the wall heater was installed there. That day, the fan was on "low" to create, he was told a positive pressure. But his meter showed that the air flowed inward -- not out -- at a rate of 150 feet per minute. The officer asked for results of samplings taken after that but none could be found. (Tr. 1187-1192). He did notice one carbon monoxide monitor equipped with an alarm there at the time (Tr. 1190). This was on an "I" beam 12 feet up outside of the lunchroom. The alarm was not working neither was the meter to produce a strip chart. He could not read the meter: it was too dark and too high up. (Tr. 1193-1195).

On November 15, 1978, he and industrial hygienist Michael Stratton took spot samples and on November 21, 1978, they returned to take a full shift sample (Tr. 1203). During the morning, very little carbon monoxide was found (Tr. 1204). But around noon there was a drastic change where two or three

furnaces were very active, numbers 41 and 42 (Tr. 1206). Some spot samples read 600 ppm, the limit of the meter (Tr. 1207-1207, 1128-1129 and 1135).

The full shift sample was taken with an ecolyzer which pumps in the air continuously and also has a direct read meter, Mr. Stratton explained (Tr. 1126). The lunchroom showed less than five (5) ppm on November 15, 1978 (Tr. 1127-1128).

November 21, 1978, was a "light day", less than a normal operation, some employees told Mr. Stratton. One furnace had been torn down and another built (Tr. 1135). But according to respondent's representative, the day's operation was normal (Tr. 1133-1134).

While some spot readings showed extremely high concentrations around the furnaces, on an eight-hour time weighted average, the reading did not exceed 50 ppm of carbon monoxide but was between 26 to 28 ppm (Tr. 1136). The test was taken on an employee who represented all (Tr. 1175, 1177).

Despite this, the decision was made not to go back for further testing because (1) the death of Mr. Martinkowski by carbon monoxide intoxication was enough to show a violation and (2) the backlog of other work (Tr. 1137).

Mr. Stratton admitted that any reliance by OSHA on studies made by the Enviornmental Protection Agency which were made available by respondent to OSHA would be in error (Tr. 1138-1139) because these have no application to employee exposure (Tr. 1173-1174). Further, the spot samplings which he and Mr. Smith took were not geared to an employee's position at work (Tr. 1175). He also stated that no OSHA standard requires an employee to monitor for carbon monoxide, nor for an employee's carboxy hemoglobin readings (the presence of carbon monoxide in the blood), nor to extrapolate its presence from mathematical formulae (Tr. 1178-1182).

Mr. Smith testified that OSHA characterized the alleged violations as willful

because of (1) the previous incident in the lunchroom in February 1978, with four or five employees overcome by carbon monoxide; (2) the failure to take samples to determine the levels; (3) two previous reports by Resources Research, Inc., indicating very high levels of the gas and which also mentions cross-drafts within Building 82 affecting the natural ventilation and outflow of carbon monoxide; (4) respondent knew of the presence of the gas because the overhead crane operators had been affected and respondent enclosed and ventilated the cabs; and (5) respondent's installation of the unconnected monitor which accomplished nothing (Tr. 1209).

Further, respondent's training program was ineffectual because it did not advise the employees of the presence of carbon monoxide, its symptoms and effect, nor what to do if exposed. The symptoms are headaches, nausea, dizziness and difficulty in breathing. (Tr. 1246-1247). They were not told to go to medical only to go outside (Tr. 1248, 1250). Mr. Smith was told that if an employee went too often to medical, it could look bad (Tr. 1253). Because of the recurrence of the symptoms among the employees, respondent should have monitored these occurences normally (Tr. 1272-1273 and 1298). Mr. Smith could not obtain any documents showing a written employee training program and doesn't know if one exists (Tr. 1280). He knew of no company producing (SiC) whose training program went further than respondent's or monitored more nor had he learned of any deaths from carbon monoxide in any furnace room (Tr. 1283). He characterized respondent's reaction to Mr. Martinkowski's death as one of shock (Tr. 1287).

Mr. Smith was not aware that the monitor he saw was there only to test its durability (Tr. 1301). And while respondent's experience with carbon monoxide gas exposure in February 1978 was a significant factor in characterizing the

alleged violations as willful, Mr. Smith did not consider that the gasses arose from an experimental furnace, two combined as one -- the Whatmore furnace -- and that the experiment was discontinued in May 1978 (Tr. 1294-1295, 1297-1298).

According to the pathologic examination and laboratory report, Mr. Martinkowski died of asphyxia due to carbon monoxide poisoning and his blood carbon monoxide showed a 46.2 percent saturation (Ex. C-2, Tr. 255).

Edward P. Radford, M.D., is an acknowledged expert on the effects of carbon monoxide by reasons of education, training and experience. He is engaged primarily in research. (Tr. 392-403). The gas is produced by the partial combustion of any material containing carbon and has no color nor odor. It is one of the most toxic gasses known. (Tr. 404). Depending on the exposure level, the following effects occur: with 10 to 20 percent in the blood throbbing headaches will occur (Tr. 407); 20 to 30 percent will affect the nervous system (Tr. 411); 30 to 40 percent results in ataxia, loss of muscular coordination (Tr. 415); and loss of consciousness, coma, may occur at the 50 percent level (Tr. 416). At the 60 or 61 percent level, the person is dead (Tr. 425). Essentially, the gas interferes with the transport of oxygen denying this to the body's vital organs (Tr. 409). Body size and health are important factors which may increase the effect (Tr. 410 and 412).

The blood can absorb large amounts of the gas quickly if exposed, or this amount can build up slowly over a long period if the exposure is less during that time (Tr. 421). Blood can be analyzed to determine the concentration (Tr. 419 and 426). An exposure of 35 to 40 ppm over a long period would show a carboxic hemoglobin level of five percent which would be the same at 50 ppm over a shorter period (Tr. 468). That level is the average for one who smokes (Tr. 470). One exposed to 50 ppm of carbon monoxide would never reach a carboxic hemoglobin state of 40 percent (Tr. 480-481A). Headaches and upset stomachs may be caused

by anything and only five or 10 percent of the employees may show symptoms of exposure to carbon monoxide at a level of 50 ppm on a time-weighted average, so much depends on the health and condition of the individual (Tr. 467-468).

The only sure way to determine the exposure is regular blood sampling (Tr. 454). Personal monitoring is not as good because of the variants such as air flow, how it is worn and where (Tr. 453). And the only treatment is pure oxygen not aspirins which act only on symptoms (Tr. 451). Long exposure to the gas induces changes in the blood vessels which can then result in permanent injury and personality changes (Tr. 429-430). But so much depends on a person's general level of health (Tr. 439).

The concentration of 42.6 percent found in Mr. Martinkowski's blood, given his physical condition and age, could mean an exposure of up to 1,000 ppm. If he were resting at the time of exposure, it would have been two or three times higher; all over an eight-hour time period. Mr. Farina's level (55.3 percent) means a somewhat similar but not a much greater exposure. (Tr. 437-438).

Hydrogen sulphide, also found in Building 82 (Dr. First, Tr. 885), has a very potent odor at very low concentrations, 0.25 ppm, and affects the nervous system. It causes headaches, nausea and dizziness (Tr. 465). Sulphur dioxide has a sharp irritating effect in the nose and mouth (Tr. 464).

The complainant called nine employee witnesses all of who worked in Building 82 (Tr. 14-119, 126-202). Additionally, the testimony of seven others was stipulated by the parties to be substantially the same as the first nine had they so been examined (Tr. 204). These employees represent all three shifts and those with long-time employment. All testified to have suffered from headaches, burning sensation in the nose and throat, nausea, gasping, weak knees, severe chest pains, watery eyes, and vision problems. The frequency of these problems

varied from two or three times a week to once every two weeks. Donald Attfield (Tr. 94-118) was overcome by gas in the lunchroom in February 1978 and hospitalized. He did not know of the particulars of the experimental furnace or any aborted run occurring at that time.

Four of the witnesses who did testify operate the overhead cranes and will be, at times, directly in the path of the rising gasses. They evidenced the same symptoms as the other employees. One, Gordon Fogg, in October 1979, experienced such a violent headache which would not abate and he went to the medical department where he received aspirins. There is no record there of his appearance at the time. The nurse did not ask and Mr. Fogg offered no opinion as to the cause of his pain (Tr. 200). He did tell a representative of management, Glen Ziobrowski, that he was going to the medical department and was told by him not to tell the nurse that "he got gassed" (Tr. 198).

Somewhere at the end of 1979 or within the last two years (dating from March 1980) the cabs of the overhead cranes were enclosed and provided with a positive pressure ventilation system (Tr. 160, 167). While respondent has directed that the window be kept closed, operators open them to communicate with employees on the floor and a rope from the hydraulic system is passed through in one cab so that the window is open a crack at all times. (Tr. 201-202).

Generally, on damp or humid days or when the wind blows from the lake, the gasses tend to remain over the furnaces and rise very slowly. That weather keeps the gasses in the building. (Tr. 136-137, 161).

Prior to the accident on November 12, 1978, and unanimously, none of the employees had been instructed as to the nature or content of the gasses in Building 82. Their only instruction, from other experienced employees, was to go outside for air if they were affected. There were safety meetings held monthly

with foremen (Tr. 143) but these mostly related to production (Tr. 25, 104). Safety problems were not resolved (Tr. 147-149). After November 1978, the gas was discussed at meetings (Tr. 26), and, before, maybe once every three months would an employee raise the question (Tr. 71).

Respondent's safety manual booklet (Ex. R-1) which advises employees to go to medical whey they feel ill or are injured — but says nothing about gasses (Tr. 258-259, stipulation to this effect) -- was received by some employees, according to their testimony, when they first reported (Tr. 83), or after a span of time (Tr. 109), and Mr. Green who has been with respondent over 30 years received the manual but never read it (Tr. 49).

Paul T. Kavanaugh became a shift foreman in Building 82 in August 1976. His responsibility included the safety of personnel there (Tr. 258); but this is not assigned, he merely assumes it (Tr. 346). He received no training on carbon monoxide because, before November 12, 1978, there was no problem with it (Tr. 259-260, 274-275, 279). After that date, he was advised that the furnaces give off carbon monoxide (Tr. 287). From the first day there he smelled the fumes describing the odor as "a rotten egg" (Tr. 271). Each and every employee on his first day was told that if he felt dizzy or had a headache or felt weak-kneed, he was to get out of the building (Tr. 302, 310). The new employee is shown all around the building and, "We try to scare them so they watch out for themselves". (Tr. 310, 318, 329).

Prior to the fatality in November 1978, he had reported six or seven accidents involving fumes or gas (Tr. 280). On February 24, 1978, involving the aborted run on the experimental furnace, because of a broken water line (Tr. 305), there were seven men who went to medical (Tr. 281-284). The abortion caused more gas to be given off, i.e., the reaction was incompleted (Tr. 305).

The monitor that was located in Building 82, 12 feet up in the air, was only being tested for its durability and had no relationship to employee exposure (Tr. 292). An exhaust fan, also acting as a heater, was installed in the lunchroom after the February 1978 incident and there were no further problems there until November 12, 1978 (Tr. 307-308). Since that time, there seems to be more complaints regarding gas (Tr. 321).

Randall Coughenour was the Respondent's Safety Engineer from 1971 to June 1978 (Tr. 1638-1639). He holds no engineering degree but does have 15 years' experience (Tr. 1658). He would check Building 82 to determine the carbon monoxide levels at least once a year but he would liked to have done it every six months. That was not feasible. (Tr. 1640, 1654). Exhibit C-2 is the record of the sample taken for June 3, 1971. He took three samples around each furnace and in the crane cab (Tr. 1641) and his ultimate result would be the average of all samples taken at any position (Tr. 1644). That day this was 43.6 ppm on the floor and 87 ppm in the cab (Tr. 1644). He never took an eight-hour time weighted average as there was no reason and he didn't have the equipment (Tr. 1645-1646). At monthly meetings which he attended, there were no complaints about the fumes in the building (Tr. 1648); although "people" would refer him to the fumes there and he would go to sample the air and nine times out of 10 find no carbon monoxide problem (Tr. 1648). He never had any reason to inform management about a carbon monoxide problem (Tr. 1650-1651). On the floor area of Building 82, he never got a reading of over 50 ppm (Tr. 1655). And he tested in all kinds of weather and in all seasons (Tr. 1651, 1659).

Robert LaDue, in August 1978, became respondent's plant personnel and safety manager and was so until January 1980. He followed Mr. Coughenour. He holds a degree in psychology (Tr. 1017-1018). He was to implement company safety

programs and policies handling on a day-to-day basis safety and labor relations questions (Tr. 1019). He could not remember specifically what his instructions were when he was hired (Tr. 1020-1021). He met with Mr. Seymour, the corporate safety director, several hours a week discussing safety and specific problems but had taken no safety courses prior to this job (Tr. 1022). He had no background in safety and health (Tr. 1024).

Mr. Coughenour introduced him to Building 82 and its process but did not discuss gasses (Tr. 1024-1025). But he was aware of the presence of carbon monoxide although not of its dangerous potential (Tr. 1025-1026). He was not taught how to handle an employee exposed to carbon monoxide or to monitor but was since November 1978 (Tr. 1026-1027). As far as he knew, there was no industrial hygienist at this facility before November 1978 (Tr. 1028). He didn't know there was a heater in the lunchroom prior to the November 1978 accident (Tr. 1029). After that event he learned that Mr. Coughenour had sampled the building for carbon monoxide (Tr. 1039).

Respondent's investigation did not reveal what caused the accumulation of carbon monoxide in the lunchroom which killed Mr. Martinkowski (Tr. 1045). It was not his responsibility to determine whether the building's natural ventilation was functioning properly. He doesn't know whose it was. Before the November 1978 accident, he was not aware of the effects if the ventilation was not working properly. Now he is and he was involved in the purchase and installation of monitors and alarms throughout, gas masks and the instructions to employees concerning the gasses (Tr. 1049-1050, 1053).

Mr. LaDue reviewed the minutes of monthly safety meetings from 1974 to 1978 (Ex. R-5) and carbon monoxide was not discussed (T.. 1065). Nor has any grievance been filed on that subject from 1960 to 1978 (Ex. R-4, Tr. 1064).

But he did not know who, in respondent's corporate structure, would be responsible for determining whether there was a safety or health hazard in Building 82 (Tr. 1119-1120). In November 1978, Clifford Seymour was respondent's corporate safety director (Tr. 1464) and he testified that Mr. LaDue was responsible for discovering safety and health hazards in Building 82 (Tr. 1494).

John C. Kinzly is respondent's medical director, a Fellow of the Industrial Medical Association, and has been with the company on a part time basis since 1963 (Tr. 350-352). The medical department is staffed by two more part time physicians, four registered nurses, an X-ray technician and a secretary and is open round the clock (Tr. 353) with only qualified first-aid persons available on weekends (Tr. 354). A record is kept every time an employee reports to medical (Tr. 360).

The Doctor is aware of the presence of carbon monoxide in Building 82 (Tr. 364). The prime requirement is to get an exposed employee to fresh air; oxygen is essential, but fresh air is the biggest item (Tr. 365). These are the instructions in Building 82, it makes good horse sense (Tr. 368).

Physical exams are given initially then every two years. Blood tests are taken but the doctor did not know if these reveal the carboxic hemoglobin level. It isn't a routine procedure. (Tr. 366-367, 384, 385).

The symptoms of exposure are: headache, dizziness, upset stomach, skin color, perspiring, any or all of these (Tr. 369). He would instruct employees of the presence of the gas in the building (Tr. 370-371). The Doctor's staff is instructed to question employees on why, how or where the symptoms occurred (Tr. 373).

Prior to November 12, 1978, it was rare for an employee to complain about fumes; of 57 employees from Building 82 there were 11 such complaints (Tr. 381-382). After that, the frequency of complaints about headaches has increased

(Tr. 389-390, Exhs. C-5 and C-6). The Doctor was aware of the employee exposure to carbon monoxide in Building 82 but not the intensity (Tr. 387-388).

Included within respondent's medical records is the report of the death of Guiseppe Filocamo on December 7, 1956, in Furnace Room 21, the predecessor to Building 82 (Tr. 378-379, Exhs. C-7 and C-45). The cause of death officially is recorded to be arteriosclerotic coronary occlusion but the autopsy report and results of blood sampling showed a carboxic hemoglobin level of 35 percent. Dr. Eddy, respondent's medical director at the time had requested the blood sampling to be done. (Exh. C-45, p. 4). William Wagner, at that time, was respondent's Assistant Corporate Insurance Manager (presently he is a compliance officer with OSHA). He was at the scene of Mr. Filocamo's collapse at a furnace with Dr. Eddy and Mr. Wagner asked him why the victim, lying outside the furnace room, "had this cherry-red color". He had never seen this before. Dr. Eddy replied that it was due to carbon monoxide poisoning. (Tr. 1617, 1619).

Don C. Olson is a Project Manager for respondent (Tr. 770). In November 1977, he visited a Bethlehem Steel plant with Mr. Coughenour, then respondent's division safety coordinator to look at equipment used for monitoring carbon monoxide (Tr. 775-775). At the time, respondent was considering expanding its furnace operation and Mr. Olson was interested in monitoring equipment if the use of such equipment ever became necessary. At the time there was no problem in Building 82; to the best of his knowledge, it was within the limits as no employee was having a problem. (Tr. 778-780). The roof monitor (opening) was expanded over the experimental furnace and there were no complaints about fumes (Tr. 793-794).

After the accident in November 1978, he was involved in the purchase and installation of six monitors, MSA model 704 (Tr. 810-811). At the time of the

hearing, 20 monitors were in place (Tr. 819).

Lewis E. Fancourt is the Senior Sales Representative for Mine Safety Appliances of Pittsburgh, Pennsylvania (Tr. 485). On December 1, 1977, he forwarded a proposal for two systems of monitoring carbon monoxide which he had discussed with Mr. Coughenour. One of these is the MSA 704 Monitoring System. Either would do the job (Tr. 489). These systems were to be used in Building 82 (Tr. 492). The order came in shortly after November 13, 1978 (Tr. 500). Before this, Mr. Coughenour told him that if an engineering study proved successful, there would be no need for the monitors (Tr. 511). Off and on since 1955, he discussed with Mr. Seymour monitoring equipment for carbon monoxide. Respondent appeared to be interested in solving this problem (Tr. 518). In respondent's area in New York, steel companies, coke furnaces and garages use monitors, otherwise their use would be rare (Tr. 521).

Melvin W. First has been a Professor of Environmental Health Engineering at Harvard University since 1961. He is a registered professional engineer (Mass.), is certified in the comprehensive practice of industrial hygiene by the American Board of Industrial Hygiene, and is a Diplomate of the Enironmental Engineering Intersociety Board. (Tr. 856-859). He considers himself to be an industrial hygienist with his main interest being in the engineering control of occupational exposures and hazards (Tr. 859).

Dr. First spent two or three hours in Building 82 as part of his preparation leading to his testimony (Tr. 856). This was his first exposure to the Acheson furnace (Tr. 956). He described the reaction in the furnace as quite straight forward. The oxygen in the silicon dioxide (sand) combines with the carbon (coke) to form carbon monoxide and some of the coke combines with the silica stripped of its oxygen to produce silicon carbide. Three parts of carbon to one part of silica

results in one part silicon carbide and two parts of carbon monoxide based on the carbon content. Because of some sulphur present, hydrogen sulphide will be formed and its presence is an indication that the gasses had not been further reacted and carbon monoxide would also be there. (Tr. 884-886).

Air around a furnace is warmed from two sources: (1) the electrical current that initiates and sustains the reaction and (2) the burning of the waste products of carbon monoxide and hydrogen sulphide. The buoyant air rises and cooler flows in to take its place. This is the building's natural ventilation. Mechanical blowers would do the same job exchanging air in the building many times a minute. (Tr 887).

The difficulty with relying on natural ventilation is the toxicity of the substances involved. Temperature, wind velocity and direction and weather can affect the building's natural ventilation. Doctor First would not rely on this system if highly toxic substances are present. Carbon monoxide has a density or specific gravity only three percent different than air and the two mix and become homogeneous (Tr. 888-891).

The construction of the building itself impedes its natural ventilation. The openings along the side, faced with louvres, started 10 feet above the floor and four feet high. Fresh air being drawn in, therefore, was well above the operating floor which, then, did not get any benefit. The aisles between the furnaces were not being ventilated. Further the louvres, baffles, were at a 45 degree angle leaning in so all incoming air was directed up. (Tr. 895-896).

On this point, respondent had stipulated that the openings all along the side walls should be lowered (Tr. 805).

The total effect of this was a mixing and swirling of clean and contaminated air and the gasses from the top of the furnaces was directed down into the aisles. A minimum amount of dilution occurred (Tr. 896).

Carbon monoxide's lower explosive limit (LEL) is 12.5 percent by volume at normal temperature and pressure (Tr. 891). Less than this, it will not burn. As the furnace begins to heat, a period of about an hour, this level is not reached and lethal concentrations will be released and must be vented out. This could amount to 1000's ppm and clearing them should not be left to natural ventilation alone (Tr. 907). Some sort of mechanical ventilation should be activated when this occurs (Tr. 908).

Carbon monoxide as it is constantly being evolved can be controlled but exposure to it is known as chronic carbon monoxide poisoning. Sudden exposure to high levels leads to acute poisoning (Tr. 906). Mechanical ventilation must be employed in controlling the latter event. Doctor First would install fans along the open roof blowing out, with ventory throats to capture the air around the fan and which would operate when a monitor finds too much of the gas. (Tr. 915-917, 935-937). He would use 12 fans at $4500 each plus three to four times the initial cost for installation. All could be done within a year. (Tr. 936-937). The fans would have to be capable of removing 100 cubic feet per minute for every square foot of floor space; but Dr. First did not calculate how much larger (Tr. 966-967). Fans would not create a down draft or bring air in from the roof (Tr. 969).

Dr. First examined the ventilation device in the lunchroom and, because of the size of the inlet pipe and its bends, found it to be inadequate to create a positive pressure in that area (Tr. 934).

Leo C. Greenburg, another of complainant's expert witnesses, trains safety specialists (Tr. 716-719) is presently employed as an Associate Professor of Safety Engineering at the Illinois Institute of Technology in Chicago, Illinois. He holds both bachelor's and master's degrees in mechanical engineering and a doctorate in

industrial safety. He is a licensed professional engineer in New York and a licensed professional safety engineer in California and a certified Technical Professional. In the field of safety he has taught, practiced and consulted. (Tr. 714-717). Respondent had no objection to Dr. Greenburg testifying in this case (Tr. 725-726).

In response to a question regarding the evaluation of hazards and safety programs in the furnace building, Dr. Greenburg responded:

> Here we have a combustion process...one should immediately become suspicious of...is that the combustion is incomplete and then you have some carbon monoxide. Some. One doesn't know initially how much. Hence the first objective is to determine, do we have carbon monoxide in the work place, to what extent and how is this reflected, is it all the time, certain times, how does this translate to worker exposure, to what extent are we exposing the employees to what levels...and perhaps a visual examination may be (SiC) occur, but beyond that, one has to start quantifying by use of measuring instruments, appropriate measuring instruments. (Tr. 729).

A review of a company's medical reports will reveal a source of danger or breakdown of a safety mechanism (Tr. 730). At respondent's plant, there was a lack of control of air flow and winds might bring down a rising plume of smoke into the work area (Tr. 731).

An employee must know the dangers inherent in his job (Tr. 734). Giving an employee a whiff of a furnace is dangerous because carbon monoxide has no odor and he will learn nothing from this. If he doesn't know, he can't tell management and he might attribute an illness to something other than the real cause. (Tr. 735-736).

No deaths within a plant doesn't reveal anything just that conditions "are not horrible" nor good. This assumes that the cause of any deaths was carefully inquired into. (Tr. 739-740, 742).

Dr. Greenburg was at Building 82 for about an hour and a half and this plus the background he received on the operations were sufficient for him to suggest

approaches for control. (Tr. 741-742). His testings showed a low of three ppm to a high of 160 ppm of carbon monoxide. The latter went down to 60 ppm very quickly and he got none over 50 ppm for over one minute. Strong winds went through the building when he was there. (Tr. 752-754). Air movers (fans) must be installed in the roof enough to draw about 100 cubic feet per minute for every square foot of floor area. The louvres along the sides will have to be lowered or these should be pierced (since they now face upward) to allow air through. To avoid gusts of wind through doors (six of them), curtains of heavy plastic should be hung to stop wind but allow vehicles through. Alternatively, high side walls should be placed into position around a furnace going into operation. This will protect workers in their vicinity and the furnaces from the effects of the winds. (Exh. C-27).

The parties stipulated that Dr. Greenburg's recommendation concerning air movers (fans) was the first mention by any OSHA representative about mechanical ventilation (Tr. 1266-1267, 1269-1270).

Hakon Skistad of Klaebu, Norway is employed by the River and Harbour Laboratory Division of the Norwegian Hydrodynamic Laboratories at Trondheim, Norway. Since May 1979 he has headed the section of Ventilation and Industrial Flow Problems. Before that, he was the senior research engineer in that section working on a number of projects involving the ventilation of industrial processes. One of these, begun in 1975, was to study and improve the ventilation of silicon carbide furnace rooms. Recommendations from this study are being implemented and evaluated at the Orkla Exolon plant in Orkanger, Norway. He also instituted a project to study the fundamentals of two-layer ventilation noticed during the water model investigation of the furnace rooms and this is funded by the Government's Research Council. This study is still in progress. (Tr. 1911-1913). Mr. Skistad is a mechanical engineer holding a degree roughly equivalent to a

Master's with an emphasis on aerodynamics (Tr. 1914-1915).

In 1975, The River and Harbour Laboratory, an independent organization, was approached by the Norwegian silicon carbide producers to study the ventilation in the furnace rooms because the permitted level of carbon monoxide was going to be reduced from 50 ppm to 35 ppm. Three producers were involved who agreed to pay one-half of the cost of the model study with the remainder paid by the Government. (Tr. 1917-1919). A water model was created because the flow dynamics of air and water are the same but changes are more easily measured using dyes in water (Tr. 1920).

The initial study revealed problems: the furnaces cannot be enclosed; they produce larger amounts of toxic gasses; hoods cannot be used because of explosion possibilities; the furnaces within the room are operated on cycles; curtains around them would be destroyed by furnace blow (eruption of gasses inside the furnace); and the carbon monoxide created must be converted into carbon dioxide so the velocities of air currents must be kept small (Tr. 1920-1921).

The two year study using the principles of natural ventilation, which have been known for a long time (Tr. 2055), resulted in a system producing clean cold air flowing below an upper layer of warmer heavily polluted air. The air flow rate had to be within a certain range incoming at a low velocity close to the floor and evenly distributed. (Tr. 1921-1922). The heat produced by the furnaces is the key and the energy producing factor which keeps the system going (Tr. 2145).

Implementation of the study's recommendations and their evaluation has been going on for three years and is not yet complete at the three plants in Norway (Tr. 1923). Since the study is still in the experimental stage, no industry practice has yet developed or has any system been accepted (Tr. 1930). Implementation is furthest along at the Orkla plant and the carbon monoxide levels

there are well within the 50 ppm limit (Tr. 1931). At the second plant, Exolon, Mr. Skistad estimates the level to be around 30 ppm or between 20 and 40 ppm on a time-weighted average (Tr. 2003).

The natural ventilation system creates two-layers and was demonstrated by Mr. Skistad in a movie using smoke bombs (Tr. 1971-1972). The fresh air is at the employee level and polluted air above the furnaces (Tr. 1932). The benefits from this system have not been known or studied before this endeavor (Tr. 2142).

The respondent retained the Laboratory in the spring of 1979 to evaluate Building 82. Mr. Skistad spent two weeks there reviewing, testing and observing the patterns with smoke bombs. His conclusion is that the building is practically identical to the model, but even there, the effectiveness of the system is not yet proven (Tr. 1925-1926) but he is sure he is on the right track (Tr. 2040). This was the respondent's first attempt since the building was erected in 1941 at determining feasible or engineering controls for reducing carbon monoxide levels (Resp.'s Answers to Interrogatories, nos. 4 and 6, marked as Exh. C-53).

Mr. Skistad's preliminary report was submitted on July 25, 1979. He recommends (Tr. 1928): (1) reducing the outlet of roof monitor to prevent instabilities created by air being pulled back down. This does not affect the ventilation rate and reduced drafts as proven at the Orkla plant (Tr. 1936); (2) lowering the louvres and redesigning them to reduce velocity of incoming air and providing for a more gentle flow (Exh. C-32, page 12). They would start three feet off the floor to prevent dust swirling and be five feet in height below the polluted air layer (Tr. 2081-2082). This also controls the wind (Tr. 1937, 2052); (3) installation of shields from point where roof meets the lower side of building (beginning of roof's inwardly slant) so polluted air would not swirl downward. This has been delayed because of problems of higher temperatures and reduced visibility for crane operators and is being studied (Tr. 1929); and (4) closing

all doors to prevent turbulence (Tr. 1946). His final report with all this was submitted in January 1980 (Tr. 1928, Exh. C-32).

Building 82 is well-suited for natural ventilation as the Arendal plant in Norway is and where the best results are being obtained. (Tr. 1933). But presently there is no two-layer system in the building because the openings are improper with a result of too much mixing of good and bad air (Tr. 1935, 2015). However, the natural ventilation there could explain why employee complaints are rare (Tr. 1934-1935).

Administrative controls are needed when a furnace is first lit. Carbon monoxide inside near the core diffuses to the outside cold air and disappears in a short time. These furnaces should be fired (outside area lit and burning) as soon as possible, within an hour, and employees instructed to keep away. He knows of no mechanical ventilation system to alleviate this condition. (Tr. 1933-1934). Ceiling fans will not control horizontal movements of air along floor level (Tr. 1938).

In Mr. Skistad's research and experimentation he has found no proven system of mechanical ventilation (Tr. 1951). One of six plants he has seen uses this method, Norton Lillesand in Norway, because its layout is wrong for natural ventilation (Tr. 2053). A new mechanical system is being designed to create the two-layer effect with $1 million having been spent so far. It is still being evaluated. (Tr. 1942-1943). Dr. Greenberg's suggestion of a rate of air exchange of 100 cubic feet per minute for every foot of floor space is seven or eight times Mr. Skistad's flow and would (1) blow out the furnaces and (2) create horizontal drafts and turbulence as the air entered (Tr. 1949-1950). Dr. First's fans along the roof monitor would create downdrafts between them from the vacuum they would create and aggravate the conditions (Tr. 1950). Mr. Skistad

has seen mechanical ventilation used to supplement natural ventilation but not successfully (Tr. 2092). Such a system would be a good idea to operate in emergencies (sudden, high levels of gas) but he hasn't seen one that could work (Tr. 2156-2157). If the heat source, the furnace, fails the system breaks down but fans won't help because the polluted air would be brought down through the roof monitor (Tr. 2145-2146, 2148-2149).

Winds have not affected the time-weighted averages at Orkla where very strong winds blow. The same result is expected at Building 82 (Tr. 1941-1942). Outdoor temperatures have no effect since the two-layer system works on the differential between the inside furnace heat and the outside and this difference is always present. Even when a furnace is cooling, pollutants are also reduced, another is heating (Tr. 1944). The air at working level is the same as outside but it seems hotter because of radiation from the furnaces (Tr. 1946). Theoretically, a thermal inversion (upper air cooler than lower) could affect natural ventilation. But his projected air flow of about 137,000 cubic feet a minute per a furnace group could be maintained with inversions of up to 30 degrees. But these are so rare he attaches to them no significance. (Tr. 1945).

Mr. Skistad knew of no deaths from carbon monoxide poisoning, at least no one in the course of his research reported any except Mr. Martinkowski (Tr. 1937-1938, 2004-2005).

When all of his recommendations are implemented, Mr. Skistad does not know what the level of carbon monoxide will be in Building 82 (Tr. 2014). And for the time before November 12, 1978, he would have to know the conditions of the louvres, doors, etc., how they were operated before he could estimate what difference there was between then and now. Assuming an opening and closing that

was evenly distributed (one-half open and rest closed), as he was told,[7/] he doubts that there would have been any significant differences. (Tr. 200-2001, 2019-2021).

Respondent called John A. Ciccarelli who is currently Operations Manager for respondent and from August 1978 to January 1980 was the Business Unit Manager for silicon carbide. He holds a degree in chemical engineering and has done some advanced study in metallury and statistics. In both of the positions, he is responsible for the scheduling and manufacture of the product, pollution control and safety. He reports to the General Manager of the Electro Minerals Division, the highest ranking person there. (Tr. 1792-1794). He is responsible for the work done in Building 82.

He knew that carbon monoxide was present in the building as a by-product of the process (Tr. 1797-1798). There had been the incident, in February 1978, of the aborted run on the experimental Whatmore furnace affecting several employees in the lunchroom. To correct this, outside air was brought in by means of a ventilation unit installed by an outside firm (Tr. 1799-1802). Prior to this time, he was not aware of any incident involving fumes (Tr. 1802).

Instructions to employees in November 1978 were to go outside if they felt dizzy, lightheaded or nauseous and if that didn't help, go to medical (Tr. 1804). He believes that the gases were identified to new employees (Tr. 1805). Prior to this time, the Safety Department took readings (Mr. Coughenour) periodically showing no problem (Tr. 1807-1808).

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7/ This does not comport with Mr. Kanvanaugh's description of openings and closings.

After November 1978, monitoring was done on every shift throughout the building by the Safety Department, line management and foremen. Continuous monitoring equipment was purchased and installed, 19 units by the end of 1979 (Tr. 1837). Results show an exposure of well below 50 ppm on a time-weighted average although there are spikes of higher readings. (Tr. 1808-1809).

The highest release of carbon monoxide occurs when a furnace comes off line. The furnace next to this would be in the stage for the pins to be removed for unloading. An employee would be next to the first furnace. (Tr. 1811-1814). That operation requires 10 minutes. Another exposure to a burning furnace giving off the gas is to the operator of the front-end loader emptying or loading a cooled furnace next to a burning one. This could take two hours (Tr. 1814). It takes five or six hours to remove a cylinder and the furnace next to this operation could be burning. Two employees are engaged in this. (Tr. 1816).

Putting on side frames requires up to an hour and a half and loading a furnace 16 hours, all while other furnaces are burning (Tr. 1818-1819).

In March 1978, model studies had been completed in Arendal, Norway, to reduce the exposure because there the limit was being lowered from 50 ppm to 35 ppm. Respondent sent a four man team over. (Tr. 1822-1823). By November 1978, no results had been received for they were still implementing and as of the hearing date this was still incomplete (Tr. 1824). In the spring of 1979, the Norwegians were hired by respondent (The University of Trondheim, Norway) and its final report was submitted in January, 1980. All of the recommendations concerning ventilation are to be implemented. (Tr. 1825-1826). The cross section of the roof monitor was reduced to increase the velocity of the fumes out; isolation panels were installed along the entire sides to sweep the air up at the furnaces;

and more louvres were installed all the way down both sides of the building. This cost $600,000. (Tr. 1827). The foreman's office, the rest room and chipping room are to be removed outside of the building at a cost of $500,000 (Tr. 1828). The company is also experimenting with a vacuum crane to replace the loaders that empty the furnaces. This is estimated to cost an additional $1.1 million. (Tr. 1828-1829). Each employee has been given a card identifying the presence and dangers of carbon monoxide and signs to this effect have been posted (Tr. 1842).

Immediately following the death in November 1978, 50 percent of the louvres were opened by company rule, about six or seven (Tr. 1867, 1872) and two malfunctioning doors of a total of six were repaired which should have been closed (Tr. 1868, 1873).

Paul Kavanaugh, one of the foremen in Building 82, was recalled by the respondent and stated that before November 12, 1978, the louvres were closed from November to March and open the rest of the year (Tr. 1885). They were opened once a year and closed once a year and otherwise not touched (Tr. 1891). Also before that date, some doors were left open and others closed. After November 12, 1978, they were told to keep them all closed (Tr. 1894).

Based on the testimony of Messrs. Ciccarelli and Kavanaugh concerning changed conditions in Building 82 since November 12, 1978, respondent's proposed exhibit R-15, sponsored by a previous witness, Catherine Ver, was rejected. The effect of these changes appear to be capsulized in a memorandum dated May 7, 1979, from Robert Letsche, plant manager. (Tr. 621, Exh. R-9). Paragraph 7 of this memo states:

> The present CO monitors in the Building are functioning and do sound an alarm when the CO level is excessive. There are fewer events now that the Building is well ventilated.

Ms. Ver was a member of a team that performed extensive testing throughout the building (Tr. 1751-1791). The readings and results are contained in exhibit R-15. No reading on a time-weighted average exceeds 50 ppm (Tr. 1764). All of this information and data were gathered after November 12, 1978 (Tr. 1898). The exhibit and her testimony do not provide a basis for comparing conditions as they were and as they are now and here exhibit, R-15, was rejected (Tr. 1896-1899, 2549). It was offered for this purpose[8/] (Tr. 1897).

Geraldine B. Baylor is a Registered Nurse, a Certified Occupational Health Nurse (Tr. 1736) and has been the Manager of respondent's Medical Department for 12 years. She works with two other nurses (Tr. 1701). She has been with the company for 29 years. (Tr. 1696-1696). She has custody and is responsible for medical records and forms. She maintains the daily log and all tests administered (Tr. 1696). Each employee is given a pre-employment physical and then one every year [employees in Building 82 (Tr. 1712)] or two depending on their place of employment (Tr. 1697).

The daily clinic sheet is a record of employees who report with ailments such as stomach upset, headache, etc., personal matters (Tr. 1698-1699). Accident reports deal with work related injuries (Tr. 1699-1670). These reports are sent to the Safety Department and a copy to the supervisor of the department (Tr. 1702).

Prior to November 12, 1978, there was no unusual pattern of complaints from employees in Building 82 concerning any of the symptoms of carbon monoxide exposure (Tr. 1702-1704). There was an influx, six or eight, in 1978 at the time of the aborted run there. Occassionally, there would be a complaint about fumes and it would be recorded on an accident report and investigated. (Tr. 1704-1705).

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8/ This evidence could be admissible under rule 407 of the Federal Rules of Evidence to show the feasibibility of subsequent precautionary measures. But that was not the point of the proffer. In fact, given the issue of willfulness, it was the opposite. (Tr. 1876-1880).

Prior to the accident, in November 1978, she could not recall any serious accident (death or hospitilization) as a result of exposure to the gas (Tr. 1707-1708). In 1976, one Osborn was overcome, given oxygen and bed rest, checked by Dr. Kinzly, and not hospitalized (Tr. 1708-1709). In January or February 1978, one Attfield was sent to emergency (Tr. 1709). No blood tests are given to employees complaining of the symptoms due to carbon monoxide (Tr. 1710-1711). Ann Baker in September 1979 was in Building 82, came out, got dizzy and fell. She complained of a headache. (Tr. 1746). She got aspirin (Tr. 1747). So for John Baldesaro in June 1979 who was given aspirin and had complained of the fumes (Tr. 1747-1748). So, too, for Sam Aceti in 1972 (Tr. 1748). Vivien Blen got Maalox for headache and upset stomach by Dr. Kinzly in 1979 when fumes were bad most of the morning in the building (Tr. 1749).

At one time, up to eight years ago, employees in Building 82 were given physicals every three years. Then, five years ago, these were increased to one physical every two years and in 1977, the yearly one was instituted. (Tr. 1712). Blood tests given do not include examination for carbon monoxide (Tr. 1743). Fumes never came up (Tr. 1713). If an employee complained of a headache stating it was from the fumes, he would be sent to the doctor but not automatically be given oxygen. There had to be more. (Tr. 1730-1731, 1742). The Safety Department's role is to examine the cause of any accident (Tr. 1733). She knows of no systematized course of study by Dr. Kinzly into symptoms reported by employees (Tr. 1734). Exhibit C-5-55 is a report on one Zedonis stating he was overcome by fumes in January 1970 (Tr. 1735). He fell and cut his lip for which he was treated according to the exhibit.

Dr. Robert Burns Forney is a Distinguished Professor of Toxicology and Director of the Indiana State Department of Toxicology at the Indiana Unviversity School of Medicine and has been working in this field since 1939 (Tr. 2163-2164).

Toxicology is the science of poison, the effects of it on the body, chemical analysis and its interpretation (Tr. 2164). He also functions as a forensic toxicologist who determines the legal cause of death (Tr. 2166-2167).

Mild symptomatology of carbon monoxide exposure would be headache, dizziness, nausea and fatigue. Serious symptomatology would be passing out or death. At a constant exposure of 50 ppm, the carboxy hemoglobin level would be about eight to 10 percent and some complaints would be heard. At an exposure of 200 ppm for 10 to 15 minutes, a headache is possible depending on the person. (Tr. 2170-2171). He knows of no prudent medical person who would recommend blood testing where only the mild symptomatology is present such as the medical records show here. Especially with the industrial record over the years which respondent has had (Tr. 2172, 2227-2228). Nor would it be necessary to conduct continuous monitoring; nor advise employees of the presence of carbon monoxide (Tr. 2175-2177). The instructions to employees to leave when the symptoms occur or go to medical were more than adequate (Tr. 2177).

The lunchroom where Mr. Martinkowski died, according to Dr. Forney, was a gas chamber because it trapped the gas there. Where it originated is unknown. (Tr. 2178). It could not have happened in the furnace room because of dilution (Tr. 2179-2180).

The pathologist who examined Mr. Filocamo's body did not note the color of the complexion and, therefore, could not have believed that carbon monoxide was a complicating factor (Tr. 2194-2196). But it does increase the risk of having further attacks (Tr. 2216, 2224).

The Doctor stated that some monitoring should be done to determine whether a hazard exists and the monitoring that was done yearly together with the history of the plant is sufficient (Tr. 2197, 2209). And while it may not be necessary to

advise employees about the presence of carbon monoxide, he'd be surprised if the plant manager didn't know it (Tr. 2214).

Respondent brought on Dr. James C. Miller to assess the probability of a death or serious physical injury based on information the company provided both before and after November 12, 1978 (Tr. 2256). His expertise through education, training and experience is that of an economist and probability analyst (Tr. 2257). He had all accident records and sampling data taken after the specified date. The perceived risk of death or serious injury was extemely small prior to November 1978 (Tr. 2270). After that time it was even less (Tr. 2270). Comparing the risks to the national industry averages, based on his information, would not put the company on notice that anything was amiss (Tr. 2266).

DISCUSSION, FINDINGS OF FACTS AND CONCLUSIONS OF LAW:

1] The General Duty Clause Allegations:

Items 1 and 2 of the citation are alleged violations of the general duty clause [29 U.S.C. §654(a)(1)] concerning exposure to carbon monoxide and items 3(a), (b) and (c) allege violations of 29 CFR §1910.1000 which governs the limits and conditions of exposure to that gas. These two groups (items 1 and 2 vs. 3) are mutually exclusive. Where a given regulation governs the conduct of a specific activity, it is improper to invoke the general duty clause because that was not the intent of the general duty clause, S. Rep. No. 91-1282, 91st Cong., 2d Sess. at 9, 10 (1970) and it creates problems of fair notice. Southern Ohio Building Systems, Inc. v. OSHRC, 649 F.2d 456 (1981) and Usery v. Marquette Cement Mfg., 568 F.2d 902 (1977). The specific regulation here sets the limit of exposure, requires controls to achieve that limit, and failing that, protective measures to keep employees within the limit. See 29 CFR §1910.1000(a)(2) and 1000(e). Monitors, warning systems and education of employees (the gist of items 1 and 2) are controls or protective measures going

directly to exposure to carbon monoxide and are within the ambit of the cited regulation. Citation to the general duty clause is out of place in this circumstance and items 1 and 2 are vacated in the order below.[9/]

II] Items 3(a) and 3(b), 29 CFR §1910.1000(a)(2) and (e):

These require that an employee's exposure shall not exceed 50 ppm in any eight hour shift of a 40-hour work week (footnote 3, above) and that engineering or administrative controls be determined and implemented to achieve compliance with the exposure level (footnote 4, above). Here I find:

1) Employees Farina and Martinkowski were assigned to the third shift on Saturday night, November 12, 1982; they were the only employees working in Building 82 then; and there was no supervision.

2) During the course of that shift, both men were overcome by carbon monoxide and were found in the small lunchroom which leads off the furnace room and was open to their use. The door to that room had been closed but it is unknown how the gas accumulated there or whether the room's ventilator (heater) was on or off.

3) Based on the carboxy hemoglobin levels found in their blood (55.3 percent for one and 46.2 percent for the other), their exposure exceeded the permissible level. For this, I rely on Dr. Radford's testimony that these percentages translate to an exposure of at least 1000 ppm on a time-weighted average or higher.

4) Respondent in the spring of 1978 had installed the ventilator in the lunchroom because at that time several employees had been affected there. From that time to November 12, 1978, there appears to have been no difficulty and the ventilator was designed to create a positive pressure in the room through the use of clean outside air.

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9/ The pleading by complainant was in the alternative (Tr. 7).

5) Mr. Farina, the senior of the two employees, had received no instructions concerning the use of the lunchroom or on any precautions that must be taken in the operation of the ventilator.[10/]

With these findings, I conclude that respondent violated the cited standards. The formula for determining the time-weighted average, 29 CFR §1910.1000(d)(2)(i) and (ii), provides for peak or acute exposures as it does for less than limit levels since it seeks to determine the average over the work shift. That is, whatever the levels had been in the furnace room and lunchroom would be accounted for. Dr. Radford's extrapolation showed this to be at least 1000 ppm using the carboxy hemoglobin levels. Whether this level was achieved in the furnace room or the lunchroom, or how much each contributed to it, is unknown.

Respondent did engineer any accumulation out of the lunchroom by installation of the ventilator; but it did not implement this control through proper instruction and work rule to its employees. It did not advise them of the danger within the room although in November 1978 it was well-versed through its February 1978 experience when gasses from an aborted run on an experimental furnace accumulated in the then unventilated lunchroom. Its control and safety program failed as a result.

Respondent in its answer pleaded its third affirmative defense in terms of the alleged violation being an isolated incident of which it had no knowledge.

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10/ There is some evidence that foremen warned employees to keep the fan on in the lavatory, also leading directly off the furnace room, because of the gas. This instruction was given at a safety meeting and whenever a foreman noticed that the fan was not operating (Tr. 68, 75, 80, 141-142, 324). But these instructions were not given concerning the lunchroom (Tr. 93). One foreman knew of no company precaution to prevent either of these ventilation systems from being turned off (Kavanaugh, Tr. 298).

This defense fails when the proof shows that an established practice (use of the ventilator) is created to prevent a violation, rules of the practice are not communicated to employees and respondent takes no steps to discover aberrations nor enforces the practice.

Whether the ventilator was working or not, whether the gas filled the lunchroom from inside the building, i.e., one recently lit furnace when emissions are high or some machinery, or was drawn in from outside, are all irrelevent if an employee has no knowledge of any safeguards he must take within the lunchroom. Otherwise, these elements may have completed the pleaded defense. Secretary v. Western Mass. Electric Company, 81 OSAHRC 63/B13, 9 BNA OSHC 1940, CCH ¶25,470. These items are affirmed in the order below insofar as they relate to the conditions at the furnace room and its attendant lunchroom, Building 82, on November 12, 1978.

III] Item 3(c), 29 CFR §1910.134(a)(2):

This standard requires the use of proper and suitable respirators to protect the health of employees when necessary. It is activated here by 29 CFR §1910.1000(e), item 3(b), which requires the use of protective equipment or protective measures if other controls do not achieve compliance. Here I find:

1) As of November 12, 1978, respondent had no personal protective equipment, masks or respirators, designed to prevent exposure to carbon monoxide to be worn as the employees went about their daily activities. There is no evidence that a type of this equipment is available for normal use rather than in an emergency application.[11/]

2) The protective measure taken by respondent was to instruct employees to get outside or to the medical department if they felt sick or otherwise were

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11/ Equipment for use in an emergency situation was available and described by Mr. Fancourt. It was purchased by respondent after November 1978. (Tr. 502-503).

affected by the atmosphere of the furnace room. Historically, this method was used and taught to new employees either by a foreman or other employees.

The respondent has the choice between the use of protective equipment or adoption of protective measures in the event of overexposure. Complainant's burden then is to show that respondent's choice did not achieve the result; but he may not dictate which choice an employer must make in the first instance. Cf., Secretary v. Todd Shipyard Corp., 81 OSAHRC 69/A2, 9 BNA OSHC 2031, CCH ¶25,516. Thus, since this item goes to the use of respirators which is but one of two alternatives available to a respondent, and since respondent chose the other, this item is vacated in the order below.

IV] WILLFULNESS:

The issue of the effectiveness of respondent's protective measures must be decided in the context of the citation's characterization as "willful". It has been shown that the level of carbon monoxide has exceeded the time-weighted average set by the standard. It has been shown that one control installed by respondent (the lunchroom's ventilator) failed. But respondent claims that there were no signs to indicate to the prudent employer that a hazard existed in the building. Until Mr. Martinkowski, no deaths occurred in the building or in the industry from carbon monoxide; employee complaints were few; spot readings showed low levels; and "going outside" is an accepted medical practice when one encounters the symptoms caused by the gas. It claims that it was under no duty to monitor or to do any more than it did.

But 29 CFR §1910.1000(a)(2) sets a limit of exposure. Respondent knew that its process generates varying amounts of carbon monoxide. It knew that certain weather conditions affect the atmosphere within the building. It knew that employees are affected by the gas and instituted the work rule of "going outside" or to medical on those occasions. On the assumption that it was in compliance

within the limit of exposure, it did not determine whether the control it had instituted, i.e., "going outside" or to medical, was sufficient to protect employees. The time-weighted averages would have shown the respondent peaks and valleys of exposure. Knowing these, respondent could then determine what other measures, administrative controls, rules concerning the use of equipment or protective equipment, might be necessary to protect against peak exposures which could well, and have been known to, drive the average above the limit. Thus, while under no regulatory duty to monitor for the average, respondent did not do so at its peril. See, Secretary v. Anaconda Aluminum Co., 81 OSAHRC 27/A2, 9 BNA OSHC 1460, CCH ¶25,299.

A violation is willful if it is done consciously and intentionally. Secretary v. Anaconda Aluminum Co., above. A failure to take positive steps to assure compliance with a standard's requirements constitutes a careless disregard and may be characterized as willful. Secretary v. Brown & Root, Inc., 79 OSAHRC 20/A2, 7 BNA OSHC 1215, CCH ¶23,435. But a good faith attempt at compliance negates the stigma of willfulness. Secretary v. Wright and Lopez, Inc., 80 OSAHRC 36/A2, 8 BNA OSHC 1261, CCH ¶24,410.

I find:

1) Respondent has known since the inception of production that carbon monoxide is created in the process and exists in the furnace room and it has always been aware of the maximum allowable levels of exposure to employees.

2) It knew or should have known that carbon monoxide was a contributing factor in the death of Guiseppe Filocamo in 1956 because its Medical Director suspected it, saw symptoms and ordered a blood test done which showed a carboxy hemoglobin level of 35 percent. I reject Dr. Forney's analysis of the autopsy report that the gas was not a complicating factor.

3) Respondent's Safety Department personnel, prior to November 12, 1978, took spot samples yearly or when a problem was called to its attention. No time-weighted sampling was done because that equipment was not available even though those averages are required by the OSHA standard of which respondent was well aware. Spot sample levels do not relate to time-weighted averages because of the varying conditions within the building.

4) Employees regularly suffered from the symptoms of carbon monoxide exposure in the furnace room before November 12, 1978. The foremen there were well aware of this but they and the men regarded it as a natural condition in the furnace room. They had not been instructed by respondent that carbon monoxide was present or its effects. They would not report to the medical department usually unless the condition was severe.

5) An analysis of respondent's medical records (Exhs. C-5 and C-6) prior to November 12, 1978 and going back to 1947 shows 224 complaints by employees about the symptoms of carbon monoxide exposure: headache, dizziness, nausea, or collapse. The vast bulk of these occurred during normal operations and not as the result of aborted runs or abnormal periods of the exceptional release of large amounts of gasses.

6) Respondent never investigated on a routine basis the cause of these complaints and relied on employees to tell the nurse which they did on only nine occassions of the 224. But the employees did not know that they had been exposed to carbon monoxide.

7) Respondent's Medical Director was unaware of the intensity of the exposure despite the complaints on file; and the yearly spot sampling would not reveal it. The only reliable evidence of the condition in the furnace room would

would be the time-weighted average for the normal workday as required by the standard. Respondent, prior to November 1978 did not know what this average was for any period.

8) Respondent's plant Safety Manager from August 1978 onward in the furnace room had no safety training and was unaware that the corporate Safety Director considered him responsible for discovering hazards in Building 82. Of course, he discovered none knowing of the presence of carbon monoxide but not of its dangerous potential there.

9) The potential is that the exposures, depending on the general health of a person, will induce changes in the blood vessels leading to permanent injury, personality changes and death.

10) Respondent reacted to the conditions in the furnace room not with a routine, safety-minded procedure, but only when catastrophes or extraordinary events occurred. Examples are: ventilating the lunchroom after several employees were affected; and enlarging the roof monitor in preparation for experimenting with an enlarged (double-sized) furnace. But it was only in 1977 that crane cabs operating directly over furnaces were planned to be enclosed and the engineer charged with this project had to use carbon monoxide exposure as a "crow-bar" to obtain approval from the financial department (Tr. 530-531, Exh. C-10).

11) Respondent relied almost totally on employee complaints to discover areas needing correction but within its structure no effective means were devised to accomplish this. The evidence was there, but the structure was not designed to be receptive because none of the employees including managers and foremen were advised of the dangers involved. But respondent knew of that dangerous potential yet took little and inadequate initiative.

12) Respondent's only protective measure against over-exposure, without its knowing what the level of that was, is its instruction to employees to leave the furnace room, get outside, and if that didn't help, go to medical. Dr. Radford, for complainant, stated that this is not sufficient. Immediate oxygen is required. Drs. Kinzly and Forney, for respondent, testified that this precaution is ample. But since the exposure, in a very short time, can lead to collapse, an employee may not be able to comply with the instruction. Instances of this have occurred prior to November 12, 1978. That condition results from carboxy hemoglobin levels between 30 and 40 percent, or on a time-weighted average, well over 50 ppm. Thus, this protective measure must be found as insufficient.

13) Natural ventilation as it existed in Building 82 up to the time of the Trondheim report in 1979 was the state of the art of ventilation in silicon carbide furnace rooms. No mechanical ventilation system was known that could be more effective. The so-called two-layer system perfects natural ventilation but even that is still being tested. Giving the respondent the benefit of every doubt, it became involved and interested in the testing of the new system before the OSHA inspection in 1978 and implemented every recommendation of the Trondheim group practically as soon as it was made after the accident. But...

14) Because respondent did not comply with the OSHA standard to determine definitively the level of exposure in the furnace room until after the fatality, it did not, it could not have implemented any administrative controls to regulate the exposure of employees to within prescribed levels on the assumption that no feasible engineering controls were available to it. Respondent assumed, without the accurate information required by the standard, that it was in compliance and

did not equip the furnace room with monitors and alarms to warn employees of dangerous emissions. Thus, there is no continuity of activity to show a good faith attempt to control exposures until the engineering procedures were perfected.

On these findings, I conclude that the violations are properly characterized as willful. There is no showing of any valid, positive steps taken to assure compliance to prevent employees from being exposed beyond the standard's limit on a time-weighted average. Where the onus of determining the exposure is placed by the standard on respondent, its practically total reliance on employees' complaints, pain and death to determine levels of exposure can hardly be termed as a good faith effort at achieving compliance. Rather, it amounts to a conscious disregard of the standard's mandate.

V] PENALTY:

The penalty for a willful violation may be up to $10,000, 29 U.S.C. §666(a), depending on respondent's size, the gravity of the violation, respondent's good faith and the history of previous violations, 29 U.S.C. §666(i).

Respondent is the largest producer of silicon carbide in the country operating six plants and in 1979 the sales' value of the product was over $4.5 million produced in Building 82 alone. This factor does not affect the penalty assessment.

The gravity of the violation is evident. Death or serious bodily harm; exposure over entire shifts. Respondent knows of this consequence and with reasonable diligence would have known by proper testing and sampling where, when and under what stage of the production process an employee is vulnerable. Thus, the violation may also be termed serious, 29 U.S.C. §666(j) and with 34 employees affected on the three shifts the gravity is high.

As noted above, there is little here to commend respondent's good faith. The effort it made to determine the actual conditions in the furnace room and to alleviate them are nil. Cf., Secretary v. S. Zara Contracting Co., 82 OSAHRC 5/C9, 10 BNA OSHC 1334, CCH ¶25,891.

Respondent's Vancouver, Washington plant, similar to the one at issue here was cited in 1977 and 1978 by that State's Division of Industrial Safety and Health (Exh. C-16, Tr. 672). Correction of those conditions dealing with enclosing crane cabs was undertaken (Exh. C-25). History of respondent has little affect on the penalty assessment. No previous OSHA citations were brought out.

With the gravity high and the good faith low, I conclude that a civil penalty in the amount of $10,000 is appropriate.[12/]

ORDER

In determining the above findings and conclusions, I have considered the parties' post-hearing filings. To the extent shown I have adopted their proposals. Otherwise, these are rejected as having no support in fact or law; and it is ORDERED that the citation issued January 22, 1979, alleging a willful violation of

(1) 29 U.S.C. §654(a)(1), item 1, and

(2) 29 U.S.C. §654(a)(1), item 2

are vacated;

(3) 29 CFR §1910.1000(a)(2), item 3(a) and 29 CFR §1910.1000(e), item 3(b)

are affirmed as a single violation with a civil penalty of $10,000 assessed

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12/ Thus complainant's motion, contained in the Post-Hearing Memorandum (page 6), to adjust the penalty is, to the extent requested, granted.

therefor; and

(4) 29 CFR §1910.134(a)(2), item 3(c)

is vacated.

DAVID J. KNIGHT
JUDGE, OSHRC

Dated: July 26, 1982
Boston, Massachusetts

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 240

ATLANTA, GEORGIA 30309

# NOTICE OF DECISION

SECRETARY v. MILLER WELL SERVICE, INC.

OSHRC Docket No. 81-2373

1. Enclosed is a copy of my decision. It will be filed with the Commission on July 27, 1982, and will become the final order of the Commission on August 26, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N. W., Suite 601
   Washington, D. C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is August 26, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Edwin G. Salyers

EDWIN G. SALYERS
Judge

Date: July 7, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

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| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 81-2373 |
| | ) | |
| MILLER WELL SERVICE, INC., | ) | |
| | ) | |
| Respondent. | ) | |

APPEARANCES:

Max A. Wernick, Esquire, Office of the Solicitor, U. S. Department of Labor, Dallas, Texas, on behalf of complainant

George R. Carlton, Jr., Esquire, Dallas, Texas, on behalf of respondent

## DECISION AND ORDER

SALYERS, Judge: Miller Well Service, Inc., is a corporation engaged in the well servicing business. On September 10, 1981, the respondent was investigated by a compliance officer of the Occupational Safety and Health Administration at a site located near Kilgore, Texas. As a result of this investigation, the respondent was issued one serious citation consisting of four items and one other than serious citation under the provisions of the Occupational Safety and Health Act (29 U.S.C. 651, et seq.). On October 2, 1981, respondent served notice that it intended to contest all citations. The case was tried in Shreveport, Louisiana, on January 28, 1982.

At the time of the inspection, respondent's employees were engaged at a work site near Highway 31 and Tucker Road in Kilgore, Texas, in servicing an oil well

owned by Amoco (Tr. 9). In use at the work site was a truck-mounted, workover rig or derrick as depicted in complainant's Exhibit 1. The rig was approximately 100 feet in height (Tr. 17). Attached to the rig were two working platforms. The first working platform, referred to as the "rod basket" in the record, is located approximately 20 feet down from the crown or top of the rig. The second platform, referred to as the "monkey board," is approximately 60 feet above the ground level (Tr. 20). Also attached to the rig is a ladder running from the ground level all the way to the top or crown of the rig. From time to time, it was necessary for employees to ascend and descend this ladder to gain access to the work platforms described above (Tr. 21). At the work site respondent had five employees, a "pusher" or superintendent and four laborers.

The Secretary charges the respondent with a violation of section 5(a)(1) of the Act, the so-called general duty clause, for exposing its employees to the hazard of being hit by a three-inch hose which was not safety chained at its connection to the standpipe at the rig. This hose was a flexible hose and was being used to pump salt water under 250 pounds of pressure into the well (Tr. 29). The connection point of the hose and the standpipe was approximately 30 feet above ground level (Tr. 30). The compliance officer speculates that, because the water was being pumped under pressure, there was a possibility that the hose might become separated from the standpipe or rupture and fall on employees at ground level (Tr. 24).

To establish a violation of section 5(a)(1) of the Act, the Secretary must prove (1) that the employer failed to render its workplace free from a hazard which was (2) recognized, (3) the occurrence of an incident was reasonably foreseeable, and (4) the likely consequences in the event of an incident was death or serious physical harm to its employees. Western Massachusetts Electric Co., 81 OSAHRC 63/B13, 9

BNA OSHC 1940, 1981 CCH OSHD ¶ 25,470 (No. 76-1174, 1981); Bomac Drilling Division of TRG Drilling Corp., 81 OSAHRC 45/A2, 9 BNA OSHC 1681, 1981 CCH OSHD ¶ 25,363 (No. 76-450, 1981).

The compliance officer in this case, Walter C. Hogan, Jr., has considerable experience in the well drilling field, covering a period of some 18 to 20 years (Tr. 10). However, his experience relative to the type of operation here involved is somewhat limited since he has made only seven or eight inspections of rigs being used to circulate water (Tr. 33, 40). His testimony concerning the potential hazard of the hose becoming separated from the standpipe or rupturing, as well as his testimony concerning possible injuries to employees in the event of such an occurrence, is not convincing. The well in question is a shallow well, and the operation in progress required only minimal pressure on the hose which had a bursting capacity of 10,000 pounds (Tr. 41). The hose was clamped or threaded onto the standpipe (Tr. 42), and there is nothing in the record to suggest that the coupling was defective. If the coupling began to unscrew or come loose, leaks would occur which would give employees ample notice of the problem before complete separation occurred (Tr. 44). Even in the event of separation, it is open to question that employees would be hit by the hose or, if hit, would be seriously injured (Tr. 47).

In contrast to the equivocal testimony of Mr. Hogan, respondent presented the testimony of James W. Miller, its president. Mr. Miller has been in the well servicing business for 23 years, holds a degree in petroleum engineering, and is a professional petroleum engineer (Tr. 113-114). His testimony confirms that the hose in question operating at a pressure of 250 pounds presented no danger of a rupture of the hose or the uncoupling of the hose from the standpipe (Tr. 115-119). In his

many years of experience, he has never known of such an occurrence (Tr. 117). In short, his testimony is both credible and convincing. The citation relating to the hose will be vacated.

Citation No. 1, item 2, charges respondent with a serious violation of 29 C.F.R. § 1910.27(d)(2).[1/] On the day of the inspection, Mr. Hogan observed a derrickman standing on the "monkey board" approximately 60 feet above ground level. As Mr. Hogan watched, the derrickman descended the fixed ladder attached to the rig to the ground level (Tr. 55). The employee was not wearing or using a ladder climbing device (Tr. 56). The evidence is undisputed that this fixed ladder did not have the landing platforms required by the standard (Ex. C-1-H). Accordingly, this citation will be affirmed.

There was sharp dispute at the hearing concerning the validity of serious Citation No. 1, item 3, which charges respondent violated 29 C.F.R. § 1910.36(b)(2).[2/] At the beginning of the hearing, the Secretary moved to amend his

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1/ 29 C.F.R. § 1910.27(d)(2) provides:

> (2) Landing platforms. When ladders are used to ascend to heights exceeding 20 feet (except on chimneys), landing platforms shall be provided for each 30 feet of height or fraction thereof, except that, where no cage, well, or ladder safety device is provided, landing platforms shall be provided for each 20 feet of height or fraction thereof. Each ladder section shall be offset from adjacent sections. Where installation conditions (even for a short, unbroken length) require that adjacent sections be offset, landing platforms shall be provided at each offset.

2/ 29 C.F.R. § 1910.36(b)(2) provides:

> (2) Every building or structure shall be so constructed, arranged, equipped, maintained, and operated as to avoid undue danger to the lives and safety of its occupants from fire, smoke, fumes, or resulting panic during the period of time reasonably necessary for escape from the building or structure in case of fire or other emergency.

complaint to allege this charge in the alternative as a violation of section 5(a)(1) of the Act. Apparently, at the time the citation was issued, the Secretary's agents were unaware of OSHA Program Directive No. 100-67 issued August 15, 1977. This directive exempts workover rigs used to service oil wells from application of the cited standard and directs that such rigs be cited under the "general duty clause" where rigs have no means of egress or inadequate means. Respondent opposed the Secretary's motion on grounds that it was untimely filed and the granting of the motion would seriously prejudice respondent's right to prepare a proper defense to the new charge. The motion was reluctantly granted after advising respondent it could renew the objection at the conclusion of the hearing and, should it appear respondent had been prejudiced by the amendment, respondent would be afforded a supplemental hearing to present its defense (Tr. 6-7).[3/] Since it appears the Secretary's agents acted contrary to his own directive in citing under the standard, the evidence will only be considered as it relates to the "general duty" charge. The elements of such a charge have already been noted.

The crux of the Secretary's charge is that respondent's rig did not afford employees engaged on the work platforms a proper means of egress in the event of an emergency; i.e., fire, blowout, explosion, etc. The means of abatement recommended by the Secretary was the use of a Geronimo slide line. This would require attaching a wire rope from the work platforms and securing the rope at ground level at an angle of approximately 45 degrees (Tr. 136). Attached to this rope at the work platform would be a trolley or sliding device which could be used

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3/ Respondent renewed the objection at the end of the hearing and was advised he would be granted a supplemental hearing upon request. Counsel for respondent requested time to discuss this with his client (Tr. 139). No request for a supplemental hearing was made.

by employees engaged on the platform to rapidly descend from the platform in the event of an emergency (Tr. 67). Although the respondent had such a device at the work site, it had not been hooked up (Tr. 68; Ex. C-1-J).

Respondent attacks the Secretary's position on two grounds. Respondent avers that the possibility of a blowout or gas kick at this particular site was highly unlikely due to the nature of the operation (Tr. 126) and the low pressure in the well (Tr. 129). A distinction is drawn between drilling wells where the conditions to be encountered are unknown and servicing a well "where you know what's there" (Tr. 76). Some support for this contention is given in the testimony of the compliance officer:

> Q. All right. And the job that they were doing, pulling the rods out, this does not entail any formation work, does it not, such as fracturing?
>
> A. That's true, sir.
>
> Q. So you are not messing with the formation itself?
>
> A. That's right.
>
> Q. So would you agree that it is rather remote to have a blowout on a shallow East Texas well on a pump?
>
> A. That I would have to admit, sir.
>
> Q. And a gas kick is more or less a condition of drilling more than anything. When you are drilling, you hit a gas pocket and out it comes.
>
> A. Well, as a general rule, you think of that. But I would say on these East Texas wells you can have a gas kick, yes, sir.
>
> Q. Would you also agree that it is extremely unlikely in this kind of well?
>
> A. Yes, sir. It is not the norm, I'll admit. (Tr. 81-82)

In addition to the remoteness of a hazard, respondent also contends the guy wires attached to the rig would provide an acceptable alternative to the use of a

Geronimo device. Once again, support for this position is provided in the testimony of the compliance officer:

> Q. For the record, I'm referring to photograph C in Complainant's Exhibit No. 1, showing a line going out at an angle from the tubing board; is that correct?
>
> A. Yes, sir. Guy lines, yes, sir.
>
> Q. All right, sir. That's, again, nothing but a wire rope, is it not?
>
> A. That's true.
>
> Q. All right, sir. And isn't it also a fact that, let's say before the advent of OSHA, for the past 50 years derrickmen have gotten out of the derrick by simply taking their safety belt and sliding down the guy wires?
>
> A. That has been done.
>
> Q. And it was done as the norm until OSHA came along, wasn't it?
>
> A. Yes, sir.
>
> Q. Okay. So although OSHA would say that there are better ways to do it, there is a way out of that derrick by simply throwing your safety line over it and coming down the guy wires.
>
> A. Could be done. (Tr. 83-84)

The alternate method of using the guy wires for quick descent is not without some hazard since an employee might fall while trying to hook on (Tr. 85), but the same hazard is presented in using the Geronimo device (Tr. 86).

After careful consideration of the record, I find that the Secretary has not established a violation of the general duty clause of the Act.

Serious Citation No. 1, item 4, charges respondent with violating 29 C.F.R. § 1910.132(a)[4/] for failure to enforce the wearing of protective footwear. The

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4/ 29 C.F.R. § 1910.132(a) states:

> (a) Application. Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall

evidence is undisputed that on the date of the inspection, the compliance officer observed two employees wearing shoes which did not meet the requirements of the standard (Tr. 87-88). It is also undisputed that company policy requires the wearing of such equipment while working around the rig (Tr. 89, 132). As soon as this matter was called to the attention of the employees, both employees obtained proper shoes and wore them throughout the balance of the inspection (Tr. 91). While the fact that a violation occurred cannot be ignored, the gravity of this violation and its short duration dictate a find that the charge should be reduced to other than serious with no penalty assessed.

Finally, respondent was charged with a violation of 29 C.F.R. § 1910.151(b)[5/] for failure to have persons at the work site who were adequately trained to render first aid. Upon his arrival at the site, the compliance officer asked all employees if any of them had "a current first aid card" (Tr. 94). When he got a negative response, he pursued the matter no further. (Id.) None of the employees were asked the definitive question as to whether they had first aid training. (Id.) When asked why this question was not put to employees, the compliance officer responded:

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4/

be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

5/

29 C.F.R. § 1910.151(b) states as follows:

(b) In the absence of an infirmary, clinic, or hospital in near proximity to the workplace which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid. First aid supplies approved by the consulting physician shall be readily available.

> THE WITNESS: Well, a person may actually be eminently qualified, but we only recognize qualification by virtue of a recognized training course by the American Red Cross, Bureau of Mines, or some other accredited or accepted course of instruction as proof that the man is qualified. In other words, it is a matter of proof. You may actually have somebody there that is. If I could determine that he was proficient, well, I'd probably still have to write it up that they didn't have these accepted proofs of training. But I'd probably put it in there that so and so and so and so was qualified by virtue of whatever. (Tr. 95)

In a charge under this standard, the Secretary must do more than merely establish that no employee had an approved first aid card. He must establish that no employee was "adequately trained to render first aid" which is all the standard requires. The Review Commission has recently sustained this position. Snyder Well Servicing, Inc., 82 OSAHRC 10/C5, 10 BNA OSHC 1371, 1978 CCH OSHD ¶ 22,912 (No. 77-1334, 1978).

## FINDINGS OF FACT

1. Respondent, Miller Well Service, Inc., is a corporation engaged in well servicing operations. At all times pertinent hereto, the respondent had employees handling or working on goods that are moved in interstate commerce.

2. On the date of the inspection, respondent had five employees engaged in operating a truck-mounted, workover rig in connection with the servicing of a well located near Kilgore, Texas. The rig was approximately 100 feet high and had two work platforms attached at heights of 60 and 80 feet above ground level. The rig had a fixed ladder running from the ground level to the crown of the rig.

3. In use at the rig was a flexible three-inch hose for pumping salt water under 250 pounds of pressure. This hose was connected to a standpipe at an elevation of 30 feet above ground level. The hose was clamped or threaded onto

the standpipe, and the evidence does not reflect there was any hazard of this hose becoming ruptured or disconnected from the standpipe.

4. The fixed ladder attached to the rig did not have landing platforms at intervals of 20 feet nor did the respondent enforce the use of protective devices when employees ascended or descended the ladder.

5. Due to the nature of the operation conducted by respondent, the possibility of a blowout or gas kick was extremely remote. In the event of such an occasion, guy wires attached to the rig were sufficiently adequate to provide a means of egress.

6. On the day of the inspection, two employees were observed to be wearing inadequate foot protection. This situation was immediately corrected when called to the attention of respondent's supervisor.

7. The Secretary has failed to establish that respondent had no one at the jobsite who was adequately trained to render first aid.

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in a business affecting commerce, and the Occupational Safety and Health Review Commission has jurisdiction of this case.

2. Respondent did not violate the provisions of section 5(a)(1) of the Act, 29 C.F.R. § 1910.36(b)(2) or 29 C.F.R. § 1910.151(b).

3. Respondent violated the provisions of 29 C.F.R. § 1910.27(d)(2) by failing to provide landing platforms on a fixed ladder or requiring employees to use protective devices when ascending or descending the ladder.

4. Respondent violated the provisions of 29 C.F.R. § 1910.132(a) by failing to insure employees wore appropriate protective equipment.

## ORDER

1. Serious Citation No. 1, items 1 and 3, are vacated.

2. Serious Citation No. 1, item 2, is affirmed and a penalty of $100.00 is assessed.

3. Serious Citation No. 1, item 4, is reduced to other than serious and no penalty is assessed.

4. "Other" than serious Citation No. 2, item 1, is vacated.

Dated this 27th day of July, 1982.

Edwin G. Salyers

EDWIN G. SALYERS
Judge

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| | (Judge's decision) | | 47/A3 |
| 78-4555 | KELLY SPRINGFIELD TIRE COMPANY | 8/27/82 | 47/B6 |
| | (Judge's decision) | | 47/C12 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

August 27, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

E. W. Scripps Co., d/b/a/ The Cleveland Press

OSHRC DOCKET NO. 12885

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF ORDER

To wit: The Secretary's Motion to Dismiss Petition for Review is granted.

FOR THE SECRETARY OF LABOR

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FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/78

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR<br><br>Complainant<br><br>v.<br><br>THE E. W. SCRIPPS COMPANY<br>d/b/a THE CLEVELAND PRESS<br><br>Respondent | OSHRC Docket No. 12885 |

DECISION AND ORDER

Appearances:

Dennis Dowdell, Jr., Esq.
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U. S. Department of Labor
Cleveland, Ohio
for the Complainant

H. Stephen Madsen, Esq.
John A. Zangerle, Esq.
Baker, Hostetler & Patterson
Attorneys at Law
Cleveland, Ohio
for the Respondent

Usher, Judge:

This is a proceeding initiated by the Secretary of Labor, United States Department of Labor, pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, et seq., hereinafter referred to as the Act) seeking affirmance by the Review Commission of a citation which charges a "nonserious" violation of Section 5(a)(2) of the Act because of Respondent's alleged noncompliance with the occupational safety and health standard promulgated by the Secretary

and codified at 29 Code of Federal Regulations, Section 1910.95(b)(1).[1/]

The citation resulted from an inspection of Respondent's plant at 901

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1/ The standard set forth at 29 CFR 1910.95 provides (in pertinent part):

> (a) Protection against the effects of noise exposure shall be provided when the sound levels exceed those shown in Table G-16 when measured on the A scale of a standard sound level meter at slow response. When noise levels are determined by octave band analysis, the equivalent A-weighted sound level may be determined as follows: [Figure G-9 omitted].
>
> (b)(1) When employees are subjected to sound exceeding those listed in Table G-16, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table.
>
> (2) If the variations in noise level involve maxima at intervals of 1 second or less, it is to be considered continuous.
>
> (3) In all cases where the sound levels exceed the values shown herein, a continuing, effective hearing conservation program shall be administered.

TABLE G-16--PERMISSIBLE NOISE EXPOSURES

| Duration per day, hours | Sound level dBA slow response |
|---|---|
| 8 | 90 |
| 6 | 92 |
| 4 | 95 |
| 3 | 97 |
| 2 | 100 |
| 1 1/2 | 102 |
| 1 | 105 |
| 1/2 | 110 |
| 1/4 or less | 115 |

Exposure to impulsive or impact noise should not exceed 140 dB peak sound pressure level.

Lakeside Avenue, Cleveland, Ohio, by Complainant's agent on March 7, 1975. The alleged violation was described in the citation as follows:

> Failed to use feasible administrative or engineering controls to reduce the sound levels within the permissible limits, in the Press room on number 1 and number 9 presses.

A March 31, 1977, abatement date was required by the terms of the citation. No penalty was proposed by Complainant's agent.

Respondent duly contested the citation, pursuant to Section 10(c) of the Act, and a complaint and answer followed. The issues were tried before the undersigned on December 16, 17 and 18, 1975, and April 6, 1976.

## PLEADED AND STIPULATED FACTS

Respondent has admitted its corporate status, its employment of employees, and its engagement in interstate commerce. It is "engaged in...printing daily newspapers,...employs approximately 1,300 employees... and shipments are received from and transmitted to points outside of Ohio," as admitted in the answer.

## THE ISSUES

The pleadings, the evidence adduced by the parties, and the briefs filed herein serve to raise the following basic issues:

1) Is the standard codified at 29 CFR 1910.95 constitutionally "unreasonable, arbitrary or capricious" as not "bearing a rational relationship between the statutory goal of safe and healthful working conditions and the requirement of the Regulation that an employer...attempt to remove excessive noise from the working environment, rather than protecting his employees with personal protective equipment?"

2) Were one or more of Respondent's employees exposed to noise levels in excess of those permitted by the standard?

3) Do feasible engineering or administrative controls exist which would effect attenuation of the noise levels and thus bring them within the range set forth in the standard?

## VALIDITY OF THE STANDARD

Respondent argues that the Review Commission has, or ought to have, the power to adjudge the subject standard to be "an invalid exercise of power by the Secretary of Labor." I agree as has the Review Commission on several occasions. See Secretary of Labor v. Castle and Cooke Foods, Inc., OSHRC Docket No. 10925, 5 BNA OSHC 1435 (May 19, 1977) and cases cited therein.

It is Respondent's position that the Secretary exceeded his statutory authority when he promulgated the standard which has been codified at 29 CFR 1926.95(b)(1) because there is no "rational relationship between the statutory goal...and the requirement of the Regulation...rather than [an employer] protecting his employees with personal protective equipment...." The Commission has rejected this and similar attacks upon the validity of the standard in question, and Respondent's argument is likewise rejected here. Secretary of Labor v. Turner Company, OSHRC Docket No. 3635 CCH OSHD para. 21,023 (August 24, 1976); Secretary of Labor v. Castle and Cooke Foods, Inc., supra.

## DISCUSSION OF THE EVIDENCE

Complainant adduced the testimony of several expert witnesses and introduced various exhibits. Respondent offered no testimony, relying instead on the assertion that Complainant had not established a prima facie case.

The testimony of Complainant's agent, Earl Gregory, an industrial hygienist, (hereinafter referred to as the Compliance Safety and Health Officer or "CSHO") served to establish the facts which formed the basis for the citation. Using a General Radio sound level meter and audio dosimeters he monitored the noise levels to which two of Respondent's employees were exposed during their workday on March 7, 1975. These employees worked as "folder operators" and tended the folding operation as the newspapers came off the press. With the sound level meter he recorded noise levels ranging from 85 dBA to 103 dBA while the folder on Press No. 1 was in operation and calculated a time-weighted average of exposure from these readings. The resulting exposures were then compared with the readings of the dosimeter on each of the two employees. (Exhibits C-2 through C-8.)

It will suffice to say that the CSHO's testimony was entirely credible, and the results of his survey on March 7, 1975, are accepted as fact.

While not conceding the accuracy of these investigation findings, Respondent seemingly did not contest seriously the conclusion that two of its employees were exposed to noise levels which exceed those allowed by the standard. Respondent did object strenuously to any conclusions which were based upon dosimeter readings. However, that argument must fall when it is noted that basically the same conclusions are reached whether the sound level meter readings or the dosimeter readings are used to establish the fact that excessive noise exposure was experienced by the employees.

Complainant sought unsuccessfully to adduce the CSHO's testimony regarding the existence of feasible administrative or engineering controls to abate the noise problem in the pressroom at Respondent's plant. The witness admittedly had no experience in the newspaper printing industry and had only limited experience in the field of noise attenuation in general.

The testimony of Robert Feaster was adduced by Complainant. Mr. Feaster is the pressroom superintendent at the Lansing State Journal, a newspaper printing and publishing firm in Lansing, Michigan.

According to Mr. Feaster the presses at the Lansing State Journal are "Goss Headliner, Mark II" presses, and there are eight black "printing units" and six colored "printing units" in the pressroom there. Each printing unit or press has two folders which are attached to or run in conjunction with the presses.

The Goss Printing Press Company (manufacturer of the equipment in use at the Lansing State Journal) installed folder enclosures in early 1973. The witness described these enclosures which were installed for the purpose of attenuating the noise emanating from the folders. According to the testimony, the enclosures did in fact accomplish the intended purpose.

Complainant adduced the testimony of Robert Kiamko,[2/] a senior project engineer at the Goss Printing Press Company (a division of Rockwell International), who conducted a test project for the installation of the folder enclosures at the Lansing State Journal in 1972 and 1973. The witness described the folder enclosures in some detail and testified

2/ "Robert Kiomko" in the transcript.

regarding their effectiveness in attenuating the noise emanating from the folders at the Lansing plant. He described in great detail the testing by which the results were obtained, but admitted that the printing equipment used at Lansing and the conditions of its use were different from those at Respondent's plant. He had not visited the pressroom at the Cleveland Press. However, he understood (from the CSHO's testimony) that the situation there was unlike that at Lansing. Admittedly, according to the witness, the folder enclosures which were installed at Lansing could not be used at the Cleveland Press plant.

Mr. Robert Newson,[3/] President of Noise Engineering, Inc., testified at the behest of Complainant. His firm "designs, manufactures and installs noise abatement systems...specializ[ing] in the industrial noise market."

The witness described "personnel enclosures" and "folder enclosures" which he has either designed and constructed at various newspaper printing plants or which he has observed being used in such workplaces. The former are enclosures "in which...employees...seek shelter from adverse noise conditions" and the latter are, as the term implies, enclosures for the folder which is apparently the equipment that is the most offensive insofar as noise in a pressroom is concerned. He identified specific newspaper printing plants in Dallas, Austin and Houston (Texas), Phoenix and Tucson (Arizona), San Jose, Palo Alto, Berkeley, and Costa Mesa (California), Atlanta (Georgia) and New Orleans (Louisiana) where such studies or installations were made. At several

3/ Sometimes spelled "Newsom" in the transcript.

of these plants the witness has made proposals for noise attenuation which have not been adopted; at others he has made proposals which have been carried out by the newspaper printing firms; and at still others he has been employed to implement the proposed installations. The witness testified regarding the cost, or estimated cost, of the several installations, or proposed installations, with which he was intimately familiar.

Complainant introduced several documents (reports, publications, etc.) in which were recounted the facts and circumstances surrounding the design and installation of enclosures in newspaper printing plants. See Exhibits Nos. C-9 through C-23. These reports deal, for the most part, with the enclosure installed at the Lansing State Journal.

EVALUATION OF THE EVIDENCE

It is now well settled that Complainant bears "the burden of proving all elements of an alleged violation...." See Commission Rule 73(a); Secretary of Labor v. OSHRC and Raymond Hendrix, etc., 511 F.2d 1139 (9th Cir. 1975); and Secretary of Labor v. Wheeling-Pittsburgh Steel Corporation, OSHRC Docket No. 13949 (May 13, 1977) and the other cases cited therein. "The standard of proof...is the preponderance of the evidence rule." Secretary of Labor v. OSHRC and Raymond Hendrix, etc., supra.

Thus, it is Complainant's burden to prove, initially, that one or more of Respondent's employees were exposed to levels of noise at the workplace which exceeded those specified in the safety and health standard, and, secondly, to prove by a preponderance of the evidence that "particular controls [are] feasible to reduce noise at the work site involved." Secretary of Labor v. Wheeling-Pittsburgh Steel Corporation,

supra. The feasibility of the administrative or engineering controls contemplated by the standard includes, the Commission has said repeatedly, engineering feasibility as well as economic feasibility. See, e.g., Secretary of Labor v. Continental Can Company, Inc., OSHRC Docket Nos. 3973, etc., CCH OSHD para. 21,009 (August 24, 1976).

The evidence adduced by Complainant through his CSHO suffices to meet his initial burden. Using a carefully calibrated sound-level meter, Complainant's agent measured the sound--emanating particularly from the presses and the folder--as it reached the ears of two of Respondent's employees. He calculated the periods of time when these employees were exposed to the measured noise levels and correctly concluded that the employees' exposure exceeded that which is allowed by the terms of the safety and health standard. The CSHO then checked his calculations with readings recorded on audio dosimeters which were worn by the two employees. These readings confirmed the conclusion that excessive noise exposure was encountered by the employees in question.[4/]

Turning to the question of the feasibility of engineering controls to reduce the exposure of Respondent's employees in its pressroom, the testimony of the CSHO, Earl Gregory, the pressroom superintendent at the Lansing plant, Robert Feaster, the project engineer at Rockwell, Robert Kiamko, and the noise control consultant, Robert Newson, must be weighed in light of the Commission's decisions on the subject.

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4/ Respondent's objection to testimony concerning the dosimeter readings was overruled. The Commission has held that "the use of an audio dosimeter for measuring this exposure is not precluded by section 1910.95(a). ...the standard does not require the use of a standard sound-level meter as the exclusive measuring instrument." Secretary of Labor v. Love Box Company, OSHRC Docket No. 6286, CCH OSHD para. 20,588 (April 7, 1975).

Mr. Gregory is the only one of Complainant's four witnesses who has visited Respondent's plant. The purpose of his visit was to monitor the noise levels to which Respondent's employees in the pressroom were exposed and to determine whether or not compliance with the applicable standard was being achieved. Inasmuch as the standard requires the use of administrative[5/] or engineering controls when certain noise exposure is found to exist, Mr. Gregory's duties included a determination of the feasibility of such controls.

The reported results of Mr. Gregory's monitoring of the exposure of Respondent's folder operators to excessive noise levels fully demonstrates his expertise in the field of sound measurement, and his findings as to that fact have been accepted. On the other hand, examination and cross-examination of this witness clearly evidenced the fact that he has no expertise in the highly technical field of noise attenuation in a newspaper printing company's pressroom.

Mr. Feaster's qualifications as a pressroom superintendent were fully set forth in his testimony and his expertise in that field of endeavor is not questioned. The witness was present at the Lansing plant while noise attenuation studies were conducted there by engineers of the Goss Printing Press Company, and he and his subordinates did perform some of the actual construction of the enclosures "with the supervision of Goss engineers." He "worked with the engineers more as a critic," rejecting ideas which "you couldn't live with." He apparently observed the construction of the folders at the Lansing plant on a daily basis, but participated in the installation only to the

5/ Complainant has adduced no evidence regarding the feasibility of any administrative controls. Thus, only the existence of feasible engineering controls need be determined.

extent that the physical structures might or might not be practical from the point of view of allowing for the performance of the required work.

Mr. Feaster explained in some detail the physical characteristics of the Lansing plant and described the Goss presses used there. He admittedly had no knowledge of the physical layout at Respondent's plant. He had never visited the pressroom at the Cleveland Press and was able to add nothing to enlighten the trier of fact as to the question of the feasibility of engineering controls to reduce noise exposure at Respondent's work place.

Robert Kiamko has earned a Master's Degree in Mechanical Engineering and is presently employed by the Goss Printing Press division of Rockwell International Corporation. He specializes, apparently among other things, in the attenuation of noise emanating from printing presses and the folding equipment which is attached to, or operated in conjunction with, such presses. He was charged with the responsibility of designing and constructing the enclosures and unit baffles on equipment at the Lansing State Journal in 1972 and 1973. According to the testimony this noise reduction project was largely successful.

This witness admitted that he has not seen and is not at all familiar with the equipment, physical layout, or operations at Respondent's plant. His understanding is that Respondent's plant is equipped with presses and folding units manufactured by the Hoe Company and that the press rooms are dissimilar to those at Lansing. Because of his lack of knowledge of the conditions which exist at Respondent's plant, Mr. Kiamko was admittedly unable to state with any degree of certainty whether

there exist engineering controls for the attenuation of noise levels at Respondent's plant which are feasible, either technologically or economically.

Taken in the context most favorable to Complainant's position, this witness' testimony served only to establish the fact that there is a technological capability to design, construct and install engineering controls to reduce noise levels in the pressrooms of newspaper printing plants.

The testimony of Mr. Robert Newson, which was adduced by Complainant, further established the conclusion which Mr. Kiamko reached.

Respondent rejects Mr. Newson's purported qualifications as an expert in the field of noise attenuation in the pressrooms of newspaper publishing firms. The record reveals an opposite conclusion. Nevertheless, this witness' expertise in the field generally has little value when it is sought to be utilized to resolve the ultimate question obtaining under the facts in this case. The witness is totally unfamiliar with the layout, design, and operation of the pressroom at Respondent's plant, save the limited knowledge he gained from hearing and evaluating the testimony of the CSHO and viewing various selected exhibits, e.g., a diagram of the plant.

Mr. Newson testified regarding noise suppression enclosures in general. He spoke with considerable knowledge about the installation of such devices at various newspaper plants where he had been involved in the installation, where he had considered the feasibility of such installations, or where he had studied the results of similar attempts at

noise attenuation. Noticeably this witness' testimony lacked probative value because of his confessed lack of knowledge of the size, shape, configuration and design of Respondent's workplace. The strictures placed upon his opinions by his lack of knowledge about Respondent's pressroom rendered his testimony valueless as to the ultimate issue involved here.

Mr. Newson's testimony did serve, however--as did Mr. Kiamko's--to establish the fact that present technology permits attenuation of employee noise exposure in newspaper pressrooms under certain circumstances through the employment of engineering devices.[6/]

Complainant argues that the trier of fact should be able to extrapolate, using the various descriptions of solutions which his witnesses adduced, and apply those to the somewhat vaguely described physical conditions which exist at Respondent's plant. In such a highly technical situation as is here presented that is a hopeless impossibility. The suggestion amounts to nothing more than a futile attempt to substitute the known for the unknown in order to compensate for the obvious absence of proof which is required of Complainant.

The Review Commission has spoken to the question presented here on several recent occasions. See, for example, Secretary of Labor v.

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6/ Thus, it cannot be decided, on the basis of the facts adduced here, whether or not feasible engineering controls exist which would sufficiently attenuate the noise levels at Respondent's pressroom to effect compliance. What is decided here is that Complainant has not met his burden of proof as to that issue.

Reynolds Metal Company, OSHRC Docket No. 1551, CCH OSHD para. 20,447 (February 26, 1976); Secretary of Labor v. Great Falls Tribune Company, OSHRC Docket No. 6632, 5 BNA OSHC 1443 (May 19, 1977); and Secretary of Labor v. Castle and Cooke Foods, Inc., supra.

Here, as in Reynolds, supra, "[t]he testimony of Complainant's expert shows only that general techniques to reduce noise [in newspaper publishers' pressrooms] exists. It does not show that any particular controls are feasible to reduce the noise in [Cleveland Press'] plant."

As in the Great Falls Tribune case (supra), Complainant here engaged experts who are familiar with the results of the engineering controls which have been successfully employed at the Lansing State Journal pressroom at Lansing, Michigan. There, according to the facts recited by the Review Commission in the Great Falls Tribune decision, "the pressroom...represented the highest state of the art among newspapers in achieving compliance with the...noise standard through the use of engineering controls." The expert who testified in the Great Falls Tribune case had inspected and studied the pressrooms at both locations. In this instance, however, Complainant sought only to adduce disjointed factual assertions and leave to conjecture whether or not those pieces of the puzzle might or might not fit.

"[Complainant's] burden is not satisfied simply by a showing that general noise controls exist. The standard is only violated if an employer fails to utilize those controls which are feasible in its

operations" Secretary of Labor v. Great Falls Tribune Company, supra. Complainant has failed to carry his burden. There has been no showing that the engineering controls described by Messers Feaster, Kiamko, or Newson are feasible, either technologically or economically, for implementation at Respondent's workplace.

## FINDINGS OF FACT

A preponderence of the probative evidence of record, taken in its entirety, compels the following findings of fact:

1. Respondent, E. W. Scripps Company, d/b/a The Cleveland Press, is a corporation which engages in the printing of daily newspapers and it ships and receives materials to and from points outside Ohio.

2. On or about March 7, 1975, Respondent employed approximately 1,300 persons at its place of business in Cleveland, Ohio where it manufactured goods for interstate shipment.

3. On or about March 7, 1975, one or more of Respondent's employees were exposed to noise levels in excess of those listed in Table G-16, a part of the safety and health standard promulgated by Complainant and codified at 29 CFR 1926.95; those employees wore personal protective equipment; the excessive noise levels emanated from printing presses and the folder equipment which was attached thereto and/or operated therewith.

4. Complainant has failed to prove that feasible engineering controls to reduce the noise levels described in Finding of Fact No. 3 do exist; neither the availability nor the cost to Respondent of the installation and use of any such engineering controls has been determined with any degree of certainty.

5. Complainant has failed to prove that any administrative controls to reduce the noise levels described in Finding of Fact No. 3 are possible.

## CONCLUSIONS OF LAW

1. Jurisdiction of the parties and of the subject matter herein is conferred upon the Occupational Safety and Health Review Commission by Section 10(c) of the Act.

2. At all times relevant hereto, Respondent was an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Act and as such was subject to the requirements of Section 5(a)(2) of the Act.

3. The occupational safety and health standard codified at 29 CFR 1910.95 is a standard promulgated by Complainant under the Act (as defined in Section 5(a)(2) of the Act) and that standard is not so unreasonable, arbitrary or capricious as to be constitutionally unenforceable or invalid.

4. Respondent did not violate Section 5(a)(2) of the Act by failing to comply with the provisions of the safety and health standard codified at 29 CFR 1910.95 on or about March 7, 1975; no feasible engineering or administrative controls have been shown to exist which would reduce the noise levels described by Complainant in his citation.

## ORDER

Upon consideration of the foregoing findings and conclusions, it is hereby ORDERED that

The citation issued to Respondent by Complainant's agent on March 21, 1975, be, and it is hereby, VACATED.

BENJAMIN G. USHER
Judge, OSHRC

Dated: August 10, 1977
Hyattsville, Maryland

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

Aug. 27, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Kelly Springfield Tire Company

OSHRC DOCKET NO. 78-4555

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

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RAY H. DARLING, JR.
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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 78-4555 |
| KELLY SPRINGFIELD TIRE COMPANY, | : | |
| Respondent. | : | |

DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

This case presents the issue whether Administrative Law Judge Henry F. Martin, Jr. correctly vacated a citation alleging that Kelly Springfield Tire Company violated section 5(a)(1) of the Occupational Safety and Health Act of 1970.[1/] Judge Martin determined that the Secretary of Labor failed to establish recognition of a hazard. For the following reasons, we reverse the judge's decision and affirm the citation.[2/]

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1/ 29 U.S.C. §§ 651-678 ("the Act"). Section 5(a)(1), 29 U.S.C. § 654(a)(1), provides:

> Sec. 5.(a) Each employer — (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

2/ This case is before the Commission for review pursuant to section 12(j) of the Act, 29 U.S.C. § 661(i). Commissioner Cleary granted the Secretary's petition for discretionary review.

I

The section 5(a)(1) citation issued following an Occupational Safety and Health Administration inspection of a dust collection system in Kelly Springfield's Tyler, Texas plant. In the citation, the Secretary alleged that Kelly Springfield failed to "maintain and/or operate the #4 Ventrijet Dust Collector System in a manner to insure that its employees were protected from the hazards of an explosion."

Kelly Springfield used four Ventrijet dust collection systems to collect rubber dust generated during the production of white sidewall tires. Part of the production process involves grinding away a thin layer of rubber along the rib of the tire to reveal a white layer. The grinding is performed with a motor-driven stone on a machine called a rib buffer. The rubber dust generated in this operation is vacuumed away at the point of operation by a Ventrijet dust collection system. This type of dust collection system consists of pick-up nozzles leading into a duct which is connected to a large, box-like piece of equipment called a dust collector. A fan capable of drawing as much or more than 10,000 cubic feet of air per minute creates a vacuum in the dust collector, the duct, and the pick-up nozzles, pulling the rubber dust from the grinding operation into the dust collector. In the top of the dust collector, the rubber dust is separated from the air by a process which mixes the dust-laden air with water. The dust-laden air is drawn over nozzles, called venturi, which are partially covered with water. The movement of the air passing through these nozzles creates turbulence, which mixes the water with the dust-laden air and causes the dust particles to fall out of the air stream. The dust falls into a water tank in the bottom of the dust collector and is finally removed as sludge for disposal. The

cleaned air exhausts from the dust collector through the fan and out an opening through the roof of the plant.

On May 12, 1978, there was an explosion in dust collection system No. 4, which served rib buffers Nos. 9, 10, and 11. The explosion was preceded by two fires. The first fire occurred at the point of grinding on rib buffer No. 11. The second fire occurred in the duct between rib buffer No. 9 and the dust collector. Perhaps 15 seconds after the second fire was discovered, dust collector No. 4 exploded. The force of the explosion blew the cast iron doors off the collector and bulged out its sides. No one was injured in the explosion. However, because the dust collector was located in a work area, employees could have been injured.[3/]

Ventrijet dust collection systems are necessarily relatively airtight or enclosed because a vacuum is necessary to collect the dust. The only openings during operation are at the pick-up nozzles and at the roof of the plant. All access doors, used for maintenance, are closed during operation. Thus, there are only limited openings through which any pressure can be vented, unless explosion venting has been designed into the system. Kelly Springfield's dust collection system No. 4 did not have explosion venting. In addition, it was designed to withstand a pressure build-up of only 10 inches water gauge static pressure because these collection systems were designed only to withstand the suction pressure exerted by the fan.

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3/ An aisle containing an uncured tire storage area passed by collector No. 4. Also, an employee break area and a janitorial storage area were adjacent to the collector.

In addition, there was a source of heat pressure in the dust collection system. Fires in this type of dust collection system have been common throughout the tire manufacturing industry and Kelly Springfield has experienced about 70 fires in about 15 years. The fires started at the point of grinding where friction heated up the rubber dust, sometimes producing embers that entered the pick-up nozzles and the duct. These embers ignited rubber dust which had adhered to the hood over the grinding stone where the pick-up nozzles were located or which had accumulated to some extent in the duct. Some dust always fell out of the air stream and there was more dust under the hood or in the duct if, for any reason, the suction of the fan was reduced.

Mr. Tarr, a consulting chemical engineer specializing in air pollution abatement systems, testified for the Secretary that chemical engineers recognize as a general principle that an explosion is possible if a combustible dust and oxygen are combined in an enclosed space and there is a source of ignition. He stated that the chances of an explosion depend on various factors, such as the rate of combustion, the availability of oxygen to sustain combustion, the size of the space, and its capacity to vent heat energy safely or contain the build-up of heat energy. According to Mr. Tarr, chemical engineers realize that they must design any enclosed system to contain or safely vent explosions whenever a combustible dust, oxygen and an ignition source are present.

Mr. Tarr acknowledged that he was unfamiliar with the tire manufacturing industry's specific awareness of this hazard but he asserted that recognition of the general principle underlying this explosion hazard is not confined to any one industry. Having examined Kelly Springfield's dust collection system, he concluded that it was hazardous. He pointed

to the recurring problem of fires in the enclosed system and the amount of dust in the ducts. He also cited the lack of explosion venting.

Kelly Springfield countered with evidence that the tire manufacturing industry, in which the use of dust collection systems like Kelly Springfield's is common, is not aware of any explosion hazard presented by these systems. Mr. Woodling, a mechanical engineering section head for Goodyear (of which Kelly Springfield is a subsidiary); Mr. Borgerding, Kelly Springfield's plant manager; Mr. Barger, Kelly Springfield's manager of engineering; and Mr. Rutledge, a regional sales manager with Carborundum Company, which manufactures this type of dust collection system, all testified that they were unaware of any other explosion having ever occurred in this type of dust collection system and, to the best of their knowledge gained through associations with other persons connected with tire manufacturing, the tire manufacturing industry does not recognize an explosion hazard from these dust collection systems. However, Mr. Rutledge only recently learned of the recurring problems the industry and Kelly Springfield had been having with fires in the systems and he testified that, where there has been a history of fires, an expert on fires should be consulted. He further testified that he would recommend using explosion panels or vents.

These four witnesses also testified that the risk of an explosion depends on the size of the enclosed space, the amount of ventilation of the space, the amount and combustibility of the fuel, and whether a hot ember could enter the system when fuel (dust) had accumulated substantially through reduced ventilation. For example, Mr. Borgerding agreed that fire in an enclosed space could create enough pressure to explode

the enclosure but he emphasized that the possibility was only "a hypothetical." Mr. Barger posited that, as long as the fan is running, any fire would be adequately vented and there would not be any excessive, explosive pressure build-up. He also testified that his experience suggested rubber dust has a low combustion rate. Further, he believed that, if for any reason the air flow was reduced, a hot ember could never enter the duct in the first place. Mr. Woodling testified that the system was sufficiently vented at the pick-up nozzles and roof ends to prevent any excessive pressure build-up. Mr. Rutledge stated that these dust collection systems have been considered fire safe because the combustible particulate is mixed with water. In short, all testified that their experience led them to conclude there was no explosion hazard.

II

Judge Martin determined that the explosion hazard was not recognized because there was no showing "that the tire manufacturing industry has been made aware of an explosion hazard in connection with the operation of the rib buffers and ventrijet dust collectors." He based this determination on Kelly Springfield's evidence that the tire manufacturing industry is unaware of any explosion hazard presented by these dust collection systems. Judge Martin noted that, although "[a]dmittedly fires can trigger an explosion in an enclosed space given the right amount of oxygen and fuel," recognition was not established because the actual chances of an explosion vary depending on the coincidence of various conditions. Kelly Springfield's witnesses all believed that the dust collection system as maintained and operated by Kelly Springfield was capable of preventing a dangerous possi-

bility of explosion from arising. The judge found that, although the record shows fires can trigger explosions in the right circumstances, Kelly extinguished fires rapidly and maintained the dust collection system adequately as far as preventing explosions was concerned. Accordingly, Judge Martin determined that both Kelly Springfield and the tire manufacturing industry lacked knowledge of any hazard. Therefore, he vacated the citation.

The Secretary argues on review that Judge Martin erred in view of the testimony of Mr. Tarr and Mr. Rutledge. The Secretary contends that their testimony shows the hazard of pressure build-up explosions was generally recognized and was recognized by safety experts familiar with the equipment used by the tire manufacturing industry. In the Secretary's view, Mr. Rutledge's testimony shows he would take the explosion hazard into account if there is a history of fires and that he would prescribe precautions. Mr. Tarr's testimony shows that recognition of the hazard of pressure build-up explosions in enclosed spaces from the presence of a combustible fuel, oxygen, and an ignition source is not confined to any one industry but rather is based on a knowledge of one of the basic chemical engineering principles. Mr. Tarr's testimony also shows that this principle applies to Kelly Springfield's dust collection system.

Kelly Springfield argues on review that Mr. Tarr's testimony shows only recognition of a theoretical possibility of explosions. Mr. Tarr had no experience specifically with the dust collection systems used in the tire manufacturing industry to collect rubber dust from rib buffing. Therefore, in Kelly Springfield's view, the judge properly discounted Mr. Tarr's views on the hazardousness of Kelly Springfield's dust collection system. Kelly Springfield argues that the record shows the tire manufac-

turing industry does not recognize any hazard of explosions associated with this type of dust collection system.

III

To establish a section 5(a)(1) violation, the Secretary must show that an employer failed to render its workplace free from a hazard that is recognized and likely to cause death or serious physical harm to its employees. Little Beaver Creek Ranches, Inc., 82 OSAHRC , 10 BNA OSHC 1806, 1982 CCH OSHD ¶ 26,125 (No. 77-2096, 1982). The Secretary must also show that there was a feasible means available to abate the hazard. Id.; National Realty and Construction Co. v. OSHRC, 489 F.2d 1257, 1268 (D.C. Cir. 1973).

The Commission has held that it is the hazard, not the specific incident that resulted in injury or, as in this case, that might have resulted in injury that is the relevant consideration in determining the existence of a recognized hazard. See Kansas City Power & Light Co., 82 OSAHRC , 10 BNA OSHC 1417, 1982 CCH OSHD ¶ 25,957 (No. 76-5255, 1982). More specifically, a recognized hazard is a condition or practice in the workplace that is known to be hazardous by either the industry in general or the employer in particular. Kansas City Power & Light Co., supra; Continental Oil Co. v. OSHRC, 630 F.2d 446, 448 (6th Cir. 1980), cert. denied, 101 S.Ct. 1481 (March 2, 1981); Empire Detroit Steel Division, Detroit Steel Corp. v. OSHRC, 579 F.2d 378, 383 (6th Cir. 1978).

The hazard on which the Secretary focused was pressure build-up explosions from the combination of a combustible dust, oxygen, and an ignition source in an enclosed space. Mr. Tarr's testimony shows that chemical engineers take precautions against explosions if a combustible dust, oxygen, and an ignition source are present in an enclosed space and if

it is at all uncertain whether or not an explosion could occur. Moreover, Mr. Tarr's testimony shows that recognition of this general principle on the causes of explosions is not confined to any one industry. Instead, the principle is a basic one known to all chemical engineers. Consistent with this testimony showing general recognition, Mr. Rutledge's testimony shows that the industry involved in the distribution and operation of dust collection systems such as that used by Kelly Springfield believed precautions against explosions should be carefully considered if there have been fires. This evidence is sufficient to establish recognition. It shows that safety experts familiar with the general workplace condition or practice recognize it as hazardous. See National Realty and Construction Co. v. OSHRC, 489 F.2d at 1265 n. 32.[4/] Accordingly, we find that the hazard of pressure build-up explosions from oxygen, a combustible dust, and an ignition source in an enclosed space was recognized.

The evidence on which Judge Martin relied to make a contrary finding shows only that the experience of the tire manufacturing industry with this type of dust collection system had been thus far free of explosions. It does not show, however, that the hazard of such explosions was not recognized by safety experts familiar with the causes of explosions and the type of dust collection system used by the tire manufacturing industry to collect rubber dust. Since the Secretary's evidence establishes this recognition, we set aside the judge's contrary finding.

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4/ Because Mr. Tarr was familiar with the type of dust collection system, ventrijet or low energy wet scrubber systems, applied to the collection of rubber dust in Kelly Springfield's plant, his lack of experience in the tire manufacturing industry does not detract from the weight we afford his testimony.

IV

Because Judge Martin determined that the Secretary failed to establish the recognition element of a section 5(a)(1) violation, the judge vacated the citation and did not enter factual findings and legal conclusions on the remaining section 5(a)(1) elements. However, the record in this case is complete and we have the authority to make factual findings. Franklin R. Lacy, 81 OSAHRC 7/A2, 9 BNA OSHC 1253, 1981 CCH OSHD ¶ 25,170 (No. 3701, 1981), citing Accu-Namics, Inc. v. OSHRC, 515 F.2d 828, 834 (5th Cir. 1975), cert. denied, 425 U.S. 903 (1976). Accordingly, in the interest of efficient adjudication, we will make the necessary determinations on the remaining elements of a section 5(a)(1) violation.

Mr. Tarr's testimony indicates that the workplace was not free of the hazard. The dust collection system was not operated or maintained in such a way as to protect employees from the danger of an explosion caused by the combination of oxygen, a combustible dust, and an ignition source in the enclosed space, nor were any other means used to free the workplace of the hazard.

Also, the record establishes that an explosion would be likely to cause death or serious physical harm to employees. Material and equipment storage areas and an employee break area were located near the dust collector. Thus, employees were subject to serious injury or death in the event of an explosion.

The remaining question is whether the Secretary established a feasible means of reducing or eliminating the hazard. The record shows that the amount of dust accumulating in the ducts can be controlled by

assuring that the vacuum in the dust collection system is maintained. This involves assuring that the water level is maintained at the proper level. If the water level becomes too high, the suction of the fan through the top of the collector to the ducts and rib buffers is reduced and more dust accumulates in the system. A hot ember or spark can ignite the accumulated dust, particularly under the hood at the grinding stone or in the duct leading away from the point of grinding. The same thing can happen if the water level becomes too low. At first, because the air flow is less impeded by the water level, the vacuum is increased. However, if the water goes below a baffle in the water tank which separates the sludge removal area from the water, then air can come into the upper part of the collector through the sludge removal opening. When this happens, the fan draws principally from the sludge removal opening, since it is closer to the fan than the remote vacuum nozzle openings at the rib buffers. In that event, the suction is reduced at the rib buffers, combustible rubber dust accumulates in the ducts, and fires occur.

Kelly Springfield had tried two methods of controlling the water level but had problems with both methods. One method was an overflow system. The required water level was maintained by running more water into the collector than was needed and draining off the excess at the required level into an overflow pipe. The other method employed a "solenoid valve" to maintain the correct water level. This system consisted of an electronic probe placed in the standing water level control box. When the probe indicated water was needed, a water valve was electronically opened. Kelly Springfield had problems with the overflow pipe stopping up. Therefore, Kelly Springfield had abandoned this

method and resorted to the probe system. However, Kelly Springfield had various electrical and mechanical problems with the probe system, too.

The record shows that the water level can be controlled. According to Kelly Springfield's plant manager, Mr. Borgerding, a new control method — a bounced-air system — worked well at other Kelly Springfield plants. This water control method was installed in the Tyler, Texas plant after the inspection.

The preponderance of the evidence of record also shows that the accumulations of dust in the ducts and portions of the dust collector can be substantially reduced by adhering to the manufacturer's recommendation to clean out the accumulations once a week. Before the inspection, Kelly Springfield had not been adhering to this requirement. Accordingly, we find that there were feasible measures to reduce the hazard.[5/]

Because all of the section 5(a)(1) elements have been established, we reverse the judge's decision and affirm the citation. We therefore must consider the penalty to be assessed. Because employees worked in the vicinity of the dust collectors, fires frequently occurred, and the harm that could result from an explosion could be severe, we consider

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5/ Measures are feasible if they materially reduce the hazard; it is not necessary for the Secretary to show that the hazard can be eliminated. Litton Systems, Inc., Ingalls Shipbuilding Div., 81 OSAHRC 101/C12, 10 BNA OSHC 1179, 1981 CCH OSHD ¶ 25,817 (No. 76-900, 1981), and cases cited therein.

The Secretary also suggested altering the grinding process to reduce sparking, installing explosion venting in the dust collectors, or removing the dust collectors from areas which employees frequent. While we do not rule on the feasibility of any of these measures, we note that Kelly Springfield must free its workplace of the hazard by any feasible means. Accordingly, Kelly Springfield must determine whether these additional means to reduce the hazard are also feasible.

the gravity of this violation to be high. Kelly Springfield is not a small employer and, although the company did take some steps to control fires in the dust collection systems, Kelly Springfield's efforts were incomplete and relatively simple measures remained to be taken. In view of this, we conclude that $810, the penalty proposed by the Secretary, is appropriate.

Accordingly, the decision of the judge vacating the citation is reversed. The citation alleging a violation of section 5(a)(1) is affirmed. A penalty of $810 is assessed. SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: AUG 27 1982

Kelly Springfield
No. 78-4555

ROWLAND, Chairman, dissenting:

I respectfully dissent. I agree with Judge Martin's determination that, on the basis of the evidence in this case, the Secretary of Labor did not establish recognition of the hazard. In my view, the majority incorrectly evaluates the substance and weight of the Secretary's evidence. Accordingly, I would affirm the judge's decision vacating the citation.

To establish the alleged section 5(a)(1) violation in this case, the Secretary must prove that the hazard of pressure build-up explosions from fires of accumulated rubber dust in a dust collection system such as the one used by Kelly Springfield was recognized, either by the tire manufacturing industry or by Kelly Springfield. See e.g., Cargill Inc., Nutrena Feed Division, 82 OSAHRC , 10 BNA OSHC 1398, 1399, 1982 CCH OSHD ¶ 25,935 at p. 32,484 (No. 78-5707, 1982). Judge Martin found that Kelly Springfield was not aware of the hazard and, although the Secretary argues otherwise on review, the majority in their decision does not overturn these findings.[6/] Instead, the majority finds

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6/ In my view, the judge correctly concluded that the Secretary did not prove that Kelly Springfield actually knew of the hazard. Two employees, Mr. Berryman and Mr. Pierce, asserted that they had observed damage caused by a prior explosion. However, they did not report to anyone that any explosion had occurred, and Mr. Barger, the manager of Kelly Springfield's engineering department, explained that the damage the employees had observed was caused by a malfunctioning fan, not an explosion. The judge implicitly credited the testimony of Mr. Barger and his implicit credibility determination is supported by the record. See e.g., Kus-tum Builders, Inc., 81 OSAHRC , 10 BNA OSHC 1128, 1130 n. 3, 1981 CCH OSHD ¶ 25,738 at p. 32,106 n. 3 (No. 76-2644, 1981) (judge's determinations concerning credibility and weight should not be disturbed on review when they are supported by the record). Accepting the judge's implicit credibility evaluation, I conclude that the judge correctly determined that the Secretary's evidence was insufficient to show actual recognition by Kelly Springfield.

that the tire manufacturing industry was aware of the hazard, relying on opinion testimony from a chemical engineer unfamiliar with the tire manufacturing industry and a regional sales manager of a company which sells dust collection systems to the tire manufacturing industry. The majority characterizes these witnesses as "safety experts familiar with the general workplace condition or practice," but discounts the opposing testimony from Kelly Springfield's plant manager, Kelly Springfield's engineering manager, and a Goodyear engineering manager, despite their superior knowledge and experience in the industry with dust collection systems such as Kelly Springfield's. Thus, the majority in this case ignores the fundamental principle that the weight to be accorded opinion testimony depends on, among other things, the witness's knowledge and experience of the subject matter and the reasoning with which his opinion is supported. See Kaiser Aluminum and Chemical Corp., OSHRC Docket No. 77-699 (July 30, 1982) (dissenting opinion) (expert testimony); Air-Kare Corp., 81 OSAHRC 98/A2, 10 BNA OSHC 1146, 1151-52, 1981 CCH OSHD ¶ 25,758 at pp. 32,179-80 (No. 77-1133, 1981) (dissenting opinion) (lay opinion testimony).

The Secretary presented the chemical engineer, Mr. Tarr, as an expert in his field, and Judge Martin permitted him to testify about recognition of an explosion hazard in this case provided that the Secretary elicited supporting knowledge and experience for the witness's expert opinions. Mr. Tarr was an engineering consultant specializing in designing air pollution abatement systems. Prior to becoming a consultant, Mr. Tarr was employed by the Texas Air Control Board where, among other things, he evaluated the toxic effects of chemical

carcinogens, the extent to which existing facilities complied with the Board's air pollution regulations, and special or unusual problems of air pollution. In connection with the assignment to special air pollution problems, Mr. Tarr investigated one explosion. However, the explosion resulted from the rupture of an ammonia pipeline between two plants in Texas and, from Mr. Tarr's description of the circumstances, it is apparent that this explosion did not involve processes or equipment in any way similar to this case. Mr. Tarr was familiar with various low-energy water scrubbers or dust collection systems, of which Kelly Springfield's is an example, but he frankly stated that "there are all different kinds of low-energy water scrubbers" and that he had "never seen one exactly like this particular one before." Mr. Tarr's visit to Kelly Springfield's Tyler, Texas plant for the Secretary in this case was the first time Mr. Tarr had any professional contact with the tire manufacturing industry. Accordingly, Mr. Tarr's opinons about the hazardous nature of Kelly Springfield's dust collection system and industry recognition of the hazard cannot be accorded much weight, for the witness was completely unable to describe any specific knowledge or experience qualifying him to give such opinions.

Not surprisingly, in view of this complete lack of specific knowledge and experience, Mr. Tarr was only able to testify about a general, textbook chemical engneering principle. Indeed, the majority acknowledges as much in saying that his testimony concerned only a "general principle on the causes of explosions." Moreover, Mr. Tarr recognized that whether an explosion occurs depends on more complex factors than the general principle he described takes into account, such as combustion rate, oxygen availability, ventilation capacity, and size of the

enclosed space. The witness thought that Kelly Springfield's dust collection system was hazardous, but only on the basis of his one-time, brief examination of it prior to testifying and only because there were recurring fires and dust accumulations in an unvented enclosed space. Obviously, Mr. Tarr was simply relying on the general principle which he had conceded did not take into account critical factors bearing on the actual existence of a hazard. Because Mr. Tarr was not familiar with the tire manufacturing industry or the dust collection system at Kelly Springfield's plant, and because Mr. Tarr's opinion about recognition of the hazard was founded only on a "general principle" on explosions, I conclude that Mr. Tarr's testimony is entitled to little weight.

The sales manager's testimony is no more reliable. This witness, Mr. Rutledge, sold dust collection systems to the tire manufacturing industry. Accordingly, he had had contact with the tire manufacturing industry for the purpose of satisfying its need for an efficient and affordable dust removal technology. Mr. Rutledge believed that, in this connection, he would have learned of any industry problems with explosions. However, as he conceded, the complaints from customers concerned mostly wear and tear and, although there had been a general problem with fires throughout the industry for a considerable time, he had only first learned of the fire problem lately, during this case. Thus, Mr. Rutledge had little real basis for giving any opinion about the industry's awareness of an explosion hazard from the dust collection systems it used. Moreover, Mr. Rutledge conceded that he was not an expert in fires and explosions, and that any en-

gineering problem with the dust collection systems would be handled by the engineering department of his company. He said that he simply described the problems to the engineers. Thus, Mr. Rutledge admitted that he did not have either the training or the experience to make recommendations about safety hazards or their abatement. Thus, the suggestion he gave in this case, on which the majority relies, about precautions against explosions can only be considered speculative. It is entitled to little weight as an indication of general recognition of an explosion hazard from recurring fires. See H.E. Wiese, Inc., 82 OSAHRC , 10 BNA OSHC 1499, 1510-11, 1982 CCH OSHD ¶ 25,985 at pp. 32,618-19 (No. 78-204, 1982) (dissenting opinion) (lay opinion not based on personal knowledge is not entitled to controlling weight), citing Ray Evers Welding Co. v. OSHRC, 625 F.2d 726, 733 (6th Cir. 1980). Moreover, in giving the testimony on which the majority relies, Mr. Rutledge was merely answering the Secretary's hypothetical cross-examination. He was asked, "If you have a circumstance where there [is] a history of fires inside a water scrubber and a known problem with low water levels, would you recommend the use of explosion panels or venting?" To this, Mr. Rutledge replied "yes" but he emphasized that, since he and his company are not experts in fire control, they would recommend consulting an expert in fire control "rather than become directly involved."

In contrast to the weak testimony on which the majority relies, there is the evidence of Mr. Borgerding, Kelly Springfield's plant manager, Mr. Barger, Kelly Springfield's engineering manager, and Mr. Woodling, Goodyear's engineering manager. Mr. Borgerding had 31 years

of experience in the tire manufacturing industry and, as a mechanical engineer, was a member of various professional industry associations. Mr. Borgerding testified that he never heard of an explosion and that the industry does not consider its rubber dust collection systems as presenting a hazard of explosions. Mr. Barger had 33 years of experience in the tire manufacturing industry and was familiar with dust collectors at other plants. He, too, had never heard of any explosions in the dust collection systems. Mr. Woodling was a mechanical engineer and a Goodyear section chief of engineering. He was a member of the Society of Mechanical Engineers in Akron, the center of the tire manufacturing industry where several plants of major tire companies are located. Mr. Woodling was completely familiar with dust collection systems of the type used by Kelly Springfield, and testified that their use is typical of the industry and that he never heard of an explosion hazard associated with them.

In light of the extensive experience of these three witnesses, I conclude that their testimony is dispositive. Contrary to what the majority says, their testimony does show that "the hazard of . . . explosions was not recognized by safety experts familiar with the causes of explosions and the type of dust collection system used by the tire manufacturing industry to collect rubber dust." Therefore, I agree with the judge's determination that the Secretary did not establish industry recognition of the hazard. Because the Secretary has not established a critical element of his charge, I would affirm the judge's decision vacating the section 5(a)(1) citation.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>KELLY SPRINGFIELD TIRE COMPANY<br><br>Respondent. | OSHRC DOCKET NO. 78-4555 |

APPEARANCES: Tracy Crawford, Esquire
Tyler, Texas
For the Respondent

Marigny A. Lanier, Esquire
Dallas, Texas
For the Complainant

DECISION AND ORDER

MARTIN, Judge:

This is a proceeding brought pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.) hereinafter referred to as the Act. Respondent filed a timely notice of contest to a citation issued on September 20, 1978, wherein respondent was charged with violating Section 5(a)(1) of the Act, commonly referred to as the general duty clause.[1/] A penalty of $810 was proposed by complainant.

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1/ Section 5(a)(1) of the Act provides as follows:

> "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

On May 12, 1978 an explosion took place in a dust collector at respondent's tire manufacturing plant in Tyler, Texas. Between May 12 and 15, 1978, representatives of the complainant conducted an inspection of respondent's plant which resulted in the issuance of the aforementioned citation. After several amendments, respondent was charged with failing to have a place of employment free from a recognized hazard that was causing or likely to cause death or serious physical harm to its employees in that:

> On or about May 12, 1978, at approximately 8:30 AM, the employer did not maintain and/or operate the number 4 Ventrijet dust collector system in a manner to insure that its employees were protected from the hazards of an explosion.

Following the filing of the notice of contest a complaint was filed by complainant and respondent, through its counsel, filed an answer generally denying the allegations of the complaint.[2/] Pursuant to notice, a formal hearing was held in Dallas, Texas on May 30th and 31st, 1979. Following the hearing briefs were filed by both parties.

In May 1978, respondent, Kelly Springfield Tire Co., was operating its tire manufacturing plant in Tyler on a 24 hour a day basis (three working shifts) with approximately 1500 employees. On May 12th shortly after 8:00 AM the number 4 Ventrijet dust collector exploded, blowing off the access doors and distorting the side walls of the dust collector located

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2/ The complaint did not describe the alleged violation - - instead the citation dated September 20, 1978 was incorporated by reference.

adjacent to an aisleway which is used as a walkway by employees (see photographs identified as complainant's exhibits 7-U, 7-V, and 7-W). Fortunately no employees were in the immediate vicinity of the dust collector at the time of the explosion. Just prior to the explosion a fire alarm sounded because of a fire in the duct leading from the number 11 rib buffer (see complainant's exhibit 7-B).

In the Tyler plant there are four Ventrijet dust collectors. The number 4 dust collector collects rubber dust or particles which have been ground off the tires in order to produce "white walls". This particular collector collects the rubber particles being ground off of the tires by the number 9, 10, and 11 rib buffers. The ducts from the three rib buffers lead into a main duct which goes to the collector, located some 60 feet away. The rubber dust (a typical sample of the rubber particles is contained in respondent's exhibit R-1) is sucked from the rib buffers by an air current created by an exhaust fan at the top of the dust collector. The purpose of the collector is to separate the dust from the air. The rubber dust falls into a water tank and the air is vented out through the roof. The rubber dust is warm and sticky when it is ground off of the tires and it frequently catches fire in the ducts because of the heat and friction from the grinding stone. A review of complainant's exhibit C-5 shows that 67 fires have been reported in the ducts leading to the number 2 and number 4 dust collectors between November, 1964 and October, 1976. These fire reports reveal no evidence of an explosion in either dust collector.

The dust collection system has been referred to as a confined or enclosed air space however there are openings at the rib buffer stations and at the top of the dust collector where the air is expelled through a vent in the roof.

The Ventrijet dust collector has been described as a low energy wet scrubber. In the collector there are two compartments (a clean air side and a dust side) divided by a partition called a water baffle. Operating water rises above the venturi tubes. Suction from the fan creates turbulence in the water on the dust side as it draws water through the venturi tubes. The rubber dust is stripped from the air stream and falls to the bottom of the collector. The clean air is then expelled by the exhaust fan through a vent pipe to the roof.

The water level in the collector should remain at a constant level in order to function efficiently. The evidence indicates that respondent has had some difficulties with the water control mechanism. When the water level is too low or too high the suction or movement of air through the ducts may be affected. On May 12th one of respondent's maintenance men, Mr. Berryman, was directed to check on the water level and found that it was below the water baffle. Apparently the automatic water control valve was not functioning properly so he opened a manual water valve. In order to visually check the water level he proceeded to open an access door. Shortly after closing the access door he heard the fire alarm go off at the number 9 rib buffer. After he walked away the dust collector exploded.

Following the explosion respondent's fire chief, Mr. Arnold, listed as the probable cause "low water level" in the number 4 dust collector. At 7:43 AM a fire in the number 11 rib buffer duct was extinguished. At around 8:05 AM and about the time of the explosion a fire was noticed in the number 9 rib buffer duct. Chief Arnold felt that the low water level caused a loss of vacuum on the number 9, 10, and 11 rib buffers and that gases accumulated in the dust collector when it was opened to check on the low water level and that there was still fire in the duct from the number 9 rib buffer which was drawn into the dust collector causing a spontaneous combustion (complainant's exhibit C-6).

The issue to be determined is whether the respondent failed to maintain its dust collecting system in a manner so as to protect its employeees from a recognized hazard, to wit, an explosion in its number 4 Ventrijet dust collecting system. Complainant contends that respondent was aware of the hazard of an explosion because it knew of the existence of many fires in the ducts leading from the rib buffers to the dust collectors and took no measures to remove the source of the fires and because any fire in an enclosed space has the potential for an explosion. Respondent's position is that the fires in the collecting ducts are a common problem in the operation of rib buffers; that the tire manufacturing industry does not have any knowledge of a potential explosion hazard regarding the operation of this type of dust collecting system being used in conjunction with rib buffers; and further that respondent itself had no knowledge of an explosion hazard being present in its rib buffing and dust collecting system.

In order to establish a violation of Section 5(a)(1) of the Act, the complainant is required to prove (1) that the employer failed to render its workplace "free" of a hazard which was (2) recognized, and (3) causing or likely to cause death or serious physical harm to its employees.

The testimony of all witnesses appearing in this case and the exhibits introduced by the parties support a finding that respondent's dust collecting system has been plagued with fires in the ducts leading from the rib buffers and the main ducts to the dust collectors and an occasional fire in the collector itself. Some 67 fires were made a matter of record (see complainant's exhibit C-5) between November, 1964 and October, 1976 nearly all of which were in the number 2 collecting system. Only 6 of the fires were reported in the number 4 collecting system, ranging from April, 1975 through September, 1976.[3/] No mention was made of any explosion, however, the reports generally blamed the fires on rubber dust build up in the ducts, coupled with the heat and friction generated by the rib grinders or buffers.

Mr. James N. Tarr, a chemical engineer, called by complainant testified that he had examined the dust collecting system at respondent's Tyler plant, which he stated is similar to other water scrubber systems in general use. Because of the number of fires in respondent's plant between the dates of 1964 and 1976, Mr. Tarr felt that fires in an enclosed system are hazardous

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3/ The four ventrijet dust collectors in respondent's plant were all manufactured by the Pangborn Corporation and are used by other tire manufacturers. The Pangborn Corporation was acquired several years ago by the Carborundum Company.

and that a potential for an explosion exists. He testified that an accumulation of rubber particles in the ducts are sufficient to cause an explosion when the right proportion of oxygen is present and an ignition source is introduced within the enclosed space. He advised that it is common knowledge that where there is fuel, an ignition source and oxygen in an enclosed area an explosion is possible.

Mr. Rutledge, an engineer and regional sales manager for the Carborundum Company, the present manufacturer of the ventrijet collector, testified that wet scrubber devices such as those manufactured by his employer are considered a fire safe device in that the dust particles collected are mixed with water streams. Until recently he had not heard of any complaints as to fires or explosions in the dust collecting system. He was not familiar with the rate of combustion of rubber materials but stated that he would be concerned if there was a history of repeated fires and low water levels (Tr. 261). Prior to the hearing Mr. Rutledge inspected the dust collecting system of respondent and found it to be functioning properly. He was made aware of the fire reports prepared by the fire chief but stated that he did not believe it was of great concern since a wet scrubbing device is an effective fire extinguisher.

Mr. James C. Woodling, head of respondent's mechanical section in the corporate engineering department, testified that fires are common in the rib buffing phase of the tire manufacturing industry and appeared to be more frequent in the case of radial tires. While he would not anticipate fires occurring he stated that they are a continuing problem and that

"we try to deal with it on a day to day basis", trying to reduce the possibility of fires. He expressed no knowledge of explosions in connection with the dust collecting system, with the exception of the Tyler explosion. He advised that the failure to properly maintain the system could have some relevancy toward an explosion potential. (Tr. 282-287). He was unable to account for the explosion which occurred on May 12th and while describing the dust collecting system as an enclosed one, pointed out the several different openings in the system and the fact that the air removal capacity (14,000 cubic feet per minute) is actually oversized and any explosive gasses should be diluted.

Mr. William Barger, manager of respondent's mechanical engineering department in Tyler, testified that he had no reason to believe that an explosion potential was present on or about May 12th. He stated that he was never advised or made aware of any prior explosion in a ventrijet dust collector, although he admitted that fires do occur in the duct work leading from the rib buffers. He did recall an occasion when a fan disintegrated, damaging the building, overhead steel work and distorting pipes (Tr. 213). He attributed it to an over-speeding condition.

Mr. Barger testified that he had undertaken several studies as to the cause of the fires in the rib buffing operation and had re-designed the duct work in 1975 (Tr. 329). He was not aware of any fires after 1976 with the exception of the May 12th fires and explosion.

Mr. James Borgerding, respondent's plant manager who was present on the day of the explosion, testified as to the way the rib buffers grind the

tires to turn out "white walls". The major problem relates to the operators grinding the tires at an excessive rate causing heat, friction and occasionally sparks. He was not aware of fires in the dust collector itself but admitted that it might be possible. He recalled that an investigation was made following the explosion but that the exact cause could not be determined. He stated that a water level control failed to function properly and that it might have affected the efficiency of the system. He advised that he was not aware of any explosion hazard associated with the dust collector.

Mr. Ray Jackson, a staff mechanical engineer, testified that on the day of the explosion he was informed that the water level in the number 4 dust collector was low. He was not personally aware of any previous fires in the dust collector but stated that he had heard that it may have happened. He stated that he was formerly a member of the Safety Committee and that no report had ever been made regarding any explosion in the number 2 dust collector in 1975.

Mr. Leroy Berryman, maintenance technician, testified that Mr. Jackson instructed him to check on the water level just before the explosion and that he found it to be low. He indicated that the company had had considerable trouble with water control valves and solenoid failures. Mr. Berryman has observed fires in the ducts, which were caused by the rib buffing operators. He stated that rubber dust or particles would build up in the ducts and that they were not always cleaned out every week. Although not aware of the specific date (1975) he recalled what he thought had been an

explosion (he was not on duty at the time) in the number 2 dust collector when the doors were distorted and the fan came apart. He stated that although the water level was low in the dust collector on various occasions and maintenance was not always done according to the manufacturer's recommendations, he personally checked the water levels everyday on his shift. (Tr. 158, 160). He testified that before the explosion the ducts had as much as 4 to 6 inches of rubber dust but that no problems were encountered. He admitted that some specifications were not always accomplished on a weekly basis. He was unable to state whether any of the lax maintenance items had any bearing upon the explosion.

Mr. James L. Pierce, a maintenance electrician, testified regarding problems with an automatic water control, a solenoid valve and a probe. Although Mr. Pierce was not present when the alleged explosion took place in the number 2 dust collector in August of 1975, he was there on the following day and discovered that the fan had disintegrated, the doors on the dust collector were distorted and the dome had bulged out. He stated that it had the appearance of an explosion because of the distorted doors and bent angle iron supports. Although he stated that the doors were "blown off the hinges" he later testified that he did not mean to say that. He advised that the metal doors were straightened out by Mr. Berryman.

After carefully considering the entire record it is concluded that complainant has not established by a preponderance of the reliable and probative evidence that respondent failed to render its workplace free of

a recognized hazard which was causing or likely to cause death or serious physical harm to its employees on or about May 12, 1978. No evidence has been presented to show that the tire manufacturing industry has been made aware of an explosion hazard in connection with the operation of the rib buffers and the ventrijet dust collectors. In order to prove a serious violation under the Act it must be shown that there is a substantial probability that death or serious physical harm would result from the operation or process in question unless the employer did not or could not with the exercise of reasonable diligence know of the presence of the hazard.[4/]

In order to show knowledge of an explosion hazard on the part of respondent the testimony of Mr. Berryman and Mr. Pierce was presented as to an alleged explosion in the number 2 dust collector three years earlier. Neither of them actually observed any explosion and there is no indication that respondent's officials were ever made aware of any explosion in a dust collector prior to the May 12th explosion. Both of the employees admitted that metal can warp and become distorted in a fire. A review of

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4/ Section 17(k) of the Act provides as follows:

> For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adoped or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

complainant's exhibit C-5 fails to reveal an explosion report in connection with dust collector number 2 during 1975 or at any other time.

Another matter to be considered is the effect of the long history of fires in the dust collecting system and whether the occurence of fires associated with the rib buffing process put respondent on notice that the dust collector itself was likely to explode. Admittedly fires can trigger an explosion in an enclosed air space given the right amount of oxygen and fuel. The rubber dust or particles can become combustible. The matter of fires in the ducts leading from the rib buffers have been for some time a continuing problem for respondent's fire brigade who have been able to extinguish the blazes, usually within a few minutes.

Complainant has stressed the recurring problem which respondent has had with the water level control and its failure to make certain weekly checks on various maintenance items. Mr. Berryman, however, testified that he checked the water levels daily on his shift. While fires in the ducts can have serious consequences the citation issued on September 20, 1978 does not relate to fire hazards - - only explosion hazards. Of course, as complainant contends a fire in the duct might become an ignition source for an explosion. It should be pointed out however, that the fires were never as frequent in the number 4 dust collecting system as they have been in the number 2 collecting system. As a matter of fact for a period of some 18 months prior to the May 12th explosion <u>no fires were reported in the rib buffing ducts, the main duct, or the dust collector itself</u>. (Underlining supplied). Although respondent was perhaps lax in complying with

certain maintenance procedures it apparently did not result in any fires during the 18 months preceeding the explosion. There is no evidence to show the respondent's management officials were aware that its maintenance personnel failed to make weekly checks as recommended by the manufacturer or that the number 4 ventrijet dust collector was operated in such a manner as to present an explosion hazard to its employees.[5/] Although problems with the water control valve and accumulations of rubber dust were maintenance items stressed by complainant as contributing to the fires in the Tyler plant, the fire reports maintained by respondent revealed that the dust collecting system has been free of fires for 18 months prior to the explosion.

Based upon the record as a whole it is concluded that respondent did not knowingly subject its employees to an explosion hazard on May 12, 1978.

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5/ At this point it should be noted that complainant's enforcement officials were vacillating for several months after the May 12th explosion as to what recognized hazard to cite. On June 9th the first citation was issued and it was apparently intended to cover the "waterfront". It charged respondent with failing to protect its workers from fire and explosions by locating the dust collector "out of doors or in a detached room, or specifically engineered for indoor installation, or provide the collector with explosion venting to the outside". The last alternative was "by any other means/methods to protect its employees." (Underlining supplied). The June 20th citation amended the previous citation with the comment, "deleted pending further investigation". On August 30th the third citation was issued and alleged that the recognized hazard was respondent's failure to maintain, repair or remove the dust collector from service which was known to be operating with a defective automatic water control valve.

Accordingly it is ORDERED that the citation be and the same is hereby vacated along with the proposed penalty.

So ORDERED at Dallas, Texas this 17th day of March 1980.

Henry F. Martin Jr

HENRY F. MARTIN, JR.
JUDGE

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

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UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

August 30, 1982

**IN REFERENCE TO SECRETARY OF LABOR v.**

General Motors Corporation, Central Foundries Div.

OSHRC DOCKET NO. 77-3790

**NOTICE IS HEREBY GIVEN TO THE FOLLOWING:**

OF COMMISSION DECISION

To wit: See attached.

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Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 77-3790 |
| GENERAL MOTORS CORPORATION, CENTRAL FOUNDRY DIVISION, | : | |
| Respondent. | : | |

## DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Judge Vernon Riehl is before the Commission pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Judge Riehl found that General Motors Corporation, Central Foundry Division ("General Motors") had violated section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1),[1/] by failing to properly install and maintain a Lincoln welder and by failing to deenergize the welder before changing the polarity of the machine. We affirm Judge Riehl's decision but for reasons different than those the judge gave.

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1/ Section 5(a)(1) provides:

> Sec. 5.(a) Each employer -- (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

I

The case involves a citation issued following the accidental electrocution of a General Motors employee. The incident occurred while the employee was attempting to change the polarity of a Lincoln Welder. The Lincoln Welder, a 300-pound upright motor generator manual arc welder, was located under a workbench close to a wall in General Motors' Pattern Shop. The current and voltage controls were on the front of the welder base. The input to the welder was alternating current at 440 volts. This drove a motor generator, which produced the electrical power used for welding. The output of the motor generator was direct current at a maximum of 30 volts. This power was supplied to the welding electrodes and leads through studs on the back corners of the welder base. To change the polarity of the leads, an employee had to remove both leads and reverse their connection to the studs. Because of the welder's position, this required the employee to reach underneath the workbench around to the back of the welder. An approximately 10-foot long, taut flexible cable, plugged into an outlet about 10 feet away, provided the 440-volt input to the welder.

While the employee was attempting to change the polarity of the welding leads,[2/] he apparently put pressure on the 440-volt input cable of the welder. The pressure was sufficient to pull the cable through the strain release connector, a device on the left side of the welder

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2/ A report compiled by General Motors after the incident indicates that the employee was experiencing difficulty in obtaining the proper current to perform a particular welding job. Apparently, he believed that reversing the polarity would assist in solving this problem.

through which the cable entered the welder casing. The cable was clamped to the strain release connector to prevent the cable from being pulled out of the welder casing. When the cable pulled loose from the strain release connector, a frayed wire inside the cable was exposed. The employee apparently contacted the exposed wire and was electrocuted. Before the incident, the frayed wire could not be seen by simply looking at the machine.

The Lincoln welder had been used in General Motors' pattern shop for the past fifteen years. The welder received maintenance when it malfunctioned but had not required maintenance in the six months prior to the electrocution. Although there was no routine maintenance program for this machine, operators were instructed to perform a visual check before each use and to report any signs of wear or abuse. Six months before the accident, employees had complained several times that the welder was not maintaining a steady heat supply. An electrician was called to fix the welder. Whether the electrician found anything wrong is not clear but from then until the time of the accident, the welder operated without incident.

General Motors instructed its employees to turn off the switch controlling the welder output voltage whenever they changed the polarity of the welding leads. Employees were not, however, required to deenergize the entire welder by unplugging it. Thus, during the change in polarity, the 440-volt input cable, and other machine parts inside the welder casing, remained energized.

II

At the hearing, the Secretary argued that General Motors had violated section 5(a)(1) of the Act by the manner in which it had serviced

and maintained the Lincoln Welder.[3/] The Secretary noted that the Lincoln Welder's maintenance manual suggested eight possible corrective measures to take when the welder would not maintain heat. According to the Secretary, if General Motors had followed these procedures, the frayed cable wire in the welder would have been discovered and the accident avoided. Generally, the Secretary believed that General Motors did not have a preventive maintenance program sufficiently rigorous to uncover defects in the welder. Also, the Secretary believed the employee should have been required to deenergize the machine by pulling the plug out of the outlet before changing the polarity. According to the Secretary, this is standard procedure in the industry. In the Secretary's view, if the welder had been completely deenergized, the employee would not have been electrocuted.

General Motors argued that the frayed conductor wire which caused the accident was a latent defect and no preventive maintenance program could have discovered the problem. The defect was only discovered when the connector was dismantled and the industry did not normally perform this kind of preventive maintenance. General Motors also countered that the maintenance manual's instructions involved the low voltage generator side of the welder and not the 440-volt side where the de-

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3/ In the citation, the Secretary alleged that General Motors violated 29 C.F.R. § 1910.309(a) and §§ 400-4 and 400-10 of the National Electrical Code because the flexible cord was too taut and permanent wiring should have been used instead of the flexible cord. However, the citation was amended at the pre-hearing conference to allege a violation of section 5(a)(1) in the alternative. The judge found that General Motors did not violate the cited standards, and that issue is not before us.

fect was located. Thus, even if General Motors had followed the manual, it would not have discovered the defect. Finally, General Motors argued that, while it could have deenergized the entire welder in order to change its polarity, General Motors did not believe this was necessary. Employees were instructed to turn off the welder and no other plant or industry required employees to deenergize or unplug the entire welder when changing the polarity.

Judge Riehl found General Motors in violation of section 5(a)(1).[5/] General Motors petitioned for review, repeating the arguments it made

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5/ Although Judge Riehl found only one serious violation of section 5(a)(1), his discussion suggests several theories of the violation. Judge Riehl found that,

> The preponderance of the credible evidence of record establishes that Respondent had an improper or inadequate preventive maintenance program.
>
> Respondent also permitted a hazard to exist on the Lincoln Welder in question by permitting a "tautness" of the cable for sometime prior to and up to the death of Respondent's employee. Still another known hazard that Respondent either knew or should have known of was that they failed to have an adequate lock-out procedure; this act of omission constituted the hazard or failure to address the recognized hazard.
>
> Respondent failed to properly train its maintenance employees so that they would deal with such recognized hazards as malfunctioning of the welder prior to the accident; that they failed to take the additional ten minutes to check out all sources of electrical power which would include the plug in, thereby creating the hazard which killed Respondent's employee.
>
> Respondent failed to provide the inspection and preventive maintenance procedures, having a degree of

(continued on next page)

to Judge Riehl. Commissioner Cottine directed review on all of the issues raised by the petition including the following:

> Whether the administrative law judge erred in finding the Respondent in violation of § 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1), by failing to inquire into conditions associated with the operation of the welder that could require implementation of preventative maintenance procedures to assure safe operation.

III

To establish a section 5(a)(1) violation, the Secretary must show that an employer failed to render its workplace free from a hazard that is recognized and likely to cause death or serious physical harm to its employees. See Little Beaver Creek Ranches, Inc., No. 77-2096 (June 30, 1982). The Secretary must also demonstrate that there were feasible means available to abate the hazard. Id.; National Realty and Construction Co. v. OSHRC, 489 F.2d 1257, 1268 (D.C. Cir. 1973).

In this case, most of the evidence and arguments about recognition of the hazard concern the foreseeability of the particular incident as it occurred. For example, the parties extensively litigated whether General Motors was aware of the defect in the welder. The Commission has held, however, that it is the hazard, not the specific incident

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5/ (continued)

> detail, which would discover hazards in the equipment in use by their employees.
>
> Respondent also had an "inappropriate strain release connector" condition concerning the Lincoln Welder involved in the fatality. A lack of preventive maintenance caused the connection to pull loose, exposing the electrically charged wire which contacted Respondent's deceased employee and electrocuted him.

resulting in injury, that is the relevant consideration in determining the existence of a recognized hazard. See Kansas City Power & Light Co., 82 OSAHRC , 10 BNA OSHC 1417, 1982 CCH OSHD ¶ 25,957 (No. 76-5255, 1982). More specifically, a recognized hazard is a condition or practice in the workplace that is known to be hazardous by either the industry in general or the employer in particular. Kansas City Power & Light Co., supra; Continental Oil Co. v. OSHRC, 630 F.2d 446, 448 (6th Cir. 1980), cert. denied, 101 S.Ct. 1481 (March 2, 1981); Empire Detroit Steel Division, Detroit Steel Corp. v. OSHRC, 579 F.2d 378, 383 (6th Cir. 1978). Although they focused on the specific incident, the parties also introduced evidence about general awareness of risks associated with energized electrical parts. General Motors' electrical engineering consultant testified that in general vibrations can damage an electrical wire. He also testified about electrical malfunctions such as overheating. There was also evidence about general awareness of the risks of servicing energized electrical equipment. Thus, the hazard in this case is electric shock by contact with energized electrical parts during the servicing of equipment.

This hazard is recognized as a matter of common knowledge, as this record shows. General Motors required employees to completely deenergize and lockout electrical equipment when maintenance work was being performed on the equipment. Also, General Motors required employees to partially deenergize welders before changing the polarity. Witnesses for both the Secretary and General Motors testified that deenergization procedures were generally followed to prevent accidental shock and electrocution.

The workplace was not free of the hazard. Defects in electrical equipment may present the hazard of shock or electrocution as long as

some parts are energized. As the record in this case establishes, strain release connectors are not failsafe, and the insulation on wiring can wear out. Accordingly, to free the workplace of the hazard, such equipment must be deenergized whenever it undergoes servicing or modification. Although General Motors required employees to completely deenergize and lockout electrical equipment during maintenance, only partial deenergization was required before changing the polarity on the welder. Because General Motors did not require total deenergization when changing the polarity of the welder, it failed to free its workplace of the recognized hazard. Furthermore, as the record clearly indicates, the likely result of an accident would be either serious injury or death. Contact with electrical parts energized at 440 volts is likely to cause death or serious physical harm.

Moreover, the feasibility of abatement in this case is clear. Deenergization can be achieved by merely pulling the plug. General Motors argues that no other member of its industry takes such precautions. However, as this Commission has frequently noted, abatement requirements are based on feasibility and an abatement order may require practices that are of a higher standard than the industry considers appropriate. Kansas City Power & Light Co., supra; Beaird-Poulan, A Division of Emerson Electric Co., supra. Since the fatal incident in this case, General Motors has instituted complete deenergization procedures whenever the polarity is changed on a welder.

Because all of the elements of a section 5(a)(1) violation are established, we affirm Judge Riehl's decision insofar as he found General Motors in violation of section 5(a)(1) for failing to deenergize

the welder when changing its polarity.[7/] A penalty of $600 is assessed.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: AUG 30 1982

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7/ Because we have found a § 5(a)(1) violation on another ground, we do not need to consider whether the judge was correct in finding that General Motors' preventive maintenance was inadequate.

ROWLAND, Commissioner, dissenting:

I dissent from the majority's determination that General Motors violated section 5(a)(1). The Secretary did not establish that it is a recognized hazard to change the polarity of welding leads on a "DC" arc welder when the welder's generator is deenergized. Nor did the Secretary show that General Motors's preventive maintenance was inadequate. Accordingly, I would vacate the section 5(a)(1) charge.

In concluding that the hazard is "electrical shock by contact with energized electrical parts during the servicing of equipment", the majority asserts that the parties' evidence concerned the "general awareness of risks" - such as "vibrations" and "overheating" - associated with electrical equipment. 8/ Throughout the procedings however, both the Secretary and General Motors focused on the specific operation of reversing the polarity of the leads on the welder. For example, the Secretary's primary witness, Mr. Bode, explained:

> [T]he most serious deficiency in this case and most likely the cause of death . . . is the power to that cable [supplying the alternating current] at the time this gentleman was <u>changing polarity</u>. . . . He should have turned off and locked out or unplugged the power . . . before attempting to <u>change polarity</u>. (Emphasis added).

As evidenced by Mr. Bode's testimony, the Secretary contended that reversing the polarity of the leads presented a danger of potential electrical shock if performed when only the generator, rather than the entire welder, was deenergized. Similarly, the testimony elicited by General Motors was directed toward changing the leads' polarity after de-activating the "generator side" or "DC side" of the machine.

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8/ I note that contrary to the majority's account of the "apparent" cause of the accident, the parties agreed that the exact circumstances of the accident were unknown. Furthermore, I cannot accept the majority's speculative theory that the employee contacted an "exposed" frayed wire, particularly because the wire remained <u>inside</u> the strain release connector after the accident. Indeed, no one discovered the frayed wire until General Motors completely dismantled the connector during its accident investigation.

Since the Commission's definition of the hazard must comport with the legal theory under which the parties tried the alleged 5(a)(1) violation, I conclude that the hazard should be described as potential electrical shock while changing the polarity of welding leads when only the welder's generator is deenergized. United States Steel Corp., 82 OSHRC 35/A2, 10 BNA OSHC 1752, 1755-56, 1982 CCH OSHD ¶ p. (No. 77-1/96, 1982). See National Realty & Construction Co. v. OSHRC, 489 F.2d 1257, 1267, n.40 (D.C. Cir. 1973); Kansas City Power & Light Co., 82 OSAHRC 13/A2, 10 BNA OSHC 1417, 1424, 1982 CCH OSHD ¶25,957, p. 32,542, (No. 76-5255, 1982) (dissenting opinion).

In an effort to establish industry recognition, Mr. Bode and Mr. Segall testified on behalf of the Secretary. However, Mr. Bode's testimony was based mainly on his experience with a different industry, the airline industry. Mr. Segall, the Secretary's expert, merely opined that a lockout "while working on electrical equipment" is "a safe procedure." He did not assert that changing the polarity of the leads - with the generator deenergized - is a recognized hazard warranting a total lockout in addition to the protection afforded by deactivation of the generator. Significantly, both Mr. Bode and Mr. Segall conceded that it is not hazardous to reverse the polarity of the welder's leads if the generator is first turned off. Moreover, Mr. Schifo, General Motor's plant engineer in charge of the Engineering Department, explained without contradiction that neither General Motors nor the industry recognized the hazard of potential electrocution while reversing the polarity of welding leads when the generator is deenergized.

The majority nevertheless concludes that the hazard was recognized because General Motors required its electricians to completely deenergize the welder during maintenance. In my view, this practice does not show recognition because an electrician performing repairs and maintenance examines the internal mechanisms of the

welding machine whereas a welding operator changing the polarity of the leads only contacts the outside of the machine and has no occasion to contact the internal wiring under normal circumstances. In light of Mr. Bode's and Mr. Segall's concessions, and in light of Mr. Schifo's testimony, I conclude that the record does not show the hazard was recognized, either by the industry or by General Motors. See, e.g., Cargill Inc., Nutrena Feed Division, 82 OSAHRC 11/A2, 10 BNA OSHC 1398, 1399, 1982 CCH OSHD ¶25,935, p. 32,484 (No. 78-5707, 1982) (recognition of the hazard, either by the employer or the employer's industry, is an element of the Secretary's prima facie case in proving a violation of the general duty clause.)

Furthermore, the record does not support the Secretary's contention that General Motor's preventive maintenance was inadequate. With respect to preventive maintenance, the Secretary was concerned about an alleged hazard involving a latent defect: the potential electrocution caused by inadvertently pulling a non-visible frayed electrical wire from its location inside the strain release connector, which connects the alternating current cable to the welder, while changing the polarity of the leads on a "DC" arc welder. It is undisputed that a frayed wire inside the strain release connector could not be visually observed and could not be detected by General Motor's maintenance procedures. Moreover, a preventive maintenance program which followed the manufacturer's instructions would not have disclosed a frayed wire in the strain release connector because the manufacturer's instructions pertained only to the "generator side" of the welder, not the "AC side" where the strain release connector and power cable were located. There is no evidence that General Motors should have perceived the need for additional maintenance procedures. Indeed, the record suggests that a power cable and strain release mechanism can never be rendered fail safe, regardless of the type of connector, the tautness of the power cable, or the maintenance procedures followed. See Jones & Laughlin

Steel Corp., 82 OSAHRC / , 10 BNA OSHC 1778, 1782, 1982 CCH OSHD ¶26,128, p. 32,887 (No. 76-2636, 1982) (an employer's duty under section 5(a)(1) is to free its workplace - to the extent feasible - of recognized hazards.) As the Court of Appeals for the D.C. Circuit aptly explained: "Congress quite clearly did not intend the general duty clause to impose strict liability: The duty was to be an achievable one." (footnote deleted). National Realty & Construction Co. v. OSHRC, supra, pp. 1265-1266. Because the record demonstrates that it was not possible to detect or prevent the occurrence of a non-visible, frayed wire inside a strain release connector, I conclude that the Secretary failed to show what further measures General Motors should have taken to render its workplace free from the asserted hazard associated with General Motor's allegedly inadequate preventive maintenance. Therefore, I would vacate the 5(a)(1) allegation.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant<br><br>v.<br><br>GENERAL MOTORS CORPORATION,<br>a Corporation,<br>CENTRAL FOUNDRY DIVISION,<br><br>Respondent | DECISION AND ORDER<br>OSHRC DOCKET No. 77-3790 |

APPEARANCES: HELEN SCHUITMAKER, Esquire, U. S. Department of Labor, Office of the Solicitor, Chicago, Illinois
For the Complainant

WALLETT BANCROFT ROGERS, Esquire, General Motors Corporation, Detroit, Michigan
For the Respondent

STATEMENT OF CASE

Vernon Riehl, Judge, OSHRC

This is a proceeding pursuant to section 10 of the Occupational Safety and Health Act of 1970 contesting a citation issued by the complainant against the respondent under the authority vested in the complainant by section 9(a) of that Act. The citation alleged that an inspection of a workplace under the ownership, operation and control of the respondent revealed the existence of workplace conditions that violated section 5(a)(2) of the Act for the reason that these conditions failed to comply with certain

occupational safety and health standards promulgated by the Secretary of Labor pursuant to section 6 thereof.

The citation alleges that the violations resulted from a failure to comply with standards promulgated by publication in the Federal Register.

In the alternative the complainant in the first part of the hearing amended his complaint to include a 5(a)(1) type of violation.

A description of the alleged violations contained in said citation states:

> CITATION NUMBER 1, SERIOUS
> 29 CFR 1910.309(a), Item 1A
> Section 400-4, National Electrical Code, NFPA 70-1971, as adopted by 29 CFR 1910.309(a): Flexible cord(s), in the following locations, were used in a prohibited manner:
>
> 29 CFR 1910.309(a), Item 1B
> Section 400-10, National Electrical Code, NFPA 70-1971, as adopted by 29 CFR 1910.309(a): Flexible cord(s) were not connected to device(s) and to fitting(s) that tension would not be transmitted to joint(s) or terminal screw(s):
>
> On the east side of pattern shop in the welder's booth, flexible cord was used in lieu of permanent wiring to the Lincoln Welder (type SAE J V440 AMP 16) which had been in the same location for approximately 15 years and not used in a portable manner. The cord at its fitting was pulled from its terminal. Hazard: shock.

Respondent has submitted a thorough 109 page brief. The complainant has elected not to submit a brief.

As mentioned in the respondent's brief the complainant relies in large part upon the "improper or inadequate (preventive) maintenance" theory. Explicit provisions of the National Electric Code of 1971 ("NEC") say nothing about electrical maintenance and contain no requirements in that regard.

Complainant also relies upon the "tautness" theory as part of its 5(a)(1) claim. This theory is that respondent caused the Lincoln Arc Welder to be installed in such a manner that there was no slack in its power cable, a four-conductor flexible cord.

A third theory is the "impermissible use of flexible cord".

A fourth theory is "impermissible use of flexible cord on a so-called stationary "permanent electrical installation".

Still another part of the 5(a)(1) case is that respondent was alleged to not have an adequate lock-out procedure, and this alleged act or omission constituted a hazard or a failure to address a recognized hazard.

A sixth contention was that respondent's welder was malfunctioning <u>immediately</u> prior to the accident (failing to generate sufficient heat at the DC welding arc) and that respondent's maintenance electricians did nothing to alleviate the problem, by completely fixing what was wrong.

It is also contended that had respondent provided the kind of inspection and preventive maintenance, having the degree of detail suggested by OSHA, the latent defect or defects which caused the accident would have been discovered, and the accident would not

have occurred.

The complainant also alleges an "inappropriate strain relief connector" theory. This theory is that the strain connector which respondent employed was "inappropriate" because its grip was broken by some unknown level of force that was apparently applied to it.

The last theory of complainant is that respondent's use of two clamps or clips to hold the power cord of the welder (a flexible cord) up off the floor for safety reasons, was barred or proscribed by NEC Article 400-4(1) or (4).

DISCUSSION

A preponderance of the credible, probative evidence of record establishes a violation by respondent of the 5(a)(1) provision of the law.

The record does not establish a violation of 29 CFR 1910. 309(a) NFPA 70-1971, section 400.10, or any other section of the electrical code.

The electrical code is quiet vague insofar as situations in the instant case. We will discuss later the testimony of Ben Z. Segall, respondent's expert witness. Mr. Segall was and is one of the members of the committee that wrote the code. On the basis of his testimony we have concluded that the code does not cover the instant situation. However, Mr. Segall in his testimony, coupled with the testimony of Donald Heitman, Dale Shields, Wilfred Haskings, Joseph Body, James Schifo, James Helmholtz and Donald Barnes, establishes a violation of the 5(a)(1) section.

Our decision is not only bottomed on the knowledge of an existing hazard and failure to correct same, it is heavily dependent upon the preventive maintenance failure on respondent's part to maintain a safe workplace.

Preventive maintenance is a part of providing a safe workplace. It is necessary to continuously maintain a workplace in a safe condition. If it is not done, it can become unsafe, and a hazard.

Whether or not respondent used sufficient diligence in its preventive maintenance program to correct and abate dangerous conditions arising out of continuous use, and wearing out of equipment to the point where an unsafe work condition occurs, is a matter of fact to be judged on each cited hazardous condition in the workplace.

We will not attempt to set forth all of the testimony bearing one way or another on the issue of violation but we use selected evidence as typical of the total substantial credible evidence of record.

Evidence substantiating the 5(a)(1) violation includes not only inadequate preventive maintenance, but specifically the evidence relating to the tautness condition of the Lincoln Arc Welder, failure to have an adequate lockout procedure effectively communicated to the electrical maintenance employees, which omission constitutes a hazard, and failure to address a recognized hazard. Also the evidence that respondent's welder was malfunctioning

immediately prior to the accident (failing to generate sufficient heat at the DC Welding Arc) and that respondent's maintenance electricians were not sufficiently advised by management to alleviate the problem by completely fixing what was wrong.

Had respondent had the kind of inspection and preventive maintenance, having the degree of detail suggested by OSHA, the latent defect or defects which caused the accident would have been discovered and the accident would not have occurred.

The evidence also establishes that the strain connector which respondent employed was inappropriate, because its grip was broken by some unknown level of force, which was apparently applied to it, and it had not been adequately inspected for a considerable length of period prior to the employee's death. This part of the evidence in combination with the preceeding establishes a 5(a)(1) violation.

It is generally recognized in all industries that there must be proper preventive maintenance to keep equipment in not only proper running condition, but in safe running condition and use.

Complainant's basic theory was that effective maintenance is essential to the proper functioning of the restraining device, in that improper maintenance aggravated the condition caused by the fixed wiring that was maintained in such a taut condition, as set forth in the evidence (T. 41).

Donald Heitman, compliance officer for the Secretary, testified that he made an inspection of respondent's workplace following a fatality of respondent's employee. Respondent's employee,

Steve Repasy, had been electrocuted while in the course of doing a welding operation. Donald Barnes, safety director for respondent, and Donald Wilson, union steward, accompanied the compliance officer on the walkaround.

The welder's power cable was a flexible cable, approximately 10 feet long, it had a disconnect attachment at one end, and it went into the piece of equipment on the left-hand side of the welder on the side that faced the wall of the shop, and was positioned or placed in there with a restrainer coupling (T. 15). It was brought up to the wall and connected to a surface of the wall by some clips attached to a rigid pipe, and the cable then ran parallel over to a disconnect switch, and plugged in with an attachment plug that came out of the welder, at a degree and angle, and in a taut condition from the welder to the clip attached to the wall (T.17).

The welder involved in the accident had been in the same position for approximately 15 years. It was between five or six years that the welder had been maintained or looked at for maintenance purposes (T. 17). This information was gained from employees of the pattern shop. There were no wheels attached to the welder and the body of the welder was lying flat on the floor. It weighed approximately 300 pounds. Examination of the cord indicated that it had been there for quite some time, painted in with the wall (T. 18). The flexible cable had been there for some length of time, it was permanently attached by clips onto a rigid

pipe and was in a taut position (T. 20, 21). Information indicated that the employee proceeded to change the leads on the welder, caught his arm between the welder and the flexible cord, which was in a taut condition, and put effort or strain on the cord, drawing the flexible cord out of the restraining nut, exposing some bare wire, bare conductor, and caused the condition of shock and injury (T. 21).

Donald Barnes, employee of respondent, provided the compliance officer with a photograph (C-4) which shows the deterioration of the flex cable as it went into the welder and into the restraining device that is connected to the welder. It shows that the deterioration of the insulation on the conductor, in the condition that it had been in, and this is the location that contacted employee in the injury and electrocuted him (T. 31, 32).

There was a rubber bushing in the wire coupling and apparently by possible lack of maintenance, it had let go, and did not provide restraint when the employee put his force against it at the time of electrocution (T. 33). This released the flexible cord, brought the cord out and exposed the bare conductor to the employee. This is confirmed by the photograph C-6.

The compliance officer testified that the various photo exhibits showed that the flexible cable was used in a manner that, over a period of time, had deteriorated and thereby caused a hazard (T. 34). The unsafe condition was using flexible cord as a permanent piece of wiring (T. 34).

There was a relationship between the tautness of the cable and the separation that pulled the flexible cable from its location of its restraining nut (T. 35).

The hazard was that lack of preventive maintenance caused the restraining nuts of the cable to become loose. The compliance officer said that if the restraining nut is loosened up, the flexible cord can be pulled, or the taut condition that it was in, if the employee gets into the location and pulls at it, can pull a flexible cable from out of the restraining nut (T. 39).

The Secretary during the hearing stated that their position was that effective maintenance is essential to the proper functioning of the restraining device, in that improper maintenance aggravated the condition caused by the fixed wiring, that was maintained in such a taut condition (T. 41). Exhibit C-4 shows the restraining nut had been on the wire and showed that the cord pulled out exposing the bare conductor. Donald Barnes informed the compliance officer that this was what occurred; the restraining device did not support the stress and tension that had been placed upon it.

The compliance officer, Mr. Heitman, testified that the lack of preventive maintenance is a recognized hazard of industry in said situations, as the instant case, where there is electrical high voltage. The following discussion establishes this general need in industry to prevent hazards.

JUDGE RIEHL: All right. I have one question. I am not

quite sure what your predicated violation under 5(a)(1) is. What is the situation that you make your finding that there is a violation? What is wrong?

WITNESS: Under 5(a)(1)?

JUDGE RIEHL: 5(a)(1). I haven't got that clear in my head.

WITNESS: The employer has failed to provide a safe and healthy workplace for the employee.

JUDGE RIEHL: Well, what is that from? Lack of preventative maintenance or what?

WITNESS: Yes. It appears that it is preventative maintenance; the condition, as by their statements, that the cord was in a manner that caused a strain on the cord; the location of the piece of equipment in a confined area where the employee had to grope and reach to change the polarity in the operation that he was doing.

JUDGE RIEHL: Now, is the lack of preventative maintenance a recognized hazard in the industry in such situations as this where there is electricity, high voltage?

WITNESS: Yes. (T. 73, 74)

* * *

JUDGE RIEHL: . . . . What kind of evidence would you present besides this picture of this worn out wire in this case? What other evidence, paint or it or whatever else, would there be?

WITNESS: The length of time that it had been there, like I say, the paint, the deterioration, the lack of maintenance. They can't tell whether it is in a deteriorated manner to be able to correct it, to keep it. (T. 75)

* * *

MR HEITMAN
A. The industry has many, many applications where they find that they have to have a lot of maintenance and maintenance force and a maintenance program which constitutes the keeping up of their equipment so that

it can become safe.

* * *

Q. Okay. Now, in the terms of the practice of all industries, what do they do with regard to periodic or preventative maintenance of strain connectors, and what evidence do you base those statements on?

A. Well, if a connector has been loosened up, why, it should be put back in its normal condition or in the condition that it was designed for.

* * *

Q. No. I mean something that you have seen in your inspections of industry or in your acquaintence with industry that shows what you say should be done should be done.

A. Whenever you see a piece of equipment that has been damaged, why, it should be taken out of service and repaired. (T. 77)

* * *

Q. . . . . In what industry have you seen a preventative maintenance program that is addressed towards strain connectors?

A. I can't specifically say what industry, but I can say that in your Pattern Shop, your equipment needed maintenance of that type of nature, and after the fatality occurred, you went in there and repaired at least three of them.

Q. What evidence do you cite to say that our equipment needed maintenance?

A. I observed this, and I was informed.

* * *

JUDGE RIEHL: . . . . What did you observe? . . . .

A. I observed a piece of equipment that was repaired. It was a planer. (T. 78)

* * *

Q. Were these repairs made before this accident or after this accident, or do you know?

A. I was informed that it was after.

Q. Are you aware of any strain connectors that needed repair before the accident?

* * *

A. Yes.

Q. How?

A. By information.

Q. From whom?

A. From an employee.

Q. What was that information?

A. That information was that a type of restraining connector, as such, had been loose for many years.

Q. Is there any indication that this information had been communicated to the Respondent?

A. Yes.

Q. Or any of its agents?

A. Yes.

Q. Who was it communicated to? Did the employee tell you?

A. Yes.

Q. Who? Who did he say it was communicated to?

A. To his supervisors.

* * *

JUDGE RIEHL: If they had used formal preventative maintenance, as such, that other shops have used, can you tell me or not if this condition was known to the

Respondent or should have been known had he used reasonable, ordinary diligence in its preventative inspections? This condition, this wiring is what I am talking about particularly.

WITNESS: Yes, I'm sure. (T. 79, 80)

* * *

Q. What evidence can you cite to show that because this metal connector, in your mind, evidenced a need of maintenance -- what connection is there with any possibility to this needed preventive maintenance, you know?

A. A lack of maintenance.

Q. Different items differ in durability.

A. A lack of observation. In this case, lack of maintenance.

* * *

Q. Yes. You see something wrong some place else, and you conclude that it is going to be wrong throughout the Pattern Shop?

A. It tells me there is a pattern.

Q. Well, fine.

A. A lack of maintenance, possibly.

Q. What does it tell you in terms of some recognized hazard that that has to do with this elbow-shaped connector? What does it tell you there? The two things might be completely different in terms of their durability. So what does it tell you?

A. When you have a lack of -- in a metal condition such as that, why, you can have a lack of continuity for grounding. (T. 83, 84)

Dale Shields, respondent's employee, a machinist had been with the company 12 to 15 years. He worked in the Pattern Shop where the welder was located (T. 77, 78). He worked in the Pattern Shop

for a little over 30 years. He used the welder involved in the accident 4 to 5 times a week up to the time of the accident. The welder was approximately in the same position for the 15 years preceeding the accident. For a while there was a maintenance man who tended the machine but for the last 5 or 6 years there wasn't, unless there was some problem with it.

There were several loose connectors in the Pattern Shop following the accident. Everyone looked for these loose connections including supervision, employees, all looking for problems following the electrocution of the employee (T. 89). Prior to the accident the welder had a problem with fluctuating heat. They called an electrician several times to check it and he would find nothing wrong, so they would go ahead and use it (T. 90). When the welder got to the position where it wouldn't function, then they would replace it. Following the accident they brought in a brand new welder (T. 91).

Prior to the accident the witness Shields had complained to the electrician about the heat fluctuation. It was reported also to the foreman (T. 92). Respondent employee, Wilfred Haskins, employed by Central Foundry for approximately 28 years, was familiar with the Lincoln Welder involved in the accident and stated that it had been in the Pattern Shop about 15 years. The welder was not a portable piece of machinery. Illustrating the lack of preventive maintenance is Mr. Haskins testimony that a grinder he worked on had a coupling that was loose. He brought this to the

attention of the management. Management responded they would get it fixed and have it repaired. They did not do this immediately however and he could not recall the exact time lapse before they got around to it. Management did have maintenance men go around and check various pieces of machinery, also in the maintenance shop. They came around periodically for a time but had not been around for a year or two prior to the accident (T. 104).

Joseph Bode, compliance officer, had worked as an engineer since 1953, had a degree in aeronautical engineering, previously employed by Douglas Aircraft Company in Santa Monica as a design engineer in constructural design and also flight test engineer. He performed every function from aerodynamic demonstrations, structural demonstrations, instrumentation verification, performance verifications, demonstrations to the FAA, and demonstrations to the military. Among his other qualifications he has worked as a welder and studied welding in college in his freshman year (T. 109, 110). The types of machines he performed welding work on were similar to the machine which was involved in the fatality on respondent's premises.

Mr. Bode had an opinion concerning the use and maintenance of the Lincoln Welder involved in the accident. He reviewed the recommendation made by the Lincoln Welder Manufacturer themselves as to the recommended procedure.

He referred to complainant's exhibit C-16, which was a copy of some pages from the operating manual of the Lincoln Welder

furnished by the manufacturer. It refers to a welder of the type that was in question in the fatality. In the maintenance instructions of this welder, it is recommended by the manufacturer that the welder be blown out, the controls and so forth be hosed once every two months, and particularly in dirty locations as cleaning may be necessary every week. The dust in the photographic exhibit indicated that it was not a totally clean place where the welder was located so it would be something like two months or less frequently in which they should be blown out and checked. There is a troubleshooting guide with the exhibit C-16, one of the keys is that the machine failed to hold heat prior to the accident on a constant basis. The manufacturer gives a list of things that should be checked and verified in the event it does not hold heat, of which, apparently the maintenance people were only checking the commutator and the brushes and like parts. One of the items the maintenance men should have been checking is, the fuel circuit which may have a variable resistance connection or intermittent open circuit due to a loose connection or broken wire. This condition should exist at the input, and in the C-5 photograph exhibit where the input cable comes into the start box, which is in the front of the welder, and which also has located the start-stop button for the welder. Mr. Bode stated that previous testimony indicated the respondent was having trouble with the machine holding heat. The Lincoln Welder company had apparently very well established, at least some kinds of typical things that go wrong

with their welder, just as General Motors does indicate to maintenance people what goes wrong with their cars.

Mr. Bode testified that if a maintenance man used this manual as he should have been instructed to do, he would have pulled the cover off the switch, and if there was a defect in the cord at the restraining device, and if that defect was in fact, there, he would have noticed it and he would have observed it, and he would have had the opportunity to repair it before the accident, if, in fact, it was there. Every indication from the fact that respondent was having trouble with the welder repeatedly before this time, although it functioned, "would tend to make me, as a careful engineer, certainly question that, and I certainly would have gone straight to that spot. This is one of the things to check. I would have gone through the whole list, not just the brushes, and looked over everything that might be causing the problem. No one single thing caused the accident. It was generally a breakdown of several things." (T. 116)

> MR. BODE
> A. Again, you have a plug at the end of that cable which could have been unplugged. If it wasn't locked out, certainly it could have been turned off, and at least a safety man could have tagged that or something, some indication, and we have a standard regarding tagging out.
>
> MR. ROGERS: Was it cited?
>
> WITNESS: In this case, no, and we very seldom do. We do go to 5(a)(1) because the standard in that area is extremely weak and poorly written. Therefore, we enforce lockout, and we impose lockout procedures on industry generally through the 5(a)(1) procedure. (T. 121, 122)

* * *

A. I'm saying that had the maintenance man, the electrician that was checking this machine, been properly trained, when he goes to a machine, one, pull the manual each time, see if it has a section in it which most good manuals do, as do yours --

A. Then had he gone down through and done the routine things which he felt might be the cause and still had not located the trouble, he should have been curious enough to go back to the manual at least then to see if there wasn't something he missed that he possibly didn't know about that machine. (T. 131)

* * *

A. The testimony indicates that the electrician was called several times and that each time he came out, looked at the armature, looked at the brushes, checked those, checked for various things in a variety of those conditions, found nothing out of the ordinary and left. (T. 132)

* * *

A. . . . you also know in today's environment, particularly in the last ten years in major industry in this country, due to the extreme economics worldwide, the extreme pressing dollar, the U.S. has shifted from preventative maintenance to catastrophic maintenance with regard to most of its facilities, and this is a damn shame.

A. OSHA didn't exist ten years ago, and this occurred in industry in this country as much as ten, twelve years ago as a result of the economic pressure, not as a result of good engineering practice, because good engineers fought against it and still do.

JUDGE RIEHL: Are you inferring that they are trading off lives and health for profit?

WITNESS: It is the old philosophy, Your Honor. You drive your car until it stops running, and then you take it in to get it fixed, or you operate your car per your manual which will cost you a great deal more money.

Q. Let me ask you this. In terms of this concentenation of these events here in your acquaintance with industry, do you find that it is a common practice for welders using this type of a DC are welder to lock it up when they change their leads? It is a common practice?

* * *

A. We locked out and shut down. (T. 135, 136)

HEITMAN
WITNESS: The pictures show that the flexible cable was used in a manner that, over a period of time, had deteriorated. It had deteriorated creating a hazard.

JUDGE RIEHL: How does that relate to the standard we are set in? This is 1(a) that we are talking about.

WITNESS: That flexible cord was used as a permanent piece of wiring.

JUDGE RIEHL: Is that the main thing?

WITNESS: Yes.

JUDGE RIEHL: Used as a permanent --

WITNESS: The prohibited use of a flexible cord.

JUDGE RIEHL: That is your interpertation of the standard. (T. 34)

* * *

MS. SCHUITMAKER
Q. Is there a relationship between the tautness in the cable and the separation which you just described?

A. Yes.

Q. What is it?

A. Oh, the tautness of the cable has caused a force that has caused probably tension on the terminals. It has pulled the flexible cable from its location of its restraining nut and has created a hazard. (T. 35)

Further questioning by Attorney Rogers elicited the following testimony:

Q. Let me ask you this. In terms of this concatenation of these events here in your acquaintance with industry, do you find that it is a common practice for welders using this type of a DC arc welder to lock it up when they change their leads? It is a common practice?

A. In every shop I have ever been in, in any shop that I had supervision or responsibility for, you bet.

Q. Okay.

A. We locked out and shut down.

Q. How many were those?

A. Four.

Q. And when were those? When did that occur?

A. Starting in 1947.

Q. How many, and where were the shops located?

A. McDonough-Douglas Welding Shop in Torrance, California.

JUDGE RIEHL: How many people were employed there?

WITNESS: Something in excess of a thousand.

Q. In the welding shop?

A. Yes. The whole facility was welding. (T. 136)

* * *

Q. Where else?

A. Packard Bell Electronics facility in Santa Monica, California.

Q. What year was that?

A. About 1959, 1958, somewhere in there.

Q. Okay. And where else?

A. Spectrolab Electronics.

Q. When was that?

A. That was three years after Packard Bell.

Q. In 1961?

A. In early '61. (T. 137)

* * *

Q. Okay. The other shop that you worked in, was that the last?

A. Well, what I am attempting to tell you is, these have been recognized hazards, and as recognized hazards in many major corporations and major facilities for a very long time.

Q. Are they still recognized, to your knowledge?

A. To my knowledge, they are still recognized, and the procedures are still enforced.

Q. In what industries? Where have you seen this done contemporaneous?

A. I know it is done continually in the aircraft industry. As a matter of fact, you will find the FAA will climb over anyone who doesn't.

What about other industries? Do you know that it is being done contemporaneously in other industries?

A. Presently?

Q. Yes.

A. Presently, yes. I spent, up until last July as a compliance officer out of the same office from which it was cited - - (T. 140)

A. * * * Electrical hazards can only be averted by consciously being concerned about lockout procedures.

Q. Okay. I agree. But what I am trying to get at is what is the prevalence of locking out arc welders contemporaneously in industry that you have personal experience with.

A. I have never had to cite it because all the

facilities I was in were doing it, and they were also doing their maintenance. (T. 144)

Respondent's witness Ben Z. Segall, a registered professional engineer, consulting engineer, who examined the electrical equipment in question in the instant case did much to establish a 5(a)(1) violation in response to respondent's attorney Rogers. He made sufficient admissions and stated sufficient facts to establish that respondent was in violation of 5(a)(1).

Mr. Segall is a cut above the average testifying expert witness because he was associated with the code drafting of the present National Electrical Code. He was chairman of the committee that wrote the NEC 309(a) etc. It is to be noted that he has been on that committee for over 40 years. His specialty is electrical engineering, as far as standards and codes are concerned, because he has gone through the entire gamut of electrical engineering, having worked for a utility company for 28 years. He was also an electrical contracting salesman, but the whole time he did one thing, and that was consulting, engineering and writing (T. 162, 163). He examined the various exhibits in the file and testified concerning them.

We cannot set forth his testimony in minute detail but will set forth some of the following that established the 5(a)(1) violation:

MR. ROGERS
Q. Okay. Fine. Let me ask you this, Mr. Segall. I am pointing now to a U-shaped connector on the right-hand

corner where the cable enters the box symbolizing the welder. Do you recognize that form of connection?

A. Yes.

Q. What is it?

A. That is a connect of which we call a strain-relief type of connector.

Q. Is that type of connector required to be used by any portion of the National Electrical Code of 1971?

A. Yes, it is.

Q. What is the section?

* * *

A. That is Section 400-10.

Q. Is there anything impermissible about using this type of connector for this type of installation?

A. Not that I know of, as long as it is recognized, and it is recognized in this particular case because it is listed by Underwriters and the Canadian Standard Association. (T. 172, 173)

* * *

JUDGE RIEHL: Did you write that standard, by the way? Did you write that particular standard?

WITNESS: I was in the panel at that time when we made quite a few of these additions.

JUDGE RIEHL: . . . but the Government has cited 309(a), and it is 400-4.

WITNESS: Yes.

JUDGE RIEHL: How do these two, in your opinion, fit this hookup and the hookup involved in the death?

WITNESS: You are talking about 309(a) or just 400,

JUDGE RIEHL: Well, the first citation is 400-4, and the second one is -- 309(a) is first, and the second one

is 400-10. There are two of them.

MR. ROGERS: Your Honor, our 309(a) is the CFR cite. The only ones that would be reflected are the sections that were adopted by 29 CFR 1910.309(a). In other words, 309 is the language of adoption of this whole code.

JUDGE RIEHL: And it is just a recommendation, but we have made it into a standard?

* * *

JUDGE RIEHL: We have made it an official standard?

WITNESS: That's right, which you have never caught up. You are still operating on the '71. We are now going to the '81. We have had three codes.

JUDGE RIEHL: When is that coming out?

WITNESS: The '81 codes, next year, in '81. But we have had the '71, the '75, and the '78, which we are operating under now. (T. 174, 175)

* * *

MR. ROGERS
Q. All right. Mr. Segall, were you involved in drafting either of the cited parts of Article 400-4 and 400-10?

A. Yes. I may have been Chairman at that time. I was Chairman for one addition of the code. I don't remember. It was right around the time that I was Chairman. But I have been a member of this particular panel, and I have worked on this particular section of the code since I would say, the 1930's.

Q. Okay. Fine. Let me ask you this then, Mr. Segall. Is there anything in that section which, to your knowledge, prevents precisely the kind of installation you find there?

A. No, sir. As I say, we have millions of those installations. (T. 175, 176)

* * *

Q. Let me ask you this. At the time that the standard was drafted, what did the committee have in mind, if anything, in terms of a type of connector or type of strain-relief device that would suffice?

A. Basically, we wanted something that would, under normal conditions, most probably take care of some normal possibilities of people pulling on that cable, and in the course of installation, that it would not give way. * * * (T. 178).

* * *

JUDGE RIEHL: Before you go any further, before OSHA adopted these electrical standards, they were industries own concoctions, right?

WITNESS: Let's say that it is not -- I don't like the word concoction, if you don't mind.

JUDGE RIEHL: Baby or, let's say, they created it. They were the creator.

WITNESS: Yes, but the industry had everyone they could possibly get in there representing, including the Government.

JUDGE RIEHL: For input?

WITNESS: Yes.

JUDGE RIEHL: And when you got through, if I understand you correctly, it was a recommendation, <u>not a law of any kind</u>?

WITNESS: That's correct.

JUDGE RIEHL: <u>So it was more in the nature then, if I could conclude this right, of the recognition of a hazard</u>?

WITNESS: <u>That's correct</u>.

JUDGE RIEHL: <u>So getting down to our instant case, it all depends not on the installation in the recognition of the hazard whether or not there was sufficient preventative maintenance or sufficient continuing diligence to see that it stayed in the recommended state? Is that it</u>?

WITNESS: There is no question about that.

RIEHL: But now it is a law?

WITNESS: Now it is a law, * * *

JUDGE RIEHL: Not that it is a law, if it isn't specific enough, it is still in the nature of a recommendation even though it is a law, and it would be in the 5(a)(1) area if it is not specified, nailed down, by the exact wording of the standard, is that correct?

WITNESS: That' right. (T. 179, 180, 181, emphasis added).

* * *

JUDGE RIEHL: Well, now, here there is some evidence that maybe this wasn't inspected for some considerable length of time. That is preventive maintenance, I know, but that would be partially ignorance, would it not, if they didn't take the normal care that industry does for electrical or any other installation, machine or whatever?

WITNESS: I would say any industry that hired people like that would be very remiss, yes. (T. 196, 197, emphasis added)

* * *

JUDGE RIEHL: So in other words, one might say that the ideal procedure would be to make sure that the power was disconnected or de-energized on the AC side?

Segal
WITNESS: Yes, sir, for a lockout. (T. 204)

* * *

Q. Are lockout procedures while working on electrical equipment recognized?

A. Very definitely.

JUDGE RIEHL: Recognized as what?

WITNESS: As a safe procedure.

JUDGE RIEHL: To prevent a hazard?

WITNESS: Yes, prevent accidents.

* * *

Q. Is it recommended that an employer or anyone utilizing electrical equipment put a service loop on the cable to the equipment?

A. That is done very often, yes, I would recommend it in most cases.

Q. I am referring to Complainant's Exhibit C-3 which is entitled Preliminary Report of Fatality, and I am referring particularly to Page 2, the bottom of the page where it is entitled Immediate Action Being Taken and where it discusses the de-energization of the electrical equipment.

Referring to this, Mr. Segall, does this recommendation make any mention of de-energizing equipment only on the DC side?

A. This says the power supply, so I would say that is on the AC side. (T. 213, 214)

From the foregoing it is evident respondent's witness Segall both on direct-examination and when cross-examined by the Government's attorney has made sufficient admissions to the effect that the lack of proper maintenance and the condition of the equipment preceeding the accident as set forth by the various exhibits establishes a 5(a)(1) violation. This is so for either knowingly not doing what is proper, or, should have known what to do as proper to prevent a known hazard.

An excellent example of respondent's failure to furnish proper preventive maintenance or to properly instruct their maintenance people in doing a proper inspection when checking equipment, is the following testimony as set forth in the record. Witness Schifo, respondent's plant engineer in charge of Engineering Department,

testified as to the following:

WITNESS: If we had taken the complete piece of equipment down to the point where we pulled this cable out of the connector for some reason, then we would have seen it. But unless we actually take this connector apart, then there is no way to find the deficiency.

JUDGE RIEHL: If your safety quit short of that point in the box, that is not a consideration as far as you are concerned?

WITNESS: At that point in time when all we are looking at would be normal maintenance on the item or looking at a reason for a voltage fluctuation, no, we would not look there. It would totally be out of the question at that point.

JUDGE RIEHL: Thank you.

WITNESS: It would only be looked at with a total rebuilding of the welder.

MR. ROGERS
Q. Why would it be out of the question? Is this because of lack of concern for safety, or it this because of some technical reason?

A. This is because the problems did not indicate any safety problem at the time. That there is a fluctuation on the generator side of a welder, now, that does not warrant rewiring the total AC side, and that is what the problem involved. That would be a total rebuild of the welder. It was just not warranted especially since it ran six months apparently with no problem.

JUDGE RIEHL: How much time would it have taken to open all the sides and looked at it? Half an hour, hour?

WITNESS: What I am saying is if we were --

JUDGE RIEHL: Just answer my question. How much time would it have taken you to take the whole box aside and look at it? Half an hour, longer or less? In other words, if you unscrewed, took a wrench or whatever is necessary.

WITNESS: Just to inspect a wire. If we knew there was something wrong?

JUDGE RIEHL: Regardless of what the reason, how long would it take you?

WITNESS: A total inspection to get to that point?

JUDGE RIEHL: To inspect that box where the wire goes in.

WITNESS: To inspect the box, all you would do is open the cover in a matter of minutes. But if --

JUDGE RIEHL: I'm not talking about this burned wire. How long would it take you to open up and look at that part where the wire was, roughly speaking, in minutes, seconds, hours, weeks, whatever?

WITNESS: To dismantle it and to get to the wire, it would probably take <u>ten minutes</u> if we knew there was a problem there. (T. 252, 253, 254, emphasis added)

JUDGE RIEHL: That is all I wanted to know.

* * *

JUDGE RIEHL: What does one of those cables cost, the one you have got there?

WITNESS: It would be a matter of dollars.

JUDGE RIEHL: And that is how old?

WITNESS: I don't know the exact age. It is somewhere - -

JUDGE RIEHL: Ten, fifteen years?

WITNESS: Fifteen years, plus. (T. 255)

* * *

JUDGE RIEHL: So ten bucks would buy the wire?

WITNESS: It would buy the wire. The insulation would probably cost you another 10. (T. 256)

Previous credible evidence of record indicates that one of the places that would have surely been looked at would be the box itself in checking out the wire if everything else did not indicate

a problem with a welder as per the manufacturer's trouble-shooting guide. We have carefully checked respondent's brief which is very thorough and feel that he is correct in that the Secretary did not make a case in regard to the violation of the electrical standard. However, respondent is in error in his various arguments attempting to show that the respondent, General Motors, had a proper preventive maintenance program. The transcript is 267 pages of somewhat contradictory testimony but the preponderance of the credible evidence establishes that respondent has been very negligent in its preventive maintenance program and allowed various parts of machinery to lie for a period of from 5 to 15 years without any sort of examination or correction. Part of this is borne out by the fact that a number of pieces had to be repaired following a death. They would probably have gone another five years according to the various statements made by various respondent's witnesses had not the death brought attention to the situation in the Pattern Shop.

It is a recognized hazard in industry to "see a piece of equipment that has been damaged" and fail to take it out of service to repair it (T. 77).

Respondent failed in instructing its maintenance people to properly check out a piece of equipment, and in particular to check it out as per the owner's manual, on a periodic basis; in particular to have checked it out following the various failures in which it was not properly put back into total function. The evidence establishes very definitely that the whole thing could have

taken about ten minutes more, perhaps ten dollars more worth of expense to have made the welder in question safe. The safety department of respondent has just about totally failed in this particular instance, and certainly did not properly instruct their repair people as to proper procedures in connection with welders or any other material, when something is wrong. Certainly they should have taken ten more minutes to run everything down that could be possibly wrong with the function of the machine, and this would most certainly include the plug-in part of the equipment and the wires involved at the point where the electricity first began to flow.

The years-old stale paint on the wire involved is telling, physical testimony of a complete lack of maintenance on the equipment involved.

Respondent in its brief argued that the Secretary's own witness, Mr. Shields, indicates that generally when the welder was checked for insufficient heat the electricians generally felt the armature to be the cause (T. 91).

The electrician should have followed all of the approved techniques for checking out equipment when there is a malfunction. This included every part of the equipment that deals with the conduit of electricity.

A preponderance of the total credible evidence of record from all of the witnesses, coupled with the exhibits in evidence firmly establish the fact that respondent has had a very poor preventive

maintenance program insofar as the Pattern Shop is concerned. Respondent's attorney has made a good number of arguments against this but the evidence totally overwhelms this side of the discussion.

Respondent's attorney indicates that the OSHA case was based on a plethora of hearsay which was in no way corroborated. This is not so. The total testimony consisted of some admissions by the respondent's authorized supervisory people, the exhibits themselves are the best credible, probative evidence of respondent's lack of preventive maintenance.

One of the things that establishes a violation of 5(a)(1) is the testimony of respondent's expert witness, Segall who was one of the authors of the electric code. He established the fact that the code is quite vague and ambiguous, was never intended to be set forth as a law, and was only adopted by the Secretary along with all the other ANSI standards as a move to get the Act started. The witness, Segall, testified that they have reduced the code now to 100 pages of simplified language which will make it much easier to understand and set forth the requirements with more specific detail.

Complainant has definitely not carried forth the burden of proof of proving a violation under any of the electrical code provisions.

## SUMMATION

1. The complainant has not carried the burden of proving the

violation of 29 CFR 1910.309(a), section 400-4 and 400-10 National Electrical Code, and FPA 70-1971.

2. On the other hand the preponderance of the credible evidence as given by Ben Z. Segall, Donald Heitman, Dale Shields, Wilfred Haskins, Joseph Bode, and James Schifo establishes respondent is in violation of the 5(a)(1) provision of the Act.

3. The preponderance of the credible evidence of record establishes that respondent had an improper or inadequate preventive maintenance program.

4. Respondent also permitted a hazard to exist on the Lincoln Welder in question by permitting a "tautness" of the cable for sometime prior to and up to the death of respondent's employee.

5. Still another known hazard that respondent either knew or should have known of was that they failed to have an adequate lockout procedure; this act of omission constituted the hazard or failure to address the recognized hazard.

6. Respondent failed to properly train its maintenance employees so that they would deal with such recognized hazards as malfunctioning of the welder prior to the accident; that they failed to take the additional ten minutes to check out all sources of electrical power which would include the plug in, thereby creating the hazard which killed respondent's employee.

7. Respondent failed to provide the inspection and preventive maintenance procedures, having a degree of detail, which would discover hazards in the equipment in use by their employees.

8. Respondent also had an "inappropriate strain release connector" condition concerning the Lincoln Welder involved in the fatality. A lack of preventive maintenance caused the connection to pull loose, exposing the electrically charged wire which contacted respondent's deceased employee and electrocuted him.

FINDINGS OF FACT

1. Respondent maintenance procedures, coupled with its lack of preventive maintenance over a period of five years or more caused a hazard in the Lincoln Welder which electrocuted respondent's employee, Steve Rapsy. The accident happened in the Pattern Shop of Central Foundry. At the time of electrocution Mr. Rapsy was a welder performing a welding operation for respondent.

2. The Lincoln Welder involved in the fatality was upright and weighed approximately 300 pounds. It was sitting flat on the surface of the floor without portable wheels. The welder had been placed in a void space underneath one end of a workbench the space being about 27 inches in width.

3. The manufacturer furnished respondent a Lincoln Upright Welder Brochure for the maintenance of a welder similar to the one involved in the fatality.

4. The welder's power cable was flexible. It was approximately 10 feet long and had a disconnect attachment at one end, and it went into the piece of equipment on the left-hand side of the space or on the side that faced the wall of the shop and was positioned in there or placed in there with a coupling, restrainer coupling.

5. The coupling supported the cable into the welder.

6. Management personnel accompanying the compliance officer on the inspection informed the compliance officer that the cable was attached to the welder with a restraining device which was brought up to the wall and connected to the surface of the wall by some clips attached to a rigid pipe, it then ran parallel over to a disconnect switch and plugged in with an attachment plug that came out of the welder at degree and angle and was in a taut condition from the welder to the clip attached to the wall (T. 16, 17).

7. The welder had been in the Pattern Shop approximately 15 years. There had not been a preventive maintenance program in connection with this welder for many years, at least between 5 and 6 years that the welder had been maintained or looked at for maintenance purposes (T. 17).

8. Exhibits of record show that the cord was painted and had been there for a long painted in with the wall.

9. The flexible cord was placed in a taut, fixed condition causing it to be strained and put tension on to the terminals, which caused the welder to be electrocuted, when the wires were pulled out of the restraining nut which held it. The restraining device that was connected to the welder, where the power lead goes into the welder and supports and restrains the flexible cable in the welder, was pulled loose because of weakness caused by a lack of maintenance. This did not provide restraint when the employee put his force against it while working on the machine. The force

released the flexible cord and brought the cord out and exposed the bare conductor to the employee's body thereby electrocuting him (T. 32, 33).

10. Photo exhibits establish that the flexible cord cable used in a manner that, over a period of time, had deteriorated, thereby creating a hazard (T. 34).

11. The tautness of the cable had caused a force that caused tension on the terminal. It pulled the flexible cable from its location of its restraining nut and thereby created a hazard (T. 35).

12. At one time the respondent had a maintenance program that was carried on by an employee; that employee had retired; since then there hadn't been any maintenance on the welders of respondent's Pattern Shop. Respondent had not made any maintenance on the Lincoln Welder in approximately five or six years, thereby creating a hazard which caused the electrocution of respondent's employee.

13. Such equipment and other equipment of like nature which had the same kind of restraining nut, which must be repaired in order to get it back in its proper shape, following lack of preventive maintenance, creates a hazard. Such equipment requires periodic preventive maintenance.

14. Effective maintenance is essential to the proper functioning of the restraining device, in that in improper maintenance aggravated the condition caused by the fixed wiring, that was

maintained in a taut condition (T. 41). If the power cord had not gone through the two restraining clamps, there was no way the accident which electrocuted respondent's employee could have happened (T. 57, exhibit number C-6).

15. Lack of preventive maintenance is a recognized hazard in industry in such situations as where there is electricity of high voltage (T. 74).

16. Whenever preventive maintenance in industry finds a piece of equipment that is damaged, it is taken out of service and repaired (T. 77). Following a fatality to respondent's employee respondent's maintenance people went into the Pattern Shop and repaired several pieces of equipment with like defects.

17. If respondent had used formal preventive maintenance, as other such shops have used, it knew or should have known of the hazardous condition, if they used reasonable, ordinary diligence in such preventive maintenance inspections.

18. Respondent had in its possession the maintenance instructions from the manufacturer of the welder. This manual of instruction recommended that the welder be blown out, the controls and so forth be hosed once ever two months, and particularly in dirty locations as cleaning may be necessary every week. It would be something like two months or less frequently in which they should be blown out and checked. Respondent's trouble-shooting manual furnished by the manufacturer informed respondent that there are a few places that become important with relation to preventive

maintenance and trouble-shooting. One key is that if a machine fails to hold heat constantly. There are eight items mentioned by the manufacturer that should be checked and verified in the event that it does not hold heat, of which the maintenance people checked only the commutator and the brushes, and that type of thing. One of the items that respondent's maintenance people should have been instructed in checking is the field circuit could have a variable resistance connection or intermittent open circuit due to a loose connection or a broken wire. This condition could exist at the input and in the C-5 photo exhibit where the input cable comes into the start box which is in the front of the welder and which also has co-located the start-stop button from the welder.

19. The Lincoln Welder Manufacturer had well established some kinds of typical things to go wrong with their welder just as General Motors does to indicate to maintenance people what goes wrong with cars.

20. If the General Motors maintenance people had been properly instructed in the use of the Lincoln Welder Manufacturer's manual, he would have pulled the cover off of the switch, and if there was a defect in the cord at the restrainer device, and if that defect was in fact there, he would have noticed it, and he would have observed it, and he would have had the opportunity to repair it before the accident, if, in fact, it was there. Every indication from the fact that respondent had trouble with the welder repeatedly before the time of the electrocution, although it

functioned, would tend to make a careful engineer certainly question and certainly would have gone straight to that spot as one of the things to check. A properly instructed maintenance person would have gone through the whole list of problems as listed by the manufacturer, not just the brushes, and then looked over everything that might be causing the problem.

21. Respondent's investigation of the accident (C-3) made a finding that the most probable cause of electrocution was "reaching for the terminal, his left arm apparently applied pressure to the 440 volt power cable which was taut, thus pulling the cable out from the strain connector exposing a section a bare wire, with which his left arm most likely made contact". This General Motors' report coincides with the preponderance of the credible evidence of record from both respondent and complainant's witnesses and also considering the various exhibits.

22. Respondent's safety or preventive maintenance program did not have a lock-out system which could have been turned off, a safety man could have tagged such lock-out system giving some indication to both the party that worked with the machine and the one who maintains it (T. 121). The compliance officer did not cite respondent for this failure, giving as his reason that they go to the 5(a)(1) citation because the standard in that area is extremely weak and poorly written. Therefore, the OSHA in force is locked out, and imposes lock-out procedures on industry in general through the 5(a)(1) procedure (T. 122).

23. Electrical hazards can only be averted by consciously being concerned about lock-out procedures (T. 141).

24. 29 CFR 1910.309(a) and the provisions of electrical standards thereunder were originally recommended standards by industry for adoption by local authorities. The Secretary has adopted this provision as an official standard. Respondent's witness, Mr. Segall, was involved in the drafting as chairman of the commission that created 309(a). His testimony that there was nothing in this section, which to his knowledge, prevents precisely the kind of installation found at the time of the electrocution.

25. The intention of the committee headed by Mr. Segall was, under normal conditions, they wanted the use of something that most probably would take care of some normal possibilities of people pulling on a cable, and in the course of installation, it would not give way. Before OSHA adopted the electrical standards they were industry's standards, in combination with other interested parties' recommendations for safety, pointing out hazards, not a law of any kind.

26. These standards created by industry and adopted by the Government were in the nature of the recognition of hazards (T. 179, 180). They made recommendations to overcome various hazards. In the use of these industry created standards, it all depended not on the installation and recognition of the hazard whether or not there was sufficient preventive maintenance, or sufficient continuing diligence to see that it stayed in the recommended state.

Now it is the law, and before becoming a Federal law it used to be on the basis that municipalities and states would adopt a specific issue. Mr. Segall helped cities write the standard such as the city of New Orleans, Jacksonville and other cities.

27. Mr. Segall agrees now that it is the law, if it isn't specific enough, it is still in the nature of a recommendation. Even though it is a law, and it would be in the 5(a)(1) area if it is not specified, nailed down, by the exact wording of the standard.

28. Mr. Segall responded to the following question: "Well, now, here there is some evidence that maybe this wasn't inspected for some considerable length of time. That is preventative maintenance, I know, but that would be partially ignorance, would it not, if they didn't take the normal care that industry does for electrical or any other installation, machine or whatever?" by saying that "industry that hired people like that would be very remiss . . . ." (T. 196, 197)

29. Mr. Segall stated that the fact that the accident occurred indicated to him that a proper lock-out procedure hadn't been followed: "If you set a lock out, I would say that the entire thing would have to be disconnected." (T. 203) Mr. Segall testified that the ideal procedure would be to make sure that the power was disconnected or deenergized on the AC side for a lock out.

30. Mr. Segall testified that lock-out procedures while working on electrical equipment is recognized as a safe procedure

to prevent a hazard, or accidents. It would take only ten minutes for the respondent's maintenance employees to inspect the box where the wire goes in and it would cost only ten dollars to replace the wire if it was found defective.

## CONCLUSIONS OF LAW

1. Respondent corporation is an employer as defined in the Occupational Safety and Health Act of 1970, and is subject to the jurisdiction of the Occupational Safety and Health Review Commission.

2. Complainant has failed to prove a violation of 29 CFR 1910.309(a) and sections 400-4, and 400-10 of the National Electrical Code.

3. Respondent is in violation of section 5(a)(1) of the Act.

4. Respondent failed to use sufficient diligence in its preventive maintenance program to correct and abate dangerous conditions arising out of continuous use, and wearing out of equipment to the point where an unsafe work condition occurred, thereby causing the death of respondent's employee.

5. The use of preventive maintenance is a part of providing a safe workplace for employees. It is necessary to continuously maintain a workplace in a safe condition. Failure to use sufficient preventive maintenance of a workplace is a violation of the duty to provide safe workplaces for employees.

6. Under the circumstances prevailing respondent failed to correct a "tautness" condition of the cable which caused

respondent's employee's death from electrocution. Respondent failed to properly advise its maintenance crew and to furnish adequate lock-out procedures in the operation of the Lincoln Welder involved in the employee's electrocution.

7. Respondent was aware of respondent's welder malfunctioning prior to the accident and failed to provide sufficiently trained maintenance engineers to thoroughly check out the condition and thereby discover the defect in the connection which caused respondent's employee's death from electrocution.

8. Respondent failed to provide the kind of inspection and preventive maintenance, having the degree of detail suggested by OSHA to discover latent defect or defects such as the one which caused the accident and death of respondent's employee.

9. A penalty of $600 for the violation of the 5(a)(1) citation is appropriate.

DECISION

Based upon the above findings of fact and conclusions of law, it is hereby ORDERED:

1. Serious citation number 1 is vacated.

2. Respondent is in violation of the amended complaint (5(a)(1)) citation. A penalty of $600 is assessed.

Vernon Riehl

Date: July 2, 1979 Vernon Riehl, Judge, OSHRC

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

August 30, 1982

**IN REFERENCE TO SECRETARY OF LABOR v.**

ENGLEHARD INDUSTRIES

OSHRC DOCKET NO. 78-2880 & 78-3251

**NOTICE IS HEREBY GIVEN TO THE FOLLOWING:**

OF COMMISSION DECISION AND REMAND

To wit: See attached.

**FOR THE SECRETARY OF LABOR**

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**FOR THE COMMISSION**

Ray H. Darling, Jr.

**RAY H. DARLING, JR.**
**EXECUTIVE SECRETARY**

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | |
| ENGLEHARD INDUSTRIES, | : | |
| Respondent, | : | OSHRC Docket Nos. 78-2880 |
| | : | & 78-3251 |
| INTERNATIONAL CHEMICAL WORKERS UNION, | : | |
| Authorized Employee Representative. | : | |
| | : | |

DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

An order of Administrative Law Judge John S. Patton is before the Commission on interlocutory appeal. In Docket No. 78-2880, Judge Patton ruled that the International Chemical Workers Union had a right to be heard on its objections to a settlement agreement between the Secretary of Labor and Englehard Industries. The judge's ruling is consistent with our decision in Mobil Oil Corp., Docket No. 77-4386 (Aug. 6, 1982). Accordingly, we affirm the judge's ruling.[1/]

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1/ Chairman Rowland dissents from the affirmance of the judge's ruling in No. 78-2880. In his view, the Commission lacks authority to consider employee objections to settlement agreements that are not related to the period for abatement. Mobil Oil Corp., supra (Rowland, Chairman, dissenting). In this case, the Union objects to the reclassification of a violation from "willful" to "serious." As that objection is unrelated to the abatement period, Chairman Rowland would approve the agreement without affording the Union a hearing on its objection.

In Docket No. 78-3251, all the parties agree that the settlement should be approved and the case severed from No. 78-2880. Accordingly, the two cases are severed. 29 C.F.R. § 2200.10. In Docket No. 78-2880, the judge's ruling is affirmed, and the case is remanded to the Chief Judge[2/] for further proceedings consistent with this opinion. In Docket No. 78-3251, the settlement agreement is approved. 29 C.F.R. § 2200.100.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: AUG 30 1982

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2/ Judge Patton has retired.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 400

ATLANTA, GEORGIA 30309

| | | |
|---|---|---|
| SECRETARY OF LABOR, | ) | |
| Complainant, | ) | |
| v. | ) | OSHRC Docket Nos. |
| ENGLEHARD INDUSTRIES, | ) | 78-2880 and 78-3251 |
| Respondent, | ) | (Consolidated) |
| and | ) | |
| INTERNATIONAL CHEMICAL WORKERS UNION, | ) | |
| Intervenor. | ) | |

## CERTIFICATION AS TO INTERLOCUTORY APPEAL

On August 21, 1978, an order was entered granting the motion of International Chemical Workers Union to intervene as a party in these consolidated cases. On October 18, 1978, a stipulation of settlement agreement, executed by complainant and respondent on October 17, 1978, was filed. The intervenor did not join in the settlement agreement. The intervenor filed a statement in opposition to the settlement agreement. The objections of intevenor as to case number 78-3251 involved only questions of law, and this judge entered an order stating that the objections of intervenor as to case number 78-3251 were without merit.

Some of the objections of intervenor as to case number 78-2880, however, involved questions of fact; and it was, therefore, ordered that a hearing be held as to certain of intervenor's objections relating to case number 78-2880.

Since it was not known whether the parties to the settlement agreement would have settled case number 78-3251 if the issues in case number 78-2880 had not been settled, the order did not sever the cases and did not approve the settlement as to case number 78-3251. The order gave complainant and respondent ten days within which to state in writing whether, in view of the settlement agreement not being approved as to case number 78-2880, there were any objections to the cases being severed and the settlement agreement being approved as to case number 78-3251. Respondent replied stating that respondent did not object. Complainant has not replied but the ten days allowed have not yet expired.

It is the position of complainant and respondent that the intervenor does not have standing to object to the settlement agreement and to prevent the settlement agreement from being approved. The respondent maintains that the intervenor has a right to object to a settlement agreement only insofar as it relates to designated abatement dates.

On December 29, 1978, the respondent filed a timely request for Judge's certification for interlocutory appeal.

It appears that the law is well settled as to the issues raised by the objections of intervenor as to case number 78-3251. Certain of the objections as to case number 78-2880 involve questions of fact. It appears that the standing of an intervenor to file objections and prevent the approval of a settlement agreement involves an important question of law concerning which there is substantial ground for difference of opinion. If the judge is in error and the ruling of the judge is not reviewed until a trial on the merits of the case, a case entirely settled before trial on the merits will be completely litigated.

It is, therefore, certified that the ruling of the judge refusing to approve the settlement agreement as to case number 78-2880 and ordering that hearing be held involves an important question of law concerning which there is substantial ground for difference of opinion, and an immediate appeal from the ruling will materially expedite the proceedings.

In view of the certification and the fact that the settlement agreement covers both cases, the cases will not be severed at this time and this judge will not at this time enter a further order as to case number 78-3251.

Dated this 29th day of December, 1978.

John S. Patton
JOHN S. PATTON
Judge

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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

August 31, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Amoco Oil Company

OSHRC DOCKET NO. 76-2099

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF ORDER

To wit: See Attached.

FOR THE SECRETARY OF LABOR

- Counsel for Regional Litigation
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FOR EMPLOYEES

- Ray Lovelady
  International Representative
  Oil, Chemical and Atomic
  Workers International
  Union AFL-CIO District No. 6
  4106 - 66th Street
  Desmoines, IA. 50322

- Judge's Office
  Occupational Safety & Health
  Review Commission
  Suite 1718 - Prudential Plaza
  1050 Seventeenth Street
  Denver, CO. 80265

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/78

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br><br>v.<br><br>AMOCO OIL COMPANY,<br>Respondent. | OSHRC DOCKET NO. 76-2099 |

ORDER

The Secretary's motion to withdraw citation is Granted.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

AUG 31 1982
Date

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>AMOCO OIL COMPANY,<br><br>Respondent,<br><br>OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO District No. 6-10,<br><br>Authorized Employee Representative. | OSHRC DOCKET NO. 76-2099 |

APPEARANCES:

Ann M. Noble, Attorney, Office of Henry C. Mahlman, Associate Regional Solicitor, U. S. Department of Labor, Denver, Colorado,
for the Complainant,

Clarence E. Reed, and Robert W. O'Connell, Attorneys, Chicago, Illinois,
for the Respondent.

Raymond A. Lovelady, International Representative, District No. 6, Oil, Chemical and Atomic Workers, International Union AFL-CIO, Des Moines, Iowa,
for the Employees.

## DECISION AND ORDER

John J. Morris, OSHRC Judge:

A citation filed herein alleges a violation of the Occupational Safety and Health Act of 1970 (29 U.S.C.A. 651 et seq., hereafter "the Act".). Complainant asserts a violation occurred by reason of certain practices and procedures at respondent's oil refinery in Mandan, North Dakota. Complainant issued his citation on April 16, 1976 after an inspection on April 13, 1976. Respondent filed a notice of contest on May 7, 1976.

Citation 4 alleges a serious violation of 29 CFR 1910.106(e)(9)[1/] and in the alternative 5(a)(1) [29 U.S.C.A. 654(a)(1)] of the Act. It reads:

> On or about April 13, 1976, and at times prior thereto, the employer failed to furnish his employees a place of employment which was free from recognized hazards that were likely to cause death or serious physical harm to his employees in that:
>
> (a) The established procedures concerning maintenance and operating practices of the mixing unit portion of the fluidized bed incinerator unit were not adequate to control leakage and prevent accidental escape of the combustible liquid contained therein through the mixer motor shaft bearing packing gland and other appurtenant parts of the process.
>
> (b) Flammable liquid spills around the fluidized bed incinerator unit have not been promptly cleaned up or otherwise effectively rendered harmless and employees have been required to perform work duties while walking through, standing in, and surrounded by said spills.

(Proposed civil penalty: $700.)

1/ The complaint sought to vacate this alleged violation.

The cited statute reads:

> §654. Duties of employers and employees.
> (a) Each employer-
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

Complainant's evidence: respondent's oil refining process requires the cleaning of its storage tanks. Residual sludge from the tanks is pumped to a sludge box, then to a sludge feed tank where it is mixed. It is thereafter fed into a fluidized bed incinerator (FBI). Torch oil then ignites the mixture of combustible sludge and spent caustic (sodium hydroxide). (Tr. 6-8, 13, 23, 24, 61, 62, 64; Exhibits 1, 4, 13). The alkylation process burns the sand-like caustic and sludge at approximately 1200° to 1300° F. (Tr. 4-5, 29, 30). An operator 200 yards away monitors the FBI's fluctuating temperatures and flow speeds (Tr. 4, 19, 22). The FBI vaporizes the caustic, but some residual accumulates. Workers empty the residual as needed, usually daily. The residual can be blown into a nearby open dumpster box through a pipe. Occasionally clinkers, which have blocked the flow of the caustic, must be broken loose with a rod (Tr. 27, 28, 42-44, 100). In dumping the hot caustic occasionally spills, the size of a wheelbarrow, occur (Tr. 27, 28, 31, 44, 64, 65, 83; Exhibits 5, 6). Several fires have been caused by the dumping of the hot material (Tr. 92).

Hydrocarbon (oil) leakage occurs at the packing gland on the sludge tank mixer and at the FBI pump. Complaints were lodged by workers as long as two years ago when the sewers plugged up (Tr. 11, 15, 32, 33, 56, 57, 65, 86, 99-101; Exhibit 7). Oil and water has accumulated to a depth of 2 to 3 inches on the concrete floor; on the date of the inspection oil and water was 2 to 4 inches deep (Tr. 33, 58). Ameliorating short term measures by respondent included: frequent tightening of the mixer packing gland; installing a sand bag dike; placing wooden planks on the floor for the workers to walk on between the FBI and the sludge feed tank; applying an oil absorbing compound (Tr. 33, 34, 37).

On the date of the inspection the sludge spill was greater than normal; further, the packing gland was leaking badly (Tr. 35-36, 60, 101).

Complainant's abatement proposals: clean the spills, repair the leaking packing gland, carry away future spills (Tr. 78).

Respondent's evidence: at the Mandan refinery any emulsion of oil and water that cannot be readily separated is burned in the FBI. Respondent pioneereed this process and equipment in 1969. It disposes of waste products without emitting smoke or odor into the atmosphere. Prior to its development sludge was burned in open pits (Tr. 108, 109, 110, 117, 143, 150, 219; Respondent's Exhibit A, C-2). The FBI disperses 35 to 40 barrels of spent caustic each day (Tr. 117-118, 126, 151, 152). When the sewer plugged in 1974 leakage at the FBI packing gland became a problem; the high silica aluminum compound in the lines eroded the

mixer shaft and increased leakage. A ditch was constructed to a sump to handle the accumulation of leakage. Also in 1974 the area was diked with sandbags (Tr. 113, 127, 139, 141, 144, 155-156, 168, 170, 173, 187, 188, 200). An evolving set of problems were countered with an evolving set of solutions (Tr. 145).

The leakage became increasingly worse. Short term efforts at solving the problem included replacing sand bags, installing a new packing gland, cleaning the deck (15 to 20 times), pumping out the sump hole (8 times) (Tr. 203-206, 157). In 1974 respondent's officials suspected a mechanical problem in the cyclone scrubber system; later they suspected a design deficiency in the sewer system (Tr. 160, 162, 169, 184). Respondent's officials now believe the problem is solved though the mixer still leaks from time to time (Tr. 174). Packing glands always leak in a minimal amount for lubrication purposes (Tr. 174). A high estimate of leakage: 2 to 3 barrels per day (Tr. 176).

In September 1975 respondent's managers commenced long range efforts to solve the problem. They contacted various mixer manufacturers. A new sewer was designed. Final sewer drawings were drafted and construction bids were in process on the date of the instant inspection. Work began in June 1976 (Tr. 210, 211, 214, 215). The sewer system is now adequate to handle the problem; no potential for a repeat performance exists at the FBI (Tr. 218, 221).

A flash point of a liquid is the minimum temperature at which it gives off sufficient vapor to form an ignitable mixture with the air near the surface of the liquid or within the vessel used. Various flash points discussed in the evidence included:

112° F; Mandan sludge
85° F; Xylene
-40° F; Gasoline
90° F to 175° F: 1 month variance in Mandan sludge in 1976.

(Tr. 3A, 248, 255, 256, 258-261, 280.)

There is a probability a fire would occur during the FBI dumping process if some hot material fell on the sludge leakage (Tr. 277, 281). Prior fires were slow burning, minor and easily extinguished (Tr. 282).

On the date of the inspection a pump hose, inadvertently positioned, functioned as a siphon thereby spilling a large amount of oil on the ground. An accident of this type had not previously occurred. It was abnormal (Tr. 111, 128, 134, 137, 141, 143).

## ISSUES

Complainant contends that:

--he has met his burden of proof to establish a violation of the general duty clause.

--that the violation is serious in nature;

--that respondent has abated the hazard therefore complainant need not show feasible methods of compliance.

Respondent contends that:

--the evidence fails to establish a recognized hazard likely to cause death or serious physical injury;

--that complainant failed to demonstrate the feasibility and utility of the steps that respondent should have taken to avoid the citation;

--that complainant failed to establish a violation of the Act on the date of the inspection hence the citation must be vacated.

The Oil, Chemical and Atomic Workers International Union contend that:

--the facts support the alleged violation.

Complainant introduced evidence of a continuing oil leakage at the fluid bed incinerator prior to the date of the inspection. The thrust of the complaint and the citation is toward the "established procedures concerning maintenance and operating practices" (Citation, complaint ¶IV). Evidence in support of this allegation must almost necessarily include events prior to the date of the inspection. Respondent correctly states the law: a violation must also be shown on the date of the inspection. However, respondent cannot escape the citation by proving that an extraordinary and unanticipated spillage occurred on the date of the inspection if the underlying defective violative conditions existed at the same time.

The evidence establishes a leakage of 2 to 3 barrels of sludge each day at the fluid bed incinerator mixer. Workers in close proximity dumped the sand like residual FBI material. Temperatures of the residual range between 1200 - 1300° F.; spills occur. Respondent's safety expert, a consultant on 50 or more refinery fires, acknowledged the probability of a fire under these circumstances. Literature received in evidence including the American Petroleum Institute publication "Fire Protection in Refineries" recognizes oil leaks as a hazard and proscribes remedial procedures (Exhibits 22, 23). Three minor fires did occur at this refinery including one at the dumpster box.

The thrust of respondent's defense is directed to the proposition that no danger of a substantial fire exists due to the low ignition qualities of the Mandan sludge. This defense conflicts with respondent's evidence, including the illustrative movie (not offered in evidence). The low flash point of the Mandan sludge (90° F.) approaches the flash point of xylene (85° F.) which was shown to be a more readily ignitable substance.

Respondent's knowledge of the flash points of the sludge and the probability of fires at this location establishes actual knowledge of the hazard. Such knowledge is sufficient for the hazard to be "recognized" within the meaning of the general duty clause. Brennan v. Occupational Safety and Health Review Commission (Vy Lactos), 494 F. 2d 460,

464 (C.A. 8, 1974); see also Secretary v. Pratt and Whitney Aircraft, Docket Nos. 130 & 510, 1974-75, OSHD ¶19,287 (1975).

Respondent's additional argument that the allegations herein were mere "housekeeping" complaints abhors the record. Two to three barrels of oil per day translates into a substantial volume in a small area.

In this case the issues concerning abatement and feasibility are not in issue. The citation asserted, in part, that respondent:

> Install a sump and system that will adequately contain, remove effectively, and prevent flooding from potential and future leaks and spills.

Respondent's witnesses indicated the problems were solved; that they anticipated no future difficulties at the fluid bed incinerator. Respondent's reliance on National Realty and Construction Company, Inc. v. Occupational Safety and Health Review Commission 489 F.2d 1957 (C.A., D.C. 1973) is accordingly misplaced.

Evaluations concerning civil penalties are to be made independently of complainant's proposals, Secretary v. Dreher Pickle Company, 2 OSHRC 497 (1973). The Commission has ruled that of the four statutory factors bearing on the appropriateness of the penalty the gravity of the violation should generally be accorded the greatest weight, 29 U.S.C., 666(i); Secretary v. Baltz Brothers Packing Company, 2 OSHRC 384 (1973). In the instant case the gravity is apparent. On the other hand respondent

spent $14,000 to redesign and reconstruct its sewer (Tr. 221). Respondent further attempted to solve the various problems it encountered at this location. On balance a civil penalty of $300 is appropriate.

No substantial issue of fact is presented by the record and the pleadings establish that respondent is an employer engaged in a business affecting commerce. Therefore, the undersigned enters the following:

ORDER

1. Citation 4 is affirmed.

2. The proposed civil penalty of $700 is vacated and a penalty of $300 is assessed in lieu thereof.

John J. Morris
Judge, OSHRC

Dated: December 27, 1976

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

---

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

Complainant,

v.

OSHRC DOCKET
No. 76-2099

AMOCO OIL COMPANY,

Respondent.

---

COMPLAINANT'S MOTION TO WITHDRAW CITATION

Complainant, the Secretary of Labor, hereby moves to withdraw the citation at issue herein on the grounds that the evidence of record does not support a violation of section 5(a)(1) of the Act, as alleged.

The instant case is before the Commission upon direction of former Commissioner Moran. Respondent filed its brief with the Commission in March, 1977. On June 24, 1982 the Commission invited the Secretary to file a responsive brief. The Secretary has requested an extension of time in which to file the brief until August 16, 1982.

Complainant has advised the authorized representative of the affected employees of his intention to withdraw the citation and has explained his reasons for so doing. The authorized employee representative has informed Complainant that the hazardous condition on which the citation was predicated has been abated and has not recurred since 1976.

Complainant has also advised respondent of its intention to move for withdrawal of the citation. Amoco has indicated that it has no objection to this motion and that it will post this motion for inspection of any affected employees who may not be represented by the authorized employee representative at or near the place at which the alleged violation occurred for a period of at least ten (10) days.

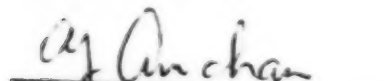
WHEREFORE, Complainant respectfully requests that the Commission dismiss the citation in this case.

Respectfully submitted,

T. TIMOTHY RYAN, JR.
Solicitor of Labor

FRANK A. WHITE
Associate Solicitor for Occupational Safety and Health

HAROLD J.ENGEL
Counsel for Regional Trial Litigation



ARTHUR J. AMCHAN
Attorney

## CERTIFICATE OF SERVICE

I hereby certify that a copy of foregoing Complainant's Motion to Withdraw Citation was mailed postage prepaid to J.D. Pickett, Esq., Standard Oil Co. (Indiana), 200 E. Randolph Drive, MC 2103, Chicago, Illinois 60610, and Mr. Ray Lovelady, Int'l Representative, Oil, Chemical & Atomic Workers Int'l, Union Dist. No. 6, 4106 66th Street, Des Moines, Iowa 50322 on this 12th day of August, 1982. An additional copy was also sent to Mr. Pickett for posting.

Aj Amchan

ARTHUR J. AMCHAN
Attorney

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

August 31, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

K-Mart

OSHRC DOCKET NO. 77-270

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR EMPLOYEES

-

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-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 77-270 |
| K-MART, | : | |
| Respondent. | : | |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners

BY THE COMMISSION:

A decision of Review Commission Judge George W. Otto is before the Commission for review pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Judge Otto vacated a citation which charged Respondent, K-Mart, with violating section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1),[1/] by failing adequately to protect employees from certain hazards arising out of the operation of a cardboard box compactor. For the reasons that follow we reverse the judge and affirm the citation.

The citation resulted from an accident at one of Respondent's stores involving a Bra-Con baler, a machine that compresses and

---

1/ Section 5(a)(1) provides:

SEC. 5. (a) Each employer--
(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

bales cardboard boxes.[2/] The baler is leased by Respondent from its owner, Radiographics, but it is operated by Respondent's employees. The baler is shaped like a vertically upright cabinet that is tall enough for a person to stand in when the ram is in its upper or lower position. Inside the superstructure are a horizontal ram which descends to compress the cardboard, and a vertical hydraulic cylinder which operates the ram. The ram pushes the cardboard down into the lower portion of the machine. In the front of the baler is a door which covers the lower portion of the baler. The open space above the door is covered by a safety gate which moves up and down with the ram. The safety gate is designed to protect employees from injury due to the downward movement of the ram. Thus, if an employee places a hand or arm in the space between the top of the door and the ram while the ram is coming down, the ram will automatically reverse its direction when the safety gate comes in contact with the employee.

Other safety features on the baler are the control panel, automatic cutoff of the motor, and a door limit switch. The control panel is located on the upper right hand side of the front of the baler. The top control is a disconnect lever which energizes the machine. The "bale eject" button determines the machine's function, i.e., compressing or baling, and the selector button determines the ram's cycle, i.e., up or down only or a full cycle starting in the up position. The bottom button turns the motor off or on, thereby activating the ram.

---

2/ The exact circumstances and cause of the accident in which an employee was crushed in the baler are unknown.

This button is pulled out to turn the machine on and pushed in to turn it off.

Normally, the motor cuts off automatically after the ram completes its intended movement (up or down or a single full cycle). However, an electrical malfunction can cause the motor to continue running after the ram has stopped moving, and such a malfunction occurred at least once in the year preceding the accident. The final safety feature, the door limit switch, stops the ram whenever the door is opened. With the door open, the ram will move only when an employee continues to hold the bottom button in the on position.

The baler performs two basic functions: compressing and baling. Any employee can compress cardboard boxes, but only stockroom personnel are authorized to perform the baling operation. The top three buttons or levers on the control panel are customarily left in the positions necessary to perform the compressing operation, so an employee need only throw the box to be compressed through the opening between the top of the door and the bottom of the safety gate and then pull out the bottom on-off button. When this is done, the ram automatically goes through a single cycle, thereby compressing the box, and the motor automatically shuts off. The process is repeated until all boxes have been compressed.

To perform the baling operation, a stockroom employee first brings the ram down to hold the cardboard in place. The employee then opens the door and places five wires around the cardboard. These wires are inserted through slots in the back of the machine and tied together at the front of the baler. The machine is then activated to eject the bale.

The record establishes that it is never necessary for Respondent's employees to go into the baler to perform the compressing and baling operations. Frequently, cardboard becomes lodged between the ram and the sides or back of the superstructure. This cardboard will not interfere with the compressing operation and therefore there is no need to remove the cardboard during this operation. However, the cardboard does interfere with the baling operation because it precludes employees from inserting wires through the baler. Accordingly, employees have been provided sharp instruments that they use to poke holes in the cardboard so that the wires can be inserted.

Although it was not necessary for them to do so, several of Respondent's employees went into the baler to dislodge cardboard. Kenneth Pflugradt, the injured employee, testified that he climbed into the baler to remove cardboard approximately once a night for the two months preceding his accident. He further testified that he had observed two other stockroom employees, including his supervisor, climb onto the ram during the baling operation in order to dislodge cardboard. To enter the baler, employees climbed the ledges on the outside of the door while the door was closed, thus circumventing the door limit switch. In addition, Kelly Gratz, who was also a stockroom employee, testified that he had seen employees "a lot [of times]" lift up the safety gate and reach across the ram in order to pull out cardboard. Gratz conceded that he had done this in conjunction with compressing, as well as baling, because "some people, if they saw that boxes were stuck in there, would just leave their boxes and not crush them."

Several employees testified concerning the instructions they had received in operating the baler. When the baler was first leased and installed, which was over two years prior to the incident in question, the store manager gave a demonstration and instructions to all employees. The manager issued a strict prohibition against any employee at any time placing a hand, an arm or any part of the body into the baler and further stated that any employee who violated this rule would be terminated.

Those employees who began working for Respondent after this initial training session were taught how to operate the baler by their supervisors or by stockroom employees. The nature and extent of this later training varied. Some employees received the same instructions from their supervisors or stockroom employees that had originally been given by the store manager. On the other hand, Pflugradt, who was trained by his stockroom supervisor, testified that the only safety instruction he received was to keep his hands out of the baler when the ram was moving. He further testified, without contradiction in this record, that he climbed on top of the ram to remove cardboard because he had seen his supervisor do so.

Respondent's employees did not service or repair the baler. This work was performed by Hiram Anderson, an employee of Radiographics, the lessor of the baler. Anderson, who serviced 114 balers on a regularly scheduled basis, testified that he routinely instructed his customers that employees should never enter the baler to pull out cardboard. When asked why this instruction was given, Anderson replied:

> I think it is just like there are so many possibilities sometimes, acts of God, I don't know what you call it, things that enter your mind when you get involved with machinery that

> I just, like, we just don't want the man in the machine. The platen is up there, there is a lot of weight up there, there is no reason for him to take any chance.

Anderson testified that he de-energized the baler by removing the fuses before he worked on it.

Judge Otto concluded that Respondent's employees were adequately trained in safe operation of the baler and vacated the citation. Commissioner Cottine directed the Secretary's petition for review in which the Secretary argues that Respondent's safety program did not free the workplace of the hazard. Respondent argues that its safety program was adequate, that the baler's mechanical safety features effectively protected employees from the hazard during normal operations, and that injury could occur only as the result of idiosyncratic employee misconduct.

In order to establish a section 5(a)(1) violation, the Secretary must prove: (1) the employer failed to render its workplace free of a hazard, (2) the hazard was recognized either by the cited employer or generally within the employer's industry, (3) the hazard was causing or was likely to cause death or serious physical harm, and (4) there was a feasible means by which the employer could have eliminated or materially reduced the hazard. E.g., Jones & Laughlin Steel Corporation, 82 OSAHRC _____, 10 BNA OSHC 1778, 1982 CCH OSHD ¶ 26,128 (No. 76-2636, 1982). We conclude for the reasons that follow that the Secretary has met his burden of proving each of these elements in this case.

The hazard at issue is the possibility of a crushing injury due to movement of the ram during routine operation of the baler. A recognized hazard is a condition or practice

in a workplace that is known to be hazardous by either the industry in general or the employer in particular. Respondent's recognition of the hazard is evidenced by the instructions that the store manager gave shortly after the baler was first installed prohibiting any employee from placing any part of the body within the baler at any time. In addition, Respondent knew that the baler was equipped with safety features, particularly the safety gate, that were specifically designed to prevent crushing injuries caused by the ram. See, e.g., Ted Wilkerson Inc., 81 OSAHRC 70/D8, 9 BNA OSHC 2012, 2016, 1981 CCH OSHD ¶ 25,551 at p. 31,856 (No. 13390, 1981)(issuance of a work rule shows employer recognition of the hazard.) Moreover, in view of Anderson's extensive experience with Bra-Con balers, his repeated warning that operating employees should never go inside the baler, and the reasons underlying his warnings, clearly show the hazard was recognized by the industry.

Respondent argues in effect that the baler's safety features and the training and instructions it provided employees rendered the workplace "free" of the hazard posed by movement of the ram. We do not agree. An employer's duty under section 5(a)(1) is to free its workplace of recognized hazards that are likely to cause death or serious harm. When elimination of a hazard depends on employee compliance with safety rules, the employer must take all feasible steps to assure that employees comply with the rules. Feasible steps for assuring employee observance of safety procedures include work rules designed to prevent the violation at issue,

effective communication of those rules to employees, employer efforts to discover violations, and employer enforcement of the rules when violations are discovered. See General Dynamics Corp., Quincy Shipbuilding Division v. OSHRC, 599 F.2d 453, 458 (1st Cir. 1979); National Realty and Construction Co. v. OSHRC, 489 F.2d 1257 (DC Cir. 1973); Little Beaver Creek Ranches, Inc., 1982 OSAHRC _____, 10 BNA OSHC 1806, 1982 CCH OSHD ¶ 26,125 (No. 77-2096, 1982); Jones & Laughlin Steel Corp., supra; Western Massachusetts Electric Co., 81 OSAHRC 63/B13, 9 BNA OSHC 1940, 1981 CCH OSHD ¶ 25,470 (No. 76-1174, 1981).

We reject Respondent's argument that the baler's safety features and the training and instructions Respondent provided employees rendered the workplace "free" of the hazard posed by movement of the ram during routine operation. Although the evidence shows that the baler is safe when employees are operating it properly and there is no electrical malfunction, the record also establishes that on several occasions employees have operated the baler improperly and electrical malfunctions have occurred that pose a danger to those employees. Consequently, the baler's safety features do not eliminate the hazard. For example, the safety gate provides effective protection against a crushing hazard to an employee who stands at the control panel and operates the baler, but it cannot provide protection to an employee who circumvents this safeguard by lifting the safety gate to reach over the ram or who climbs over the door and safety gate onto the ram. Respondent's employees engaged in both of these activities.

These examples establish that it was necessary for Respondent to supplement the machine's physical safeguards with adequate employee training and safety instructions in order to satisfy its obligation under section 5(a)(1).[3/] Respondent's safety program was not, however, adequate. Respondent attempted to establish an effective work rule when Respondent's store manager instructed all employees that they should never place a part of their bodies into the baler. However, at the time of Pflugradt's accident, it had been over two years since the training session when that instruction was given. There is no evidence that employees who received their training at this initial session were ever reminded of this work rule. Moreover, employees who were taught how to operate the baler after the initial session were not instructed to keep out of the baler at all times. The injured employee, Pflugradt, for example, testified without contradiction that he was instructed only to avoid entering the baler when the ram was actually moving.

In addition, Respondent failed to take adequate steps to effectively enforce its work rule, including measures to discover violations of the rule. The number of incidents of employees--including supervisory employees--entering the baler demonstrates that Respondent did not effectively monitor employee compliance or discipline employee non-compliance. As the United States Court of Appeals for the District of Columbia Circuit noted in National Realty & Construction Co. v. OSHRC, 489 F.2d at 1267

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3/ The Secretary has not suggested any method of machine guarding in addition to those already in use on the baler as a means of protecting Respondent's employees.

n.38, the fact that a supervisor feels free to breach a company safety policy is strong evidence that implementation of that policy is lax. The hazard in this case could have been materially reduced if Respondent had adequately trained and instructed its employees.[4/]

Based on our conclusion that Respondent failed to take the steps necessary to assure that employees operated the baler safely, we reject Respondent's contention that the Secretary is seeking to impose strict liability. Because employees frequently entered the baler and because the machine has previously had electrical malfunctions, we cannot agree with Respondent that injury could only occur as the result of idiosyncratic misconduct or "freakish . . . circumstances."

The Secretary satisfied his burden of proving that the hazard was causing or likely to cause death or serious physical harm by introducing evidence concerning the pressure exerted by the ram. The Secretary's evidence also shows the existence of "pinch points" where an employee could be crushed due to movement of the ram or the safety gate, and hospitalization and extensive lost time could result.

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4/ Because the Secretary met his burden of proving that Respondent failed to take adequate measures to establish and communicate an effective work rule, Chairman Rowland does not find it necessary to decide whether an employer may properly be required to enforce work rules which have been communicated to employees. For a discussion of the question whether an employer should be required to do anything more than give instructions to employees regarding proper safety procedures, see General Electric Co. v. OSHRC, 540 F.2d 67, 69 (2d Cir. 1976); Borton, Inc., 82 OSAHRC 17/E13, 10 BNA OSHC 1462, 1982 CCH OSHD ¶ 25,983 (No. 77-2115, 1982)(dissenting opinion), petition for review docketed, No. 82-1661 (10th Cir., May 26, 1982).

Finally, the Secretary established the feasibility of materially reducing the hazard by providing adequate training and instructions to employees in safe operation of the baler.[5/]

Accordingly, we find that a violation of the general duty clause has been established and reverse the judge.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

DATED: AUG 31 1982

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5/ We vacate the allegation that Respondent violated section 5(a)(1) by failing to establish procedures for locking out the source of power at the main disconnect switch. We conclude that the Secretary failed to prove that establishing lockout procedures was a precaution that would have eliminated or materially reduced the hazard at issue. The purpose of a lockout device in this context would be to protect an employee working inside the baler from the possibility that a second employee might activate the ram without knowing that he was thereby endangering the first employee. However, the record establishes that there was no need for Respondent's employees to go inside the baler. We note that the baler was serviced by Anderson, the Radiographics employee, who locked out the baler by removing the fuse. Hence, lockout procedures are unnecessary if effective work rules preclude entry into the baler.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
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| SECRETARY OF LABOR, | : | |
| Complainant | : | OSHRC |
| v. | : | Docket No. 77-270 |
| K-MART, | : | |
| Respondent. | : | |

Appearances:

Donald H. Segel, Esq., for Complainant

Truman Q. McNulty, Esq., for Respondent.

Judge George W. Otto

This proceeding under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq., (Act) arose pursuant to notice by K-Mart, a corporation, contesting a citation issued by the Secretary of Labor (Secretary) by authority of 29 U.S.C. 658(a). The citation charges a serious violation of 29 U.S.C. 654(a)(1), specifies immediate abatement and proposes a $600 penalty.

Respondent K-Mart alleges the cited statute is unconstitutional, that the inspection was made without proper authority, denies jurisdiction, objects to amendment of the citation, denies violation and disputes the abatement time and proposed penalty.

Determination of constitutionality of the Act is not within Commission authority.[1/] No court has found 29 U.S.C. 654(a)(1) invalid. Respondent has presented nothing to impair the validity of the inspection. The employer's personnel manager telephoned the OSHA Milwaukee, Wisconsin office on November 23, 1976 and reported injury to an employee. An OSHA compliance officer commenced inspection and investigation on November 23 and the employer did not refuse access to the workplace. The inspection was confined to the area involved in the reported injury. The compliance officer presented appropriate credentials and there is no indication that he failed to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner. In Stephenson Enterprises, Inc., v. Marshall, 5th Cir. 1978, No. 76-4163, inspection was declared valid, the employer having consented to examination of the plant facilities; the court distinguished Marshall v. Barlow's Inc., 98, S.Ct. 1816, 56 L.Ed.2d 305 (1978), wherein the Supreme Court held that provisions of the Act violate the fourth amendment to the extent that they purport to authorize warrantless inspections over the refusal of an employer.

K-Mart has not been prejudiced by the complaint amendment of the citation description of alleged violation. A citation does not freeze the legal theory of a case. The Act does not expressly provide for the issuance of a complaint, following an employer's contest of citation. However, Commission Rule 33(a)(3), codified as 29 C.F.R. 2200.33(a)(3), provides that where the Secretary seeks in his complaint to amend his citation or proposed penalty, he shall set forth the reasons for amendment and shall state with particularity the change sought. Complaint paragraph IV(a) states with particularity the change sought and complaint paragraph V states the reason for amendment.[2/]

## THE ISSUES

1. Violation of 29 U.S.C. 654(a)(1).

2. Abatement time.

3. Assessment of penalty.

## FINDINGS OF FACT

1. Respondent K-Mart is an employer engaged in a business affecting commerce, with employees in a workplace at 4601 South 27th Street, Greenfield, Wisconsin.

2. On November 22, 1976 an employee was injured on a Bra-Con Baler, Series 800. The cause and the circumstances of the injury are unknown.[3/]

3. The baler was owned by Radiographics, leased to K-Mart and installed in August 1974. Since installation it has been serviced and repaired by a Radiographic employee; it has not been serviced or repaired by any K-Mart employee. Since installation it has been used by K-Mart for baling cardboard. Employees of all K-Mart departments have been authorized to dispose cardboard into the baler. Only K-Mart assistant managers and stockroom employees have been authorized to place wires or bands around the compressed cardboard and operate the baler to eject the bale.[4/]

4. The baler was maintained by a Radiographics employee. The baler was not maintained by any K-Mart employee. Removal of cardboard from the platen-backwall space or from the top is not a baler maintenance function but is a bale production element.[5/]

5. K-Mart employees were instructed in the performance of their duties associated with the use of the baler.[6/]

6. Respondent did not fail to train and instruct employees on the safe use and operation of the baler.

7. Respondent did not add padlocks or other devices to the baler, after installation.[7/]

8. The providing of lockout procedures, such as padlocks, at the source of power at the main disconnect switch prior to maintenance of the Bra-Con Baler, is not essential to furnish to respondent employees employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm.[8/]

9. There was no recognized hazard causing or likely to cause death or serious physical harm to K-Mart employees who disposed of cardboard by placing it in the baler or who worked as stockroom employees in tying, banding and ejecting bales from the baler.

OPINION

To establish a violation of the general duty clause, the Secretary must prove (1) that the employer failed to render its workplace free of a hazard which was (2) recognized and (3) causing or likely to cause death or serious physical harm. U. S. Pipe and Foundry Company, #11739, 1978.

The Secretary does not contend the baler operation and use is unsafe during normal, expected performance, and in the absence of malfunction. If an employee believes it advantageous to compress the cardboard accumulation, to permit additional cardboard in the bale formation, the employee is authorized to pull the lowest button

on the control panel to activate the ram. The control panel is not detached from the baler, is part of the machine and is located on the face to the immediate right and above the top of the baler door. The door height is four feet eleven inches from the floor and the disposal opening above it is two feet four inches (the dimensions in R-1, p.4 figure 2 are deemed accurate for this baler). The main disconnect switch on the control panel contains two holes which could be used to attach a padlock. In vertical alignment below the switch are three black buttons. The top black button is used in ejecting the completed bale from the baler. The middle black button permits selection of the ram movement, either automatic or manual up or manual down. The bottom button is pulled to activate the ram (T. 103 - 108, 262, 263, 411 - 415, 447 - 454, 3H: 14 - 19, 96, 97, C2 - 3 - 4 - 7 - 8 - 9, R-1 p. 2, 5). A safety gate above the door moves down and up with the ram movement. The disposal interior is four feet eight inches wide and the exterior dimension front to back is three feet seven inches. There is three-fourths inch clearance between the interior walls and the platen; cardboard lodges within this space and gets on top and at times interferes with the insertion of wires or bands. Employees responsible for attaching the wires or bands around the compressed cardboard are provided with a sharp tool to punch holes in the cardboard between the wall and the platen if there is such obstruction but this is not always effective. Holes are punched from the back with the employee outside the baler. According to a former stockroom employee, punching the hole

with the tool worked about 95% of the time and in 5% the ram was raised, wire fed through and the ram lowered (T.426). The employees were instructed that at no time were they to put hands, arms, parts of the body into the machine, (that) anyone violating this procedure would be terminated (T.379, 380). However, some stockroom employees did move or reach into the baler to remove cardboard; this was done without the employer's knowledge or approval. Without doubt there was a problem at times due to cardboard interfering with the final baling operation within the machine but this problem did not constitute a recognized hazard.

The Radiographic employee who installed, serviced, maintained and repaired this baler did similar work, about monthly, on a total of 112 balers and was familiar with other balers. He has never seen a padlock on balers and there is no testimony or other record that padlocks are used on this type of baler operation. The Secretary introduced a data sheet prepared by the National Safety Council (C-10), entitled "Methods of Locking Out Electrical Switches." This document is an informational article discussing various techniques for accomplishing the locking function. Lockouts are recommended where the disconnect is remote from the machine or where the machine is so large that the employee at the disconnect could not possibly see all parts of the machine, according to respondent's expert witness. In the instant case the control panel containing the disconnect switch is attached to the machine; an employee using the control panel should have no difficulty in seeing the interior and other parts of the baler, considering its size. The duties performed by K-Mart employees did not require a power disconnect to provide a more safe employment and place of employment. The Radiographic employee used a

fuse puller and removed the fuses before performing maintenance or repair work but the baling operations performed by K-Mart employees are unrelated to the maintenance and repair activity making advisable removal of fuses.

## CONCLUSIONS OF LAW

1. The Commission has jurisdiction to hear, determine and make final disposition of this proceeding.

2. Respondent did not fail to furnish to each of its employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees.

## ORDER

The citation issued December 27, 1976 is hereby vacated.

George W. Otto
Judge, OSHRC

Dated: October 23, 1978

## FOOTNOTES

(The first and second hearings are recorded on transcript pages 1 -497 (T.1-497).
The third hearing is recorded on transcript pages 1-118 (3H: 1-118).

1. Hullenkremer Construction Co.,Inc., 78/19/C8, 6 BNA OSHC 1469, CCH OSHD para. 22,568 (No. 15370, 1978).

2. Citation description: (a) Each employee required to operate the Bra-Con Baler, Model 800 located in the stockroom, was not instructed in the recognition and avoidance of unsafe conditions. (b) Positive means, such as padlocks, were not provided for locking out the source of power at the main disconnect switch prior to maintenance of the Bra-Con Baler, Model 800.

   Complaint description: Respondent's employees operating and working on the Bra-Con Baler, Model 800, located in the stockroom were subjected to being crushed by the Bra-Con Baler as a result of the employer's failure to train and instruct employees on its safe use and operation; (b) respondent failed to provide lockout procedures, such as padlocks, at the source of power at the main disconnect switch prior to maintenance of the Bra-Con Baler,Model 800.

3. T.19, 173, 187, 188, 211, 212, 215, 239, 240.

4. T.13, 22, 25, 35-50, C2-C9, 54, 107, 110, 121, 131, R-1, 42, 121, 304, 305, 378, 398, 459, 3H: 2, 5, 6, 7.

5. T.148, 150, 151, 152, 153, 157, 230, 234, 256, 258, 347, 458, 475, 3H: 2, 6, 7, 28, 34, 38, 41, 52, 56, 58, 68, 70.

6. T.202, 203, 205, 206, 217, 218, 232, 376, 379, 380, 387, 388, 389, 390, 402, 403, 404, 408, 410, 422, 423, 430, 434, 3H: 61, 62, 64.

7. T. 79, 267.

8. T.51, 52, 59-60, 61, 100,127-128, 129, 136, 142, 143, 157-159, 168-170, 178, 188, 267-270, 271-272, 289, 292, 294-296, 298-299, 309, 338, 344, 353, 354, 385-386, 404, 408, 416, 422, 423, 426, 447, 467, 487, 488, 302, C-10, R-1, 3H: 32, 33, 36, 64, 66.

9. T.41 — 49, 150, 151, 152, 207, 232, 233, 378, 379, 395, 397, 416, 422, 425, 426, 430, 474, 3H: 33, 44, 46, 59,60,64,71,92, C4-C9.

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

Aug. 31, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Bechtel Power Corporation

OSHRC DOCKET NO. 77-3222

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

FOR THE SECRETARY OF LABOR

OF COMMISSION DECISION

To wit: See attached.

- Counsel for Regional Litigation
  Office of the Solicitor, USDOL
  200 Constitution Ave., NW. - Rm. S-4014
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- Marshall H. Harris
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FOR EMPLOYER

- Michael A. Floyd
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  Bechtel Power Corporation
  P.O. Box 3965
  San Francisco, CA. 94119

FOR EMPLOYEES

-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

OFFICE OF THE JUDGES'
Occupational Safety & Health
Review Commission
1515 Broadway
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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>BECHTEL POWER CORPORATION,<br><br>Respondent. | OSHRC Docket No. 77-3222 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge Henry K. Osterman is before the Commission pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Judge Osterman vacated a citation issued by the Secretary of Labor ("the Secretary") to Respondent, Bechtel Power Corporation ("Bechtel"), following an employee's fatal fall from a scaffold and the Secretary's subsequent inspection of the accident site in Pottstown, Pennsylvania, where Bechtel was engaged in constructing a nuclear power plant. The Secretary's citation alleged that Bechtel had failed to comply with the standards at 29 C.F.R. § 1926.451(e)(5) 1/

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1/ The standard at 29 C.F.R. § 1926.451(e)(5) provides:

> § 1926.451 Scaffolding.
>
> * * *
>
> (e) Manually propelled mobile scaffolds.
>
> * * *
>
> (5) A ladder or stairway shall be provided for proper access and exit and shall be affixed or built into the scaffold and so located that when in use it will not have a tendency to tip the scaffold. A landing platform must be provided at intervals not to exceed 35 feet.

The citation alleged:

> Proper and safe access was not provided to employees working on top of the 24 foot high mobile scaffold in the Turbine Enclosure Unit #1 in that the positioning of the ladder below an overhead beam required the employees to reach out and up to gain access to the scaffold platform. This resulted in an accident to an employee on 8/24/77.

and 29 C.F.R § 1926.451(e)(8) [2/] and proposed a penalty of $900 for these alleged violations, which were characterized as serious. [3/] The judge vacated the citation based on his conclusion that the Secretary had failed to establish Bechtel's knowledge of the allegedly violative conditions. The Secretary petitioned for review of the judge's disposition of both items and Commissioner Cleary directed review on the issues raised by the petition.

For the reasons stated below, the Commission concludes that the Secretary established noncompliance with both cited standards and that Bechtel's noncompliance with section 1926.451(e)(5) was a serious violation of the Act, as alleged. However, the Commission also concludes that Respondent's failure to comply with section 1926.451(e)(8) was a de minimis violation of the Act and therefore neither a penalty nor an abatement requirement for that violation is warranted.

I

The fatal incident giving rise to the citation on review involved a Bechtel pipe welder, Zaleski, who was performing an assigned task on top of a scaffold

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2/ The standard at 29 C.F.R. § 1926.451(e)(8) provides:

> § 1926.451 Scaffolding.
>
> * * *
>
> (e) Manually propelled mobile scaffolds.
>
> * * *
>
> (8) Scaffolds in use by any persons shall rest upon a suitable footing and shall stand plumb. The casters or wheels shall be locked to prevent any movement.

The citation alleged:

> The casters or wheels on manually propelled mobile scaffold were not locked to prevent movement:
>
> a) Turbine Enclosure Unit #1--three unlocked wheels on 5x7 safeway scaffold.

3/ The Secretary subsequently moved to amend his citation and complaint to charge a violation of section 5(a)(1), 29 U.S.C. § 654(a)(1), of the Act as an alternative to the alleged failure to comply with the standard at § 1926.451(e)(5). For the reasons developed infra, the Commission concludes that the cited standard is applicable here. It is well established that the applicability of a standard precludes citation to the general duty clause. Brisk Waterproofing Co., Inc., 73 OSAHRC 30/E1, 1 BNA OSHC 1263, 1973-74 CCH OSHD ¶ 16,345 (No. 1046, 1973). Accordingly, the Commission does not consider the parties' arguments on review concerning the alternative allegation under the general duty clause.

(scaffold "O") that was located alongside a wall inside the plant under construction. For approximately one week, Zaleski and another welder, Kertes, had been using a ladder affixed to an adjacent scaffold (scaffold "X") whenever they needed to gain access to scaffold "O", because the ladder on "O" was too short--by 6 or 8 feet--to reach the scaffold platform. 4/ Scaffold "X" was a single-tower, mobile scaffold on four wheels, with a 5x7-foot platform that was 24 feet above the ground. It was situated in such a manner that the edge of the platform to which its ladder was attached was located beneath a horizontal beam passing overhead. As described later by Kertes at the hearing, Zaleski climbed up the scaffold ladder and, as he neared the platform level, he reached for the top guardrail. When Zaleski grabbed the rail, it tore loose from the scaffold. 5/ Zaleski fell backward from the scaffold and landed on the ground. He never regained consciousness.

At the hearing before Judge Osterman, the Secretary's compliance officer testified that, as a result of the presence of the overhead beam, one was prevented from going up to a standing position and stepping off the ladder at the same level as the scaffold platform: "It would force him to be holding onto the ladder with one arm and one leg and he would have to whip his leg up onto the platform . . . approximately two to three feet." The compliance officer, who climbed the scaffold himself during his inspection, stated that the beam impeded

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4/ The record also indicates that two other ladders would have afforded access to scaffold "O". Nevertheless, based on one of the exhibits introduced by Bechtel, it does not appear that either provided as direct access to Kertes and Zaleski's work station. Moreover, Hagan, one of Bechtel's safety representatives, testified that one of these ladders also appeared to be too short.

5/ Much of the record is devoted to the possible unauthorized modification of the guardrails on the scaffold--Kertes denied that he had tampered with the guardrail--and to the failure of the employees to report this unsafe condition to Bechtel supervisors, as required by company workrules. This evidence formed part of the basis of Bechtel's unpreventable employee misconduct defense. Nevertheless, we conclude that this evidence (and Bechtel's arguments in support of this aspect of its unpreventable employee misconduct defense) need not be considered further, because the basis of the alleged violation is the positioning of the scaffold ladder, not the condition of the perimeter guarding on the scaffold platform.

the progression of the climber up the ladder. The union steward, who followed the compliance officer up the ladder during the inspection, also referred to the dangerous transition from the ladder to the platform--"Well, the left hand, you had to grab up higher and then swing actually your body into the scaffolding to get over to the scaffolding . . . You could not step on there, no."--and cited the overhead beam as a cause of the access problem. Kertes recalled that the scaffold platform was so close to the ceiling that one could not stand up. In describing the transition from the ladder, Kertes stated, "You had your left hand on the ladder, left foot at a ladder rung, put your knee on the scaffold and just crawled in." Thus, an employee, instead of alighting from the ladder in a standing position and then bending over to enter the platform between the top and mid-rails, would necessarily have to dismount the ladder from below the level of the platform and then grasp a guardrail and pull himself up to the platform and through the guardrails.

The record indicates that, according to company policy, the carpenter foreman was responsible for inspecting scaffolds when they were erected, modified or moved. 6/ Scaffold "X" was "reworked" by three carpenters under the direction of the carpenter foreman two days before the accident and the record indicates that the scaffold was located beneath the beam at that time. The carpenter foreman testified that he probably passed by the scaffold many times in the period between the "rework" and the accident, but he could not recall if he had observed the entire scaffold. The record also reveals that some employees at the worksite complained to their union steward about unsafe access to scaffolds several weeks prior to the incident in question. There is no evidence that any of these complaints concerned the specific scaffold described in the citation, although the complaints involved scaffolds in the same general area.

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6/ Bechtel's "Safe Practices" booklet provides:

> Each scaffold must be inspected and approved by responsible supervisory personnel prior to initial use and after alteration or moving.

II

A

In his decision, Judge Osterman found that the beam's location directly above the scaffold made it impossible to step directly from the ladder to the scaffold, thereby necessitating that Zaleski haul himself up a distance of approximately 2 feet from a rung on the ladder to the platform of the scaffold. Without explicitly holding that section 1926.451(e)(5) was applicable here, the judge assumed that the positioning of the ladder on the scaffold and its relationship to the platform violated the standard because "proper access and exit" to and from the platform was not provided. Nevertheless, the judge found that the Secretary had failed to show that Respondent had prior knowledge, either actual or constructive, of a potential hazard to its employees. On this basis, the judge vacated this item in the citation.

B

On review, Bechtel argues that section 1926.451(e)(5) simply requires that the employer furnish a stairway or ladder; the standard in its view does not address the issue of the positioning of the mobile scaffold to avoid overhead obstructions. Contrary to Judge Osterman's analysis, Bechtel insists that the words "for proper access and exit" are mere surplusage, for they merely explain why the drafters required a ladder on a mobile scaffold. Bechtel contends that, if these words are to be interpreted by the Secretary to mean something other than simply locating the ladder so that it will not have a tendency to tip the scaffold when it is in use, then the standard is vague and unenforceable.

Citing Perini Corporation, 77 OSAHRC 65/A2, 5 BNA OSHC 1343, 1977-78 CCH OSHD ¶ 21,790 (No. 12589, 1977), Bechtel also asserts that the Commission has held that employers may rely on the standards for ladders contained in Subpart L as prescribing the exclusive requirements for the types of ladders to be used on mobile scaffolds. It argues in effect that a violation of section 1926.451(e)(5) cannot be sustained in the absence of a showing of noncompliance with a ladder

specification standard. Thus, Bechtel states that its obligation under the standards was to provide a ladder which was affixed or built into the scaffold and so located that, when in use, it would not have a tendency to tip the scaffold, and which had side rails extending at least 36 inches above the platform landing. Bechtel declares that it satisfied all of these requirements and, hence, there was no violation.

Alternatively, Bechtel contends that, even under the Secretary's interpretation of the standard, the Secretary did not sustain his burden of proving that the means of access provided was improper. In effect it argues that the employees obtained access in the customary manner by climbing through the guardrails and that the overhead beam did not obstruct this access.

Bechtel further asserts that it rebutted any presumption of employer knowledge of the alleged violative condition by introducing evidence that the use of the scaffold in question by Kertes and Zaleski was an unknown, isolated incident of employee nonconformance with Bechtel's safety program. Bechtel insists that there is no evidence either that it required any employee to use the mobile scaffold at that location at the time of the alleged violation or that it had knowledge of the employees' use--which was not foreseeable--of the scaffold, in noncompliance with Bechtel's work rules.

C

At the outset, the Commission must determine whether section 1926.451(e)(5) includes a requirement that the means of access provided be safe. The Commission concludes that the standard contains this requirement. 7/ The recent case of H.E. Wiese, Inc., 82 OSAHRC 18/A2, 10 BNA OSHC 1499, 1982 CCH OSHD ¶ 25,985 (Nos. 78-204 & 78-205, 1982), presented a similar interpretative issue involving a different

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7/ Commissioners Cleary and Cottine join in this subpart (II C) of the Commission's decision. Chairman Rowland's views are stated in his separate opinion.

but related standard governing scaffolding, section 1926.451(a)(13). 8/ There, we rejected the employer's argument that compliance with the standard was achieved simply by providing a ladder even though the ladder did not provide complete access across a 2-foot gap to the scaffold in question. We noted that the plain meaning of the standard is that safe access must be provided at all points between the lower elevation and the scaffold. In addition, we rejected the employer's argument that the cited standard was unenforceably vague, concluding that the term "safe access", as used in the standard, was not unclear, and also rejected the contention that the Secretary must prove noncompliance with a ladder specification standard in order to prove a violation of section 1926.451(a)(13).

We conclude that, consistent with the holdings of H.E. Weise, Bechtel's contentions concerning the proper interpretation of section 1926.451(e)(5) must be rejected. The requirement of section 1926.451(e)(5) to provide "proper access" imposes the same obligation as that contained in section 1926.451(a)(13) to provide "safe access." Therefore, we conclude that the objective of section 1926.451(e)(5) is to provide employees with safe access—"proper access and exit"—to mobile scaffolds by means of a ladder or stairway. This objective cannot be achieved if, as Bechtel argues, an employer is required merely to provide a ladder that may or may not afford "proper access and exit." Cf. H.E. Wiese, Inc., supra. To read this standard narrowly to require an employer simply to provide a ladder or stairway, but not to require that the employer ensures that the ladder is so positioned as to provide "proper access and exit", would (1) improperly read that phrase out of context and in a manner contrary

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8/ The standard at 29 C.F.R. § 1926.451(a)(13) provides:

§ 1926.451 Scaffolding.

(a) General requirements.

* * *

(13) An access ladder or equivalent safe access shall be provided.

to the purposes of the Act and (2) improperly shift responsibility for occupational safety and health from the employer to the employee, cf. Borton, Inc., 82 OSAHRC 17/E13, 10 BNA OSHC 1462, 1982 CCH OSHD ¶ 25,983 (No. 77-2115, 1982) (under section 1926.451(a)(13), an employer must not only provide but also ensure use of an "access ladder or equivalent safe access" when employees seek to gain access to scaffolding). As in H.E. Wiese, we also reject Bechtel's argument that the cited standard is unenforceably vague, for a ladder or stairway that poses hazardous access to the scaffold platform plainly does not provide "proper access and exit." Moreover, we conclude that Bechtel's reliance on Perini Corp. is misplaced because the issue there was whether the means of access provided by the employer was a "ladder" within the meaning of the cited standard, not whether it provided "proper access and exit." Perini Corp. interprets section 1926.451(e)(5) as requiring a ladder to meet certain minimum specifications, for example, distances between rungs. However, for the reasons discussed, section 1926.451(e)(5) also requires an employer to provide a ladder which is positioned to afford "proper access and exit."

The next issue for determination is whether Bechtel complied with its obligation under the cited standard. The Secretary presented two witnesses, the compliance officer and the shop steward, who testified that the presence of the overhead beam directly above the ladder prevented employees from stepping off the ladder onto the platform at the level of the platform and, thus, subjected employees to the hazard of falling from the platform to the ground 24 feet below. Both witnesses testified that employees had to swing their legs up to reach the platform. This testimony is substantiated by the photographic evidence, which demonstrates that the vertical distance between the overhead beam and the scaffold platform was clearly less than the width of the platform itself, which Bechtel concedes to be 5 feet. In addition, the Secretary's contention that the beam obstructed access is further corroborated by Kertes' testimony that he could not stand up on the scaffold's platform. Judge Osterman found

that Zaleski could not step directly from the ladder to the floor of the platform. We conclude that this finding is supported by a preponderance of the evidence as set forth above and, based on this finding, we further conclude that the ladder's positioning beneath the beam did not afford the "proper access and exit" which the standard requires.

Respondent's argument to the contrary is unpersuasive, for although Bechtel introduced testimony that the customary practice at construction worksites was to climb through the guardrails in order to gain access to a scaffold platform, the record does not indicate that customary practice also embraced swinging one's leg up some 2 feet in the air and pulling oneself up to the scaffold platform so that one could then climb through the guardrails. It is not the practice of climbing through the guardrails that is at issue in this case, but rather it is the necessity of pulling oneself up a distance of approximately 2 feet to the level of the platform before one can climb through the guardrails.

The evidence establishes that Respondent failed to comply with the requirements of the cited standard. In addition, it is undisputed that employees had access to the hazard. In order to prove that an employer committed a violation, the Secretary must also show that the employer knew or, in the exercise of reasonable diligence, could have known of the violative condition. Prestressed Systems, Inc., 81 OSAHRC 43/D5, 9 BNA OSHC 1864, 1981 CCH OSHD ¶ 25,358 (No. 16147, 1981). The record does not reflect actual knowledge by Bechtel of the violative condition involving the scaffold. However, we conclude that there is ample evidence to support a finding of failure to exercise reasonable diligence. First, Kertes and Zaleski openly and regularly climbed up and down the scaffold in question during the week prior to the accident. Second, the carpenter foreman—who was responsible for inspecting a scaffold after it had been moved or altered, e.g., after it was "reworked" two days before the accident—admitted that he had passed the scaffold many times in the period between this reworking and the accident. We note Bechtel's evident failure to inspect the scaffold, as

its own safety manual requires. It is well-settled that an employer must make a reasonable effort to anticipate the particular hazards to which its employees may be exposed in the course of their scheduled work. Automatic Sprinkler Corp. of America, 80 OSAHRC 47/E4, 8 BNA OSHC 1384, 1980 CCH OSHD ¶ 24,495 (No. 76-5089, 1980). Here, the record indicates that the scaffold had been in the same position for about one week, yet no corrective action was taken regarding the positioning of the ladder. Finally, Respondent was specifically alerted to similar problems involving safe access to nearby scaffolds several weeks before the fatal accident. Thus, we conclude that the Secretary established that Bechtel could, with the exercise of reasonable diligence, have known of the violative condition involving failure to afford proper access and exit as required by section 1926.451(e)(5) and, therefore, we reverse the judge's finding that Bechtel lacked actual or constructive knowledge.

Bechtel raises the affirmative defense of unpreventable employee misconduct, asserting that the two employees should not have been using the scaffold in question as access to their work station on an adjacent scaffold and that they failed to report the dangerous condition to Bechtel. The Commission has held that it will sustain the unpreventable employee misconduct defense only if an employer demonstrates that an employee's conduct was a departure from a uniformly and effectively communicated and enforced work rule. H.B. Zachry Co., 80 OSAHRC 9/D8, 7 BNA OSHC 2202, 1980 CCH OSHD ¶ 24,196 (No. 76-1393, 1980), aff'd, 638 F.2d 812 (5th Cir. 1981). Bechtel's warning to report "any unsafe practice" or "any questions concerning safety in the use of scaffolds" is too general to be regarded as an effective work rule directed to this specific hazard. See J.K. Butler Builders, Inc., 77 OSAHRC 26/A2, 5 BNA OSHC 1075, 1977-78 CCH OSHD ¶ 21,585 (No. 12354, 1977) and cases cited. Bechtel did have a work rule which states "Do not take shortcuts. Use appropriate ladders, ramps, stairways, and paths." However, there is no persuasive evidence in the record that the ladder in question was not "appropriate" within the meaning of this work rule. Kertes

and Zaleski were performing an assigned task which required them to stand on scaffold "D". The record indicates that the ladder in question provided the most direct route, excluding other means of access that were in effect unusable, to the area where Kertes and Zaleski were assigned to work. See note 4 supra and accompanying text. The record indicates that Kertes and Zaleski openly, regularly, and frequently used this route to get to their job assignment. Yet there is no record evidence that they were ever told that the ladder was inappropriate or that they were ever instructed to use another means of access. Therefore, Bechtel did not demonstrate any departure from a work rule in this instance. Accordingly, we conclude that Bechtel failed to establish the unpreventable employee misconduct defense. We further conclude that Bechtel's noncompliance with section 1926.451(e)(5) constituted a serious violation of the Act as alleged by the Secretary, inasmuch as it exposed employees to a potential fall of 24 feet.

III

In his decision, Judge Osterman also vacated the citation item alleging noncompliance with section 1926.451(e)(8). Specifically, the citation alleged that three of the four wheels on the scaffold Zaleski fell from were unlocked. The judge simply stated that "there is no evidence that Respondent had prior knowledge, actual or constructive, that the wheels on certain portable scaffolds were unlocked and that employees were thus exposed to the hazard." On review, Bechtel supports the judge's reasoning and also offers alternative grounds for vacating this portion of the citation. It does not dispute that, on the day of the inspection, three of the four wheels were unlocked, but it charges that the Secretary presented no evidence that the wheels were unlocked at the time of the accident. Thus, Bechtel contends, the Secretary failed to prove employee exposure to noncomplying conditions. Moreover, even if some of the wheels were unlocked at the time of the accident, Bechtel continues, the record indicates through the testimony of a paramedic that the scaffold was immobile and, thus,

the citation must be vacated because there was no hazard. Finally, Bechtel states that its work rule required employees to lock the wheels when a scaffold is not in motion, yet Kertes testified that neither he nor Zaleski ever checked to see if the wheels were locked on those occasions when they ascended the scaffold. Therefore, Bechtel concludes it cannot be held liable for the employees' noncompliance with its safety rules.

The uncontradicted evidence establishes that three of four scaffold wheels were unlocked at the time of the inspection that occurred on the day following the accident. In view of the testimony that Bechtel immediately took steps to preserve the site in the condition it was in at the time of the accident, it is reasonable to conclude that the wheels had not been altered during the interval between the accident and the inspection. Accordingly, the Commission concludes that the Secretary established Bechtel's noncompliance with the cited standard. 9/

Nevertheless, we conclude that Bechtel's argument that its noncompliance did not create a hazard is supported by the record. We note that the Commission has found violations to be de minimis when the hazard involved bears such a negligible relationship to employee safety as to render inappropriate the imposition of an abatement requirement or the assessment of a penalty. Bethlehem Steel Corporation, 81 OSAHRC 86/A2, 9 BNA OSHC 2177, 1981 CCH OSHD ¶ 25,645 (No. 77-617, 1981), appeal docketed, No. 81-2802 (3rd Cir. Oct. 30, 1981). Here, the record establishes that, immediately following Zaleski's fall, a paramedic called to the scene was unable to move the scaffold "at all" while applying "[a]s much force as [he] was humanly capable [of applying] in a crouched position next to Mr. Zaleski." Kertes testified that the scaffold shook as he climbed but it was not alarming because it was normal for a scaffold to wobble a little. This assessment was echoed by the union steward. On this record, we

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9/ Chairman Rowland and Commissioner Cleary join in Part III of the Commission's decision. Commissioner Cottine joins only in the conclusion, supra, that the Secretary established Bechtel's noncompliance with the cited standard. With this exception, his separate views are stated in note 10, infra.

conclude that the possibility of injury as a result of the unlocked wheels was too remote to warrant the imposition of an abatement requirement or the assessment of a penalty and, hence, the de minimis classification is appropriate.[10/] In light of this holding, we need not reach the parties' other arguments.[11/]

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10/ Chairman Rowland emphasizes that the fatal fall was not due to the failure to lock all the wheels on the scaffold. Rather, as explained previously, the fatal fall occurred when Zaleski grabbed the top guardrail and pulled the guardrail loose. Therefore, Chairman Rowland disagrees with the suggestion that the occurrence of the accident supports characterizing the violation as serious.

Chairman Rowland also notes that a violation cannot be sustained unless the Secretary shows, among other things, employer knowledge of the non-complying condition. There is no evidence that Bechtel had actual knowledge of the unlocked wheels on scaffold "X". Nor does the record suggest that Bechtel could, with the exercise of reasonable diligence, have known of the unsecured wheels. Although Bechtel's supervisory personnel observed other scaffolds prior to the inspection, those scaffolds were 50 to 60 feet away. Indeed, even if the supervisory personnel had observed scaffold "X", it appears they would have concluded that the scaffold was in compliance, because scaffold "X" was marked with a tag which, according to Bechtel's work procedures, could not be attached unless the scaffold were completed and checked by the foreman. Furthermore, it is not dispositive that the shop steward discovered another scaffold with unlocked wheels; not only did his discovery involve a different scaffold, but his discovery did not occur at the time of the alleged violation. Accordingly, Chairman Rowland concludes that the Secretary did not establish that Bechtel knew or, with the exercise of reasonable diligence, could have known that three of the wheels on scaffold "X" were unlocked. While Chairman Rowland would normally vacate an alleged violation when, as here, the Secretary failed to show employer knowledge, Chairman Rowland agrees with Commissioner Cleary's decision to find a de minimis violation in order to reach a consensus in this case.

11/ Commissioner Cottine dissents to the de minimis classification of the violation. He would reject Bechtel's contention that, even if the wheels were unlocked, the scaffold was shown to be immobile at the time of the accident, based on the testimony of the paramedic who attempted without success to move the scaffold by himself. In Commissioner Cottine's view, the fact that the crouching paramedic alone could not move the scaffold--which the Secretary established would take two persons to move under normal circumstances--did not show that the scaffold was immobile. Furthermore, the paramedic's testimony does not establish that the scaffold was not subject to movement if the scaffold was tipped due to a weight shift at the top--24 feet above the floor. The crucial question is the effect of force applied 24 feet above the wheels. The record does not establish that failure to lock the wheels had only a negligible relationship to the stability of the scaffold.

(Footnote cont'd)

IV

For the foregoing reasons, Judge Osterman's vacating of the citation is reversed. The allegation of noncompliance with section 1926.451(e)(5) is affirmed as a serious violation of the Act. The allegation of noncompliance with section 1926.451(e)(8) is affirmed as a de minimis violation. Considering the gravity of the violation and Bechtel's size, good faith and prior history, the Commission assesses a penalty of $900 for the serious violation.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

Dated: AUG 31 1982

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(Footnote 11 cont'd)

In addition, Commissioner Cottine notes that before a de minimis violation can be affirmed the Secretary must establish a prima facie case and any affirmative defense raised by the Respondent must be found to be without merit. Inasmuch as the majority ignores those prerequisites to affirmance of any violation and merely discusses the de minimis characterization of the alleged violation, it is necessary to address the other issues on review. He concludes that the Secretary established that Bechtel could, with the exercise of reasonable diligence, have known of the violative condition involving the failure to lock the wheels of the mobile scaffold, and he would reverse the judge's contrary finding. The evidence demonstrates that the unlocked condition of the wheels was not concealed from view and that Bechtel supervisory personnel passed by the scaffold frequently on the days prior to Zaleski's fall. Also, Bechtel had a workrule requiring inspection of all scaffolds following any alterations, and no such inspection was made.

Commissioner Cottine would also reject Bechtel's affirmative defense of unpreventable employee misconduct. Although Bechtel had a workrule requiring locking the wheels of mobile scaffolds, it cannot successfully defend on the basis of that workrule where its supervisors failed to inspect the scaffold as required. To sustain the defense an employer must have an adequate workrule that is uniformly and effectively communicated and enforced. H.B. Zachry, 80 OSAHRC 9/D8, 7 BNA OSHC 2202, 1980 CCH OSHD ¶ 24,196 (No. 76-1393, 1980), aff'd, 638 F.2d 812 (5th Cir. 1981). Where the employer does not conduct proper inspections to detect scaffold violations it has not shown uniform and effective enforcement of its safety rule. See, e.g., Paul Betty d/b/a Betty Bros., 81 OSAHRC 18/B11, 9 BNA OSHC 1379, 1981 CCH OSHD ¶ 25,219 (No. 76-4271, 1981). Other evidence that Bechtel's workrules were not adequately communicated or enforced includes: (1) Kertes' ignoring the rule to lock scaffold wheels during the week prior to the accident and (2) the union Steward's discovery of unlocked wheels on another mobile scaffold in use at the time of the inspection. The consequences of a fall from the improperly secured 24-foot scaffold could and did prove fatal. Accordingly, Commissioner Cottine would affirm the citation item as a serious violation of the Act.

ROWLAND, Chairman, dissenting in part:

I join the lead opinion in affirming a de minimis violation of section 1926.451(d)(8). However, I dissent from Commissioners Cleary and Cottine's determination that Bechtel violated section 1926.451(e)(5). I would vacate the alleged violation of section 1926.451(e)(5) and the alternatively alleged violation of section 5(a)(1).

As the majority notes, this case is analogous to H.E. Wiese, Inc., a case involving the interpretation of a similar standard, section 1926.451(a)(13). Consistent with my opinion in Wiese, a violation of the "proper access and exit" language in section 1926.451(e)(5) cannot be sustained, in my view, unless the Secretary shows non-compliance with other requirements in subpart L, or unless the Secretary shows other objective criteria which would indicate that the means of access and exit was "not proper." H.E. Wiese, supra, 10 BNA OSHC at 1508-9, 1982 CCH OSHD at p. 32,617 (dissenting opinion) and cases cited.

The Secretary did not introduce any evidence suggesting that the ladder to scaffold "X" did not comply with the other standards in subpart L. Indeed, the compliance officer's testimony on cross-examination, as well as the pictorial evidence, indicates that Bechtel's ladder complied with the specifications in subpart L.

Furthermore, the record does not show the existence of other objective factors which would have apprised Bechtel that the means of access and exit provided by the ladder was not "proper." Contrary to the majority's assertion that the location of the ladder below the beam required an employee to "swing . . . [his] leg up some 2 feet in the air and pull . . . [himself] up to the scaffold platform", the compliance officer's testimony and the Secretary's own pictures establish that the employees could have climbed to a level nearly adjacent to the

platform.[12/] Significantly, the shop steward--upon whose testimony the majority relies--stated that prior to the accident, neither he, nor the non-supervisory employees, nor the managerial personnel, considered the overhead beam to be a "problem" which interfered with access to the scaffold.[13/] Since the Secretary did not establish either non-compliance with the other standards in subpart L or other objective criteria which would indicate that access was not "proper", I would vacate the alleged violation of section 1926.451(e)(5).

I note that the testimony of both the Secretary's and Bechtel's witnesses suggest that the gist of the Secretary's case was that the scaffold floor itself was allegedly too high. In reality, the Secretary was not concerned about the location of the ladder. However, neither the cited standard nor any other standard in subpart L addresses the minimum clearance between the roof and the scaffold floor. If the Secretary seeks to require a minimum distance between the roof and the scaffold floor, he has the means and the obligation to do so by promulgating a specific standard. But he cannot distort an existing standard to impose an additional requirement. See B&B Insulation, Inc. v. OSHRC, 583 F.2d 1364, 1371-2 (5th Cir. 1978).

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12/ For example, one of the Secretary's pictures, Exhibit C-7, shows the shop steward ascending the ladder. The compliance officer testified that in the picture, the shop steward's waist was approximately level with the platform, and that the distance from the shop steward's head to the beam was two and one-half feet. Thus, when crouching to slide between the guardrails, the shop steward could obviously climb a number of feet above his position in Exhibit C-7 before entering the platform.

13/ In this regard, I disagree with the majority's assertion that Bechtel was alerted to "similar problems" involving access to other "nearby" scaffolds. Although Bechtel was aware of other scaffolds for which access was temporarily

(Continued)

Moreover, I would vacate the alternatively alleged violation of section 5(a)(1), assuming that a section 5(a)(1) charge is proper. To establish a violation of section 5(a)(1), the Secretary must prove, among other things, the feasibility and likely utility of his proposed abatement methods. E.g., Williams Enterprises, Inc., 79 OSAHRC 24/A2, 4 BNA OSHC 1663, 1666, 1976-77 CCH OSHD ¶ 21,071, p. 25,361 (No. 4533, 1976).

The Secretary's witnesses discussed three means of abatement: installing a small "outrigger" platform between the ladder and the scaffold platform, relocating the ladder so it was not beneath the beam, and installing a gate in lieu of stationary guardrails at the entrance area.[14/] It is undisputed that an outrigger platform would not be feasible because it would tip the scaffold. Regarding the second method of abatement—relocation of the ladder—Bechtel's carpenter foreman stated that it was possible to move the ladder from beneath the beam in about one hour. However, moving the ladder would not be useful because the height of the scaffold would remain the same. As the majority acknowledges, Kertes testified, without contradiction, that the scaffold platform was so close to the ceiling that he could not stand upright. Furthermore, even if the ladder were relocated to another position unobstructed by the horizontal beam, an employee ascending the ladder would still be required to crouch

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13/ (Continued)

blocked until corrective action was taken, the access to those scaffolds was obstructed by vertical beams, whereas the access to the scaffold in issue involved an overhead horizontal beam. Scaffold "X" was fifty to sixty feet from those scaffolds for which access was temporarily blocked. There were numerous scaffolds on the premises. Moreover, no employees complained about access to scaffold "X".

14/ Respondent's carpenter foreman also mentioned the use of safety belts and lanyards, but the feasibility of that method of abatement was not discussed by the Secretary's witnesses.

when departing from the ladder and sliding between the mid and upper guardrails. Similarly, a swinging gate apparatus would not alleviate the clearance between the roof and the scaffold platform. Moreover, to find a section 5(a)(1) violation based on the failure to furnish a swinging gate would essentially permit the Secretary to circumvent his own regulations, which require stationary guardrails on all open sides--including the access area--and which make no mention of swinging gates at the access point. See 29 C.F.R. section 1926.451(e)(10). Accordingly, I would affirm the judge's vacation of the citation.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR | : | |
| Complainant | : | |
| v. | : | OSHRC DOCKET NO. 77-3222 |
| BECHTEL POWER CORPORATION | : | DECISION AND ORDER |
| Respondent | : | |

Appearances:

Marshall H. Harris, Esq.
Regional Solicitor
U.S. Department of Labor
Philadelphia, Pennsylvania
for the Complainant

James H. Hartl, Esq. and
Michael Floyd, Esq.
Bechtel Power Corporation
San Francisco, California
for the Respondent

OSTERMAN, Judge, OSHRC

This is a proceeding initiated by the Respondent to contest a Citation and Notice of Proposed Penalty issued to Respondent on or about September 14, 1977 following the investigation of Respondent's workplace on August 25 and September 2, 1977. A penalty of $900 was proposed. The investigation was conducted after the Secretary received word of a fatal accident which occurred on August 24, 1977.

The Secretary's complaint filed subsequent to the issuance of the Citation charged Respondent with "serious" violations of 29 C.F.R. 1926.451(e)(8) and 29 C.F.R. 1926.451(e)(5). Thereafter, the Secretary moved

to amend his complaint by adding the alternative allegation that Respondent violated either 29 C.F.R. 1926.451(a)(5) or Section 5(a)(1) of the Act by its failure to provide safe access and exit to a mobile scaffold involved herein. The Secretary's motion was granted (Tr. 6).[1/]

29 C.F.R. 1926.451(e)(5) reads as follows:

> A ladder or stairway shall be provided for proper access and exit and shall be affixed or built into the scaffold and so located that when in use it will not have a tendency to tip the scaffold. A landing platform must be provided at intervals not to exceed 35 feet.

29 C.F.R. 1926.451(e)(8) states that:

> Scaffolds in use by any persons shall rest upon a suitable footing and shall stand plumb. The casters or wheels shall be locked to prevent any movement.

With respect to "serious" violations this Commission and various circuit courts have held that, in order to succeed, the Secretary must establish that the employer had prior knowledge, either actual or constructive, of the existence of the hazardous condition involved, Secretary of Labor v. D. R. Johnson Lumber Co., Docket No. 3179, 1974-1975 OSHD § 19.695; Secretary of Labor v. Rockwell International, Docket No. 2875, 16 OSAHRC 444, 540 F.2d 1283 (6th Cir. 1976); Secretary of Labor v. Mountain States T & T Co., 2 OSAHRC 168; Secretary of Labor v. The Commission and Hendrix d/b/a Alsea Lumber Co., 511 F.2d 1139, 1143-45 (9th Cir. 1975).

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1/ During the presentation of the Secretary's case discussions were held relating to the applicability of either 29 C.F.R. 1926.451(e)(5) and Section 5(a)(1) to the facts in this case. Because the court believed that some confusion resulted from these conversations, the court made it clear at the end of the Secretary's case that a decision to dismiss one of the alternative charges would be made only at the end of the entire case after Respondent had presented his defense (Tr. 127).

Section 5(a)(1) of the Act provides that:

> Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

This section of the Act has been construed by various circuit courts to require that the Secretary, in order to succeed, must establish that the hazardous condition involved was known to the employer or to the Respondent's industry generally or that the employer must have been able to foresee the hazard. Empire-Detroit Steel v. OSHRC, 579 F.2d 278, 384 (6th Cir. 1978); Brennan v. Vy Lactos Labs, Inc., 449 F.2d 460 (8th Cir. 1974); Usery v. Marquette Cement Mfg. Co., 568 F.2d 902, 910 (24 Cir. 1977).

The record discloses that Respondent's corporation was engaged in the construction of The Limerick Power Plant, a nuclear energy facility located in Pottstown, Pennsylvania. On August 24, 1977, one of Respondent's employees, John Zaleski, fell from the top of a scaffold and was killed by the fall. On August 25 an investigation was commenced which resulted in the issuance of the Citation herein. The scaffold in question was a 24-foot high mobile scaffold with a 5 X 7 foot platform located in an area designated as Turbine Enclosure No. 1, elevation 269 (Tr. 11).

Because an overhead beam was located near the platform, the ladder attached to the scaffold could not be extended high enough to allow Zaleski to step directly from the ladder onto the platform and it was necessary for Zaleski to haul himself up a distance of approximately two feet from a rung on the ladder to the floor of the platform (Tr. 22). From this first platform, Zaleski would proceed to a second and adjacent platform where he was working on a welding job (Tr. 28). On August 24, after having made several

trips in this manner, Zaleski came up the ladder for the last time (Tr. 95, 110). When he ascended as far as he could he took hold of the top rail of the scaffold platform in order to haul himself up to the platform floor. The top rail, which was wired at each end to uprights on the platform, gave way with the result that Zaleski fell to the concrete floor below (Tr. 28-29, Ex. C-9).

The record shows that prior to Zaleski's accident, the platform which Zaleski was trying to reach when he fell was guarded by standard guardrails as required by 29 C.F.R. 1926.500(d)(1) (Tr. 26-27, 58, 60, 135, 144-146, 195). After the accident it was discovered that the mid-rail facing the ladder had been removed and was lying on the platform (Tr. 16, 212-213, Ex. C-8). The top rail which gave way when Zaleski fell was lying on the concrete floor below (Tr. 18, Ex. C-9).

The first issue to be determined is whether or not the Complaint was properly brought under 29 C.F.R. 1926.451(e)(5). That standard, which deals with mobile scaffolds, provides that a ladder or stairway for proper access and exit shall be affixed or built into the scaffold and so located that when in use it shall not have a tendency to tip the scaffold. The last sentence of the standard is not applicable since the scaffold involved was less than 35 feet in height. Because a beam was located directly above the scaffold it was impossible to extend the ladder so that an employee could step directly onto the platform from the ladder. To reach the platform it was necessary to reach up and around the side of the ladder in order to climb onto the platform which was at the height of a man's midsection (Tr. 17, 43, 47, Ex. C-7). The question to be resolved is whether the ladder provided for "proper access and exit" to the platform involved.

The Respondent urges inter alia that the scaffold met the requirements of the standard since it did have affixed to it a ladder; that the positioning of the ladder in relation to a landing platform is not a factor to be considered; and further that the matter of overhead obstructions is not covered by any standard (Respondent Br. 12 et seq.).

Section 1926.451 of 29 C.F.R. deals generally with the construction of mobile scaffolds and platforms on such scaffolds, and it is a reasonable assumption that the drafters of the regulation intended that a ladder should be so positioned on a scaffold so as to provide safe access to platforms on which employees would stand or work.[2/] To hold that the words "for proper access and exit" in subsection (e)(5) are surplusage and meaningless would emasculate the standard and defeat the purpose for which it was enacted.

Assuming, therefore, that the positioning of the ladder on the scaffold and its relationship to the platform involved violates the standard because "proper access and exit" to and from the platform was not provided, the further question to be resolved is whether the record supports a finding that Respondent had prior knowledge, either actual or constructive, of a potential hazard to its employees. The evidence on this point does not favor the Secretary.

The record shows clearly that Respondent had in place an ongoing and effective safety program and that Zaleski and all other employees attended

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2/ It should be noted that the subsection immediately preceding (e)(5) deals with the construction of platforms.

regular toolbox safety meetings (Exs. R-1 thru R-4). When an employee believed that additional safety measures were necessary, a procedure was in place to remedy the unsafe condition (Tr. 132, 135, 144, 152-154, 173, 197-198).

With respect to the scaffold in question, testimony given by James Kertes, Zaleski's working partner, shows that both he and the deceased had used the scaffold for approximately a week before the accident and had previously been up and down at least six or eight times on the day that Zaleski fell to his death (Tr. 95, 110). Both Kertes and Zaleski knew that the top rail of the platform was "wired" and not bolted (Tr. 106-108). Kertes testified that safety meetings were held every Monday (Tr. 82-87, 109; Exs. R-1 thru R-4) and as indicated, above the records of those meetings substantiate the fact that Zaleski was present at those meetings (Exs. R-1, R-2, R-3, R-4). He further stated that the scaffold was not unsafe (Tr. 101) and that if either he or Zaleski had believed the scaffold to be unsafe he could have asked for safer access to be constructed and that appropriate corrections would have been made. He testified that neither he nor Zaleski had reported the scaffold as unsafe (Tr. 98-99, 106-108).

The Secretary argues that Respondent could have constructed an "outrigger" on the scaffold in question which would have eliminated the danger of falling. However, Kertes stated that he was not certain that an "outrigger" would increase the safety of the scaffold because of the increased weight on the overhang (Tr. 125-126), and there is substantial credible evidence that the addition of an "outrigger" to the platform could have tipped it over because of the added weight on one side, thus increasing the hazard to employees (Tr. 126, 150-151, 168, 169, 189-191).

Testimony given by Respondent's witnesses confirms the fact that no complaint had ever been made to indicate to management that the scaffold in question, or its positioning, was hazardous (Tr. 71-72, 74). On the basis of this record I must find that the Secretary has not established that the Respondent had either constructive or actual knowledge that a hazardous condition existed with respect to the scaffold.

On the issue of Section 5(a)(1) liability, the Secretary, as I have indicated above, is required to show that the hazard complained of is one which is known to the industry, or the Respondent, or which should have been known to the Respondent. The record shows that the normal method of reaching a platform from a ladder or a scaffold was to crawl between the top and middle guardrails of the platform or to get onto the platform "the best way you could" (Tr. 97, 136, 149-150). In the instant case this was the method used by Zaleski and his partner Kertes. On this point there is no evidence in the record that the Respondent was derelict with respect to the generally accepted practice in the industry.

The Secretary's proof that Respondent was guilty of a "serious" violation of 29 C.F.R. 1926.451(e)(8) suffers from a defect similar in nature to the proof which relates to Item 1 of the Citation, i.e., there is no evidence that Respondent had prior knowledge, actual or constructive, that the wheels on certain portable scaffolds were unlocked and that employees were thus exposed to a hazard.

## FINDINGS OF FACT

1. Respondent is a corporation organized and existing under the laws of the State of Nevada and having its principal office in San Francisco, California. Respondent is an employer subject to the jurisdiction of this Commission.

2. On all material dates Respondent was engaged in the construction of a nuclear power facility located in the vicinity of Pottstown, Pennsylvania.

3. On August 24, 1977, a pipefitter named John Zaleski employed by Respondent fell to his death from a height of 24 feet while attempting to climb onto the platform of a scaffold.

4. An investigation conducted by the Secretary of Labor during the period August 25 through September 2, 1977, was followed by the issuance of a Citation charging Respondent "serious" violations of 29 C.F.R. 1926.451(e)(5) or in the alternative Section 5(a)(1) of the Act and 29 C.F.R. 1926.451(e)(8). A total penalty of $900 was proposed.

5. The Secretary has failed to establish that Respondent had prior knowledge, either actual or constructive or that Respondent should have foreseen that a hazardous condition existed with respect to the scaffold and its ladder, or the platform, from which John Zaleski fell to his death on August 24, 1977, or that the Respondent had prior knowledge that the wheels on certain portable scaffolds were unlocked and presented a hazard to its employees.

6. The Secretary has also failed to establish by credible evidence that the scaffold involved, and the positioning of the ladder on the scaffold in relation to the platform involved created a hazardous condition which was known to the Respondent, or foreseeable by the Respondent, or known to the industry of which Respondent is a part.

## CONCLUSIONS OF LAW

During the period August 24, 1977 thru September 2, 1977, Respondent was not in violation of either 29 C.F.R. 1926.451(e)(5), Section 5(a)(1) of the Act or 29 C.F.R. 1926.451(e)(8).

## ORDER

Pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970 and Rule 66 of this Commission's Rules of Procedure it is ORDERED:

1. That the Citation issued to Respondent on or about September 14, 1977 and the Secretary's Complaint filed on October 19, 1977 be, and the same hereby are, DISMISSED.

2. The Notice of Proposed Penalty which accompanied the said Citation is VACATED.

HENRY K. OSTERMAN
Judge, OSHRC

Dated: JUN 26 1979
Hyattsville, Maryland

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

August 31, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Standard Motor Products Company

OSHRC DOCKET NO. 77-3939

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

FOR THE SECRETARY OF LABOR

OF COMMISSION DECISION

To wit: See attached.

Counsel for Regional Litigation
Office of the Solicitor, USDOL
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FOR EMPLOYER

Nathaniel Sills, Executive
Vice-President
Standard Motor Company
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Long Island City, New York 11101

FOR EMPLOYEES

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Judge's Office
Occupational Safety & Health
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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>STANDARD MOTOR PRODUCTS, INC.,<br>Respondent. | OSHRC Docket No. 77-3939 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

The Secretary of Labor issued a citation item alleging that Standard Motor Products violated 29 C.F.R. § 1910.217(c)(2)(i)(a). Administrative Law Judge Alfieri vacated the citation item because he found insufficient evidence that employees had access to the allegedly violative condition. We affirm the judge's disposition but on the ground that the evidence of noncompliance is insufficient.

Standard Motor operates a mechanical power press equipped with a hairpin guard that is interlocked with the press' ram. The hairpin guard has a six-inch by six-inch opening out of which stamped parts are ejected through a discharge chute. A box covered this opening. 1/ The compliance officer testified that, in an effort to relieve a jam or readjust stock, an employee might remove the box that covers the hairpin guard opening and reach through the opening into the point of operation, instead of stopping the press by raising the interlocked guard.

---

1/ Although the photographic exhibits do not show the box in position, the compliance officer testified that the box covered the opening when he inspected the machine. From this, we infer that the box was removed during the inspection for demonstrative purposes.

Section 1910.217(c)(2)(i)(a) states that point of operation guards on mechanical power presses "shall prevent entry of hands or fingers into the point of operation by reaching through, over, under or around the guard." A "guard," as that term is used in section 1910.217, is a "barrier." 2/ The record in this case must therefore show that the press lacked a barrier that prevented hands or fingers from reaching through the guard. The record is not sufficient on this point. It has not been shown and the Secretary does not argue that when the box covering the opening was in place, entry of the operator's hands or fingers by reaching through the hairpin guard was not prevented by a barrier. The Secretary also does not contend and the record does not show that the box had been removed when the violation allegedly occurred. Although the box may not have been fastened to the hairpin guard and may not have been interlocked with the press ram, we are reluctant to construe the cited standard to impose such requirements. Other standards within section 1910.217 specifically address those matters. See sections 1910.217(c)(2)(i)(d) and (c)(2)(iv). 3/

Accordingly, the judge's decision is affirmed.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: AUG 31 1982

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2/ Section 1910.211(d)(32) defines "guard" as used in section 1910.217 as "a barrier that prevents entry of the operator's hands or fingers into the point of operation."

(Footnote 3 continued on next page)

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3/ The majority disagrees with the statement in the dissenting opinion that the compliance officer's theory of how an employee might be injured on the L & J press "was corroborated by the fact that an injury had occurred recently on another of Standard's power presses"; the majority also disagrees with the significance of the statement in the dissent that a Standard employee "had received an injury after lifting [a hairpin] guard and attempting to manually clear another power press."

The compliance officer testified that on the Bliss press there were two openings in the hairpin guard large enough to permit an employee to insert his hand or fingers into the point of operation. The operator of the Bliss press was not injured by inserting his hand or fingers through the openings in the guard. He instead lifted the interlocked hairpin guard, inserted his fingers to clear a jam, and was injured when he activated a jog button. The compliance officer himself conceded that the circumstances of this accident had nothing to do with the later citation alleging violations of section 1910.217(c)(2)(i)(a) on either the Bliss or L & J machines. In view of these dissimilarities, we disagree with the dissenting opinion's conclusion that the injury on the Bliss press corroborated the compliance officer's theory of how an injury could occur on the L & J press.

COTTINE, Commissioner, dissenting:

I.

The compliance officer described how an injury could occur on the power press cited in this case:

> [I]f the press were to jam as it is in the automatic mode, an employee could put his hand in the point of operation to free a jam, to free a part which may have gotten hung up on some portion of the die or perhaps to realign the strip of metal as it is fed through the die through the point of operation. So, it is predictable that an employee could put his hands into that hole.

The compliance officer's opinion that an employee might reach his hand into the point of operation to free a jam and thereby injure himself was corroborated by the fact that an injury had occurred recently on another of Standard's power presses. Nonetheless, the majority vacates a citation for failure to guard the point of operation on a power press because an "oil-soaked cardboard box" happened to be over the press's discharge chute when the compliance officer first observed the machine. The cardboard box was removed during the inspection. There is no indication that the box generally was kept on the machine or that it was attached to the machine. Standard made no reference to the cardboard box in its defense. Up to now no one, including the judge, has put any significance on the presence of the box at the start of the inspection.

Numerous provisions of section 1910.217 amply demonstrate that cardboard boxes do not constitute machine guards. To conclude that the presence of the cardboard box precludes finding that employees were not protected by a guard to "prevent entry" of hands or fingers into the point of operation is to misread the standard and ignore well-established Commission precedent.

Section 1910.217 is intended to provide positive protection against injury resulting from bad judgment and deliberate disregard of safe procedures. This is clear from an examination of the language of section 1910.217 when it is read as a whole. Sections 1910.217(c)(2)(i)(a), (b), and (d) state:

> (2) Point of operation guards. (i) Every point of operation guard shall meet the following design, construction, application, and adjustment requirements:
>
> (a) It shall prevent entry of hands or fingers into the point of operation by reaching through, over, under or around the guard;
> (b) It shall conform to the maximum permissible openings of Table 0-10;
>
> * * *
>
> (d) It shall utilize fasteners not readily removable by operator, so as to minimize the possibility of misuse or removal of essential parts;

Table 0-10 provides:

| Distance of opening from point of operation hazard [In inches] | Maximum width of opening |
|---|---|
| 1/2 to 1 1/2. . . . . | 1/4 |
| 1 1/2 to 2 1/2. . . . . | 3/8 |
| 2 1/2 to 3 1/2. . . . . | 1/2 |
| 1 1/2 [sic] to 5 1/2. . . . . | 5/8 |
| 5 1/2 to 6 1/2. . . . . | 3/4 |
| 6 1/2 to 7 1/2. . . . . | 7/8 |
| 7 1/2 to 12 1/2 . . . . . | 1 1/4 |
| 12 1/2 to 15 1/2. . . . . | 1 1/2 |
| 15 1/2 to 17 1/2. . . . . | 1 7/8 |
| 17 1/2 to 31 1/2. . . . . | 2 1/8 |

This table shows the distances that guards shall be positioned from the danger line in accordance with the required openings.

Section 1910.217(c)(2)(iv) states:

> An interlocked press barrier guard shall be attached to the press frame or bolster and shall be interlocked with the press clutch control so that the clutch cannot be activated unless the guard itself, or the hinged or movable sections of the guard are in position to conform to the requirements of Table 0-10.

The maximum opening widths prescribed by Table O-10 are so narrow and the minimum safety distances so great that press guards meeting the table's requirements would prevent the operator from reaching into the point of operation. The reference in section 1910.217(c)(2)(i)(d) to "misuse or removal of essential parts" clearly indicates an intent to protect against even intentional employee misconduct. Section 1910.217(c)(2)(iv) specifically forbids reliance on an employee to activate a press without an interlocked barrier guard.

The cited standard, which seeks to preclude entry of hands or fingers into the point of operation "by reaching through, over, under or around the guard," is based on the judgment that guards must prevent entry of hands into the point of operation, whether entry is caused by inadvertence, poor judgment or intentional misconduct. It recognizes that employees do not always follow prescribed safety procedures and that the serious potential hazards associated with unguarded points of operation on power presses require reliance on fully effective physical guards.

II.

The majority cites no Commission cases to support its conclusions, although many similar cases have been decided. The Commission has consistently affirmed citations in comparable circumstances. For example, in Pass & Seymour, Inc., 79 OSAHRC 101/C13, 7 BNA OSHC 1961, 1979 CCH OSHD ¶24,074 ( No. 76-4520, 1979), appeal dismissed, No. 80-4013 (2d Cir. March 21, 1980), the Commission affirmed an alleged violation of

section 1910.212(a)(3)(ii)[4/] for an unguarded point of operation on an automatic molding machine. The Commission analyzed the case as follows:

> During the times when a tender operates a machine to clear it, the employee stands directly in front of the machine within reach of the point of operation. After jogging the machine to position it for clearing, the tender is supposed to use a metal rod hanging by a chain from the machine to perform the clearing operation. Respondent recognized that this operation could, if not performed properly, subject the employee to being injured at the point of operation, as exemplified by the training and warnings it gave its operators to avoid reaching into the point of operation. During the periods of normal operation of the machines, a tender does not have any duties to perform that require him to place his hands near the point of operation. However, the tender does observe the operation while in the five-foot wide aisles between the rows of machines. Thus, the tender must come within a few feet of the point of operation, and there is nothing to prevent him from getting his hand in a point of operation should he accidentally stumble or attempt to perform some adjustment on a machine while it is operating. Respondent argues, however, that the precautions it took were sufficient to avoid the point of operation hazard.

7 BNA OSHC at 1963, 1979 CCH OSHD at pp. 29,237-38. In rejecting the Respondent's argument, the Commission stated:

> The Commission has consistently held that the cited standard requires physical methods of guarding rather than methods of guarding that depend on human behavior. Hughes Brothers, Inc., [78 OSAHRC 65/A2, 6 BNA OSHC 1830, 1978 CCH OSHD ¶22,909 (No. 12523, 1978)]; Boonville Division of Ethan Allen, Inc., 78 OSAHRC 105/B4, 6 BNA OSHC 2169, 1979 OSHD ¶23,219 (No. 76-2419, 1978); MRS Printing, Inc., 78 OSAHRC 84/B10, 6 BNA OSHC 2025, 1978 CCH OSHD ¶23,102 (No. 76-3113, 1978); Akron Brick and Block Co., 76 OSAHRC 2/E2, 3 BNA OSHC 1876, 1976-77 CCH OSHD ¶20,302 (No. 4859, 1976). As the judge observed, the standard is intended to protect against injury resulting from an instance of inattention or bad judgment as well as risks arising from the operation of a machine.

Id.

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4/ § 1910.212 General requirements for all machines.

(a) Machine guarding--

* * *

(3) Point of operation guarding.

* * *

(ii) The point of operation of machines whose operation exposes an employee to injury, shall be guarded. The guarding device shall be in conformity with any appropriate standards therefor, or, in the absence of applicable specific standards, shall be so designed and constructed as to prevent the operator from having any part of his body in the danger zone during the operating cycle.

There is no basis for distinguishing Pass & Seymour from the present case. In this case, the compliance officer testified without rebuttal that the operator stood one foot from the machine and was responsible for monitoring the press and clearing it in the event of a malfunction. The compliance officer also testified that an employee might neglect to shut off the press before attempting to clear it in an attempt to save time. The hairpin guard would not prevent entry into the point of operation if that occurred. Indeed, despite the presence of a guard, one of the Respondent's employees had received an injury after lifting the guard and attempting to manually clear another power press. As noted, there is absolutely no record evidence supporting the conclusion that the cardboard box was a suitable point of operation guard or that it prevented access to the point of operation. Common sense dictates that an oil-soaked cardboard box, that is not even affixed to the machine and is therefore readily removable, could not serve as a positive means of employee protection as required by the cited standard.

Since Pass & Seymour was decided the Commission has consistently affirmed citations alleging inadequately guarded points of operation where an employee had duties that could result in exposure to injury and has repeatedly stressed that there must be positive means of protection that are not dependent on human behavior. E.g., F.H. Lawson Co., 80 OSAHRC 19/A14, 8 BNA OSHC 1063, 1066-7, 1980 CCH OSHD ¶24,277 at p. 29,574 (No. 12883, 1980), appeal dismissed, No. 80-3277 (6th Cir. Feb. 9, 1981)(operator's hands were 10 to 20 inches from unguarded point of

operation during work cycle — a prima facie case of noncompliance with both 1910.212(a)(3)(ii) and 1910.217(c)(1)(i) established); Amforge Div., Rockwell International, 80 OSAHRC 46/A2, 8 BNA OSHC 1405, 1407, 1980 CCH OSHD ¶24,439 at p. 29,814 (No. 76-3488, 1980)(evidence that operator's hand "could" become caught in point of operation because of "both actual and potential" proximity of the employee's hands to the unguarded point of operation — point of operation hazard established); H.B. Zachry Co., 80 OSAHRC 69/A2, 8 BNA OSHC 1669, 1674, 1980 CCH OSHD ¶24,588 at p. 30,166 (No. 76-2617, 1980)(standard requires physical methods of guarding, not reliance on human behavior; where it is "possible" for an employee to place a hand or finger in the point of operation during the operating cycle, a "hazard, though remote, exists")(emphasis in original); Mayhew Steel Products, Inc., 80 OSAHRC 77/A2, 8 BNA OSHC 1919, 1920, 1980 CCH OSHD ¶24,678 at p. 30,286 (No. 77-3970, 1980)(machine guarding standards intended to prevent accidental presence of extremities in the point of operation; operator's fingers could come within inches of the stamp — this alone constitutes a hazard requiring protection); Dayton Tire & Rubber Co., 80 OSAHRC 95/D4, 8 BNA OSHC 2086, 2092, 1980 CCH OSHD ¶24,842 at p. 30,639 (No. 16188, 1980), appeal dismissed, No. 80-3755 (6th Cir. Aug. 18, 1981)(partial point of operation guarding inadequate — physical guarding rather than guarding methods that depend on human behavior required); American Package Co., Inc., 80 OSAHRC 102/E12, 8 BNA OSHC 2167, 2170, 1980 CCH OSHD ¶24,871 at p. 30,670 (No. 76-2349, 1980)("possible for the operator's hand to be in the point of operation and receive a crushing injury" because the operator "could . . . insert his or her hand into the point of operation" — point of operation hazard established);

Ornet Corp., 80 OSAHRC 116/C10, 9 BNA OSHC 1055, 1058, 1980 CCH OSHD ¶25,001 at p. 30,882 (No. 76-530, 1980)(no evidence that an employee's hand or arm "could be caught or pulled" into the machine -- hazard requiring guarding has not been established); Tube-Lok Products, 81 OSAHRC 17/B7, 9 BNA OSHC 1369, 1374, 1981 CCH OSHD ¶25,235 at p. 31,194 (No. 16200, 1981)(employees whose hands were at times 12 inches from point of operation during the operating cycle were exposed to the possibility of permanent injury, even though "the possibility of such an incident was low" -- standard violated); York Heel of Maine Inc., 81 OSAHRC 40/B11, 9 BNA OSHC 1803, 1807-8, 1981 CCH OSHD ¶25,351A at p. 31,474 (No. 78-5920, 1981)(operator's fingers "could" fit through a 1/2 inch gap into the point of operation -- employer violated the standard's requirements that a guard be designed so as to prevent entry); Columbian Art Works, Inc., 81 OSAHRC 96/F5, 10 BNA OSHC 1132, 1133 & n.2, 1981 CCH OSHD ¶25,737 at p. 32,102 & n.2 (No. 78-29, 1981)(standard requires physical guarding device designed to prevent employees from having any part of their bodies in the danger zone rather than reliance on employee skill or attentiveness); George C. Christopher & Sons, Inc., OSAHRC , 10 BNA OSHC 1436, 1444, 1982 CCH OSHD ¶25,956 at p. 32,532 (No. 76-647, 1982)(machine guarding "standards require a device that itself prevents the operator from endangering himself" and reject reliance on employee skill or attentiveness); American Luggage Works, Inc., OSAHRC , 10 BNA OSHC 1678, 1682-3, 1982 CCH OSHD ¶26,072 at p. 32,796 (No. 77-893, 1982)(standard requires physical guarding, not reliance on employee skill or attentiveness, and "is intended to eliminate danger from unsafe operating procedures, poor training, or employee inadvertence);

General Electric Co., 82 OSAHRC 31/C2, 10 BNA OSHC 1687, 1690-91, 1982 CCH OSHD ¶ 26,071 at p. 32,789 (No. 77-4476, 1982)(standard requires "physical guarding methods that do not depend for their effectiveness on correct employee behavior").

I would affirm the alleged violation on the basis of this precedent.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>STANDARD MOTOR PRODUCTS, INC.,<br><br>Respondent. | OSHRC DOCKET<br><br>NO. 77-3939 |

Appearances:

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by James A. Magenheimer, Esq., of Counsel

Nathaniel L. Sills, Exec. Vice-President
Standard Motor Products, Inc.
37-18 Northern Boulevard
Long Island City, New York 11101
For Respondent

## DECISION AND ORDER

Alfieri, Judge:

## STATEMENT OF THE CASE

This is a proceeding under Section 10 of the Occupational Safety and Health Act of 1970 (29 U.S.C. §651 et seq.) contesting one serious citation issued on November 11, 1977 by the Secretary against the Respondent under the authority vested in the Secretary by Section 9(a) of the Act (29 U.S.C. §658(a)).

The citation, consisting of two items each having two sub-items, alleges that an inspection made on September 16, 1977 and November 10, 1977, of Respondent's workplace, located at 37-18 Northern Boulevard, Long Island City, New York showed that the Respondent violated Section 5(a)(2) of the Act (29 U.S.C. §654(a)) because it failed to comply with the occupational safety and health standards promulgated under Section 6 of the Act (29 U.S.C. §655) and codified in 29 CFR 1910.217(c)(2)(i)(a) and 29 CFR 1910.217(c)(2)(i)(d) relating to mechanical power presses.

A single penalty of $210.00 is proposed. The abatement date for all items is December 9, 1977.

ITEM 1(a)

The standard 29 CFR 1910.217(c)(2)(i)(a) provides:

> (c) Safeguarding the point of operation.
>
> (2) Point of operation guards.
>
> (i) Every point of operation guard shall meet the following design, construction, application, and adjustment requirements:
>
> (a) It shall prevent entry of hands or fingers into the point of operation by reaching through, over, under or around the guard.

The violation is described as follows:

Point of operation guard(s) on mechanical power press(es) did not prevent entry of hands or fingers into the point of operation by reaching through, over, under or around the guard(s):

a) Power Press Dept. #13

1) "Bliss" press #27; front, guard allowed entry from left side and from underneath; rear, guard allowed entry from underneath.

2) "L & J" press #37; front, discharge chute opening allowed entry through the guard.

ITEM 1(b)

The standard 29 CFR 1910.217(c)(2)(i)(d) referring to point of operation guards provides:

> (d) It shall utilize fasteners not readily removable by operator, so as to minimize the possibility of misuse or removal of essential parts;

The violation is described as follows:

Point of operation guard(s) on mechanical power press(es) utilized fasteners readily removable by the operator, so as to create the possibility of misuse or removal of essential parts:

a) Power Press Dept. #13

1) "Bliss" press #27, rear barrier guard.

2) "L & J" press #37, front and rear barrier guards.

Pursuant to the enforcement procedure in Section 10 of the Act (29 U.S.C. §659), Respondent was informed of the alleged violations and the penalty proposed. Respondent timely contested.

During the course of the hearing held on March 20, 1978, the Secretary moved to withdraw that part of item 2, subpart a(2), which refers to the "front" of the barrier guard on the "L & J" press #37 (Tr. 53). The motion is granted.

## THE ISSUES

1. Whether or not the point of operation guards on Respondent's power presses meet the requirements of 29 CFR 1910.217(c)(2)(1)(a).

2. Whether or not the point of operation guards were secured by fasteners not readily removable by the operators as required by 29 CFR 1910.217(a)(2)(i)(d).

3. If Respondent failed to comply with one or both of the standards are the violations serious.

4. What penalty, if any, is appropriate if Respondent is found in violation of one or both standards.

## SUMMARY OF THE EVIDENCE

Called by the Secretary, James Lark testified that he has been a compliance officer for the Occupational Safety and Health Administration for the past five years. During that time he has conducted about 500 inspections.

On September 16, 1977,[1/] he appeared at Respondent's workplace and held an opening conference with Mr. Slame, Respondent's personnel manager, and its plant superintendent Mr. Kirschberger (Tr. 11). At that time he informed both gentlemen that he was

---

1/ Due to compliance officer's illness inspection was concluded on November 6, 1977 (Tr. 10).

there to investigate two industrial accidents reported by the Respondent to have occurred at a Bliss power press and an L & J power press (Tr. 12). The investigation was to be limited to two presses.

Lark's investigation disclosed that the accidents were the result of employees violating Respondent's safety policy (Tr. 19, 34) and were not related to any violative conditions for which Respondent was cited and now contests.

Accompanied by Kirschberger, Lark conducted the walk-around inspection. The conditions that he observed and the information he gathered which resulted in Respondent being cited follow:

Item 1(a)(1) - 29 CFR 1910.217(c)(2)(i)(a)

Bliss power press No. 27, which was button controlled, ran 16 hours a day (Tr. 17) and was equipped with a hairpin-type barrier guard (Tr. 14) that when opened, automatically stopped the press (Tr. 15). The guard on the front of the press, left a five-inch wide and 30-inch long unprotected space at the bottom. On its left side, the unprotected area was also five inches wide but 24 inches long (Tr. 14). This is shown in the photograph Exhibit C-1. These openings in Lark's opinion, would not completely prevent an employee from putting his fingers and "perhaps" part of his hand into the point of operation six to eight inches in from the guard (Tr. 14-15). Lark described the way he was able to get his hand behind the guard as follows:

THE WITNESS: Your Honor, I had to take my hand and at the lower portion of the guard with it completely in place, I had to bend my wrist so that my hand was in a ninety degree angle to my wrist and then reach over the bed of the press and I could have reached the point of operation had I gone a little bit further. (Tr. 16).

Later when cross-examined about this Lark answered as follows:

Q. One other question for you. How high off the floor is this opening at the bottom of the press in Exhibit 1?

A. I did not measure it. I would say it's about thirty-six inches.

Q. Three feet off the floor?

A. Right.

Q. Tell me how a man can get his hand up there to the point of operation?

A. Sir, a man would have to bend at his waist or at his knees; he would have to put his hand in.

Q. Flat in? (Tr. 55)

A. Flat in. He would then have to rotate his hand at the wrist.

Q. Couldn't get it up to the elbow, could have?

A. Admittedly, with difficulty.

Q. Then what would he have to do?

A. Once he had his hand in, he could straighten his hand.

Q. He'd have to go this way?

A. With his arm and then he would have something of an S. He would have something of an S configuration of his hands to fingers.

Q. All he would have is about the length of his fingers to get to the point of operation?

A. His fingers would get there.

Q. That's all he would have after he got to the press to have his fingers in there, like an ostrich?

A. I don't catch your analogy.

Q. Pretty difficult isn't it?

A. Yes, sir.

Q. Pretty problematical?

A. Yes, sir. (Tr. 56)

The hazard foreseen by Lark was that if an employee introduced his hand into the point of operation that injury would be amputation, laceration or fracture (Tr. 17).

Item 1(a)(2) - The "L & J" press #37

This press also was operated by button control and after three strokes it would function automatically (Tr. 29).

Lark observed that it too had a hairpin-type barrier guard. At the bottom of the guard there was a six-inch by six-inch opening (Tr. 28, 32) through which there was a chute for discharging fabricated parts into a cardboard box (Tr. 28). When the box was removed according to Lark, an employee, in an

effort to relieve a jammed machine, (Tr. 31, 32) could put his entire hand and fingers into the opening and reach the point of operation - four to six inches in from the barrier guard (Tr. 28). Exhibit C-2 shows the violative condition described by Lark.

When cross-examined, Lark testified that if the press were to jam, the operator would not open the guard which deactivated the press (a) to save time and (b) because he is too lazy to raise the barrier (Tr. 63). Lark identified Exhibit R-1 as a photo of the same press shown in Exhibit C-2.

Lark classified the violations as serious because of the potential of injuries such as amputations.

Item 1(b)(a)(1) - 29 CFR 1910.217(c)(2)(i)(d)

Bliss press #27: Lark observed that the rear of the press had a barrier guard that was secured by a piece of twisted wire (Tr. 39). He anticipated that the press operator would open the guard to free a jammed machine or make an adjustment. The guard, which when opened did not shut off the press, was six to eight inches from the point of operation (Tr. 40). Exhibit C-3 depicts the barrier guard.

Cross-examination of Lark disclosed that the space between the wall and the guard was about 18 to 24 inches (Tr. 64).

Item 1(3)(a)(2) - L & J press #37

Lark testified that this press also had a rear barrier guard that when opened did not shut off the press (Tr. 43). The guard was secured by a latch that was very easy to open (Tr. 45). In his presence, Mr. Kirschberger opened the latch with a flick of the wrist (Tr. 68). He foresaw the possibility of the press operator or an unauthorized person gaining access to the point of operation by opening the rear guard (Tr. 43-44). Exhibit C-4 depicts the condition described by Lark.

Lark classified the violations as serious because they could cause amputations, fractures or deep lacerations (Tr. 47).

In computing the proposed penalty of $210.00, Lark gave Respondent the maximum 30% for good faith. Because it had more than 99 employees Respondent received no credit for size. No credit was given for history because of a prior inspection (Tr. 50).

Respondent's case

William C. Crager, a safety consultant for the past 50 years, was called by the Respondent. He testified that he makes scheduled monthly visits to Respondent's plant. He devotes one-half of the day to inspecting for hazards and observing work practices. The other half is devoted to meeting with the Respondent's safety committee (Tr. 72) which includes a representative of the employees (Tr. 73). He expressed the opinion that none of the violations were serious.

On cross-examination, Crager stated that all of the opening measurements that he testified to on direct examination, were made after the compliance officer's inspection (Tr. 79, 80) and after Respondent made modifications to the various violative conditions (Tr. 80).

## DISCUSSION

This proceeding was initiated by injuries sustained by two employees who concededly violated the safety rules of an employer that has an outstanding safety program. Although the employees were injured while operating the Bliss & "L & J" presses involved here, none of the violative conditions reported by the Secretary's compliance officer in anyway contributed to their injuries.

Directing our attention to item 1(a)(1) which alleges that the front guard of the Bliss press #27 permitted the entry from the left side and from underneath, the allegations must be vacated for failure to show reasonable predictability of access to the hazardous condition.

Dispositive of the question is the ruling of the Commission in Secretary v. Gilles & Cotting, Docket No. 504, 3 OSHC 2002 (1976).[1/] Gilles & Cotting set forth the following guideline in those cases where actual exposure to the danger zone is not shown or conceded:

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1/ Decision following Remand, 504 F.2d 1255 (4th Cir. 1974).

> . . . On balance we conclude that a rule of access based on reasonable predictability is more likely to further the purposes of the Act than is a rule requiring proof of actual exposure. . . . (Emphasis added) . . . [W]e would expect Complainant, absent an admission to establish access by evidentiary facts.

What constitutes "reasonable predictability" will of course vary. It is a relative term whose meaning is shaded and varied by the facts of a particular case. Its application to the determination of access to the danger zone bars the rigidity of mandating a finding of a violation in every case where access is shown regardless of the method or the manner adopted to achieve it. Any other view would produce harsh results never intended by the framers of the Act.[2/]

The term "reasonable predictability" however, is not so uncertain that an employer cannot comply with the Commission's ruling.

Relevant to the question, but by no means exclusive, is whether or not the employer-respondent exercised diligence to the extent of having a safety program which it uniformly or affectively enforced. For, the Commission has held that the Act does not impose an absolute liability upon employers when an employee fails to follow established safety practices. Brennan v. OSAHRC & Hanovia, 502 F.2d 946 (3rd Cir. 1974); Secretary v. Engineers Const. Inc., 20 OSAHRC 348 (1975).

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2/ The Act is very specific. Section 2(a) states that the Congressional intent is . . . [T]o assure as far as possible every working man and woman in the Nation safe and healthful working conditions.. . . .

In an effort to show access to the zone of danger, here the point of operation, within the Gilles & Cotting (supra) guidelines the Secretary's compliance officer obviously contorted his body and limbs well beyond ordinary expectations. He engaged in a strained physical effort to place his fingers within the danger zone. His explanation that to do this required him to make an "S configuration of his hands to fingers" (Tr. 56) strains credulity. Access which is reasonably predictable involves the probable and foreseeable act of an employee.

Here, the Respondent has equipped the Bliss press #27 with a guard that when opened deactivated the machine. Respondent has an outstanding safety program. Its efforts to anticipate or foresee hazardous conditions are firmly demonstrated by monthly safety inspections and employee participation safety meetings. In the light of these hard facts it cannot be concluded that Respondent could reasonably predict that its employee would engage in the same strained and contorted physical effort to gain access to the danger zone as the compliance officer did. The more reasonable conclusion is that if in fact the employee did do that he would, like the two injured employees, be violating company policy.

The Secretary cannot be upheld where, as here, he shows the possibility of access by strained and contorted effort while ignoring the foreseeability.

The remaing part of the item, subpart 1(a)(2), has a similar fatal defect. There is no quarrel about there being a front guard on the "L & J" press #37 which when opened will deactivate it. Thus, here too the test is "reasonable predictability" of access. The testimony of the compliance officer that the Respondent's machine operator would place his hand into the open chute because he would be too lazy to open the guard or would not open it to save time is highly speculative and imaginary.

It does not constitute that quality of proof upon which it can reasonably be predicted that an employee will have access to the danger zone. Secretary v. Gilles & Cotting (supra). The preponderance of the evidence rule is applicable in these proceedings. Olin Construction Company Inc. v. OSAHRC, No. 74-2516 (2nd Cir. 9/9/75); Secretary v. Armor Elevator Company, Inc., 5 OSAHRC 260 (1973). Complainant has not sustained the burden of proof.

The allegation in Item 1(b)(a)(1), that Respondent has violated 29 CFR 1910.217(c)(2)(i)(d) because it did not utilize proper fasteners for the rear barrier guard on Bliss press #27 is supported by the record. The twisted wire fastener does not meet the requirement that it be not readily removable. Not foreign to the hazardous condition is the undisputed fact that the rear barrier guard when opened did not deactivate the press.

There remains for disposition the same allegation in item 1(b)(a)(2) of inadequacy of the rear barrier guards for the

"L & J" press #37. The Secretary's evidence shows that the latch on the guard was easily flipped open by Respondent's plant superintendent, Mr. Kirchberger.

The facts and circumstances surrounding this alleged violation also support the Secretary's contention that the Respondent's employee would have access to the zone of danger. Gilles & Cotting (supra). However, the Respondent cannot be held accountable for an unauthorized person's presence in the danger zone.

Respondent's safety expert, William C. Crager, gave credible testimony about the plant safety program. However, his testimony concerning the openings in the various barrier guards on the presses must be discounted. It is based on measurements taken of the guards modified subsequent to the Secretary's inspection.

The citation charges the Respondent with serious violations. Under the applicable provisions of Section 17(k) of the Act (29 U.S.C. § 666(j)), a violation is serious if there is a substantial probability that death or serious physical harm could result from the violation and the employer knew, or with the exercise of reasonable diligence, could have known of the presence of the violation. Here Respondent's employees were exposed to or had access to hazardous areas of the points of operation of the presses. In all probability hand or finger caught in the presses would result in a serious if not fatal injury. There is little reason to believe that an injury sustained by a press operator from the power driven presses would not be serious.

Relative to the element of knowledge of the existence of the violations, the Secretary has established that by the frequent safety inspections conducted by Respondent.

Respondent's expert William Crager's testimony relative to the serious nature of the violations constitute simply a conclusion without supporting evidence. It is rejected.

The penalty proposed for all of the items is $210.00. The single penalty was based on the violations grouped to make up the one citation. Since all of the violations were of approximately equal gravity and some have not been vacated, an adjustment is necessary. In addition to examining all of the evidence I have considered all of the criteria set forth in Section 17(j) of the Act in assessing the penalties for the several violations.

Having heard the testimony of the witnesses and having observed their demeanor, it is concluded that the preponderance of the credible evidence supports the following:

## FINDINGS OF FACT

### Item 1(a)(1)

1. The front barrier guard on Bliss press #27 had an opening at the bottom five inches high and 30 inches long and an opening on the left side five inches wide and 24 inches long.

2. It is not likely or foreseeable that the Bliss press #27 operator would engage in the same contortions as the compliance officer to reach the danger zone.

3. It was not reasonably predictable by Respondent that the operator of Bliss press #27 would have access to the danger zone, i.e., the point of operation in the front of the press.

4. The Bliss press #37 operator did not have access to the danger zone.

Item 1(a)(2)

5. It is neither likely nor reasonably predictable by Respondent in the light of Respondent's excellent safety program, that the operator of "L & J" press #37 would place his hand into the danger zone because of laziness or to save time rather than open the rear guard which deactivates the press.

6. The operator of "L & J" press #37 did not have access to the danger zone in the rear of the press.

Item 1(b)(a)(1)

7. The barrier guard on the rear of Bliss press #27 was fastened by twisted wires which were readily removable by the operator.

8. The operator of Bliss press #27 had access to the zone of danger through the rear barrier guard.

Item 1(b)(a)(2)

9. The barrier guard on the rear of "L & J" press #37 was secured by a latch that was readily removable by the operator.

10. The operator of "L & J" press #37 had access to the danger zone through the rear barrier guard.

## CONCLUSIONS OF LAW

1. Respondent is, and at all times material hereto was, engaged in a business affecting commerce within the meaning of Section 3(5) of the Occupational Safety and Health Act of 1970.

2. Respondent is, and at all times material hereto, was subject to the requirements of the Occupational Safety and Health Act and the standards promulgated thereunder and the Commission has jurisdiction of the parties and of the subject matter herein.

3. Respondent did not fail to comply with 29 CFR 1910.217 (c)(2)(i)(a) as alleged in item 1(a)(1).

4. Respondent did not fail to comply with 29 CFR 1910.217 (c)(2)(i)(a) as alleged in item 1(a)(2).

5. Respondent was in violation of Section 5(a)(2) of the Act (29 U.S.C. 654) because it failed to comply with 29 CFR 1910. 217(c)(2)(i)(d) as alleged in item 1(b)(a)(1).

6. Respondent was in violation of Section 5(a)(2) of the Act (29 U.S.C. 654) because it failed to comply with 29 CFR 1910. 217(c)(2)(i)(d) with respect only to the rear barrier guard as alleged in item 1(b)(a)(2).

7. Considered within the provisions of section 17(j) of the Act (29 U.S.C. 666(i)), the amount of the proposed penalty

for failing to comply with 29 CFR 1910.217(c)(2)(i)(a) and 29 CFR 1910.217(c)(2)(i)(d) is not under the circumstances appropriate and should be reduced.

**ORDER**

Items 1(a)(1) and 1(a)(2) are vacated.

That part of item 1(b)(a)(2) which refers to the "front" barrier guard is vacated.

Item 1(b)(a)(1) is affirmed.

Item 1(b)(a)(2) insofar as it refers to the "rear" barrier guard is affirmed.

A single penalty of $50.00 is assessed for items 1(b)(a)(1) and 1(b)(a)(2).

EDWARD V. ALFIERI
JUDGE, OSHRC

Dated: June 5, 1978
New York, New York

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

August 31, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Wisconsin Steel, Div. of Envirodyne Co.

OSHRC DOCKET NO. 78-4730

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

REMAND

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>WISCONSIN STEEL, DIVISION OF ENVIRODYNE INDUSTRIES, A CORPORATION,<br><br>Respondent,<br><br>PROGRESSIVE STEEL WORKERS Union,<br><br>Authorized Employee Representative. | OSHRC Docket No. 78-4730 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

The authorized representative of the affected employees in this case, Progressive Steel Workers Union ("the union"), has petitioned for review of an order by Administrative Law Judge Ralph B. Maxwell approving a settlement agreement entered into by the other two parties, the Secretary of Labor ("the Secretary") and Wisconsin Steel Division of Envirodyne Industries ("the company"). Commissioner Cottine granted the petition and directed review under 29 U.S.C. § 661(i), section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678.

Judge Maxwell held a hearing at which the union presented its objections to the settlement agreement and the parties presented oral argument. No testimony was taken but the judge admitted into evidence a written statement of the union's objections and a copy of the collective bargaining agreement between the company and the union. Following that hearing, Judge Maxwell entered an order overruling

the objections to the settlement agreement, stating that the employee representative had "failed to demonstrate, by a preponderance of the evidence, that the proposed Settlement Agreement . . . is unreasonable or improper." Judge Maxwell subsequently approved the settlement agreement.

The union's petition for review argues that the judge's order was inadequate because it is not clear whether the judge held that the union had no standing to object to the settlement agreement or whether he overruled the objections on their merit. In either case, the union argues, the judge's decision does not explain why the union's objections were found to lack merit.

We have recently held that an authorized employee representative that elects party status in the contest of a citation before this Commission is entitled to be heard on its objections to a settlement agreement between the Secretary and the employer. Mobil Oil Corp., 82 OSAHRC ____, 10 BNA OSHC _____, 1982 CCH OSHD ¶ _____ (No. 77-4386, 1982). In addition, we agree with the union that the reasons for the judge's order overruling its objections were not adequately set out. 1/ While the wording of the order suggests that the judge gave the union's objections full consideration, it is not clear why he overruled them. We therefore remand this case for a statement of reasons why the union's

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1/ Where, as here, a union objects to a settlement agreement, the judge is required to make findings of fact on the issues raised and to enter conclusions of law based on Commission Rule 100. 5 U.S.C. § 557(c); P & Z Co., 77 OSAHRC 211/F5, 6 BNA OSHC 1189, 1191, 1977-78 CCH OSHD ¶ 22,413, p. 27,023 (No. 76-431, 1977). We note that the standard for reviewing a settlement proposal is not whether it is "unreasonable or improper" but whether it satisfies the requirements of Commission Rule 100(a) and (b), 29 C.F.R. § 2200.100(a) and (b).

objections were overruled and for any further consideration that may be appropriate in light of our decision in Mobil. 2/

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: AUG 31 1982

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2/ Chairman Rowland does not join in remanding this case for further consideration of the union's objections to the abatement measures set out in the settlement agreement. For the reasons explained in his dissenting opinion in Mobil, the Chairman believes consideration of the settlement agreement should be limited to any objections the union may have to the reasonableness of the abatement period agreed upon by the Secretary and Wisconsin Steel. Since the union's petition for discretionary review raised no objection to the reasonableness of the abatement period, in the Chairman's opinion, further consideration of the adequacy of the settlement agreement is inappropriate.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 78-4730 |
| WISCONSIN STEEL, DIVISION OF ENVIRODYNE INDUSTRIES, a Corporation, | : | |
| | : | |
| Respondent. | : | |

## ORDER APPROVING SETTLEMENT

A Settlement Agreement having been filed by the parties on October 12, 1979, and it appearing that thereafter the employee representative objected in writing to certain provisions of the Settlement Agreement, and that a hearing on such objections was duly held on December 10, 1979; and it further appearing that by Order dated December 11, 1979, the objections to the Settlement Agreement were overruled, it is now ORDERED as follows:

1. The Settlement Agreement is in all things approved.

2. The Citation and Notification of Penalty shall be amended as set forth in Paragraph I of the Agreement.

3. The respondent shall be allowed to withdraw its Notice of Contest and Answer.

4. The Citation, as amended, and the proposed amended penalty of $5,000.00 are affirmed.

Ralph B. Maxwell
Judge, OSHRC

Dated: December 19, 1979

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

August 31, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Whirlpool Corporation

OSHRC DOCKET NO. 78-6055

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF DECISION

To wit: See Attached.

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Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>WHIRLPOOL CORPORATION,<br><br>Respondent.<br><br>ALLIED INDUSTRIAL WORKERS OF AMERICA, LOCAL UNION 370,<br><br>Authorized Employee Representative. | OSHRC Docket No. 78-6055 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

Various related rulings made by Administrative Law Judge John S. Patton are before the Commission on interlocutory appeal. Judge Patton concluded that Local No. 370 of the Allied Industrial Workers of America ("the Union") has a right to present evidence and be heard on its objections to a settlement agreement between the Secretary of Labor ("the Secretary") and Respondent, Whirlpool Corporation. Specifically, the judge ruled that (1) the Union is not limited to raising issues related to abatement but can litigate the appropriateness of any part of the settlement agreement, including the change in the classification of the violation from serious to other than serious; (2) the issue to be resolved is whether the settlement agreement is appropriate rather than whether the alleged violation is meritorious; (3) the entire

settlement agreement will be set aside if any part of the agreement is found to be improper; and (4) a hearing on the merits of the case will then be held if the settlement agreement is not approved. The judge's rulings are consistent with our recent decision in Mobil Oil Corp., OSHRC Docket No. 77-4386 (Aug. 6, 1982). See also, Englehard Industries, OSHRC Docket Nos. 78-2880 & 78-3251 (Aug. 30, 1982). The judge's rulings are therefore affirmed.

While this case was pending on review, the Union filed with the Commission a motion for an order compelling the production of documents in the Secretary's possession. The Secretary responded by filing a memorandum in opposition to the Union's motion in which he raised several procedural objections to the Commission's consideration of the motion and also asserted that the requested documents are exempt from discovery under Rules 26(b)(3) and (b)(4) of the Federal Rules of Civil Procedure. We decline to rule on this motion. The motion raises issues that are beyond the scope of the interlocutory appeal and that the judge has not had the opportunity to rule on in the first instance. Moreover, these issues are not easily resolved in light of the Secretary's claims of privilege and the need to provide the Union an opportunity to respond to those claims. Therefore, in the interest of adjudicative efficiency, we conclude that the Union's motion should be considered and resolved on remand.

Accordingly, the judge's rulings are affirmed and the case is remanded to the Chief Judge [1/] for further proceedings consistent with this opinion. [2/]

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.
Ray H. Darling, Jr.
Executive Secretary

DATED: AUG 31 1982

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1/ Judge Patton has retired.

2/ Chairman Rowland dissents from the affirmance of the judge's rulings. For the reasons explained in his dissenting opinion in Mobil, the Chairman believes consideration of the settlement agreement should be limited to any objections the Union may have to the reasonableness of the abatement period agreed upon by the Secretary and Whirlpool. Since the Union has raised no objection to the reasonableness of the abatement period, in the Chairman's opinion, further consideration of the adequacy of the settlement agreement is inappropriate. For this reason, the Chairman would also deny the Union's motion for an order compelling the production of documents.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 400
ATLANTA, GEORGIA 30309

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|---|---|---|
| SECRETARY OF LABOR, | ) | |
| Complainant, | ) | |
| v. | ) | OSHRC Docket No. 78-0855 |
| WHIRLPOOL CORPORATION, | ) | |
| Respondent, | ) | |
| and | ) | |
| ALLIED INDUSTRIAL WORKERS OF AMERICA, LOCAL UNION 370, | ) | |
| Authorized Employee Representative. | ) | |

## ORDER RECERTIFYING INTERLOCUTORY APPEAL

Interlocutory Appeal was previously certified in this case and the Interlocutory Appeal was dismissed as improvidently certified.

The complainant and respondent executed a settlement agreement in this case to which the intervening union objected. On September 19, 1979, a hearing was held to determine, first, whether the objections of the union to the settlement agreement had the effect of nullifying the settlement agreement, making it necessary to proceed to a hearing on the merits of the case, or whether the issue to be decided was the appropriateness of the settlement agreement itself. The second issue at said hearing was whether the union had a right only to object to issues relating to abatement or whether the union had a right to object to any part of the settlement agreement. No evidence was introduced at this hearing but said issues were thoroughly argued by the representatives of all parties in this cause. At said hearing, this Judge ruled on each of the above described issues, his ruling being made from the bench in open court and being a part of the transcript of the hearing of said cause.

[illegible] in the transcript. Thirty errors were [illegible] by the Judge in an errata dated October 16, 1979, and, at the request of the parties, twenty additional errors were corrected by errata dated November 21, 1979. It is necessary to refer to the erratas to understand the transcript. Errors which changed the meaning of what was said were corrected. However, even after the corrections, errors still appear in the transcribing of statements of the Judge as to reasons for his rulings, which errors make it difficult to understand said statements by the Judge. Quotation marks do not appear where they belong, sentences are broken at the wrong places and words are omitted. The rulings of the Judge, however are correctly stated. Therefore, to save further delay, no additional errata will be submitted to the parties at this time.

The decision of the Judge will be found in the transcript at the following places. The reference to line is by actual count and not necessarily by the numbers appearing in the transcript.

Beginning on page 11, line 14, through page 12, line 10, the Judge, while stating that he was not at that time ruling on the intervenor's request for continuance, did state in discussion of the question of continuance, part of his ruling as to the procedure to be followed in ruling on the intervenor's objections to the settlement. The Judge's further ruling is found beginning on page 43, line 4, of the transcript with the words "I realize" and ending with the words "non-serious" in line 9, page 43 and on page 45, line 17, beginning with "my question", and ending on page 46, line 14.

At the conclusion of the ruling of the Judge, counsel for complainant requested that the Judge certify an Interlocutory Appeal from said ruling and counsel for the other parties stated that they had no objections to an Interlocutory Appeal being certified.

The Judge stated on the record that the motion that he certify an Interlocutory Appeal was granted. The Judge subsequently on November 21, 1979, did certify an Interlocutory Appeal. The Judge in the certification of Interlocutory Appeal, however, failed to state that the decision of the Judge was made in open court and that it appears as a part of the transcript of the hearing on September 19, 1979.

The Review Commission thereupon on December 7, 1979, as a result of this Judge failing to properly make known to the Review Commission that said decision had been rendered from the bench, entered an order dismissing the Interlocutory Appeal on the ground that no decision had been rendered by the Judge and that the effect of the certification was to request in essence, a declaratory judgment.

In view of the fact that this appeal was dismissed on the ground that no decision had been rendered, whereas in actuality a decision was rendered from the bench, it would appear that this Judge should again certify an Interlocutory Appeal from said decision. This Judge at this time also reaffirms the decision rendered from the bench on September 19, 1979, said decision being as follows:

Hearing on the objections of the union to the settlement agreement shall be a hearing on the appropriateness of the settlement agreement, not a hearing on the merits of the complaint as though a settlement agreement had not been executed.

In the event any part of the settlement agreement is found not to be proper, the entire settlement agreement shall be set aside and a hearing on the merits of the case shall be held as though no settlement agreement had been executed.

The position of complainant and respondent that the union may object only to issues relating to abatement is overruled.

The union is hereby permitted to litigate the appropriateness of any part of the settlement agreement, including whether the alleged violation is serious or nonserious.

It appears that the ruling of the Judge as above set forth involves important questions of law concerning which there is substantial ground for differences of opinion. It also appears an immediate appeal from said ruling will materially expedite the proceedings.

For these reasons and the reasons set forth in the original certification of Interlocutory Appeal, the request for certification of Interlocutory Appeal of said ruling of this Judge is granted and Interlocutory Appeal is hereby certified.

Dated this 14th day of December 1979.

JOHN S. PATTON
Judge

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| 80-6051 | THE HEARST CORP., PEJEPSCOT PAPER DIV. (Remand) | 8/31/82 | 50/B7 |
| | (Judge's decision) | | 50/B11 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

August 31, 1982

**IN REFERENCE TO SECRETARY OF LABOR v.**

FISHER BODY DIVISION OF GENERAL MOTORS CORP.

OSHRC DOCKET NO. 79-2212

**NOTICE IS HEREBY GIVEN TO THE FOLLOWING:**

**FOR THE SECRETARY OF LABOR**

- **Counsel for Regional Litigation**
  **Office of the Solicitor, USDOL**
  **200 Constitution Ave., NW. - Rm. S-4014**
  **Washington, D.C. 20210**

- Francis V. LaRuffa
  Reg. Sol., USDOL
  1515 Broadway, Room 3555
  New York, New York 10036

**OF** COMMISSION DECISION

**To wit:** See attached.

**FOR EMPLOYER**

- Otis M. Smith, General Counsel
  General Motors Corporation
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**FOR EMPLOYEES**

- Mr. Andrew Di Matteo
  Local 731, United Automobile Workers
  10-1/2 Chelmsford Drive
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  Mr. Charles Ketterer, Pres.
  Local 731, United Automobile Workers
  440 Durham Road
  Langhorne, PA

- Richard DeBenedetto
  Judge, OSHRC
  1515 Broadway, Room 3800
  New York, NY 10036

**FOR THE COMMISSION**

Ray H. Darling, Jr.

**RAY H. DARLING, JR.**
**EXECUTIVE SECRETARY**

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>GENERAL MOTORS CORPORATION,<br>FISHER BODY DIVISION,<br><br>Respondent.<br><br>UNITED AUTOMOBILE, AEROSPACE,<br>AGRICULTURAL IMPLEMENT WORKERS<br>OF AMERICA, AMALGAMATED<br>LOCAL 731,<br><br>Authorized Employee<br>Representative. | OSHRC Docket No. 79-2212 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge Richard DeBenedetto is before the Commission for review pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). In his decision, Judge DeBenedetto granted the motion filed by Respondent, General Motors Corporation, Fisher Body Division ("G.M."), to dismiss the case under Rule 41(b) of the Federal Rules of Civil Procedure. 1/ Accordingly, he vacated the

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1/ In the absence of a specific Commission rule, the Federal Rules of Civil Procedure are applicable to Commission proceedings. Section 12(g) of the Act, 29 U.S.C. § 661(f); 29 C.F.R. § 2200.2(b). Rule 41(b) provides, in pertinent part:

> (b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of

one citation item at issue, which alleged an other than serious violation of the Act based on noncompliance with the occupational noise standard at 29 C.F.R. § 1910.95(b)(1), and he further vacated the proposed penalty of $100. Review was directed on the issues raised in the petition for review filed by the Secretary of Labor ("the Secretary"): (1) whether Judge DeBenedetto erred in denying the Secretary's motion to postpone the hearing and his request for production and inspection of documents, and (2) whether the judge abused his discretion in granting Respondent's motion to dismiss under Rule 41(b). We conclude that the judge did not err in denying the Secretary's motions to postpone the hearing and to conduct further discovery; nor did he abuse his discretion in granting the motion to dismiss.

I

Given Judge DeBenedetto's detailed presentation of the procedural history of the case in his decision, we only briefly state it here. On October 31, 1979, only one day before the scheduled hearing in this case, the Secretary filed with the judge a motion to postpone the hearing for at least one month. The Secretary gave the following reasons for his motion to postpone: (1) Norman Dotti, the Secretary's acoustical engineering expert, was unable to meet with the Secretary's counsel prior to the hearing due to Dotti's previously-scheduled commitments from October 25 to November 1, 1979; (2) because he had never received certain information that he had requested during his discovery inspection conducted on October 17, 1979, Dotti was unable to complete his report on the technological and economic feasibility of engineering controls to reduce noise levels in the cited areas of G.M's facility; and (3) the Secretary's preparation period had been "diminished

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(Footnote 1 cont'd)

> an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

significantly" as a result of a three-week delay in Dotti's discovery inspection due to complications arising from G.M.'s request that Dotti execute a trade-secrecy oath before conducting the discovery inspection. At the same time he filed the motion to postpone, i.e., one day before the hearing, the Secretary filed an extensive and generally-worded request for production and inspection of documents.

Rule 61 of the Commission's Rules of Procedure, 29 C.F.R. § 2200.61, provides:

> Postponement of hearing.
>
> (a) Postponement of a hearing ordinarily will not be allowed.
> (b) Except in the case of an extreme emergency or in unusual circumstances, no such request will be considered unless received in writing at least 3 days in advance of the time set for the hearing.
> (c) No postponement in excess of 30 days shall be allowed without Commission approval.

At the scheduled hearing, Judge DeBenedetto permitted the parties to present extensive arguments on the Secretary's motions. After considering these arguments, the judge denied the Secretary's motions to postpone the hearing and to permit further discovery. We conclude that the judge did not err in denying the Secretary's motions.

All parties in cases before the Commission are expected to comply with the Commission's Rules of Procedure and the orders of its judges. See, e.g., TRC Drilling Corp. (Mid-Continent Division), 81 OSAHRC 108/D10, 10 BNA OSHC 1268, 1982 CCH OSHD ¶ 25,837 (No. 80-6008, 1981). Commission Rule 61(b) clearly states that a motion to postpone a hearing must be received at least three days before the hearing unless the moving party shows that there is "an extreme emergency" or there are "unusual circumstances." We conclude that the three reasons given by the Secretary for his motion, as set forth above, do not establish the existence of "an extreme emergency" or "unusual circumstances" so as to excuse his failure to timely file his motion. With regard to the Secretary's first reason, we note that no explanation was provided as to why the Secretary's counsel could not have met with Dotti at some time between October 17, the day of his discovery inspection, and October 24, the day before his previously-scheduled commitments began. Con-

cerning the Secretary's second reason, it was established at the hearing that it was the Secretary's own failure to timely request in writing the information deemed necessary by Dotti that resulted in Dotti's failure to complete his report before the scheduled hearing date. 2/ Moreover, the Secretary concedes that he was aware of the need for this information on October 22, and yet he filed no motion for postponement until nine days later. Regarding the Secretary's third reason, it was further established at the hearing that the three-week delay in the discovery inspection was caused primarily by problems Dotti encountered in mailing the signed trade-secrecy oath back to the Secretary, rather than by G.M.'s request that an oath be signed. In any event, the Secretary was aware of the delay in Dotti's discovery inspection well in advance of the hearing and yet failed to request a postponement at that time. As Judge DeBenedetto noted in his decision, no request for a postponement was made when, on October 9, the Secretary's counsel telephoned the judge for suggestions about what could be done to arrange a new discovery inspection date necessitated by the delay encountered in mailing the oath. Indeed, in a settlement conference between the Secretary and G.M. on October 23, counsel for the Secretary informed counsel for G.M. that the Secretary was prepared to try the case on November 1 and 2. 3/

II

Following the judge's denial at the hearing of the Secretary's motions to

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2/ Dotti was informed at the time of his discovery inspection on October 17 that G.M. would not consider his request for additional information until it was submitted in writing. Nevertheless, the Secretary never submitted a written request to G.M. and he waited until October 31, the day before the hearing, to file a request for production and inspection of documents.

3/ In support of its conclusion that dismissal is not warranted in this case, the dissent claims that G.M. incorrectly represented to the Secretary's counsel at the settlement conference that the information counsel requested had already been provided in G.M.'s answers to the Secretary's interrogatories. The dissent misreads the record. According to the Secretary's counsel, in response to the Secretary's request G.M.'s counsel stated, "We won't respond in writing. I can tell you now that what we would answer is what we've already answered in the answers to your interrogatories." While it appears from further statements by the Secretary's counsel that counsel misunderstood G.M.'s response, it is clear that G.M.'s counsel did not represent that the information requested by the Secretary had already been provided.

postpone and to permit additional discovery, Judge DeBenedetto advised the Secretary's counsel: "[Y]ou better proceed with your case in chief." After the lunch break, the Secretary's counsel stated that he was unable to proceed with the Secretary's case. G.M.'s counsel then made a motion to dismiss the case "with prejudice" under Rule 41(b) of the Federal Rules of Civil Procedure. The judge granted the motion of G.M.'s counsel and closed the hearing.

In his decision, Judge DeBenedetto concluded that the Secretary's motion to postpone the hearing "comes at a time and under circumstances which convince me that it is not made in good faith." He then went on to rule that, because the Secretary did not present his case on the scheduled hearing date, the citation item and proposed penalty should be dismissed.

While a judge's dismissal of a case under Rule 41(b) should be upheld unless the judge abused his or her discretion, the scope of the judge's discretion is narrowly circumscribed by the following criterion: "[o]nly where there is a 'clear record of delay or contumacious conduct' should an action be dismissed for failure to prosecute." Federated Metals, Inc., 81 OSAHRC 58/A2, 9 BNA OSHC 1906, 1911, 1981 CCH OSHD ¶ 25,425, at p. 31,692 (Nos. 79-2255 & 79-3647, 1981). The Secretary argues on review that there was no "clear record of delay or contumacious conduct" in the instant case. We disagree. As we noted previously, the judge did not abuse his discretion by refusing to grant the Secretary's motion to postpone the hearing. Accordingly, the Secretary was obliged to proceed with his case. We conclude that the Secretary's conduct throughout this proceeding, culminating in his refusal to go forward when so instructed by the judge, constituted a pattern of conduct rising to the level of contumacy.

We recognize the competing concerns that confronted Judge DeBenedetto: (1) the public policy favoring disposition on the merits, and (2) the preservation of the integrity of Commission rules and orders and the deterrence of future misconduct by the Secretary. We conclude that under the facts of this case the balance the judge struck between these competing interests was within the range of his

discretion. See Pittsburgh Forgings Co., 82 OSAHRC 14/D13, 10 BNA OSHC 1512, 1982 CCH OSHD ¶ 25,974 (No. 78-1361, 1982)(judge's decision to vacate citation items as a sanction for the Secretary's failure to comply with discovery order did not constitute abuse of discretion).

While we conclude that the judge did not abuse his discretion in granting G.M.'s motion to dismiss under Federal Rule 41(b), we do not agree that the dismissal should be "with prejudice" and thus constitute a decision on the merits. To dismiss this case "with prejudice" would prevent the Secretary from later trying a case on the merits against G.M. for the same noise violation that is alleged here. Assuming G.M. did fail to comply with the noise standard and that it continues to do so, to dismiss "with prejudice" would therefore frustrate the remedial purpose of the Act and, in the long term, punish only the employees for the conduct of the Secretary.

Accordingly, we modify the judge's order to be a dismissal under Rule 41(b) "without prejudice." 4/ As modified, we affirm the judge's order granting the motion to dismiss and vacating the citation item and proposed penalty.

IT IS SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: AUG 31 1982

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4/ Chairman Rowland does not agree that the "remedial purposes" of the Act require that dismissal in this case be without prejudice. In Chairman Rowland's view, the judge did not abuse his discretion in ordering dismissal with prejudice in the circumstances presented here. See Lopez v. Arkansas County Indep. School Dist., 570 F.2d 541 (5th Cir. 1978); Schwarz v. United States, 384 F.2d 833 (2d Cir. 1967); Hooper v. Chrysler Motors Corp., 325 F.2d 321 (5th Cir. 1963), cert. denied, 377 U.S. 967 (1964). Chairman Rowland also notes that in Pittsburgh Forgings Co., 82 OSAHRC 14/D13, 10 BNA OSHC 1512, 1982 CCH OSHD ¶ 25,974 (No. 78-1361, 1982), and TRG Drilling Corp., 81 OSAHRC 108/D10, 10 BNA OSHC 1268, 1982 CCH OSHD ¶ 25,837 (No. 80-6008, 1981), the Commission affirmed its judges' rulings vacating citation items with prejudice. Accordingly, Chairman Rowland joins in ordering dismissal without prejudice solely to form a majority disposition in this case.

COTTINE, Commissioner, dissenting:

This case does not involve contumacious conduct on the part of the Secretary's counsel. Nor does the Secretary's late filing of the motion to postpone the hearing justify dismissal. Accordingly, dismissal of the Secretary's citation is judicial overreaction to the circumstances of this case.

I

The legal standards governing dismissal for failure to prosecute were recently stated by this Commission:

> Only where there is a "clear record of delay or contumacious conduct" should an action be dismissed for failure to prosecute. Reizakis v. Loy, 490 F.2d 1132, 1135 (4th Cir. 1974), citing and quoting Durham v. Florida East Coast Railway Co., 385 F.2d 366, 368 (5th Cir. 1957). Dismissal is justified where there is a "drawn-out history of the litigation" which demonstrates that the prosecuting party has been "deliberately proceeding in a dilatory fashion." Link v. Wabash Railroad Co., 370 U.S. 626, 633 (1962).

Federated Metals, Inc., 81 OSAHRC 58/A2, 9 BNA OSHC 1906, 1911, 1981 CCH OSHD ¶25,425 at p. 31,692 (Nos. 79-2255 & 79-3647, 1981)(footnote omitted). Under Federated Metals, only deliberate misconduct justifies dismissal for failure to prosecute. Unintentional delay is not enough. See also Ralston Purina Co., 79 OSAHRC 81/E6, 7 BNA OSHC 1730, 1979 CCH OSHD ¶23,897 (No. 78-145, 1979).

The Secretary's counsel failed to gather the information necessary to try the alleged noise violation in time for the hearing. Realizing that fact at the last moment, counsel filed a motion to postpone the hearing and a motion for production of the necessary documents by GM. There is no indication that the delays or motions were the result of a contumacious attitude and the majority points to no such evidence.

There is no evidence of intentional misconduct based on the mere series of mishaps that delayed the Secretary's discovery inspection

until October 17. Nor does the fact that the Secretary's counsel did not learn about the need for additional information until 5 days after that inspection indicate contumacy. The necessary information was requested from GM's counsel during a settlement meeting the next day (October 23) and counsel was informed that it had been included in GM's answers to interrogatories. This incorrect representation contributed to the delay in seeking a postponement of the hearing (the expert was unavailable for consultation after October 24). Thus, the further eight-day delay by the Secretary's counsel in seeking a postponement and requesting the needed information is understandable and does not indicate contumacious behavior.

The Commission repeatedly has faced the problem of delays in noise cases due in part to the lack of expeditious, thorough discovery by the Secretary. E.g., Samsonite Corp., 10 BNA OSHC 1583, 1982 CCH OSHD ¶26,054 (No. 79-5649, 1982); Federated Metals, supra; Ralston Purina, supra. Extensive and complex discovery generally is involved where the feasibility of engineering controls to reduce noise exposure is in issue. See Del Monte Corp., 81 OSAHRC 78/A2, 9 BNA OSHC 2136, 1981 CCH OSHD ¶25,586 (No. 11865, 1981); Federated Metals, supra; Ralston Purina, supra. There is no basis for finding that the delays and errors in this case were any more deliberate than those in the noise cases cited above.

Shortly before the hearing the Secretary's counsel met with her supervisor and they determined that they could not try the case without more information. They did the only thing possible short of dropping the case-- they filed a motion to postpone the hearing and a motion for the production of documents. The judge did not clearly order the Secretary to proceed with his case. The judge's comment, "you better proceed with your case in chief" was followed by further consideration of pretrial

motions. Thereafter, the judge did not order the Secretary to proceed. Thus, there was no disobedience of an order to proceed with the Secretary's case. Moreover, the Secretary has declined to go forward with his case in similar noise cases where he lacked the necessary evidence. Del Monte, supra; Federated Metals, supra; Ralston Purina, supra. The Commission did not find that action to be contumacious.

The majority has reached out again to find contumacy on the part of the Secretary's counsel without factual support. See also TRG Drilling Corp., 81 OSAHRC 108/D10, 10 BNA OSHC 1268, 1982 CCH OSHD ¶25,837 (No. 80-6008, 1981)(Cottine, Commissioner, dissenting). This finding has another serious consequence. It casts an adverse reflection on the professional competence of an attorney. Under these circumstances the issue of contumacy must be carefully addressed and resolved in fairness to the parties and their representatives. Id.

Federated Metals indicates that dismissal is inappropriate here for another reason:

> A dismissal under Federal Rule 41(b) is a sanction against the prosecuting party. Therefore, it is not properly employed where, as here, the prosecuting party's failure to proceed is largely the defending party's fault. Fidelity Philadelphia Trust Co. v. Pioche Mines Consolidated, Inc., 587 F.2d 27 (9th Cir. 1978); United States v. Inter-American Shipping Corp., 455 F.2d 938 (5th Cir. 1972); Davis v. Romney, [53 F.R.D. 247 (E.D. Pa. 1971)].

9 BNA OSHC at 1913, 1981 CCH OSHD at p. 31,694. As noted above, the incorrect representation by GM's counsel that all additional information requested by the Secretary's counsel 9 days before the hearing had already been turned over contributed to the delay in seeking a postponement of the

hearing. 1/ Also, neither the Secretary nor the judge received GM's witness list, the list of documents GM intended to offer in evidence, or other information covered by the pre-trial order until the day of the hearing. The judge had ordered that information turned over at least a week before the hearing. The Secretary objected to the late disclosures, claiming surprise. In fairness, GM must share the responsibility for the need to postpone the hearing. Accordingly, the Secretary's case should not have been dismissed.

II

The failure by the Secretary's counsel to comply with Commission Rule 61(b) also does not justify dismissal:

> [T]he Commission and the courts of appeals that review our decisions have required a showing of actual prejudice before vacating citations for failure to follow Commission rules or orders or for failure to follow procedural provisions of the Act itself. . . .
>
> Assuming, as we do here, an absence of contumacious conduct on the part of the delaying party, we consider lack of prejudice to respondents as the controlling factor in determining that dismissal is too harsh a sanction under the circumstances.

Duquesne Light Co., 80 OSAHRC 32/B7, 8 BNA OSHC 1218, ]222, ]980 CCH OSHD ¶24,384 at 29,719 (No. 78-5034, 1980)(footnotes omitted). The majority has not found, nor could it find, that the failure to file the motion to postpone at least 3 days before the hearing was in itself a contumacious act. Nor was there any prejudice to GM, as its ability to

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1/ Even accepting the majority's selective interpretation of the record at note 3, supra, the Secretary's counsel reasonably understood the responses of GM's counsel during the pretrial period to have suggested that the requested information had already been supplied. TR. 20, 28-9, 31. Under these circumstances, the conduct of the Secretary's counsel cannot be considered contumacious.

present its defenses was not shown to have been compromised. E.g., Rollins Outdoor Advertizing, Inc., 77 OSAHRC 24/C1, 5 BNA OSHC 1041, 1977-78 CCH OSHD ¶21,551 (No. 12528, 1977); Accu-Namics, Inc., 74 OSAHRC 35/A2, 1 BNA OSHC 1751, 1974-75 CCH OSHD ¶17,936 (No. 477, 1974), aff'd, 515 F.2d 828 (5th Cir. 1975), cert. denied, 425 U.S. 903 (1976).

There are no grounds for dismissal in this case under Commission precedent. Accordingly, the judge's action in dismissing the citation should be reversed and the case remanded for further proceedings.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>FISHER BODY DIVISION OF GENERAL MOTORS CORPORATION,<br><br>Respondent. | OSHRC DOCKET<br><br>NO. 79-2212 |

RULING ON RESPONDENT'S MOTION TO DISMISS
UNDER RULE 41(b) OF FEDERAL RULES OF CIVIL PROCEDURE

On April 2, 1979, respondent was cited for violating section 5(a)(2) of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. § 654(a)(2), by failing to comply with various general industry safety and health standards, including the occupational noise standard of 29 C.F.R. § 1910.95(b)(1) [item 1 of citation number 2]. The parties entered into a settlement agreement on November 1, 1979, which resolved all matters except the charge of violating the noise standard, for which a $100.00 penalty is proposed by the Secretary.[1/] The remaining contested noise-standard allegation is the subject of respondent's motion to dismiss for failure of the Secretary to prosecute.

Inspection of respondent's plant in West Trenton, New Jersey, took place during the period from February 12 to March 22, 1979.

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1/ The matters settled by the parties were severed from the instant proceeding by Order approving the settlement agreement entered on December 19, 1979.

The Secretary apparently found, in two departments of the plant, excessive noise levels emanating from several presses and roll mills. The complaint was filed on June 11, 1979. It was signed by attorney Helen Maher. The complaint was answered in June, and on August 15, 1979, a notice of hearing was sent to the parties setting November 1 and 2, 1979, as the hearing dates.

Both parties conducted discovery by written interrogatories; respondent filed its request for interrogatories in July 1979, and the Secretary had until September 21, 1979, to respond to the interrogatories. The Secretary, through attorney Helen Maher, filed his interrogatory request on September 11, 1979, and respondent had until October 19, 1979, to respond to the interrogatories. The Secretary's expert witness, Norman Dotti, conducted an inspection of the cited worksite on October 17, 1979 (Tr. 19). A settlement conference was held by the parties on October 23, 1979, and on October 26, 1979, Secretary's counsel, Helen Maher, pursuant to the prehearing order, sent a notice of issues and a list of witnesses to be produced in the Secretary's case at the scheduled hearing.

On October 31, 1979, the day before the hearing, the Secretary filed a motion to adjourn[2/] and a request for production of

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2/ Under the Commission's procedural Rule 61(b), 29 C.F.R. § 2200.61(b), no request for postponement of a hearing will be considered unless received in writing at least three days in advance of the time set for the hearing, "[e]xcept in the case of an extreme emergency or in unusual circumstances."

documents[3/] (both were dated October 31, 1979). Respondent and the employee representatives did not receive their copies of the motion and discovery request until the day of the hearing (Tr. 6-7). The Secretary gives the following reasons for seeking an adjournment and discovery by production of documents: (a) the Secretary's expert witness, Norman Dotti, was unavailable to meet with Secretary's counsel prior to the November first hearing date because of "previously scheduled commitments out of town from Thursday, October 25, 1979, through to November 1, 1979"; (b) Norman Dotti had been unable to prepare a full report because of the lack of necessary information -- a problem which, according to the Secretary, Dotti disclosed to Secretary's counsel on October 22; (c) the November first hearing date was "originally acceptable based on an understanding that the Secretary's expert would conduct his discovery inspection" by September 24, 1979, but because of a three-week delay in that inspection (due to problems encountered in mailing a trade-secrecy oath (Tr. 8, 39)), "the preparation period for the Secretary diminished significantly."

What is strikingly at odds with the foregoing reasons given by the Secretary in its application for an adjournment are the following undisputed facts: Helen Maher, the Secretary's attorney of record who handled the case since commencement of the action,

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3/ Request for production of documents is governed by Fed. R. Civ. P. 34, which is made applicable to Commission proceedings by 29 C.F.R. § 2200.2(b):

> In the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Procedure.

assured respondent's counsel as late as October 23, 1979, that the Secretary was prepared to go forward on the scheduled date of hearing (Tr. 31); the Secretary's October 26, 1979, prehearing notice of issues and list of witnesses (J-11) did not suggest that there might be need for a continuance; Secretary's counsel had indeed intended to present the Secretary's case at the hearing set for November first until "[t]here was a discussion held in our office and it was decided that we had not had the necessary information to go on" (Tr. 33, 41) -- that discussion took place on Tuesday, October 30, 1979, just two days before the scheduled hearing.

Further undermining the Secretary's position is his application for production of documents. It is significant to note the general nature of the Secretary's requests. Merely to state them is to show that they are so manifestly broad in scope as to be suitable to any occupational noise case in which engineering and administrative controls are at issue. Here, for example, are the first four of the Secretary's requests:

> 1. All documents relating to the results of sound level measurements taken in respondent's premises at the cited locations during the years 1965 through 1979 inclusive.
>
> 2. All documents pertaining to any and all studies, investigations, or evaluations of the feasibility of engineering controls for the purpose of reducing noise levels, exposure to noise, or the time of employee exposure to noise in the premises at the cited locations.

3. All documents pertaining to any and all studies, investigations, or evaluations of the feasibility of administrative controls for the purpose of reducing noise levels, exposure to noise, or the time of exposure of employees to noise in the premises at the cited locations.

4. All writings submitted to the respondent by any person or firm which pertain to any study, investigation or evaluation of the feasibility of engineering controls for the purpose of reducing noise levels, exposure to noise, or the time of employee exposure to noise in the premises at the cited locations.

Such requests, which have been seen before by the undersigned in a number of other cases, have heretofore been routinely made by Secretary's counsel at the same time interrogatories were directed to the employer -- far in advance of the date set for hearing. Considering the general nature of the requests, it is somewhat anomalous for Secretary's counsel to state that he was "only interested in what Mr. Dotti requested" and that the request for production of documents was an "attempt to move as expeditiously as possible" (Tr. 30). Mr. Dotti indicated that he needed information concerning "die changes and press loading." When Secretary's counsel was asked where those articles appeared among the items listed in the requests for production of documents, the following exchange occured (Tr. 46):

JUDGE DE BENEDETTO: But I mean is it included in the Request for Production of Documents?

MR. SCOTT [counsel assisting Helen Maher during the hearing]: Yes.

JUDGE DE BENEDETTO: What item is that?

MR. SCOTT: Not for die change, it was the audiometric testing --

JUDGE DE BENEDETTO: No, I'm referring to die changes and press loading.

MR. SCOTT: No. I don't think that that specifically appears. We asked for the engineering studies.

JUDGE DE BENEDETTO: Would that appear in the engineering studies?

MR. SCOTT: My expert advises me that he believes it would. He said it's part of the economic analysis data.

If the requests for documents were made only after thoughtful consideration and grounded on the specific needs of the Secretary's expert witness, as Secretary's counsel suggested(Tr. 30, 47-48), I should think the requests would have been drafted with a greater degree of specificity. What should also be noted is that while at one point Secretary's counsel professed to have waited until it was ascertained whether respondent actually had the documents before requesting them (Tr. 48), at another point Secretary's counsel indicated that there might be documents listed among the requests that respondent may not possess (Tr. 49-50).

It is recognised that the discretionary power to dismiss for want of prosecution should be used sparingly and that the policy of law favors disposition of litigation on the merits.

However, the Secretary had ample opportunity to apply to the undersigned for whatever relief the Secretary may have been entitled to.[4/] The motion for adjournment comes at a time and under circumstances which convince me that it is not made in good faith. Secretary v. Ralston Purina Co., No. 78-145 (September 26, 1979) CCH OSHD para. 23,897.

The Secretary having failed to present his case at the November 1, 1979, hearing, respondent's motion to dismiss the case with prejudice under Fed. R. Civ. P. 41(b)[5/] for failure to prosecute is granted, and the Secretary's motion for an adjournment is denied. Accordingly, it is

ORDERED that item 1 of citation number 2 and the $100.00 penalty proposed therefor are vacated.

Richard DeBenedetto
RICHARD DeBENEDETTO
JUDGE, OSHRC

Dated: December 19, 1979
New York, New York

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4/ On one occasion, in a telephone conversation with the undersigned on or about October 9, 1979, Secretary's counsel indicated that there was a problem in arranging the expert's visit to respondent's plant as planned due to the trade-secrecy oath mailing mishaps. The undersigned suggested a course of action which aided in a resolution of the problem. At no time during this conversation did Secretary's counsel request a continuance (Tr. 38-39, 57-58).

5/ Fed. R. Civ. P. 41(b) states in part:

> For failure of the plaintiff to prosecute . . . a defendant may move for dismissal of an action or of any claim against him . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision . . . operates as an adjudication upon the merits.

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

August 31, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

The Hearst Corp., Pejepscot Paper Div.

OSHRC DOCKET NO. 80-6051

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION
REMAND

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>HEARST CORPORATION,<br>PEJEPSCOT PAPER CORPORATION,<br><br>Respondent,<br><br>UNITED PAPERWORKERS INTERNATIONAL UNION,<br>LOCAL No. 23,<br><br>Authorized Employee<br>Representative. | OSHRC Docket No. 80-6051 |

ORDER OF REMAND

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

The Secretary of Labor and Hearst Corporation submitted a settlement proposal to Administrative Law Judge Richard J. DeBenedetto. The judge approved the settlement proposal, finding in part that the United Paperworkers International Union Local No. 23 had been afforded "adequate notice." We find that the union was not afforded the opportunity to respond that it was entitled to under the Commission's rules. We therefore vacate the judge's decision and remand for consideration of the union's objections to the settlement proposal.

The Commission's rules of procedure afford representatives of affected employees a ten-day period for objecting to a settlement proposal. 1/ Although

1/ Commission Rule 100(c), 29 C.F.R. § 2200.100(c). This requirement applies whether a union is a party or not. If, as here, a union is a party, it is

(cont'd)

this period begins to run from the day the proposal is served on a union, [2/] our rules contemplate that service on a union would be simultaneous with the filing of the proposal with the judge or the Commission. [3/] In this way, a union served with a settlement proposal that has been filed with a judge or the Commission would understand that its ten-day period for filing an objection is running.

The union in this case was twice served with a settlement proposal far more than ten days before a settlement proposal was either filed with or approved by the judge. However, the letters to the union representatives that accompanied the proposal they received did not give them any notice that the proposal would be filed with the judge for approval if the union failed to object. [4/] Weeks later, when the proposal was filed with the judge, it was evidently not served

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(Footnote 1 cont'd)

in any event entitled to a 10-day response period under Commission Rule 37, 29 C.F.R. § 2200.37 (response to motions); American Cyanamid Co., 80 OSAHRC 40/C8, 8 BNA OSHC 1346, 1348, 1980 CCH OSHD ¶ 24,424, p. 29,791 (No. 77-3752, 1980)(filed settlement proposal is in the nature of a motion), rev'd on another ground sub nom. Marshall v. Oil, Chemical & Atomic Workers Int'l Union, 647 F.2d 383 (3d Cir. 1981). This period is extended by three days when the union has been served by mail. Commission Rule 4(b), 29 C.F.R. § 2200.4(b).

2/ Commission Rules 37 and 100(c), 29 C.F.R. §§ 2200.37 and 2200.100(c).

3/ Commission Rules 7(a) and 100(c), 29 C.F.R. §§ 2200.7(a) and 2200.100(c). See American Cyanamid, note 1 supra.

4/ The letters to the union representatives stated:

> Enclosed please find a copy of the Settlement Agreement in this case. Union acceptance of settlement agreements is now requested, and we will therefore appreciate your signature and title on the last page of the agreement. The agreement has already been explained to union representatives who have called this office. After signing it, please return it to this office for filing with the Administrative Law Judge.

on the union and it was not accompanied by a certificate of such service. 5/ In short, there is no evidence that the union knew that its ten-day period for filing objections had begun.

Accordingly, the judge's decision is vacated and the case is remanded for consideration of the union's objections to the settlement proposal. We also call the parties' and the judge's attention to our recent decision in Mobil Oil Corp., 82 OSAHRC _____, 10 BNA OSHC _____, 1982 CCH OSHD ¶ _____ (No. 77-4386, 1982). 6/

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: AUG 31 1982

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5/ See Commission Rule 7(d), 29 C.F.R. § 2200.7(d)(proof of service, stating date and manner of service, must accompany filed document). Although the settlement proposal was posted, this is not sufficient service upon represented employees. See Commission Rules 100(c) and 7(h), (f) and (c); Asarco, Inc., 80 OSAHRC 104/F5, 8 BNA OSHC 2200, 1980 CCH OSHD ¶ 24,913 (No. 79-5557, 1980).

6/ For the reasons explained in his dissenting opinion in Mobil, the Chairman believes that consideration of the settlement agreement should be limited to any objections the union may have to the reasonableness of the abatement period agreed upon by the Secretary and Hearst.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant | : | |
| v. | : | OSHRC DOCKET NO. 80-6051 |
| THE HEARST CORPORATION, PEJEPSCOT PAPER DIVISION, | : | |
| Respondent | : | |

## ORDER

On September 8, 1980, respondent was cited for allegedly seriously violating the general duty clause of section 5(a)(1) of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. §654(a)(1), and the specific duty clause of section 5(a)(2) of the Act, 29 U.S.C. §654(a)(2), by failing to comply with several health standards, designated in the citation as items 1a, 1b, 2, 3, 4 and 5. The Secretary proposes that penalties be assessed totaling $1,600 (as amended on September 30, 1980). Respondent contested the matter.

The parties entered into a settlement agreement whereby the Secretary has moved to: withdraw items 1a and 2; delete certain words from item 4; modify the abatement dates for certain specified items; and reduce the proposed penalty from a total of $1,600 to $510. In consideration thereof, respondent has moved to withdraw its notice of contest and has agreed to take certain specified abatement actions.

The record reflects (1) abatement of the violations has been or will be accomplished at a specified time; (2) assurance of continuing compliance by respondent; (3) payment of the amended proposed penalty; and (4) adequate notice to affected employees.

The settlement agreement being in accord with the purposes and objectives of the Act, it is approved and the motions are granted. Respondent's notice of contest is dismissed. Items 1a and 2 are vacated, the remaining items of the citation are amended to conform to the terms of the settlement agreement, the citation is affirmed, as amended, and a total penalty of $510 is assessed.

Richard DeBenedetto
RICHARD DeBENEDETTO
Judge, OSHRC

Dated: April 30, 1981
Boston, Massachusetts

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| | (Judge's decision) | | 45/G2 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

August 6, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Mobil Oil Corporation

OSHRC DOCKET NO. 77-4386

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION (REMAND)

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 77-4386 |
| MOBIL OIL CORPORATION, | : | |
| Respondent, | : | |
| PETROLEUM TRADES AND EMPLOYEES UNION, LOCAL 419, | : | |
| Authorized Employee Representative. | : | |

## DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

COTTINE, Commissioner:

A decision of Administrative Law Judge Edward V. Alfieri is before the Commission for review pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Judge Alfieri approved a settlement agreement between the Secretary of Labor ("the Secretary") and Mobil Oil Corporation ("Mobil Oil" or "the Company") without considering the objections raised by the affected employees through their authorized employee representative, the Petroleum Trades and Employees Union, Local 419 ("the P.T.E.U." or "the Union"). The judge concluded that the P.T.E.U. lacked standing to challenge the sufficiency of the abatement plan included in the settlement agreement. The Commission reverses the judge's decision, declines to approve the settlement agreement, and remands the case for further proceedings.

I

On November 30, 1977, the Secretary issued a citation to Mobil Oil alleging a serious violation of section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1),[1/] at the company's petroleum tank storage facility on Staten Island, New York. The citation concerned the required method used by the bulk plant men to perform manual gauging and sampling of petroleum stored in floating roof tanks. Specifically, the allegations were that these employees were required "to descend onto the roof of said tank(s) without any tests being taken of the potentially toxic/combustible atmospheres into which they are required to enter" and "to perform their task alone when the floating roof(s) were ten (10) feet or more below the tank(s) shell." Lack of adequate training was also alleged. Immediate abatement was required and a $540 penalty was proposed.

Mobil Oil contested the citation and proposed penalty and a hearing was scheduled before Judge Alfieri. However, prior to the hearing the judge learned that the Secretary and Mobil Oil had settled the case. He therefore canceled the hearing and directed the parties to file their agreement.

Before the parties responded, the P.T.E.U. elected party status on behalf of the affected employees. The judge ordered service of all documents on the P.T.E.U. Shortly thereafter, the Secretary notified Mobil Oil that the settlement agreement would not be filed and that the settlement negotiations should continue. The Secretary stated that his reconsideration of the proposed abatement plan included in the agreement revealed that it did not best provide for employee safety because the plan was based on outdated material.

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1/ This section provides that "[e]ach employer...shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

Mobil Oil objected but also continued settlement negotiations. As a result, the Secretary and Mobil Oil reached a second agreement and, on May 18, 1978, the Secretary sent a copy of this agreement to Mobil Oil for signature and service on affected employees. On May 25, 1978, a general objection to the settlement was filed with the judge by the P.T.E.U. The Union also requested "a formal hearing so that we can press our viewpoint on this matter as we have not participated in any discussions because of no notice to us." In view of this response, Judge Alfieri held a prehearing conference for all parties on May 31, 1978. At the hearing the Secretary and Mobil Oil submitted a signed copy of the second settlement agreement. The judge then scheduled a hearing for June 6, 1978, on whether he should approve the settlement agreement.

The proposed abatement plan incorporated into the second settlement agreement pertains to gauging procedures for floating roof tanks during two defined times: "detector alarm conditions" and the time after detector alarm conditions ("less critical period"). Detector alarm conditions exist while the floating roof of the tank is being refloated and for four hours thereafter. During this time, Mobil Oil is required, among other things, to have immediately available at the tank gauging platform a second person to maintain visual contact with the gauger on the floating roof performing manual gauging and sampling of petroleum. During the less critical period, Mobil Oil is required only to have available at the terminal a second person to maintain radio contact with the gauger while he performs his tasks, first when he arrives at the top of the tank and then every ten minutes thereafter. If at any time the second person cannot make contact with the gauger, then he must proceed immediately to the tank after alerting a third backup person.

At the hearing, the P.T.E.U. argued that the proposed abatement plan is insufficient because of the provision for ten-minute radio contact between the

gauger and a second person during the less critical period. The Union asserts that the gauger's safety requires an immediately available second person maintaining visual contact with the gauger at all times. In response, Judge Alfieri stated that this objection could not be heard. Noting Commission precedent,[2/] the judge stated that the Commission had interpreted section 10(c) of the Act, 29 U.S.C. § 659(c), to limit employees' objections in Commission proceedings to the reasonableness of the abatement period. The judge specified that objections to the sufficiency of the abatement plan must be tied to an objection to the abatement time. Because immediate abatement is required in this case, the Union conceded that its objection could not be framed in terms of an objection to the abatement time. The Secretary and Mobil Oil at this point asserted that, in view of their agreement that the abatement plan was sufficient and the Union's lack of standing to object to the sufficiency of the settlement agreement, the agreement should be approved. Accordingly, Judge Alfieri denied further hearing on the Union's objections.

In his decision issued on July 6, 1978, Judge Alfieri affirmed his rulings at the hearing. He therefore approved the settlement without consideration of the P.T.E.U.'s objections. Consistent with the agreement, he affirmed the citation and assessed a $400 penalty.

II

The P.T.E.U. filed a letter objecting to the judge's order and I directed review of the case.[3/] The P.T.E.U. argues on review that the Commission's

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2/ United Automobile Workers, Local 588 (Ford Motor Co.), 76 OSAHRC 58/B8, 4 BNA OSHC 1243, 1976-77 CCH OSHD ¶ 20,737 (No. 2786, 1976), aff'd, 557 F.2d 607 (7th Cir. 1977); Southern Bell Telephone & Telegraph Co., 77 OSAHRC 83/D1, 5 BNA OSHC 1405, 1977-78 CCH OSHD ¶ 21,840 (No. 10340, 1977).

3/ In its letter, the Union stated that it would file a petition for review and indicated the grounds on which it objected to the judge's

(Continued on next page)

interpretation of section 10(c) of the Act, on which the judge relied, is unduly narrow in light of the plain language of the last sentence of the section: "[t]he rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection." The P.T.E.U. further argues that the Commission's interpretation limiting employee challenges to the abatement time is inconsistent with the purpose and objectives of the Act. According to the Union, the result of the narrow interpretation is to exclude the Act's beneficiaries, the employees, from any meaningful role in achieving appropriate abatement of workplace hazards.

On review, the Secretary and Mobil Oil support the judge's decision. Both argue that the decision comports with established Commission precedent, and Mobil Oil extensively argues that the precedent is fully consistent with the Act's purpose and objectives. Briefly stated, Mobil Oil's reasoning is

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3/ (continued)

order. I regarded the letter as a petition for review and directed review on the issues raised by the Union, stating the following specific issues:

> 1) Whether the judge erred in concluding that the Authorized Employee Representative may not challenge the sufficiency of abatement in terms of the reasonableness of the abatement period under 29 U.S.C. § 659(c).
>
> 2) Whether the Judge erred in approving the settlement agreement filed by the Secretary and the Respondent without considering the objections raised by the Authorized Employee Representative.
>
> 3) Whether the settlement agreement approved by the Judge is consistent with the provisions and objectives of the Act.

Mobil Oil contends that the P.T.E.U.'s petition for discretionary review and the direction for review are both invalid. However, Commission

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that strictly clear and narrow limitations on the employees' role in the enforcement proceedings are necessary to preserve the Secretary's authority to enforce the Act in a manner that is consistent with the varying demands of the public interest. Both parties additionally argue that their settlement agreement should be approved because the abatement plan included in it effectuates the Act's goal of abatement of workplace hazards.

This opinion addresses these issues in terms of the statutory right of party status conferred by section 10(c) of the Act (Part III) and the settlement agreement offered for Commission approval (Part IV). It is concluded that the Act independently creates a right to contest the citation distinct from the absolute right afforded employees to participate in

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3/ (continued)

Rule 91a(d), 29 C.F.R. § 2200.91a(d), now redesignated Rule 92(d), 29 C.F.R. § 2200.92(d), provides:

> At any time within 30 days after the filing of a decision of a judge, a case may also be directed for review by a member [of the Commission] upon his own motion upon any ground that could be raised by a party, but the issues would normally be limited to novel questions of law or policy or questions involving conflict in Administrative Law Judges' decisions. Any direction for review shall state the issues with particularity. Except in extraordinary circumstances, the Commission's power to review is limited to issues of law or fact raised by the parties in the proceedings below.

Because a Commission member can on his own motion direct review of any issues that could be raised by a party, Mobil Oil's arguments as to why the P.T.E.U.'s petition for review is defective need not be considered. As long as the direction for review is independently valid, the issues set forth in it are before the Commission for review regardless of a defect in the petition.

Clearly the direction for review is valid. Contrary to Mobil Oil's contention, the issues stated in the direction for review apprise the parties of the issues the Commission intends to review. These issues are inherent in the objections of the P.T.E.U. raised in the proceedings below, and they present substantial questions of law. The direction for review is therefore consistent with Rule 92(d).

Commission proceedings (Parts III A & B) and that the Commission adopted appropriate rules of procedure implementing this statutory framework (Part III C). In addition, the statute is interpreted as a whole to confer rights on employees that are independent of, though interrelated with, the Secretary's enforcement authority (Part III D) and that the Commission majority erred in United States Steel Corp., 77 OSAHRC 12/C3, 4 BNA OSHC 2001, 1976-77 CCH OSHD ¶21,463 (No. 2975, 1977), by limiting employee party status to the "reasonableness of the abatement period" (Part III E). In considering employee objections to a settlement agreement, a reasonable balance is struck if a settlement agreement is approved over the objections of the participating employees provided the settlement satisfies certain minimum conditions (Part IV A & B). Finally, the abatement method and abatement period are inextricably intertwined and employee objections to an abatement plan must be considered in determining whether the mini mum conditions for approval have been satisfied (Part IV C).[4/]

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4/ Several courts of appeals have considered these and related issues and reached contrary conclusions. See text and nn. 23, 25, 29, 34, infra. Nevertheless, the Commission adheres to its longstanding and often-stated view that an administrative agency charged with the duty of formulating uniform and orderly national law for these adjudications is not bound to acquiesce in the views of the United States courts of appeals that conflict with those of the agency. Consistent application of Commission rules of procedure is also essential to maintain the procedural regularity required for efficient administration of Commission proceedings. Certainly, the Commission gives due deference to the views of the circuits. However, the Commission is obligated to establish and follow its own precedent in carrying out its adjudicatory functions under the Act unless that precedent is reversed by the United States Supreme Court. Raybestos Friction Materials Co., 80 OSAHRC 111/E14, 9 BNA OSHC 1141, 1980 CCH OSHD ¶24,910 (No. 80-2793, 1980); Farmer's Export Co., 80 OSAHRC 66/A2, 8 BNA OSHC 1655, 1980 CCH OSHD ¶24,569 (No. 78-1708, 1980); S&H Riggers & Erectors, Inc., 79 OSAHRC 23/A2, 7 BNA OSHC 1260, 1979 CCH OSHD ¶23,480 (No. 15855, 1979), rev'd on other grounds, 659 F.2d 1273 (5th Cir. 1981); Grossman Steel & Aluminum Corp., 76 OSAHRC 54/D9, 4 BNA OSHC 1185, 1975-76 CCH OSHD ¶20,691 (No. 12775, 1976).

III

Analysis of these issues necessarily begins with the language of the statute. E.g., American Textile Manufacturers Institute, Inc. v. Donovan, 101 S.Ct. 2478, 2490 (1981). In full, section 10(c) of the Act provides:

> If an employer notifies the Secretary that he intends to contest a citation issued under section 658(a) of this title or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 658(a) of this title, any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of Title 5 but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Upon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

29 U.S.C. § 659(c).

A

The Commission's adjudicatory jurisdiction is invoked under section 10(c) when a notice of contest is filed by either the cited employer or affected employees. The interests of a party in contesting the Secretary's citation are specified in the statute. An employer may contest the

entire citation, i.e., the existence of a violation, its classification and associated penalties, and the abatement period.[5/] Similarly, employees may contest the citation "alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable." Both the employees' and the employer's right to initiate Commission proceedings by a notice of contest is included in the same clause. The adverse interests of the employers and the employees in relation to the Secretary's citation are the jurisdictional foundation for the adjudication that follows. See generally Atlas Roofing Co., Inc. v. OSHRC, 430 U.S. 442 (1977).[6/]

After a hearing opportunity has been extended to the parties, the Commission issues an order, based on findings of fact, "affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief."[7/] The form of Commission adjudication is also mandated by the applicable provisions of the Administrative Procedure Act, specifically 5 U.S.C. § 554.

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5/ See Penn-Dixie Steel Corp. v. OSHRC, 553 F.2d 1078 (7th Cir. 1977). An employer may also limit its contest to the merits of an alleged violation or the proposed penalties. See Acme Metal, Inc., 76 OSAHRC 7/B14, 3 BNA OSHC 1932, 1975-76 CCH OSHD ¶20,364 (Nos. 1811 etc., 1976).

6/ Section 10(c) also authorizes hearings on employer applications to modify the abatement requirements of a citation. See generally Commission Rule 34, 29 C.F.R. § 2200.34; Gilbert Mfg. Co., 79 OSAHRC 68/A2, 7 BNA OSHC 1611, 1979 CCH OSHD ¶ 23,782 (No. 76-4719, 1979).

7/ As a practical matter, the Commission is the original forum for adjudicating compliance with the general duty clause of the Act and

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Distinct from the contest rights which confer Commission jurisdiction, section 10(c) concludes with a Congressional direction that the rules of procedure adopted by the Commission "shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection." Not only is this clause granting intervening party status to the employees separate and distinct from the right to initiate Commission proceedings, it is not qualified by the earlier specific language limiting employee contests. In addition, the general reference to "hearings under this subsection" indicates that employee interests transcend those interests that might lead to an employee notice of contest. For example, the possible vacation of a citation for a hazardous condition vitally affects the statutory interests of employees whose lives, health and safety will be at risk if the condition persists in violation of the Act. Moreover, other employee rights under the Act are not limited to the abatement period even in the enforcement context. See 29 U.S.C. §§ 657(e),(f)(1).[8/] In fact, the statute directly involves employees in the entire range of administrative and judicial functions covered by the Act. See Oil, Chemical & Atomic Workers Int'l Union & Its Local 3-499 v. OSHRC (American Cyanamid Corp.), 671 F.2d 643, 647 (D.C. Cir. 1982), petition for cert. filed sub nom.

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7/ (Continued)

the various occupational safety and health standards promulgated by the Secretary, 29 U.S.C. § 654. See Babcock & Wilcox, Co. v. Marshall, 622 F.2d 1160 (3d Cir. 1980). The only exception is the rarely invoked jurisdiction of the district court to issue injunctive relief against imminent dangers. 29 U.S.C. § 662. See Hodgson v. Greenfield & Assoc., 1 BNA OSHC 1015 (E.D. Mich. 1972). See generally Whirlpool Corp. v. Marshall, 445 U.S. 1, 8-10 (1980).

8/ See notes 26-27, infra.

American Cyanamid Corp. v. OCAW, 50 U.S.L.W. 3803 (Mar. 26, 1982) (No. 81-1784).[9/] Thus, the earlier limitation of section 10(c) regarding employee contests is unique in its reference to the abatement period. Moreover, qualifying words are to be applied to words or phrases immediately preceeding and not extended to more remote words or phrases. E.g., United States v. Pritchet, 470 F.2d 455 (D.C. Cir. 1972). "By permitting employees to elect party status, and not qualifying this status with the same limits imposed on employee initiation of Commission proceedings, it is apparent that Congress intended to continue the broad scope of employee participation in the enforcement of the Act through the adjudicative stages." Oil, Chemical & Atomic Workers Int'l Union & Its Local 3-499 v. OSHRC, 671 F.2d at 648. Accordingly, the general grant of employee party status is not qualified by the earlier qualifying language associated exclusively with employee contests.

B

Section 10(c) is unambiguous in its direction to afford employees or their representatives an opportunity to participate as parties in all Commission hearings. Congress did not leave the employees' participatory

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9/ In standard-setting proceedings, employees and employee representatives may petition the Secretary to promulgate occupational safety and health standards, 29 U.S.C. § 655(b)(1), may participate as "interested persons" in the rulemaking proceedings, 29 U.S.C. § 655(b)(2), must be represented on any advisory committee reviewing a standard, 29 U.S.C. § 656(a)(1) and (b), and may obtain pre-enforcement judicial review of the standard, 29 U.S.C. § 655(f). In any standard providing for medical surveillance an employee may exercise a right of disclosure. 29 U.S.C. § 655(b)(7). In addition, there must be an opportunity to observe environmental and personal monitoring and access to exposure records must be provided. 29 U.S.C. § 657(c)(3).

(Continued on next page)

right to the discretion of agency rulemaking 10/ or the vagaries of

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9/ (Continued)

An authorized employee representative may also request a health hazard evaluation by the National Institute for Occupational Safety and Health. 29 U.S.C. § 669(a)(6). Moreover, employees and employee organizations are entitled to the dissemination of information collected by NIOSH in its research, demonstrations and experiments, 29 U.S.C. § 669(d), and training and consultation shall be provided to assist in the recognition and prevention of occupational injuries and illnesses, 29 U.S.C. § 670(c).

10/ See, e.g., International Union, UAW, Local 283 v. Scofield, 382 U.S. 205, 219 n. 14 (1965). Scofield dealt with the statutory scheme for adjudicating unfair labor practice charges under section 10 of the National Labor Relations Act, 29 U.S.C. § 160, which parallels sections 9 and 10 of the Occupational Safety and Health Act, 29 U.S.C. §§ 658, 659. In NLRB proceedings, the charging party is afforded "formal recognition":

> ...he participates in the hearings as a "party"; he may call witnesses and cross-examine others, may file exceptions to any order of the trial examiner, and may file a petition for reconsideration to a Board order, 28 Fed. Reg. 7973 (1963), as amended, 29 CFR § 102.46 (1965). Of course, if the Board dismisses the complaint, he can obtain review as a person aggrieved, which serves the "public interest" by guaranteeing that the Board interpretation of the relevant provisions accords with the intent of Congress.

382 U.S. at 219 (footnotes omitted). See also Oil, Chemical & Atomic Workers Int'l Union & Its Local 3-499 v. OSHRC, 671 F.2d 643, 649 n.6 (D.C. Cir. 1982). In Scofield, the Court reserved ruling on the scope of intervention rights in the context of settlement agreements proposed during appellate review. 382 U.S. at 222 n.19. However, the Court observed that nothing in the record indicates that these proposed settlement agreements will be thwarted as a consequence of intervention. Id. Commission experience is consistent with the Court's observation. Affected employees and their representatives have elected party status on numerous occasions and have actively participated in the litigation of these Commission cases. See, e.g., American Cyanamid Co., 81 OSAHRC 49/A2, 9 BNA OSHC 1596, 1981 CCH OSHD ¶25,338 (No. 79-5762, 1981) (motion for summary judgment), dismissal denied sub nom. Oil Chemical & Atomic Workers Int'l Union & Its Local 3-499 v.

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intervention under the Administrative Procedure Act, 5 U.S.C. §554(c)(3)[11/]. Instead, Congress employed the legal term "party" expecting that the Commission would give the term its legal meaning. See Bradley v. United States, 410 U.S. 605 (1973); Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911). In contrast to an amicus curiae,[12/] a "party" is an active participant in the litigation to the full extent required for its complete determination. See Clark v. Barnard, 108 U.S. 436, 448(1883); United States v. Associated Milk Products, Inc., 394 F.Supp. 29, 41(W.D. Mo. 1975). In the context of an employer contest the Secretary is properly considered a plaintiff and the employer a defendant within the framework of the Commission Rules and the Federal Rules of Civil Procedure. Compare 29 C.F.R. § 2200.33(a)(b)(1981) with

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10/ (Continued)

OSHRC, 671 F.2d 643 (D.C. Cir. 1982)(employee petition for judicial review under 29 U.S.C. § 660(a)), petition for cert. filed sub nom. American Cyanamid Corp. v. OCAW, 50 U.S.L.W. 3803 (Mar. 26, 1982) (No. 81-1784); Hull Pottery Co., 82 OSAHRC 18/D9, 10 BNA OSHC 1575, 1982 CCH OSHD ¶ 25,972 (No. 78-555, 1982)(trial); Mobil Oil Corp., 82 OSAHRC 19/F4, 10 BNA OSHC 1606, ___ CCH OSHD ¶___ (No. 80-6678, 1982) (trial). Objections to settlement agreements are not an invariable consequence of their intervening party status. See Part IVB, infra.

11/ Compare Citizens for Allegan County v. FPC, 414 F.2d 1125 (D.C. Cir. 1969) with City of San Antonio v. C.A.B., 374 F.2d 326 (D.C. Cir. 1967).

12/ An amicus curiae is not a "party" to the litigation, International Union, UAW, Local 283 v. Scofield, 382 U.S. 205, 209 (1965), and its arguments are not considered unless urged by a party to the litigation, e.g., United Parcel Service, Inc. v. Mitchell, 101 S.Ct. 1559, 1562 n.2 (1981); Bell v. Wolfish, 441 U.S. 520, 531 n.13 (1979).

Fed. R. Civ. P. 3, 7(a), 12(a).[13/] In a controversy between the Secretary and the employer, the employees are authorized to elect party status. 29 U.S.C. § 659(c); 29 C.F.R. § 2200.20(a). The statutory status of employees is identical to the absolute intervention afforded interested parties before other federal agencies and the courts. See Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad, 331 U.S. 519 (1947) (absolute right to intervene under Interstate Commerce Act, which provides that representatives of employees of a carrier "may intervene and be heard in any proceeding under this Act affecting such employees"); cf. Interstate Broadcasting Co. v. United States, 286 F.2d 539 (D.C. Cir. 1960) (party in interest in broadcast license entitled to intervene in FCC proceeding as a matter of right); United States v. Ketchikan Pulp Co., 430 F. Supp. 83 (D. Alaska 1977)(citizen intervention of right in government enforcement action under Federal Water Pollution Control Act); 28 U.S.C. § 2323 (parties in interest are intervenors of right in judicial enforcement of ICC order).[14/]

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13/ In the context of traditional two-party litigation, the contesting employer and the Secretary would be described as "principal parties" because of their adverse interests. However, litigation before the Commission frequently involves three parties, each with interests potentially adverse to the other two. In this context, the simple alignments of an earlier era do not provide "the protection needed in a modern complex society." 3B Moore's Federal Practice ¶24.02 at p. 24-32.

14/ It is crucial to distinguish between absolute intervention (intervention of right) and permissive intervention. In

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Intervention principles further aid in the interpretation of the participatory right of employee parties. See International Union, U.A.W., Local 283 v. Scofield, 382 U.S. 205 (1965). The underlying principle of intervention is that third parties are permitted to enter a controversy in order to protect interests that may be jeopardized by the

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14/ (Continued)

absolute intervention, the status of the intervenor mandates the entry of an order granting intervention. In permissive intervention, a party's interest in the proceedings must be balanced against forum considerations, e.g., delay, before the court exercises its discretion to grant or deny intervention. Limitations on permissive intervention are not necessarily limitations on absolute intervention. As Professor Moore observed, "It would be meaningless to give him [an intervenor] an absolute right to intervene in order to protect his interest, if once in the proceeding he were barred from raising questions necessary for his own protection." 3B Moore's Federal Practice ¶24.16[4] at p. 24-631. See Park & Tillford, Inc. v. Schulte, 160 F.2d 984 (2d Cir. 1947). Professor Moore contrasts permissive intervention and concludes that when the issues introduced by the permissive intervenor unduly burden the proceeding, "[t]he remedy"...is to deny intervention, or at least to allow intervention only for limited purposes." Id. at p. 24-632. The Act precludes limitation of the absolute intervention afforded affected employees or their authorized representative.

Furthermore, the "scope" of absolute intervention is not "subordinated to the interests of the principal parties" as stated in the concurring opinion. Note 38, infra(Cleary, Comm'r, concurring). The term "subordination" has a distinct technical meaning in describing the relation between an intervenor and the original parties. Prior to the adoption of the Federal Rules of Civil Procedure, Equity Rule 37 provided:

> Anyone claiming an interest in the litigation may at any time be permitted to assert his right of intervention, but the intervention shall be in subordination to, and in recognition of, the main proceeding.

3B Moore's Federal Practice ¶ 24.05 at p. 24-75. However, that requirement was negated with the adoption of Federal Rule 24 in 1937. Id. at ¶¶24.05, 24.16.

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litigation. In contrast to an amicus curiae, an intervening party may seek protection or affirmative relief in the pending litigation. 3B Moore's Federal Practice ¶24.02 at pp.24-33 to 24-34. Thus, the plaintiff's right to exclusively control its action is limited when court process would be used to the prejudice of the rights of interested third parties. Id. at ¶24.03 at pp.24-42, 24-46 to 24-47.

Employees have a direct and personal stake in the outcome of litigation before the Commission. In fact, the personal injuries and illnesses arising out of hazardous working conditions and the consequential burden in terms of "lost production, wage loss, medical expenses, and disability compensation payments" prompted the passage of the Act. 29 U.S.C. § 651(a); S. Rep. No. 1282, 91st Cong., 2d Sess. 2-5, 54, 61 (1970), reprinted in Subcomm. on Labor, Senate Comm. on Labor & Public Welfare, The Legislative History of the Occupational Safety and Health

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14/ (Continued)

Of course, every party's conduct is subject to the necessary limitations and restrictions imposed by the forum. E.g. Commission Rule 66, 29 C.F.R. § 2200.66. The final right to control the proceedings rests with the forum, not the parties. In addition, affected employees, authorized employee representatives, and employers participating in employee contests must elect party status before the hearing under Commission Rule 20. 29 C.F.R. § 2200.20. This is similar to the "timely application" requirement for intervention. Fed. R. Civ. P. 24(a),(b). See generally Note, The Timeliness Threat to Intervention of Right, 89 Yale L.J. 586 (1980). Election at a later time is allowed only for good cause. 29 C.F.R. § 2200.20.

Act of 1970 at 142-5, 193, 200 (1971)("Legis. History").[15/] Moreover, the affected employees have intimate contact with their working conditions, and thus may have significant information to offer regarding the alleged violations and the most appropriate form of relief. Cf. Trbovich v. United Mine Workers of America, 404 U.S. 528, 537 n.8 (1972)(interest in the formulation of post-election relief by affected employee); Brennan v. Connecticut State UAW Community Action Program Council, 60 F.R.D. 626, 630 (D. Conn. 1973)(same); United States v. Reserve Mining Co., 56 F.R.D. 408, 418-9 (D. Minn. 1972) (interest in abatement methods by environmental organization). In addition, the employees' immediate and long-term interests in a safe and healthful workplace will be determined by the Commission's order. If a violative condition is left unremedied in Commission litigation, the employees will remain exposed to the hazard. As a result, employees will be relegated to filing a new complaint with the Secretary, claiming that the conditions are hazardous notwithstanding the Commission's determination. See Marshall v. Oil, Chemical & Atomic Workers Int'l Union(IMC Chemical Group), 647 F.2d 383, 388 (3d Cir. 1981). The inefficiency of this approach is apparent — it generates the piecemeal adjudication of workplace hazards sought to be avoided by the exclusive delegation of administrative adjudication to the Commission. See generally 29

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15/ See H.R. Rep. No. 1291, 91st Cong., 2d Sess. 14-16 (1970), Legis. History at 844-6; Whirlpool Corp. v. Marshall, 445 U.S. 1, 11-12 & n.16 (1980).

U.S.C. § 651(b)(3). Furthermore, a new employee complaint to the Secretary charging the hazardousness of the same condition is unlikely to result in a new inspection by the Secretary or re-citation in light of the prior Commission determination. The principal parties would be identical in a later contest of the subsequent citation. Accordingly, the doctrine of res judicata would bar a new action when in a prior case the Secretary had litigated an employer's specific worksite conditions to a final order that resolved the disputed legal and factual issues. See International Harvester Co. v. OSHRC, 628 F.2d 982 (7th Cir. 1980). Collateral estoppel will apply to issues actually litigated and necessarily determined in the prior case. See Continental Can Co. v. Marshall, 603 F.2d 590 (7th Cir. 1979). As a consequence, the exclusion of the intervening employees from the original contest could well preclude any further government consideration of their complaint or subsequent enforcement action.

Moreover, Congress created the Commission to hear and provide relief to parties appearing before it. It specifically withdrew adjudicatory responsibilities from the Secretary when it created the Commission as an independent agency. Amdt. No. 1061 to S.2193, 91st Cong., 2d Sess. (1970)(Sen. Javits), Legis. History at 381, amendment approved, 116 Cong. Rec. 37613 (1970), Legis. History at 479; H.R. Rep. No. 1765, 91st. Cong., 2d Sess. 13 (1970), Legis. History at 1166. 16/ Employees

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16/ See H.R. 16785, 91st. Cong., 2d Sess. §11(b)(1970), Legis. History at 954.

were provided with an opportunity to be heard in Commission proceedings, not simply to complain to the Secretary regarding hazardous conditions. Thus, the employees' right to appear as parties before the Commission precludes returning the affected employees to the Secretary for relief that is obtainable in litigation before the Commission by the election of party status.[17/] Though the employees' participation is limited to the violations alleged by the Secretary's citation and complaint, this limitation applies only to the violative conditions and not the appropriate relief to be afforded by the Commission. See Trbovich v. United Mine Workers of America, 404 U.S. at 537 & n.8; Brennan v. Connecticut State UAW Community Action Program Council, 60 F.R.D. at 630.

Fairness and efficiency support the interpretation of section 10(c) that permits the intervening employees to participate in order to protect their statutory interest in safe and healthful working conditions. Accordingly, section 10(c) must be read to permit all parties to fully litigate the controversy initiated by the Secretary's citation so as to resolve as many of the issues as possible in one action.

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17/ Only penalties may be mitigated by the Secretary without resort to the Commission or the courts. See 29 U.S.C. § 655(e). Reconsideration of the Commission's final order by the Secretary's examination of the employees' evidence and arguments would in fact permit the Secretary to review an order that Congress made reviewable exclusively in the courts of appeals, 29 U.S.C. § 660(a); see Atlas Roofing Co., Inc. v. OSHRC, 430 U.S. at 446-7.

C

In 1971, the Commission implemented the Congressional mandate of section 10(c) to provide affected employees or their representatives an opportunity to participate as parties to hearings under this subsection.[18/] The interim rules specifically provided that "[i]n all proceedings brought pursuant to sections 10(a), 10(b) and 10(c) of the Act, the Secretary, the employer to whom the citation, notice of proposed penalties, or notice of failure to abate has been issued, and the affected employees or authorized employee representatives shall be deemed parties...." 29 C.F.R. § 2200.5(a), 36 Fed. Reg. 17409, 17410 (Aug. 31, 1971) (Emphasis added). The equal status afforded both original and intervening parties was codified in the Commission's adoption of its permanent rule on party status in 1972. 29 C.F.R. § 2200.20, 37 Fed. Reg. 20237, 20239 (Sept. 28, 1972). This rule permitted employees to "elect" party status at any time before the commencement of the hearing. Similarly, party status was afforded to employers when employees were the contesting party. 29 C.F.R. § 2200.20(b). Thus, the specific rights of interested intervening parties were established by Rule 20 as mandated for employees by the statute and properly afforded to employers as a matter of fairness under this statutory framework for adjudication.[19/]

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18/ The authority to adopt rules of procedure is delegated by section 12(g) of the Act, 29 U.S.C. § 661(g).

19/ In the absence of Rules 20 and 21 the Commission would have been required to conduct its proceedings in accordance with the Federal Rules of Civil Procedure. 29 U.S.C. § 661(f); 29 C.F.R. § 2200.2, 36

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D

In spite of the unconditional statutory grant of invervening party status to affected employees and the Commission's implementing rules, the Secretary argues that this statutory language should be restricted to accommodate his "prosecutorial discretion." 20/ The Secretary's argument overlooks the fundamental distinction between the initiation of enforcement proceedings and employee participation in adjudicatory proceedings. Certainly, the Secretary is granted discretion to investigate workplace hazards, issue citations, mitigate penalties and enforce the Commission's final orders, 29 U.S.C. §§ 657(a), 658(a), 655(e),

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19/ (Continued)

Fed. Reg. 17409 (Aug. 31, 1971). Under Federal Rule 24(a)(1), the affected employees would be entitled to a statutory right to intervene based on the unconditional language of section 10(c) of the Act. See Brotherhood of Railroad Trainmen v. Baltimore & Ohio R.R., 331 U.S. 519 (1947). See generally 3B Moore's Federal Practice, ¶24.06 (1981). Similarly, the employer would be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest and intervention would have been permitted as of right under Federal Rule 24(a)(2). See generally 3B Moore's Federal Practice ¶¶24.05, 24.09.

The Commission rules also recognized the distinction between the absolute right of employee intervention under the statute as contrasted with other forms of intervention permitted by the rules. 29 C.F.R. §§ 2200.20, 2200.21; see Pennsylvania Truck Lines, Inc., 79 OSAHRC 79/D12, 7 BNA OSHC 1722, 1979 CCH OSHD ¶23,873 (No. 77-3050, 1979); Brown & Root, Inc., 7 BNA OSHC 1526, 1979 CCH OSHD ¶23,731 (No. 78-127, 1979).

20/ "Prosecutorial discretion" can only be defined in reference to the specific governmental authority exercised. It is not a "magical incantation which automatically provides a shield for arbitrariness." Medical Comm. for Human Rights v. SEC, 432 F.2d 659, 673 (D.C. Cir. 1970), dismissed as moot, 404 U.S. 403 (1972). Enforcement discretion is entirely dependent on the government function assigned, the range of discretion

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660(a), respectively.[21/] Moreover, the Act reserves to the Secretary the exclusive authority to initiate an enforcement action by issuing a citation under section 9 of the Act. 29 U.S.C. § 658. Employees are not authorized to issue a citation. 29 U.S.C. § 657(f)(2). Furthermore, the statute does not create any independent cause of action by affected employees against their employers for allegedly violative conditions. 29 U.S.C. § 653(b)(4); see, e.g., United Steelworkers of America v. Marshall,

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20/ (Continued)

delegated, and the adjudicatory forum involved. Certainly, criminal proceedings involve a broad range of enforcement discretion. Compare Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978) and United States v. Ammidown, 497 F.2d 615 (D.C. Cir. 1973) with Blackledge v. Allison, 431 U.S. 76 (1977) and NAACP v. Levi, 418 F.Supp. 1109 (D.D.C. 1976), dismissed as moot sub. nom. NAACP v. Bell, 76 F.R.D. 134 (D.C. Cir. 1977). However, the Commission is not a criminal tribunal. McGowan v. Marshall, 604 F.2d 885 (5th Cir. 1979); Brennan v. Winters Battery Mfg. Co., 531 F.2d 317 (6th Cir. 1975); Frank J. Irey, Jr., Inc. v. OSHRC, 519 F.2d 1200 (3d Cir. 1975), aff'd on other grounds sub nom. Atlas Roofing Co. v. OSHRC, 430 U.S. 442 (1977). The Commission is an administrative tribunal created to adjudicate specific statutory duties. Atlas Roofing Co. v. OSHRC, 430 U.S. at 455-7, 461.

Furthermore, prosecutorial discretion in civil and administrative proceedings is reviewable. Dunlop v. Bachowski, 421 U.S. 560 (1975) (reviewable: Secretary of Labor's refusal to file a complaint under the Labor-Management Reporting and Disclosure Act); Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971)(reviewable: EPA determination not to institute a proceeding to suspend or cancel a pesticide registration); Medical Comm. for Human Rights v. SEC, supra (reviewable: SEC determination not to require inclusion of a shareholder proxy proposal); see Marshall v. Jerrico, Inc., 446 U.S. 238, 249-250 & n.11 (1980)(reviewable: prosecutorial discretion under Fair Labor Standards Act).

21/ These exercises of the Secretary's discretion are not subject to direct administrative review. Moreover, judicial review of a specific exercise of this discretion is limited. See 29 U.S.C. §662(a)(Secretary's failure to seek relief against an imminent danger reviewable in district courts); 5 U.S.C. §§ 701-706 (general judicial review provisions).

647 F.2d 1189 (D.C. Cir. 1980), cert. denied, 101 S.Ct. 3148 (1981). Thus, enforcement actions under section 9 may only be initiated by the Secretary. 22/

The citation represents the exercise of the Secretary's discretion under sections 9 and 10 of the Act. However, once a citation is issued and a contest is filed the Commission is the exclusive post-citation forum and the Secretary's exercise of enforcement discretion is the

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22/ Though employees may not initiate enforcement proceedings, this is not inconsistent with their right to participate in those proceedings. See Trbovich v. United Mine Workers of America, 404 U.S. 528, 536-7 (1972); International Union, UAW, Local 283 v. Scofield, 382 U.S. at 221. In fact, the absence of a private right of action reinforces the necessity of the intervening party's participation in this exclusive forum.

With respect to the statutory right of action created against an employer for discriminating against an employee for exercising his or her rights under the Act, the Sixth Circuit has concluded that section 11(c) of the Act, 29 U.S.C. § 660(c), does not create an implied private right of action. Taylor v. Brighton, 616 F.2d 256 (6th Cir. 1980). The court considered the explicit provision for an alternative means of redressing this form of discrimination -- a cause of action brought by the Secretary in the United States district court -- as precluding a private civil action by the employee. Id. at 263-4. However, the absence of a private right of action with respect to retaliatory discrimination does not resolve the question of intervention in enforcement proceedings before the Commission. Congress expressly severed the two actions, assigning discrimination actions to the district courts and enforcement actions to the Commission. Compare 29 U.S.C. § 660(c) with Federal Mine Safety and Health Act Amendments of 1977, § 105(c)(2),(d), 30 U.S.C. § 815(c)(2),(d)(discrimination and enforcement actions assigned to the Federal Mine Safety and Health Review Commission).

heart of the controversy before the Commission. 23/ Parties with interests adverse to the Secretary invoke Commission jurisdiction by their notices of contest. Moreover, their adverse interests confer intervening party status in the event they do not contest the citation but another party does. Commission Rule 20(a) & (b), 29 C.F.R. § 2200.20(a) & (b)(1981).

The mere existence of enforcement discretion does not limit the statutory status of the intervening party. This is not to suggest that the Secretary is deprived of enforcement discretion but that this discretion is subject to independent review when it is involved in an enforcement action before the Commission. The interests of all parties, governmental and private, are subject to the scrutiny of adversarial adjudication and "issues cannot be resolved by a doctrine of favoring one class of litigants over another," Schlagenhauf v. Holder, 379 U.S. 104, 113 (1964). Unlike the earliest versions of the legislation which vested investigatory, enforcement and adjudicatory authority exclusively

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23/ The court in Marshall v. Sun Petroleum Prod. Co. considered a citation to be "self-executing" under the Act. 622 F.2d 1176, 1184 (3d Cir. 1980). However, once a citation is contested it is no longer self-executing — abatement is automatically stayed during Commission proceedings unless the contest is not initiated in good faith or the contest has been filed for the sole purpose of penalty avoidance. 29 U.S.C. §§ 659(b), 666(d). In addition, a further stay of the Commission's final order is available on judicial review. 29 U.S.C. § 660(a). Thus, a citation is "self-executing" only when Commission jurisdiction has not been invoked by a notice of contest.

in the Secretary, [24/] Congress ultimately assigned adjudicatory responsibilities to the Commission under section 10 of the Act. H.R. Rep. No. 1765, 91st Cong., 2d Sess. 13(1970)(conference report), Legis. History at 1166. Here the parties' adverse interests are to be adjudicated independent of the investigatory and enforcement discretion assigned to the Secretary. See S. Rep. No. 1282, 91st Cong. 2d Sess. 63 (1970)(minority view of Sens. Dominick & Smith), Legis. History at 202. Thus, the Secretary is deprived of the power to issue an enforceable order once a notice of contest has been filed. Instead, the government must come to an adjudicatory forum to obtain an enforceable final order. See United States v. Ketchikan Pulp Co., 430 F. Supp. at 86 (analogous judicial provision of Federal Water Pollution Control Act).[25/]

24/ S.2193, 91st Cong., 1st Sess. § 6(a)(1969)(bill as originally introduced), Legis. History at 11-12; S.2193, 91st Cong., 2d Sess. § 10 (1970)(bill as reported by Senate Committee), Legis. History at 255-8; S.Rep. No. 1282, 91st Cong., 2d Sess. 14-15 (1970), Legis. History at 154-5; see text accompanying note 16, supra. Judicial review of the Secretary's enforcement orders could be obtained in the United States courts, S.2193, 91st Cong., 1st Sess. § 7(a)(1969), Legis. History at 12; S.2193, 91st Cong., 2d Sess. § 10(d), Legis. History at 258.

25/ In Oil, Chemical & Atomic Workers Int'l Union v. OSHRC (American Cyanamid Co.), the court relied on section 10(a) of the Act as the origin of the Secretary's discretion to settle cases over employee objections and reasoned that an employer's withdrawal of its notice of contest ousts the Commission of jurisdiction. 671 F.2d 643, 650 n.7 (D.C. Cir. 1982). The analysis overlooks the fact that settlements involve a wide variety of bargained-for-exchanges between the parties and do not necessarily dispose of an entire contest. Compare, e.g., Nu-Way Mobile Home Mfg., Inc., OSHRC No. 80-7082-A

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Furthermore, even in the exercise of the Secretary's investigatory and enforcement discretion, affected parties have distinct rights. Employees are explicitly permitted to file a complaint seeking inspection of a worksite hazard, 29 U.S.C. § 657(f)(1)[26/], and both employees and

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25/ (Continued)

(May 28, 1982)(contest partially settled and severed for disposition) and Avalotis Painting Co., 81 OSAHRC 7/B1, 9 BNA OSHC 1226 n.1, 1981 CCH OSHD ¶25,157 at p. 31,055 n.1 (No. 76-4774, 1981) (partial dismissal of citation & partial withdrawal of contest) with Research Cottrell, Inc., Hamon Cooling Tower Div., 80 OSAHRC 113/F13 (No. 80-2431, 1980)(complete withdrawal of notice of contest) and Mass. Bay Electrical Corp., No. 80-5380 (Oct. 16, 1981)(complete withdrawal of citation). Furthermore, a contesting party usually seeks to withdraw its notice of contest when "the promise of another party has not led to the motion to withdraw the notice of contest." Commission Rule 100a, 29 C.F.R. § 2200.100(a). If a settlement prompts the withdrawal, the requirements of the Commission Rule on settlements must be satisfied. Id.; see Commission Rule 100, 29 C.F.R. §2200.100; cf. Fed. R. Civ. P. 23(e)(compromise or settlement of class action requires court approval); Fed. R. Civ. P. 23.1 (derivative actions); Fed. R. Civ. P. 23.2 (unincorporated associations). In either case, Commission rules specifically apply and jurisdiction is not terminated until the appropriate motion has been granted. Compare Commission Rules 100 & 100(a), 29 C.F.R. §§ 2200.100 and 100(a) with Fed. R. Civ. P. 41 and Marshall v. OSHRC (IMC Chemical Group, Inc.), 635 F.2d 544 (6th Cir. 1980)(dismissal of Secretary's complaint).

26/ Section 8(f)(1) states in relevant part:

(f)(1) Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger....If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

employers are authorized to accompany the Secretary's representative during an inspection, 29 U.S.C. § 657(e).[27/] Moreover, "[i]f the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representatives of the employees in writing of such determination." 29 U.S.C. § 657(f)(1). Both the employer and employees are also entitled to be informed that an imminent danger exists and that relief will be sought. 29 U.S.C. § 662(c). In addition, affected employees may seek a writ of mandamus if the Secretary "arbitrarily or capriciously fails to seek relief" to correct an imminent danger. 29 U.S.C. § 662(d). See generally Whirlpool Corp. v. Marshall, 445 U.S. 1 (1980).

The statute read as a whole establishes a series of checks and balances on the Secretary's enforcement discretion, including Commission adjudication of contested enforcement actions. Interpreting the statute to give effect to all its provisions, see Colautti v. Franklin, 439 U.S. 379 (1979), including the provision granting party status to affected employees, the Secretary's discretion and the statutory rights of employers and employees co-exist without sacrificing the interests of the private parties to the government's unlimited enforcement discretion.

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27/ Section 8(e) states:

> (e) Subject to regulations issued by the Secretary, a representative of the employer and a representative authorized by his employees shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace under subsection (a) for the purpose of aiding such inspection. Where there is no authorized employee representative, the Secretary or his authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.

E

The principal error of early Commission decisions was the failure to recognize the statutory distinction between a contesting party and an intervening party. In United States Steel Corp., 77 OSAHRC 12/C3, 4 BNA OSHC 2001, 1976-77 CCH OSHD ¶21,463 (No. 2975, 1977), the Commission majority limited the intervening party status of the employees to the "reasonableness of the abatement period." It relied on United Automobile Workers, Local 588 (Ford Motor Co.), 76 OSAHRC 58/B8, 4 BNA OSHC 1243, 1976-77 CCH OSHD ¶20,737 (No. 2786, 1976), aff'd, 557 F2d 607 (7th Cir. 1977)(hereinafter cited as UAW Local 588). 28/ Without even discussing the relevant statutory issue, the majority in United States Steel simply concluded that "[o]ur decision in United Automobile Workers, Local 588 (Ford Motor Co.) is controlling in this case...." 4 BNA OSHC at 2002, 1976-77 CCH OSHD ¶21,463 at p. 25,742. However, the literal interpretation of this language relating to employee contests has no application to the participatory rights independently established by section 10(c) with

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28/ In UAW the Commission held that the sufficiency of a noise abatement plan established by the citation "cannot be directly contested by the union" (original emphasis) and that the Commission lacks authority to issue an order modifying an abatement plan. 4 BNA OSHC at 1244, 1976-77 CCH OSHD at p. 24,865. The holding in UAW was based on an interpretation of that provision of section 10(c) of the Act pertaining to employee notices of contest. The Commission majority concluded that employee contests and the ensuing Commission proceedings are limited to questions concerning the reasonableness of the abatement period and that employees filing a notice of contest under section 10(c) cannot challenge the sufficiency of an abatement plan except to support their position that the period of time for abatement is unreasonably long. Primary reliance for this conclusion was placed on the reference in section 10(c) to the reasonableness of the period of time, which the Commission majority viewed as a literal limitation on the employee right to contest.

respect to employer contests.[29/] Furthermore, the limitation on party participation imposed by the Commission in United States Steel leads to an anomalous result in this enforcement context. As Judge Louis H. Pollack observed:

> ...such a limitation would seem anomalous: Typically, an employer contests the Secretary's citation because the employer disputes the Secretary's finding of a violation — a finding which in many cases flows from an employee or union complaint which the Secretary is by

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29/ In Marshall v. OSHRC(IMC Chemical Group, Inc.), 635 F.2d 544 (6th Cir. 1980), the court overlooks the party status provision entirely and states:

> 29 U.S.C. § 659(c) authorizes any employee of an employer contesting a citation issued by the Secretary to challenge as unreasonable the period of time fixed in the citation for abatement of the violation. This is the only provision in the act authorizing an affected employee to participate in OSHA proceedings before the Commission.

Id. at 551 (Original emphasis).

Similarly, in Marshall v. Sun Petroleum Prod. Co., 622 F.2d 1176 (3d Cir. 1980), the court relies exclusively on the legislative history underlying the contest rights of employees to conclude that "party status" is limited to the reasonableness of the abatement period. Id. at 1186 & nn.17&18. The court acknowledges that the employees must be considered "parties" but then concludes that employee party status is limited to the reasonableness of the abatement period because the contest right is merely a "fail-safe mechanism to insure employees the opportunity for a hearing" and is "operative only when the employer has not contested the citation and a hearing is desired by the employee or his representative." 622 F.2d at 1186 (Emphasis added). See also Marshall v. Oil, Chemical & Atomic Workers Int'l Union, 647 F.2d 383 (3d Cir. 1981). In other words if the employees want to guarantee their right to a hearing on the citation they must file a notice of contest within fifteen working days. It seems unlikely that Congress would require the employees to actively initiate the Commission's jurisdiction when their only intention is to be heard if their employer decides to invoke Commission jurisdiction. Party status protects their interest in the Commission proceedings without unnecessarily burdening the Commission with cases unless the employees have a specific claim that the abatement period is unreasonable.

> statute required to inquire into. And it would, indeed, be odd if the words of Section 10(c) precluded employees from pursuing at the adjudicative phase of OSHA enforcement the interests the Act encourages them to monitor at the investigative phase [footnote omitted].

Marshall v. Sun Petroleum Prod. Co., 622 F.2d 1176, 1189 (3rd Cir. 1980)(concurring in part & dissenting in part). Accordingly, Commissioner Cleary and I overrule United States Steel Corp., supra, to the extent it held that the employees' party status is statutorily limited to the "reasonableness of the abatement period."

IV

After electing party status in this proceeding, the Union has objected to a bilateral settlement agreement concluded between the Secretary and the Respondent. The P.T.E.U. claims the abatement plan contained in the agreement is insufficient.

A

The Commission rules specifically encourage parties to resolve the controversy presented by a contesting party through a settlement acceptable to all parties provided certain minimum conditions are satisfied. 29 C.F.R. § 2200.100 (1981). The interim rules had provided that "[i]f all parties agree, settlement will be allowed at any stage of the proceeding." 29 C.F.R. § 2200.23, 36 Fed. Reg. 17409, 17414 (Aug. 31, 1971)(Emphasis added). However, in 1972, the rule on settlements was amended to simply provide that "[s]ettlement is encouraged at any stage of the proceedings where such settlement is consistent with the provisions and objectives of the Act "...and that "[s]ettlement agreements submitted by the parties shall be accompanied by an appropriate proposed order." 29 C.F.R. §§ 2200.100(a), (b), 37 Fed. Reg. 20237, 20242 (Sept. 28, 1972).

Notwithstanding the advantages of a settlement agreed to by all parties, it is inevitable in any multi-party litigation that a settlement may be acceptable to some but not all of the parties, United States v. Ketchikan Pulp Co., 430 F.Supp. at 85, or that a party may not sign the agreement for reasons unrelated to the litigation, E.I. du Pont de Nemours & Co., 81 OSAHRC 11/A9, 9 BNA OSHC 1296, 1981 CCH OSHD ¶25,194 (No. 79-2261, 1981). For example, the contesting employees and the Secretary might agree on the settlement of an abatement contest that is unacceptable to the intervening employer. The intervening party's interest does not disappear because the contesting party and the Secretary have reached a mutually agreeable resolution of the contest, particularly when the interest of the intervening party involves a statutory right of participation or a statutory obligation to comply.

It is obvious that problems could result in government enforcement actions if an intervening party could block the approval of the settlement merely by objecting to its terms. See NLRB v. Oil, Chemical & Atomic Workers Int'l Union, 476 F.2d 1031, 1034-5 (1st Cir. 1976); United States v. Ketchikan Pulp Co., 430 F.Supp. at 85. The anomaly of approving a settlement when one of the parties to the action objects to the agreement is also obvious. See Id.; Brennan v. Connecticut State UAW Community Action Program Council, 60 F.R.D. 626, 632 (D. Conn. 1973). A reasonable procedural balance is struck under these circumstances by affording the intervening party with an opportunity to be heard on its objections to the settlement, but permitting a settlement to be approved over those objections when the minimum conditions established by Commission Rule 100 and related case-law have been satisfied, e.g., Dawson Bros. - Mech. Contractors, 1 OSAHRC 386, 1 BNA OSHC 1024, 1971-73 CCH OSHD

¶15,039 (No. 12, 1972). Accordingly, the Commission must determine whether the settlement is consistent with the purposes and provisions of the Act before the intervening party's interests are extinguished by the entry of a final order approving the settlement. This procedure assures basic fairness to all interested parties and generally avoids the troublesome substitution of a private party for the government, be it the employer for the Secretary in an employee abatement contest or the employees for the Secretary in an employer contest. 30/

B

Again the Secretary claims that the consideration of the Union's objections by the Commission interferes with his "prosecutorial discretion" to settle enforcement actions. However, the Secretary misconstrues the Commission's procedural framework for consideration of settlements.

First, the employees' unilateral objections do not result in disapproval as a matter of right. Instead, the Commission considers the settlement

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30/ It is presumed at this time that the Secretary would proceed appropriately if the Commission determines that the settlement agreement fails to satisfy the minimum requirements of Commission Rule 100. See Dunlop v. Bachowski, 421 U.S. 560, 574-6 (1975).

The issue of the Secretary's withdrawal of a citation under Fed. R. Civ. P. 41(a) is not before the Commission in this case; this case involves only the approval of a settlement over the objections of an intervening party. Accordingly, it is unnecessary to address either the court's holding in the Marshall v. OSHRC (IMC Chemical Group, Inc.), 635 F.2d 544 (6th Cir. 1980), that the Secretary may unilaterally withdraw a citation prior to the filing of a complaint and answer, or the underlying Commission decision holding that the Secretary's withdrawal does not terminate proceedings in which the employees have elected party status and objected to the withdrawal, 78 OSAHRC 95/C14, 6 BNA OSHC 2075, 1978 CCH OSHD ¶23,149 (No. 76-4761, 1978).

agreement and the objections in terms of Rule 100(a) to determine whether the settlement is "consistent with the provisions and objectives of the Act." 29 C.F.R. § 2200.100(a). Thus, the Secretary's discretion to settle is not unilaterally limited by employee participation and settlements have been approved over employee objections on numerous occasions. E.g., E.I. du Pont de Nemours & Co., supra.

Second, no party, including the Secretary, is the exclusive representative of the "public interest." This statute like the National Labor Relations Act establishes a statutory pattern that does not permit an easy dichotomy between "public" as contrasted with "private" interests. See International Union, UAW, Local 283 v. Scofield, 382 U.S. at 220. Instead, these two interests "interblend in the intricate statutory scheme." See Id.; 29 U.S.C. §§ 651(b)(1), (13). Though the Secretary is charged with enforcing a public right, Atlas Roofing Co., Inc. v. OSHRC, 430 U.S. 442 (1977), "to employ the rhetoric of 'public interest'...is not to imply that the public right excludes the recognition of parochial private interests," International Union, UAW, Local 283 v. Scofield, 382 U.S. at 218. The public interest is determined by the adjudication of the various adverse interests in Commission proceedings, not the unilateral representation of one party. See Id. at 221. Nor can it be assumed that there is an identity of interests between the exposed employees and the Secretary. See Trbovich v. United Mine Workers of America, 404 U.S. 528, 538-9 (1972); American Airlines Inc., 75 OSAHRC 43/F3, 2 BNA OSHC 1391, 1392, 1974-75 CCH OSHD ¶19,108 at p. 22, 838 (No. 6087, 1974). In fact, the party status conferred by the Act is an apparent recognition that the government might not always adequately protect the public interest.

See United States v. Ketchikan Pulp Co., 430 F.Supp. at 86. See generally Dunlop v. Bachowski, 421 U.S. 560, 571 n.9 (1975). 31/

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31/ In analyzing the Secretary's enforcement discretion, the role of the General Counsel at the National Labor Relations Board is particularly pertinent. In unfair labor practice cases the "unique legal status" of the charging party in relation to the General Counsel is practically identical to the relations between an authorized employee representative and the Secretary. With respect to unfair labor practice complaints, section 10(b) of the National Labor Relations Act provides that "if it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board . . . shall have the power to issue and cause to be served upon such a person a complaint." 29 U.S.C. § 160(b). As successor to that power in 1947, the General Counsel "shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title and in respect of the prosecution of such complaints before the Board . . . . " 29 U.S.C. § 153(d).

The General Counsel's discretion is divided into two distinct time frames — pre-complaint and post-complaint. Compare United Elec. Contractors Ass'n v. Ordman, 366 F.2d 776 (2nd Cir. 1966), aff'g 258 F.Supp. 758 (S.D.N.Y. 1965) (dismissal of action seeking a mandatory injunction to compel the General Counsel to issue an unfair labor practice complaint) with NLRB v. Martin A. Gleason, Inc., 534 F.2d 466 (2d Cir. 1976)(NLRB and judicial consideration of a charging party's objections to a post-complaint settlement). Thus, the discretion to file an unfair labor practice complaint and determine the precise charges to be litigated is distinct from the right of the charging party to be heard on its objections to a settlement agreement between the General Counsel and the charged party after a complaint has been filed. Compare Saez v. Goslee, 463 F.2d 214 (1st Cir. 1972) with NLRB v. Oil, Chemical & Atomic Workers Int'l Union, 476 F.2d 1031 (1st Cir. 1973).

In the exercise of the General Counsel's post-complaint settlement discretion, the Fifth Circuit has held that a charging party "must be afforded (1) an evidentiary hearing on any material issues of disputed fact presented by [the] objections and (2) a presentation on the record of [the] reasons for acceptance of the settlement agreement notwithstanding the objections." Concrete Materials of Georgia,

(Continued on next page)

Third, the Commission does not sit to reassess the relative merits of the bargain between the parties, but only to determine that certain minimum conditions have been satisfied. The Commission's limited proceedings

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31/ (Continued)

Inc. v. NLRB, 440 F.2d 61,68 (5th Cir. 1971)(citations omitted). The First and Ninth Circuits have expressly followed Concrete Materials, holding that the charging party is entitled to a hearing if it alleges facts which are disputed and materials to the Board's decision. NLRB v. Oil, Chemical & Atomic Workers Int'l Union, supra; NLRB v. International Bhd. of Elec. Workers, Local 357, 445 F.2d 1015 (9th Cir. 1971). The DC Circuit requires either a statement of reasons for accepting the settlement or an opportunity to be heard on the charging party's objections. International Ladies Garment Workers Union v. NLRB, 501 F.2d 823 (D.C. Cir. 1974); Textile Workers Union of America v. NLRB, 294 F.2d 738 (D.C. Cir. 1961). In contrast, the Third Circuit has held that a charging party is always entitled to a hearing on its objections. Marine Engineers Beneficial Ass'n No. 13 v. NLRB, 202 F.2d 546 (3d Cir.), cert. denied, 346 U.S. 819 (1953); Leed & Northrup Co. v. NLRB, 357 F.2d 527 (3d Cir. 1966). Compare George Ryan Co. v. NLRB, 609 F.2d 1249 (7th Cir. 1979) with International Union, UAW v. NLRB, 231 F.2d 237, 242 (7th Cir. 1979) and Oshkosh Truck Corp. v. NLRB, 530 F.2d 744 (7th Cir. 1976). The Second Circuit has considered the substantive objections raised by a charging party to a post-complaint settlement between the General Counsel and the charged party, NLRB v. Martin A. Gleason, Inc., 534 F.2d at 481-2, though this circuit has held that the charging party's consent is not necessary to effectuate a settlement and a charging party is not entitled to an independent evidentiary hearing on its objections to a settlement, Local 282, Int'l Bhd. of Teamsters v. NLRB, 339 F.2d 795 (2d Cir. 1964).

It is also noteworthy that the discretion delegated to the NLRB General Counsel varies considerably. In contrast to the discretion delegated under 29 U.S.C. §§ 153(d) and 160(b) with respect to unfair labor practices, in representation elections "[t]he Board . . . shall direct an election by secret ballot and shall certify the results thereof." 29 U.S.C. § 159(c). Moreover, the General Counsel "shall, on behalf of the Board petition . . . for appropriate relief" with respect to secondary boycotts. 29 U.S.C. § 160(l). This obligatory language is similar to the discretion delegated under both the Occupational Safety and Health Act and the Labor-Management Reporting and Disclosure Act -- "the Secretary shall issue a citation", 29 U.S.C. § 658(a), and "the Secretary shall bring a civil action," 29 U.S.C. § 482(a); Dunlop v. Bachowski, 421 U.S. 560 (1975).

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on the settlement agreement preserve the Secretary's independent party status while assuring that the interests of all parties are given due consideration. Furthermore, the Secretary's range of discretion in the negotiation of a settlement remains unaffected and subject only to a limited review of the agreement for the purposes of assuring procedural fairness to all parties, Anaconda Co., Wire & Cable Div., 80 OSAHRC 106/E2 9 BNA OSHC 1159, 1980 CCH OSHD ¶ 24,917 (No. 79-5449, 1980), the abatement of the hazard, Nashua Corp., 80 OSHRC 121/A2, 9 BNA OSHC 1113, 1980 CCH OSHD ¶25,020 (No. 78-2146, 1980), and the necessary vacation, modification, or affirmance of the citation, Commission Rule 100(b)(1), 29 C.F.R. § 2200.100(b)(1). The Commission's minimum conditions are regularly satisfied without any objection. E.g., Consolidated Edison Co. of New York, 81 OSAHRC 9/B2, 9 BNA OSHC 1267, 1981 CCH OSHD ¶25,165 (Nos. 80-999 & 80-1252, 1981) (Commission approval); Fike Chemicals, Inc.,

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31/ (Continued)

The Commission, like the NLRB and other adjudicatory agencies, is necessarily granted discretion to promulgate rules regarding settlement and to determine whether the public interest is best effectuated by the acceptance or rejection of a settlement agreement. See Wallace Corp. v. NLRB, 323 U.S. 248 (1944) cited approvingly in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 544 n.18 (1978); NLRB v. Martin A. Gleason, Inc., 534 F.2d 466, 482 (2d Cir. 1976); NLRB v. Northern Cal. Dist. Council of Hod Carriers, 389 F.2d 721, 724-5 (9th Cir. 1968). As the court observed in Leeds & Northrup Co. v. NLRB regarding the settlement of an unfair labor practice charge, "these are sensitive areas in the labor-management complex which the adjudicatory process provided by the Act was designed to reach." 357 F.2d at 436 (Emphasis added). This is particularly true when Congress directs specific action to be taken in response to violative conditions. See Adams v. Richardson, 480 F.2d 1180 (D.C. Cir. 1973).

OSHRC No. 78-2473 (Aug. 1, 1979)(Administrative law judge approval). It is a rare case that generates an objection to the settlement, see E.I. du Pont de Nemours & Co., supra, and the exceptional case which results in the disapproval of the settlement, see Nashua Corp., supra. 32/

Finally, the Commission treats the settlement as an integrated, non-severable agreement reflecting the bargained-for-exchange of the parties who signed it. See United States v. Armour & Co., 402 U.S. 673, 682 (1971). As a consequence, the Commission does not selectively approve some provisions and disapprove others. See Connecticut Aerosols, Inc., 80 OSAHRC 16/A2, 8 BNA OSHC 1052,1980 CCH OSHD ¶ 24,256, (No. 78-25, 1980); Logan County Farm Enterprises, Inc., 79 OSAHRC 18/G9, 7 BNA OSHC 1275, 1979 CCH OSHD ¶ 23,425 (No. 78-4535, 1979); cf. Seaboard Coast Line Railroad Co., 76 OSAHRC 125/G4, 3 BNA OSHC 1760, 1975-76 CCH OSHD

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32/ The lifeblood of the Act and the employees it seeks to protect must not be drained for the sake of administrative convenience. The dissent would create a one-way street to settlement for the mere purpose of administrative expedience, notwithstanding the direct statutory interest of affected employees in Commission proceedings. In the period from October 1976 through May 1982, the Commission disposed of 25,445 cases on the basis of settlements and withdrawals — more than 75 percent of the total caseload. In that same period a mere 16 cases involving employee objections to settlements and withdrawals, including this one, have been directed for review. In addition, there were a small number of cases involving employee objections that were not directed for review in this period. Certainly, some employees may have been discouraged from objecting based on the narrow grounds permitted under United States Steel, 77 OSAHRC 12/C3, 4 BNA OSHC 2001, 1976-77 CCH OSHD ¶21,463 (No. 2975, 1977). However, employees were not completely barred from raising their objections before the Commission and thus it cannot be concluded that the Commission's past experience with employee objections is "inapposite or unrepresentative" as argued in the dissent. Furthermore, the dissent claims that cases may not be settled by the Secretary as a consequence of this ruling. However, if the Secretary concludes in the exercise of his enforcement discretion not to settle a case on the basis of employee objections, that certainly must be the Secretary's prerogative as is the discretion to settle.

¶20,184 (No. 10541, 1975), appeal dismissed, No. 76-1058 (D.C. Cir. March 15, 1976)(Commission concluded it would be unfair to a Respondent for the Commission to abrogate one term of a stipulation while leaving the remainder intact). Similarly, no modifications are made in the settlement by the Commission; it is reviewed as submitted by the parties and their motion to approve is either granted or denied. In this context the Commission does not modify the abatement provisions to satisfy any concerns it may have regarding the sufficiency of that abatement. In addition to assuring procedural fairness and protecting the public interest, these minimum conditions preserve the statutory interests of all parties without any sacrifice in the Secretary's discretion except to submit the contested citation to final adjudicatory resolution as prescribed by the statute. Once the employees have elected party status, the Commission is obligated to consider the objections to the settlement. If the review were circumscribed by a extremely narrow standard of review, the right of intervention would be a hollow right indeed. United States v. Ketchikan Pulp Co., 430 F.Supp. at 86.

C

The Union's objection in this case concerns one of the central purposes of the Act -- the abatement of allegedly hazardous conditions. See Farmer's Export Co., 80 OSAHRC 66/A2, 8 BNA OSHC 1655, 1980 OSHD ¶24,569 (No. 78-1708, 1980). In fact, disputes concerning the steps an employer must take to abate a violation are familiar controversies before the Commission.[33/] Even in UAW Local 588 the Commission read

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33/ The following illustrate the range of abatement issues resolved by

(Continued on next page)

section 9(a) of the Act, 29 U.S.C. § 658(a), which requires the citation "to fix a reasonable time for the abatement of the violation", as authorizing the use of abatement plans. 4 BNA OSHC 1243, 1244, 1976-77 CCH OSHD ¶20,737 at p. 24,865. Under whatever circumstances abatement is an issue in a Commission proceeding, employees who are affected by a hazardous condition are in a unique position to offer information on the basis of their knowledge and experience as to whether a particular procedure will abate the cited hazard. It is the employees who obviously have the most direct interest in assuring that abatement is accomplished. Where, as here, affected employees object to an abatement plan in a settlement agreement on the grounds that it will not achieve abatement of a cited

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33/ (Continued)

the Commission:

(1) The Secretary's allegation that an employer has failed to correct a violation established by a prior final order of the Commission may be contested, invoking the Commission's jurisdiction to determine whether any of the steps the employer took to abate the violation satisfied its obligation under the previous order. 29 U.S.C. § 659(b).

(2) When a dispute concerning the reasonableness of the abatement period specified in a citation is before the Commission a reasonable abatement time must be determined and it may be necessary for the Commission to inquire into and resolve disputes concerning the appropriate method of abatement to achieve compliance in the shortest time. See UAW Local 588, supra; cf. Amoco Chemicals Corp., 80 OSAHRC 15/E3, 8 BNA OSHC 1085, 1980 CCH OSHD ¶24,253 (No. 79-4874-P, 1980); Gilbert Mfg. Co., 79 OSAHRC 68/A2, 7 BNA OSHC 1611, 1979 CCH OSHD ¶23,782 (No. 76-4719, 1979).

(3) Where the Secretary and a cited employer agree to settle a case that is within the Commission's jurisdiction, a statement of the employer's abatement obligations must be included in the agreement, which may be approved only if the agreement is consistent with the provisions and objectives of the Act. Farmers Export Co., supra; Commission Rule 100(a), 29 C.F.R. § 2200.100(a).

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hazard and they elect party status in a Commission proceeding in which that plan is submitted for approval, it would be contrary both to the purposes of the Act and to the Commission's independent adjudicatory responsibility under the Act to refuse to hear the employees' objection in determining whether the plan actually abates the hazardous condition and ultimately whether the entire agreement satisfies the minimum conditions required for approval.

Even the majority in UAW Local 588 stated that in the context of an employee notice of contest as to the abatement period, "the union may properly adduce evidence to show that the employer's abatement plan does not include all feasible abatement methods or controls that are presently available." 4 BNA OSHC at 1244, 1976-77 CCH OSHD ¶20,737 at p. 20,866. Thus, the majority implicitly recognized that the abatement method and the reasonable period of time for its accomplishment are inextricably intertwined. For this additional reason it is inappropriate to read the

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33/ (Continued)

(4) In order to prove a violation of the "general duty clause," 29 U.S.C. §654(a)(1), the Secretary must prove the feasibility and likely utility of his proposed means of abating the violation. E.g. National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973).

(5) Certain OSHA standards specifically require proof of the feasibility of means of abating the hazardous condition. E.g. 29 C.F.R. § 1910.95(b)(1)(the occupational noise standard).

(6) Under certain standards the Commission requires the Secretary to identify means of abatement as part of his prima facie case. E.g., 29 C.F.R. § 1926.28(a)(the construction safety personal protective equipment standard).

statute in a manner allowing employees to prove that an abatement method is ineffectual, yet not authorizing the Commission to enter an appropriate order approving or disapproving the settlement agreement.

Finally, even if we were to accept the Secretary's view that participating employees are limited in their participation to the allegation that "the period of time fixed in the citation for the abatement of the violation is unreasonable," the Secretary's narrow construction of this statutory phrase as "abatement date" is misplaced and inconsistent with the remedial purposes of the Act.

Section 10(c) simply reflects the statutory language of section 9 of the Act, which states,

> In addition, the citation shall fix a reasonable time for the abatement of the violation.

29 U.S.C. § 658(a). Thus, that section of the statute authorizing the Secretary to issue citations makes no reference to abatement requirements or abatement plans, but refers only to the <u>time</u> for abatement of a violation. Similarly, section 10(c), in affording employees the right to file notices of contest with respect to abatement, uses parallel language concerning the period of time for abatement. Inasmuch as the manner for achieving abatement is not ordinarily set forth in the citation, it would be impossible for employees to file a notice of contest regarding the abatement method. As a result, it would be absurd for the Act to provide for employee notices of contest as to any aspect of abatement other than time, the only abatement factor required to be identified by section 9(c) of the Act.

Time and abatement are inextricably intertwined. The period of time fixed in the citation has meaning only in relation to the abatement of the violative

condition or hazard. As the Commission observed in UAW Local 588 "specific methods or controls and the time required for their implementation are determinative of the length of time needed for abatement." 4 BNA OSHC at 1244, 1976-77 CCH OSHD ¶ 20,737 at p. 24,866. A simple date devoid of abatement is meaningless in terms of assuring "so far as possible every working man and woman in the Nation safe and healthful working conditions". 29 U.S.C. § 651(b). Employees may be left at risk because: (1) there is no actual abatement as a result of the settlement; (2) interim abatement steps may not assure protection while a comprehensive engineering solution is installed, Nashua Corp., supra; (3) abatement is incomplete because it cannot remove all exposed employees from risk; or, (4) ineffective methods of abatement have been selected rather than effective abatement methods. In each of these examples abatement will not have been achieved and employees will continue to be at risk from exposure to hazardous physical conditions or toxic substances. Accordingly, Commissioner Cleary and I overrule the Commission's decision in UAW Local 588 to the extent it held that the statutory language of section 10(c) limits employee participation to the date set for abatement. 34/

This is not to suggest that the employees' objections bar approval of the settlement but only that their objections must be considered in determining whether approval of the settlement agreement is appropriate. An evidentiary hearing is not required when a sufficient foundation for the serious consideration of the employees' objections may be established by other equally effective means. See NLRB v. Oil, Chemical & Atomic

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34/ In Marshall v. Oil, Chemical & Atomic Workers Int'l Union, 647 F.2d 383, 388 (3d Cir. 1981), the court suggests that in the absence of

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Workers Int'l Union, 476 F.2d at 1035-6 and cases cited; United States v. Ketchikan Pulp Co., 430 F.Supp. at 86.

V

As Justice Frankfurter observed, "We are not concerned with law enforcement practices except insofar as the courts themselves become instruments of law enforcement." McNabb v. United States, 318 U.S. 322, 347 (1943). The history of statutes as well as "[t]he history of liberty has largely been the observance of procedural safeguards." Id. In safeguarding the employees' express statutory rights under the Act, the approval of a settlement is a "judicial act which deserves more than the court's rubber stamp on the agency's action." United

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34/ (Continued)

any abatement date the employee's right of participation is even further limited. However, section 9(a) of the Act provides that "a citation shall fix a reasonable time for the abatement of the violation." 29 U.S.C. § 658(a)(emphasis added). The Secretary may not preclude the employee's statutory right to be heard by omitting a time period from the citation. Similarly, the Secretary may not accomplish the same result by accepting the unilateral representation of the employer in the settlement agreement that abatement has already been achieved when employees claim that no abatement has occurred. Relegating the employees to a new enforcement complaint is inefficient, time-consuming, hazardous and inconsistent with the Commission's independent adjudicatory authority. See Part IIIB, supra .

States v. Ketchikan Pulp Co., 430 F.Supp. at 86. Thus, the judicial power is exercised when judgment is entered on the basis of consent, Pope v. United States, 323 U.S. 1, 12 (1944), and the approval of a consent decree becomes an adjudication of the court, United States v. Ling-Temco-Vought, Inc., 315 F.Supp. 1301 (W.D.Pa. 1970). Because the judge declined to consider the Union's objections in approving the settlement agreement, this case is remanded for further adjudicatory proceedings consistent with the requirements of the statute and Commission rules.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: AUG 6 1982

CLEARY, Commissioner, concurring:

I agree with Commissioner Cottine that employees who have elected party status under section 10(c) of the Act have a right to be heard on their substantive objections to an abatement plan, and that United States Steel Corp., 77 OSAHRC 12/C3, 4 BNA OSHC 2001, 1976-77 CCH OSHD ¶ 21,463 (No. 2975, 1977), must be overruled to the extent it holds that employee party status is statutorily limited to challenging the reasonableness of the abatement period.[35/] I also agree that a settlement agreement cannot be judged for consistency with the purposes and objectives of the Act without a hearing on employees' substantive objections.[36/] When affected employees or their authorized representative object to a proposed abatement plan, those objections must be taken into consideration

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35/ Indeed, it was in my dissenting opinion in United States Steel that I first stated that "[t]here is nothing in the Act or in the Commission rules that limits the participation of an employee representative once party status has been elected. Neither the Act nor our rules envision that an employee representative be a party for limited purposes. I submit that an employee representative is a full party with all rights of any party, including the right to join or object to settlement." 4 BNA OSHC at 2003, 1976-77 CCH OSHD at 25,742. See also my dissenting opinion in Southern Bell Telephone & Telegraph Co., 77 OSAHRC 83/D1, 5 BNA OSHC 1405, 1977-78 CCH OSHD ¶ 21,840 (No. 10340, 1977), in which I first stated my view that employees have a right to be heard in opposition to the Secretary's motion to dismiss the citation and complaint.

36/ I also agree with Commissioner Cottine that abatement method and abatement period are inextricably intertwined and this alone would be sufficient basis for employees' right to be heard on substantive objections to an abatement plan. However, this would be an alternative basis for the disposition of this case, and for the reasons given above, I regard the last sentence of § 10(c) as the primary source of employees' rights in the adjudicatory process, including the right to a hearing on objections to settlement.

by the administrative law judge in determining whether the agreement meets the minimum conditions established by Commission Rule 100. In the words of the Secretary of Labor, "election of party status by an authorized employee representative entitles said representative to meaningful participation in the settlement process." ITT Thompson Industries, Inc., 78 OSAHRC 70/D10, 6 BNA 1944, 1978 CCH OSHD ¶ 22,944 (No. 77-4174, 1978). The "right to meaningful participation" is meaningless if it does not include the right to be heard on substantive objections to a settlement agreement.

I

The immediate question before us is whether an administrative law judge must consider employee objections to an abatement plan in determining whether a settlement agreement comports with the provisions and objectives of the Act. To answer that question, we must answer the larger one: what rights do employees have under section 10(c) of the Act? Section 10(c) provides in pertinent part:

> If an employer notifies the Secretary that he intends to contest a citation issued under section 9(a), or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 9(a), any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission . . . and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) . . . . The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection.

Four United States Circuit Courts of Appeals have considered the matter and have concluded that employees' rights under section 10(c) are limited to challenging the reasonableness of the abatement period. The courts' reading of employee rights under section 10(c) is based on their interpretation of the overall scheme of the Act, its legislative history, and general principles of exclusive prosecutorial discretion.

However, a restrictive reading of section 10(c) with respect to employee enforcement rights is not supported, much less dictated, by the reasons given by the circuit courts, nor is it consistent with the purpose of the Act, which is to promote employee safety and health.

II

In holding that section 10(c) does not give employees the right to challenge the adequacy of an abatement plan agreed upon by the Secretary and the employer, the Third Circuit stated that the Act's legislative history shows that Congress did not intend for employees to be heard on matters other than the reasonableness of the abatement period. Sun Petroleum Products Co., 622 F.2d 1176 (3d Cir.), cert. denied, 101 S.Ct. 784 (1980). The court found evidence of legislative intent in a statement in the Senate Committee Report that section 10(c) "gives an employee or representative of employees a right, whenever he believes that the period of time provided in a citation for abatement of a violation is unreasonably long, to challenge the citation on that ground." LEGIS. HIST. at 155 (emphasis added by Third Circuit), and a statement by Senator Williams that "[e]mployees are also given appeal rights when they believe that an unreasonably long period of time

has been allowed for abatement of a violation," LEGIS. HIST. at 414 (emphasis added by Third Circuit).

The court also concluded that the overall administrative "schema" vests unreviewable and exclusive prosecutorial powers in the Secretary: "Necessarily included within these prosecutorial powers is the discretion to settle citations issued against employers and to compromise, mitigate or settle any penalty assessed under the Act. 29 U.S.C. § 655(e)." Marshall v. Sun Petroleum Products Co., 622 F.2d at 1187. The court regarded matters of settlement and compromise as "basic administrative responsibilities" which Congress intended to place with the Secretary and beyond Commission review. Again quoting Senator Williams, the court suggested that Commission review of employee objections to the substance of settlement agreements would lead to "diffusion of responsibility and accountability as to seriously undermine the effectiveness of this program." LEGIS. HIST. at 417. In Marshall v. OCAW and OSHRC, 647 F.2d 383 (3d Cir. 1981), the Third Circuit further ruled, for the same reasons stated in Sun Petroleum, that employees have no right under section 10(c) to contest the representation of a settlement agreement that abatement has occurred.

The Sixth Circuit concluded that employees may not prosecute a citation before the Commission after the Secretary has moved to withdraw it because "the Act, by its terms, makes the Secretary the exclusive prosecutor of OSHA violations." Marshall v. OSHRC (IMC Chemical Group, Inc.), 635 F.2d 544, 550 (6th Cir. 1980).[37/]

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37/ The IMC court also stated that that provision in section 10(c) which authorizes employees to contest the reasonableness of the abatement period "is the only provision

The Seventh Circuit ruled that employees have no right to challenge the adequacy of an abatement plan because section 10(c) limits the Commission's adjudicative powers to consideration of whether the period of time fixed in the citation for the abatement of the violation is unreasonable. Automobile Workers v. OSHRC, 557 F.2d 607 (7th Cir. 1977). Like the Third Circuit, the Seventh quoted from that portion of the Senate Report which states that section 10(c) gives an employee or union the right to challenge the Secretary's citation on the ground that the abatement date provided therein is unreasonably long. In addition, the Seventh Circuit states that "a plain reading" of Section 10(c) shows that Commission review is limited to the reasonableness of the abatement period.

The D.C. Circuit, in deciding the scope of employee rights to appeal from a final order of the Commission, endorsed the holdings of the Third, Sixth and Seventh Circuits and stated that "so broad a reading of prosecutorial discretion under the statute . . . comports with the Congressional intent that the Secretary be charged with the basic responsibilities for administering the Act." Oil, Chemical and Atomic Workers v. OSHRC, 671 F.2d 643, 650 (D.C. Cir. 1981), pet. for cert. filed sub nom. American Cyanamid v. OCAW, (March 26, 1982) (No. 81-1784).

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37/ (Continued)

in the Act authorizing an affected employee to participate in OSHA proceedings before the Commission." 635 F.2d at 551. This, of course, is incorrect. Section 10(c) also provides, in its concluding sentence, that affected employees may elect party status. Both the D.C. Circuit, in OCAW v. OSHRC, supra, and the dissenting judge in the Third Circuit's Sun Petroleum case noted this.

The courts are saying, in each case, that employees must be excluded from substantive participation in Review Commission proceedings in order to assure the Secretary exclusive prosecutorial discretion, and that the Secretary's exclusive prosecutorial role requires that employees be excluded from substantive participation in enforcement proceedings. But why? Does the legislative "scheme" or the legislative history really show that the Secretary must have exclusive and unreviewable control over enforcement proceedings once a citation is issued and that employee participation is limited to questioning the reasonableness of the abatement period? If not, do general principles of "exclusive prosecutorial discretion" require that result? And if neither prosecutorial "discretion" nor the legislative scheme and history demand preclusion of employees from substantive participation before the Commission, what construction of the statutory language best serves the purpose of the Act, which is to promote employee safety and health?

III

Our analysis must begin with the language of the Act, specifically, the last sentence of section 10(c), which provides that "[t]he rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as <u>parties</u> to hearings under this subsection." (emphasis added) The key word is "parties"; what does it mean that employees have the right to participate as parties?

The terms "party" and "parties" have many different meanings and definitions, depending generally upon the context in which they are used, but in connection with judicial proceedings the term "parties" is a technical word with a precise, legal meaning. A party to a judicial proceeding is, generally, one of the opposing litigants, whether a natural or legal person. A person is not a true party to an action even though he is named in a pleading unless he is competent to sue and has a right to control the proceedings, defend, adduce and cross-examine witnesses, and appeal in his own right. It is the right to control the proceedings that is the hallmark of a party to a judicial proceeding. One who has such rights is generally called a "principal party" to distinguish him from other parties to the action such as parties in interest, warrantors, parties opposing, and intervenors. An intervenor party, for example, although generally permitted to submit evidence, cross-examine witnesses, and appeal from a final order, may participate only by leave of court, after objections from the principal parties to his appearance have been heard, and under whatever restrictions the court deems appropriate.[38/] 67A C.J.S. Parties §§ 3, 68, 69; 59 AM.JUR.2d Parties § 7.

If "party" is a legal term of art describing one with the rights of a plaintiff or defendant, i.e., having the right to control the judicial proceeding, and there are those who say that under the Occupational Safety and Health Act employees'

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38/ Even when an intervenor enters litigation pursuant to Fed.R.Civ.P. 24(a)(1), which provides that "anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to

only substantive right with respect to enforcement of a citation is to challenge the reasonableness of an abatement period, we must ask whether other provisions in the Act, its legislative history, or its purpose, show that "party" within section 10(c) means something less than "principal party."

The language in the Act which has caused courts strictly to limit the scope of employee participation in Commission proceedings is that clause in section 10(c) which provides: "if, within fifteen working days of the issuance of a citation . . . any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, . . . the Commission shall afford an opportunity for a hearing . . . ." As the Seventh Circuit put it, "[u]nder a plain reading of section 10(c), the Commission may review only the reasonableness of the period of time fixed in the citation for the abatement of the violation." Automobile Workers v. OSHRC, supra, 557 F.2d at 609. In the courts' view, this provision states the outer bounds of any legitimate dispute between the Secretary and employees.

However, explicit inclusion of this right should not be construed as an implicit preclusion of other rights, especially in light of the peculiar relationship that can sometimes develop

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38/ (Continued)

intervene" (emphasis added), the scope of the intervenor's participation may be limited in subordination to the interests of the principal parties. See Shapiro, Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators, 81 HARV.L.REV.721 (1968).

between the Secretary and employees wherein the employees agree with the Secretary that a violation exists, but disagree with the Secretary with respect to abatement. When this occurs, employees have no interest in contesting the citation, but they do have an interest in contesting one, subsidiary, provision in the citation. The second clause of section 10(c) merely acknowledges this reality and makes plain that employees have the right to contest something less than the entire citation. Examined from another angle, this provision also serves the purpose of vesting jurisdiction in the Commission, at the behest of employees, over less than the entire citation. This scheme is entirely consistent with section 10(a), which explicitly provides for an employer right to limit a contest to the amount of penalty only.

The Seventh and Third Circuits relied heavily on pronouncements in the Senate Committee Report and by Senator Williams that employees have the right to contest the period of abatement as evidence that this is their only right. However, the quoted passages are virtually identical to the very language in question, they appear in the legislative history unaccompanied by any discussion or elaboration whatever, and there is not a shred of evidence elsewhere in the legislative history to indicate that Congress wished to withdraw from employees those rights that normally flow from party status. Under these circumstances the quoted statements are incapable of shedding light on the statutory language, and just as the clause itself cannot reasonably be taken as preclusive, neither can these excerpts.

IV

The second important reason for the courts' unwillingness to treat employees as principal parties is that, in their view, to do so would be to infringe on the Secretary's prosecutorial powers. They infer that Congress intended that the Secretary's exercise of prosecutorial powers be exclusive and beyond Commission review from the fact that Congress separated the three agency functions--regulatory, enforcement and adjudicative--placing the first two with the Secretary and the last with the Commission. In the words of the D.C. Circuit, "so broad a reading of prosecutorial discretion under the statute . . . comports with the Congressional intent that the Secretary be charged with the basic responsibilities for administering the Act." OCAW v. OSHRC, supra.

However, it is clear from the legislative history that Congress' purpose in separating the adjudicative from the regulatory and enforcement functions was to avoid placing an undue concentration of power in the hands of one individual and had nothing to do with the scope of employee rights in adjudicative proceedings.

> The concentration of all authority for the promulgation of standards, the inspection and investigation of complaints, the prosecution of cases, and the adjudication of cases, totally in the hands of the Secretary of Labor is not a balanced approach . . . . It is objectionable because concentration of power gives rise to a great potential for abuse. A single man is easier to harass than an independent board or commission. Political pressure can be concentrated to achieve a particular point of view or course of action. The tradition of this Nation has been to place safeguards on power whenever it is granted. One of the greatest safeguards has been the separation of powers. By separating the legislative, executive, and judicial functions, a balance has been achieved which permits progress without abuse of authority.

LEGIS. HIST. at 420.

"While the concentration of authority may lead to more efficient action in line with a particular point of view, it also raises the [specter] of abuse." LEGIS. HIST. at 201.

There were those who thought that the Department of Labor had been captured by business.[39/] Others regarded the Department as the tool of Labor.[40/] But no one seriously disputed that it was crucial that the Occupational Safety and Health Act, whatever its contours, inspire confidence in the impartiality of its administration: "The important thing is to inspire confidence in the community that we expect to obey this law . . . . There is no question about the fact that the community will be considerably reassured in the difficult, and one might say dangerous situation, by the adoption of this amendment placing the adjudi-

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39/ In considering whether adjudicative function ought to be with the Secretary or with an independent body, Senator Javits stated:

> I, for one, believe that in the light of over 30 years of utterly dismal performance by the Department of Labor of its safety and health responsibilities under the Walsh-Healey Act, labor has little reason to expect, or business any reason to fear, overly energetic administration of this act by the Secretary of Labor or disregard by him of the legitimate concerns of business.

LEGIS. HIST. at 194.

40/ Senator Holland from Florida:

> I know perfectly well, from my own experience as a lawyer over a good many years, that the impression prevailed that the labor unions and the labor union administrators and managers and leaders were much too close to the personnel of the Board under the Wagner Act, and that fair and objective and impartial judgments were not to be expected from that agency . . . . There was the feeling that the decisions of the then

cative function in an independent agency."41/

There is simply no basis in the legislative history for the courts' suggestion that Congress, by assigning the adjudicative function to an independent body, meant to preclude that body from considering the Secretary's exercise of prosecutorial discretion for consistency with the remedial purpose of the Act. Indeed, all the evidence indicates that Congress regarded employers and employees as parties of equal standing. In discussing a provision under which a plant could be shut down due to imminent dangers, Senator Tower observed that "Government, labor, and management [should] have an equal stake in improving safety conditions . . . .[W]e must insure that employers and employees alike have a stake in improving these conditions. Labor-management relations can only improve if a sense of harmony and cooperation between employer and employee alike exists, independent of an omnipotent centralized voice from Washington." LEGIS. HIST. at 448. Senator Williams stated that permitting employees to accompany OSHA inspectors on inspections

> reflects a fair and practical resolution of the conflicting viewpoint of employers who fear that an unlimited right of employees to accompany inspectors could lead to disruption of production operations and, the viewpoint of employees who

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40/ (Continued)

> Secretary of Labor--and I again say that I do not question his soundness of conscience--were not practicable, were not objective, and were much more nearly in accord with the demands and expectations of those who were directly representing the labor organizations.

LEGIS. HIST. at 473; see also Senator Holland's remarks at 474-5.

41/ LEGIS. HIST. at 469, Senator Javits.

> urgently believe they need their representatives to participate and assist in the inspection which is so important to their continued protection on their job.
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> I think this is an important point. Certainly no one knows better than the working man what the conditions are, where the failures are, where the hazards are, and particularly where there are safety hazards. The opportunity to have the working man himself and a representative of other working men accompanying inspectors is manifestly wise and fair . . . .

LEGIS. HIST. at 430.

Of particular significance is the fact that the Act itself limits the Secretary's prosecutorial discretion. If, upon receipt of an employee complaint of a serious violation or an imminent danger, the Secretary "determines there are reasonable grounds" he must make an inspection as soon as practicable. If he determines that there are no reasonable grounds to believe that a violation or danger exists, he must notify the employees in writing. Section 8(g). If, upon inspection, the Secretary believes that a violation exists, he must issue a citation. Section 9(a). Section 6(e) of the Act, which is generally ignored, provides that "Whenever the Secretary promulgates any standard, makes any rule, order, or decision, grants any exemption or extension of time, or compromises, mitigates, or settles any penalty assessed under this Act, he shall include a statement of the reasons for such action, which shall be published in the Federal Register." All these restrictions have been placed on the Secretary's prosecutorial discretion, despite Congress' fine awareness that his resources would be limited (and perhaps because of a fine awareness of the political pressures which

would be operating upon him).[42/]

It simply makes no sense to say that an adjudicative body, created for the express purpose of assuring that the Secretary performs his enforcement function with the maximum of fairness, is unduly involved in the "basic administration"[43/] of the Act if it hears objections to settlement agreements and withdrawal of citations.[44/]

Although the courts do not say so explicitly, it is apparent that they consider employee and Commission involvement in settlement agreements and withdrawal decisions as an undue interference with the Secretary's prosecutorial discretion. The tradition is well established that prosecutorial powers, by their nature, are exclusive and unreviewable. After all, the reasoning goes, the prosecutor knows his own resources, the quality of the evidence that has been collected, how a particular case fits into an overall enforcement strategy. He should not be forced to spend resources he does not have. He should not be forced to prosecute an unwinnable case. Nothing is gained by forcing him into litigation that undermines a larger strategy. The United

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42/ The fact that Congress was conscious of the Secretary's vulnerability to special interest pressure has been discussed above. Congress was also aware that he would have limited resources. See LEGIS. HIST. 399 and 471.

43/ See OCAW v. OSHRC, 671 F.2d 643 (D.C. Cir. 1981), in which the court stated that employee challenges to the Secretary's decision to settle or drop a case would not comport with Congressional intent that the Secretary be charged with "basic responsibility for administering the Act."

44/ In the Commission's Sun Petroleum decision, 79 OSAHRC 26/C1, 7 BNA OSHC 1306, 1977-78 CCH OSHD ¶ 21,870 (No. 76-3749, 1979), Commissioner Barnako stated that the Commission has no authority to specify abatement measures. But the proper question is whether the Commission has authority to examine abatement plans for consistency with the Act's purpose.

States Court of Appeals for the District of Columbia, for example, in holding that it was powerless to intervene where it appeared that a United States Attorney had treated two individuals indicted for the same offense disparately, stated:

> Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought. . . . Two persons may have committed what is precisely the same legal offense but the prosecutor is not compelled by law, duty or tradition to treat them the same as to charges. . . . [N]o court has any jurisdiction to inquire into or review his decision. . . . [W]hile this discretion is subject to abuse or misuse just as is judicial discretion, deviations from his duty as an agent of the Executive are to be dealt with by his superiors. . . . [I]t is not the function of the judiciary to review the exercise of executive discretion whether it be that of the President himself or those to whom he has delegated certain of his powers.

Newman v. United States, 382 F.2d 479, 480, 481-82 (D.C. Cir. 1967).

To paraphrase Plato, the unexamined rule is not worth having, and the question must be asked, why is it not the function of the judiciary to review the exercise of executive, or prosecutorial, discretion? Will review necessarily impede the Secretary's management function by involving him in unwinnable and unaffordable litigation?

Professor Davis, in his treatise on administrative law, poses some extremely cogent questions: "[i]nstead of saying that 'few subjects are less adapted to judicial review' than prosecutors' discretion, why not say that few subjects are more adapted to a judicial check to prevent abuse of discretion, including a judicial requirement that findings and reasons be adequately stated?" DAVIS, ADMINISTRATIVE LAW TEXT 522, § 28.07 (3d. ed. 1972) (hereafter "DAVIS"). Instead of saying that "it is not the function of the

judiciary to review the exercise of executive discretion," why not cite a hundred Supreme Court decisions holding that the judicial function is to review the exercise of executive discretion in order to check abuse, and why not observe that under the Administrative Procedure Act judicial review of discretionary action is the rule and unreviewability is the exception?45/ Instead of saying that no court has jurisdiction to review executive discretion, why not point out thousands of cases in which federal courts do review executive discretion?

Professor Davis points out that the tradition of unreviewability of prosecutorial discretion became settled in the nineteenth century when courts adhered to the now outmoded view that "interference of the Courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief." Decatur v. Paulding, 39 U.S. 497, 516 (1840). Yet, as the very existence of the Administrative Procedure Act testifies, limited judicial review can occur without judicial assumption of power committed to administrators.

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45/ Section 554(c) of the APA, 5 U.S.C. § 554(c), provides in pertinent part:

> The agency shall give all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceedings, and the public interest permit.

> We have learned during the present century that the exercise of administrative discretionary power is not weakened but can be strengthened by a limited judicial review. Our modern system of judicial review of administrative action is built upon almost precisely the opposite of the Court's 1840 pronouncement: We now know that a judicial check to prevent or correct abuse of discretion in the performance of the ordinary duties of the executive departments of the government makes for better administration and for a higher quality of justice. This is why the courts developed a presumption of reviewability, and this is why Congress carried that presumption into the Administrative Procedure Act.

DAVIS, supra at 523.

The unfettered power to settle or withdraw for good reason is also the unfettered power to settle or withdraw due to favoritism, caprice, or neglect and may be extremely damaging to private interests. And the interest at stake here is considerable--the safety and health of human beings. Although Justice Douglas may be describing more an ideal than a practical reality inasmuch as absolute discretion is not always pernicious or even undesirable, he states a guiding principle when he says: "Law has reached its finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has always suffered . . . . Absolute discretion . . . is more destructive of freedom than any of man's other inventions." United States v. Wunderlich, 342 U.S. 98, 101 (1951). And: "Absolute discretion, like corruption, marks the beginning of the end of liberty." New York v. United States, 342 U.S. 882, 884 (1951).

V

The legislative history and the structure of te Act itself demonstrate, on the one hand, a complete lack of Congressional intent to bestow absolute prosecutorial discretion in the Secretary, and on the other, Congressional intent that employees play a central and active role in the OSHA process. As mentioned above, Senator Williams argued in favor of employee walk-around rights because "no one knows better than the working man what the conditions are, where the failures are, where the hazards are . . . ." LEGIS. HIST. at 430. Senator Tower stressed that employers and employees should have an equal stake in improving safety conditions. LEGIS. HIST. at 448. Congress was well aware of the conflict that often exists between employers and employees[46/] and that employees might attempt to abuse the OSHA process.[47/] Nevertheless, as Commissioner Cottine documents, the Act is

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46/ LEGIS. HIST. at 474-5.

47/ Senator Saxbe: "If the employee wants to be a harrassing agent, of course he can send in a complaint every day, and then the Secretary would have to determine whether it is genuine." LEGIS. HIST. at 398.

Representative Scherle from Iowa:

> As it stands at the time of the issuance of this citation, the employer is simply accused of violating one of his duties under the Act. However, he must post, in conspicuous places on his bulletin boards and near the place of the violation, the accusation of the Federal Government. It can be expected that the unions will make use of these accusations in any bargaining sessions, and in addition, you must remember

replete with provisions which bring employees into the heart of the OSHA process.

One of the assumptions underlying the idea that employees need not be treated as principal parties despite the language of section 10(c) is that their interests are adequately represented by the Secretary, who has a legislative mandate to protect employee safety and health. But the Secretary represents public interests as well as the interests of employees at a particular site. As the United States Supreme Court observed when it acknowledged that the Secretary of Labor's obligations to the public interest may conflict with his obligations to individual union members in litigation under the Labor-Management Reporting and Disclosure Act of 1959, "[e]ven if the Secretary is performing his duties, broadly conceived, as well as can be expected, the union member may have a valid complaint about the performance of 'his lawyer.'" Trbovich v. United Mine Workers of America, 404 U.S. 528, 539 (1972). The court concluded that the mere possibility of inadequate representation by the Secretary entitles unions to a limited right to participate in Title IV litigation even though the Labor-Management Reporting and Disclosure

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47/ (Continued)

> that the Taft-Hartley Act allows employees, under certain conditions, to leave a job where certain hazardous conditions exist. It is conceivable that after the employer has been accused of having an unsafe plant that the employees could walk off, and use the accusation of the Department of Labor as the reason for the wildcat strike.

LEGIS. HIST. at 1223-4.

Act makes no explicit provision whatever for union participation.[48]

The idea of "the public interest" should not be misunderstood. The public interest is no single thing, there are many public interests-here ranging from occupational safety and health, to conservation of government resources, to expeditious resolution of cases, to integrity of the judicial process. Specific public interests can fall into conflict with each other as well as with specific interests of employees at a particular worksite, and these larger conflicts can obscure the issues in individual cases. As a court we would do violence to our judicial responsibilities if we failed to recognize this, particularly if we failed to distinguish between the public interest in bureaucratic economy which grows primarily out of the Secretary's administrative function and the public interest in occupational safety and health which grows primarily out of the remedial purpose of the Act. We would violate our judicial obligation of neutrality if we ceded to the Secretary, on the ground of his amorphous "public interest" mandate, our independent duty to assure a full airing of all factual and legal issues necessary to resolution of a case.

Another factor which undoubtedly contributes to judicial reluctance to read section 10(c) expansively is that to do so is to disturb the "prosecutor-defendant" paradigm: there can be only one prosecutor; the Secretary is the prosecutor under the

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48/ And it cannot be overemphasized that union participatory rights under LMRDA depend entirely on Fed.R.Civ.P. 24(a)(2), which limits participatory rights by permitting the parties already in the suit to argue in opposition to intervention, which requires the party seeking to intervene to justify its presence in the case, and which permits the court to apply its discretionary judgment before granting the intervening party the "right" to participate. Each of these limitations is precluded by the final clause of section 10(c) of the OSH Act.

Act; ergo, employees cannot take on prosecutorial functions. This however, is taking the word "prosecutor" entirely too literally and elevating form over substance. After all, Commission proceedings are only quasi-judicial in nature, and in large part the terms "prosecutor" and "prosecutorial function," in the context of this Act, have more to do with the idea of executive function than with courtrooms. As long as due process is preserved, there is no good reason for subsuming the purpose of the Act to legal jargon or technicalities.

VI

If neither prosecutorial discretion nor legislative intent demand limited employee participation with respect to settlement and withdrawal, one must ask: Is the purpose of the Act--to protect employee safety and health--best served by limiting employee participation in such matters?

To preclude employees from showing that an abatement plan is inadequate or that, contrary to the representations of a settlement agreement, abatement has not occurred, is to undermine

rather than advance the purpose of the Act. It is true that the Secretary can reinspect at a later date and cite the employer for failure to abate, but I agree with Commissioner Cottine's reasons why this is unsatisfactory. Moreover, if employees in a particular case are right, that the fact of abatement has been misrepresented or that an abatement plan is inadequate, to postpone discovery of that fact in order to preserve a legalistic and outmoded view of the prosecutorial function seems indefensible.

If the Secretary wishes to withdraw a citation, he can have only three reasons: He may decide a particular case is not worth the expenditure of agency resources; he may decide that the evidence is not good enough to win; he may decide that the legal issues raised ought to be decided at another time, in another context, for purposes of an overall enforcement strategy. If we examine these reasons from a pragmatic, rather than legalistic viewpoint, it is hard to see how it serves the purpose of the Act to keep employees out of settlement and withdrawal in at least two out of the three situations. If the Secretary's reason for wishing to withdraw is lack of resources, and the employees, acting through their authorized representative (generally a union), volunteer to take on the financial burden of proving a violation, does it serve the purpose of the Act to cry "exclusive, unreviewable prosecutorial discretion" and leave the dangerous condition uncorrected? If the

Secretary's reason for withdrawal is his judgment that the evidence is not good enough to establish a violation, and he is wrong, does it serve the purpose of the Act to prevent employees from proving that fact? If the evidence is as insufficient as the Secretary's preliminary assessment indicates, that fact will soon become apparent to the administrative law judge, probably fairly early in the proceedings.

We must not forget that sections 8(g) and 9(a), which mandate Secretary action only upon reasonable belief that a violation exists, have already operated as a screening process upon the matter and have indicated that a violation does exist.49/ Moreover the danger of employee abuse of participatory rights is significantly minimized by two factors: the economic realities which operate on employer pocketbooks operate on employee pocketbooks as well, and the Secretary's motion to dismiss will be decided by the administrative law judge in light of the quality of the employees' arguments.50/ IMC Chemical Group, Inc.,

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49/ It is worth noting that Justice Douglas, in Trbovich v. United Mine Workers of America, supra, in agreeing with the majority that the Secretary's power to bring suit under the LMRDA is a "screening function," also said that the decision to bring suit exhausts the screening function.

Although the point has been made that a citation is issued by non-legal personnel acting with necessary dispatch, the complaint which follows is issued by legal personnel who at that point have the added benefit of the employer's notice of contest.

50/ Indeed, our actual experience is that employee assumption of prosecutorial function in Commission proceedings is both manageable and effective. In Eaton Corp., 78 OSAHRC 70/B14, 6 BNA OSHC 1905, 1978 CCH OSHD ¶ 22,942 (No. 76-1056, 1978), and Penn Central Transport. Co. and Daniel Tarasevich, 1976-77 CCH OSHD ¶ 20,832 (No. 11581, 1976), the Secretary announced his intention, immediately prior to the scheduled hearing, not to present evidence and moved to amend the citations to reduce the characterization of the violations to de minimis. The employees, acting through their authorized representatives, were permitted

78 OSAHRC 95/C14, 6 BNA OSHC 2075, 1976-77 CCH OSHD ¶ 21,514 (No. 76-4761, 1978), reversed, 635 F.2d 544 (6th Cir. 1980).

The third reason for prosecutorial restraint is somewhat different. If the Secretary's reason for withdrawing a citation is that prosecution of the particular case would interfere with an overall enforcement scheme, that would be sufficient ground for the Commission to grant the Secretary's motion to dismiss over the objections of the employees without a full airing of the employees' substantive contentions.

In the instant case, the argument is made that introduction of yet another stage in the adjudicatory process, i.e., an evidentiary hearing on employee objections to a settlement agreement, hampers employee safety and health by delaying if not actually foreclosing a legal duty to abate; no abatement is required while the parties dispute the abatement plan, and if the hearing ends in disapproval of the settlement agreement,

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50/ (Continued)

to go forward with the evidence, and in each case successfully proved a violation and established that it was not de minimis. In Southern Bell Telephone & Telegraph Co., 82 OSAHRC 6/ , 10 BNA OSHC , 1982 CCH OSHD ¶ (No. 80-1195, 1982), the Secretary's motion to dismiss for lack of sufficient evidence was denied after the authorized employee representative indicated a willingness to assume the burden of proving the alleged violations. After a hearing at which the Secretary declined to present evidence and the employee representative presented testimony and exhibits, the citation was vacated on the merits. See also Gurney Industries, Inc., 74 OSAHRC 8/A2, 1 BNA OSHC 1218, 1971-73 CCH OSHD ¶ 15,684 (No. 722, 1973), in which the Commission held that it was abuse of discretion for the administrative law judge to grant the employer's motion to withdraw its notice of contest without considering the employees' proffer of evidence on the feasibility of abatement and the seriousness of the violation.

a final order against the Respondent may never issue.[51/] The implication is that even if the Secretary's abatement plan is less than perfect it will certainly achieve some improvement in employee safety and health and that a very real gain is being traded away for the chimera of perfect safety. This might be true if the focus of the hearing were whether and to what extent the employees' abatement plan is better than the Secretary's, but that is not the case. The question before the administrative law judge at such a hearing is not whether the employees' plan is better than the Secretary's plan, but whether the Secretary's plan comports with the purposes and objectives of the Act, in other words, whether it is adequate. In the case, as here, of a general duty clause violation, a plan will be deemed adequate if it renders the workplace free of the hazard. The employees' burden will be to prove that the agreement's averment of actual abatement is in fact not true or that the proposed

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51/ My dissenting colleague takes particular note of the fact that the instant case is now four years old. I could not agree more that time is of the essence; no one could seriously argue against speedy resolution of OSHA cases. However, one must question the value of a final, enforceable order which is based on a settlement agreement which will not achieve abatement.

In any case, the question before us is a legal one--what, in light of the Act's legislative history and overall scheme, is the scope of section 10(c) of the Act? The question is not whether cases could be more quickly disposed of if employees were excluded from substantive participation in settlement. Moreover, in the instant case, the four year delay is not the result of anything the employees did or sought to do during settlement, but is the result of the fact that their right to be heard was placed in issue as a legal matter; had the fundamental question of employee rights not been in dispute, a final order in this case would undoubtedly have been issued long ago.

abatement method will not render the workplace free of the hazard. Therefore, the focus of the hearing will be not on the relative merits of the employees' and the Secretary's plan, but on whether the proposed abatement method(s) have rendered or will render the workplace free of the hazard.

A related argument is that a hearing on employee objections does not actually advance employee safety and health interests because it is, in fact, an exercise in futility. The terms of the challenged agreement represent the Secretary's best assessment both of the case and of his own resources, and if his abatement plan is disapproved he will not act to pursue the employees' views. However, as explained above, the settlement agreement will be disapproved only if the employees show that the proposed abatement methods are ineffective. To suggest that even in the face of such evidence the Secretary will refuse to negotiate further, or, in the event the employees take over the prosecutorial function and achieve a final order affirming the citation, he will subsequently refuse to issue a failure-to-abate order, is to assume that the Secretary will not act in good faith. There is no foundation for such an assumption.

ROWLAND, Chairman, dissenting:

More than four years ago, the Secretary of Labor and Mobil Oil Company entered into an agreement to end this litigation. As part of the agreement, Mobil promised to implement certain measures to protect its employees against the hazard the Secretary alleged to exist in Mobil's workplace. However, while the Commission has been deciding whether to approve the agreement, Mobil has been under no legal obligation to institute either these or any other measures to protect its employees against this allegedly serious hazard. Now, my colleagues[1/] further delay the entry of an abatement order by remanding this case so that the administrative law judge can consider whether additional measures sought by the union representing Mobil's affected employees are necessary to abate the violation.[2/] If so, then the judge must disapprove the settlement agreement. If this occurs, it is not clear what my colleagues expect the parties to do, but it is clear that the entry of the

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1/ It may be presumptuous of me to read any majority views into the widely divergent separate views of my colleagues. Nevertheless, they both agree to dispose of this case in the same manner, and I must assume there is some common ground for their disposition.

2/ For the reasons stated infra, the facts of this case illustrate that resolving the merits of the Union's objection may be more easily said than done. The Union agrees with virtually the entire abatement plan submitted by the Secretary and Mobil. It disputes only that portion of the plan that provides for radio contact to be maintained with the gauger during what the parties refer to as the "less critical period" following the refloating of a roof. This period begins at least four hours after the roof has been refloated. Thus, the provision the Union objects to would only come into play after the most dangerous time for an employee to be on a roof has passed without incident. The Union contends that the provision is inadequate and seeks to have a second employee maintain visual contact with the gauger during the less critical period as well as during the earlier, more dangerous period.

abatement order will at best be further delayed and perhaps will never occur at all. This procedure is necessary, my colleagues assert, to serve the purpose of protecting employee health and safety.

In my opinion, my colleagues' disposition misconceives the role of the Commission in the Act's enforcement scheme, misconstrues the Act by giving employees broader "rights" than Congress explicitly gave them, and is inconsistent with the very objective of employee safety and health that my colleagues assertedly seek to advance.

A

The Occupational Safety and Health Act imposes mandatory requirements on employers and gives the Secretary broad enforcement powers.[3/] The Secretary is given the authority to promulgate occupational safety and health standards,[4/] inspect and investigate worksites,[5/] issue citations to employers he believes are in violation of the Act,[6/] prosecute contested citations before the Commission,[7/] seek enforcement of

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3/ Section 5(a), 29 U.S.C. § 654(a), requires that employers comply with the general duty clause and with the occupational safety and health standards promulgated under the Act. Employers can be penalized for failing to do so. 29 U.S.C. § 666(a)-(c). Although section 5(b), 29 U.S.C. § 654(b), requires that employees comply with provisions applicable to their conduct, the Act does not provide for enforcement actions against employees. Nacirema Operating Co., 4 BNA OSHC 1393, 1976-77 CCH OSHD ¶ 20,879 (No. 12099, 1976). See Atlantic & Gulf Stevedores, Inc. v. OSHRC, 534 F.2d 541, 553-54 (3d Cir. 1976). Thus, the Secretary can bring enforcement actions against employers only.

4/ 29 U.S.C. §§ 655(a) and (b).

5/ 29 U.S.C. § 657(a).

6/ 29 U.S.C. § 658(a).

7/ 29 U.S.C. § 659(c).

Commission orders,[8] seek injunctions to counteract imminent dangers,[9] grant variances from standards,[10] and compromise, mitigate, and settle penalties.[11] The Commission's sole authority is to resolve disputes resulting from enforcement actions brought by the Secretary.[12]

Employees are given certain specific rights under the Act, such as the right to request an inspection of their workplace[13] and to accompany the inspector during the inspection.[14] They cannot, however, compel the Secretary to issue a citation and, with one exception, they cannot dispute the citation once it is issued. The exception involves the abatement date contained in the citation. Under section 10(c), 29 U.S.C. § 659(c), employees may contest before the Commission the reasonableness of the time permitted for abatement. Section 10(c) also gives employees the procedural right to participate as parties to Commission proceedings instituted by their employers.

Except for the right to challenge the abatement time, the Act gives employees only one other way in which they can question the Secretary's prosecutorial discretion. Section 13(d), 29 U.S.C. § 662(d), permits

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8/ 29 U.S.C. §§ 659(b) and 660(b).

9/ 29 U.S.C. § 662(a).

10/ 29 U.S.C. § 655(d).

11/ 29 U.S.C. § 655(e).

12/ 29 U.S.C. § 659(c). A case may come before the Commission in three ways: (1) an employer may contest a citation or notification of proposed penalty; (2) employees may contest the period of abatement provided in a citation; and (3) an employer can seek a modification of an abatement date established by a Commission final order.

13/ 29 U.S.C. § 657(f)(1).

14/ 29 U.S.C. § 657(e).

an employee to seek a writ of mandamus in a federal district court if the Secretary arbitrarily and capriciously fails to seek an injunction to counteract an imminent danger. These two limitations on the Secretary's prosecutorial authority demonstrate that, where Congress intended for employees to question the Secretary's prosecutorial discretion, it explicitly provided that they could do so. Where Congress did not so provide, it did not intend to create a private right of action. Taylor v. Brighton Corp., 616 F.2d 256 (6th Cir. 1980).

Thus, the Act gives the Secretary broad prosecutorial authority, limited only by the right of employees to challenge an abatement date and by the right, which is not applicable to Commission proceedings, to seek a writ of mandamus in imminent danger situations. The procedural right of affected employees to become parties to Commission proceedings must be interpreted consistent with the overall enforcement mechanism the Act establishes, and therefore cannot be read to limit the Secretary's prosecutorial discretion in Commission proceedings except where the employees and the Secretary differ on the issue of the abatement date. The cases decided by the courts of appeals universally recognize this principle. In Marshall v. OSHRC (IMC Chemical Group, Inc.), 635 F.2d 544 (6th Cir. 1980), the court held that employees cannot object to the Secretary's decision to withdraw a citation. The Third Circuit has stated that the only objection an employee party can raise to a settlement agreement between the Secretary and an employer concerns any abatement date provided for in the agreement. Marshall v. Sun Petroleum Products Co., 622 F.2d 1176 (3d Cir.), cert. denied, 101 S. Ct. 784 (1980). The same court has held that employees may not contest the representation in a settlement agreement that abatement has occurred.

Marshall v. Oil, Chemical and Atomic Workers, 647 F.2d 383 (3d Cir. 1981). The D.C. Circuit has agreed with the Sixth and Third Circuits that employees cannot prosecute a citation the Secretary seeks to withdraw and cannot dispute the terms of a settlement between the Secretary and an employer. Oil, Chemical and Atomic Workers v. OSHRC, 671 F.2d 643, 650 (D.C. Cir. 1981), pet. for cert. filed, No. 81-1784 (March 26, 1982). The court further stated that, although an employee representative that has elected party status can appeal an adverse Commission decision to a court of appeals, such an appeal will be rendered moot if the Secretary informs the court that he will not further enforce the claim regardless of the court's disposition of the appeal. Id. at 651. My colleagues do not find these decisions persuasive.[15/] They prefer to read the final sentence of section 10(c) to give employees broad rights that are inconsistent with the Act's overall pattern. In my opinion, the courts are precisely correct in recognizing that the procedural right of employees to elect party status does not confer on them the right to challenge the Secretary's prosecutorial authority in Commission proceedings except on the specific issue of the abatement date.

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15/ Commissioner Cottine notes that some courts have held that the charging party in an NLRB case is entitled to be heard on its objections to a settlement between the Board's General Counsel and the party charged with an unfair labor practice. Those decisions, however, have relied on the "unique legal status" of the charging party in an unfair labor practice proceeding, NLRB v. Oil, Chemical & Atomic Workers Int'l Union, 476 F.2d 1031, 1036 (1st Cir. 1973), and on the "overall legislative scheme" of the National Labor Relations Act, Concrete Materials of Georgia, Inc. v. NLRB, 440 F.2d 61, 67 (5th Cir. 1971). However, as I have noted, the courts that have considered the role of employee parties in the context of the overall legislative scheme of the Occupational Safety and Health Act have held that employee objections to settlement agreements are limited to the period of time allowed for abatement. Thus, the NLRB cases are inapposite.

Prosecutorial discretion serves a valuable purpose; it assures that a private person need not answer frivolous charges, but provides for a government agency to serve a screening function and decline to bring charges it determines have no merit.[16/] Trbovich v. United Mine Workers of America, 404 U.S. 528, 537; Taylor v. Brighton Corp., 616 F.2d at 262. Moreover, this screening function does not cease when the Secretary issues a citation. As Commissioner Cleary has pointed out, citations are issued by the Secretary's nonlegal personnel acting with necessary dispatch. Donald K. Nelson Construction, Inc., 76 OSAHRC 2/A2, 3 BNA OSHC 1914, 1975-76 CCH OSHD ¶ 20,299 (No. 4309, 1976). Thus, the Secretary's attorneys normally do not assess the justification for a citation until the citation is issued and is contested. At that time, they are obligated to review the matter to determine whether the citation should be prosecuted. See Rule 11 of the Federal Rules of Civil Procedure. Moreover, this screening function continues throughout a case. As prosecuting attorneys representing the United States government, the Secretary's attorneys have a continuing duty to see that justice is done.

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

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16/ Even if a person is ultimately vindicated, the necessity to answer and defend a charge imposes a substantial burden on the accused party. Indeed, it was concern for the burden imposed by the need to simply defend a charge that led Congress to enact the recent Equal Access to Justice Act, 28 U.S.C. § 2412, which provides that certain parties who prevail in suits against the government may be awarded attorney fees and expenses if the government's position was not substantially justified.

Berger v. United States, 295 U.S. 78, 88 (1935).[17/] Although this statement was made in a criminal case, its rationale obviously applies equally to any proceeding, such as this, in which the government is prosecuting a private party for allegedly violating the law and the party can be penalized if found in violation.

B

One of the principal controversies that arose during the congressional debates was whether adjudicatory authority should be vested in the same agency, the Secretary of Labor, responsible for prosecuting contested actions or whether a separate, independent agency should be established for the adjudication of disputes. The Act was considered first by the Senate, whose Committee on Labor and Public Welfare reported to the floor a bill, S. 2193, that gave adjudicatory as well as prosecutorial authority to the Secretary.

The Committee minority, however, favored an independent panel to adjudicate disputes. Senator Javits explained the rationale for the minority view:

> [H]earing and determination of enforcement cases by an independent panel more closely accords with traditional notions of due process than would hearing and determination by the Secretary. In the latter case the Secretary is essentially acting as prosecutor and judge. Any finding by the Secretary in favor of a respondent would be essentially a repudiation by the Secretary of his own Department's employees. While this type of enforcement has been used in connection with other statutes, is contemplated by the Administrative Procedure Act, and is not jurisdictionally defective on due process grounds,

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17/ I do not agree with my colleagues that the Secretary cannot be relied upon to adequately represent the public interest. I have no reason to believe that the Secretary's concern for the public interest is any less than that of this Commission.

> the awkward mechanics it imposes upon heads of Departments who wish to exercise their adjudicatory power personally in order to preserve due process has not generally been appreciated.

Senate Subcommittee on Labor, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970 at 195. Consequently, on the floor of the Senate, Senator Javits introduced an amendment to S. 2193, which was ultimately adopted and established the Commission as an independent adjudicatory agency.

The House of Representatives also considered a committee bill, H.R. 16785, which vested both prosecutorial and adjudicatory authority in the Secretary of Labor, and a substitute bill, H.R. 19200, which established an independent commission to adjudicate contested enforcement actions. The substitute bill was passed as an amendment to the committee bill. Thus, Congress established this Commission because it was concerned that placing adjudicatory as well as prosecutorial authority in the Secretary of Labor would be unfair to employers who were subject to enforcement actions brought by the Secretary. See Taylor v. Brighton Corp., 616 F.2d at 260-61. The Commission was not given any policy-making role, any prosecutorial powers, or any authority to oversee the Secretary's exercise of his prosecutorial discretion. Marshall v. Sun Petroleum Products Co., 622 F.2d at 1183-84. Indeed, asserting such powers would necessarily detract from the impartiality that provided the very reason for Congress to create the Commission. See Dale M. Madden Construction, Inc.v. Hodgson, 502 F.2d 278 (9th Cir. 1974).

C

Informal dispositions are the "lifeblood of the administrative process." Local 282, International Brotherhood of Teamsters v. NLRB, 339 F.2d 795, 797 (2d Cir. 1964). This principle holds true under the Occupational Safety and Health Act. If every dispute between the Secretary and employers had to be resolved through litigation, the Act's enforcement machinery would be overburdened, with even longer delays in the disposition of cases than now exist.[18/] And since any abatement requirement is tolled pending the entry of a Commission final order when an employer contests a citation in good faith,[19/] there would be long delays in achieving abatement in those situations ultimately found by the Commission to be in violation of the Act.

Thus, settlements play a vital role in the Secretary's ability to enforce the Act. They enable him to allocate his resources efficiently while achieving rapid entry of abatement orders. However, settlements involve an element of compromise, and the Secretary may be unable to achieve all he seeks in a settlement agreement. Nevertheless, when he balances the concessions he must make against the conservation of his resources, the swift entry of an abatement order, and the possibility he may lose in litigation, he might well conclude that a settlement ful-

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18/ As noted above, this case has been before the Commission for more than four years. Other cases have been here even longer. The Commission's backlog would be even worse but for the fact that a substantial number of cases are disposed of by the consent of the parties. For example, Commission records reveal that, in fiscal 1981, 92.7% of case dispositions by Commission administrative law judges occurred prior to a hearing. These dispositions include settlements, withdrawals of citations by the Secretary, and withdrawals of notices of contest by employers.

19/ 29 U.S.C. § 659(b).

fills the purposes of the Act even if its terms are not those he would regard as optimum.

My colleagues remand this case for the judge to second-guess the Secretary and decide whether the settlement agreement between the Secretary and Mobil fulfills the purposes of the Act. In making this determination, the practical considerations that may have induced the Secretary to agree to the settlement apparently must be ignored. Instead, the judge is to hold some type of hearing at which the Union presents its objections to the agreement and, on the basis of whatever information the parties present to him, determine whether the abatement plan in the agreement is inadequate.[20/] If the judge believes that the Secretary's plan is inadequate, he must disapprove the settlement agreement.[21/]

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20/ At various places in my colleagues' opinions, they imply that the judge will encounter little difficulty in making this determination. That is only true if, as I suspect, they expect the judge to simply compare the Union's abatement proposal with that of the Secretary and Mobil and see which appears to offer more protection. However, a serious inquiry into an employer's abatement responsibility under a broad requirement such as § 5(a)(1) is not a simple task. See National Realty and Constr. Co. v. OSHRC, 489 F.2d 1257, 1266-67 (D.C. Cir. 1973). Normally, the Commission determines whether an employer's precautions were sufficient to free its workplace from a hazard when an employer contests a citation or a failure to abate notification. However, when the Commission does so, it has the benefit of a complete evidentiary record made after the employer's precautions have been implemented and their effectiveness, or lack thereof, demonstrated. See BASF Wyandotte Corp., 81 OSAHRC , 10 BNA OSHC 1250, 1982 CCH OSHD ¶ 25,831 (No. 78-2316, 1981) (employer's precautions against explosion hazard were sufficient; additional precautions sought by the Secretary are therefore not required). In contrast, assuming that my colleagues expect the judge to conduct a serious inquiry into the adequacy of the abatement plan contained in the settlement agreement, they expect him to do so in some type of proceeding whose nature is not clear but is apparently something other than a full evidentiary hearing. Indeed, it does not appear that my colleagues even agree on the nature of this proceeding.

21/ On its face, the provision in the Union's plan for continuous visual contact with the gauger appears to provide more protection than the plan for radio contact at ten-minute intervals contained in the settlement

(continued on next page)

If the judge disapproves the settlement agreement, the Secretary must then decide whether to abide by the agreement or withdraw from it. If he abides by the agreement, he cannot obtain an enforceable order. He may also not be able to obtain an enforceable order if he withdraws from the agreement. One court has persuasively held that "dictates of fairness and justice require that all parties be placed in the position of status quo ante the issuance of the citation" if the Secretary withdraws from a settlement. Marshall v. Sun Petroleum Products Co., 622 F.2d at 1187.

If the Secretary nevertheless attempts to withdraw from the agreement and litigate the case on the merits, the burden is on him to prove a violation, and he may be unable to satisfy that burden. In such a situation, Mobil would have no abatement obligation at all, and the Secretary loses the benefits he would have gained through the settlement. If the Secretary sustains his burden of proof, then Mobil will be required to abate the violation.[22/] However, only the Secretary can issue a failure to abate

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21/ (continued)

agreement. See note 2 supra. However, it is not clear that a recognized hazard likely to cause death or serious harm to employees would remain after implementation of the Secretary's abatement plan. An intelligent inquiry into the adequacy of the Secretary's abatement plan must address in detail the nature of the hazard during the less critical period. Thus, the Secretary may be unable to persuade the judge that his plan is adequate without extensive litigation, which is what he sought to avoid by settling the case in the first place.

22/ When the Commission finds, in a case litigated on its merits, that an employer violated the Act as alleged in a citation, it enters an order affirming the citation. The Commission has never included in its order a specific abatement method an employer must follow. See United Auto Workers, Local 588 (Ford Motor Co.), 76 OSAHRC 58/B8, 4 BNA OSHC 1243, 1976-77 CCH OSHD ¶ 20,737 (No. 2786, 1976), aff'd, 557 F. 2d 607 (7th Cir. 1977) (Commission lacks authority to order employer to institute specific abatement

(Continued on next page)

notification, which Mobil can avoid by taking whatever abatement measures are satisfactory to the Secretary. Thus, even if the Union and the Commission disagree with the adequacy of the abatement measures sought by the Secretary, it is futile for them to suggest that an employer must do more than the Secretary believes is necessary, for it is within the Secretary's sole discretion to decide whether to issue a failure to abate notification to an employer.

Thus, the disposition ordered by the majority imposes substantial burdens on the Secretary and Mobil while producing benefits to nobody. This absurd result illustrates the anomaly of the Commission, a purely adjudicatory agency, interfering in matters that lie within the Secretary's prosecutorial discretion. It further illustrates the wisdom of the court decisions that have recognized that the right of employees to elect party status cannot be interpreted as a limitation on the Secretary's prosecutorial discretion except where the abatement date is an issue.[23/] This Commission has enough to do without assuming

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22/ (continued)

measures); Brown & Root, Inc., 80 OSAHRC 97/A2, 8 BNA OSHC 2140, 2144, 1980 CCH OSHD ¶ 24,853 at p. 30,656 (No. 76-1296, 1980) (employer may abate violation by any method it chooses that is sufficiently effective). Therefore, in my view, even if the Union persuades the judge that the abatement plan in the settlement agreement is inadequate, the Commission cannot require the employer to follow the particular plan of abatement proposed by the Union.

23/ Commissioner Cottine's observation that the Commission has rarely disapproved settlement agreements is inapposite. Until today, the Commission and its administrative law judges would not consider employee objections to abatement plans in settlement agreements under the Commission precedent the majority overrules. United States Steel Corp., 77 OSAHRC 12/C3, 4 BNA OSHC 2001, 1976-77 CCH OSHD ¶ 21,463 (No. 2975, 1977). However, while this case has been under consideration, a number

(continued on next page)

powers that Congress did not give it. I would affirm the judge's order approving the settlement agreement.

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23/ (continued)

of other cases involving employee objectons to settlement agreements have accumulated in the Commission's backlog. Therefore, it is not accurate to say that such objections occur only rarely. Moreover, we obviously do not know in how many cases employees refrained from raising objections to settlement agreements because the administrative law judge could not consider the objections under United States Steel Corp., supra. Finally, we do not know how many cases may not be settled because of the possibility this decision creates that the settlement may not be approved.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>MOBIL OIL CORPORATION,<br><br>Respondent,<br><br>PETROLEUM TRADES EMPLOYEES UNION LOCAL 419<br><br>Authorized Employee Representative. | DECISION AND ORDER<br><br>OSHRC DOCKET<br><br>NO. 77-4386 |

Appearances:

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Mobil Oil Corporation
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By Gordon P. Selfridge, Esq., and
Vedder, Price, Kaufman, Kammholz & Day, Esqs.
By James S. Petrie, Esq., for Respondent

Petroleum Trades Employees Union
450 Seventh Avenue
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By Bromsen, Gammerman, Altier & Wayne, Esqs.
By Joseph P. Altier, Esq., for Employees

The Petroleum Trades Employees Union, Local 419 ("PTEU") seeks to have not approved the Stipulated Settlement executed by Complainant and Respondent on May 31, 1978. Its request must be denied.

So far as relevant the facts are these: By Citation and Notification of Penalty dated November 30, 1977 (the "Citation"), Respondent was charged with a violation of section 5(a)(1) of the Occupational Safety and Health Act of 1970 (the "Act") at its Port Mobil, Staten Island facility. Respondent timely filed its notice of Intent to Contest the Citation and the proposed assessment of penalty.

A complaint was issued by the Secretary of Labor on January 12, 1978, alleging that Respondent had violated the Act as alleged in the citation. Respondent timely filed an answer denying that it had violated the Act and raising certain affirmative defenses.

The case was scheduled to be tried on April 14, 1978. Prior to that date, following several months of extensive negotiations, the Secretary and Respondent executed a stipulated settlement resolving all issues in dispute. On March 10, 1978, the Court advised the parties in writing that it had been informed the case had been settled and that it had cancelled the hearing.

By letter dated March 16, 1978, Richard Lewicki, President of PTEU, gave notice of intent to participate in the case as the certified bargaining agent for the affected employees at Respondent's Port Mobil facility. On March 23, 1978, the Court granted PTEU, the authorized employee representative, party status. A copy of the stipulated settlement was mailed to Lewicki by Respondent on March 28, 1978, and was posted by Respondent at its Port Mobil facility.

By letter dated March 31, 1978, from the OSHA Regional Solicitor, Respondent was advised that the Secretary had decided not to submit the previously agreed upon stipulated settlement to the Court for approval. On April 17, 1978, Respondent filed a motion to compel submission of the stipulated settlement. PTEU filed an affidavit in opposition to Respondent's motion. The Secretary was granted an extension of time for responding to Respondent's motion in order further to pursue settlement of the case.

Thereafter, following further discussions, a second stipulated settlement was submitted to Respondent by the Secretary on May 18, 1978. In capsule it recites that the violations have been abated and sets forth in detail the training and gauging procedures for external floating roof tanks that Respondent shall follow.

On May 25, 1978, PTEU advised the Court in writing that it did not agree with the second stipulated settlement and requested a hearing.

An informal pre-trial conference was held on May 31, 1978 at which counsel for all parties appeared. At the conference the Secretary and Respondent executed the second stipulated settlement and submitted it to the Court for its approval, a copy was given to PTEU's counsel. PTEU's application for a hearing was granted.

Oral argument on the question of whether or not the stipulated settlement should be approved was heard on June 6, 1978. PTEU did not challenge the reasonableness of the abatement date and conceded that the Commission has held that an employee contest is limited to the reasonableness of an abatement period. However, it argued that even though Respondent has abated the violative condition the stipulated settlement should nevertheless not be approved because (a) it failed to require that <u>at all times</u> when an employee is engaging in gauging activities a second person must be immediately available at the tank gauging platform where he will maintain visual contact with the gauger and (b) the reliance on combustible gas/oxygen sufficiency detectors alone under conditions named in the stipulated settlement is misplaced. As an alternative PTEU offered to agree to the stipulated agreement if paragraph 10, item c, were modified to require radio communication

between the employee engaging in gauging activities and a second person (not in visual contact) every five minutes instead of ten. The offer was rejected by the Respondent and the Secretary.

The Secretary and Respondent rely on Commission rulings limiting the employees participation.

The rights of employees or their representatives to participate as parties to hearings under the Act is set out in section 10(c) of the Act (29 U.S.C. § 659(c)) which provides that:

> "If an employer notifies the Secretary that he intends to contest a citation issued under section 658(a) of this title or notification issued under subsection (a) or (b) of this section, or if, within fifteen working days of the issuance of a citation under section 658(a) of this title, any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of Title 5 but without regard to subsection (a)(3) of such section). The Commission shall thereafter issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation or proposed penalty, or directing other appropriate relief, and such order shall become final thirty days after its issuance. Under a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and that abatement has not been completed because of factors beyond his reasonable control, the Secretary, after an opportunity for a hearing as provided in this subsection, shall issue an order affirming or modifying the abatement requirements in such citation. The rules of procedure prescribed by the Commission shall provide affected employees or representatives of affected employees an opportunity to participate as parties to hearings under this subsection." (Emphasis added.)

In Secretary v. Local 588, United Auto Workers, (Ford Motor Co.) OSAHRC Docket No. 2786, May 25, 1976, aff'd 557 F.2d 607 (7th Cir. 1977) the Commission[1/] concluded that an employee contest of an abatement period under this section is limited to the reasonableness of the abatement period and does not extend to the sufficiency of the abatement plan submitted by the employer. To the same effect is Secretary v. Southern Bell,[2/] Docket No. 10340 (May 1977) 5 OSHC 1405.

The precedent established by the Commission, and upheld by the Circuit Court of Appeals, is controlling and must be followed. Continental Steel Corp. v. Secretary, 10 OSAHRC 93, 94-95 (and the case cited therein). Accordingly, the posture of PTEU is untenable and is rejected.

The settlement agreement filed by the Secretary and the Respondent on May 31, 1978 is approved, the motions contained therein are granted and Respondent's notice of contest and that of the PTEU are dismissed.

Citation 1, serious, for violation of section 5(4)(1) of the Act (29 U.S.C. 654) as amended by changing the substantive abatement provisions and reducing the proposed penalty is affirmed.

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1/ Commissioner Cleary dissented.

2/ ibid.

Abatement shall accord with the provisions of the settlement agreement.

A penalty of $400.00 is assessed.

SO ORDERED.

EDWARD V. ALFIERI
JUDGE, OSHRC

Dated: July 6, 1978
New York, New York

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

TABLE OF CITATIONS

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

Secretary of Labor v. NATIONAL STEEL AND SHIPBUILDING COMPANY
OSHRC Docket No. 80-4827

1. Enclosed is a copy of my decision. It will be filed with the Commission on July 6, 1982, and will become the final order of the Commission on August 5, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is August 5, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Sidney J. Goldstein
Judge, OSHRC

Date: June 16, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 80-4827 |
| NATIONAL STEEL AND SHIPBUILDING COMPANY, | : | |
| Respondent. | : | |

## DECISION

This is an action under Section 10(c) of the Occupational Safety and Health Act of 1970 brought by the Secretary of Labor against the National Steel and Shipbuilding Company to affirm two items of a Repeat Citation that alleged the Company violated regulations promulgated under the Act relating to housekeeping and to guarding of deck openings. The matter arose after a Compliance Officer for the Occupational Safety and Health Administration inspected a worksite of the Respondent, concluded that it was in violation of the two regulations, and recommended that the Repeat Citation and proposed penalty be issued.

The Repeat Citation describes the infraction in the following terms:

> 1. Staging platform(s), ramp(s), stairway(s), aisle(s) and passageway(s) on vessel(s) or drydock(s) were not kept clear of all tool(s), material, equipment or debris.
>
> LOCATION: Hull 7415, #6 Starboard wing tank near frame 53

in violation of the standard found at 29 C.F.R. 1919.51(a) which provides:

> Section 1916.51 Housekeeping
>
> (a) Good housekeeping conditions shall be maintained at all times. Adequate aisles and passageways shall be maintained in all work areas. All staging platforms, ramps, stairways, walkways, aisles and passageways on vessels or drydocks shall be kept clear of all tools, materials, and equipment except that which is in use, and all debris such as welding rod tips, bolts, nuts, and similar material. Hose and electric conductors shall be elevated over or placed under the walkway or working surfaces or covered by adequate crossover planks.
>
> 2. Manhole(s) or other comparable small opening(s) in the deck or other working surface(s) were not suitably covered or guarded.
>
> LOCATION: Hull 7415, #5 Inboard Starboard Tank forward at frame 47

in violation of the standard at 29 C.F.R. 1916.43(a) providing:

> Section 1916.43 Guarding of deck openings and edges
>
> (a) When employees are working in the vicinity of flush manholes and other small openings of comparable size in the deck and other working surfaces, such openings shall be suitably covered or guarded to a height of not less than 30 inches, except where the use of such guards is made impractible by the work actually in progress.

After a Notice of Contest, a Complaint and Answer were filed with this Commission, and a hearing was held by Judge Jerry Mitchell in San Diego, California. Before Judge Mitchell could issue a decision, he was separated from the service of this Commission because of budgetary considerations. The matter was then reassigned to me. At the suggestion of counsel for the Respondent, a non-evidentiary hearing was held to enable the parties to explain their positions.

The facts in this case disclose that the Respondent was engaged in shipbuilding operations in the San Diego area. A Compliance Officer

for the Administration inspected the worksite, spoke briefly with some employees, and photographed two alleged violations of standards adopted by the Administration.

At the hearing the Compliance Officer testified he saw planking and a welding lead on the floor of the scaffolding where a welder was working. The Officer considered the planking to be unused, and this lumber and a welding lead constituted a tripping hazard.

Respondent's employees disputed the conclusions of the Compliance Officer. They testified that the planking was on the floor of the scaffold preparatory for use in secondary scaffolding. At one time planking for secondary scaffolding was accomplished by hoisting the heavy lumber by hand, a practice considered relatively unsafe. In recent times the planking was placed on the floor of the original scaffold as found by the Compliance Officer. To avoid a tripping hazard, the planking was secured and the ends were painted a light yellow as reflected in the photographs. No employee was ever injured by tripping over the planks. Scaffolding, initially and secondarily, was a continuous process. Company practice was to erect guardrails as quickly as possible after scaffolding was in place and before employees were permitted to work on it.

On the basis of the foregoing summary of the record with respect to housekeeping, I place more reliance upon the observations of Respondent's employees as compared with the Compliance Officer. The latter had no experience with shipbuilding operations other than three inspections involving the Respondent. From the testimony it appears that he spent

but ten minutes on the premises and had little opportunity to discuss his findings with management personnel. On the other hand the Respondent's witnesses were veteran employees in the ship construction field and highly experienced in their assignment. Their testimony was to the effect that the planking was secure and in preparation for secondary scaffolding, and that no one considered the lumber to be a tripping hazard. From my study of the photograph depicting the scaffolding, I conclude also that there was no hazard in the storage of the planking while awaiting further use. I agree that it would be far safer to have the planking handy and elevated when needed for secondary scaffolding than to have the lumber hoisted to its new position. So far as the planking is concerned, I do not believe any hazard has been demonstrated.

I take a different view in connection with the welding lead. In this respect the last sentence of the regulation in question provides that hose and electric conductors shall be elevated over or placed under the walkway or working surfaces or covered by adequate crossover planks. An examination of the picture of the alleged housekeeping violation discloses that the welding lead was on the floor of the scaffolding and thus constituted a violation of this portion of the regulation.

This conclusion is in harmony with a decision of the Commission in Secretary of Labor v. FMC Corporation, OSHRC Docket No. 12311, June 6, 1979, 7 BNA OSHC 1419; 1979 CCH OSHD 23,631 p.28,654. There a Citation alleged that the company failed to maintain good housekeeping in that hoses were on deck, on walkways, and working areas at different locations throughout the ship. The Company defended on the ground that the tools, materials and

equipment were in use. The Commission found unpersuasive general testimony that it was possible that some objects may have been in use. Moreover, the Commission ruled that the "in use" exception did not apply to hose and electric conductors, and that, under the standard, hoses must be elevated or covered regardless of whether they are in use.

From the photograph it is apparent that the welder's hose was not elevated; nor did it otherwise meet the test of the last sentence of Section 1916.51(a). It follows that Item 1 of the Citation cannot be vacated. There is no dispute that a previous Citation under the same section of the regulations issued to the Respondent on July 30, 1979, alleging that cables and cords were scattered over the working area was not contested and now is a final order of the Commission. This infraction must be considered as Repeat in nature. Thus Item 1 of the Citation in the instant matter is affirmed as a Repeat Citation.

The Compliance Officer also photographed the alleged violation of a regulation found at 29 C.F.R. 1916.43(a) relating to the guarding of deck openings. No one was on the scaffolding at the time. This picture illustrates a space approximately 21 x 31 inches between the scaffolding and the skin or side of the ship under construction. Indeed there was a series of such spaces along the length of the scaffold. The Officer was of the opinion that an employee could fall into this space and suffer injury. He also thought that the openings could have been covered and the hazard thus eliminated.

As previously mentioned, the regulation provides that when employees are working in the vicinity of flush manholes and other small openings

of comparable size in the deck or other working surfaces, such openings shall be suitably covered or guarded. The Complainant alleges that the spaces between the scaffolding and the side of the ship fell within the meaning of such manholes as provided by the regulation, but the Respondent contends that the regulation is confined to manholes or similar small openings. It urges that a literal interpretation of the standard is in order, and that therefore the space between the scaffold and the ship is not a flush manhole or other small opening in the floor of the deck.

I conclude that the Respondent's view of the meaning of the regulation at 1916.43(a) is the more reasonable one. By its terms the regulation is concerned with holes in the floor, not spaces between the ship and scaffold. Even if a scaffold could be considered to be a working surface, there was no manhole or small opening on its floor. Thus construed, it is not necessary to discuss whether or not the Complainant established that employees were working in the vicinity of the openings.

The alleged hazard involved in this item of the Repeat Citation is the open space between the scaffold and the bulkhead. Since the standard in issue makes no reference to such an open area, the regulation was not violated. This item of the Repeat Citation is vacated.

In summary, I find that a welder's hose was not elevated over or placed under a working surface or covered by adequate crossover planks. In as much as there is no dispute with respect to the amount of the penalty proposed by the Secretary, this portion of the Repeat Citation is affirmed. I also find that there was no flush manhole or other small opening on the working surface of the scaffold.

It is also concluded that at the time mentioned in the Repeat Citation the Respondent was an employer within the meaning of Section 3 of the Occupational Safety and Health Act of 1970; that the Occupational Safety and Health Review Commission has jurisdiction over the parties and subject matter; that the Respondent was in violation of the standard found at 29 C.F.R. 1916.51(a); and that the Respondent was not in violation of the standard found at 29 C.F.R. 1916.43(a).

Based upon these findings of fact and conclusions of law, it is ordered that Item 1 of the Repeat Citation dated July 30, 1980, and the proposed penalty thereof, be AFFIRMED; and that Item 2 of this Citation be VACATED.

Sidney J. Goldstein
Judge, OSHRC

Dated. July 6, 1982

Chicago, Illinois

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

Secretary of Labor v. OMNI CONSTRUCTION, INC.
OSHRC Docket No. 82-0238

1. Enclosed is a copy of my decision. It will be filed with the Commission on July 6, 1982, and will become the final order of the Commission on August 5, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is August 5, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Benjamin G. Usher
BENJAMIN G. USHER
JUDGE, OSHRC

Date: June 16, 1982
New York, New York

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR | : | |
| Complainant | : | |
| v. | : | OSHRC DOCKET NO. 82-238 |
| OMNI CONSTRUCTION, INC. | : | |
| Respondent | : | |

## DECISION AND ORDER

Appearances:

Kenneth A. Hellman, Esq.
Office of the Solicitor
U.S. Department of Labor
Washington, D.C.

For the Complainant

Mr. Robert M. Frew
Project Manager
Omni Construction, Inc.
Rockville, Maryland

For the Respondent

USHER, Judge:

These proceedings were initiated by the Secretary of Labor, United States Department of Labor, pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, et seq., hereinafter referred to as the Act).

Complainant seeks affirmance by the Review Commission of two Citations which charge two "serious" and two "other than serious" violations of Section 5(a)(2) of the Act, and seeks

further to have the Commission assess penalties totaling $980 for these alleged violations.

Complainant has filed a Motion to Dismiss Respondent's Notice of Contest "as untimely". For the reasons set forth below, I agree with his position, and Complainant's motion will be granted.

An agent of Complainant's Occupational Safety and Health Administration (hereinafter referred to as OSHA) conducted an inspection of a worksite maintained by Respondent at 1001 22nd Street, N.W., Washington, D.C., on October 28-30, 1981, and issued two Citations to Respondent, dated November 6, 1981. These Citations and a Notification of Proposed Penalty were received (via certified mail) by Respondent's agent on December 24, 1981.1/

Respondent does not dispute the assertion that the Citations were received at its Rockville, Maryland, office on December 24, 1981. During the first or second week of January, 1982, Respondent's Project Manager and one of its Vice Presidents conferred regarding the receipt of the Citations and "decided to pursue it", but neither they nor anyone else on Respondent's behalf filed a Notice of Contest at that time as required by the provisions of Section 10(a) of the Act.2/

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1/ Neither party has offered an explanation for the delay (November 6 to December 24, 1981) in the receipt of the Citations, but, when taken with the pertinent facts surrounding the resulting failure of Respondent to file its Notice of Contest, that question appears inconsequential.

2/ Section 10(a) of the Act provides, in pertinent part:

> If, after an inspection or investigation, the Secretary issues a citation under section 9 (a), he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 17, and that the employer has fifteen working days within which to notify

(Continued)

It seemingly was Mr. Frew's responsibility to initiate such action. Mr. Frew vacationed away from Respondent's offices sometime in early February, 1982, but not during the period from December 24, 1981, until January 18, 1982. He contacted OSHA for the first time in February to arrange an informal conference, and he conferred informally with Mr. Gilbert L. Esparza, OSHA's Area Director, on February 17, 1982. Mr. Esparza informed Mr. Frew that there was nothing he could do regarding the Citations in view of Respondent's failure to file a timely Notice of Contest as required by the provisions of Section 10(a) of the Act. Mr. Frew was told at that time that the Citations and Notification of Proposed Penalty had become final orders of this Commission by operation of the law. Mr. Frew nevertheless filed a "request [for] a late contest hearing to review the . . . citation[s]". That request was dated February 18, 1982.

Respondent's request was forwarded to the Review Commission by Complainant's agent, and the Review Commission assumed jurisdiction. J.I. Hass Co., Inc. v. OSHRC, et al., 648 F.2d 190 (3 Cir. 1981). A pretrial hearing was held at Washington, D.C., on May 17, 1982, and testimony was adduced by the parties.

The facts are not in dispute. Regardless of when they were mailed by Complainant, Respondent received the Citations and Notification of Proposed Penalty on December 24, 1981. The fifteenth

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2/ (Continued)

> the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under subsection (c) within such time, the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency. (Emphasis added.)

working day after that was January 18, 1982. Respondent did not file a Notice of Contest within that time period. Its failure to do so was not "caused by" Complainant's "deceptive practices [or] failure to comply with procedures required by the Act". Atlantic Marine, Inc. et al. v. OSHRC, et al., 524 F. 2d 476 (5 Cir. 1975). Likewise, its inaction was not the result of a "mistake, inadvertence, suprise, or excusable neglect" as those terms are used in Rule 60(b)(1), Federal Rules of Civil Procedure. See Secretary of Labor v. Monroe and Sons, Inc., et al., 615 F.2d 1156 (6 Cir. 1980.[3/]

There is no argument by Respondent concerning whether the person charged with responsibility for acting on the Citations knew or should have known of their issuance (Buckley & Company,Inc. v. Secretary of Labor, 507 F. 2d 78 (3 Cir. 1975)). Mr. Frew knew about the OSHA inspection, knew that the Citations had been issued, discussed them with a corporate vice president, and was fully aware of the 15-day statutory requirement for filing the Notice of Contest - all before embarking on his vacation, but he did nothing to ensure that Respondent's rights were protected. That was a mistake on his part, undoubtedly neglect or inadvertence, but hardly "excusable" as that term has been applied by the Courts.

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3/ There is disagreement among the circuits regarding whether Rule 60(b)(1) of the Federal Rules of Civil Procedure may be applied in the face of the explicit language of Section 10(a) of the Act (Fn.2, supra.) or Section 12(j) of the Act, as the case may be. See Secretary of Labor v. OSHRC, et al., 502 F. 2d 30 (5 Cir. 1974).

## FINDINGS OF FACT

1. As the result of an inspection by his agent on October 28-30, 1981, at a worksite maintained by Respondent at 1001 22nd Street, Washington, D.C., Complainant issued two Citations and a Notification of Proposed Penalty which were received by Respondent on December 24, 1981, and were made known to its responsible officials.

2. Respondent did not file its Notice of Contest until February 18, 1982, more than 15 working days after its receipt of the Citations and Notification of Proposed Penalty.

3. Respondent's failure to file its Notice of Contest was occasioned by neglect on the part of its responsible officials and was not due to any action or inaction on the part of Complainant or his agents.

4. Respondent's neglect (as mentioned in Finding of Fact No. 3) was not excusable neglect (or a mistake or inadvertence) as that term is used in Rule 60(b)(1) of the Federal Rules of Civil Procedure.

## CONCLUSIONS OF LAW

1. Jurisdiction of the parties and of the subject matter herein is conferred upon the Occupational Safety and Health Review Commission by Section 10(c) of the Act.

2. At all times relevant hereto, Respondent was an employer engaged in a business affecting commerce within the meaning of

Section 3(5) of the Act and as such was subject to the requirements of Section 5(a)(2) of the Act.

3. In the absence of a Notice of Contest, filed by Respondent within 15 working days of its receipt of the Citations and Notification of Proposed Penalty on December 24, 1981, the Citations and Notification of Proposed Penalty became final orders of this Commission on January 18, 1982.

## ORDER

Upon consideration of the foregoing findings and conclusions, it is hereby ORDERED that Complainant's Motion to Dismiss Respondent's Notice of Contest, filed on February 18, 1982, is GRANTED; the Citations and Notification of Proposed Penalty, issued by Complainant to Respondent on November 6, 1981, are AFFIRMED; and a penalty of $980 is ASSESSED.

BENJAMIN G. USHER
JUDGE, OSHRC

Dated: July 6, 1982
New York, New York

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

TABLE OF CITATIONS

| OSHRC Docket No. | OSAHRC Reports* | BNA OSHC | CCH OSHD |
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(A) - Notes a case presently under appeal to a U.S. Circuit Court of Appeals.
(D) - Notes a case in which a decision has been issued by a U.S. Circuit Court of Appeals.

* Citations for OSAHRC Reports are listed according to microfiche cites. When applicable citations for the printed volumes of OSAHRC Reports are listed in parentheses.

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

420 U. S. COURTHOUSE
POST OFFICE SQUARE
BOSTON, MASSACHUSETTS 02109

## NOTICE OF DECISION

Secretary of Labor v. Andreassi Brothers, Inc.
OSHRC Docket No. 80-6222

1. Enclosed is a copy of my decision. It will be filed with the Commission on August 2, 1982, and will become the final order of the Commission on September 1, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is September 1, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Richard DeBenedetto
RICHARD DeBENEDETTO
Judge, OSHRC

Date: July 13, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant | : | |
| v. | : | OSHRC DOCKET NO. 80-6222 |
| ANDREASSI BROTHERS, INC., | : | |
| Respondent | : | |

Appearances:

Frederick E. Dashiell, Esq., for Complainant

Tanous J. Thomas, Esq., for Respondent

DECISION AND ORDER

On October 2, 1980, respondent, Andreassi Brothers, Inc. (Andreassi), was cited for seriously violating section 5(a)(2)[1/] of the Occupational Safety and Health Act of 1970 (the Act) by failing to comply with the trenching standard 29 C.F.R. §1926.652(c), which, in pertinent part, reads as follows:

> Sides of trenches in hard or compact soil, including embankments, shall be shored or otherwise supported when the trench is more than 5 feet in depth and 8 feet or more in length. In lieu of shoring, the sides of the trench above the 5-foot level may be sloped to preclude collapse, but shall not be steeper than a 1-foot rise to each 1/2 foot horizontal....

1/ Section 5(a)(2) of the Act, 29 U.S.C. §654(a)(2), requires each employer to "comply with occupational safety and health standards promulgated under the Act."

The Secretary proposes that Andreassi be assessed a penalty of $140 for the alleged violation.[2/] Andreassi contested the matter, and a hearing was held on June 23, 1981.

In September 1980, Andreassi was excavating and laying a pipe for a sewer line in Randolph, Massachusetts. During the course of a general inspection on September 15, 1980, OSHA compliance officer John Yanovitch came upon the job site, at which time two of Andreassi's employees were present; one was observed working inside the excavation while the other, the backhoe operator, was standing near the edge of the excavation. The excavation measured 8 feet 5 inches deep, 3 feet wide, and 26 feet long. The backhoe was located in proximity to one end of the excavation (or, more accurately the "trench")[3/] which was sloped; all other sides or walls of the trench were practically vertical. There was no shoring or other support provided for the trench walls. According to the compliance officer, the soil was "fairly hard and compact," and contained some stone and sand (Tr. 45, 53). The compliance officer testified that he saw a failure in the surface of the trench wall which he described as "some sloughing off at the spoils" (Tr. 36-37).

---

2/ Andreassi was also cited for nonserious violations of two other construction safety standards, including the failure to place excavated soil at least 2 feet from the edge of the excavation. Andreassi did not contest the nonserious citation which became a final and nonreviewable order.

3/ 29 C.F.R. §1926.653(n) defines "trench" as:

> A narrow excavation made below the surface of the ground. In general, the depth is greater than the width, but the width of a trench is not greater than 15 feet.

The Secretary contends that the failure to slope or otherwise support the sides of the trench was a serious violation because the condition could have resulted in serious injury or death to the employee who had been working inside the trench (Tr. 63-64).[4/]

Whether the sides of the trench be in "hard or compact soil," as alleged here, or in "unstable or soft material," which apparently is the more appropriate designation in view of the "sloughing" incident viewed by the compliance officer, specific trenching standards require that they be shored, sloped or otherwise supported when the trench is 5 feet or more in depth. In fact, according to Table P-1 of 29 C.F.R. §1926.652, the only kinds of soil which permit a slope of 90 degrees--which is about what existed at the trench being excavated by Andreassi--are solid rock, shale or cemented sand and gravels. The principal hazard of excavation work is death by suffocation or crushing when exposed soil fails and buries a worker. A violation of the trenching safety standard was clearly established in this case by the testimony of the compliance officer and the photographic evidence.

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4/ Section 17(k) of the Act, 29 U.S.C. §666(k), defines a serious violation:

> A serious violation shall be deemed to exist in a place of employment if there is substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Substantial probability of an accident is not requisite to the establishment of a serious violation. A serious violation is established if there is a possibility of an accident which, if it occurs, would have a substantial probability of resulting in death or serious physical harm. Secretary v. Portland Stevedoring Co., 1 BNA OSHC 1250, CCH OSHD ¶15,052, No. 5 (July 25, 1973). See also California Stevedore & Ballast Co. v. OSHRC, 517 F.2d 986, 988 (9th Cir. 1975).

Andreassi offered no proof to counter the Secretary's case. Instead, Andreassi relies on the arguments that the excavation job involved only some three hours and the employee worked in the trench only for a part of that time, and that the trench could not have been dangerous inasmuch as the compliance officer did not immediately order the employee out of the trench. The duration of the hazard in this case is relevant to the question of the penalty to be assessed and has no significant bearing on the merits of the citation itself. The validity of a citation rests upon evidence having the quality of proof and fitness to induce conviction. Whether or not a compliance officer, during the course of an inspection, immediately voices a warning on encountering what he believes to be a hazardous condition cannot serve to point out the truth of the matter.

The Secretary having carried his burden of proof, a penalty of $100 is assessed, in accordance with the criteria of 29 U.S.C. §666(j).[5/]

## FINDINGS OF FACT

1. On September 15, 1980, one of Andreassi's employees was working inside a trench measuring 8 feet 5 inches deep, 3 feet wide, and 26 feet long.

2. The soil of the trench was hard and compact and had some stone and sand. The 26-foot-long sides of the trench were essentially vertical and were not shored or otherwise supported.

---

5/ Section 17(j), 29 U.S.C. §666(j), provides:

The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

3. Andreassi's employee was exposed to danger of a cave-in as a result of the absence of shoring or sloping of the sides of the trench.

4. Serious physical harm was substantially probable in the event of a failure of the trench walls, and Andreassi should have known of the violative condition.

## CONCLUSIONS OF LAW

1. At all times relevant herein, Andreassi has been engaged in a business affecting commerce within the meaning of section 3 of the Act, 29 U.S.C. §652 (Tr. 6, 24).

2. Andreassi seriously violated 29 U.S.C. §654(a)(2) by failing to comply with the trenching standard 29 C.F.R. §1926.652(c), and a penalty of $100 is appropriate.

## ORDER

It is ORDERED that the October 2, 1980, citation charging serious violation of 29 C.F.R. §1926.652(c) is affirmed, and a penalty of $100 is assessed.

Richard DeBenedetto
RICHARD DeBENEDETTO
Judge, OSHRC

Dated: August 2, 1982
Boston, Massachusetts

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1114 MARKET STREET, ROOM 608
ST. LOUIS, MISSOURI 63101
(314) 425-5071

# NOTICE OF DECISION

Secretary of Labor v. Havens Steel Co.

OSHRC Docket No. 81-2071

1. Enclosed is a copy of my decision. It will be filed with the Commission on August 2, 1982, and will become the final order of the Commission on September 1, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is September 1, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Paul E. Dixon

Paul E. Dixon, Judge, OSHRC

Date: July 13, 1982

Enclosures

OSHRC FORM NO. 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant<br><br>v.<br><br>HAVENS STEEL COMPANY,<br><br>Respondent | OSHRC DOCKET 81-2071 |

APPEARING ON BEHALF OF COMPLAINANT:

JAYLYNN K. FORTNEY, ESQ., U. S. Department of Labor, Office of the Solicitor, 911 Walnut Street, Kansas City, Missouri 64106

APPEARING ON BEHALF OF RESPONDENT:

THOMAS M. MOORE, ESQ., Gould & Moore, Suite 380, 9233 Ward Parkway, Kansas City, Missouri 64114

Hearing held January 19 and March 30, 1982, U. S. Court of Appeals Courtroom, Kansas City, Missouri, Judge Paul E. Dixon presiding.

## STATEMENT OF THE CASE

This is a proceeding pursuant to section 10 of the Occupational Safety and Health Act of 1970, contesting citations issued by the complainant against the respondent under the authority vested in the complainant by section 9(a) of the Act. The citation alleged that an inspection of a workplace under the operation and control of respondent revealed existence of conditions that violated section 5(a)(2) of the Act, for the reason that these conditions failed to comply with certain occupational safety and health standards promulgated by the complainant pursuant to section 6 thereof.

Citation 1 for serious violation, consisting of two items, and proposed penalties in the amounts of $720 respectively for each alleged violation, was issued on August 25, 1981, along with a citation for alleged willful violation, with a proposed penalty of $5,760, which was issued on the same date.

These citations were issued as a result of an inspection conducted on June 17 and 18, 1981, under a warrant following an employee complaint of respondent's worksite, four miles south of Holcomb, Kansas, where respondent was engaged in work as a subcontractor performing steel erection.

Respondent duly contested the citations and the proposed penalties, and upon filing of the complaint and answer by the respondent the cause was at issue.

## CITATIONS

### Citation 1 for Serious Violations
### Item 1

"29 CFR 1926.500(d)(1): Open-sided floors or platforms, 6 feet or more above adjacent floor or ground level, were not guarded by a standard railing or the equivalent on all open sides:

(a) A turbine and/or generator pedestal used as a landing platform, south of the bolt-up deck, approximately 20 feet above concrete floor

on west side and 45 feet above ground on east side, was not equipped with standard railing or equivalent, thus exposing employees to injury."

Item 2

"29 CFR 1926.500(d)(2): Open side(s) of runways, 4 feet or more above floor or ground level, were not guarded by a standard railing, or the equivalent:

(a) A runway on the north side of the pedestal and south side of bolt-up deck, approximately 50 feet above ground level - no standard railing or equivalent was provided, thus exposing employees to injury."

Citation 2 for Willful Violation
Item 1

"29 CFR 1926.500(d)(1): Open-sided floors or platforms, 6 feet or more above adjacent floor or ground level, were not guarded by a standard railing or the equivalent on all open sides:

(a) The south, west, and east sides of the bolt-up deck, approximately 50 feet above ground level, were not provided with a standard railing or the equivalent on all open sides, thus exposing employees to injury."

STANDARDS

"29 CFR 1926.500--Guardrails, Handrails, and Covers
(d) Guarding of open-sided floors, platforms, and runways
(1) Every opensided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f)(i) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a standard toeboard wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard.
(2) Runways shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f) of this section, on all open

sides, 4 feet or more above floor or ground level. Wherever tools, machine parts, or materials are likely to be used on the runway, a toeboard shall also be provided on each exposed side.
(f) Standard specifications
(1) A standard railing shall consist of top rail, intermediate rail, toeboard, and posts, and shall have a vertical height of approximately 42 inches from upper surface of top rail to floor, platform, runway, or ramp level. The top rail shall be smooth-surfaced throughout the length of the railing. The intermediate rail shall be halfway between the top rail and the floor, platform, runway, or ramp. The ends of the rails shall not overhang the terminal posts except where such overhang does not constitute a projection hazard. Minimum requirements for standard railings under various types of construction are specified in the following paragraphs:"

## THE EVIDENCE

In respondent's answer and at the commencement of the hearing and in its brief, respondent moved for dismissal of complainant's citations on the ground that the citation had been issued 67 days following the inspection, alleging that 1) the delay was unconscionable and 2) the respondent's defense was prejudiced thereby. This issue will be treated later in the Decision.

At the commencement of the proceedings, the parties stipulated that respondent is covered by the Occupational Safety and Health Act of 1970, 29 USC 651, et seq.; the inspection was made on June 17 and 18, 1981, of a location known as the Sunflower Electric Power Plant, which is located a few miles south of Holcomb, Kansas; at the time of the inspection respondent employed 73 employees at the worksite; at one time during the various business activities had employed over 160 employees; at the time of the inspection respondent had employees working at the jobsite; and, further, the citation was issued on August 25, 1981.

The inspection was conducted by compliance officers Robert Lathrop and Homer Groves, who contacted the project manager, Parrish, of United Engineers and then George Wright, respondent's general superintendent, and advised him of the employee complaint.

The wind was high on the 17th, so that the actual and physical inspection was deferred until June 18, 1981.

Lathrop and Groves were conducted to the workareas by Gary Tipton, the job steward.

The inspection started where the boiler steel was being erected to the south side of the turbine generator pedestal where Groves and Tipton climbed a ladder to the top of the turbine pedestal which was some 4 feet wide, 26 feet, 8 inches, long, with some embedded bolts protruding from the surface and which was not equipped with standard railing or the equivalent.

They then traversed a ramp, which was approximately 32 inches wide and 10 feet, 7 inches, long, with its lower portion resting on the pedestal and the upper portion resting on the bolt-up deck. This ramp crossed a 2-foot open gap between the pedestal and the bolt-up deck, which was some 45-50 feet above ground level. (Exhibit GC-3)

The bolt-up deck was described as two bays wide, approximately 150-200 feet long. The deck was a structural part of the power plant which respondent erected. At the time of the inspection, respondent's employees were erecting steel above the bolt-up deck. The bolt-up deck was also utilized to store materials and tools, and was approximately 45-50 feet above ground level.

Groves observed a four or five-man crew on the bolt-up deck working, and interviewed three of them who were involved in installing handrails on an upward stairway near the center of the bolt-up deck.

Groves identified photographs he took (Exhibits GC-1 through GC-5), with Exhibit GC-1 indicating the top ladder from the mid-elevation of the pedestal to the top of the pedestal, which was taken on June 18, 1981. The turbine pedestal with protruding bolts was demonstrated by Exhibit GC-2, with Groves describing the protruding bolts as presenting a tripping hazard to respondent's employees, using the pedestal as an access way to the bolt-up deck. The pedestal was further described as a landing platform to get from the lower elevation to the bolt-up deck. It was Groves' opinion that the lack of handrails on the pedestal presented a fall hazard, which would result in serious injury or death, the distance to the ground being some 20-25 feet on the right side elevation and on the left side some 45-50 feet.

The pedestal was just south of the bolt-up deck and lower by some 3-4 feet.

Groves identified Exhibit GC-3 as the ramp, runway or walkway leading from the turbine pedestal to the bolt-up deck, which also was cited as not being provided with guardrails, and running some 10 1/2 feet long and 32 inches wide, crossing some 2 feet of space from the pedestal to the bolt deck. From the runway on the right to ground level was 45-50 feet on both sides. Groves further perceived a fall hazard involving the ramp, and that death or serious harm would result from such a fall.

Groves identified Exhibit GC-4 as depicting the south portion of the bolt-up deck facing west, and representing approximately 50 percent of the bolt-up deck, and further demonstrating that the bolt-up deck had no perimeter guarding and was some 45-50 feet to ground level. Groves did not at the time of the inspection personally observe the employees at or near the perimeter. Groves identified Exhibit GC-5 as looking up between the steel structures in the concrete pedestal, with the ramp, runway or walkway shown, along with

a plank across a lower elevation.

Groves was advised by respondent's representative Wright that the only other access to the bolt-up area was by use of a skip box and crane. After departing the bolt-up deck and returning to the ground, Groves upon looking upward observed an individual working around the outside edge of a column of the bolt-up deck. Based upon the fact that his descent from the bolt-up deck took approximately five minutes and only respondent's employees were working the bolt-up deck, it was Groves opinion that the individual was one of respondent's employees.

It was Groves' further opinion that the particular employee was exposed to a fall hazard.

Groves then had a closing conference with respondent's representative Wright, wherein he discussed the apparent violations he observed; namely, the unguarded pedestal, the unguarded runway, and the lack of perimeter guarding on the bolt-up deck.

Respondent's Wright claimed that the responsibility for the pedestal rested with the contractor Newburg; further, that respondent's employees would be taken up in a skip box, and agreed to guard the ramp crossing the two structures which was acknowledged to be respondent's equipment.

Wright was quoted as stating that permanent guardrails were being put up, and that the bolt-up deck did not need perimeter guarding.

Compliance officer Robert Lathrop accompanied Groves on the inspection, and concurred generally in Groves' observations. He accompanied Groves for the opening conference with respondent's superintendent at the job trailer, returned the next day with Lathrop proceeding no further than the top of the ladder to the pedestal some 20-25 feet up from the ground from where he could

observe the top of the level. Lathrop observed that there were no guardrails at the pedestal level, nor were there guardrails on the ramp crossing the pedestal to the bolt-up deck. While he did not go to the bolt-up deck, he could see the perimeter and saw no perimeter guarding. It was Lathrop's opinion that the ladder side of the pedestal was some 20-25 feet to concrete, with the other side being some 40-45 feet to ground level, which would also represent the distance of a fall from a ramp; and, that a lack of guarding on the bolt-up deck pedestal and ramp would constitute a serious hazard in that a fall from that height would result in serious injury or death.

Lathrop participated in the closing conference with respondent's superintendent Wright and quoted Wright as stating that if respondent's employees did not go over the pedestal to get to the job they could have been lifted by crane in a skip box.

He further quoted Wright as agreeing to install guardrails on the ramp, but not the bolt-up deck.

Lathrop observed respondent's employees wearing belts and lanyards, but could not determine whether or not they were tied off.

Lathrop was unsure as to when he completed his investigative report for submission to his supervisor, giving estimates ranging from three to four weeks, and did not know when the area director received his report from the supervisor.

Mike Simpson, a former ironworker employee of respondent, testified on behalf of complainant. Simpson has two and-a-half years of college, three years as an apprentice ironworker and was formerly employed as assistant director of safety for the Building Trades Counsel in Wichita, Kansas.

Simpson worked for respondent at the Sunflower Plant, commencing mid-May 1981

until approximately mid-June 1981, for a period of about three and-a-half weeks. Simpson was assigned to a detail crew to erect stairways, handrails and miscellaneous odds and ends.

He worked with a foreman, an apprentice and two other ironworkers.

The first week of employment he worked the bolt-up deck, helping to land and erect stairways that ran up from the deck to the level above.

Simpson observed other respondent employees using the bolt-up deck for access to the toolbox, company equipment, water supply and for break periods.

He described Exhibit GC-3 as demonstrating the southwest section of the bolt-up deck.

The bolts stored on the bolt-up deck were pulled up from the ground by a well pulley and rope, attached at the edge of the deck for supply to the bolters working above.

Simpson described the well pulley as being attached to a column above. The employee would lean over the edge and yell for his needs which would be placed in the bucket and pulled up by the pulley.

Simpson had occasion to utilize the pulley for the acquisition of reamers and a hammer handle.

During his time of employment, Simpson testified that there was never any perimeter guarding around the bolt-up deck, either temporary or permanent, with the only permanent guardrail being around certain stairways.

Simpson identified Exhibit GC-3 as the ramp to the bolt-up deck which was utilized by Simpson as the only access to the bolt-up deck, in that there was no stairway to the elevation.

Simpson observed that respondent's employees use the ramp every day for work on the deck or above.

The only time Simpson observed the skip box being used was to elevate water cans or transport the raising gang to a higher elevation. Simpson also observed buckets of bolts and tool belts being carried by respondent's employees over the ramp which connected the two structures, and noted that the ramp never had any guardrails.

Simpson identified Exhibit GC-2 as the pedestal area, where employees would exit from the ladder, and Exhibit GC-1 as the open area to the ramp and bolt-up deck.

On the right side of the ladder, it was Simpson's estimate that there was a 20-foot drop, and on the left a drop of approximately 45 feet.

Simpson never observed any guardrails on the pedestal.

Simpson complained about the unguarded conditions to his job steward, Gary Tipton, and foreman, Shonaway, about a week before he contacted OSHA.

He made a complaint to OSHA on June 10, 1981, and signed the complaint on June 11, 1981.

In describing the use of respondent's skip box, Simpson testified that the skip box was utilized to transport persons to the bolt-up deck or other levels first thing in the morning, occasionally before lunch and right after lunch, and right before quitting time to transport equipment, men and water cans back to the ground.

Normally, the crane would be erecting steel during the day, and employees would utilize the ladder, pedestal and ramp to obtain access to the bolt-up deck.

With respect to the well pulley, it was Simpson's testimony that he had observed both the bolt-up forman and apprentice going to the perimeter to utilize the well pulley to receive material, namely bolts, and that he himself

had used the pulley on one or two occasions.

Never at any time had he observed any cable strung at the well pulley.

Simpson described the toolbox on the bolt-up deck as being approximately 2 1/2 feet high by 6 feet long by 2 1/2-3 feet deep, where along with tools there was stored on the bolt-up deck bolts, materials and water.

The toolbox was located some 5-10 feet from the edge of the deck and some 25-30 feet from the well pulley on the northeast face of the structure.

The water was close to the center, near the stairwell.

The bolts were stored near the toolbox about 10 feet from the perimeter.

Simpson described two skip boxes as being available at the jobsite to reach the upper levels, but noted that the skip boxes were not requested if the crane was in use.

At the time Simpson was at the jobsite, there was no iron work to be performed on the pedestal, but rather the pedestal was utilized as an area to walk to the bolt-up deck.

From the ladder to the top of the pedestal, the employees would walk across the pedestal approximately 12 feet or so to the ramp, which went up at a 45-degree angle onto the bolt deck operation. It was Simpson's estimate that the distance between the two structures was approximately 3 feet, with about a 2 1/2-3 foot rise.

It was Simpson's estimate that the crossing ramp was approximately 3 feet across and without guardrails. The ramp was equipped with cleats made up of strips of wood to keep the employees' feet from sliding. He estimated the ramp to be roughly 5-6 feet long with a drop of 40 feet at that point.

Simpson never observed any of respondent's employees performing work from the ramp, although he observed them utilizing the ramp to travel to the

bolt deck or elevations above or travelling down to the ground.

Simpson's work crew, besides the foreman and apprentice, consisted of one Bill Fassnichi, Charles Lamore and Bill Martin. Fassnichi is an apprentice in Simpson's local in Wichita, Kansas. Lamore was from a local in Colorado and Martin was from a local in Utica, New York.

The only guardrail Simpson observed during his 3 1/2 weeks employment was the last day he worked on the job before voluntarily terminating when he observed his crew working on handrails for a stairway cater-cornered from the area, but he did not recall any permanent guardrail being put in, although there was a considerable amount of guardrail on the ground.

He never observed any wire rope cables strung along part of the expanse of the north edge of the bolt deck or at the perimeter where the wheel well pulley was situated to raise bolts to the deck.

Simpson, in addition to observing his foreman Shonaway and the bolt-up foreman using the ramp access to the bolt-up deck, also observed a foreman who is responsible for the tank crew using the ramp to reach the bolt deck, along with members of his own crew and other of respondent's employees.

It was Simpson's testimony that on any given day at least two-thirds or three-fourths of respondent's employees working at elevation would utilize the pedestal ramp to achieve access to the bolt-up deck, which would amount to approximately 12-15 workers.

These trips were required for personal functions, in that the toilet facility was on the ground and workmen would be transferred from one duty to another during the course of the work.

Gary Tipton, an ironworker, employed by respondent February 23, 1981, and on the jobsite June 16 and 17, 1981, testified on behalf of complainant.

As union steward, Tipton accompanied Lathrop and Groves on their June 18 inspection.

Mike Simpson had complained to him some three weeks before with safety complaints on two or three occasions. Simpson discussed perimeter rails and safety nets, but Tipton did not recall the pedestal being mentioned.

Tipton was requested by Simpson to talk to respondent's representative, which he had already done. Tipton testified that he had talked to superintendent Wright regarding temporary handrails on the stairs.

Tipton talked to Wright about perimeter guarding on the bolt-up deck, quoting Wright as responding, "...as long as we were installing permanent handrails, there was no need for temporary ones."

At the time of the discussion no one was actually installing permanent rails on the perimeter of the bolt deck, although there were rails being installed elsewhere, in that two decks were being used from time to time, the other deck being the one below the bolt deck. Tipton could not say for sure whether or not there were any permanent handrails other than that around the stairwell on the bolt deck. He acknowledged that Exhibit GC-4 demonstrated no guardrail at the west end of the bolt deck, nor had there ever been to his knowledge.

On the date of the inspection June 18, 1981, there were respondent's employees working on the bolt-up deck. Tipton also testified that the employees would have had to come down to the bolt-up deck to get materials or water, and if tools were stored there to obtain tools.

Tipton described the course of the inspection party as up a two-sided ladder to the top of the pedestal, which he described as being used by most of the employees to reach the bolt deck, adding that he thought there was one other ladder but it was not used.

Tipton identified Exhibit GC-2 as being the top of the pedestal that was crossed and utilized by respondent's employees to reach the bolt deck. It was Tipton's recollection that there had been guardrails attached to the pedestal, but he did not recall why or when they were taken down.

Tipton identified Exhibit GC-3 as being the ramp or "chicken ladder" utilized to cross from the pedestal to the bolt deck, and testified that he used the ramp and had seen respondent's employees using it.

Tipton never saw any handrails prior to the inspection on the "chicken ladder".

Tipton had observed job superintendent Wright on the bolt-up deck level, along with two foremen, John Coffey and Bob Shonaway.

It was Tipton's recollection that following the inspection, while at ground level, his attention was called to what he believed to be the level above the bolt-up deck where he saw a man swing around a column, but Tipton was not convinced it occurred on the bolt-up deck.

In response to a question from the compliance officer, Tipton responded that he did not recall if he gave the compliance officer the employee's name or just identified him as one of respondent's employees.

Tipton has been an ironworker on and off for 25 years. However, as union steward he performed no tool work, but rather took up the complaints of the men to the management and tried to have the complaints rectified. It was Tipton's recollection that at the peak of the job there were probably 80 ironworkers at the site, and it was his belief that the job would have taken about 1,000 man-hours in construction. In his capacity as union steward, he was not aware of any injuries other than of a minor nature. To his knowledge, there were no broken bones or loss of fingers or any falls.

There had been several safety complaints on the job which had been rectified to Tipton's satisfaction, with the only disagreement being over the guardrails as to whether to put up temporary guardrails while permanent ones were being installed on any of the decked perimeters such as the bolt deck.

Tipton described work from the bolt deck as consisting of bolts being distributed to different locations, a toolbox site and employees taking their breaks on the deck.

The bolts were kept in buckets probably 10 feet from the north edge in two piles, which were pulled up on a wheel well pulley on the north side of the bolt-up deck at the edge.

It was Tipton's belief that at the time of the inspection respondent had one cable stretched from the column to the diagonal brace or to the next column, the idea being that when the apprentice pulled bolts up he was supposed to lean onto the cable if he was going to lean over the edge, but Tipton could not say how much cable was up or how long it was up. If the apprentice did not pull up the bolts other people would come from other elevations to raise bolts, which would be taken out onto the beams as the bolting up process was taking place at the time.

Tipton estimated the bolt deck to be approximately 50 by 200 feet, with its decking having been placed. After the decking is down, the bolt-up has to be done around the edge.

Tipton guessed that the decking had been down probably three weeks.

It was Tipton's recollection that contractor Newburg had guardrails on the perimeter of the pedestal, which were taken down immediately after the pour.

The guardrails were reinstalled within a few days after the compliance

officers' inspection.

There was no work for respondent's employees on the pedestal, except to traverse to the bolt-up deck or the higher elevations.

Tipton described the use of skip boxes by the connectors to achieve elevations that were too long of a climb as the main reason, the climb being 200 feet.

Respondent had regular safety meetings every couple weeks and Monday morning once-a-week meetings conducted by the foremen, where safety items and complaints were entertained.

It was Tipton's recollection that at the time he saw the employee swing around the outside of the column there was a diagonal to the inside of the column; he further observed two other employees which he believed had a piece of handrail that he thought they were going to slip to the first employee on the perimeter.

Tipton described that when the expanded metal grating or decking is installed a guardrail can be put up at that point as normal procedure, the grating constituting a completed floor.

Tipton testified that individuals would ride the skip boxes at noon and break time, but not all the time because iron was being hung with the rig. The box was utilized in the morning, at break time, at noon, prior to noon, afternoon break, and in the evening.

Respondent's personnel manager, David Hinkley, along with his other duties is also charged with respondent's safety program.

He testified that it is respondent's policy to install either temporary or permanent guardrails when an employee is going to work at or near an edge of a building, but that on this particular job they already had permanent

guardrails available and respondent decided to install the permanent guardrails rather than have a double installation with putting in temporary guardrails.

He testified that generally if the other trades are going to work in the area they will not take down the guardrails themselves. Either the respondent removes the temporary guardrails or the trades that follow behind or other contractors will remove it.

With respect to the jobsite in question, Hinkley had received a call from the superintendent Wright with respect to putting up the perimeter guarding.

Hinkley testified that he had advised Wright that they were going to put up permanent guardrails, and he saw no need for temporary guardrails. It was Hinkley's advice to Wright that they were not going to have anybody at the edge and there was no use in sending someone to the edge and exposing them to the risk of falling in order to put up a temporary guardrail.

Hinkley established the departure date of ironworker Lamore as July 3, 1981, Fassnichi July 8, 1981, Martin July 23, 1981, and Simpson June 18, 1981.

He further testified that it was a 106,000 man-hour job, with one man falling from a boom with no injury.

Hinkley attempted to contact ironworkers Lamore and Fassnichi after the citation, but the respondent's information available on the men was very limited and his efforts were fruitless.

Respondent's field superintendent George Wright testified on behalf of respondent. His previous work experience was that of a working foreman with 17 years in construction as an ironworker.

Wright was superintendent June 17 and 18, 1981, at the jobsite, and was the individual presented with the inspection warrant by the compliance officers on June 17.

At this point, he advised the compliance officers that most of the employees were off the site due to high wind conditions.

Wright accompanied the inspectors to the pedestal structure where one of the compliance officers pointed out the ramp running between the pedestal structure and the bolt deck, at which time he advised the compliance officer that he was not aware the ramp was there; nor was he aware that the ramp was being used as access to the bolt deck, as he had been advised by the general foreman that the skip box had been tied up approximately one hour every morning getting everybody to the worksite.

The complaints were explained to Wright regarding the perimeter guardrails, to which Wright responded that at the time they were being installed.

With regard to the bolt-up deck, it was Wright's testimony that the only work going on the deck was some work on the stairway that went from the deck upwards, which is located in the central portion of the bolt deck.

Bolts were being stockpiled in the area at the east end of the bolt deck in the northeast corner. There is also a stockpile of bolts in the middle of the deck in the middle of the east and west towards the north side.

Wright testified that he had not been on the deck at the time they were stockpiling, but told foreman Coffey to keep the stockpile at least 10 or 15 feet away from the edge.

Wright estimated the dimensions of the bolt deck to be two bays, approximately 50 feet wide or approximately 150-200 feet long.

Respondent erected the steel and placed the deck. Upper steel erection was still going on.

Wright located the wheel well pulley as being to the east of the center line to the bolt deck with another one located towards the east side, with

both of them being on the north edge of the bolt-up deck, the one closer to the center and the other further to the east.

Wright testified that there was approximately 1/2-inch cable strung between columns three and five at the one well pulley, or from column five to a diagonal brace where the bolts would be pulled up. His observation of this was made from the ground prior to the inspection. Wright did not know how long the cable had been there, having relied on his bolt-up foreman.

Wright denied knowledge that the pedestal was being utilized by means of access prior to the inspection, basing his reliance on reports he was getting from his general foreman that it was taking so much time to get the employees onto the workareas in the skip boxes.

Wright recalled that at one time there were guardrails around the entire top perimeter and center section of the pedestal when they were pouring concrete.

Respondent had no work to do in the area of the pedestal.

Wright had no recollections when the guardrails were taken down, but estimated that it was after the first week in June in that the pedestal was poured May 15.

Wright felt that the guardrails were taken down because material was being landed on the pedestal by Newburg.

Newburg replaced the guardrails following the inspection within a period of five days.

Wright described safety meetings as being held by the foremen, probably every two weeks on a Monday before commencing work.

It was Wright's testimony that he had never been on the bolt deck prior to the inspection from February to June, because the deck did not go up until close to the last week in May.

He knew of the stockpile bolts on the deck from his observations from the ground.

Wright further guessed that permanent decking on the bolt deck had been down at the very most a couple of weeks.

The deck below the bolt deck had been guardrailed, and the permanent guardrail for the bolt deck was on the job.

Wright was aware that two weeks prior to the inspection respondent's employees were doing work on the bolt deck, and that there was no perimeter guarding.

Wright was aware that the employees were obtaining tools from a toolbox 10-15 feet away from the edge and storing stockpiles of bolts some 10-15 feet from the edge.

Wright recalled safety steward Tipton contacting him, but did not recall the matter discussed, although he recalled the gist of a part of the conversation was that an employee complained about putting up some temporary guardrails of some kind.

Wright testified that steel cable was used as perimeter guarding and was available on the job and could be put up in about an hour in the correct fashion.

The second well pulley at the perimeter did not have a wire cable, because due to Wright there was no way to put a cable at the pulley.

Wright conceded that the apprentice or the bolt-up foreman used the pulley, but denied that it was hanging over the edge, but rather testified that there was a grated walkway where the employees could stand on and pull the load to a higher elevation with the grating located in the interior of the building and about 7 feet wide down the edge of the building, so that the person who

was to get the supplies would get them from the pulley and take them to the other side.

Wright testified that he knew there were no guardrails on the pedestal prior to the inspection, but he did not know there was a ladder going up to the top of the pedestal; nor had he ever seen the ramp crossing over to the bolt-up deck from the pedestal.

## DISCUSSION

### Issue of 67-Day Delay in Issuance of Citation

Respondent strenuously argues that its case was prejudiced by its inability to locate three members of the crew working with Simpson; one, an apprentice out of Simpson's local in Wichita, Kansas, one from a local in Colorado, and one employee from a local in Utica, New York.

In a recent decision by a divided Commission, the majority in the case, which involved the passage of 177 days from the date of the alleged violations until the issuance of citation, reiterated the general principles to sucessfully carry this defense. (See Stripe-A-Zone v. OSHRC and Secretary of Labor, __F.2d__ (5th Cir., 1981), OSHRC Docket 79-2380, 80 OSHRC 11/C14, 80 OSHRC 111/D12, 9 BNA OSHC 1040, CCH OSHD ¶24,029, 24,912)

The employer must establish prejudice in the preparation or presentation of its defense, and the appropriate consideration for determining whether to vacate a citation for the complainant's noncompliance with section 9(a) of the Act is the prejudice to the employer from the delay rather than the justifiability of the delay (cases cited).

This Writer can find no material harm rendered respondent by virtue of the delayed citation.

There was no showing by respondent of the insufficient knowledge of the

details of the citation that would be peculiar within the knowledge of the absent witnesses, in that 1) all of the violations were in plain view from either ground level or from atop the pedestal, in particular the crossing ramp could be observed from the ground, along with the ladder to the pedestal and the well pulley; 2) superintendent Wright was fully advised at the commencement of the inspection and at the close of the inspection of the employee complaint and the nature of the alleged violations; 3) the representations of respondent as to what, if anything, the absent members of the crew would contribute to the evidence is all of a speculative nature and without foundation in contrast to the physical evidence photographed and the eye witness testimony of the participants in the inspection and the employees who were particularly concerned with the absence of guarding in and around the workarea; 4) the argument by respondent that guardrails had been removed from the pedestal prior to its use by respondent's employees and foremen as a means of access is not relevant to the case law involved in this case; namely, the Grossman/Anning-Johnson, infra., defenses where the principle inquiry is whether or not the respondent has used all reasonable efforts to forestall use rather than tolerate use of a hazardous access route as a means of arriving to the job location; 5) respondent stated intentions of not providing temporary guardrails to the bolt-up deck; 6) superintendent Wright's admission to the compliance offiter that the cross ramp was respondent's equipment, so that; 6) the evidence as to when the ramp was installed or built was irrelevant to the case law of its use by respondent's employees and foremen.

Further, there is no major discrepancy in the testimony of the locations of items and activities taken place on the bolt-up deck, but to the contrary there is general accord in the use of the cited facilities throughout the testimony.

Based upon the foregoing, respondent's motion is denied on the basis that it did not suffer prejudice in the delayed issuance of the citation.

Citation 1: Alleged Serious Violations of 29 CFR 1926.500(d)(1) and 29 CFR 1926.500(d)(2)

The genesis of liability on a multi-employer jobsite was established by the case of Secretary v. Anning-Johnson Co., OSHRC Docket 3694/4409, 76 OSHRC 54/A2, 4 BNA OSHC 1193, CCH OSHD ¶17,817, 20,690, where it was held that the complainant must show a violation of the standard and employee exposure or access to a hazard.

It further held that the employer had a defense that did not create or control the violative condition, nor had the means to rectify the violative condition.

Further, that if the subcontractor neither created nor controlled the violative condition it could show that its employees, if exposed, were protected by realistic measures as an alternative or it did not have, nor with the exercise of reasonable diligence could have, notice of a condition being hazardous.

Where the subcontractor neither created nor controlled the hazardous condition, he had the duty, if its employees were exposed, to do what is "realistic" under the standard.

As was stated in a recent decision by the 10th Circuit, U. S. Court of Appeals in Dun-Par Engineered Form Co. v. Ray V. Marshall & OSHRC, __F.2d__ (10th Cir., 1982):

> "However, Dun-Par's attempt to recharacterize the situation does not undermine the Commission's finding that the company participated in the erection of the open-sided floor while leaving its edges unguarded. The creation of the hazard resulted in this case not from Dun-Par's actions, but from a lack thereof."

Along with the Anning-Johnson case, supra., it was established by Secretary v. Grossman Steel and Aluminum Corp., OSHRC Docket 12775, 76 OSHRC 54/D9, 4 BNA OSHC 1185, CCH OSHD ¶19,982, 20,691, that each employer is responsible not to create hazards to any employees. The general contractor is liable if it could reasonably have expected to prevent or abate the hazard. The subcontractor is not liable who could not reasonably detect the violation, or abate it if it discovered a violation, even though its employees were exposed. Further, the employer must exert efforts to have the hazard abated, and the employer has the burden of proof of showing its steps taken to abate, which can be asserted as an affirmative defense.

It is felt, in the present case, that the respondent has failed to demonstrate any one of the required elements established by the cases cited.

With respect to the exposure of respondent's employees and foremen to the hazard, the tests have been enunciated in Peter J. Brennan v. Gilles & Cotting & OSHRC, 504 F.2d 1255 (4th Cir., 1974), OSHRC Docket 504, 73 OSHRC 44/E13, 76 OSHRC 30/D9, 1 BNA 1388, 3 BNA 2002, CCH OSHD ¶15,140, 16,763, 18,861, 20,448 (remand case), where a showing of actual exposure to hazard is not necessary to establish the violation, in that the complainant could prove exposure under what was described as a practical test of "reasonable predictability" of access to a hazard and what was described in a separate opinion as a test of "reasonable anticipation" of the risk of employees from the hazard. It was further stated that such acts could be established by showing:

> "...that employees either while in the course of their assigned working duties, their personal comfort activities while on the job, or their normal means of ingress-egress to their assigned workplaces, will be, are, or have been in a zone of danger."

Thus, the utilization of the means of access by ladder to pedestal by ramp to bolt-up deck by respondent's foremen and a substantial number of its employees is verified both by the testimony of Tipton and Simpson and has satisfied the requirements of exposure to a fall ranging from 25-45 feet to either concrete or ground level, which could result in severe bodily injury or death. (See Thermo Tech, Inc. v. U. S. OSHRC, 580 F.2d 1051 (5th Cir., 1978), OSHRC Docket 15381, 77 OSHRC 192/A2, 5 BNA OSHC 2045, CCH OSHD ¶20,697, 22,281)

A finding is made of the testimony of respondent's superintendent, as to his lack of knowledge or awareness of the ramp being used as an access to the bolt-up deck and as to a cable being strung at one of the well pulleys and his lack of knowledge of employees using a ladder to the pedestal to gain access to the bolt-up deck, to be totally and entirely incredible.

His self-contradictory testimony that from the ground he could observe strung cable across pulley prior to the inspection and that he could observe storage of bolts on the bolt-up deck is entirely inconsistent with his inability to observe the crossing ramp in open view, which could be observed from the ground, and the access ladder to the pedestal which was also equally in open view.

The complainant has met and carried his burden of proof as to the three cited violations, and respondent was in serious violation of citation 1, items 1 and 2, and citation 2 for willful violation of 29 CFR 1926.500(d)(1).

## Citation 2: Alleged Willful Violation of 29 CFR 1926.500(d)(1)

Complainant introduced Exhibit GC-6, quoting a 29 CFR 1926.500(d)(1) alleged serious violation by respondent of open-sided floor, based upon an inspection made February 13, 1974, at a workplace at 1101 Walnut Street, Kansas

City, Missouri, along with Exhibit GC-7, citation for nonserious violation by respondent of 29 CFR 1926.500(b)(1), based upon 25 feet of unguarded open-sided floor at the third floor level from an inspection on February 7, 1974, of a worksite at 18815 East 39th, Independence, Missouri.

The Review Commission's definition to what constitutes a willful violation, as stated in Secretary v. Titanium Metals Corp. of America, OSHRC Docket 14080, 80 OSHRC 6/A2, 7 BNA OSHC 2173, CCH OSHD ¶24,198 (Petition denied 1980, 3rd Circuit), states:

> "...the Commission has followed a test that regardless of venal motive, willfulness is established by a conscious, intentional, deliberate decision and may be characterized by a careless disregard of the requirements of the Act or an indifference to employee safety."

Here the respondent made a conscious and deliberate decision not to comply with a known requirement of the Act in not providing interim guardrail protection in three areas, namely the pedestal, the ramp and finally the bolt-up deck. The Commission's definition has been adopted in the Eighth Circuit by Western Waterproofing Co., Inc. v. Marshall & OSHRC, 576 F.2d 139 (8th Cir., 1978), p. 143, wherein the Court stated:

> "Western's officials substituted their own judgment for the provisions of the standards and therefore cannot escape the conclusion that they acted voluntarily with either intentional disregard of, or plain indifference to, the requirements of the Act. The regulations allow no such unbridled discretion."

The respondent was in willful violation of 29 CFR 1926.500(d)(1), in that the record is replete with the testimony of its job superintendent and its personnel manager with responsibilities for its safety program, of a deliberate decision not to install temporary guardrails.

## PENALTY

A review of the cases involving affirmances of willful violation indicates the principal guideline to be applied.

> "In respect to Occupational Safety and Health Act provision penalizing an employer who willfully violates the safety requirements of the Act, Congress intended to punish the conduct of one who 'intentionally disregards the statute or is plainly indifferent to its requirements'." [Intercounty Construction Co. v. OSHRC, 522 F.2d 777, p. 778 (4th Cir., 1975)]

The penalties heretofore assessed indicate Western Waterproofing Co., Inc. v. Marshall & OSHRC, supra., $9,000; Intercounty Construction Co. v. OSHRC, supra., $5,000; Cedar Construction Co. v. OSHRC and F. Ray Marshall, 587 F.2d 1303 (1978), $9,500 reduced to $4,050; National Steel & Shipbuilding Co. v. OSHRC, 607 F.2d 311 (9th Cir., 1979), $2,000; Georgia Electric Co. v. F. Ray Marshall & OSHRC, 595 F.2d 309, $6,500 and $650 respectively for the willful and serious citation.

The evidence disclosed that the respondent's construction involved some 106,000 man-hours at the jobsite, with no employee falling or having been seriously injured, and it is felt that this should operate as a mitigating circumstance in light of the foregoing cases and also serve the stated principle to act as a deterrent and to punish respondent for a deliberate violation of the guarding standard, therefore it is felt that a penalty of $5,760 is appropriate for citation 2, willful violation, along with a penalty of $720 for each of the serious violations.

## FINDINGS OF FACT

Based upon the preponderance of the credible evidence, the following findings of fact are made:

1. Respondent is a corporation which, on June 17 and June 18, 1981, maintained a construction jobsite at a project which was some four miles south of Holcomb, Kansas, where it was engaged in steel erection.

2. Respondent maintains its principal office and place of business in Kansas City, Missouri.

3. Respondent is engaged in the business of structural steel erection, which is a business affecting commerce as the term is defined in the Act.

4. As a result of the inspection made on June 17 and June 18, 1981, respondent was issued citations for violation of three provisions of the Act, consisting of one citation for serious violation, with two items, and one citation for willful violation, pursuant to section 9(a) of the Act.

5. The citations and proposed penalties were issued on August 25, 1981, with respondent filing its notice of contest August 27, 1981.

6. Respondent employed 73 persons at the Sunflower Electric Plant worksite and approximately 160 employees in its various business activities.

7. The inspection was precipitated by employee Simpson's complaint of unguarded floors and an unguarded pedestal utilized as access to the bolt-up deck.

8. Compliance officers Lathrop and Groves obtained a warrant respecting the areas to be inspected, and under the warrant were accompanied by job steward Tipton, where they observed a ladder used to gain access to a top of a turbine pedestal, which had a ramp connected from it to the bolt-up deck, where respondent had a crew of some four or five men working installing handrail around an interior stairway.

9. The pedestal was 4 feet wide, 28 feet, 8 inches, long, with cemented bolts protruding from the surface.

10. On the right side of the pedestal the distance to ground level was 20-25

feet, and on the left-hand side was a distance of 45-50 feet to ground level.

11. At the time of the inspection, the pedestal was not equipped with standard railing or the equivalent and had not been so equipped for a period of approximately three and-a-half weeks prior to the inspection.

12. The ramp crossing from the pedestal to the bolt-up deck was approximately 32 inches wide and 10 feet, 7 inches, long, and crossed a 2-foot open gap between the pedestal and the bolt-up deck which was some 45-50 feet from ground level, and at the time of the inspection and for approximately three and-a-half weeks preceding had no standard railing or the equivalent attached to it.

13. The bolt-up deck was two bays wide, approximately 150-200 feet long and a structural part of the power plant.

14. At the time of the inspection, respondent's employees were erecting steel above the bolt-up deck.

15. The bolt-up deck was used to store materials and tools, and was approximately 45-50 feet above ground level and was not guarded by standard railing or its equivalent.

16. The ladder, unguarded pedestal, ramp and bolt-up deck were utilized by a substantial number of respondent's employees and its foremen to gain access to the bolt-up deck in the normal pursuit of their duties.

17. There existed the falling hazard of a distance of 20-50 feet from either the pedestal, ramp or bolt-up deck.

18. Work activities took place at the edge of the bolt-up deck, consisting of the utilization of two well pulleys for the transfer of tools and bolts for stockpiling for the steel erection.

19. The employees Tipton and Simpson had complained previous to the inspection to their foremen and superintendent about the unguarded conditions of the

pedestal, ramp and bolt-up deck.

20. Respondent's management made a deliberate decision not to provide interim guarding on the pedestal ramp or bolt-up deck.

21. Respondent utilized no alternative means of guarding for the pedestal, ramp or bolt-up deck. Respondent's foremen established that a cable could have been strung around the perimeter of the bolt-up deck in approximately an hour's time.

22. Respondent's supervisory personnel, who were on the jobsite and during the course of time preceding the inspection of approximately three and-a-half weeks, were aware of the lack of perimeter guarding.

## CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of the Act.

2. Jurisdiction over the parties in the subject matter herein is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act, and the citations were issued in accordance with section 9(a) of the Act.

3. Respondent committed a serious violation of section 5(a)(2) of the Act by failing to comply with the Occupational Safety and Health Act of 1970, as alleged in citation 1 and complaint as being in serious violation of 29 CFR 1926.500(d)(1) and 29 CFR 1926.500(d)(2) and in willful violation as alleged in citation 2, item 1, of 29 CFR 1926.500(d)(1).

## DECISION AND ORDER

Based upon the above findings of fact and conclusions of law, it is hereby ORDERED:

1. Citation 1, items 1 and 2, for alleged serious violations of 29 CFR 1926.500 (d)(1) and 29 CFR 1926.500(d)(2), is affirmed, and a penalty of $720 for each

violation respectively is hereby assessed, for a total of $1,440.

2. Citation 2 for alleged willful violation of 29 CFR 1926.500(d)(1) is affirmed, and a penalty of $5,760 is hereby assessed.

DATE: August 2, 1982

Paul E. Dixon, Judge, OSHRC

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
Room 7B11, Federal Building
1100 Commerce Street
Dallas, Texas 75242

NOTICE OF DECISION

Secretary of Labor v. Electro Painters, Inc.
OSHRC Docket No. 81-2093

1. Enclosed is a copy of my decision. It will be filed with the Commission on August 2, 1982, and will become the final order of the Commission on September 1, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is September 1, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Louis G. LaVecchia
Judge, OSHRC

Date: July 13, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, Complainant, | : | |
| | : | OSHRC |
| v. | : | Docket No. 81-2093 |
| | : | |
| | : | |
| ELECTRO PAINTERS, INC., Respondent. | : | |

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DECISION AND ORDER

Appearances:

Donald W. Hill, Esquire, for the Complainant.

D. Allen Grumbine, Esquire, for the Respondent.

This is a proceeding under section 10(c) of the Occupational Safety and Health Act of 1970. The respondent was cited for several alleged violations of the safety standards promulgated under the Act. It did not contest Item 1a of Citation No. 1, nor Item 1 of Citation No. 2. Those have become final orders by operation of law. The remaining items (other than 1a of Citation No. 1) are contested.

A hearing in the matter was held on April 27, 1982 at Dallas, Texas.

The respondent stipulated to the jurisdiction of the Commission in this proceeding, and to its engagement in a business affecting commerce within the meaning of applicable sections of the Act. (Answer, pp. 1,2).

The alleged violations, as set forth in Citation No. 1, and characterized as "serious," are described as follows:

Item

1b 29 CFR 1910.107(c)(6): Electrical wiring and equipment not subject to deposits of combustible residues but located within spraying area(s) was not of the explosion-proof type approved for Class I, Group D, locations conforming to the provisions of Class I, Division I, hazardous locations:

a. Paint Shaker, no S/N, Spraying Area.
b. Exhaust window fan, no S/N, Spraying Area-North Wall.
c. Two (2) each off/on switches to lights - Spraying Area - East Wall.
d. Sixteen (16) each Colorant Machine operating on 110 volt circuit, Spraying Area.
e. Electrostatic Hand Spraying Machine, no S/N, Spraying Area.

1c 29 CFR 1910.107(c)(7): Electric lamps outside of but within 20 feet of spraying area(s), and not separated therefrom by partition(s), were not totally enclosed to prevent the falling of hot particles:

Six (6) each Fluorescent Lamps, Spraying Area.

1d 29 CFR 1910.107(e)(2): The quantity of flammable or combustible liquids kept in the vicinity of spraying operations exceeded the minimum required for operation:

Approximately 150 gallons of paint and catalyst including two (2) 55-gallon drums of cleaning solvent, Spraying Area.

1e 29 CFR 1910.107(i)(6): Electrically conductive objects in the electrostatic hand spraying area(s) were not adequately grounded:

Metal paint containers and wash cans.

An unallocated penalty of $280 was proposed for the alleged violation of all items included in Citation No. 1.

The Relevant Testimony

The government compliance officer stated that he performed an inspection of the respondent's warehouse in Dallas on July 16 and 17, 1981. An employee complaint had mentioned the possibility of hazardous fumes being present in the workplace, and also the presence of possible electrical shock hazards. (Tr. 5). No spraying operations were being done at the time of the inspection, the employees having been assigned duties in the field. (Tr. 5,6).

The area where spraying operations were performed was a room about 25 feet long, 20 feet wide, and perhaps 10 feet high. An exhaust fan was located on one wall and there was an overhead metal door. (Tr. 7,8). The inspector noted, upon nearing the employer's office area, an odor of some kind and a burning sensation in his eyes. He felt a little dizzy. (Tr. 8). He experienced the same sensations in the spraying area. There was a portable, hand-held, electrostatic spraying unit plugged into a 110-volt outlet in the spray room. (Tr. 9). The pilot light on a hot water heater (gas) was lighted, as was a gas pilot light on an air conditioning unit. (Tr. 9). The other conditions described in the citation were also noted. (Tr. 9).

Using a Scott's Vapor Tester, the inspector tested containers of paint, catalyst, and cleaning solvent that were used in the spraying operations. (Tr. 10). Substantial quantities of these materials were found in the spray room. (Tr. 15).

On cross-examination the witness stated that he had a college degree in Business Administration, but no background in chemistry or electrical engineering. (Tr. 19). He was told by respondent's representatives that very little spray painting was done at the warehouse and that the bulk of respondent's painting was done in other places. (Tr. 24). He considered combustion possible only when the lower explosive limit in a concentration of vapors was reached. (Tr. 27). Since there was no spraying operation underway at the time of the inspection the compliance officer could not test the atmosphere to determine whether combustible quantities of vapors were present. (Tr. 28). No such testing was conducted at any time during the inspector's visit. (Tr. 28). The only testing performed was done at six-inch heights over open containers of paint, etc., with the Scott tester. (Tr. 29). No testing of residues or deposits or dust was done, and very little residue was noted. (Tr. 31). Upon examining his inspection notes the witness stated that the paint reading reached 18 percent of the lower flammable level; the catalyst reached 40 percent of the lower flammable limits; and the cleaning solvent measured 10 percent of the lower flammable explosive limit. (Tr.33).

The witness stated that he was only testing the materials used in the spraying operations for their combustibility. (Tr. 33). He was not able to say whether the vapors from the materials would reach the lower flammable limits under actual working conditions. (Tr. 33). Without reaching the lower flammable limits, combustion could not occur. (Tr. 35). Even assuming the presence of vapors which were within the limits of combustibility, there must be present a source of ignition in order to cause an explosion. (Tr. 48, 50).

The respondent's president testified that its business in the main comprises the electrostatic painting or coating of primarily metal office furniture. The vast majority of the work is performed at the customers' locations. The company has been in business about 25 years, has about 20 branches throughout the Umited States, and does some business in Canada. (Tr. 53,54). The equipment used is not the conventional spray gun mode. There is no overspray; the electrostatic system used can be kept within the confines necessary to do the job. (Tr. 55). (Ex.R-1). (Ex. R-2). The system is automatically grounded into the building's electrical modes when the work is performed. (Tr. 61). The items to be coated are also grounded individually with proper wires provided by the respondent for that purpose. (Tr. 61). Metal paint cans are normally not within the area when the painting is being done. At the warehouse, once the paint is mixed it is put in sealed pots and becomes part of a grounded unit. (Tr. 61).

The company has never had a fire or explosion or accident of that nature in its 25-year history, and has not been previously cited by OSHA. (Tr. 62).

Respondent's manager of technical services, with 20 years' experience in the field of electrostatic coatings, stated that in formulating coatings to be used in its processes the safety factor is given a very high priority. Consequently, certain properties which might be superior in durability, etc., are sacrificed in order to attain a safer product. (Tr. 68). Calculations based on the typical jobs performed at the Dallas warehouse indicated that combustible materials in the atmosphere would be about .019 percent by volume. This figure translates to less than 2 percent of the lower combustible limit. Accordingly, it would take 50 times that amount to arrive at the lower combustible limit. (Tr. 71-74). An industrial hygienist, Carol Lane, was engaged to perform testing during actual operations at the warehouse. At no time did the readings reach more than 5 percent of the lower explosive level. The fan was off and the door closed at the time of the testing, with measuring instruments only two feet from the piece being painted. (Tr. 75). This was an effort to present the worst-case condition, since normally the door is opened to about six inches and the exhaust fan is operating. (Tr. 76). Two percent was obtained at two feet; at three feet the reading was 1.9 or less; and at six feet from the object being painted no readings were attainable for lack of detection of combustible vapors. (Tr. 76). The readings of two to five percent translate to two to five percent of one percent of combustible vapors in the atmosphere. (Tr. 77). The meters used for testing had been calibrated. (Tr. 81). (Ex. R-3).

An expert in the field of electrostatic processes explained the manner in which the "Ransburgh gun" is used in the electrostatic coating of objects. (Tr. 120-123). The gun, when properly used, is incapable of releasing enough engery to ignite the most flammable mixture of any paint solvent. The process results in an infinitesimal amount of overspray. Use of the types of solvents utilized by the respondent in conjunction with the Ransburgh gun creates no hazard of explosion. (Tr. 131). Tests have been conducted to measure the energy release by the Ransburgh gun, and they have been negative insofar as ignition hazards are concerned. (Tr. 131). None of the readings testified to by the compliance officer constituted a combustible mixture. (Tr. 132). From his knowledge of the warehouse respondent uses for electrostatic coating of some objects, and considering the equipment used and the manner in which the paint is applied, the witness could see no danger in the operations. (Tr. 140).

## Discussion

Only the respondent filed a brief of law and argument. It argues, essentially, that the cited operations do not fall within the definition of "a spraying area" as defined in 29 CFR 1910.107(a)(2),i.e., "any area in which dangerous quantities of flammable vapors or mist, or combustible residues, dust or deposits are present due to the operating of the spraying processes." It points out that dangerous quantities of flammable vapors or mist can exist only where the concentration of vapors or mist reaches the lower explosive limit of the material involved. Hydronamics, Inc., 7 OSHC 2019 (1979). The extent of the testing done by the compliance

officer was the holding of test instruments about 6 inches above open cans of solvent, catalyst and paint to determine vapor concentrations. Even under this obviously unsatisfactory method of determining whether dangerous mixtures of the materials were in the atmosphere, the lower explosive limit of the solvents was not reached. The readings were, in fact, far below the lower explosive limits of the materials. No actual spraying operations were being performed at the time of the inspection, reflecting adversely upon the weight of the evidence in any event.

The simulated operations conducted by the respondent for test purposes and the presentation of its case bear out its contentions, in the absence of any evidence to the contrary, that no hazard is presented in the spray painting by electrostatic gun of objects in the warehouse used for that purpose. In these circumstances, Items 1b through 1e of Citation No. 1 will be, and hereby are, VACATED.

So ORDERED.

Louis G. LaVecchia
Administrative Law Judge

Dated: August 2, 1982
Dallas, Texas.

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

55 East Monroe Street
Room 1530
Chicago, Illinois 60603

## NOTICE OF DECISION

Secretary of Labor v. International Bridge Corporation
OSHRC Docket No. 80-3748

1. Enclosed is a copy of my decision. It will be filed with the Commission on August 4, 1982, and will become the final order of the Commission on September 3, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is September 3, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Ralph B. Maxwell
Judge, OSHRC

Date: July 15, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 80-3748 |
| INTERNATIONAL BRIDGE CORPORATION, a Corporation, | : | |
| Respondent. | : | |

## DECISION

A citation was issued by the complainant (Secretary) on June 6, 1980, charging the respondent International Bridge Corporation (International) with three serious violations of OSHA safety regulations. The citation relates to conditions observed during a routine OSHA inspection on May 28-30, 1980, at a bridge construction worksite near Hazelcrest, Illinois.

The hearing in this case was begun in Chicago, December 17, 1980. After several continuances, the presentation of evidence was ultimately completed September 29, 1981. The last brief was filed December 3, 1981. The Secretary was represented in these proceedings by attorney Leonard Borden of the office of the Solicitor, Department of Labor, Chicago. International was represented by attorneys John M. Vander Aa and James Lanting, of the firm Vander Aa and Lanting, South Holland, Illinois.

## Eye Protection

Item 1 of the citation alleges a failure to use required eye protective equipment. The citation states:

> Employees were not protected from potential eye injury by the use of eye or face protection or other appropriate personal protective equipment:
>
> Protective equipment was not used to protect employees from eye injury when chipping concrete with air hammers. Location: East bound lane of route 294 at Ashland Avenue.

The regulations alleged to have been violated are 29 C.F.R. 1926.28(a) and 1926.102(a)(1). Section 1926.28(a) reads as follows:

> The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

Section 1926.102(a)(1) is as follows:

> Employees shall be provided with eye and face protection equipment when machines or operations present potential eye or face injury from physical, chemical, or radiation agents.

The evidence conclusively established that several of International's employees were using jackhammers to strip concrete and blacktop from the surface of a bridge. They wore no safety goggles or other equipment to protect their eyes from the danger of flying fragments.

The OSHA compliance officer testified that while on the inspection tour,

> "I observed approximately seven employees chipping asphalt and concrete from the surface of the road with air hammers without the protection of eyeglasses, eye goggles or face shields. . . " (T 49)

With reference to the hazard presented, the compliance officer testified:

> "Well, chipping concrete with an air hammer, chips are flying around. Some of the employees were facing one another and a piece of concrete could be embedded in an employee's eye. He could lose his eyesight or have severe eye injury, even severe facial damage." (T 50)

International argues that its obligations under the regulations were fulfilled in that Rule No. 4 of its Company Safety Rules (Exh.5) specifically requires the wearing of eye and face protection where there is danger from flying objects or particles. International further points out that appropriate eye and face protection was provided by the company and was available at the jobsite.

The Commission has ruled that more is required of a company than promulgating a personal protection regulation and furnishing the equipment. Bechtel Poser Co., 7 OSHC 1361 (1979). The employer must also show that the safety rule was effectively communicated to the employees, and was enforced. A. J. Mc Nulty & Co., 4 OSHC 1097 (1976); Candler-Rusche, Inc., 4 OSHC 1232 (1976); Jensen Construction Co., 7 OSHC 1477 (1979); R. Zoppo Co., Inc., 9 OSHC 1392 (1981).

International's sole method of communicating the safety workrule to the employees was the furnishing each of them with the safety booklet. (T 158)

No procedure for enforcement of safety rules had been set up or implemented. (T 131) Respondent's safety director testified that it was not until after the date of the inspection that supervisors were instructed to carry out a system of progressive disciplinary action to enforce the safety rules. (T 164, 166)

The safety policies of the International in force at the time of the citation were patently inadequate. Rules unenforced are soon rules dis-disdained. By failing to adequately communicate safety requirements to employees, and by not enforcing them, International failed to fulfill its obligation under the Act to insure safe working conditions.

A violation of Sec. 1926.28(a) has been duly established. Therefore, arguments of International relating to the alternative allegation of a violation of Sec. 1926.102(a)(1) need not be addressed.

Fall Protection

Item 2 of the citation charges that personal protective equipment was not used by employees who were working more than 25 feet above the ground. The citation alleges:

> Employee(s) were not protected against falls of more than 25 feet by the use of safety nets, ladders, scaffolds, catch platforms, temporary floors, safety lines, safety belts, or other appropriate personal protective equipment:
>
> Fall protection equipment was not used where it was necessary by reason of hazards encountered in a manner capable of causing serious injury or impairment in the function of any part of the body. Location: Three employees placing concrete in stem from 32 feet above the ground. Employee directing concrete breaker on south side of bridge 50 to 60 feet above ground and road.

The regulations that the government claims were violated are 29 C.F.R. 1926.28(a), (quoted supra), 29 C.F.R. 1926.104(a) and 1926.105(a). Sec. 1926.104(a) reads as follows:

> Lifelines, safety belts, and lanyards shall be used only for employee safeguarding. Any lifeline, safety belt, or lanyard actually subjected to inservice loading, as distinguished from static load testing, shall be immediately removed from service and shall not be used again for employee safeguarding.

Sec. 1926.105(a) states:

> Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

The OSHA inspector testified that he observed three of International's employees working on a pier or column 32 feet above the ground. They were pouring concrete into a metal form (called a stem form) that had been erected. (T 54) They did not have safety belts. There was a single guard rail on one side of the work platform. The other three sides were unprotected.

In a separate instance, the inspector observed an employee standing on a parapet wall 40 to 60 feet above ground level, giving directions to the operator of a chipping machine that was in the process of demolishing a portion of the parapet wall. (T 57) The inspector testified that the employee, although standing at the edge of the wall, had no type of fall protection. Photos entered in evidence quite graphically support this testimony (Exhs. 5, 8).

International contends that the single guardrail on the one side of the work platform atop the stem form was adequate to protect the workers, since that was the only side where employees worked. However, even if that were a valid defense, the photograph Exhibit 5 negates the assertion that employees stayed exclusively on the one side. It shows one employee working on the extreme edge of an unprotected side.

With reference to the worker on the parapet wall, the respondent conceded a violation occurred, but attributed it to idiosyncratic employee misbehavior in violation of company safety policy. However, the defense of employee misbehavior is not available to an employer that does not enforce safety policy. In Asplundh Tree Expert Co., the Commission said that to support such a defense,

> "The employer must show that it established work rules designed to prevent the violation adequately communicated these rules to its employees, took steps to discover if violations of these rules occurred, and effectively enforced the rules when violations were discovered." 6 OSHC 1951, 1953 (1978)

Because International failed to show that it qualified to assert the affirmative defense of employee misconduct, such defense fails.

The evidence has satisfactorily established that both violations occurred as charged in Item 2 of the citation. The same will therefore be affirmed as violations of 29 C.F.R. 1926.28(a).

## Ladder

Item 3 of the Citation alleges a failure to provide a suitable ladder for access to the top of the stem form. The citation states:

> Ladder(s) were not used to give safe access to all elevations:
>
> Employees were exposed to falling 32 feet to ground level when using horizontal bracing as steps for access to top of form. Fall capable of causing serious injury or fatality.

The regulation governing the use of ladders is 29 C.F.R. 1926.450(a)(1):

> Except where either permanent or temporary stairways or suitable ramps or runways are provided, ladders described in this subpart shall be used to give safe access to all elevations.

It is undisputed that no ladder was provided for access to the work platform atop the stem form. Workers reached the platform by climbing the stem form's vertical side, using "stiffeners" as rungs. (T 198) Stiffeners are horizontal iron slats, used to brace the form, spaced twelve inches apart from the bottom to the top of the stem form. (T 198)

International suggests this item be vacated for the reason that these stiffeners made the stem form the "substantial equivalent" of a fixed verticle ladder.

In order to qualify as a fixed ladder, or substantial equivalent, a ladder must meet the requirements of Sec. 1926.450(a)(5). The stem form falls far short of these requirements. Among other things, there are no side rails or prescribed safety devices that a fixed verticle ladder must have under that regulation. (T 85, 95, 96, 97)

No ladder as required by section 1926.450(a)(1) having been provided by the respondent, citation Item 3 must be affirmed.

The evidence and the record as a whole, support the following findings of fact:

## FINDINGS OF FACT

1. Respondent, International Bridge Corporation, is a corporation having a place of business at 7015 West 5th Avenue, Gary, Indiana, and a workplace or near Hazelcrest, Illinois where it engaged in concrete bridge construction, general contracting and related activities.

2. Jurisdiction is not contested by respondent.

3. Several of respondent's employees were using jackhammers to strip concrete and blacktop from the surface of a bridge; none of them wore safety goggles or other equipment to protect their eyes from flying fragments.

4. Three of respondent's employees were working on a stem form 32 feet above the ground without safety belts; a single guard rail had been erected on one side of the platform; the other three sides were without guardrails.

5. An employee of respondent was standing on a parapet wall 40 to 60 feet above ground level without any fall protection.

6. Respondent did not provide a ladder for access to a 32 foot high work platform atop a stem form; workers reached the platform by climbing the stem form's vertical side, using horizontal iron slats, 12 inches apart, as rungs; the iron slats or stiffeners had no side rails or other safety devices and was not a fixed ladder as defined by regulation.

7. Respondent's Safety Rule No. 4 requires the wearing of eye and face protection when there is danger from flying objects or particles; respondent's sole method of communicating its safety rules to employees was by furnishing each a copy of the safety booklet.

8. No procedure for enforcement of safety rules was set up or implemented until after issuance of the instant citation.

9. The penalties proposed herein are excessive under the facts and circumstances; penalties of $180.00 for Item 1, of $320.00 for Item 2, and of $60.00 for Item 3 are appropriate.

From the above findings, the following conclusions of law are reached:

## CONCLUSIONS OF LAW

1. Respondent was at all times material and employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Occupational Safety and Health Act.

2. Respondent was at all times subject to the requirements of the Act and the standards promulgated thereunder.

3. The commission has jurisdiction of the parties and the subject matter of this proceeding.

4. As to Item 1 of the citation, respondent violated provisions of 29 C.F.R. 1926.28(a) for which a penalty of $180.00 should be imposed.

5. As to Item 2 of the citation, respondent violated provisions of 29 C.F.R. 1926.28(a) for which a penalty of $320.00 should be imposed.

6. As to Item 3 of the citation, respondent violated provisions of 29 C.F.R. 1926.450(a)(1) for which a penalty of $60.00 should be imposed.

7. Respondent's method of communicating its safety rules to workers and its method of enforcing compliance with safety rules were inadequate.

8. The iron slats used as rungs by workers to reach the top of a stem form do not meet the prescribed specifications for a verticle fixed ladder.

## ORDER

Based upon the foregoing findings of fact and conclusions of law, it is now ORDERED that:

1. Item 1 is affirmed as a serious violation, and a penalty of $180.00 is imposed.

2. Item 2 is affirmed as a serious violation, and a penalty of $320.00 is imposed.

3. Item 3 is affirmed as a serious violation, and a penalty of $60.00 is imposed.

Ralph B. Maxwell
Judge, OSHRC

Dated:

Chicago, Illinois

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
ROOM 7B11, FEDERAL BUILDING
1100 COMMERCE
DALLAS, TEXAS 75242
FTS 729-5271
COM (214) 767-5271

## NOTICE OF DECISION

Secretary of Labor v. **John R. Hughes Construction Corporation**
OSHRC Docket NO. **80-4354**

1. Enclosed is a copy of my decision. It will be filed with the Commission on **August 5, 1982**, and will become the final order of the Commission on **September 7, 1982**, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D. C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is **September 7, 1982**. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed portcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92 and 93.

E. Carter Botkin
**E. CARTER BOTKIN**
**Administrative Law Judge**

Date: **July 16, 1982**

OSHRC Form 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>JOHN R. HUGHES CONSTRUCTION CORPORATION,<br><br>Respondent. | OSHRC DOCKET NO. 80-4354 |

JUDGE'S DECISION
AUG 5 '82
RECEIVED
FINAL ORDER ON
SEP 7 '82

DECISION AND ORDER

Appearances:

E. Justin Pennington, Esq., of Dallas, Texas, for the Complainant.

Scott R. Kidd, Esq., of Austin, Texas, for the Respondent.

BOTKIN, Judge:

This is a proceeding brought before the Occupational Safety and Health Review Commission ("the Commission") pursuant to §10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq. ("the Act"), contesting citations issued by the complainant, the Secretary of Labor ("the Secretary"), to the respondent, John R. Hughes Construction Corporation ("Hughes Corp."), under authority vested in the Secretary by §9(a) of the Act.

As a result of an inspection conducted on June 26, 1980, of a workplace located at Loop 1 North at Hart Lane, Austin, Texas, where respondent's employees were engaged in work activities necessary to install a 48-inch water main beneath Loop 1, three citations were issued to respondent on July 11, 1980, alleging violations of §5(a)(1) and §5(a)(2) of the Act. The citations charged

respondent with (i) a serious violation of §5(a)(1) of the Act, (ii) a willful serious violation of §5(a)(2) of the Act, and (iii) a repeat nonserious violation of §5(a)(2) of the Act. A total penalty of $5,120.00 was sought.

Respondent timely filed notice of contest on July 23, 1980, commencing this proceeding before the Commission under §10(c) of the Act. Thereafter, a complaint and answer were filed with the Commission. A hearing was held in this matter on March 18, 1981, in Austin, Texas. No affected employees or representatives of affected employees participated in the proceeding. Complainant submitted a post-hearing brief and respondent submitted proposed findings of fact and a post-hearing brief. The matter is now ripe for decision.

## JURISDICTION

In its answer, respondent admitted that jurisdiction of the proceeding was conferred on the Commission by §10(c) of the Act. It denied that it is an employer engaged in a business affecting commerce who has employees within the meaning of §3(5) of the Act. However, at the hearing, respondent stipulated that it is an employer within the meaning of §3(5) of the Act (Tr. 5). I so find. Therefore, no issue remains in regard to jurisdiction.

## ISSUES

1. Whether respondent was in repeat nonserious violation of 29 CFR 1926.450 (a)(2), and, if so, the appropriate penalty therefor.

2. Whether respondent was in serious violation of §5(a)(1) of the Act, and, if so, the appropriate penalty therefor.

3. Whether respondent was in willful serious violation of 29 CFR 1926.652(c), and, if so, the appropriate penalty therefor.

## PARTIAL RESOLUTION OF THE FACTS

On June 26, 1980, Roy E. Moore ("CO Moore") and Walter B. Cunningham ("CO Cunningham"), compliance officers with the Occupational Safety and Health Administration ("OSHA") conducted an inspection of respondent's workplace located at Loop 1 North at Hart Lane in Austin, Texas (Tr. 12, 14-15, 116-117). Respondent's employees were engaged in work activities related to the installation of a water main beneath Loop 1, pursuant to a contract between respondent and the city of Austin (Tr. 13, 17-18, 167-168).

CO Moore, a safety engineer, has been employed by OSHA since June 1975 (Tr. 7-8, 11-12). He holds a B.S. degree in electrical engineering (Tr. 9-10, 96). He has over 25 years of combined experience in the fields of manufacturing engineering and manufacturing engineering management, including the care and maintenance of manufacturing facilities and oversight of the construction of new manufacturing facilities (Tr. 8). Manufacturing engineering involves consultation with design engineers regarding the choice of machinery and processes. Manufacturing engineering management is an extension thereof. One of the primary considerations of both jobs concerns the design features of machinery which is manufactured as it relates to job safety (Tr. 9). Although he had some involvement in excavation of basements for several houses in Illinois, his personal work experience in the construction business as it relates to excavation had been primarily with OSHA. He has never been an engineer on the commercial construction of underground utilities such as utility water and waste water (Tr. 97). He has attended various training courses since becoming employed by OSHA, including a two week course at Oklahoma University in soil mechanics and soil safety (Tr. 10-11, 97). The course consisted of both lecture

and laboratory experience. The course dealt with (i) the nature of soils, (ii) soil behavior under various conditions, (iii) the load bearing capacity of soils, (iv) the freestanding capacity of soils, (v) the kinds of forces generated by soils and what can happen as a result thereof, and (vi) the effect of water on soils (Tr. 11, 97).

CO Cunningham, a safety engineer, has been employed by OSHA for approximately four years (Tr. 111-112). He holds a B.S. degree, together with approximately 40 additional hours in engineering subjects. He is a registered professional engineer in the field of safety and a certified safety professional (Tr. 115). His qualifications in the fields of industry (safeguarding of industrial equipment and machinery) and vertical transportation (elevator safety) enabled him to become a licensed professional safety engineer in the state of California (Tr. 115-116). During his employment with OSHA, he has conducted approximately 450 inspections with one-third of them involving construction activities (Tr. 112). On a reverse chronological basis, his prior work experience included the ownership and operation of a safety consulting firm, for an approximate eight year period, where he provided such service to businesses (insurance companies, small contractors and other small businesses) which did not have their own safety departments (Tr. 112). In such work, he conducted simulated OSHA inspections (Tr. 113). Other periods of employment were spent with (i) several insurance companies as a safety engineer, (ii) Westinghouse Electric, and (iii) the U.S. Corps of Engineers (Tr. 113-114). The latter, a 19-month stint, included duties with a construction battalion involving a miscellany of construction activities, such as (i) constructing airport landing areas and barracks, (ii) paving roads, (iii) building trenches, and (iv) installing water and sewer lines (Tr. 114). His

total work experience in safety related occupations exceeds 20 years (Tr. 114-115). Special training courses which he has taken since joining OSHA include a soil safety course at Oklahoma University and a course in underground tunnels at the Ampshire Academy in West Virginia (Tr. 115).

John R. Hughes, Sr. ("Hughes"), is president of the respondent and John R. Hughes, Jr. ("Hughes, Jr."), his son, is vice-president thereof (Tr. 13-14, 118-119, 164-165). Hughes, his wife and son own the respondent corporation. He started this business approximately 15 years ago (Tr. 165). However, he has been involved in this type of work for 25 years, commencing as a laborer and ultimately becoming the owner of the subject firm (Tr. 204-205). He has laid three to five million feet of pipe in trenching operations in the Austin area (Tr. 205). He manages the respondent on a daily basis, bidding and pursuing jobs (Tr. 165). Until three or four months prior to the hearing, he oversaw the daily affairs (work activities) of respondent (Tr. 165-166). It is his practice to regularly visit worksites in order to keep informed of work progress and work conditions at each worksite (Tr. 166). He was completely familiar with "every inch" of the subject worksite prior to and on June 26, 1980 (Tr. 166-167).

After arrival at respondent's worksite during the morning of June 26, 1980, CO Moore presented his credentials to the foreman, Lee Davis ("Davis"). Shortly thereafter, Hughes, Jr., arrived and again CO Moore presented his credentials. They accompanied CO Moore throughout most of the inspection (Tr. 13-15). During the afternoon portion of the inspection, CO Cunningham came to the worksite to assist CO Moore in the inspection process (taking measurements and photographs)(Tr. 15, 116-118).

Davis was at the worksite on a regular basis, but not at all times. Hughes stopped by the worksite two or three times a day, but it was not determined how often Hughes, Jr. was there (Tr. 51, 93).

29 CFR 1926.450(a)(2)- Ladder Issue

Item 1 of repeat nonserious citation 3 alleges that, on or about the date of the inspection, a violation of 29 CFR 1926.450(a)(2) occurred as follows:

> 29 CFR 1926.450(a)(2): Defective ladder(s) were in use by employee(s):
>
> Ladder in trench east of Loop 1 southbound lanes had bent siderails and 5 damaged rungs.

The cited standard provides:

> §1926.450 Ladders.
>
> (a) General requirements.
>
> * * *
>
> (2) The use of ladders with broken or missing rungs or steps, broken or split side rails, or other faulty or defective construction is prohibited. When ladders with such defects are discovered, they shall be immediately withdrawn from service. Inspection of metal ladders shall include checking for corrosion of interiors of open end hollow rungs.

Many of the underlying facts related to this citation are not in dispute. On the date that respondent was inspected, there was an aluminum ladder in the trench located on the west side of the lanes for southbound traffic on Loop 1 North ("trench A")(Tr. 86-88, Ex. P-2).[1] It was a 24-foot extension ladder, with each section 12 feet long (Tr. 86). The rungs were made of aluminum tubing (Tr. 90). The ladder was resting on the bottom of the trench and

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1 Exhibits P-9k and P-10 are photographs of the ladder (Tr. 87-89).

against the east wall thereof (Tr. 87). The boring machine was also in trench "A" (Tr. 89, Ex. P-9k). Since the ladder was not extended, the ladder rungs of each section were parallel to and even with one another (Tr. 220-221). The side rails of the ladder were bent and there were also damaged rungs (Tr. 87).[2] The ladder rungs are approximately one foot apart (Tr. 96). One photograph was taken at an angle which does not reveal the damage to the ladder (Tr. 88, Ex P-10). In the other photograph, damage to the ladder can be seen (Tr. 89, Ex. P-9k). The bottom rung of the ladder was submerged in water. (Tr. 96).[3] Commencing at the surface of the water shown in the trench, the photograph reveals obvious damage to the first, third and fourth rungs above the water level (Tr. 89, Ex. P-9k). Those damaged rungs were approximately two, four and five feet above the bottom of the trench, respectively. The other two damaged rungs were near the top of the ladder (Tr. 96).[4] The damaged rungs near the bottom of the ladder exhibited a definite bowing or bending downward in the center portions thereof (Tr. 87-90, Ex. P-9k). Instead of being straight, the side rails of the ladder exhibit a definite bowing to the right (Tr. 90, Ex. P-9k). CO Moore did not observe this ladder being used by a workman during the inspection (Tr. 91). It was impossible to ascertain whether the damage to the ladder was old or new (Tr. 109).

---

2 Hughes admitted that the ladder was damaged (Tr. 221).

3 Nevertheless, that rung can be seen in Ex. P-9k.

4 My eye is unable to detect damage to the rungs near the top of the ladder in Ex. P-9k. This is probably due to camera angle. There is no reason to doubt CO Moore's testimony on this point (Tr. 87-89). Moreover, it went unchallenged by respondent.

This standard is designed to protect workers from falls caused by damaged or defective ladders.[5] The standard applies to the cited condition and the terms of the standard have not been met. Therefore, the existence of the hazard has been established.[6] Nevertheless, in its brief, respondent contends the evidence does not establish that the ladder was used in a damaged condition and, consequently, there is a failure of proof that a violation occurred. In effect, respondent argues that employee exposure to the cited condition was not proven. Respondent correctly points out that CO Moore (i) did not observe the ladder being used, and (ii) did not know how long the ladder had been in the trench (Tr. 91, 104-105). In fact, he could not tell whether the damage to the ladder was new or old (Tr. 107-109). However, his unrebutted testimony shows that (i) the boring machine was also in the same section of the trench as the ladder, (ii) a worker identified himself as the operator of the boring machine, (iii) Davis, the foreman, stated that the ladder was used by the boring machine

---

5 I agree with CO Moore's interpretation of the standard (Tr. 91-92).

6 See Pratt & Whitney Aircraft, 81 OSAHRC 39/A2, 9 BNA OSHC 1653, 1981 CCH OSHD ¶25,359(No. 13401, 1981), appeal withdrawn, No. 81-4104(2nd Cir. August 3, 1981), and cases cited therein for a discussion of this type of standard where a hazard is presumed. In so finding, I have not overlooked the testimony by Hughes that, since it was not extended, he assumed it was as strong as an undamaged ladder which was extended. However, at the same time, he admitted that he did not know how much residual strength the damaged ladder contained (Tr. 221). Moreover, this standard does not speak in terms of equivalence. I agree with CO Moore that (i) the structural integrity of the ladder had been substantially compromised by the damage thereto, and (ii) there was a possibility of the ladder failing and collapsing under the weight of a worker (Tr. 92). Despite the effect of a double rung, a person ordinarily places his foot on the leading edge of the rung in front. Finally, Ex. P-9k appears to reveal that the side rails in both sections exhibit a bow to the right.

operator to gain access thereto, (iv) there was no other available means of access to the bottom of the trench, and (v) Davis told him that the boring machine had not been in use for several days (Tr. 89, 91, 109).[7] As a result of the foregoing, CO Moore was of the opinion that the damaged ladder had been used to enter and leave the trench, but not for several days prior to the inspection (Tr. 91, 109).[8] The Commission had recently reaffirmed its previous holdings that, in addition to direct evidence, circumstantial and hearsay evidence are admissible in these proceedings and such evidence may be probative. Ultimate Distribution Systems, Inc., 82 OSAHRC ____, 1982 CCH OSHD ¶26,011 (No. 79-1269, April 15, 1982).[9] I find that said unrebutted testimony by CO Moore has probative value. I further find that the physical facts, coupled with the admissions (by Davis and the operator of the boring machine), support a reasonable inference that, several days prior to the inspection, the damaged

---

7 The Secretary unsuccessfully attempted to present Mr. Davis as a witness (Tr. 192-193).

8 He admitted that (i) this was an opinion, and (ii) it was not impossible that a worker had used the ladder on the day of the inspection. However, it is clear that his opinion was based on circumstantial evidence and admissions (Tr. 91, 109-110).

9 However, CO Moore's testimony regarding what he was told by Davis and the operator of the boring machine is not hearsay. It constitutes an admission by a party-opponent. See Rule 801(d)(2)(D) of the Federal Rules of Evidence.

ladder was used by the operator of the boring machine.[10] By the same token, the circumstantial evidence and admissions, together with reasonable inferences arising therefrom, support a finding that there was employee access to the cited condition. See Daniel Construction Company, 82 OSAHRC , 1982 CCH OSHD ¶26,027 (No. 16265, April 20, 1982) and cases cited therein.

The Secretary has the burden of proving employer knowledge of nonserious violations of the Act. Prestressed Systems, Inc., 81 OSAHRC 43/D5, 9 BNA OSHC 1864, 1981 CCH OSHD ¶25,358 (No. 16147, 1981). Therefore, the record must establish that the respondent knew or, with the exercise of reasonable diligence, could have known of the violation. The evidence establishes that (i) Davis was on the site on a regular basis, (ii) Hughes visited the worksite two or three times a day, and (iii) CO Moore presented his credentials to Davis after arrival at the worksite on the date of the inspection (Tr. 13-15, 51, 93).[11] The violative condition was readily discoverable by sight if either of them had exercised reasonable diligence. Therefore, the requisite knowledge was present. It is well established that a supervisor's knowledge is imputable to an employer.

---

10 In arriving at this finding, I have carefully weighed testimony by Hughes that (i) he buys approximately ten ladders a month, and (ii) he gets rid of damaged ladders as soon as he finds them (Tr. 221). However, these statements do not refute the above findings. He made no statement as to the frequency or regularity of inspections for damage to ladders. In fact, respondent offered no evidence that would establish the damaged ladder was not used until the day of the inspection. Moreover, other evidence establishes that this is not a novel situation with respondent (Exs. P-7 and P-8).

11 CO Moore's testimony is uncontraverted.

Wander Iron Works, 80 OSAHRC 40/A2, 8 BNA OSHC 1354, 1980 CCH OSHD ¶24,457 (No. 76-3105, 1980). I find that the violative condition did bear a direct and immediate relationship to employee safety and health. Therefore, a nonserious violation was established.

The next issue is whether the violation was repeated within the meaning of §17(a) of the Act. The evidence of record establishes that, at the time of the current violation, there was a Commission final order against the respondent for a violation of the same standard due to a defective ladder in use in a trench. The inspection took place in October 1978 and a citation was issued during the same month. Subsequently, respondent withdrew its notice of contest as part of a settlement agreement which was approved in March 1979 (Tr. 93-95, Exs. P-7 and P-8).

In its brief, respondent points out that the prior citation (October 1978) involved a different ladder (Tr. 104). It also contends that one previous unrelated citation does not establish a repeat violation, citing Bethelehem Steel v. O.S.H.R.C. ("Bethlehem"), 540 F.2d 157(3d Cir. 1976). In limine, it should be observed that I am constrained to follow Commission precedent. In Potlatch Corp. ("Potlatch"), 79 OSAHRC 6/A2, 7 BNA OSHC 1061, 1979 CCH OSHD ¶23,294 (No. 16183, 1979), the Commission rejected the "more than twice" concept favored by the Third Circuit in Bethlehem. In Potlatch, the Commission held that (i) a violation is repeated if at the time of the alleged repeated violation, there was a Commission final order against the same respondent for a substantially similar violation, (ii) a prima facie case of substantial similarity can be established by showing

that the past and present violations are for failure to comply with the same standard, and (iii) a respondent may rebut the prima facie case by establishing that the factual circumstances of the violations are so dissimilar that they cannot be viewed as substantially similar. I find that the Secretary has established a prima facie case. The fact that different ladders were involved in the two situations does not serve as a rebuttal thereof. Accordingly, I find that a repeat violation has been proven.

In light of the record and the statutory penalty criteria set forth in §17(j) of the Act, I conclude that a penalty of $125.00 is reasonable and appropriate.

## FINDINGS OF FACT

The evidence of record having been considered and evaluated in its entirety, the following facts are specifically found:

1. To avoid repetition, those facts set forth (i) under the headings entitled JURISDICTION and PARTIAL RESOLUTION OF THE FACTS, and (ii) those undisputed facts set forth in the third paragraph of the foregoing discussion of item 1 of repeat nonserious citation 3 (immediately following a recital of the standard), are hereby incorporated by reference to the extent that they are not set forth hereunder.

2. On June 26, 1980, an inspection was conducted by compliance officers of OSHA of a workplace located at Loop 1 North at Hart Lane in Austin, Texas, where respondent's employees were engaged in work activities related to the installation of a water main beneath Loop 1, pursuant to a contract between respondent and the city of Austin.

3. On the date that respondent was inspected, there was an aluminum ladder in the trench located on the west side of the lanes for southbound traffic on Loop 1 North.

4. It was a 24-foot extension ladder, with each section 12 feet long.

5. The rungs of the ladder were made of aluminum tubing.

6. The ladder was resting on the bottom of the trench and against the east wall thereof. A boring machine was in the same trench.

7. Since the ladder was not extended, the ladder rungs of each section were parallel to and even with one another.

8. The ladder rungs were approximately one foot apart. The bottom rung of the ladder was submerged in water.

9. There were five damaged rungs, two near the top of the ladder and, the first, third and fourth rungs above the water level at the bottom of the trench. Those near the bottom of the trench exhibited a definite bowing or bending downward in the center portions thereof.

10. The side rails exhibited a definite bowing to the right.

11. It was not possible to ascertain whether the damage to the ladder was new or old.

12. Circumstantial evidence and admissions by respondent's foreman and operator of the boring machine, together with reasonable inferences arising therefrom, establish that (i) several days prior to the inspection, the damaged ladder was used by the operator of the boring machine, and (ii) there was employee access to the cited condition.

13. The operator of the boring machine was not protected from a fall hazard related to the use of the ladder when the structural integrity thereof had been substantially compromised by damage thereto.

14. Respondent's supervisors knew or, with the exercise of reasonable diligence, could have known of the hazard described in finding no. 13 hereof which was created by the work conditions heretofore described.

15. The violative condition did bear a direct and immediate relationship to employee safety and health.

16. At the time of the current violation, there was a Commission final order against the respondent for a violation of the same standard due to a defective ladder in use in a trench.

17. The evidence establishes that both past and present violations are substantially similar.

18. Respondent was in repeat nonserious violation of 29 CFR 1926.450(a)(2).

19. The appropriate penalty is $125.00.

## §5(a)(1) - Skid Steer Loader Issue

Item 1 of serious citation 1 alleges a violation of §5(a)(1) of the Act as follows:

> Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which was free from recognized hazards that were causing or likely to cause death or serious physical harm to employees, in that:
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> > "Bobcat" skid steer loader had no guard to protect operator from scissors points between arms and frame.

§5(a)(1) of the Act provides that:

> Sec. 5.(a) Each employer-
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

Most of the surrounding factual circumstances related to this citation are not disputed by the parties. The Melroe Division of the Clark Equipment Company ("Clark" or "Clark's") manufactures a skid-steer loader called a Bobcat 310 ("Bobcat") (Tr. 120-122, 171, Exs. P-12 and P-13). On the date of the inspection, there was a

Bobcat at the worksite in one of the trenches (Tr. 120-121, 169, Ex. P-11). The Bobcat used by respondent at the worksite was the same type as depicted in the specification sheet (sales literature) published by Clark (Tr. 122,171, Ex. P-12).[12] The specification sheet displays a picture of the unit as it is shipped from the factory, together with a schematic drawing with various specifications set forth (Tr. 121-122, Ex. P-12). This Bobcat, a four-wheeled unit with rubber tires, was equipped with a small bucket on the front end (Tr. 120, Exs. P-11, P-12 and P-13). It is steered by braking action applied to the wheels (Tr. 120). The operator of the Bobcat is in a sitting position when using the machine (Tr. 123, 131-132, Ex. P-12, Ex. P-13, page 1). Braking action is caused by the operator pushing and pulling hand levers. The levers are located in front of the operator's seat on both the left and right sides thereof. By manipulation of the levers by hand, the Bobcat moves forward, backward and turns either left or right. While the Bobcat is in motion, an operator must keep his hands on the steering levers to steer it (Tr. 120, 131-132, 159-160, 163, Ex. P-13, page marked 310 BOBCAT LOADER and numbered pages 3 and 4). However, if the Bobcat is not in motion, it is unnecessary for an operator to have his hands on the steering levers when lowering the bucket (Tr. 163). Foot pedals are used to control the hydraulic cylinders to raise and lower the lift arms and attachments thereto such as the bucket. They are also used to tilt attachments (such as the bucket) (Tr. 124-125, 128-130, 132, 159, 163, Ex. P-13, page 5). The hydraulic cylinders are attached by a clevis on both sides of the Bobcat toward the rear of the machine (Tr. 124-125, Ex. P-12, Ex. P-13, pages 1, 22 and second unnumbered page). When

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[12] Also, see the owner's manual for the same type of Bobcat (Tr. 137, P-13).

the bucket is down at ground level, the hydraulic cylinders are even with the frame of the machine, just above the tires (Tr. 124-125, Ex. P-12, Ex. P-13, cover and inside thereof, pages 1, 2, 8, 22 and second unnumbered page). As the bucket is raised, the hydraulic cylinders move upward which creates a scissor type of pinch point as it leaves the frame of the machine (Tr. 124-126, Ex. P-12, Ex. P-13, page 9). Then, when the bucket is lowered, the scissors narrow and close the pinch points as the hydraulic cylinders meet the frame of the machine (Tr. 125-130, Ex. P-12). The interior space of the Bobcat, where the operator is seated, is approximately 30 inches between the pinch points (Tr. 132-133). The seat is a bucket seat with the edge of the seat higher than the center thereof (Tr. 162). The seating portion of the seat is higher than the frame (Tr. 157-158, 162, Ex. P-12, Ex. P-13, page 2). Measurements were not taken of the difference in height and photographs are of no assistance in making that determination (Tr. 157-158). However, at most, the height differential between the top portion of the bucket seat and the frame is five or six inches (Tr. 161-162).

Since 1972, Clark, the manufacturer, has provided an operator guard on the equipment. It is a cage type of guard which extends up from the frame along both sides of an operator, behind him and over his head (Tr. 123, 136, Ex. P-12, Ex. P-13, pages 22, 29 and second unnumbered page).[13] Although this Bobcat was used when purchased, it had a guard on it such as the one depicted in Ex. P-12. The guard had been removed by respondent's employees (Tr. 135-136, 172). Although Hughes had not ordered the removal of the guard, he was aware that it had been removed and was not being used at the time of the inspection (Tr. 172). CO Cunningham did not see the Bobcat in operation, but observed fresh tracks on

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13 In effect, the only open space is directly in front of the operator, except for a small opening on the rear side of the guard.

the bottom of the trench leading into the work area, with one set of tracks leading to the parked Bobcat (Tr. 130-131). The Bobcat was being used to remove soil from a tunnel at the worksite; however, the operator's guard on the Bobcat was a fraction of an inch too high to permit the Bobcat to enter the pipe lining the tunnel (Tr. 131, 145-147, 169). As a result, it was removed from the Bobcat (Tr. 127, 135-136, 143, Ex. P-11). Other workers inside the tunnel loaded the bucket by hand while it was at ground level. The operator would then back out of the pipe to a location where a small hopper was located. The bucket was raised three to four feet and the soil was dumped into the hopper. Then, the operator lowered the bucket to ground level and drove the Bobcat back into the tunnel for another load (Tr. 169-171).

If the operator's body or any portion thereof was caught between the pinch points created by the frame and hydraulic cylinders of the Bobcat, it would cause a crushing injury, resulting in broken bones, loss or partial loss of an upper extremity or death (Tr. 141-142, 173). The portion of the body injured would be dependent upon the size of the pinch point (as the bucket is raised, the size of the scissor area increases) and what portion of the operator's body is exposed and caught therein (Tr. 141-142). The cited condition could have been abated by the fabrication of a piece of expanded metal to form an arc over the operator extending from one side of the Bobcat to the other. This would keep the operator in a confined area, preventing him from exposing any body parts to the area of the pinch points (Tr. 142-145, 178-179). It would not be as high or take up as much area as the manufacturer's guard, thereby permitting the Bobcat with the fabricated guard to enter the tunnel (Tr. 143-145, 147-148, 178-179). A sheet of expanded metal can be purchased from a local steel supply house. Any competent welder could form the metal to fabricate such a guard which could be bolted or welded onto the machine (Tr. 143-144, 179). The total cost thereof would be less than $100.00 and the use of such a guard would not result in the loss of production

or efficiency on the job (Tr. 144). In fact, Hughes ordered guards and placed them on the Bobcat so that the operator could not possibly get into the pinch points (Tr. 173, 234).

To establish a violation of Section 5(a)(1) of the Act, the "general duty clause," the Secretary must establish that (i) an employer failed to render its workplace free from a recognized hazard, (ii) the occurrence of an incident was reasonably foreseeable, and (iii) in the event of an incident, the likely consequence was death or serious physical harm to its employees. Bomac Drilling, Division of TRG Drilling Corp., 81 OSAHRC 45/A2, 9 BNA OSHC 1681, 1981 CCH OSHD ¶25,363 (No. 76-450, 1981)("Bomac"). The Secretary must also show that there were feasible means available which the employer could have taken to abate the hazard. Id.; National Realty and Construction Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973) ("National Realty").

A recognized hazard is a practice or condition in the workplace that is known to be hazardous either by the industry in general or by the employer in particular. Beaird-Poulan, A Division of Emerson Electric Co., 79 OSAHRC 21/D11, 7 BNA OSHC 1225, 1979 CCH OSHD ¶23,493 (No. 12600, 1979) ("Beaird-Poulan"); see Continental Oil Co. v. OSHRC, 630 F.2d 446 (6th Cir., 1980), cert. denied, 101 S.Ct. 1481 (March 2, 1981); Empire Detroit Steel Division, Detroit Steel Corp. v. OSHRC, 579 F.2d 378 (6th Cir., 1978). Moreover, in determining the existence of the recognized hazard, it is the hazard which is relevant, not a specific incident resulting in injury. See Brennan v. OSHRC (Vy Lactos Laboratories, Inc.), 494 F.2d 460 (8th Cir. 1974); Boeing Co., Wichita Division, 77 OSAHRC 188/D13, 5 BNA OSHC 2014, 1977-78 CCH OSHD ¶22,266 (No. 12879, 1977).

In this case, the hazard presented is a crushing injury to an upper extremity of the operator of a Bobcat when the operator cage or guard is not in place, caused by an upper extremity being caught in a scissor type of pinch point formed by the downward motion of hydraulic cylinders to a point where they meet the frame of the machine.[14] Undisputed evidence establishes that (i) it is unnecessary for the operator to have his hands on the steering levers when lowering the bucket if the Bobcat is not in motion, (ii) at most, an operator sits five or six inches above the point where the hydraulic cylinders meet the frame of the machine, and (iii) the interior space where the operator sits is approximately 30 inches between the pinch points. By his own admission, Hughes was concerned about the possible exposure of the operator to a crushing injury between the hydraulic cylinders and the frame of the machine. This is a highly significant admission despite the fact that, after examination of the situation, he concluded that no hazard existed. The Commission has held that matters of common knowledge are a basis for finding a recognized hazard. See Eddy's Bakeries Co., 81 OSAHRC 79/F4, 9 BNA OSHC 2147, 1981 CCH OSHD ¶25,604 (No. 77-1084, 1981); Litton Systems, Inc., Ingalls Shipbuilding Division, 81 OSAHRC , 1982 CCH OSHD ¶25,817 (No. 76-900, 1981). I agree with CO Cunningham that the hazard created by the pinch points is obvious and that

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14 Due to the work situation in this particular case, a hazard did not exist that the operator's torso would be caught in the pinch points. This results from the bucket being raised only three to four feet from the ground prior to dumping its contents and lowering the bucket (Tr. 169-171). The torso can only be exposed thereto if the bucket is raised to a very high position (Tr. 127, 134, 142).

recognition thereof requires no special training or expertise. The fact that Hughes did not fully appreciate the existence of the hazard does not remove it from the sphere of common knowledge. His reasoning that it would take an intentional act for an incident to occur was based on several faulty premises. They are that (i) when not steering, an operator would always keep arms and hands at his sides, (ii) to suffer a crushing injury, the operator's hand or arm would have to be resting on the frame and thereby be intentional, or (iii) if the upper extremity was struck, it would be at a high enough level (both the extremity and the distance from the frame) to remove it from danger before the hydraulic cylinder met the frame. I agree with CO Cunningham that an operator could through carelessness or inattention easily place any portion of an upper extremity into the path of the hydraulic cylinder or arm as it descends. The Commission has held that momentary lapses of concentration and human error are part of every job. See Georgia Electric Co., 77 OSAHRC 30/A2, 5 BNA OSHC 1112, 1977-78 CCH OSHD ¶21,613 (No. 9339, 1977), aff'd, 595 F.2d 309 (5th Cir. 1979). Human errors in general are foreseeable. It is to prevent such errors that physical means of protection, a guard in this case, are usually preferred. Western Massachusetts Electric Co., 81 OSAHRC 73/B13, 9 BNA OSHC 1940, 1981 CCH OSHD ¶25,470 (No. 76-1174, 1981). Moreover, the extremity could be at an oblique angle where it would not be too distant from the frame, but still be in the path of the arm as it descends.[15] Finally, the contention by Hughes that, if the

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[15] Here, the hydraulic cylinder would not be high since the bucket was raised only three or four feet from ground level.

hydraulic arm did strike an operator's upper extremity, it could be removed from the scissor area in time simply blinks several important facts. Human beings do not always react in their own best interests in emergency situations. In short, they sometimes panic. Finally, the force of the hydraulic cylinder striking an upper extremity might well throw the operator off balance and further into the area of the scissor type of pinch point. Accordingly, based on the foregoing, I find that (i) the hazard of a crushing injury to an upper extremity of an operator of a Bobcat when the cage or guard is not in place, caused by an upper extremity being caught in a scissor type of pinch point formed by the downward motion of hydraulic cylinders to a point where they meet the frame of the machine, is obvious, (ii) recognition of the hazard can be inferred from the obvious nature of the hazard, and (iii) such an incident is reasonably foreseeable.[16] Uncontraverted testimony establishes that, if such an incident occurred, the likely consequence would be serious physical harm to the operator (Tr. 141-142,

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16 I have not overlooked the evidence of record related to the manufacturer's warning (owner's manuals and decals in operator cage or guard) not to use a Bobcat without the operator guard. The Commission has held that a warning by a manufacturer about a specifically described hazard is probative evidence of a recognized hazard. Young Sales Corp., 79 OSAHRC 28/A2, 7 BNA OSHC 1297, 1979 CCH OSHD ¶23,768(No. 8184, 1979), aff'd, memo no. 77-1612 (D.C. Cir., 1980). However, the evidence falls short of that in this case. The operator's manual and the decals do not spell out the nature of the hazard of operating the Bobcat without the cage or guard. Here, there are two hazards which the cage or guard protects against, rollover protection and the scissor type of pinch points. However, the above-noted materials do not spell out why use of the cage or guard is required. Moreover, there is no evidence that respondent possessed such a manual or that decals were on this Bobcat. It was not new when purchased by respondent.

173-174). I so find.[17] See Bomac, supra. Hughes was aware of all the facts at the worksite giving rise to the violation. The hazard was obvious. Once again, full appreciation of the hazard by Hughes is not necessary to establish knowledge of its existence. I find the requisite knowledge to be present. His knowledge is imputed to the respondent.

The next issue to be resolved is whether respondent breached its duty to render its worksite free of the recognized hazard. The burden of proof is on the Secretary. National Realty, supra. Here, there is no dispute in the

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17 In the citation and complaint, the Secretary alleged a serious violation of §5(a)(1). In its brief, respondent argues that there is only a remote possibility that an incident will occur, and therefore, only a remote possibility that serious bodily injury or death would result. §5(a)(1) speaks in terms of ". . . recognized hazards that are causing or are likely to cause death or serious physical harm. . ." §17(k) states, in pertinent part, that a serious violation exists ". . . if there is substantial probability that death or serious physical harm could result. . ." First, I do not understand the Secretary's pleading. I am of the opinion that a §5(a)(1) violation is at least the equivalent of a serious violation by its own terms. In other words, it is not clear to me why a "serious" §5(a)(1) violation would ever be alleged. However, I take respondent's position to run more against foreseeability of an incident. I have already addressed that issue heretofore. The Commission has held that, in a §5(a)(1) allegation, the Secretary has sustained his burden if he establishes that the incident is reasonably foreseeable and the likely consequence in the event of an incident would be death or serious physical harm. It expressly held that the occurrence of an incident need not be likely. See Bomac, supra. In cases alleging a serious violation (§17(k)), the Commission has employed the same rationale. There, the Secretary must establish that, if an accident occurred, there is a substantial probability that death or serious physical harm could result. The probability of an accident occurring is irrelevent. See Niagara Mohawk Power Co., 79 OSAHRC 36/A2, 7 BNA OSHC 1447, 1979 CCH OSHD ¶23,670 (No. 76-2414, 1979). In any event, I find that the Secretary has met his burden under either test.

evidence. The operator's guard had been removed and the Bobcat used in the performance of work thereafter (Tr. 127, 130-131, 135-136, 145-148, 172-174, Ex. P-11). By Hughes' own admission, he was aware of that fact (Tr. 172-174).

It cannot be reasonably questioned that there were feasible means available which the respondent could have taken to abate the hazard (Tr. 142-145). In fact, Hughes agreed that CO Cunningham's method of abatement was feasible (Tr. 178-179). However, he apparently abated the hazard by a different type of guard than the one described by CO Cunningham (Tr. 173, 234).

Under the facts and circumstances of this case, I find that a §5(a)(1) violation of the Act has been established. In light of the record and the statutory penalty criteria set forth in §17(j) of the Act, I conclude that a penalty of $300.00 is reasonable and appropriate.

## FINDINGS OF FACT

The evidence of record having been considered and evaluated in its entirety, the following facts are specifically found:

1. To avoid repetition, those facts set forth (i) under the headings entitled JURISDICITON and PARTIAL RESOLUTION OF THE FACTS, and (ii) those undisputed facts set forth in the third, fourth and fifth paragraphs of the foregoing discussion of item 1 of serious citation 1 (immediately following a recital of §5(a)(1) of the Act), are hereby incorporated by reference to the extent that they are not set forth hereunder.

2. The OSHA inspection in June 1980 disclosed a Bobcat (skid-steer loader) at the worksite in one of the trenches.

3. The Bobcat, a four-wheeled unit with rubber tires, was equipped with a small bucket on the front end.

4. The operator of the Bobcat is in a sitting position when using the machine.

5. The Bobcat is steered by braking action to the wheels. Braking action is caused by the operator pushing and pulling hand levers which are located in front of the operator's seat. By manipulation of the levers, the Bobcat moves forward, backward and turns either left or right. While the Bobcat is in motion, an operator must keep his hands on the steering levers to steer it.

6. If the Bobcat is not in motion, it is unnecessary for an operator to have his hands on the steering levers when lowering the bucket.

7. Foot pedals are used (i) to control the hydraulic cylinders in order to raise and lower the lift arms and attachments thereto such as the bucket, and (ii) to tilt such attachments.

8. The hydraulic cylinders are even with the frame of the Bobcat, just above the tires, when the bucket is at ground level. As the bucket is raised, the hydraulic cylinders move upward which creates a scissor type of pinch point as they leave the frame of the Bobcat. Then, when the bucket is lowered, the scissors narrow and close the pinch points as the hydraulic cylinders meet the frame of the machine.

9. The interior space of the Bobcat, where the operator is seated, is approximately 30 inches between the pinch points. The seating portion of the seat, top portion thereof, is, at most, five or six inches higher than the frame.

10. Since 1972, the manufacturer has provided an operator guard on Bobcats. It is a cage type of guard which extends up from the frame along both sides of the operator, behind him and over his head.

11. The Bobcat was being used at the worksite to remove soil from a tunnel;

however, the operator's guard was a fraction of an inch too high to permit the Bobcat to enter the pipe lining the tunnel. Therefore, the operator's guard had been removed by respondent's employees.

12. Hughes was aware that the operator's guard had been removed from the Bobcat and was not being used at the time of the inspection.

13. Workers inside the tunnel loaded the bucket by hand while it was at ground level. The operator would then back out of the pipe to an area where a small hopper was located. The bucket was raised three to four feet and the soil dumped into the hopper. Then, the operator lowered the bucket to ground level and drove the Bobcat back into the tunnel for another load.

14. The hazard presented is a crushing injury to an upper extremity of the Bobcat operator when the operator guard is not in place, caused by an upper extremity being caught in a scissor type of pinch point formed by the downward motion of the hydraulic cylinders to a point where they meet the frame of the machine.

15. The hazard set forth in finding of fact no. 14 is obvious. Recognition of the hazard can be inferred from the obvious nature thereof.

16. An operator could through carelessness or inattention easily place any portion of an upper extremity into the path of the hydraulic cylinder as it descends, as momentary lapses of concentration and human error are part of every job. Human errors in general are foreseeable.

17. The force of the hydraulic cylinder striking an upper extremity might throw the operator off balance and further into the area of the scissor type of pinch point. Moreover, human beings sometimes panic.

18. The occurrence of such an incident (upper extremity caught in a pinch

point) is reasonably foreseeable.

19. The likely result of such an incident would be serious physical harm to the operator.

20. Hughes was aware of all the facts at the worksite giving rise to the violation. Although he did not fully appreciate the hazard, it was obvious. The requisite knowledge was present. It is imputed to the respondent.

21. The operator's guard had been removed and the Bobcat used in the performance of work thereafter. Therefore, respondent breached its duty to render its worksite free of the recognized hazard.

22. The condition could have been abated by the fabrication of a piece of expanded metal to form an arc over the operator (smaller than the manufacturer's guard) from one side of the Bobcat to another. Consequently, there was a feasible means available which the respondent could have taken to abate the hazard.

23. Respondent was in violation of §5(a)(1) of the Act.

24. The appropriate penalty is $300.00.

## 29 CFR 1926.652(c) - Trench Issue

Item 1 of willful serious citation 2 alleges a violation of 29 CFR 1926.652(c) as follows:

> 29 CFR 1926.652(c): Where the side(s) of the trench(es) above the 5 foot level were sloped to preclude collapse in lieu of shoring, the slope(s) were steeper than 1 foot rise to each 1/2 foot horizontal:
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> > Employees exposed in trenches (3) on Loop 1 North at Hart Lane. No shoring being used. Sloping was inadequate for soil conditions.

The cited standard provides:

> §1926.652 Specific excavation requirements.
>
> * * *

> (c) Sides of trenches in hard or compact soil, including embankments, shall be shored or otherwise supported when the trench is more than 5 feet in depth and 8 feet or more in length. In lieu of shoring, the sides of the trench above the 5-foot level may be sloped to preclude collapse, but shall not be steeper than a 1-foot rise to each 1/2-foot horizontal. When the outside diameter of a pipe is greater than 6 feet, a bench of a 4-foot minimum shall be provided at the toe of the sloped portion.

Respondent's employees were engaged in work activities related to the installation of a water main beneath Loop 1 North ("the Loop"), pursuant to a contract between respondent and the city of Austin (Tr. 13, 17-18, 167-168). At the worksite, the Loop runs generally north and south with two to three lanes in each direction. It is basically a freeway with heavy traffic (Tr. 17-19, 184, Ex. P-2).[18] Three separate trenches were in existence at the location,

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18 Ex. P-2 is a diagram prepared by CO Moore, based on visual observations, photographs and measurements of the worksite as it existed on the date of the inspection, June 26, 1980. It represents an overhead view of the worksite (Tr. 19-20). CO Cunningham assisted CO Moore take photographs and measurements (Tr. 15, 26, 117). Measurements were taken with a steel tape, a plumb bob and a long pole (Tr. 26). The photographs were actually taken by CO Moore (Tr. 59-60, Exs. P-9(a)-(k)). A brief description of those pictures found in Ex. 9 is as follows: (a) a view looking down into the trench at the west end of trench B (not at section B-B) (Tr. 60-61); (b) a view looking down into trench B at about the center of the trench (Tr. 62); (c) a view looking toward the east face of trench B, depicting the area represented in section B-B (Tr. 63-65); (d) a different angle of the view in (c) (Tr. 65); (e) a slightly different angle of the views seen in (c) and (d) (Tr. 66); (f) a view of a ladder leaning against a wall, located right at section B-B (Tr. 68); (g) a view of trench A (Tr. 68); (h) a view of the west end of trench C, with the end of the pipe located at section C-C (Tr. 70-71); (i) a slightly different angle of the view in (h) (Tr. 72-73); (g) a closeup view of the soil shown in (i) (Tr. 74); and (k) a view of the east end of trench A, looking almost directly at section A-A (Tr. 74).

running in a generally east-west direction. One trench ("trench A"), west of the southbound lanes of traffic, was rectangular in shape. Another trench ("trench B"), located in the median between northbound and southbound traffic, was shaped like a light bulb. The third trench, ("trench C"), on the east side of the northbound lanes of traffic, was shaped somewhat like a boxing glove (Tr. 21, 168, Ex. P-2).[19] The interior rectangular lines in trenches B and C represent the width of those trenches at the bottom (Tr. 21-22, Ex. P-2).[20] Dotted lines, running across both southbound and northbound lanes of traffic, represent tunnels under those lanes of traffic. However, the tunnel under the southbound lanes had not been completed (Tr. 23-24). Ex. P-2 contains section lines which run from the south to the north wall of the trenches. Those areas are designated as A and A in trench A, B and B in trench B, and C and C in trench C (Tr. 24-25).[21] Exhibit P-3, the other diagram, is a cross-sectional view which shows the dimensions of the three trenches where those section lines (A and A, B and B, and C and C) meet the north and south trench walls (Tr. 26-29, 99-100).[22]

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19 The different shape of trenches was due to sloping in some areas thereof (Tr. 22).

20 This dimension is not shown for trench A since it was rectangular in shape with very little sloping (Tr. 22).

21 Those lines in trenches B and C run in nearly a straight line from one trench wall to the other. However, that is not true in trench A (Tr. 99, Ex. P-2).

22 Ex. P-3 reflects the dimensions in each of the three trench sections where CO Moore was of the opinion that sloping was inadequate (Tr. 43-44). This exhibit was prepared based on measurements taken at the worksite (Tr. 26). The areas are designated as A-A, B-B and C-C (Ex. P-3). For the most part, the parties and their witnesses referred to sections A-A, B-B and C-C when discussing either Exs. P-2 or P-3. I have distinguished between those two exhibits as follows: trench A contains areas A and A (Ex. P-2) and section A-A (Ex. P-3); trench B contains areas B and B (Ex. P-2) and section B-B (Ex. P-3); and trench C contains areas C and C (Ex. P-2) and section C-C(Ex. P-3).

The trenches were not shored or braced in any manner (Tr. 41, 181). Trench A, rectangular shaped, was approximately 20 feet long. At section A-A, it was 13 feet 10 inches deep, eight feet five inches wide at the top and approximately seven feet one inch wide at the bottom (Tr. 25, 29-30, Exs. P-2 and P-3).[23] There was a 16-inch slope on the left wall of section A-A, but the right side was virtually vertical (Tr. 30, 44, Ex. P-3).[24] Trench B was approximately 35 feet long. Section B-B thereof was 16 feet deep, six feet wide at the bottom and six feet three inches wide (75 inches) at the top (Tr. 25, 30, Exs. P-2 and P-3).[25] The inner left wall of section B-B was sloped at the top. The dimensions of the slope, both vertically and horizontally, were two feet each (Tr. 30-31, Ex. P-3). Since the depth of the trench was 16 feet, the slope began 14 feet above the bottom of the trench (Tr. 31, Ex. P-3). On the right side of section B-B, the trench wall at the top was sloped three feet seven inches (43 inches) horizontally and four feet six inches vertically. Below four feet six inches, the wall was essentially vertical. The depth of the trench was 16 feet. Therefore, the slope began at 11 feet six inches above the bottom of the trench (Tr. 31-32, Ex. P-3). Trench C was approximately 35 feet long. Section C-C thereof was 18 feet six inches deep, six feet wide at the bottom, and seven feet six inches wide at the top (Tr. 25-26, 32-33, Exs. P-2 and P-3).[26] At the bottom of the trench at section C-C was a

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23 CO Moore's earlier testimony gives somewhat different dimensions on this trench (approximately eight feet wide at the bottom and approximately 12 feet deep) (Tr. 24). However, this was prior to introduction of Ex. P-3. I view the earlier testimony only as approximations and his testimony based on the diagrams as the actual dimensions thereof.

24 This accounts for the differential between the width at the top and the bottom of trench A (Tr. 30).

25 Again, CO Moore's earlier testimony regarding the width at the bottom of the trench appears to have been an approximation (Tr. 25-26).

26 Once again, CO Moore's earlier testimony appears to have been an approximation (Tr. 25-26).

corrugated pipe which had a six-foot diameter. This pipe had been drawn through the tunnel underneath the northbound lanes of traffic (Tr. 33, Ex. P-3). On the right side of section C-C, the trench wall at the top had been sloped from a point one and one half feet (18 inches) horizontally and four feet vertically. At the top of the trench in section C-C was the road surface. This was at the west end of trench C (Tr. 33-34, Ex. P-3).

Originally, Hughes had anticipated only two open trenches on the project, A and C. The intent was to connect those two trenches by the use of a boring machine (Tr. 194). The first step is to run a five-inch drill stem on line and grade through the ground (from A to C underneath all lanes of traffic and the median). Then, a larger drill stem is attached and pulled backward through the hole, cutting or reaming out the desired size of hole. It is not a dry cut as water is flooded into the hole to wash the cuttings back onto the floor of the trench where they can be picked up and removed (Tr. 195). On this project, the boring machine operator had initially used the five-inch drill stem in a west to east direction (trench A to trench C).[27] Then, the large reamer (bigger drill stem) was attached to enlarge the hole back to the boring machine in trench A (east to west). During such an operation, the hole is periodically checked. When the large reamer had reached a point approximately 10 to 15 feet underneath

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27 Trench B was not in existence at that time. Trench C was opened in approximately March of 1980 (Tr. 214). I assume that trench A was opened at about the same time. Therefore, trenches A and C had been open for approximately three to four months prior to the inspection on June 26, 1980. Trench B had been opened for approximately two and one half months prior to inspection (Tr. 215). Trenches A and B stayed open for approximately five months (Tr. 211). Trench C was open for the approximate period of March-December of 1980 (Tr. 11, 214).

the southbound lanes of traffic, it was discovered that the roof of the tunnel (under the southbound lanes) was caving in and falling down (Tr. 195-196). Emergency barricades were thrown up and the highway engineer ("Gamble") came out to the worksite. Prior to boring, Hughes had drilled test holes, two each on the west side and middle and one on the east side of the road (southbound lanes of traffic), and had the soil tested (Tr. 196-197, 232-233). The problem, a gully, was located between the tests on the west side and middle of the southbound lanes, underneath the highway (Tr. 198). It was subsequently learned that, 30 or 40 years prior to the commercial development of this area, a slurry pit had been dug in that area to receive waste materials (cuttings and water) from a plant at a rock quarry. As a result, there was a gully underneath the middle of the main lane (southbound) (Tr. 197-198). Several days later, Gamble authorized Hughes to drill test holes across the southbound lanes every five feet to ascertain subsurface soil conditions. The material (in the gully) extended from the west side or face of trench B (the east edge of southbound lanes) to within five feet of the east face of trench A (near the west edge of southbound lanes) (Tr. 60-62, 198-199, 203-204, Ex. P-9(a)). This condition was encountered approximately 75 days prior to the inspection. It necessitated a change in the work method. Liner plates were ordered, but were not delivered for almost two months. Thereafter, the pipe was placed into the tunnel as far as it would go. Then, liner plates were bolted together and the soil was removed by hand shovel (Tr. 199-200).[28]

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[28] In this process, liners are bolted together for protection and then soil is removed. This is performed repetitiously.

Soil samples were taken during the inspection at section B-B from the right wall of trench B by CO Moore, by using a sharp-pointed shovel.[29] They were taken at grade level and one and one half feet, six feet and eight feet below grade level. Soil samples were not taken from sections A-A (trench A) or C-C (trench C). CO Moore maintained custody of the samples until he delivered them to Shilstone Engineering Testing Laboratory ("Shilstone") for a soil analysis (Tr. 32, 36-38, 81-84, 148-149, Ex. P-4). Shilstone's tests included a moisture content determination, Atterberg limits, and a sieve analysis to determine percentages of coarse and fine-grained material.[30] That data enabled Shilstone to classify the soil in accordance with the Unified Classification System.[31] The soil samples were described as follows: ground level - brown, sandy silt; 18 inches - gray clayey, sandy gravel; six feet - dark gray, sandy clay; and eight feet - tan clayey, gravelly sand (Ex. P-4).

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29 Section B-B is located near the east end or face of trench B (Tr. 63-65, Exs. P-2, P-3, 9(c) and (d)). The area of trench B where the roof of the tunnel caved in or fell was at the opposite end thereof (Tr. 60-62, 203, Ex. P-9(a)).

30 CO Moore requested that Shilstone provide (i) a description and classification of the soil, and (ii) the Atterberg limits of the soil which is indicative of the strength or self-supporting characteristics thereof. He described the Atterberg limit as a combination of the liquid limit and the plasticity index (included in the report). However, he either would not or could not attach any significance to the reported values (Tr. 84-85).

31 Values are set forth in the report for the soil taken at different levels. The stated values are for liquid limit percentage, plasticity index, percentage passing in #200 mesh sieve, classification and description, as well as gradation on several other sieve sizes. The classification is reported in symbols (ML, GC, CL and SP) for the several levels. However, the symbols are not explained in the report (Ex. P-4).

In its brief, respondent correctly states that the crucial issue revolves around the nature of the material in which the trenches were dug. It notes that CO Moore and Cunningham classified the soil as hard and compact while Hughes identified it as rock and cemented gravel. In effect, respondent argues that, based on practical experience, Hughes possesses more expertiese in soil recognition than the compliance officers who were given a short training course in the subject of soils. Respondent points out that CO Moore testified that (i) trench A approached being cemented sand and gravel, (ii) it most closely resembled cemented sand and gravel, and (iii) its soil was not compacted angular gravel. Respondent argues that the report by Shilstone merely contains a description of the soil and does not classify it according to OSHA guidelines. It observes that much of the description identifies the presence of sand and gravel, noting that the description does not identify the soil as hard and compact or eliminate the possibility that the samples were cemented sand and gravel. Respondent directs attention to testimony by Hughes that (i) the material is commonly called caliche which is weathered limestone, (ii) the decaying limestone produces a bond which cements the sand and gravel, (iii) the material (caliche at the trench site) was equivalent to "half-sack" concrete and would never cave in, and (iv) caliche can not be dug with a shovel, but can be dug with a backhoe. Finally, respondent argues that testimony regarding the impact of water in the trenches establishes that the trench sites were composed of cemented sand and gravel.

The Secretary argues that the evidence conclusively establishes that soil conditions fell within the category of hard and compact soils. In support thereof, he argues that (i) the trench was dug in a backfill area, (ii) respondent had difficulty with unstable soil conditions while tunneling under the roadway,

(iii) the compliance officers identified the trench material as a mixture of silt, sand, clay and loam, (iv) their opinions were based on observations, training and opportunity to feel and handle the soil, and (v) their opinions were corroborated by the analysis by Shilstone. He observes that Hughes was unable to identify the category of soil, referring to it at various times as limestone, shale, caliche, cemented sand and gravel and solid rock. He further calls attention to testimony by Hughes that a number of different types of soil material was present in trench walls, including natural earth, a junk layer of compacted material, clay, dirt and stuff hauled in by the highway department. He concludes that, at best, testimony by Hughes establishes the nonhomogenous nature of the soil and that it does not refute the evidence presented by the government.

To resolve the issue presented, it is helpful to summarize certain portions of testimony by the witnesses. A summary thereof follows:

(1) John R. Hughes- Hughes testified that different engineers might call the same soil material severely weathered limestone, cemented sand and gravel, caliche or shale. He observed that these materials actually go on a curve (tendency to be in the same neighborhood of a support system), causing the differing opinions (Tr. 205-206, 222, 224). He stated that caliche in the Austin area is a white layered rock, cemented together like small pieces of limestone laid together with the lime content between the pieces causing them to adhere together. It can be difficult to use a front end loader in one caliche pit, but it can change considerably in 50 feet, e.g., when there is a little clay between the rocks. When referring to caliche in different areas, one can be talking about several different types of soil, some harder than

others (Tr. 208, 223). He would not consider it caliche if it could be dug with a shovel, but caliche (softer) could be dug with a pick and shovel while some caliche (harder) would require the use of a trenching machine. He does not consider caliche to be the same material as shale (Tr. 224). In the Austin area, a reference to caliche is the same as weathered limestone. Cemented sand and gravel has been stuck together by nature with a binder. There is only one area around Austin where it exists, by I-35 and Highway 183 (Tr. 225). It has pea-sized pieces of gravel and it is difficult to drill with a drilling machine (Tr. 225-226). In some locations, there is cemented sand and gravel which approaches man-made cement in terms of consistency and, in others, it is much looser and not compacted or bonded together as well (Tr. 226). When Hughes referred to cemented sand and gravel in the trenches at the worksite, it was man-made by the highway department when establishing the fill. The fill material is wet down and 50,000 pound rollers compact it, smashing limestone and clay, the binding material, together. It was so turned out that it was difficult to tell when you got into it. It approaches the consistency of one-half sack of man-made cement. It was not soil which would cave in (Tr. 226-227). All of the trenches were cut with a Koeh Bantam backhoe 366. It was unnecessary to blast, to use a trench cutter or to use any special equipment (Tr. 227-228). One can use a backhoe to dig a trench in solid rock, except for dolomite and cherts (Tr. 228-229). They encountered no difficulty in digging the trenches, except for one large rock embedded in a shale area in the west end of trench C (apparently on the right wall) (Tr. 209-210, 230-231, Ex. P-9(i)). The trenches did not cave in, except where they were knocked down on purpose (Tr. 201). Hughes agreed that (i) the Loop is heavily traveled, (ii) there is an increased danger of trench collapse

due to vibration from traffic when a trench is located next to a heavily traveled highway such as the Loop. He stated that was the reason barricades were installed and moved over during this problem (Tr. 184). However, he denied that part of the pavement was undercut by a collapse of soil thereunder, stating that traffic had been detoured some 80 feet away and there was no vibration in the area of the trench from traffic (Tr. 184-185). He then stated that barricades were installed and traffic moved to the other side of the road where a problem was encountered on the east side (Tr. 185-186).[32] The barricades were up at least 75 days prior to the inspection (Tr. 186). In response to a question of whether water got into the trenches after they were opened, Hughes testified that he did not remember directly about trench C getting real deep in water, but it was completely full when they went back to tie-in in December and had to be pumped out (Tr. 211-212). He was then asked if he had seen water in there on more than one occasion and responded ". . . probably have and we pumped it out, half a dozen times." He stated that this was during the time that the tunnel was being bored and reamed, explaining that water placed in the tunnel would build up on the top of the head and it would be pumped out (Tr. 195, 212-213).[33] He then stated that it had been full of water two or three times in the two to three month period prior to the inspection (Tr. 213). He further testified that (i) none of the trench walls in A, B or C revealed any cracking or breaking as a result of exposure to water, and (ii) the only sloughing off and caving in occurred under the highway (Tr. 215).[34]

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32 Based on subsequent testimony by Hughes, it is clear that the above-noted reference to the problem on the east side was a reference to trench C (Tr. 231-232, (Ex. P-9(i)).

33 The reference to top of the head is undoubtedly a reference to the head of the boring machine.

34 A reference to the area of the old slurry pit.

He stated that they were scared of the one in trench C and put the pipe in there to protect workers (Tr. 216). He agreed that trenching is a very hazardous occupation; but, due to his experience, he is capable of recognizing different types of soil and hazardous conditions. He is always looking for signs that a trench might collapse (Tr. 168-169, 179-180, 205). In regard to photographic evidence related to trench C, Hughes agreed that Ex. P-9(h) revealed some undermining of the road surface.[35] However, he stated that this had been done by the backhoe operator. The material on top of the corrugated pipe had not fallen, but was a natural material which had been left there, a hardened material the backhoe could not dig (Tr. 201-202). It was rock, cemented gravel, etc., the same type of material as that on the right hand side of the photograph (Tr. 202-203). He stated that Ex. P-9(i) shows a number of different kinds (about 10) of soil. Starting at the top and working down, he described (i) CO Moore standing on the highway, (ii) approximately ten inches of base material, (iii) one layer looking like caliche and stuff hauled in and compacted by the highway department, (iv) another little line of something else hauled in and compacted by said department, (v) another kind of junk layer of compacted material, a limestone mixed with water when compacted, and (vi) then the natural earth with dirt up on top (apparently on top of the corrugated pipe) (Tr. 209-210). He stated that (i) the big rock had been further to the right, (ii) there was clay on the left wall which had been sloped and (iii) on the right wall, there was caliche, a wetted

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35 A view of the west end of trench C, with the end of the corrugated pipe located near section C-C (Tr. 70-71). Ex. P-9(i) is a slightly different view of the same area (Tr. 72-73). Ex. P-9(j) is a closeup view of the soil in 9(i)(Tr. 74).

limestone (Tr. 210). With respect to trench B and Ex. P-9(a), he stated that (i) the dark area above the corrugated pipe is the area where the tunnel started caving and falling down, and (ii) the area over the worker's head and coming down at an angle is caliche, shale and conglomerated material (Tr. 203).[36] The material on top (apparently above the corrugated pipe) was fine and sandy, but the bottom two feet was rock, necessitating the use of a jack hammer (Tr. 203-204). He stated that Ex. P-9(c) reveals a color of white above the foreman's head.[37] It is essentially the same material that is on the opposite side of the road. In this area, the Balconies (sic)[38] Fault, soil can change radically within 50 feet. There is a narrow layer of natural dirt above the white layer and directly above that layer is an area where the highway department built a compacted fill when building the Loop (Tr. 206-207). When questioned whether the fill was hauled in by the highway department or basic caliche, he responded that it is a little bit of everything, pointing out grass roots and above that some compacted caliche (Tr. 207-208). He stated that the soil below the dark area was a watered limestone (white area), along with a caliche conglomerate, kind of cemented. His testimony about trench A and Ex. P-9(k) indicates that the trench materials were a conglomerate type, cemented gravels (Tr. 205).[39] He then implicitly agreed that it was compacted angular gravel, together with limestone fragments (Tr. 206).

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36 A view of the west end of trench B (not at section B-B)(Tr. 60-61).

37 A view looking toward the east face of trench B, depicting the area represented in section B-B (Tr. 63-65).

38 The correct spelling is Balcones.

39 A view of the east end of trench A, looking almost directly at section A-A (Tr. 74).

(2) CO Cunningham - CO Cunningham was of the opinion that the trenches were dug in a hard and compact soil. He stated that there was no possibility whatsoever that it was solid rock, shale or cemented sand and gravel. His opinion was based on observations of the sides of trenches, handling soil and removing soil from a wall of a trench (trench B) with a shovel to obtain soil samples. The soil was granular with some clay in it (Tr. 148-149). He defined granular as gravel pieces or small stones, three to four inches in size and no more than two to three inches in diameter (Tr. 153-154). In one area, he observed some compacted material on top of black loam (Tr. 148-149, 153, Ex. P-9 (e)). He stated that there were some areas where the soil had apparently collapsed. In one area, there was loose material (soil) on a metal pipe, together with some voids between the pipe and the surface above it. On the east side of the worksite, a shoulder of the road was opening up due to supporting material having fallen away (Tr. 149-150). Requested to point out photographic evidence that the soil was not rock, shale or cemented sand and gravel, he stated the following: Ex. P-9 (j), reveals (i) voids where pieces of material have fallen out, and (ii) very small granular pieces, some approximately three to four inches in size and others smaller, which are loose and form the face of the material (Tr.150-151):[40] Ex. P-9(i) shows (i) a void area, previously filled, underneath the road surface where material has fallen away and landed on the pipe in the trench, (ii) some clay type of soil which is sloughing off small stones (left side of photograph), and (iii) various layers which appear to have been in the loam layer (Tr. 151); Ex. P-9(h) depicts

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40 Ex. P-9(j) is a closeup of the soil shown in Ex. P-9(i). Ex. P-9(h) and (i) are views of the west end of trench C, with the end of the pipe located near section C-C (Tr. 70-74).

basically the same conditions as Ex. P-9(i), as well as loose soil above the corrugated pipe (Tr. 152); Ex. P-9(f) reveals a root growing or coming out of the soil and small pieces of granular material (Tr. 152);[41] and Ex. P-9(e) shows (i) an area of black loam beneath layers of compacted material (left side of photograph approximately one inch below the top of the ladder), and (ii) granular and a stone type of material on the right side of the trench (Tr. 153).[42] The only evidence of previous collapses seen by him was where the six foot corrugated pipe went under the highway. Since his only visit to the jobsite was duing the inspection, he did not know the condition of the trenching operation previous or subsequent thereto (Tr. 160-161).

(3) CO Moore - CO Moore characterized the trench soil as hard and compact. He based this opinion on observations, handling the soil and digging in the soil (Tr. 33-34, 37, 77-78, 80). When asked to set forth the difference between hard and compact soil and solid rock, shale or cemented sand and gravel, he stated that solid rock can only be cut with special equipment, drilled or blasted. He further stated that (i) these trenches were cut with an excavator, (ii) an excavator could not be used to cut through solid rock, shale, or cemented sand and gravel, unless the rock had been broken up or was soft enough to be broken up, and (iii) there was no indication of solid rock or any indication that rock had been broken up (Tr. 35-36). He observed evidence of soil caving in or falling in two locations,

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41 Ex. P-9(f) is a view of trench B right at section B-B (Tr. 68).

42 Ex. P-9(e) is a view looking toward the east face of trench B, depicting the area represented in section B-B (Tr. 63-66).

one at the west end of the center trench (trench B) where a substantial quantity of soil had caved in and the other at the west end of the east trench (trench C) (Tr. 36, 105). The only other evidence was the breakdown of soil near the tops of trenches, exhibited by the slope shown in the dimensions on sections A-A through C-C; however, he did not see any soil on the bottom of the trenches and stated that sloping and rounding could have resulted from something done by Hughes, Inc. (Tr. 106). He did not believe the soil was compacted angular gravel (Tr. 97). If there was a 90 degree cut, approximately 12 feet deep, in hard and compact soil which was allowed to fill and sit full of water prior to being pumped out, there would be a substantial weakening of the sides (Tr. 97-98). If that occurred on a repeated basis over a period of time, he would expect to see some cracking, sloughing off and caving in of trench walls (Tr. 98, 101). He would expect to see some damage if this occurred three times in a six-month period. He did not know if this occurred in this case (Tr. 98). In reference to photographic evidence, CO Moore stated that Ex. P-9(a) reveals that a prior cave-in of significance had occurred which casts a shadow above the corrugated pipe (Tr. 61).[43] He testified that Ex. P-9(b) shows loose soil coming out of the corrugated pipe which had been dug from the face (of the tunnel) underneath the highway and pushed back through the pipe (Tr. 63). The soil is similar to the soil above the end of the pipe (Tr. 106-107).[44] He stated that

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43 A view of the west end of trench B(not at section B-B)(Tr. 60-61).

44 A view looking down into trench B at about the center of the trench (Tr. 62, 76). The end of the corrugated pipe is at the west end of trench B (Tr. 60-61).

a black line, approximately one and one half inches above the workers head in Ex. P-9(c), was representative of the topsoil in this area, a black clay, prior to any grading operations when the Loop was opened in 1975 (Tr. 64-65, 77).[45] Apparently, a substantial fill, five or six feet in depth, was compacted on top of the original topsoil (Tr. 65). A combination of clay and silt extends from foot level to the dark line. The fill, above the black line, is a mixture of black clay taken from another site. Above that fill, there is the emergence of soil similar to that near the worker's body (Tr. 77-78). The vertical nature of the trench walls at section B-B, indicative of hard and compact soil, can be seen in Exs. P-9(d) and (e) (Tr. 65-66). Tree or bush roots can be seen in the trench wall at section B-B. CO Moore felt the roots were part of the fill when it was placed into position (Tr. 68, Ex. P-9(f)). CO Moore stated that Ex. P-9(g), a photograph of trench A with the bottom thereof at approximately section A-A, reveals a vertical trench wall on the right wall with a slight amount of slope on the left wall (Tr. 68-69, 78-80).[46] The soil in trench A was of a slightly different character than the soil in trenches B and C, with fist to head-sized stones embedded in clay and silt (Tr. 37, 78-80). He stated that the soil in trench A was in the middle classification of hard and compact soil (Tr. 78-80). However, he also stated that (i) it most closely resembled cemented sand and gravel, (ii) it approached being cemented soil, and (iii) it was at a point

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45 A view looking toward the east face of trench B, depicting the area represented in section B-B (Tr. 63-65).

46 Also, see his testimony at pages 74 and 75 of the transcript in regard to trench A, together with Ex. P-9(k).

(a step below) where it could become cemented sand and gravel in the future (Tr. 37, 78-80, 102-103). He testified that photographs of trench C reveal (i) loose dirt on the corrugated pipe and a cavity above it indicating a prior cave-in, and (ii) a slight undercutting of the pavement indicating that dirt had fallen (Tr. 70, 72-73).[47] He pointed out that (i) there was a combination of clay and silt at the bottom of the trench which compacts relatively hard, (ii) a black line, above and to the right of the corrugated pipe, represented original topsoil of black clay, and (iii) a layer of fill, mixed material which had been added to complete the road to grade, composed the top five or six feet of the trench walls (Tr. 73-74, 80). CO Moore testified that the trench walls above five feet were sloped adequately in some places and inadequately in other places (Tr. 41). Inadequate sloping was present in those areas designated A and A, B and B, and C and C in Ex. P-2 (Tr. 41-42). The deficiencies in sloping, based on Ex. P-3 and Moore's testimony, were as follows: The right wall of trench A at section A-A, four feet five inches; right wall of trench B at section B-B, one foot eleven inches and left wall, three feet six inches; and the left wall of trench C at section C-C, six feet nine inches and the right wall, five feet three inches (Tr. 43-47).[48]

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47 Exs. P-9(h) and (i) are views of the west end of trench C, with the end of the corrugated pipe near section C-C (Tr. 70-71, 72-73). Ex. P-9(j) is a closeup of the soil shown in Ex. P-9(i) (Tr. 74).

48 Moore's testimony regarding deficiencies of sloping of trench walls is based on the difference in footage between (i) dividing two into the remainder of the vertical height of a wall minus five feet, and (ii) the amount of the actual horizontal slope. Where the alleged deficiency was not set forth numerically, I have calculated it based on said formula.

The Secretary establishes a prima facie case of noncompliance with §1926.652(c) by showing that (i) the trench is at least five feet deep and eight feet long, (ii) a significant portion of the trench wall is composed of hard or compact soil, and (iii) the trench is neither shored nor sloped appropriately. This may be rebutted by respondent's establishing that the trench was dug entirely in solid rock, shale, or cemented sand and gravel. CCI, Inc., 80 OSAHRC 127/D4, 9 BNA OSHC 1169, 1981 CCH OSHD ¶25,091 (No. 76-1228, 1980), aff'd, No. 81-1218 (10th Cir. June 9, 1982).[49]

I find that a preponderance of the evidence establishes that Hughes, Inc., failed to comply with the subject standard at its workplace. Respondent argues that the most convincing evidence stems from CO Moore's testimony regarding the expected effect of water on hard and compact soil and testimony by Hughes related to the exposure of trench walls thereto. CO Moore did testify that he would expect to see some damage to trench walls if there was a 90 degree cut, approximately 12 feet deep in hard and compact soil, which was allowed to fill and sit full of water prior to being pumped out as many as three times in a six-month period. However, I do not find testimony by Hughes regarding trench exposure to water to be of a convincing nature. At best, a careful scrutiny

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49 The Commission also held that (i) trench walls composed of soils with different strengths are only as stable as the weakest component thereof, and (ii) trenches must comply with §1926.652(c) if a significant portion of the trench walls are hard and compact soil. In other cases, it has also held that guidelines for the proper sloping and shoring of trenches of varying dimensions and in varying soil types are contained in Tables P-1 and P-2. Duane Meyer d/b/a/ D.T. Construction Co., 79 OSAHRC 57/D4, 7 BNA OSHC 1560, 1979 CCH OSHD ¶23,742 (No. 16029, 1979); Connecticut Natural Gas Corp., 78 OSAHRC 60/B3, 6 BNA OSHC 1796, 1978 CCH OSHD ¶22,874 (No. 13964, 1978).

thereof reveals it has a tentative quality.[50] At first, he stated that he could not remember trench C's getting real deep in water until going to complete the job (tie in) in December.[51] He then stated that he probably had seen water in there on more than one occasion and it was pumped out a half dozen times. However, it was obvious that Hughes was referring to those occasions when water was intentionally placed into the tunnel during the boring procedure.[52] Thereafter, he stated that, prior to the inspection, he would ". . .say it had been full of water two or three times." Even assuming the accuracy of the last statement, the result does not change. The expected results of nature do not always occur. Moreover, he admitted fear that the walls of trench C would be affected by weather, stating that was the reason the corrugated pipe was installed.[53] This is a highly significant admission. The clear implication is that, prior to the inspection, Hughes felt that the walls of trench C at section C-C posed a hazard to workers. I further find that the evidence establishes that a prior cave-in had occurred at the west face of trench C near section C-C. Hughes denied that a cave-in had

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50 Insofar as I can ascertain, all of such testimony was directed toward water in trench C. However, it is possible to interpret some of said testimony to apply to the other trenches.

51 This was a number of months after the inspection.

52 He referred to water building up on top of the head. Presumably, this reference is to the head of the boring machine. The height thereof was not stated. However, Ex. P-9(g) appears to illustrate that the height from the trench floor to the head of the boring machine would not be highly significant when compared to height of trench walls. Finally, it does not stand to reason that the water would be allowed to stand for long during this work process.

53 The corrugated pipe was located at the west end of trench C, with the end of the pipe near section C-C (Tr. 70-71, Ex. P-9(h) and (i)).

taken place, stating that (i) the backhoe operator had undercut the road surface, and (ii) material on the corrugated pipe was a hardened material (rock, cemented gravel, etc.) that the backhoe could not dig. This is in contrast to his subsequent testimony that no difficulty was encountered while digging the trenches, except for one large rock embedded in a shale area in the west end of trench C. This was apparently on the right wall near the face. However, his testimony indicates that despite some difficulty the rock was removed. Consequently, there is an obvious conflict in Hughes' own testimony. Moreover, the witnesses agree that the upper portion of the west end of trench C was dug in a fill area. CO Moore's unrebutted testimony establishes that it constituted the top five or six feet of material. Hughes admitted that there were approximately ten different kinds of soil at that location from the top of the trench to the bottom thereof. In pertinent part, he described several layers of fill material which had been hauled in and compacted by the highway department as (i) looking like caliche and stuff, (ii) something hauled in and compacted, and (iii) another kind of junk layer, limestone mixed with water. When referring to cemented sand and gravel in the trenches, Hughes testified that (i) it was man-made by the highway department when establishing the fill, (ii) it was composed of smashed limestone and clay, approaching the consistency of one-half sack of man-made cement, (iii) it was so turned out that it was difficult to recognize, and (iv) it would not cave in.[54] To the contrary, the compliance officers felt that this soil fell into

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[54] Although he made no direct reference to cemented sand and gravel in relation to the fill at this location, his reference to layers of compacted caliche, limestone and other materials appears to fit within this description. Moreover, he referred to cemented gravel on top of the corrugated pipe.

a category of hard and compact. I agree. Again, by Hughes' own admission, he feared the walls in trench C would be affected by the weather and, therefore, installed the corrugated pipe.[55] On another occasion, he referred to placing up barricades when we had a problem on the east side.[56] On the basis of the obvious conflicts in Hughes' testimony regarding the nature and strength of the soil material in trench C, I cannot find it credible. Moreover, even if one assumes arguendo that the fill area was a mixture of limestone or caliche with clay, the result does not change. This would be soil material of a nonhomogenous nature which would certainly not constitute rock, shale or cemented sand and gravel. Furthermore, I find the photographic evidence to be consistent with CO Cunningham's assessment of the soil, a clay type of material which is sloughing off small stones. I further find that (i) the black layer thereunder represents the original topsoil of black clay, and (ii) the bottom portion of the trench at section C-C is a combination of clay and silt. I also find that trench B was dug in hard and compact soil. Here again, unrebutted testimony by CO Moore establishes that at section B-B the fill was approximately five or six feet in depth above the original topsoil.[57] It is only necessary to observe that soil samples were taken by hand with a shovel at levels of one and one-half feet, six feet and eight feet. If the

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55 He also testified that workers were protected by pipe where there were signs of instability (Tr. 184).

56 The record shows that this is a reference to trench C (Tr. 185-186, 231-232).

57 It was the other end of trench B where the old slurry pit caused the tunnel to cave in.

nature and strength of the soil material was of the character described by Hughes in either the fill area or the area beneath the original topsoil, certainly the soil samples could not have been taken in that manner.[58] In assessing the conflicts in testimony as they relate to trench A, Hughes' initial description of the soil material was a conglomerate type, cemented gravel. He then agreed that it was compacted angular gravel, together with limestone fragments. These descriptions are not necessarily mutually exclusive; however, if they are the same, they are not consistent with his earlier usage of the term cemented, since there is no mention of clay.[59] The effect thereof is to cloud the credibility of Hughes' testimony about the composition of soil material in trench A. To the contrary, testimony by CO Moore does not cast that shadow. He acknowledged that the soil material in trench A was of a different character than that found in the other trenches, stating that fist to head-sized stones were embedded in clay and silt. While he admitted that it closely resembled cemented sand and gravel and approached that category, a careful reading of his testimony reveals that, in his opinion, it was hard and compact at this stage of its development. In summary, I find that a preponderance of the evidence establishes that the soil material was hard and compact in trenches A, B and C. Measurements by CO Moore of the overall dimensions of the trenches, as well as the amount of slope in trench walls at

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58 Although unnecessary to this decision, I further find that, based on the same facts and reasoning, the soil analysis by Shilstone was consistent with observations of CO Moore.

59 His testimony indicated that his usage of the term cemented in regard to the trenches indicates smashed limestone and clay, a man-made cement in the fill areas approaching the consistency of one-half sack of man-made cement.

sections A-A, B-B and C-C were not controverted by Hughes. I so find. I further find his testimony regarding the deficiencies in sloping of trench walls at sections A-A, B-B and C-C to be correct.

This standard seeks to protect workers in trenches from the hazards of trench walls sloughing off or caving in upon them. On the basis of the unrebutted testimony of CO Moore, I further find that (i) respondent's employees were exposed to the hazard by virtue of their working in trenches B and C during the inspection and having previously worked in trench A, (ii) there was a substantial probability of death or serious physical harm if such an accident occurred (a cave-in of trench walls), and (iii) the hazardous conditions were readily visible and obvious (Tr. 49-50, 80-81; Tr. 50; and Tr. 51).[60] Respondent was in serious violation of the subject standard.

The next issue to be resolved is whether the violation was willful. In order to establish a violation of that character, the evidence must establish that the violation was committed with either (i) an intentional disregard of the requirements of the Act, or (ii) a plain indifference to them. If the employer had a good faith belief that the violative conditions met the requirement of the subject standard, then the violation is not willful. Mel Jarvis Construction Co. 81 OSAHRC 89/B13, 10 BNA OSHC 1052, 1981 CCH OSHD ¶25,713 (No. 77-2100, 1981). In this case, the evidence of record reveals that (i) respondent has been cited for a violation of the same standard on two prior occasions, and (ii) those

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60 Due to the facts that (i) Davis was on the site on a regular basis, and (ii) Hughes visited the worksite two or three times a day, I find that the requisite knowledge was present if either of them had exercised reasonable diligence. Their knowledge is imputed to respondent.

citations were the subject of settlement agreements, wherein respondent withdrew its notices of contest and which became final orders of the Commission (Tr. 52-59, 187-191, 218, 220, Ex. P-5 through P-8). Indeed, Hughes admits actual knowledge of the requirements of the standard prior to all three inspections (Tr. 190-191). He testified that the prior citations were settled, despite his opinion that their issuance was not justified by the facts, because the Secretary's settlement offers were so low that they did not justify hiring a lawyer and contesting them (Tr. 218, 220). In effect, he testified that CO Moore did not understand the standard when issuing the prior citations or the current one in issue (Tr. 189, 218). In other testimony, he points out that (i) the prior citations were issued at different workplaces than the subject of the current citation, and (ii) different circumstances were encountered at those locations (Tr. 216-220, 229-230). According to CO Moore, soil conditions at the other locations were similar to those encountered at the workplace which was the subject of the current citation, i.e., hard and compact (Tr. 101-104).

I have carefully considered the arguments advanced by the parties in their briefs, together with authorities cited in support thereof, in regard to the issue of whether the violation was of a willful character. Since Hughes was fully aware of the standard, the issue is whether the evidence establishes a good faith defense. The test employed is an objective one, i.e., was respondent's belief concerning (i) a factual matter, or (ii) the interpretation of the standard, reasonable under the circumstances. Wright & Lopez, Inc., 81 OSAHRC 92/D10, 10 BNA OSHC 1108, 1981 CCH OSHD ¶25,728 (No. 76-256, 1981). Under the facts of this case, I conclude that the violation was willful. I cannot overlook (i) the inconsistencies in his testimony regarding the composition and strength

of the trench walls in trench C at section C-C,[61] or (ii) the fact that samples were taken from the trench wall at section B-B by shovel on the date of the inspection. Additionally, on the basis of my assessment of the total evidence of record, including testimony, exhibits and credibility resolutions, I find that a good faith defense has not been established in this matter.

In light of the record and the statutory penalty criteria set forth in §17(j) of the Act, I conclude that a penalty of $2,500.00 is reasonable and appropriate.[62]

## FINDINGS OF FACT

The evidence of record having been considered and evaluated in its entirety, the following facts are specifically found:

1. To avoid repetition, those facts set forth (i) under the headings entitled JURISDICTION and PARTIAL RESOLUTION OF THE FACTS, and (ii) those undisputed facts set forth in the third, fourth, fifth and sixth paragraphs of the foregoing discussion of item 1 of willful serious citation 2 (immediately following a recital of the standard), are hereby incorporated by reference to the extent that they are not set forth hereunder.

2. The OSHA inspection in June 1980 disclosed that three separate trenches (A, B and C) had been dug by respondent's employees.

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61 These were discussed fully hereinabove, i.e., a fear that weather would affect trench walls, barricades erected after a problem on that side (trench C) and the material on top of the pipe being too hard to dig versus a contrary statement that no problem, except for one large rock, was encountered while digging the trenches.

62 Since the evidence of record does not show the size of the business of the employer, I have assumed that it is small. I have also made this assumption in assessing penalties on the other two violations.

3. All of the trenches significantly exceeded five feet in depth and eight feet in length.

4. The trenches were not shored or braced in any manner.

5. All of the trenches were dug in hard and compact soil.

6. Trench walls above five feet were sloped adequately in some places and inadequately in other places. Where inadequately sloped, they were steeper than a one-foot rise to each one half-foot horizontal.

7. The various dimensions of the trenches were measured by the compliance officers, using a steel tape, a plumb bob and a long pole.

8. Prior to the inspection, a cave-in occurred at the west face of trench C.

9. The compliance officers were able to take soil samples with a shovel at depths of one and one half feet, six feet and eight feet in the right wall of trench B in section B-B.

10. Inadequate sloping was present in those areas designated in Ex. P-2 as A and A, B and B, and C and C.

11. The deficiences in sloping were as follows: the right wall of trench A at section A-A, four feet, five inches; right wall of trench B at section B-B, one foot eleven inches, and left wall, three feet six inches; and the left wall of trench C at section C-C, six feet nine inches and the right wall, five feet three inches.

12. Respondent's employees were exposed to the hazard of trench walls sloughing off or caving in upon them while working in trenches A, B, and C.

13. Hughes, respondent's president, was aware of all facts at the worksite giving rise to the violation. The requisite knowledge was present and is imputed to respondent.

14. If an accident occurred (sloughing off or caving in of trench walls), there was a substantial probability that the result thereof could be death or serious physical harm.

15. Respondent had been cited for a violation of the same standard on two prior occasions at different worksites. As part of settlement agreements in those cases, respondent withdrew its notices of contest. The settlement agreements became final orders of the Commission.

16. Hughes possessed actual knowledge of the requirements of the subject standard prior to the current inspection.

17. The violation of §1926.652(c) was committed with either an intentional disregard of the requirements of the Act or a plain indifference thereto.

18. Respondent was in willful violation of §1926.652(c).

19. The evidence does not establish that the violation of §1926.652(c) by respondent was based on beliefs or opinions which constitute a good faith defense.

20. The appropriate penalty is $2,500.00.

## CONCLUSIONS OF LAW

1. At all times material hereto, respondent was an employer within the meaning of §3(5) of the Act, engaged in a business affecting commerce, and having employees.

2. The Commission has jurisdiction over the parties and subject matter of the proceeding.

3. Respondent was in repeat nonserious violation of 29 CFR 1926.450(a)(2).

4. Respondent was in (serious) violation of §5(a)(1) of the Act.

5. Respondent was in willful serious violation of 29 CFR 1926.652(c).

## ORDER

Upon the basis of the foregoing findings of fact, conclusions of law, and the record as a whole, it is ORDERED that:

1. Respondent's requested findings of fact, to the extent that they are inconsistent with this decision, are denied.

2. Item 1 of citation 3, alleging a repeat nonserious violation of 29 CFR 1926.450(a)(2), is AFFIRMED, and a civil penalty of $125.00 is ASSESSED.

3. Item 1 of citation 1, alleging a (serious) violation of §5(a)(1) of the Act, is AFFIRMED, and a civil penalty of $300.00 is ASSESSED.

5. Item 1 of citation 2, alleging a serious willful violation of 29 CFR 1926.652(c), is AFFIRMED, and a civil penalty of $2,500.00 is ASSESSED.

E. Carter Botkin

E. CARTER BOTKIN
Administrative Law Judge

Date: August 5, 1982

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
ROOM 7B11, FEDERAL BUILDING
1100 COMMERCE
DALLAS, TEXAS 75242
FTS 729-5271
COM (214) 767-5271

# NOTICE OF DECISION

Secretary of Labor v. Welltech, Inc.
OSHRC Docket NO. 81-2740

1. Enclosed is a copy of my decision. It will be filed with the Commission on August 5, 1982, and will become the final order of the Commission on September 7, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D. C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is September 7, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92 and 93.

Administrative Law Judge

Date: July 16, 1982

OSHRC Form 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>WELLTECH, INC.,<br><br>Respondent. | OSHRC DOCKET NO. 81-2740 |

JUDGE'S DECISION
AUG 2 '82
RECEIVED
FINAL ORDER ON
SEP 7 '82

DECISION AND ORDER

Appearances: Marigny A. Lanier, Esq., of Dallas, Texas, for the complainant.

George R. Carlton, Jr., Esq., of Dallas, Texas, for the respondent.

PROCEDURAL HISTORY

After an employee was fatally injured by being wrapped up in the cable of a draw works drum November 25, 1981, on an oil well workover rig on Walters Road near Houston, Texas, the workplace was inspected between November 30, 1982, and December 4, 1981, by a safety compliance officer of the Occupational Safety and Health Administration ("OSHA"), which, on December 11, 1981, issued one citation to the respondent, Welltech, Inc. ("Welltech") alleging that it seriously violated §5(a)(2) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et seq. ("the Act") and the regulation codified at 29 CFR §1910.212

(a)(1) [1] by failing to guard the draw worksdrum. Welltech timely filed a notice of contest December 21, 1981, initiating this proceeding before the Occupational Safety and Health Review Commission ("the Commission") under §10(c) of the Act. Thereafter a complaint and an answer were filed with the Commission. The case came on regularly for hearing in Houston, Texas, on May 18, 1982. No affected employee or representative of affected employees participated in this proceeding. Neither party submitted a posthearing brief.

## THE ISSUES

Welltech's answer admitted the jurisdictional allegations of the complaint. The ultimate issues remaining to be determined are whether Welltech seriously violated §1910.212(a)(1) and, if so, the appropriate penalty.

## DISCUSSION AND OPINION

The factual background.

Charles Borst, a motorman, was fatally injured when he hopped up on top of the draw works drum when it was stopped momentarily—apparently believing that the well servicing rig was being shut down for inspection of the gear box.

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[1] 1910.212—GENERAL REQUIREMENTS FOR ALL MACHINES

(a) Machine guarding.

(1) Types of guarding. One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are—barrier guards, two-hand tripping devices, electronic safety devices, etc.

Instead, the line on the drum was taken in again at high speed, and Borst was wrapped around the drum by the wire rope. When the line is being spooled in, it forms an ingoing nip point with the drum.

This rig (No. 76) was one of some 400 oilwell servicing rigs operated by Welltech. It was of the two-drum type, that is, it had a draw works (or "main") drum and a sand line drum, and the gear box was between them. The main drum was in front (closer to the rig floor), and the sand line drum was in the back. The sides of the two drums were enclosed by a metal sheet which went down to the ground, with the top bent over the edges of the drums about 4 feet high. The back and part of the top of the sand line drum was covered by a splash guard to keep mud and fluid from the sand line from being thrown over the rig.

The sand line operates down the hole and thus gets muddy. The draw works (or "tubing") line is used only to support the traveling block and the pipe suspended in the hole (sometimes weighing many tons); it is kept oily but does not require a splash guard like that on the sand line drum.

The wire rope lines from both drums go over the crown block in the top of the derrick, but since the draw works drum is closer to the rig its line ascends at a steeper angle (60 to 70 degrees from horizontal) than does the sand line. This makes it possible to cover more of the top of the sand line drum than that of the draw works drum. It is not possible to cover either of them completely since a slot or "window" has to be left in the cover to enable the lines to be spooled out or in.

Rig No. 76, although classified as a well servicing or workover rig, was capable of being used to drill shallow wells (up to 3,000 feet deep) and was

so used about half the time. A regular drilling rig is much larger and has its draw works on the rig floor (Tr.53). Since there is considerable activity on a drilling rig floor, there is danger that a crew member may fall into the draw works; therefore, it is always fenced off. The draw works drum on well servicing rigs, such as Rig No. 76, is characteristically several feet away from the rig floor and below it.

On Rig No. 76 the draw works was located near the foot of the stairs leading from the rig floor to a walkway; it would be to the right of a person coming down the stairs, and the walkway would then lead to the left, away from the draw works. A person coming down the stairs would have to step to the right about two feet from the foot of the stairs to stand between the rig floor and the draw works. On that side of the draw works there was no fence or guardrail, but there was a catline box about two feet high and three feet wide which partially blocked the four-foot-wide opening to the draw works on that side (Tr.118,119).

No member of the Welltech crew had a work station near the draw works or a reason to be near it while the rig was in operation (Tr.84). However, David Nielsen, drilling supervisor for the operator, Texaco USA, happened to be standing on the walkway at the foot of the stairs when the fatal accident occurred. Nielsen testified that Borst came down the stairs, stepped up on top of the catline box until the draw works drum stopped, then stepped over onto the drum just two or three seconds before it started spinning again at tremendous speed (Tr.49-61). Since the drum was spooling in the line, Borst was caught in the nip point and instantly wrapped around the drum with fatal results. Nielsen warned Borst to stay away from the tubing line, but Nielsen did not know whether Borst heard him (Tr.59).

David Mastin, the driller, had talked to Niesen and Borst about a missing link in a chain in the gear box which he thought should be repaired before it caused more serious trouble. Mastin had decided that they would look at the chain as soon as he had made "one more stand", meaning as soon as two lengths of pipe were lowered into the hole. However, the derrickman missed the stand, so Mastin stopped the drum, lowered the travelling block so the derrickman could attach the elevators, then hoisted the travelling block again. He estimated the speed of the draw works drum at 70 miles per hour when he heard Nielsen shout to him to stop (Tr.44-46,50). By then, of course, Borst was dead. Borst had apparently been misled by the extra trip of the block due to the derrickman's missing the stand, so when Mastin had lowered the block and stopped the draw works drum momentarily he stepped on the drum to get to the gear box to look at the chain.

The defense of impossibility of compliance.

Welltech did not plead the affirmative defense of impossibility of compliance, and since it made no closing argument and filed no posthearing brief its position on this matter is not entirely clear. However, most of the testimony of its three witnesses was devoted to proving this defense.

Impossibility of compliance is an affirmative defense, with the burden of proof on the respondent, and it should be pleaded by the respondent at an early stage of the proceedings to give the complainant a fair opportunity to meet it. The Leone Construction Co., 76 OSAHRC 12/E6, 3 BNA OSHC 1979, 1975-76 CCH OSHD ¶20,387 (No. 4090, 1976). Such a defense ordinarily is waived by failure timely to plead it. However, as stated in York Metal Finishing Company, 74 OSAHRC 19/D2, 1 BNA OSHC 1655, 1973-74 CCH OSHD ¶17,633

(No. 245,1974), pet. for review dismissed, No. 75-1554 (3d Cir. 1974),

> "To hold differently would subject an employer to daily penalties for failure to abate a condition that may not actually violate the Act."

Here the incongruous result might be to require respondent to do the "impossible" or to subject itself to penalties in perpetuity. Therefore, this defense will be considered fully.

The Secretary introduced evidence that the draw works drum should have been guarded in the same manner as the sand line drum, that is, with a metal cover (Tr.12,14,47). Welltech introduced evidence that this would have been impossible because of the necessity of leaving a window or slot for the tubing line to move back and forth as it was spooled onto or off of the drum and because the high angle of the tubing line would have placed this slot so near the top of the spool that such a guard would have been ineffective (Tr.81,108, 109).

In addition, Welltech contends that a guard over the top of the drum would conceal the cable on the drum from the driller and prevent his seeing a possible overlap which, due to the tremendous weight borne by the draw works, might cause the cable to cut itself in two, dropping the block on the crew.

The elements of the affirmative defense of impossibility, which must be established by the respondent, are that compliance with the cited standard either was functionally impossible or would preclude the performance of required work and that alternative means of compliance were unavailable. N.J. Lee Constr. Co., 79 OSAHRC 12/A2, 7 BNA OSHC 1140, 1979 CCH OSHD ¶23,330 (No. 15094, 1979).

The evidence of functional impossibility of compliance is conflicting.

Compliance Officer Carpena, who had never before inspected an oil well service rig and admitted he didn't know the difference between service rigs and drilling rigs (Tr.18,22), testified that in his opinion the draw works drum could be guarded in the same manner as was the sand line drum (Tr.14) and that he had been told by a representative of the manufacturer of Rig No. 76, Cabot Corp., that, although such rigs had not been so guarded in the past, future models would have the draw works drum guarded (Tr.26).

John R. Reese, vice-president for engineering of Cabot's present owner, Ingersoll Rand Oil Field Products Co. and former Cabot employee, testified that such rigs had never had guards over the draw works drums, that this rig was standard in the industry, and that a guard such as that on the sand line drum would not prevent an employee's stepping onto the drum (Tr. 108, 109). He was not asked whether his company planned to equip future models of this rig with guards on the draw works drums or whether he considered it possible to guard them.

Mastin, who at the time of the accident had had only a few months' experience in drilling or service rigs and had only recently been promoted to driller by Welltech, testified that the draw works drum should have had a guard over the top (Tr.47) and that he had seen guards on such drums on two drilling rigs (Tr.52).

Nielsen, the Texaco drilling superintendent, testified that he had seen workover rigs with guards on the draw works drums of the type contended for by the Secretary (Tr.62,63). His total experience was not developed, but he had worked for Texaco five years (Tr.55).

On the basis of 32 years' experience in the oil fields, Vance Sharpe,

Welltech's loss prevention manager, testified that he had never seen a workover rig with a guard over the draw works drum (Tr.71). He said that Welltech had 400 such rigs and in a dozen or more OSHA inspections it had never been cited for failure to guard a draw works drum (Tr.70,80). He described the partial guard around the draw works, as set forth previously, and said this was considered adequate in the industry (Tr.73,74).

The Secretary introduced into evidence two sets of industry safety standards or recommendations which provided for guards in front of the draw works drum. API RP54, Recommended Practices for Occupational Safety and Health for Oil and Gas Well Drilling And Servicing Operations, First Edition, January 1981, (Exhibit C-5), provides at §8.5.2:

> The draw works shall have a guard in front of the drum to prevent employees from falling into the drum or lines.

This provision is eliminated in vertical regulations for the oil well servicing industry proposed to OSHA by the Association of Oilwell Servicing Contractors (Exhibit R-1). Sharpe, who worked on the drafting of this exhibit, testified that the provision for guarding the draw works drum was eliminated because the industry's safety people felt there was no hazard (Tr.79).

The other publication on this subject was Exhibit C-6, Rotary Drilling, Safety on the Rig, Unit 1, Lesson 10, Third Edition, 1981, published by the Petroleum Extension Service, Division of Continuing Education, The University of Texas, in cooperation with the International Association of Drilling Contractors, on p.17 of which is the statement, "A steel guard should be placed in front of the draw works drum to prevent a floorman from falling into the drum and being caught by the hoisting line."

Finally, Rick Poyner, an insurance executive who said he had inspected "thousands" of oil field rigs (Tr.92), testified that he had never seen a guard on the draw works drum of a service rig (Tr.93), at least on a double-drum unit such as this one (Tr.94).

It is apparent from the evidence summarized above that it is rare indeed for the draw works drum of an oil well service rig to have a guard over its top. In fact, the only witness to testify that he had seen such guards was Nielsen, the Texaco drilling superintendent. There is no reason to question his veracity, impartiality, or expertise. However, he was not asked how many such rigs he had seen that were so equipped.

That it was not industry practice to use such guards is not conclusive of the matter, for it is OSHA's job to improve worker safety and, in the process, push forward the frontiers of such things as machine guards.

Nielsen's testimony does tend to prove that it is possible to guard draw works drums on service rigs in the manner advocated by the Secretary. There is also evidence that such guards are sometimes used on drilling rigs. Mastin, the driller, testified that he had seen them on two drilling rigs. The American Petroleum Institute's Recommended Practices (Exhibit C-5), which is applicable to both types of rigs, provides for " a guard in front of the drum," which apparently means some type of fence rather than the kind of guard here proposed.

The main thrust of Welltech's testimony regarding impossibility of compliance is that the high angle of the tubing line, together with the slot required to allow it to wind on and off the drum, makes it impossible to put a guard on the top of the drum where Borst stepped. It would, however, be possible to have the guard over part of the drum , and it would afford some

protection. An employer is required to provide feasible protection to his employees, even though it is not complete.

Welltech also introduced evidence that a guard over the drum would interfere with the driller's ability to see the drum and tell whether the line is winding on properly. Whether Welltech intended this testimony to help prove impossibility of compliance is uncertain. Actually, it would be more pertinent to a defense of "greater hazard" because Welltech's testimony is to the effect that an overlapping line could sever itself and cause the travelling block to fall on the crew (Tr.94,95). "Greater hazard" is also an affirmative defense which Welltech should have pleaded if it intended to rely on it. In any event, it does not meet the requirements of this defense which are that the hazards of compliance are greater than the hazards of non-compliance; that an alternative means of protection is unavailable; and that a variance application under §6(d) of the Act would be inappropriate. Cornell & Co., Inc., 77 OSAHRC 18/D10, 5 BNA OSHC 1018, 1976-77 CCH OSHD ¶21,532 (No. 9353, 1977). Welltech has shown none of these things.

The second element of the "greater hazard" defense is like that of "impossibility" in that the respondent must show that an alternative means of protection is unavailable. Here an alternative means of protection is available in the form of a fence in front of the drum. A fence would have kept Borst from stepping up onto the catline box and thence onto the drum. One of Welltech's witnesses, Poyner, conceded that such a fence was feasible (Tr. 103). The API standards (Exhibit C-5) and the Safety on the Rig course co-sponsored by the International Association of Drilling Contractors (Exhibit C-6) seem to contemplate a barrier or fence rather than a guard on the drum itself, since they both provide for a guard in front of the drum.

Therefore, assuming that Welltech has proved that it is impossible to

put a guard over the drum and that such a guard would create a greater hazard, it still has not shown that an alternative means of protection was unavailable—or that it used an alternative means of protection that was available.

The Secretary has the burden of proving that a hazard exists for there to be a violation of §1910.212(a)(1). Papertronics, Division of Hammermill Paper Co., 78 OSAHRC 54/C6, 6 BNA OSHC 1818, 1978 CCH OSHD ¶22,898 (No. 76-3517, 1978).

Compliance Officer Carpena based his opinion of the existence of a hazard primarily on the accident in which Borst lost his life (Tr.10). Although he thought that the drum could and should have had a guard on it (Tr.14), the driller, Mastin, testified that there was no danger that a person descending the stairs from the rig floor or using the walkway at its foot would fall into the drum (Tr.18,119). This was because the side of the draw works toward the rig floor was offset about 2 feet and was partially blocked by the 2 x 3 foot catline box and because the stairway had guardrails. However, the route used by Borst was an easy way to the gear box, as Nielsen, the Texaco drilling superintendent, testified (Tr.65). I find that there is sufficient proof of the existence of a hazard. The likelihood of an accident such as Borst's was small, but the possibility of horrible injuries or death was so great if an accident did occur that the employer should have done everything reasonably possible to prevent it. A fence across the open end of the draw works would have been a simple and obvious precaution, whether or not it was feasible to guard the top of the draw works drum.

Machine guards, of course, are intended to avoid dependence on human conduct, skill or experience for safety. B.C. Crocker dba Crocker Cedar Products,

76 OSAHRC 132/B6, 4 BNA OSHC 1773, 1976-77 CCH OSHD ¶21,179 (No. 4387, 1976).

I find this item proved and that the violation was serious in that there was substantial probability that if an accident did occur it was likely to result in death or serious physical harm within the meaning of §17(k) of the Act.

The appropriate penalty.

Section 17(j) of the Act requires the Commission, in assessing penalties, to consider the gravity of the violation and the employer's size, good faith and history of previous violations. These factors need not be accorded equal weight, but the gravity is usually of greater significance than the others. Colonial Craft Reproductions, 72 OSAHRC 11/B10, 1 BNA OSHC 1063, 1971-73 CCH OSHD ¶15,277 (No. 881,1972). Elements to be considered in determining gravity include the number of employees exposed to the risk of injury, duration of the exposure, precautions taken against injury, and the degree of probability of occurrence of an injury. National Realty & Construction Co.,Inc., 72 OSAHRC 9/A2, 1 BNA OSHC 1049, 1971-73 CCH OSHD ¶15,188 (No. 85, 1972) rev'd on other grounds, 489 F.2d 1257 (D.C. Cir., 1973).

Welltech is a large employer and has previously been cited by OSHA for various violations of the Act at other worksites (Stipulation, Tr.4). There is nothing in the record of this case reflecting on its good faith. The gravity of the violation is high.

The Secretary has proposed a penalty of $560. On balance, I find this penalty appropriate.

FINDINGS OF FACT

1. Welltech is a large firm engaged in the oil well servicing business with over 4,000 employees and over 400 rigs in operation. It is engaged in a

business affecting commerce within the meaning of §3(5) of the Act.

2. On November 25, 1981, Welltech's Rig No. 76 was servicing a well at a location off Walters Road near Houston, Texas. The draw works drum and the sand line drum were located off the rig floor, with the gear box between them and the draw works drum nearer to the rig floor. The sand line drum had a guard over the top as far as possible in view of the necessity to leave a window or slot for the sand line to wind on and off the drum. The draw works drum had no guard over its top. It would have been possible to install such a guard on the draw works drum, but it would not have covered as much of the top of the drum as that on the sand line drum because the tubing line spools on and off the draw works drum at a steeper angle than the sand line does to its drum.

3. The two drums were enclosed on three sides by a metal skirt to a height of about 4 feet. The fourth side, toward the rig floor,was partially blocked by a catline box about two feet high and three feet wide.

4. Charles Borst, Welltech motorman, was fatally injured November 25, 1981, when he stepped up on the catline box and then onto the draw works drum while it was stopped momentarily. The drum was started up again while Borst was on top of it, and he was caught in the ingoing nip point formed by the tubing line and the drum, which was reeling in the line.

5. David Mastin, the driller in charge of the crew in the absence of the toolpusher, had told Borst that after making one more stand of pipe he was going to shut down the rig to look at a chain in the gear box which had a missing link. Borst then went to the draw works in preparation for this operation. Apparently unknown to Borst, the derrickman missed the stand of

pipe, causing Mastin to lower and then raise the travelling block an extra time. Not expecting the block to be raised again, Borst stepped from the catline box to the draw works drum with fatal results.

6. The route taken by Borst was an easy way to reach the gear box. There was no evidence that it could be reached any other way.

7. A guard over the top of the draw works drum would not have afforded complete protection to employees, since it was not possible to cover the whole top of the drum, but enough of it could have been covered to provide substantial protection.

8. The draw works was guarded on three sides, and the fourth side, through which Borst entered, could feasibly have been guarded by a barrier or fence.

9. Due to the tremendous weight supported by the draw works drum and the tubing line, the tubing line could cut itself if it overlapped, thus possibly causing the travelling block to fall to the rig floor. This was a remote possibility and did not pose a greater hazard than the unguarded draw works drum.

10. Welltech has failed to prove the elements of the affirmative defenses of impossibility of compliance and greater hazard.

11. Welltech knew or in the exercise of reasonable diligence could have known of the existence of the hazard posed by the unguarded draw works drum.

12. The proposed penalty of $560 is appropriate.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction of the parties and of the subject matter of this proceeding.

2. On November 25, 1981, Welltech was in serious violation of §5(a)(2) of the Act and 29 CFR 1910.212(a)(1).

## ORDER

On the basis of the foregoing discussion and opinion, findings of fact, and conclusions of law, it is ORDERED that:

1. Item 1 of citation 1, issued to Welltech December 11, 1981, for serious violation of 29 CFR 1910.212(a)(1), is AFFIRMED and a penalty of $560 is ASSESSED.

DEE C. BLYTHE
Administrative Law Judge

Date: August 5, 1982

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| 82-0018-P | SECRETARY OF LABOR AND VICTORY LODGE NO. 1862, et al | 9/8/82 | 53/A3 |
| 81-0470 | MODINE MANUFACTURING CO. | 9/9/82 | 53/A6 |
| 81-2635 | KENNETH J. HERMAN, INC. | 9/9/82 | 53/B2 |
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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v | : | OSHRC Docket No. 8165 |
| CARNATION COMPANY, a Corporation | : | |
| Respondent. | : | |

ORDER APPROVING SETTLEMENT AGREEMENT AND DISMISSING COMPLAINT

The parties have entered into a settlement agreement pursuant to Rule 100 of this Commission's Rules of Procedure. In that agreement, filed July 27, 1982, Respondent has certified that a copy of the settlement agreement has been served on the employee representative by mailing to the Secretary-Treasurer, Local 695, International Brotherhood of Teamsters, 1314 N. Stoughton Road, Madison, Wisconsin 53714.

Pursuant to that settlement agreement Complainant moves to dismiss its complaint, as amended by the settlement agreement with no costs, fees or other expenses to the assessed against or awarded to any of the parties. Respondent stipulates to that motion.

It is ordered that the settlement agreement is approved and the motion to dismiss the complaint is granted.

Richard J. Murphy
Judge, OSHRC

Dated: August 9, 1982

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

LADISH COMPANY v. SECRETARY OF LABOR AND VICTORY LODGE NO. 1862, et al

OSHRC Docket No. 82-0018-P

1. Enclosed is a copy of my decision. It will be filed with the Commission on August 9, 1982, and will become the final order of the Commission on September 8, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is September 8, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

EABobrick

Edward A. Bobrick
Judge, OSHRC

Date: July 20, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| LADISH COMPANY, | : | |
| Petitioner, | : | |
| v. | : | OSHRC Docket No. 82-0018-P |
| SECRETARY OF LABOR, | : | |
| Respondent. | : | |
| VICTORY LODGE NO. 1862, International Association of Machinists and Aerospace Workers, | : | |
| Employee Representative, | : | |

DECISION AND ORDER

Appearances:

T. TIMOTHY RYAN, Esq., Solicitor of Labor, HERMAN GRANT, Esq., Regional Solicitor and KAREN L. MANSFIELD, Esq., Office of the Solicitor, Chicago, Illinois, for RAYMOND J. DONOVAN, Secretary of Labor, U.S. Department of Labor, Respondent.

MICHAEL S. McCAULEY, Esq., QUARLES & BRADY, for Petitioner.

ANDY VICTOREY, Chairman, IAMAW Local 1862, the Authorized Employee Representative

BOBRICK, Judge

Hearing was held in this matter on June 8, 1982, under section 10(c) of the Occupational Safety and Health Act of 1970,

29 U.S.C. 651 et seq., hereinafter referred to as the Act, pursuant to the filing of a Petition for Modification of Abatement by the Petitioner, Ladish Company, and the responses thereto filed by the Respondent, Raymond J. Donovan, Secretary of Labor, U.S. Department of Labor, and the Authorized Employee Representative, Victory Lodge No. 1862, International Association of Machinists and Aerospace Workers, in which the Petition was contested.[1/]

At the hearing, each party indicated that agreement had been reached concerning the terms of abatement as set out in the Petition, which included the abatement dates. The respective positions of the parties as to abatement, as set forth in the Petition as amended at the hearing, was incorporated into a Settlement Agreement. The Settlement Agreement, dated June 25, 1982, is approved and made a part hereof.

Based upon the record in this case and the representations made by all parties who participated at hearing, it is therefore ORDERED that the Petition for Modification of Abatement, as modified or amended by the Settlement Agreement, is AFFIRMED.

Edward A. Bobrick
Judge, OSHRC

Dated: August 9, 1982

Chicago, illinois

---

1/ With respect to contests initiated by an employee, or representative of employees, section 10(c), in applicable part, provides: any employee or representative of employees files a notice with the Secretary alleging that the period of time fixed in the citation for the abatement of the violation is unreasonable, the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
55 EAST MONROE STREET, ROOM 1530
CHICAGO, ILLINOIS 60603
(312) 353-2584

## NOTICE OF DECISION

SECRETARY OF LABOR v Modine Manufacturing Co.

OSHRC DOCKET NO. 81-0470

1. Enclosed herewith is my decision in the above-entitled case. It is being filed on this date and will become the final order of the Commission pursuant to 29 U.S.C. §661(i) on September 9, 1982, unless a Member of the Commission directs that it be reviewed.

2. Parties will not receive any further communication from the Commission on this case unless review is directed by a Member of the Commission. In that case each party will be notified and given an opportunity to submit a brief to the Commission Members prior to their final disposition of the case.

Ralph B. Maxwell
Judge, OSHRC

Enclosure

Date: August 10, 1982

OSHRC FORM NO. 99
DEC 74

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v | : | OSHRC Docket No. 81-0470 |
| MODINE MANUFACTURING COMPANY, | : | |
| Respondent. | : | |

## DECISION

By stipulation of the parties, the question of the validity of a search warrant will control the disposition of all issues in this case. The two citations herein are to be affirmed if the search warrant which authorized the OSHA inspection was valid. If, however, the government evidence is the tainted product of an unconstitutional search, the citations are to be vacated.

## FACTS

From the record submitted, I find the essential facts to be as follows:

On September 5, 1980, an OSHA inspector appeared at respondent Modine's place of business in Racine, Wisconsin. He sought to make an inspection of the premises under OSHA's general administration inspection plan. Permission to inspect was refused. The inspector was informed that respondent did not believe there was probable cause for an inspection.

The following day, Modine's attorney telephoned the OSHA inspector and asserted his belief that Modine's Racine facility was not properly subject to inspection under the general administrative inspection plan. On the same date the attorney wrote a letter to OSHA. In it he stated that the Racine location was the company's headquarters, research and prototype facility; that production was carried on at other locations, not at Racine; and that the Racine facility had a very good safety record.

On January 14, 1981, the OSHA inspector appeared ex parte before a U. S. magistrate and secured a search warrant. Under authority of this warrant an inspection was made which resulted in the present citations.

The respondent contends the evidence obtained pursuant to the search warrant should be ruled inadmissable as having been unlawfully obtained. It claims there was no probable cause for issuance of the warrant because the OSHA inspection program was unreasonable. It also claims the program was not properly set up. And finally, Modine says that in any event, the facility inspected did not fit into the inspection program.

## DISCUSSION

From the time of enactment of the Occupational Safety and Health Act in 1970, until 1978, OSHA officials could inspect any workplace almost as their fancy pleased. Search warrants were not deemed necessary because of the language of the Act. Section 8(a) states:

> In order to carry out the purposes of this Act, the Secretary upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized --
>
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and
>
> (2) to inspect and investigage during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

However, in 1978, the U. S. Supreme Court held that Sec. 8(a) violated Fourth Amendment guarantees against searches made without a warrant. Marshall v. Barlow's, Inc., 98 S. Ct. 1816 (1978). The court stated it could find "no justification for federal agents to enter a place of business from which the public is restricted and to conduct their own warrantless search."

Hence, since the Barlow's case, whenever government agents are refused admission to a workplace, they must obtain a warrant before they inspect.

Before a warrant issues, probable cause must, of course, be shown. In the Barlow's case, the Supreme Court set forth what was needed to establish probable cause for OSHA searches. It stated that a showing "that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the Act derived from neutral sources" would constitute probable cause.

The Barlow's decision recognized that inspections are essential if the laudable objectives of the Act are to be achieved. But at the same time the court wanted to assure that no business would be arbitrarily chosen, or that visits would be made willy nilly or upon whim. That decision reaffirmed that the Fourth Amendment was meant to thwart the unbridled invasion by government agents into the sanctuary of home and shop.

> "The basic purpose of this amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." Camara v Municipal Courts, 87 S. Ct. 1727 (1967)

While the Barlow's case required search warrants for administrative inspections, it made them easier to obtain than criminal warrants. For a warrant to inspect for the purpose of enforcement of a regulatory statute, only "administrative probable cause" would be required. And, as above noted, administrative probable cause is established if the proposed inspection is pursuant to a general enforcement program derived from neutral sources.

In the wake of the Barlow's decision OSHA devised a "general administrative plan". It was promulgated December 6, 1978, as OSHA Instruction CPL 2.25. This is the plan which the government says was followed in the instant case, and which it claims conforms in every respect to the dictates of the Barlow's case: that it is a "general administrative plan" for enforcement of the Act; that it is "derived from neutral sources"; and that it provides an unbiased, reasonable scheme for selecting sites for inspection, based on national and regional injury statistics.

Under CPL 2.25, industries in the U.S. were ranked according to degree of employee exposure to danger. Those which statistically have the most injuries were placed highest on the list for inspection purposes. Particular types of businesses were classified according to the Standard Industrial Classification (SIC). As a neutral source for names of employers in a SIC classification within a given geographic area (Wisconsin in this case) OSHA used names found in the records of the State unemployment department. These names were then placed on a schedule or "cycle" for subsequent inspection. With some minor exceptions, each employer on a cycle was inspected before moving on to a cycle of lower priority. Within a cycle, priority of inspections was determined by such factors as size of establishment and how much time had elapsed since the place was previously inspected.

The government in the instant case made a comprehensive documentary presentation to the U. S. magistrate. Among other things, the government laid before the magistrate the text of CPL 2.25, and described in detail how that plan was followed in selecting respondent for inspection; that selection criteria was based primarily on worst injury rates; that respondent had at least eighty-five employees at the Racine facility engaged in making prototype heating, cooling, air handling equipment; that the SIC proper category was No. 3433, the 5th most hazardous in the Milwaukee area; that hazards at the plant arose from use of abrasive

wheels, power shears, punch and drill presses, lathes, welding equipment and hand power tools, that could result in cuts, fractures, sprains, amputations, crushing and falling injuries.

From this record the magistrate found probable cause to issue a search warrant. Great deference is to be paid this determination.

In my opinion, the evidence before the magistrate was sufficient to support his finding of probable cause. I concur with his conclusion, implicit in his action approving a warrant, that CPL 2.25 constituted an administrative plan for enforcement of the Act appropriately derived from neutral sources, thus meeting constitutional and judical standards.

Respondent contends that its Racine establishment was improperly classified by the government as a manufacturer of heating equipment (SIC Code 3433). It concedes that it is a manufacturer of heating equipment, but not at Racine. The Racine facility, Modine claims, is the company headquarters where, among other things, prototypes of its products are engineered and built. The manufacture of products to be marketed is done elsewhere.

In my view SIC Code 3433 was a proper classification of the Racine facility. The fact that Modine did fabricate prototype heating equipment at Racine brought it within the broad definition of manufacture, to-wit; something made from raw materials by hand or by machinery. Modine advocates a more restricted definition of manufacturing. It views manufacturing as production on a limited or mass basis for sale to the public. However, even under that concept, SIC Code 3433 would be appropriate, since in Modine's operation, the

building of prototypes is an integral part of the process of manufacturing heating equipment for sale.

Modine also contends that the warrant was invalid because administrative plan CPL 2.25 was not properly adhered to, and as a result Modine was scheduled for inspection out of its proper turn. It claims that taking Modine out of sequence made its selection arbitrary and capricious.

This argument has little merit. According to the evidence presented to the magistrate, Modine was on the third cycle of places to be inspected. All of the work places in cycles one and two had been inspected, except one which was on strike. In the third cycle, two inspections scheduled ahead of Modine had been postponed.[1/] This is the entire basis for Modine's claim of impropriety.

CPL 2.25 allows postponement of a scheduled inspection under certain specified circumstances. The circumstances that were administratively deemed sufficient for postponement in the instant case were fully disclosed to the magistrate.

No comprehensive nationwide program can be expected to function with absolute mechanical precision. Some administrative latitude for making minor adjustments to accommodate special circumstances is necessary, and is provided for in CPL 2.25. In the present instance, the magistrate found that administrative discretion was properly exercised. I concur.

---

1/ These establishments were litigating prior citations and settlement negotiations were in progress. Ostensibly a new inspection would prejudice these negotiations.

Finally, Modine asserts that probable cause for a warrant did not exist because its Racine facility had an injury rate well below that shown by nationwide statistics. However, under CPL 2.25 as it existed on the date the warrant was issued, the injury rate of the specific workplace selected for inspection was immaterial.[1/] And in any event, to support Modine's contention that it's injury rate was less than the national average, we would be required to consider injury statistics of the Modine workplace that were not before the magistrate.[2/] In reviewing a magistrate's finding of probable cause, we are limited to the record before the magistrate. Sarasota Concrete Co. 9 OSHC 1613 (1981).Legal precedent requires me to decline to pursue this contention.

From the record before me, and the stipulation of the parties, I now find and conclude as follows:

1. The OSHA general administrative program, CPL 2.25, used in the instant case meets the "neutral source" criteria of the Barlow's case, and the magistrate was correct in finding probable cause for a warrant from the evidence presented to him.

2. Pursuant to stipulation of the parties the respondent is found in violation of Sec. 5(a)(2) of the OSH Act as alleged in the citations herein; and the penalties as proposed in the citations are appropriate.

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1/ CPL 2.25 has since been amended, and individual injury rates are now a factor in selection.

2/ The only allusion to this aspect of the case in the evidence before the magistrate was a copy of a letter from Modine's attorney to OSHA in which the attorney alleged that Modine had a "very good"safety record.

It is now therefore ORDERED that

1. Items 1(a) and 1(b) of Serious Citation No. 1 are affirmed, and a penalty of $180 is imposed.

2. Item 2 of Serious Citation No. 1 is affirmed, and a penalty of $240 is imposed.

3. Items 3(a) 3(b) & 3(c) of Serious Citation No. 1 are affirmed and a penalty of $180 is imposed.

4. Items 1 through 10, 11a, 11b, and 14 through 21 of Non-serious Citation No. 2 are affirmed, and no penalties are imposed.

Ralph B. Maxwell
Judge, OSHRC

Dated: August 10, 1982

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1515 Broadway, Room 3800
New York, New York 10036

## NOTICE OF DECISION

Secretary of Labor v. KENNETH J. HERMAN, INC.
OSHRC Docket No. 81-2635

1. Enclosed is a copy of my decision. It will be filed with the Commission on August 10, 1982, and will become the final order of the Commission on September 9, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is September 9, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

DAVID G. ORINGER
JUDGE, OSHRC

Date: July 21, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>KENNETH J. HERMAN, INC.,<br><br>Respondent. | OSHRC DOCKET<br><br>NO. 81-2635 |

Appearances:

FOR THE SECRETARY OF LABOR

Francis V. LaRuffa, Regional Solicitor;
William G. Staton, Esq., of Counsel,
U. S. Department of Labor
1515 Broadway, Room 3555
New York, New York 10036

FOR THE RESPONDENT

Kenneth J. Herman, President
Kenneth J. Herman, Inc.
67 Albany Avenue
Amityville, New York 11701

DECISION AND ORDER

ORINGER, JUDGE: This is a proceeding under Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, et seq., (hereinafter referred to as "the Act"), to review a citation issued by the Secretary of Labor, (hereinafter sometimes referred to as "Complainant"), pursuant to Section 9(a) of the Act, and a proposed assessment of penalties thereon issued, pursuant to Section 10(a), of the Act.

This cause arose as a result of one citation being issued against the Respondent by the Complainant, alleging a serious violation of the standard set forth at 29 CFR 1926.451(d)(10) and proposing a penalty of $160.00 therefor.

The description of the allegation of violation in this case, reads as follows:

CITATION NO. 1 FOR SERIOUS VIOLATION

| Standard, Regulation or Section of the Act Allegedly Violated | Description of Alleged Violation |
|---|---|
| 29 CFR 1926.451(d)(10) | Standard guardrails and toeboards were not installed at all open sides and ends on tubular welded frame scaffolds more than 10 feet above the ground or floor:<br><br>Job site - Front of building under construction.<br>Tubular welded frame scaffold.<br>Standard railings were not provided for open sides of:<br><br>1) Scaffold platform 13' above ground level.<br><br>2) Scaffold platform mounted on steel frame over cab of motor vehicle 12' above ground level. |

Abatement was demanded by November 6, 1981.

## TEXT OF THE STANDARD INVOLVED HEREIN

| Standard, Regulation of Section of the Act Allegedly Violated | Text of Standard |
|---|---|
| 29 CFR 1926.451(d)(10) | Guardrails made of lumber, not less than 2 x 4 inches (or other material providing equivalent protection), and approximately 42 inches high, with a midrail of 1 x 6 inch lumber (or other material providing equivalent protection), and toeboards, shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor. Toeboards shall be a minimum of 4 inches in height. Wire mesh shall be installed in accordance with paragraph (a)(6) of this section. |

## THE ISSUES

1. Whether or not this Respondent, Kenneth J. Herman, Inc., was in violation of the standard set forth at 29 CFR 1926.451(d)(10)?

2. In the event that a violation by this Respondent is found proven, of the standard set forth at 29 CFR 1926.451(d)(10), was the violation properly characterized as "serious"?

3. In the event a violation is found proven, what would be the appropriate penalty therefor?

OPINION

The testimony of record indicates that there were three scaffolds complained of by the compliance officer, however the citation only specifies two. While some of the testimony of the compliance officer was equivocal, the Secretary nevertheless proved that the Respondent was in violation insofar as at least the ends of the scaffolds were concerned. Neither of the scaffolds delineated in the citation had guardrails at the end, which were wholly unguarded.

By the Respondent's own testimony, at least some unguarded ends had to be at least 12 feet above the ground.

Accordingly, giving the Respondent the best of the testimony, the record clearly demonstrates a violation of this standard which is specific in its requirements.

Among its defenses, the Respondent argued that it had another platform under the one upon which the men were working and that in the event of a fall, this would stop them from falling to the ground below. Assuming that this thesis was accurate, the danger of a fall from more than 10 feet above the ground would not exist. The Respondent however, admitted that at the ends of the platform that were unguarded, the men would, in the event of an accident, fall to the ground. Therefore, the hazard existed. The standard does not provide for equivalent protection such as a platform underneath.

The viability of that defense depends upon the concept that the fall would not be to the ground and therefore would be under 10 feet and would not come within the purview of this standard. In order to appreciate the concept, one could liken it to someone who worked on a floor with a hazardous floor hole with another floor beneath it some six feet below. In that case even if it were a 40-story building, the most that an employee could fall would be six feet through the floor hole because there was a floor below and thus could not fall the 40 stories to the ground.

In the instant cause, however, even assuming that such was the case in the instant cause, the ends of each of the platforms involved herein were totally unguarded. Accordingly, a violation is found.

Insofar as the characterization of the violation is concerned, testimony of the compliance officer was that in the event of a fall, fractures, serious injury or death could occur. With this concept, this tribunal agrees. Falls of ten feet, of twelve feet and of less than ten feet have in the past resulted in death or injury and could again reoccur. Insofar as knowledge of the violation is concerned, mere and sheer observation disclosed a lack of guardrails at the ends of the platform. Additionally, the foreman stated to the compliance officer that Respondent forgot to bring its guardrails. Accordingly,

knowledge of the violation and of the failure to utilize guardrails at the ends of the platforms is demonstrated in the record. In consonance therewith, the characterization of the violation as "serious" was proven.

Insofar as the penalty is concerned, this tribunal finds a penalty of $75.00 reasonable and appropriate herein. The Respondent is advised to heed this caveat, however. This standard requires guardrails whenever employees use scaffolds more than ten feet above the ground or floor. This means guarding the ends as well. In the opinion of this tribunal, if the scaffold is six inches or eight inches from the wall, certainly on that side you would not expect a guardrail because a man could not fall to the ground in a space that close to the wall. On the other hand, at the ends of the scaffold, the hazard of falling always exists. The argument that the men are surefooted, that they will not walk to the end, is devoid of merit. Therefore, the Respondent better heed this caveat that he comply with the standard in the future or be faced with a possible citation of repeated violation or willful violation with greatly enhanced penalties in the event of further violation.

This standard is unequivocal in its requirement that standard guardrails be used wherever the scaffold has an unguarded or open end or side.

As the Secretary correctly points out in its brief, the case of Secretary v. Dick Corporation 7 BNA OSHC 1951, is precedential herein. The Commission, in that decision, said, in pertinent part:

> ". . . the Secretary establishes a prima facie violation of § 1926.451(d)(10) by proving that guardrails meeting the specifications of that standard are not provided on the open sides or ends of tubular welded frame scaffolds more than 10 feet above the ground or floor. The burden then shifts to the employer to prove that its scaffold falls within the "equivalent protection" exception." - at p. 1953, column 2.
>
> ", . . . we defined the terms "open sides and ends" as follows:
>
> > The sides and ends of a scaffold are open if the fall hazards addressed by the standard are present. See Marshall v. Western Waterproofing Company, 560 F.2d 947." - at p. 1954, column 1, para. 1.
>
> ". . . Dick interprets § 1926.451(d)(10) as requiring employees either to equip their scaffolds with standard guardrails or to provide their employees with some form of equivalent protection. We do not agree. The cited standard requires that tubular welded frame scaffolds be equipped with a guardrail that is approximately 42 inches high, a midrail and toeboards. Under the clear terms of the standard, the "equivalent protection" language relied upon by Dick refers to the material used in constructing the required guardrail and midrail. . . . Thus, the standard permits employers to construct guardrails (top rails) from materials that provide protection equivalent to that provided by 2 x 4 lumber and midrails from materials that provide protection equivalent to that provided by 1 x 6 lumber. Accordingly, we reject Dick's contention that the standard by its terms permits employers to use means of fall protection other than standard guardrails (top rails, midrail and toeboards)." - at p. 1953, column 1.

Given the unguarded ends of the scaffolds, at least some of which were 12 feet above the ground, under this decision, a finding of violation was mandated, giving the Respondent the best of the evidence.

The Complainant only proved its case insofar as the ends of the scaffolds were concerned. Whether better preparation would have proven the rest of his case is mere speculation. Accordingly, a penalty of $75.00 is found reasonable and appropriate herein.

Having heard the testimony and observed the demeanor of the witnesses and having considered the same, together with the citation, notification of proposed penalty, notice of contest, pleadings, representations, stipulations and admissions of the parties, it is concluded that the preponderance of the credible evidence of record supports the following

## FINDINGS OF FACT

1. The Respondent, Kenneth J. Herman, Inc., is incorporated in the State of New York and does business in the entire tri-state area (Tr. 5 & 6 of Docket No. 81-1664 involving the same Respondent).

2. The distance between the scaffolds and the wall was little. In both cases they were in close proximity to the wall (Tr. 7).

3. The Secretary's Compliance Officer, Mr. Mincieli, has extensive experience in safety inspection of the construction field (Tr. 10 thru 13).

4. This inspection was a general schedule inspection (Tr. 14).

5. This job consisted of alterations to an old supermarket, both inside and outside (Tr. 17).

6. The Respondent used two sets of scaffolds, one of tubular welded steel scaffold mounted on leveling jacks and there was a tubular welded steel frame scaffold mounted on the front and back of a pickup truck (Tr. 17 & 18).

7. The scaffold platform was two feet wide (Tr. 20, See Exhibit C-1).

8. The Respondent also had a tubular welded frame steel scaffold also consisting of two one foot wide aluminum platforms totalling two feet in width (Tr. 24, 25, and Exhibit C-2).

9. The Respondent also had a tubular welded steel scaffold with two one foot wide aluminum platforms mounted on a pickup truck on the frame of the body of a pickup truck (Tr. 30 & 31).

10. There were men working on the different platforms during the days of the inspection (Entire record).

11. The compliance officer used a steel tape to measure the various heights of the platforms (Tr. 1 thru 33).

12. When the compliance officer had a closing conference with the Respondent's foreman, Mr. Pacasoni, and advised him of the allegations of violation, the Respondent's representative said that they had the railings back in the shop and someone forgot to put them on the truck (Tr. 61).

13. Giving the Respondent the best of the evidence, having a work platform on the scaffold, 12 feet above the ground on one side and 10 feet on the other, the Respondent's witness testified that the men would work on both sides so that they would have to be on the 12 foot side as well as the 10 foot side (Tr. 79).

14. The ends of the platform were clearly unguarded (Exhibits C-1 and C-2).

15. In the event of an accident, fractures or death could have resulted (Tr. 38).

16. The unguarded ends of the platforms were obvious and ascertainable by mere and sheer observation (See Exhibits C-1, C-2 and C-3).

Based on the aforementioned findings of fact, opinion and the entire record, the Judge makes the following

## CONCLUSIONS OF LAW

1. At all times herein mentioned, the Respondent, Kenneth J. Herman, Inc., was engaged in a business that affected commerce within the meaning of Section 3(5) of the Occupational Safety and Health Act of 1970 and this tribunal has jurisdiction to hear and decide the within controversy.

2. The Respondent, at the time of the inspection herein concerned, was in serious violation of the standard set forth at 29 CFR 1926.451(d)(10) and a penalty of $75.00 is appropriate therefor.

## O R D E R

In view of the foregoing, good cause appearing therefor, it is ORDERED that:

The allegation of serious violation by this Respondent, of the standard set forth at 29 CFR 1926.451(d)(10), is AFFIRMED and a penalty of $75.00 is ASSESSED therefor.

SO ORDERED.

DAVID G. ORINGER, JUDGE, OSHRC

Dated: August 10, 1982
New York, New York

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

Secretary of Labor v. Timco Manufacturing Corp.
OSHRC Docket No. 81-1139

1. Enclosed is a copy of my decision. It will be filed with the Commission on August 16, 1982, and will become the final order of the Commission on September 15, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is September 15, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

William E. Brennan
WILLIAM E. BRENNAN
JUDGE, OSHRC

Date: July 27, 1982
New York, New York

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR | : | |
| Complainant | : | |
| v. | : | OSHRC Docket No. 81-1139 |
| TIMCO MANUFACTURING CORP. | : | DECISION AND ORDER |
| Respondent | : | |

APPEARANCES

FOR COMPLAINANT

Francis V. LaRuffa, Regional Solicitor
U.S. Department of Labor
1515 Broadway, Room 3535
New York, New York 10036
Att: Stephen F. Smith, Esq.

FOR RESPONDENT

Stephen J. Spencer, President
Timco Manufacturing Corp.
603 Dean Street
Brooklyn, New York 11238

## BACKGROUND

This matter comes on for determination upon a Motion by the Secretary of Labor (Complainant), dated May 27, 1981 to Dismiss the late filed Notice of Contest of the Timco Manufacturing Corporation (Respondent). (See Exh. C-1).

This case originated on January 19, 1981 when Compliance Officer (C.O.) Spiegelman of the Occupational Safety and Health Administration (OSHA) went to Respondent's small plant located at 272 41st Street, Brooklyn, New York, in response to a complaint from an employee of this company (See Exh. C-2). The C.O. conducted an inspection at this worksite which was concluded on the following day, January 20, 1981. As a result of this inspection, and pursuant to Section 9(a) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 658(a)(the Act), on January 30, 1981 there was issued to this Respondent, a four Itemed Serious Citation proposing a total of $320 in penalties and a five Itemed Nonserious Citation for which no penalties were proposed. (See Exhs. A-1 thru A-4 attached to Exh. C-1). Pursuant to Section 10(a) of the Act, 29 U.S.C. 659(a) these Citations and proposed penalties were sent by Certified Mail, Return Receipt Requested to "Timco Manfucturing Corp. - 272 41st Street, Brooklyn, N.Y. 11232." (See Exh. B-1 attached to Exh. C-1).

No notice of Contest was filed by Respondent to these Citations until after its president, Mr. Spencer, received a letter from the OSHA Area Director Mr. Kingsley inquiring about

the abatement of the cited conditions and payment of the proposed penalties. By letter dated April 15, 1981, Mr. Spencer requested the Review Commission to review the penalties proposed (See Exh. F attached to Exh. C-1). On May 7, 1981, the Commission acknowledged receipt of this case. (See Exh. G attached to Exh. C-1).

By Order dated July 6, 1981, this case was assigned to Judge O'Connell for determination. Judge O'Connell, pursuant to Notice dated July 13, 1981, held a hearing on August 7, 1981 on the issue of "Whether the Employer's notice of contest was timely filed or not?" (Page J-1-Docket File).

Thereafter, as a result of a major reduction in Commission personnel, Judge O'Connell left the Commission and on February 11, 1982 this case was reassigned to the undersigned.

After affording the parties an opportunity for a de novo hearing or to supplement the record herein with additional evidence, which was declined, the parties agreed to have this case decided on the record as it had been formulated. (See pages J-3, J-4 and J-5, Docket File).

## I S S U E S

The issues presented by this case are:

1. Was a Notice of Contest to the Citations and proposed penalties timely filed by Respondent?

2. If the answer to Issue 1 is in the negative, does Respondent qualify for relief from Commission's Final Order under Federal Rule of Civil Procedure 60(b)?

Both issues are answered in the negative.

## EVIDENCE

The evidence of this record considered in its entirety establishes the following:

The Brooklyn area office of OSHA received a complaint from an employee of Respondent, who did not desire to be identified, on November 20, 1980. This complaint listed nine conditions which, if accurate, could have effected both the safety and health of Respondent's employees. (See Exh. C-2).

C.O. Spiegelman was assigned by the Area Director to respond to this employee complaint, which he did by inspecting Respondent's worksite located at 272 41st Street, Brooklyn, New York.[1/]

Upon his arrival at this small metal fabricating plant on January 19, 1981, the C.O. spoke to a Mr. Blanco who stated that he was "...the manager in sole charge of the plant.(TR.26).[2/] The C.O. asked the identity of the president of the company stating that he wanted "... to contact the president or an officer of the corporation." Mr. Blanco replied, "... that it wasn't necessary, that he was in complete charge, and that the president of the corporation was occupied with other business, and that he would let him know whatever was found."(TR.26).

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1/ The address given by the complaining employee was 217-41st Street, Brooklyn, N.Y. When the C.O. went to that location he found no building numbered "217" and was told by someone in the neighborhood that Respondent's building was located at 272-41st Street. (Tr. 22,23, Exh. C-2).

2/ TR. references are to pages in the transcript of the hearing held herein.

After an opening conference with Mr. Blanco and two employee representatives, during which the C.O. delivered a copy of the employee complaint to Mr. Blanco and explained the scope of his inspection, the C.O., who was accompanied by OSHA Industrial Hygienist Hochman, conducted his inspection. The inspection was completed the following morning and a closing conference was held by the C.O. with Mr. Blanco and the employee representatives. During this closing conference, all alleged violative conditions were discussed and the C.O. and Mr. Blanco agreed upon dates by which the conditions were to be corrected, ie. abatement dates were agreed upon. All conditions were to be corrected by February 20, 1981 at the latest. Additionally, the C.O. supplied Mr. Blanco with an OSHA booklet entitled "OSHA Closing Conference Guide", going over each subject listed on the back page thereof with Mr. Blanco. (See Exh. C-3). Paragraphs numbered 4, 5 and 6 clearly describe the procedures to follow if an employer wishes to contest a citation, penalty or abatement dates, emphasizing that the notice of contest must be in writing, filed with the Area Director (whose name, address and telephone number is supplied on the next to the last page of the booklet), within 15 working days after receipt of a Citation and Notification of Penalty. C.O. Spiegelman testified that he always emphasized the 15 working day contest period in his closing conferences and wrote "15 working days" on this booklet. (TR. 22-34).

The C.O. then returned to his office, wrote his report of the inspection and recommended the issuance of the Citations herein, which after review by Supervising Compliance Officer Wise, were issued to Respondent on January 30, 1981, being sent by Certified Mail, Return Receipt Requested. (See Exhs. A-1 through A-4 attached to Exh. C-1).

Based on these unrebuted facts it is clear that the inspection was properly conducted by C.O. Spiegelman.

The Citations as issued were directed to: "Mr. Steve Spencer, President - Timco Mfg. Corp. - 272 41st Street - Brooklyn, N.Y. 11232".

The Citation consists of a printed form, in use for many years by OSHA, with space provided for the typed insertion of the name and address of the Employer, the type or alleged violation, the Citation No. as well as space for listing Items, the specifics of the alleged violative conditions. To the right of each Item there is space for the typed insertion of the "Date by which violation must be corrected", and space on the far right side of the form for the typed insertion of the penalty proposed for each listed Item. Thus, in practical effect, the form Citation when completed by the OSHA Area Office, consists of both the "Citation" as mandated by Section 9(a) of the Act, 29 U.S.C.658(a) as well as the notification of penalty as required under Section 10(a) of the Act.[3/]

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3/ Section 9(a) of the Act provides:

> Sec.9.(a) If, upon inspection or investigation, the Secretary or his authorized representative believes that an employer has violated a requirement of section 5 of this

(Continued)

(Footnote 3/ Continued)

Act, of any standard, rule or order promulgated pursuant to section 6 of this Act, or of any regulations prescribed pursuant to this Act, he shall with reasonable promptness issue a citation to the employer. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to de minimis violations which have no direct or immediate relationship to safety or health.

Section 10(a) of the Act provides:

Sec.10.(a) If, after an inspection or investigation, the Secretary issues a citation under section 9(a), he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 17 and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within fifteen working days from receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under subsection (c) within such time, the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

The following printed sentences appear on the top third of the Citation form:

> This citation describes violations of the Occupational Safety and Health Act of 1970. The penalty(ies) listed below are based on these violations. You must correct the violations referred to in this citation by the dates listed below and pay the penalties proposed, unless within 15 working days (excluding weekends and Federal holidays) from your receipt of this citation and penalty you mail a notice of contest to the U.S. Department of Labor Area Office at the address shown above. (See the enclosed booklet which outlines your responsibilities and courses of action and should be read in conjunction with this form.)

At the top of the column headed "Penalty", the following printed sentence appears in captial letters:

PENALTIES
ARE DUE
WITHIN 15
DAYS OF
RECEIPT
OF THIS
NOTIFICATION
UNLESS
CONTESTED
(See enclosed
Booklet)

At the bottom of this Citation form, the following printed statement appears:

> EMPLOYER RESPONSIBILITIES AND COURSES OF ACTION - The enclosed booklet outlines employer responsibilities and courses of action and should be read in conjunction with this notification.

See Exhibits A-1 thru A-4 attached to Exh. C-1.

Mr. Wise, the supervising C.O. in the Brooklyn Area Office, testified to the proceedures followed in his office in issuing Citations.

The citations are mailed by Certified Mail to the employer with a form, forwarding letter.[4/] There is also enclosed in this mailing the OSHA booklet entitled "Employer Responsibilities and Courses of Action Following an OSHA Inspection", OSHA 3000, referred to in the three printed sentences appearing on the Citation as quoted supra.

The first paragraph of this booklet, entitled "Employer Action Required" advises the employer that he has one of two courses of action to elect upon receipt of a Citation. First, if he agrees with the Citation and proposed penalty, he may correct the condition and pay any proposed penalty. Second, if he disagrees with the Citation, "...within 15 working days, you may elect to contest any or all of the following: Citation, Penalty, Abatement Date. For details, see the section on How to Contest." The paragraphs entitled "How to Contest" and "The Contest Process" clearly and simply point out the steps the employer must take to initiate a contest, including the 15 working day period within which to file his "Notice of Contest" with the OSHA Area Director, as mandated by Section 10(a) of the Act, supra. fn.3, and a brief

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4/ This form letter refers to an enclosed "...booklet which explains your rights and responsibilities under the Act." This letter in its entirety however, expresses the availability of the Area Director for an "informal conference" and states, "... I [Area Director] am authorized to enter into an informal settlement agreement which amicably resolves this matter without any litigation or contest". Exh. C-6.

description of the procedures before the Review Commission. (See Exh. C-4.)

Also enclosed in the Citation mailing package is OSHA pamphlet 3047, entitled "Onsite Consultation for the Employer". which outlines the availability of "...a free onsite consultation service funded by the Occupational Safety and Health Administration", delivered by state governments or private firm contractors. (Exhibit C-5,p3). This booklet does not cover the issuance of Citations or contests thereof.

The Citations in this case were received by Respondent on February 2, 1981, as evidenced by the executed Return Receipt, Exhibits B-1 and B-2 attached to Exhibit C-1. (The identity of the person signing this receipt is not established in this record, but Respondent does not dispute that the Citations were received at the 272 41st Street address of the Timco Manufacturing Company.)

Thus, the 15 working day contest period mandated by section 10(a) of the Act expired on February 24, 1981 (weekends and holidays are excluded).

Based upon the unrebuted testimony of C.O. Speigelman, that Mr. Blanco was the manager of and in complete charge of Respondent's plant at 272 41st Street, and his assurance that he would notify Timco's president of "whatever was found" during the inspection, the Citations herein were properly issued and served.

The next development in this case was the receipt by the OSHA Area Office of a letter dated March 2, 1981 signed by "Ray Blanco, Manager" on Timco Mfg. Corp. letterhead stationery,

with the Timco address listed as "603 Dean Street - Brooklyn, New York 11238". This letter, addressed to Mr. Kingsley, the Area Director, states that "...corrective actions have been taken..." on the Citations at issue here.[5/]

Mr. Wise testified that in the latter part of March 1981, he initiated a telephone call to Timco's President, Mr. Spencer, "...to follow up on the abatement, and to discuss the penalty that was due".(TR. 76). During this telephone call, Mr. Spencer advised Mr. Wise that he was not aware of the Citation or Mr. Blanco's letter of March 2, 1981. Mr. Wise pointed out to Mr. Spencer that OSHA had received the postal Return Receipt showing receipt of the Citations by Timco. Additionally, it had Mr. Blanco's letter dated March 2, 1981 proving receipt of the Citations because of its content. Further, that because the 15 working day contest period had expired, (on February 24, 1981), under OSHA's Regulations, OSHA could do nothing and suggested that if Mr. Spencer wanted any relief he should write the Review Commission. (TR. 75-77).

Mr. Wise, by a letter dated April 2, 1981 which he wrote and which the Area Director signed, confirmed the major points of his telephone discussion with Mr. Spencer. (See Exhibit C-8.)

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5/ This letter also refers to a third Citation which involved alleged health violations, (OSHA Citation 1 -H1549-159 (other), issued some two weeks after the two Citations at issue here (Exh R-1). No penalties were proposed on this health Citation and it is not at issue in this case.

During his telephone conversation, Mr. Wise asked Mr. Spencer to which address he wished the confirmatory letter sent, the 603 Dean Street address (the address on the letterhead of Mr. Blanco's March 2, 1981 letter, Exh. D attached to Exh. C-1) or to the 272 41st Street address, to which the Citations had been mailed. Mr. Spencer asked that it be mailed to the 603 Dean Street address. (TR. 43-85;78,79).

Upon the close of Complainant's case in chief, (as well as at the beginning of the hearing), Judge O'Connell went to extensive lengths to explain to Mr. Spencer, appearing pro se., his rights under the Act. Judge O'Connell was particularly concerned because when the 10:00 AM time for the hearing to begin arrived, Mr. Spencer was not present. Judge O'Connell telephoned Mr. Spencer who advised that he had not received the written Notice of Hearing (R.p. J-1-Docket File), despite the fact that it had been mailed to Mr. Spencer at the 603 Dean Street address. Thus the commencement of the hearing was delayed until 11:45 AM, when Mr. Spencer arrived. Because of these developments, both before the hearing began, and at the close of Complainant's case, Judge O'Connell offered Mr. Spencer the opportunity for an adjournment of the hearing to a later date to prepare his case. Mr. Spencer chose to proceed. (TR. 3-7; 85-92).

After a luncheon recess, Mr. Spencer proceeded with his case, appearing as Respondent's only witness. He testified that he was the President of Timco Manufacturing Corporation and maintained his office at 603 Dean Street, Brooklyn, New York. He readily

acknowledged that Mr. Blanco was his manager at the 272 41st Street plant location and that Mr. Blanco was in charge of that relatively small operation which had twelve employees. He stated that he had not been aware of the Citations in this case until his telephone call with Mr. Wise in the latter part of March, which conversation was confirmed by Mr. Wise's letter dated April 2, 1981. (Exh. E attached to Exh. C-1). Mr. Spencer deduced that Mr. Blanco had been confused about the requirement to file a written Notice of Contest within 15 working days of the receipt of the Citations, and theorized that Mr. Blanco probably thought that if the alleged violative conditions were corrected, the payment of the proposed penalties would be excused by OSHA.

After learning of the Citations, Mr. Spencer by letter dated April 15, 1981 to the Review Commission, requested the Commission to "review", and "drop" the proposed penalties. (See Exh. F, attached to Exh C-1).

In his April 15th letter, Mr. Spencer alludes to procedures of the"New York State Labor and Safety Department", which did not access any penalties if violations which were found were corrected within a certain time period.

This letter from Mr. Spencer dated April 15, 1981, is the only document of record which can be construed as a Notice of Contest, and it is so construed. (Exh. F, attached to Exh. C-1).

Mr. Spencer, on cross examination, stated that as of the time of the hearing, (August 7, 1981), Mr. Blanco was no longer employed by Respondent but readily admitted that Mr. Blanco had

been the manager of the 272 41st Street plant at all relevant times herein, with authority to run that business on a day-to-day basis which included authority to discharge employees.

Further, that Mr. Blanco had informed him of the Citations, but he was vague as to precisely when this communication took place, claiming that Mr. Blanco gave him copies of the Citations some time around April 15, 1981 "or later", and that Mr. Blanco advised that all conditions had been corrected.(TR. 105). However, Mr. Spencer claimed that he "...did not know what the contents of the citations were until much later". (TR. 105).

He further stated that Mr. Blanco had the authority to write the letter of March 2, 1981 to the Area Director concerning abatement of the allegedly violative conditions set forth in the citations, and to use the "Timco Manufacturing Corp." stationery, which gives the address as "603 Dean Street", because there was no stationery for the 272 41st Street plant address.

Mr. Spencer stated that his motivation for writing his letter of April 15, 1981 to the Commission (Exh. F attached to Exh. C-1), was that he was upset about the penalties (proposed for the Serious Citation), "Without the opportunity to do anything about it, ..." (TR. 107). In short, Mr. Spencer's position was that because of the confusion over the 15 working day Notice of Contest period, he was upset, "...because we were cut off after that, of not being permitted to have our day in Court or in hearing of these complaints".(TR. 110).

He further stated that he is one of a number of owners of the Timco Company and he operates as President of this concern only out of the 603 Dean Street office. Further, that Timco manufactures its product for only one customer and his function at Dean Street, "...is to take care of the payroll, the finances, and to look at the orders that come in from this one customer, and let Ray Blanco handle the manufacturing end of it, and whatever goes on in the [272 41st Street] shop".(TR. 107). He further stated he "runs" two other companies from his Dean Street office address, with managers for these companies also located at Dean Street.

Lastly, Mr. Spencer stated "...that we did have another case prior to this when Timco was under the name of ATKO Marine, and this was about two or three years ago. At that particular time, because I was notified directly, etc., I took the proper action, and there was no problem". (TR. 112)(TR. 100-113).

## OPINION

The evidence in this case as detailed above clearly establishes the following:

1. The inspection of Respondent's plant located at 272 41st Street, Brooklyn, New York, was properly conducted by the OSHA compliance officer under the provisions of Section 8 of the Act, 29 U.S.C. 657.

2. The two Citations resulting from this inspection were properly issued and mailed by certified mail to this Respondent company's address at 272 41st Street, Brooklyn, New York.

This service of the Citations herein was reasonably calculated to provide this employer with knowledge of the Citations and proposed penalties and an opportunity to determine whether to abate or contest. The service of the Citations herein at the plant site, under the mangership of Mr. Blanco who knew Respondent's president and reported directly to him, complies with the Commission requirements as set forth in Secretary of Labor v. B.J. Hughes, Inc., Docket No. 76-2165; 7 BNA-OSHC 1471,1474 (1979).

3. This Respondent corporation received these Citations on February 2, 1981, a fact undisputed in this record.

4. The 15 working day period within which a written Notice of Contest should have been filed with the OSHA Brooklyn Area Directors office, as mandated by Section 10(a) of the Act, 29 U.S.C. 659(a), expired on February 24, 1981. (See 29 C.F.R. 1903.21(c)).

5. No timely Notice of Contest was filed by Respondent. The only document of record which can be construed as a Notice of Contest, is Mr. Spencer's letter to the Review Commission dated April 15, 1981. This letter was filed beyond the statutorily required 15 working day contest period.

6. The failure of Respondent to file a timely Notice of Contest was in no way attributable to any action or inaction by the Secretary's OSHA representatives. There is no evidence whatever to support a conclusion that this Respondent was misled by OSHA or that its failure to file a timely Notice of Contest

was caused by Complainant's deception or failure to follow proper procedures. See: Atlantic Marine, Inc. v. OSHRC, 524 F.2d 476(5th Cir., 1975); Secretary of Labor v. Banciforte Builders, Inc., Docket No. 80-1920, 9 BNA-OSHC 2117 (1981) and cases cited therein.

7. Under the provisions of Section 10(a) of the Act, 29 U.S.C. 659(a), (quoted at fn 3 supra.), a Citation and penalties proposed thereon become a final order of the Commission, not subject to review by any court or agency, when a Notice of Contest is not timely filed within 15 working days of receipt of the Citation. Saturdays, Sundays and Federal holidays are excluded in computing "working days". See: 29 C.F.R. 1903.21(c).

8. As of the time this decision is issued, Commission precedent holds that, "...in cases where an employer files a late notice of contest, the employer may be granted relief from the final order under the terms of Rule [Federal Rule of Civil Procedure] 60(b)". Secretary of Labor v. Banciforte Builders, Inc., supra., at 9 BNA-OSHC 2117. See also: J.I. Hass Co., Inc. v. OSHRC, 648 F.2d 190, 195,(3rd Cir., 1981).

9. Federal Rule of Civil Procedure 60(b), in pertinent part, provides:

> Rule 60. Relief From Judgment or Order.
>
> * * *
>
> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the folling reasons: (1) mistake, inadvertence, surprise,

> or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.
>
> * * *

10. Of the grounds set forth in Rule 60(b), only subparts (1) or (6) apply to this case.

The record in this case does not establish a basis to support a conclusion that this Respondent qualifies for Rule 60(b) relief because of "mistake, inadvertence, surprise, excusable neglect" or any other reason which is just.

The mistake which occurred in this case was that of Manager Blanco, in not timely doing what he told C.O. Spiegelman he would do, that is, notify Mr. Spencer, the President of Timco, of receipt of the Citations, ie, what was discovered during the January inspection. Why he made this mistake can not be accurately determined on the evidence of this record, as Mr. Spencer's conclusions as to the reasons for Mr. Blanco's failure to notify him of receipt of the Citations, are not supported by any credible and reliable evidence. Mr. Blanco was not called as a witness by either party. Hence, any statements going to Mr. Blanco's motivation on this point are purely speculative.

Mr. Spencer, by his own testimony, put Mr. Blanco in complete charge of the day-to-day operation of the plant at 272 41st Street, including authority to write the OSHA Area Director concerning abatement of the alleged violation. Thus, Mr. Blanco was a corporate management representative at this worksite. Either Mr. Spencer neglected to advise his Manager Blanco to immediately forward documents such as an OSHA Citation to him, or if so ordered, Mr. Blanco did not comply with such a directive. In either event, this state of facts do not constitute the type of mistake nor neglect which is excusable under Rule 60(b).

Nor does this record contain sufficient evidence to justify relieving Respondent of the effect of the Citations and penalties which have become final orders of the Commission by operation of Section 10(a) of the Act, 29 U.S.C. 659(a) for "any other reason". As pointed out by Complainant, the Citation forms themselves, at three different locations, the OSHA booklet, OSHA 3000, Exhibit C-4 enclosed with the Citations, if read, clearly put an employer on notice of the requirements which must be followed to contest a Citation. Further, the closing conference held by the inspecting C.O., and the booklet left with management's representative, Exhibit C-3, if read, clearly advises employers of their options upon receipt of an OSHA Citation and what steps must be taken if the employer does not agree with any portion of the Citation or Notification of Penalty. It is difficult to envision what more Complainant can reasonably do to advise employers of their rights and procedures which must be followed under the Act to excerise these rights.

## O R D E R

Respondent herein did not file a timely Notice of Contest to the two Citations and Notification of Proposed Penalties issued to it on January 30, 1981.

These Citations and penalties proposed thereon have become final Orders of the Review Commission by operation of Section 10(a) of the Act, 29 U.S.C. 659(a).

There are not sufficient grounds supported by reliable evidence in this record to justify relieving this Respondent of the Commission's final Order under Federal Rule of Civil Procedure 60(b).

Complainant's Serious Citation consisting of four numbered Items and the Nonserious Citation consisting of five numbered Items, issued to Respondent on January 30, 1981, and the penalties proposed thereon constitute final Orders of the Review Commission. Complainant's Motion to Dismiss "Respondent's Late Notice of Contest", Exhibit C-1, is GRANTED.

SO ORDERED.

William E. Brennan
WILLIAM E. BRENNAN
Judge, OSHRC

Dated: August 16, 1982
New York, New York

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
John W. McCormack Post Office and Courthouse, Room 420
Boston, Massachusetts 02109

NOTICE OF DECISION

Secretary of Labor v. Thomas C. Mobilia General Contractors, Inc.
OSHRC Docket No. 81-1534

1. Enclosed is a copy of my decision. It will be filed with the Commission on August 16, 1982, and will become the final order of the Commission on September 15, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is September 15, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

David J. Knight
DAVID J. KNIGHT
JUDGE, OSHRC

Date: July 27, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant<br>v.<br>THOMAS C. MOBILIA GENERAL CONTRACTORS, INC.,<br>Respondent | OSHRC DOCKET NO. 81-1534<br><br>DECISION AND ORDER |

APPEARANCES:

For Complainant,
Francis V. LaRuffa, Regional Solicitor
U.S. Department of Labor
New York, New York
By: Jonathan Kay, Esq.

For Respondent,
Thomas C. Mobilia, President
Thomas C. Mobilia General Contractors, Inc.
Williamsville, New York

Statement of Proceedings:

By letter dated June 16, 1981, Thomas C. Mobilia General Contractors, Inc., of Williamsville, New York (respondent) contested[1/] the civil penalties of $1440 proposed for the citation issued[1/] on May 19, 1981, by the Occupational Safety and Health Administration of the U.S. Department of Labor (complainant) alleging six serious violations of various safety standards concerned with power

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1/ Under the Occupational Safety and Health Act of 1970, U.S.C. §§651, et seq., citations and proposed penalties are issued after inspection or investigation and these may be contested within 15 working-days, 29 U.S.C. §659(a).

operated tools (item 1), ladders (item 2), and scaffolds (items 3 to 6).

By notice dated October 2, 1981, the matter was set for hearing on November 18, 1981, but on November 12, 1981, the complainant reported that the parties had settled the controversy and those documents were to be filed by December 3, 1981. These papers were sent by complainant to respondent on November 13, 1981. According to complainant's letter of December 14, 1981, respondent had mailed the documents back but these were apparently lost in the mail and, on that date, another set was sent to respondent for signature.

On February 23, 1982, the matter was rescheduled for hearing on March 18, 1982, at Rochester, New York, because no settlement documents had been filed. That site was selected for the convenience of respondent. I arrived from Boston, Massachusetts, and the Solicitor's Counsel from New York City.

No one appeared for respondent, after due notice received, but its President called the courthouse, requested a continuance because certain employees did not appear at a jobsite and he, therefore, could not leave work. The continuance was denied because of the burden and expense complainant had taken on to prepare for trial. Complainant's evidence was heard without respondent's attendance. However, it was afforded an opportunity to show good cause to reopen the record under Commission Rule 62(b) and (c), 29 CFR §§ 2200.62(b) and 62(c).

Respondent's petition to reschedule a hearing was received on April 2, 1982. Its president states that, on the morning of the hearing, two men did not appear at a job which required three men to perform. He had to remain there to avoid a delay in completion required by its agreement and a large financial burden to the company. He could not attend the hearing and sought a continuance.

Complainant's counsel stated at the hearing that some time after the second set of proposed settlement documents were sent to respondent with no

response, he called its president who then informed him that he, the president, was thinking it over[2/] and that he had engaged an attorney. Complainant contacted the attorney but nothing resulted from this. See counsel's affidavit attached to his reply, dated April 8, 1982, to respondent's petition to reopen.

Concerning the emergency at the job site on the morning of the hearing, complainant points out that the OSHA inspection showed respondent to have 26 employees but respondent does not indicate why replacements for the absent men were not selected from these. In short, argues complainant, respondent chose not to attend and granting its petition would only enlarge the hardship, burden and expense already incurred by complainant and this Commission.

Under Commission Rule 62(c), a party's failure to appear will be excused and a hearing rescheduled only upon a showing of good cause. That has been found when the non-appearance is caused by injury, Simpson Roofing Co., 78 OSAHRC 28/D12, 5 BNA OSHC 1836, CCH ¶22,147, severe weather conditions, Herriott Printing Co., Docket No. 10615 (1975), 2 BNA 1702, CCH ¶19,446, or a bona-fide misunderstanding about the hearing date where respondent showed some diligence, National Roofing Corp., 81 OSAHRC 9/A2, 9 BNA 1249, CCH ¶24,977.

But where respondent knows of the hearing date and takes no precautions to assure his representation there and then must elect between two alternatives (come to the hearing or remain at the job site), he does so at his own peril. He consulted but apparently did not retain an attorney to protect him in an event just as occurred here while all other parties appeared prepared. No good cause has been shown to excuse his choice and attendant neglect and foist further expense upon complainant.

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2/ This then casts a shadow over respondent's claim that the first set of documents were, in fact, mailed to complainant and lost in transit.

In Usery v. Weiner Bros., Inc., 70 FRD 615 (1976), defendant moved to erase a default judgment entered against it for failure to appear because

> The period from the commencement of this action and the entry of judgment is the busiest season in the fruit and vegetable business and I could not devote time to this matter. 70 FRD at 617.

The court found this excuse to be frivolous and denied the motion. A like result is warranted here. I find no good cause to reschedule a hearing to receive respondent's defense and its petition for that relief is denied.

Complainant's Evidence: 3/

Wilford Schall, an OSHA compliance officer for seven years, between May 4 and 6, 1981, inspected the worksite at the Darien Lake Fun Country Amusement Park and Campgrounds, one of the largest campgrounds in the country, where respondent was in the process of building a two-story wooden frame arcade building. (Tr. 10).

Item 1 cites the absence of a guard covering the blade of an eight inch Rockwell Power saw, required by 29 CFR §1926.300(b)(1). One employee used this intermittently every day for a half to one hour and his left hand and leg were very close to the exposed and bucking saw. If it cut him, a permanent or disabling injury could occur. A gross penalty of $600 was assessed for this from which was deducted 20 percent for respondent's size (27 employees); 30 percent for good faith since the officer believed respondent to be safety-conscious with no record of previous injuries; and 10 percent for its history of no previous OSHA citations leaving a net proposed penalty of $240. (Tr. 10-14). The saw was removed from the job site (Tr. 30).

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3/ Because of its failure to appear at the hearing, respondent was deemed to waive all rights except the rights to receive a copy of the decision and to petition the Commission for review. See 29 CFR §2200.62(a).

Item 2 cites the absence of ladders for access to elevations as required by 29 CFR §1926.450(a)(1). (Tr. 15). Two scaffolds were at the building: a mobile one at the front 19.5 feet high over a concrete pad and a carpenter's bracket scaffold at the rear some 20 feet over hand-packed clay soil (Tr. 16, 21 and 27). Three employees would climb the mobile scaffolds four or five times a day zig-zagging their way up the cross-bracing of the frames. A fall from either the 12 foot or 19 foot levels where work was being done onto the concrete pad would lead to fractures. A gross penalty of $600 was assessed and with the same reductions as above a net penalty of $240 resulted. (Tr. 15-20). The mobile scaffold was removed and ladders were used for employees climbing to the second floor (Tr. 30).

Item 3(a) cites the failure to tightly plank the mobile scaffold's platform at the 19.5 foot level as required by 29 CFR §1926.451(e)(4). Three men worked there most of the shift. There was only one 16 inch wide plank with 42 inches of open space at its rear and 26 inches open between it and the building. A fall to the concrete pad would result in a fracture. (Tr. 20-22, 23). This scaffold was removed (Tr. 31).

Item 3(b) cites the failure to have two 2 x 10 inch planks on the carpenter's bracket scaffold required by 29 CFR §1926.45(m)(5). It contained only one 12 inch plank with 14 to 16 inches open between it and the building. A fall from that 20 foot height would result in fracture. Again for this item a total, gross penalty of $600 was applied and reduced to $240. (Tr. 20, 22-23).

Item 4(a) and (b) cites the failure to have any guardrails on either scaffold as required by 29 CFR §§1926.451(e)(10) and (m)(6). No protection at all was afforded the two employees on the mobile scaffold and the one man on the other who were there for a good portion of the day. A fall could result in fracture and the net $240 penalty was determined as in the other cases. (Tr. 23-25).

Item 5 cites the absence of support brackets not more than eight feet apart on the carpenter's bracket scaffold, 29 CFR §1926.451(m)(3), since on the scaffold here these two supports were 16 feet 4 inches apart. This is insufficient for the weight of the three to four employees atop it at various times and the scaffold could have been pulled away from the wall and fall the 20 feet to the hard clay. Broken bones would likely result. (Tr. 26-27). As in all prior items, the gross $600 penalty was reduced to the $240 net.

Finally, item 6 cites the failure to restrict the overhang or extension of the plank on the carpenter's bracket scaffold to not less than six inches to no more than one foot as required by 29 CFR §1926.451(m)(5). That scaffold's plank went out three feet over each end with two men working on it with one right up against the extension. Most work was done inside the brackets or end supports. But some work could be done from the extension which, because of the length, would cause the platform to tilt and upset sending the men 20 feet down. Fractures would result. Again the $600 gross penalty was reduced to $240. (Tr. 28-29).

Findings and Conclusions:

Considering this evidence, I find that the proposed civil penalties take into account the violations' gravity and the respondent's size, good faith and history mandated by the Act, 29 U.S.C. §666(i) and conclude that the total of $1440 is appropriate for the violations cited.

Paragraphs II and III of the complaint allege that respondent's business affects interstate commerce and no denial of these jurisdictional facts alleged was made. They may then be taken as admitted. I conclude that the Commission's authority to decide this matter is proper. 29 CFR §2200.33(a)(2) and (b)(2).

ORDER:

Based on the foregoing, it is ordered, the proposed penalties be affirmed

and that a civil penalty of $240 be assessed for each of the six violations cited for a total of $1440.

DAVID J. KNIGHT
JUDGE, OSHRC

Dated: August 16, 1982
Boston, Massachusetts

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

# NOTICE OF DECISION

**SECRETARY v. GREAT SOUTHERN OIL AND GAS COMPANY, INC.**

**OSHRC Docket No. 81-1966**

1. Enclosed is a copy of my decision. It will be filed with the Commission on August 16, 1982, and will become the final order of the Commission on September 15, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupationsl Safety and Health Review Commission
   1825 K Street, N. W., Suite 601
   Washington, D. C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is September 15, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92 and 93.

Joe D. Sparks

JOE D. SPARKS
Judge

Date: July 27, 1982

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

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| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 81-1966 |
| | ) | |
| GREAT SOUTHERN OIL AND GAS COMPANY, INC., | ) | |
| | ) | |
| Respondent. | ) | |

APPEARANCES:

Marigny A. Lanier, Esquire, and Patricia D. Keane, Esquire, Office of the Solicitor, U. S. Department of Labor, Dallas, Texas, on behalf of complainant.

J. Barry Mouton, Esquire, Lafayette, Louisiana, on behalf of respondent.

## DECISION AND ORDER

SPARKS, Judge: On March 25, 1981, the mast of one of respondent's drilling rigs collapsed killing one workman. Compliance Officer Vern Bechtel visited the site of the accident, took measurements and photographs, interviewed employees, and secured documents and other data. As a result of the investigation, a citation for a serious violation was issued which was later amended to "willful", charging respondent with a violation of section 5(a)(1) of the Occupational Safety and Health Act in that guy wires and anchors were not installed in accordance with the manufacturer's specifications and were not tested prior to use.

## ISSUES

1. Whether respondent is engaged in a business affecting commerce and is thereby an employer subject to the Act.

2. Whether respondent violated section 5(a)(1) of the Act, the general duty clause, and if so, the appropriate penalty.

3. Whether the violation, if any, was willful.

## JURISDICTION

Respondent drills oil and gas wells on a contract basis and produces oil and gas. It operates three drilling rigs and five work over and completion rigs. It operates approximately 160 wells (Tr. 56-57).

In its response to requests for admissions, respondent admits it has more than ten employees, but states that "...[a]ll of the oil which is produced by RESPONDENT's business activities is sold off the leased premises to purchasers, who, to the best of RESPONDENT's knowledge, information and belief, do not transport the oil beyond the boundaries of the State of Louisiana." Considering the world-wide production and trade in oil, the production of oil and gas for use within the State of Louisiana is sufficient to affect interstate commerce. Wickard v. Filburn, 317 U.S. 111, 127, 63 S. Ct. 82, 90 (1942); United States v. Wrightwood Dairy Co., 315 U.S. 110, 62 S. Ct. 523 (1942).

In addition, the rig and mast in use were obtained from Dresser-Ideco which has corporate offices in Texas, and were manufactured outside the State of Louisiana (Tr. 56, 71, 134). The use of equipment obtained from and manufactured out of state is sufficient nexus to "affect" commerce. Avalotis Painting Co., 81 OSAHRC 7/B1, 9 BNA OSHC 1226, 1981 CCH OSHD ¶ 25,157 (No. 76-4774, 1981).

It is also noted that, at the time of the hearing, respondent was performing contractual drilling for O'Boyle Energy Company of New York City and Tex-Oil of Houston and during 1981 at least some of its clients were companies located outside Louisiana (Tr. 57-58).

## FACTS AND DISCUSSION

On the day of the accident, respondent's drilling rig number 37, a trailer-mounted rig manufactured by Ideco-Dresser was drilling in St. Martin Parish, Louisiana, at a site identified as Vernon E. Faulconer—J. J. Martin No. 15 well (Tr. 19, 22-23, 56, 59-60). A crew of 22 employees operates the rig (Tr. 93). The rig was described as ". . . an article 701 carrier mounted rig. It is equipped with 108 foot, 268,000 pound mast. This particular rig is also equipped with an 800 horsepower Continental EMSCO pump, generators, and mud system, block preventors and so forth, designed to operate 11,000 foot 24 hours a day" (Ex. R-1; Tr. 59, 77).

Following the fatal accident, Compliance Officer Bechtel determined that the guy wires had not been anchored at the distances stated in the manufacturer's manual nor had the anchors been test pulled prior to use. Those determinations are not disputed.

A survey made after the accident established that the guy wires attached to the mast had not been anchored in a symmetrical arrangement as recommended by the manufacturer. The two anchors placed north of the drilling hole were approximately 61.5 feet and 138 feet, respectively, from the north-south axis, while the two anchors to the south of the drilling hole were 91.5 feet and 138 feet of that axis. The two anchors west of the drilling hole were 68 feet and 30 feet from the

north-south axis and the two anchors east of the drilling hole were 50 feet and 37.5 feet, respectively, from the east-west axis. The anchor in the south-east guadrant, which was 91.5 feet west and 30 feet south of the drilling hole had been pulled out of the ground during the collapse of the rig (Ex. C-2; Tr. 67-69).

The record does not definitely establish the cause of the collapse. The most convincing testimony concerning the cause of the accident was that of Dr. Courtney Busch, who specializes in conducting failure analysis of oil rigs (Tr. 168-169). From his analysis, Dr. Busch concluded the most plausible explanation for the collapse of the rig was that drilling pipe had been stacked unsymmetrically on the right side of the rig which caused the rig to twist slightly which in turn caused the drilling pipe on the left side, which was stacked nearly vertically, to fall onto the other side causing the rig to twist around and fall (Tr. 173-174).

It is well established that the Secretary is not required to show that an alleged violation was the cause of an accident. The Review Commission recently reaffirmed that view in Western Massachusetts Electric Co., 81 OSAHRC 63/B13, 9 BNA OSHC 1940, 1981 CCH OSHD ¶ 25,470 at pp. 31,764-31,765 (No. 76-1174, 1981), as follows:

> . . . [I] t is the hazard, not a specific incident that resulted [in] injury, which is relevant to determining the existence of the recognized hazard. . . .

The proof necessary to establish a violation of the general duty clause was recently reiterated by the Review Commission in Bomac Drilling, 81 OSAHRC 45/A2, 9 BNA OSHC 1681, 1981 CCH OSHD ¶ 25,363 (Nos. 76-450 and 76-2131, 1981), as follows:

> In order to establish a section 5(a)(1) violation, the Secretary must show that an employer failed to render its workplace free from a hazard that is recognized, the occurrence of an incident was reasonably foreseeable, and the likely consequence in the event of an incident was death or serious physical harm to its employees. Pratt & Whitney Aircraft, Division of United Technologies Corp., 80 OSAHRC 38/A2, 8 BNA OSHC 1329, 1980 CCH OSHD ¶ 24,447 (No. 13591, 1980), aff'd in pertinent part, No. 80-4102 (2d Cir. April 20, 1981). The Secretary must also demonstrate that there were feasible means available to abate the hazard. National Realty & Construction Co. v. OSHRC, 489 F. 2d 1257 (D. C. Cir. 1973).

In U. S. Steel Corp., __ OSAHRC ___, 10 BNA OSHC 1752, 1757, __ CCH OSHD ¶ _____ (No. 77-1796, June 30, 1982), the Review Commission specifically overruled so much of Bomac as held "reasonable foreseeability" of an incident as a distinct element of a section 5(a)(1) violation.

The hazard alleged by the Secretary in the citation was being ". . . struck or crushed by the unplanned collapse of an Ideco Drilling rig mast . . . ." The Secretary amended the citation and complaint to further allege a means of abating the hazard as follows:

> A feasible means of abating the hazard of a rig collapse would include installation and placement of guy wires on the rig mast and anchors on the gound according to the rig manufacturer's instructions in addition to installing the mast guy wires and anchors to withstand a tension load toward the well at an angle of 45 degrees above horizontal of 10,000 lbs. and verifying by test as alleged;

Respondent states it is ". . . not aware of any drilling industry recognition of what hazards would be involved in an unplanned collapse of a drilling rig" but acknowledges that the collapse of a drilling rig would probably result in death or serious physical injury to an employee present at or on the rig (Respondent's responses to requests for admissions 11 and 12).

The record contains convincing evidence that the collapse of a drilling rig is a recognized hazard in the industry. Mr. Weldon Walker who is employed by Ideco as Engineering Group Leader for Structural Products, testified as follows (Tr. 132, 141):

Q Is the collapse or the unplanned collapse, . . . of a drilling rig a hazard that's recognized by the industry?

A Yes, it is.

The hazard is further described by Mr. Fred Martin, respondent's Manager of Operations, who testified he had seen 35 or 40 rigs which had collapsed due to the horizontal force exerted by improperly stacked drilling pipe (Tr. 79).

Documentary evidence reflects industry concern about the possibility of a collapse of drilling rigs. The Operating Guide for the Ideco rig contains several warnings that improper procedures could result in the rig turning over or collapsing with damage to the equipment or bodily injury (Ex. C-3).

In addition to the general recognition in the industry, respondent has specific knowledge of the danger of a collapsing rig as the same rig, number 37, had collapsed in 1976 (Tr. 60). Respondent's knowledge is sufficient to establish a "recognized hazard." Continental Oil Co. V. OSHRC, 630 F.2d 446, 448 (6th Cir. 1980).

The evidence is convincing that the industry recognizes the collapse of drilling rigs as a hazard in the industry and that respondent was specifically aware of the hazard. Respondent acknowledges that death or serious bodily injury would likely result from such an occurrence.

Respondent's Manager Martin testified there were three sources of horizontal forces which could collapse a rig: (1) wind, (2) improper levelling and (3) improper stacking of drilling pipe (Tr. 75-80). He further testified that guy wires were used primarily to counteract wind load and there was no evidence of wind involvement in this accident (Tr. 75-76). He stated the guy wires were useless in preventing a collapse caused by a shifting of drilling pipe because ". . . if you have sufficient horizontal force for it to twist, [it] destroys the compressive stability of the mast and causes failure" (Tr. 79-80).

Respondent's contention that the accident was caused by improperly stacked drilling pipe was described by its expert witness, Dr. C. C. Busch. Dr. Busch has a Ph.D. degree from Harvard University in mechanical engineering and is licensed both as a mechanical engineer and as a metallurgical engineer. He specializes in performing failure analysis of rigs and derricks (Tr. 168-169). Dr. Busch was employed by respondent to determine the cause of the failure of rig 37 (Tr. 170). After investigation he concluded the mast failed by twisting clockwise and falling over in a right rear quadrant (Tr. 171). His explanation for the failure was that drilling pipe was stacked unsymmetrically on the right side of the rig which caused the rig to twist slightly causing the pipes on the right side which were standing nearly vertically to fall onto the other side which in turned caused the rig to twist around and fall (Tr. 173-174). Dr. Busch was of the opinion that guy wires which could withstand force of 10,000 pounds as suggested by the manufacturer would not have prevented the collapse of the rig in this case (Tr. 173). He also agreed that guy wires are to offset wind, stating as follows (Tr. 173):

> A Stabilizing guys are there for — to stabilize due to wind load and not meant to hold the structure upright when it's in a failure mode.

He found no evidence of any wind loads at the time of the accident and the record does not contain evidence that wind forces caused or contributed to the accident (Tr. 173).

The testimony of Dr. Busch and other evidence are convincing that properly anchored guy wires would probably not have prevented the collapse of rig 37 on the date of the fatal accident.

The record contains substantial evidence, however, that properly installed guy wires and anchors are a feasible means of reducing the incidence of collapsing rigs.

Complainant produced the testimony of two expert witnesses, who did not visit the accident site nor attempt to determine the cause of the accident, but did offer probative evidence concerning the effect of the improperly placed anchors and guy wires. Dr. Aravamudhan Ramon, professor of mechanical engineering at LSU, emphasized the importance of the symmetrical arrangement of the anchors and guy wires. The imbalance resulting from the failure to place the anchors at the distances prescribed by the manufacturer caused the anchor which pulled out of the ground to bear 2.7 times the force of its opposite anchors (Tr. 101, 107-108).

Mr. Weldon Walker, Engineering Group Leader for Structural Products, has been employed by Ideco for 20 years. His department is responsible for designing the masts and structures of the drilling rigs (Tr. 132). Mr. Walker left no doubt as to the importance of the guy wires (Tr. 140):

> Q . . . how important is it that this mast is rigged properly then, or guyed properly, guyed in accordance with the instructions?
>
> A It's very important that the small self-propelled, or the mast on a small self-propelled rig be properly guyed. The structural integrity of the mast depends upon the guy wires.

The significance is demonstrated by the instructions furnished with the rig. Five copies of the operations manual containing diagrams for guying the rig are furnished with the rig. A brass plate affixed to the base of the mast gives a guying diagram and, if requested, the company, Ideco, will send a serviceman to advise the customer concerning placement of the guying anchors (Tr. 139). The information is considered necessary to the successful operation of the rig (Tr. 151-152). Mr. Walker further testified that improperly placed anchors is a "common problem" of rigs which have experienced an accidental collapse (Tr. 142).

On cross-examination, Mr. Walker agreed that the primary design criteria for the system of guy wires and anchors was to stabilize the mast in high winds (Tr. 160-161, 164-165). He has also known them to provide stability in other situations such as shifting drilling pipe, which according to respondent's expert witness, was the cause of the accident (Tr. 160-162). He testified as follows (Tr. 156-157):

> A That's the design criterion for that stabilizer — excuse me, for that guy wire except we know of instances where these guy wires have done more than stabilize a mast during a high wind situation.
>
> Q What more do they do, sir?
>
> A Well, I know of some instances where guys became slack, the foundation gave way for whatever reasons, you had some subsidence and pipes started moving and the boards started twisting around the mast until the guy wire became tight and if the anchor is sufficient, I've seen them hold —
>
> * * *
>
> Q 10,000 pounds of tension load on the anchor. That's all you require, isn't it?
>
> A Well, our requirement is not intended to hold a rig up in such an instance. I was merely relaying to you —
>
> Q Oh, it's not intended to do that? I thought that's why we were here today. The rig is not supposed to be held up by that guy wire? That's not the purpose of it?
>
> A Is that a question, sir?
>
> Q Yes. You just said it's not intended to hold up a rig in a circumstance where it starts to fall, is that your statement?
>
> A In the instance that I was citing where a guy wire becomes slack and the — board twists around the mass [sic] and it allows pipe to move, pipe to swarm, and the — board continues to twist around the mast and perhaps it gets several degrees, 10 or 15 degrees twist in it, and then the guy wire becomes tight and I've have seen instances of this when a sufficient guy anchor held the rig up and stopped its fall.

A safety manual for drilling contractors published by the International Association of Drilling Contractors specifies that guys should be ". . . utilized according to the manufacturer's specifications" (Ex. C-4). The guys are referred to as "wind guys." Regulations of the State of Wyoming require the use of guy wires according to the manufacturer's requirements (Ex. C-15).

The Secretary also suggests the anchors be pull-tested up to 10,000 pounds prior to use. There is evidence that the anchors of the type used can withstand tests to that degree. A test in a location near the site of the anchor which failed withstood tension of more than 11,000 pounds (Ex. C-10).

In summary, the evidence establishes that the guys and anchors were not erected as specified by the manufacturer of the rig and were not tested prior to use. Even if the guys had been properly erected, it is doubtful they would have prevented the collapse of the drilling rig in this case, although they have prevented the collapse of rigs in some such instances.

As previously stated, however, respondent expressed surprise on several occasions when it was advised that the inquiry was not focused on the cause and prevention of the fatal accident, but whether it had violated regulations or the general duty clause (Tr. 39-41, 51-54).

It is entirely foreseeable that any of the conditions which contribute to the collapse of drilling rigs, wind, instability or improper pipe placement, could possibly arise at respondent's operations. The guy system was designed especially to prevent collapse caused by high winds but has been shown effective in withstanding other forces. Moreover, to be "feasible" it is not necessary that the method of abatement proposed eliminate the hazard. It is sufficient if it materially reduces

the risk of the hazard. Bomac Drilling, A Division of TRG Drilling Corp., 81 OSAHRC 45/A2, 9 BNA OSHC 1681, 1981 CCH OSHD ¶ 25,363 (Nos. 76-450, 87-2131, 1981); Noble Drilling Corp., 78 OSAHRC 96/C12, 6 BNA OSHC 2108, 1978 CCH OSHD ¶ 23,157 (No. 15405, 1978).

Although the installation of guy wires in accordance with the manufacturer's recommendations and performing a "pull test" prior to use would not insure against all collapses of rigs, they are feasible means of materially reducing the risks of collapse not only in high winds but in other conditions. A violation of section 5(a)(1), the general duty clause, has been established.

The Secretary amended his complaint and citation to propose that the violation be characterized as willful and a penalty of $10,000 be assessed. Without question the collapse of a rig can result in death or serious bodily injury. Such collapses occur with such frequency they are a reasonably foreseeable hazard. The assignment of workers not familiar with locating anchors and guy wires and the failure to supervise their placement permitted a hazard to exist for which there was a feasible means to materially reduce the hazard.

The Secretary has a more onerous burden of proof to establish a willful violation of the general duty clause than such violation of a regulation. The Review Commission in Kus-Tum Builders, Inc., 81 OSAHRC 97/B2, 6 BNA OSHC 1166, 1981 CCH OSHD ¶ 25,738 at pp. 32,105-32,106 (No. 76-2644, 1981), stated as follows:

> The Commission characterizes a violation as "willful" if it was committed with either an intentional disregard of, or plain indifference to, the Act's requirements. Mel Jarvis Construction Co., OSHRC Docket No. 77-2100 (RC, September 30, 1981). This position is consistent with the views of the United States Courts of Appeals for the First, Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth and District of Columbia Circuits. . . .

* * *

> The Secretary's burden of proving willful conduct is notably more difficult when an employer is charged with a willful violation under a general standard or "the general duty clause," section 5(a)(1), rather than a specific standard. St. Joe Minerals Corp. d/b/a St. Joe Lead Co. v. OSHRC & Marshall, 647 F. 2d 840 (8th Cir. 1981). In particular, a more concrete evidentiary showing is required to prove willfulness in this context. Where a willful violation of section 5(a)(1) is alleged, the Secretary has the burden of proving the employer's intentional disregard of or its plain indifference to its statutory duty to furnish a workplace free from recognized hazards that are causing or likely to cause death or serious physical harm. Id. at 848. Thus, "there must be evidence, apart from that establishing knowledge of the hazard, from which we may reasonably conclude that the employer intentionally disregarded or was indifferent to the safety of the workplace." Id. at 848-849.
> [Citations omitted].

The violation here, though serious, was not willful. It was the result of careless oversight by assigning the duty of locating the guy wires to a worker who was not trained or experienced in that task. The meager facts concerning the previous collapse do not suggest a different result.

Considering the gravity of violation, the history, size and good faith of the company, a penalty of $900 is appropriate.

## FINDINGS OF FACT

1. Respondent has employees and is engaged in drilling for oil and gas and operates producing wells.

2. Some of respondent's customers are located outside the State of Louisiana.

3. Respondent purchases goods and materials from outside the State of Louisiana.

4. In late March, 1981, respondent moved drilling rig number 37 to a new location and began erecting it to begin drilling operations.

5. Roland Veillon, a driller without experience in placing and erecting the anchors and guy wires, was assigned that task (Tr. 90-95).

6. The guy wires were not placed in the symmetrical arrangement as recommended by the manufacturer, nor were the anchors "pull-tested" after they were installed (Ex. C-2, C-3; Tr. 93).

7. The unplanned collapse of a drilling rig is a recognized hazard in the industry.

8. Respondent had specific knowledge of the hazard of an accidental collapse of a drilling rig as a result of the prior collapse of rig 37.

9. The placement of the anchors and guy wires on rig 37 on March 25, 1981, substantially reduced the ability of the rig to remain stable when subjected to horizontal forces.

10. A symmetrical system of guy wires and anchors as recommended by the manufacturer and pull-testing the anchors are feasible means of materially reducing the destabilization effect of horizontal forces which could cause the collapse of a drilling rig.

11. The collapse of a drilling rig operating under conditions of rig 37 was reasonably foreseeable.

12. Respondent's place of employment was not "free" of a recognized hazard.

13. The collapse of a drilling rig would likely result in death or serious bodily injury.

14. The evidence does not establish that respondent showed intentional disregard or plain indifference to the requirements of the Act.

15. A penalty of $900 is appropriate.

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in a business affecting commerce who has employees and is subject to the jurisdiction of the Act and this proceeding.

2. Respondent violated section 5(a)(1) of the Act, the general duty clause.

3. The violation was serious but not willful.

4. A penalty of $900 is warranted and appropriate.

5. Abatement within five days after this order becomes final is reasonable.

## ORDER

1. The citation is affirmed as a serious violation.

2. A penalty of $900 is assessed.

3. The violative conditions shall be abated within five days after this order becomes final.

Dated this 16th day of August, 1982.

Joe D. Sparks

JOE. D. SPARKS
Judge

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
John W. McCormack Post Office and Courthouse, Room 420
Boston, Massachusetts 02109

NOTICE OF DECISION

Secretary of Labor v. Bethlehem Steel Corporation, (Lackawanna Plant)
OSHRC Docket No. 79-5257

1. Enclosed is a copy of my decision. It will be filed with the Commission on August 23, 1982, and will become the final order of the Commission on September 22, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is September 22, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

David J. Knight
DAVID J. KNIGHT
JUDGE, OSHRC

Date: August 3, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant<br>v.<br>BETHLEHEM STEEL CORPORATION,<br>(LACKAWANNA PLANT),<br>Respondent | OSHRC DOCKET NO. 79-5257<br><br>DECISION AND ORDER |

APPEARANCES:

For complainant,
Francis V. LaRuffa, Regional Solicitor
U.S. Department of Labor
New York, New York
By: Michael R. Adams, Esq.

For respondent,
George B. Levasseur, Jr., Esq.
Bethlehem, Pennsylvania

For affected employees,
John Choinski, Safety Chairman
Local 2601, United Steelworkers of America
Buffalo, New York

Statement of Proceedings:

By letter dated September 21, 1979, Bethlehem Steel Corporation (respondent) contested[1/] a citation issued[1/] August 31, 1979, as amended September 11, 1979, by the Occupational Safety and Health Administration of

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1/ Under the provisions of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§651, et seq., citations are issued after inspection [§658(a)] and may be contested within a 15 working day period [§659(a)]. A hearing is then afforded to resolve the issues [§659(c)].

the U.S. Department of Labor (OSHA or complainant) alleging[2/]:

> (1) a repeated violation of 29 CFR §1910.23(c)(1) in that the no. 2 mold platform was improperly guarded on three sides by a rail 21.5 inches from the floor rather than by standard guardrails required by the standard and a civil penalty of $1400 was proposed; and
>
> (2) a serious violation of 29 CFR §1910.309(a) or, in the alternative, 29 CFR §1910.309(b), in that flexible wiring or cords were used in a prohibited manner for which a civil penalty of $700 was proposed.

These alleged violations took place at respondent's Lackawanna, New York, facility.

The matter was heard on October 29, 1980, with all parties and affected employees represented. Respondent admits the jurisdictional facts alleged in the complaint and I conclude that the Commission's authority to decide this matter is proper. 29 U.S.C. §§652(5) and 653(a). Complainant and respondent filed post-hearing briefs on February 6, 1981.

The Evidence:

I] Citation No. 2: An alleged repeated violation of 29 CFR §1910.23(c)(1).

William Wagner has been an OSHA compliance officer for six years conducting about 300 inspections in that time. He has been, over his career, working in the field of safety for almost 25 years. (Tr. 8-9).

He inspected the no. 2 mold platform on July 17, 1979, where empty molds are cleaned by two employees with a Vac-al unit, a large industrial vacuum cleaner measuring 12 by 14 feet. (Tr. 10-12). The officer described these molds as being 12 feet deep and 30 inches square at the top (Tr. 14). These are brought under the no. 2 platform on rail flatcars. That platform, extending in

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2/ The notice of contest embraced all items of three citations issued. At the outset of the hearing the parties disposed of all of these save the two described above and the order below conforms with the parties' agreement as to the non-tried items.

part over the rails, is about nine by nine feet square and guarded all around by the standard guardrails except at two areas: at the two stairs giving access to it; and at an area over the tracks where a section measuring 40 by 60 inches was cut out. The empty molds are moved under this cut-out section. Iron pipe rails 21.5 inches high surround this section on three sides and the fourth, the edge of the platform itself, is guarded by the top rail of the standard guardrails (Exs. C-5 and R-7).

The Vac-al unit is to the rear of the platform and the tube and hose, whose diameter is six to eight inches and is some 10 feet long, extend over the platform to the cut-out section where the two employees would bend to push it down into the mold holding onto its bar and vacuum dusts and debris from the mold. Some force is required to overcome the pull of the unit's counterweight and when the men release the bar, the hose raises itself. (Tr. 12-14, 55-56). At times, an employee would use a 10-foot rod with magnet attached to retrieve metal pieces the vacuum could not remove. Doing this, he saw an employee bending over the 21.5 inch rail with one foot on it. (Tr. 21-22, 56).

The officer stated that a standard guardrail, 42 inches in height, would preclude performance of this work[3/] (Tr. 14). But the circumstances do expose the two employees to a grave falling hazard of 12 to 14 feet into a mold which might be hot or onto the tracks. This could result in fractures or permanent disability. The 21 inch rail only provides a false sense of security. (Tr. 20-21, 25-26). His investigation revealed no incident of a fall (Tr. 54) and he doesn't think that a mold is seven and a half feet deep (Tr. 53). This obvious fall hazard, according to the officer, could be cured by the use of safety belts

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3/ Complainant and the employee representative stipulated this point: "...the ...work could not possibly be performed." (Tr. 7)

tied off to the rail as is done at the no. 3 platform and worn at all times (Tr. 22 and 24, 28, 57). A foreman at the site, Mr. Zuffranieri, told the officer that he would have the men put on the belts and tie-off (Tr. 24-25). Mr. Zuffranieri denied making such a statement and he could not since the respondent's General Superintendent would have to approve a policy requiring their use on this platform (Tr. 172-173). The belts have been tried by new employees but quickly discarded. Belts are required and worn only on the main platform. (Tr. 174-175).

Officer Wagner recommended a civil penalty of $700 based mainly on the gravity of the violation and this was doubled because it is alleged to be repeated (Tr. 27-28). In 1977, respondent received a similar citation but that matter was settled after an amendment to cite a violation of 29 CFR $1910.132(a) which requires the use of personal protective equipment (safety belts) because of hazards encountered (Tr. 26, Exs. C-6 and C-7).

John Choinski, a union safety man representing the affected employees, testified that the use of safety belts would create a greater hazard (Tr. 81) and stated for 70 employees that the work couldn't be done wearing the belts or harnesses (Tr. 88-89). Mr. Choinski has been Local 2601's safety representative for eight years and works at the plant. He is familiar with the operations of the molding platform. (Tr. 79-80).

In his opinion, the drop of six to eight feet and then the sudden snap when the lanyard is fully extended would cause more bodily harm than falling about 13 feet into the mold (Tr. 81). That snap and banging causes spinal and internal injuries (Tr. 86). It is also very difficult, needing three men, to pull a man up who is suspended by the belt and this action aggravates injuries. And those three men would be in a precarious position. All one could really do

is cut the rope. (Tr. 82). Furthermore, the rail cars are operated by remote control and if an unauthorized signal, a gypsy signal, moves them at the wrong time with the vacuum tube in the mold, the whole platform goes with the employees tied off there (Tr. 83-84). He knows it takes times to unhook (Tr. 93). Without a belt, a man could escape the platform (Tr. 92). Gypsy signals have moved trains at the wrong time (Tr. 90).

Mr. Choinski believes there is a falling hazard present but knows of no instance of such an event (Tr. 85). The men do hold on to the rail on the vacuum's pipe when bending over and this does provide some support (Tr. 91-92).

As the safety representative, Mr. Choinski requested of Dr. Eulah Bingham (the former Assistant Secretary of Labor for Occupational Safety and Health) an investigation of this problem and she promised him one over a year ago (Tr. 82-83). The union has made several suggestions two of which are: (1) vacuum the tops of the molds separately so there would be no open hole at the platform where the tops are now cleaned. When the inner parts are vacuumed the men are holding on to the bar; and (2) have the vacuum pipe motor driven to eliminate the pipe's counterweight and force. He couldn't recall the other suggestions made. He believes these should be studied by the plant engineers to eliminate all the hazards. (Tr. 84-85).

Respondent called Joseph P. Eagan, its Senior Corporate Safety Engineer (Tr. 95), who testified that the prior citation referred to by Officer Wagner concerned a different mold platform and a different operation. That platform is much larger and wide open with no rails where the molds came through. The men there stepped out onto the mold. Respondent agreed that these men should tie off so the citation was amended to charge a violation of 29 CFR $1910.132(a) and settled. (Tr. 154-156).

Mr. Eagan agrees with Mr. Choinski about the danger of using the belts and the injuries likely. Worse yet, if the platform is torn away by a runaway train with a man tied off, he could be crushed. Here, as it is now operated, the hazard is very low because the men are holding onto the vacuum's bar and could not fall (Tr. 159). He doesn't believe that respondent is in any violation for this standard does not apply so there is no reason to apply for a variance (Tr. 159-160).

David C. Tanner is an engineer in respondent's Technology Department and before that was the General Foreman in the mold yard from 1978 to 1980 (Tr. 136). A mold measures 90 inches or 7.5 feet. A man is unlikely to fall because he is braced against the 21.5 inch rail placed at that height at the employees' request and the vacuum tube practically closes off the opening (Tr. 144). He, too, agrees with Mr. Choinski about the severity of injuries if the mold were to move with a man suspended in it (Tr. 145).

Officer Wagner was recalled and testified that some injuries can be expected when a fall is stopped by the snap at the end of a safety belt's lanyard, but these would be minor compared to a man falling 10 to 12 feet on his head (Tr. 179).

Based on this testimony, I find that the use of safety belts on the no. 2 mold platform would more likely increase the chance of serious physical harm than would working without them. The belts themselves have no affect on the fall hazard. It is their affect on what happens after a man falls that must determine whether they should be used.

Tied off, a fallen man would be trapped inside of or between molds. If the molds were to move improperly -- and this has been known to happen -- he could be crushed or smashed against a mold. This could also happen if the moving molds tore away the platform with an employee tied-off and here I accept Mr. Choinski's

testimony that a man may not be able to unhook in time. Without the belts, a man would be where he fell or he could escape an endangered platform. In other words, the injuries a man might sustain as testified to by Mr. Choinski and respondent's witnesses would be worse than those suffered when a belt and lanyard stop a fall. Even if nothing untoward happened, the result of a fall of eight feet without a belt may well be no worse than a fall with the belt since the mold is only 30 inches square so that a man would suffer injuries against the sides on the way down. But, I find that the belt could cause death if the wrong event occurs at the wrong time. Cf., Ed Cheff d/b/a Ed Cheff Logging, 81 OSAHRC 60/A2, 9 BNA OSHC 1883, CCH ¶23211.

To prove the so-called "greater hazard" affirmative defense, a respondent must show[4/] (1) that compliance with the standard[5/] would diminish rather than enhance employee safety and this aspect has been shown above; and (2) that alternative means of protecting employees are either unavailable or are being used and this respondent has not shown. The employee representative has made several suggestions for limiting those parts of the job function which expose employees to the hazard but respondent has not refuted or even acknowledged these. And this is its burden.

The third aspect of this defense is a showing that a variance from the standard, 29 U.S.C. §655(d), would be inappropriate. Here, respondent argues that 29 CFR §1910.23(c)(1) does not apply to this platform. The cut-out section of the platform is more in the nature of a floor hold than an "open-sided floor or platform..." (Respondent's brief, pps. 20-23). But this standard applies

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4/ Marion Power Shovel Co., 80 OSAHRC 110/A2, 8 BNA OSHC 224, CCH ¶24,915.

5/ Which all parties concede is impossible.

on its face[6/] and beyond those few words quoted by respondent. The guarding is required "on all open sides..." and is not restricted to the normal four sides. A respondent may not create open sides on a platform, -- that is, increase its perimeter — four feet above ground as was done here with this seven-sided platform and then claim that anything but the original four must be something other than an open side. Cf., Donovan v. Anheuser-Busch, Inc., 666 F2d 315 (1981) at 327. I conclude that the cited standard applies to this platform and respondent has not shown why a variance application, excusing literal compliance, would be inappropriate since it has not examined alternate means of protecting employees. Cf., General Electric Co. v. Secretary of Labor, 576 F2d 558 (1978).

Because the affirmative defense of "greater hazard" has not been proven in all of its elements, I conclude that respondent has not complied with the standard and this citation should be affirmed but not as issued, i.e., a repeat violation. The prior citation which forms the basis for this characterization (Exs. C-6 and C-7) covered no. 3 mold platform and I find substantial differences between the operation there and that under consideration here. No. 3 mold platform is larger, unguarded and employees have to step off the platform onto the molds to accomplish the vacuuming. None of that is present here. The use of safety belts there was considered feasible by all parties but not so on the no. 2 platform. These differences ar abustantial and the

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6/ The standard reads:

> (c) Protection of open-sided floors, platforms, and runways. (1) Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides except where there is entrance to a ramp, stairway, or fixed ladder.

prior final order, I conclude, does not create a basis for denominating this citation as repeated. Potlatch Corp., 79 OSAHRC 6/A2, 7 BNA OSHC 1061, CCH ¶23,294.

But should an employee fall the eight feet from the platform into a mold or onto the tracks, he could suffer serious physical harm such as there is a substantial probability of fractures. Therefore, the violation is serious. 29 U.S.C. §666(j). But the likelihood of an accident is very small. I find that the employees brace themselves against the 21.5 inch rail around the cut-out section and hold on to the vacuum pipe's bar when bending over and vacuuming and that when the pipe is in the mold, it practically fills it. Further, there has been no instance of a fall which again detracts from the potential. Likelihood of an accident is a facet of a violation's gravity and I conclude that the complainant's proposed civil penalty overemphasizes this aspect. While respondent's good faith may be questioned for its failure to pursue the union's suggestions, that union is still awaiting a promised response from OSHA. Although respondent bears the primary responsibility for employee safety, 29 U.S.C. §654(a) and (b), I find that it believed the work operation on the no. 2 mold platform did not expose its employees to a hazard. A minimal penalty is appropriate here. 29 U.S.C. §666(i).

The order below affirms the alleged violation as serious and a civil penalty in the amount of $50 is assessed therefor.

II] Citation No. 1, item 2, an alleged violation of 29 CFR §1910.309(a) or (b).

Officer Wagner saw a flexible cable suspended 10 feet over the floor reaching 35 to 45 feet from the Vac-al unit to the power panel board on the wall (Tr. 28-29, 33). It is shown on exhibit C-8. This line carries 440 volts (Tr. 29). It had been struck twice by a crane and severed once with a resulting explosion of sparks resembling a July Fourth celebration (Tr. 33). Certain death by

electrocution would result if an employee were struck or if the line landed on the metal no. 2 mold platform (Tr. 33, 36, 38). The line should be imbedded in the concrete floor (Tr. 33-34); the condition was obvious and the $700 proposed penalty reflects the gravity (Tr. 39). He was told that the Vac-al unit was moved several times but this condition has existed for some four months (Tr. 34). If the line were shut down on severance by a fail-safe system, he would not have recommended the citation be issued (Tr. 50, 68-69).

Robert Horvath is a C and D[7/] mold man at the facility and pursues safety problems for Local 2601 until cured (Tr. 71-72). The Vac-al was moved many times before permanently set during the winter of 1979. Then the cable system was installed under the platform to the power panel. It took about three months after the unit's final placement and at first the flexible cable was along the floor. An assistant superintendent had it removed and suspended 10 feet. If the line is severed, a fuse would be "kicked out" of operation. (Tr. 73-77).

Mr. Eagan testified that installing the Vac-al was a construction project. Tests, such as noise studies, were conducted, before the unit's final position was determined (Tr. 102-103). David Tanner, an engineer in respondent's Technology Department, detailed this placement process and construction (Tr. 137-143) and it wasn't until May or June 1979 that the final site was found, the unit placed, and the construction completed with the cable installed (Tr. 142-143).

Mr. Eagan referred to the cable not as flexible cord but as temporary wiring during a construction process (Tr. 104). It had been knocked down twice

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7/ Although employed for 27 years, the witness did not know what C and D represents (Tr. 71-72).

with an instantaneous shut off at the power panel occurring in milliseconds (Tr. 114, 117). It presented no hazard (Tr. 114-115) and the sparking indicates that the line was faulting out (Tr. 118) as soon as the crane touched the conductor.

I find that the suspended cable was not flexible cord used as a substitute for fixed wiring as charged originally in the citation, 29 CFR §1910.309(a)[8/], referring to the National Electrical Code (1971), section 400-4. Rather, the evidence shows that it was temporary wiring permitted under 29 CFR §1910.309(b)[9/] with reference to the National Electrical Code, section 305-1(a) which states:

> (a) Temporary electrical power and lighting installations may be used during the period of construction, remodeling, or demolition of buildings, structures, equipment, or similar activities.

Complainant argues that the process was not construction but rather "experimental or development work" for which temporary wiring may be used for only 90 days under the National Electrical Code, section 305(1)(b)[10/]. Construction is defined as "work for construction, alteration, and/or repair". 29 CFR §1910.12.

I find that the main purpose of the total process was the installation of the Vac-al unit and some trial and error (or as complainant would have it, experiment and development) was necessary to determine the most efficacious

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8/ Since recodified in 29 CFR §1910.305(g)(iii)(A). See 46 FR 4056, Jan. 16, 1981.

9/ Since recodified in substance by 29 CFR §1910.305(a)(2)(i)(A). See 46 FR 4056, Jan. 16, 1981.

10/ This limitation was removed in the recodified standard. See 29 CFR §1910.305 (a)(2)(i)(B).

location. Respondent was not developing any new process. The platform was remodeled and altered to accomodate the unit as it was finally placed and, upon completion, the temporary wiring was removed and emplaced. I conclude that 29 CFR §1910.309(a) does not apply to this process; 29 CFR §1910.309(b), pleaded in the alternative, does and respondent was in compliance with that section. Otherwise, if respondent is found to be in violation of either section, it would have to be deemed as de minimis since no hazard existed because the power, on severance of the line, would be immediately shut down. This item is vacated in the order below.

ORDER:

In reaching the above findings and conclusions, I have considered the parties' proposed findings and conclusions in their briefs and the respondent's motion to dismiss. To the extent shown, these are adopted. Otherwise, they are rejected as not supported by either the fact or the law. Based on those findings and conclusions, it is ORDERED that:

(1) The citation No. 1, item 2, alleging a serious violation of 29 CFR §1910.309(a) or, in the alternative, 309(b), is vacated together with the civil penalty of $700 proposed therefor; and

(2) Citation No. 2 alleging a repeated violation of 29 CFR §1910.23(c)(1) is affirmed as a serious violation and a civil penalty of $50 is assessed therefor.

In accordance with the parties stipulations and motions presented at the outset of the hearing (Tr. 5-7), the following is entered:

(1) Citation No. 1, item 1, and citation 3 are vacated together with any proposed penalty on complainant's motion:

(2) Citation No. 1, item 3, is affirmed as a non-serious violation of

29 CFR §1910.95(b)(3) with no penalty assessed on complainant's motion to amend its charaterization as serious and respondent's motion to withdraw its notice of contest.

DAVID J. KNIGHT
JUDGE, OSHRC

Dated: August 23, 1982
Boston, Massachusetts

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

John W. McCormack Post Office and Courthouse, Room 420
Boston, Massachusetts 02109

## NOTICE OF DECISION

Secretary of Labor v. John Luther and Sons Co., Inc.
OSHRC Docket No. 81-228

1. Enclosed is a copy of my decision. It will be filed with the Commission on August 23, 1982, and will become the final order of the Commission on September 22, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is September 22, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

David J. Knight
DAVID J. KNIGHT
JUDGE, OSHRC

Date: August 3, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant<br>v.<br>JOHN LUTHER AND SONS CO., INC.,<br>Respondent | OSHRC DOCKET NO. 81-228<br><br>DECISION AND ORDER |

APPEARANCES:

For complainant,
Francis V. LaRuffa, Regional Solicitor
U.S. Department of Labor
New York, New York
By: Ronnie Gardstein, Atty.

For respondent,
Arnold Cirman, Safety Director
John Luther and Sons Co., Inc.,
Rochester, New York

Robert Szymanski, a compliance officer with the Occupational Safety and Health Administration of the U.S. Department of Labor (OSHA or complainant), during the course of his inspection on December 19, 1980, of a multi-story building located at Stillson and East Main Streets, Rochester, New York, which was being gutted in preparation for renovation saw two employees of John Luther and Sons Co., Inc., (respondent) working at an open elevator shaft on the fourth floor (Tr.[1/] 8-13). These employees were between the guardrail

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1/ Tr. indicates reference to pages of the transcript.

around the shaft and the shaft itself, one removing cement with a chipping hammer about two feet from the open shaft and the other working on a perpendicular portion of the shaft (Tr. 13, 33).

No precuations had been taken to prevent a fall into the shaft -- measuring about seven by seven feet -- and a drop of nine and a half feet onto a catch platform at the third floor (Tr. 13, 16, 19). If this occurred, fractures, lacerations and concussions could result (Tr. 21). Or a man might roll off this platform which was about the size of the shaft and raised three or four feet above the third floor level and fall all the way to the building's basement (Tr. 16-18).

The men worked in this area about 20 minutes as the job of removing the cement would not take long (Tr. 27) and would come up to the edge of the shaft in the course of this work (Tr. 15); their foreman and superintendent were at the site and the placement of the guardrails around the shaft indicated respondent's knowledge of the hazard of working near the open shaft (Tr. 20).

These employees, according to the officer, should have been wearing safety belts with lanyards attached to the building columns (Tr. 19). He discussed these circumstances with respondent's superintendent, Mr. Prossick, (Tr. 11) who then told the men to put safety belts on and they did (Tr. 23).

As a result of this inspection a citation was issued[2/] on January 5, 1981, alleging that respondent seriously[3/] violated the safety standard at 29 CFR §1926.28(a) stating that

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2/ Under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§651, et seq., citations are issued after inspections are conducted, 29 U.S.C. §658(a), and OSHA believes a standard has been violated, 29 U.S.C. §658(a). Civil penalties may be proposed under 29 U.S.C. §659(a).

3/ A serious violation is one where there is a substantial probability that death or serious physical harm could result, 29 U.S.C. §666(j).

> The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions...

A gross civil penalty of $600 was proposed. This was reduced by allowing respondent 30 percent for its good faith, 10 percent for its history, and 20 percent for its size, it has eight or nine employees in all (Tr. 14), resulting in a net civil penalty of $240 (Tr. 22).

Respondent contested[4/] this citation and penalty by letter dated January 15, 1981. It was represented by Arnold Cirman, its Safety Director for the past 11 years (Tr. 34) who was its sole witness. He testified that safety harnesses were located on the building's first floor but, since the chipping was only a 15 minute job, the men didn't want to go down and one felt the belt would be an encumberance. The floor they were working on was solid and there was little danger of a fall. (Tr. 35). Mr. Cirman did not know if the superintendent required the men to wear safety belts, but these are worn generally in the building when it is being gutted. The men will wear the belts when they feel it is necessary; it is left to each employee's discretion (Tr. 41-42). At the elevator shaft opening, the belts could have been tied off to the temporary shoring (Tr. 46).

The two men seen by the compliance officer were enlarging the shaft being prepared for a new and bigger elevator. It was to be nine feet long and 21 feet wide. They had begun at the sixth floor. One employee would be between two and three feet of the open shaft's nine foot side and the other farther away. In some cases, the cement would fall away when the underplanking was cut from beneath. Otherwise it would have to be chipped. (Tr. 36-37).

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4/ Contests must be made within 15 working-days of receipt of the citation and penalty assessment, 29 U.S.C. §659(a) and thereafter a respondent is afforded an opportunity for a hearing, 29 U.S.C. §659(a).

Based on this evidence and after consideration of the parties' closing arguments (Tr. 43-48) where respondent maintains that little danger of a fall existed; that the employees were aware of their situation; that safety belts were available; and that if it were truly a serious violation, the compliance officer should have halted the operation, I find:

(1) An employee chipping cement within two to three feet of an open shaft was exposed to the hazard of tripping or falling into it, and

(1a) If he did, he would fall nine and a half feet and could suffer serious physical harm. If he were to roll off of that catch platform and fall to the basement, he could be killed. Respondent knew of the existence of these hazards.

(2) Respondent does not have a safety program requiring the use of safety belts when employees are exposed to this danger but rather leaves their use to an employee's choice.

The Act requires compliance by employers with the safety standards, 29 U.S.C. §654(a)(2), and the safety standard cited against the respondent here specifically places upon it the responsibility of insuring the use of protective devices when its employees are faced with hazardous conditions. Respondent has failed in this requirement and the citation must be affirmed[5/] against it. The proposed penalty appropriately accounts for the gravity of the violation including the likelihood of a fall which, although not great, could happen, respondent's size, history and good faith; and this penalty should be affirmed. 29 U.S.C. §666(i).

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5/ Respondent, in its answer and at the hearing (Tr. 5), admitted that it is an employer having employees and affecting interstate commerce. The Commission's jurisdiction is proper. 29 U.S.C. §§652(5) and 653(a).

It is ordered[6/] that the citation issued January 5, 1981, alleging a serious violation of 29 CFR §1926.28(a) together with the civil penalty of $240 be affirmed.

DAVID J. KNIGHT
JUDGE, OSHRC

Dated: August 23, 1982
Boston, Massachusetts

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6/ Although notice of the hearing was not given to employees (Tr. 5), in view of the outcome, no employee interest is prejudiced, this failure is of no effect and there is no reason to delay issuance of this decision. Cf., Oil, Chemical & Atomic Workers v. OSHRC, 671 F.2d 643 at 647 (1982).

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

# NOTICE OF DECISION

SECRETARY v. CONSTRUCT ERECTORS, INC.

OSHRC Docket No. 82-77

1. Enclosed is a copy of my decision. It will be filed with the Commission on August 24, 1982, and will become the final order of the Commission on September 23, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupationsl Safety and Health Review Commission
   1825 K Street, N. W., Suite 601
   Washington, D. C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is September 23, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92 and 93.

James D. Burroughs
JAMES D. BURROUGHS
Judge

Date: August 4, 1982

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

| | | |
|---|---|---|
| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 82-77 |
| | ) | |
| CONSTRUCT ERECTORS, INC., | ) | |
| | ) | |
| Respondent. | ) | |

APPEARANCES:

Larry A. Auerbach, Esquire, Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia, on behalf of complainant.

Terence G. Connor, Esquire, Morgan, Lewis & Bockius, Miami, Florida, on behalf of respondent.

## DECISION AND ORDER

Burroughs, Judge: Construct Erectors, Inc., seeks relief from the finality of a repeated citation issued to it on November 5, 1981, and asks that the Commission entertain a late-filed notice of contest. The repeated citation alleged a violation of 29 C.F.R. § 1926.28(a) and proposed a penalty of $1,280 for the alleged violation.

As a result of an inspection conducted in October, 1981, at a work site located in Juno Beach, Florida, respondent was issued a serious citation and a repeated citation. The parties have stipulated that the citations were issued on November 5, 1981, and received by respondent on November 9, 1981 (Tr. 3-4). The parties are also in agreement that a meeting occurred on November 18, 1981, between James Aubke,

respondent's president, David Norris, acting area director of the Fort Lauderdale OSHA office at the time of the meeting, and Joseph DiMartino, the inspecting compliance officer, and that an informal settlement agreement was concluded by Aubke and Norris at the meeting and a written agreement was executed by them on the same date (Ex. C; Tr. 4-5).

On December 14, 1981,[1/] the Prestressed Concrete Institute issued a newsletter advising its members of the decision of the Court of Appeals for the Fifth Circuit in S & H Riggers and Erectors v. OSHRC, 659 F.2d 1273 (5th Cir. 1981), wherein the court held the Secretary bears the burden of proving either that the employer failed to provide personal protective equipment to its employees under which it is the general practice in the industry to do so or that the employer had actual knowledge that personal protective equipment was necessary under the circumstances. Aubke received a copy of the newsletter from another contractor some time within the month after its publication (Tr. 37-39). After reading the newsletter, Aubke telephoned Norris on January 5, 1982, and complained that the settlement was not fair since the fifth circuit had, in his opinion, held that safety belts were not applicable to the facts of his case (Tr. 38, 41, 106-107). According to Aubke, he was told by Norris that the case was bad law (Tr. 38).

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1/ The record does not indicate the exact date the newsletter was issued (Tr. 37-38). Respondent's brief uses the date of December 14, 1981, and this date is accepted since it is consistent with the time period testified to by the witnesses. Aubke talked with Norris again after reading the newsletter (Tr. 37-38, 39-40, 41), and Norris testified that the conversation took place on January 5, 1982 (Tr. 106-108). Aubke testified that he could not deny that the conversation took place on that date (Tr. 48). The January 5, 1982, date would appear reasonably correct since Aubke testified that he talked with his attorney about the matter within a week or so of talking with Norris (Tr. 40, 43). The attorney wrote a letter to Norris which was dated January 14, 1982 (Tr. 4).

Sometime after talking with Norris about the unfairness of the settlement, Aubke mentioned the matter to his attorney. On January 14, 1982, his attorney wrote the following letter to Norris:

> I am the attorney for Con-Struct Erectors, Inc. Mike Aubke, the president of the company was to my office the other day wherein he advised me that an action was implemented by your office with regard to the requirement of his employees to wear safety belts. I understand that that matter was handled wherein my client paid a penalty of some fifteen hundred dollars and change. Subsequent to that we received notice of the court ruling by the U.S. Circuit Court of Appeals, Fifth Circuit, that Ironworkers are not required to wear safety belts. To add insult to injury it has now been acknowledged that your district office knew of this ruling before taking on the action and certainly before the settlement of the case which under these circumstances, we think was in bad faith. We respectfully request your reconsideration of what has transpired and would ask for you to consider refunding the money that was paid under these circumstances. Your immediate attention to this matter will be most appreciated.

The parties stipulated that the letter of January 14, 1982, was the only notice of contest filed by respondent concerning any part of the November 5, 1981, citations (Tr. 4).

On February 8, 1982, a motion to dismiss notice of contest was filed by the Secretary on the grounds that the notice was untimely and because the matter in dispute had previously been resolved by an amicable settlement between the parties. Since the letter of January 14, 1982, raised the spectre of bad faith or misrepresentation on the part of the Secretary, the motion was denied by order dated March 16, 1982, without prejudice to renew, in order to allow respondent an opportunity to present evidence for relief under Rule 60(b) of the Federal Rules of Civil Procedure, as made applicable to Commission proceedings by Branciforte Builders, Inc., 81 OSAHRC 80/A5, 9 BNA OSHC 2113, 1981 CCH OSHD ¶ 25,076 (No. 80-1920, 1981). A hearing was held for this purpose on May 14, 1982.

The settlement agreement covered the serious and repeated citations issued to respondent on November 5, 1981. Under the terms of settlement, respondent agreed to the violations set forth in the citations, and the Secretary agreed to reduce the penalty for the repeated violation from $1,280 to $880 (Ex. C). Respondent seeks to void the terms of settlement and requests that the letter dated January 14, 1982, from its attorney, be treated as a notice of contest to the repeated citation.

In order for the Commission to have jurisdiction, a timely notice of contest must be filed. Service Specialty, Inc., 80 OSAHRC 16/A9, 7 BNA OSHC 1770, 1979 CCH OSHD ¶ 23,928 (No. 16033, 1979). Section 10(a) of the Act, 29 U.S.C. § 659(a), gives an employer 15 working days from the receipt of a citation within which to notify the Secretary of Labor that he intends to contest the citation. The Commission's docketing of a case and its subsequent assignment to a judge does not constitute a waiver of the 15-day contest period. The Commission merely provides a forum in which the timeliness of the notice of contest may be adjudicated. Branciforte Builders, Inc., supra.

Under certain circumstances, a late notice of contest is considered timely. The Commission has held that an employer's failure to contest a citation within the 15-day period was excused when the delay in filing was caused by the Secretary's deception or failure to follow proper procedures. B. J. Hughes, Inc., 79 OSAHRC 49/E6, 7 BNA OSHC 1471, 1979 CCH OSHD ¶ 23,675 (No. 76-2165, 1979). The Commission's holding in B. J. Hughes, supra, was implicitly grounded on the equitable principles of Rule 60(b) of the Federal Rules of Civil Procedure even though in Plessey, Inc., 74 OSAHRC 77/C1, 2 BNA OSHC 1302, 1974-75 CCH OSHD ¶ 18,907 (No. 946, 1974), the Commission held it could not grant relief under Rule

60(b) to modify a citation and penalty that became final because a timely notice of contest was not filed. This is made clear by the Commission's holding in Branciforte Builders, Inc., supra, wherein it concluded that section 10(a) of the Act does not in all cases present an impenetrable barrier to Commission jurisdiction over a citation when the notice of contest is untimely. Following the rationale of Branciforte Builders, Inc., supra, an employer filing a late notice of contest may be granted relief if one or more of the provisions of Rule 60(b) of the Federal Rules of Civil Procedure are applicable.

Rule 60(b) states six reasons upon which a motion to relieve a party from a final judgment may be granted.[2/] Respondent's arguments fall under subsections (1), (3) or (6) of Rule 60(b). Rule 60(b)(1) provides relief from a final judgment or order when it is shown that the final judgment or order was entered because of "mistake, inadvertence, surprise, or excusable neglect." Under Rule 60(b)(3) a final judgment may be vacated when it is shown that it occurred because of " fraud . . . , misrepresentation, or other misconduct of an adverse party." Rule 60(b)(6) is the residual clause and provides that a final judgment may be vacated for "any other reason justifying relief from the operation of the judgment."

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2/ Rule 60(b), Federal Rules of Civil Procedure, sets forth the following reasons to relieve a party from a final judgment:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Respondent's primary contention is that the settlement of the issue involving 29 C.F.R. § 1926.28(a) is contrary to the law as established by the fifth circuit in S & H Riggers, Inc., supra, that the settlement is inequitable, and that justice demands that respondent have relief from the settlement. It asserts:

> In this case the Area Director misled Respondent's President, a lay person, by falsely representing to him that there was a violation of the Act and refusing to consider dismissal or vacation of the citation, thus leading him to believe that respondent had no defense to the citation. (Respondent's brief, p. 10).

There is no evidence of any deception or improper conduct on the part of Norris or any other representative of the Secretary. The evidence does not support the conclusion that Aubke entered into the settlement agreement through inadvertence, surprise, mistake or excusable neglect (Rule 60(b)(1)), or fraud, misrepresentation, or misconduct of an adverse party (Rule 60(b)(1)). There is also no evidence that the settlement agreement was procured under exceptional or compelling circumstances justifying relief under Rule 60(b)(6). Aubke's decision to settle was based upon a consideration of the benefits to be derived from a settlement balanced against the probable costs of litigation.

Aubke testified that to his knowledge it was not industry practice or custom to use safety belts under the circumstances which his company was cited (Tr. 33-34, 36, 39, 51). He obviously possessed his view of the industry custom at the time of the conference on November 18, 1981. When he was unable to convince Norris of the merits of respondent's case, he agreed to settle in order to reach some immediate finality to the matter. He testified (Tr. 35-36):

> Q. At the meeting, was there any discussion of the purpose or the simplicity of this settlement meeting, as opposed to contesting the action?
>
> A. Well, I think basically is the fact that, let's not get the lawyers involved in this thing; let's work it out and go on our way and not have a big, involved, long, drawn out process.

The acting area director was not respondent's attorney and had no duty to advise Aubke as to whether respondent had a defense to the action. If Aubke felt strongly about the matter, he could have contested the citations on behalf of respondent. The truth is, as conceded by Aubke, respondent did not contest the citations because of the expense involved and the small probability of success. He testified (Tr. 51-52):

> JUDGE BURROUGHS: Why did you forego your right to contest the citation in this case?
>
> THE WITNESS: Well, this was prior to the knowledge that I came about there, as far as that Fifth Circuit Court of Appeals and my previous experience — not my previous experience, but other peoples' experience in going through these contestings, with a long drawn out expensive affairs, and what the ultimate percentage of success was not very good, it seemed like.
>
> So based on that, we just felt that it was in our best interest to go ahead and, based on what we were told, and the citations issued and so forth, we felt it was in our best interest to go ahead and settle it.

Aubke's description of his meeting with Norris on November 18, 1981, does not reveal any deception or fraud on the part of Norris. Aubke testified (Tr. 34-35):

> Q. How did that meeting begin, if you recall?
>
> A. Well, I don't remember that much about it. I just remember that we talked in general about our business and about the violations.
>
> And it seemed that we came to some sort of like a — we just sort of ran out of things to talk about. There was no movement one way or the other.
>
> This is strictly just an opinion or a feeling that I had, was that we were sort of, well, let's get on into settling this thing, and then it was into the negotiations of what the fine would be reduced by. And we came to an agreement on the amounts of the money, and that was the basic.
>
> Q. Did Mr. Norris indicate to you whether your company had violated a standard that OSHA had issued?
>
> A. I don't recall the specific words. It was just that there was a citation issued and we had violated that.

Aubke further described his conference with Norris in the following manner (Tr. 52-53):

> JUDGE BURROUGHS: Well, did you do any negotiating with Mr. Norris concerning a settlement?
>
> THE WITNESS: As far as the money? The monetary value?
>
> JUDGE BURROUGHS: Well, any issue.
>
> THE WITNESS: Well, they absolutely refused to dismiss it. There was no question. They would not dismiss the charge. That was obvious from the beginning.
>
> We had a telephone conversation, I think, before this happened. Then we had this meeting, and there was no discussion about dismissing the citation, period.
>
> JUDGE BURROUGHS: Well, who suggested that the penalty be downgraded in order to dispose of the matter.
>
> THE WITNESS: My own feeling was that we came to this point where we had reached an impasse, a sort of just a lull in the conversation. And it seems to me, my recollection is that in order to get this thing moving, there was discussion about, well, what do we do now; what is the way that we settle this; how do we go about settling this.
>
> And I had never been involved in any negotiation with OSHA before. Any citation we had before, we just paid the fine and went about our way.
>
> And so my recollections of it was that it was initiated from that side, from the other side, that if the penalties were downgraded would it be acceptable to us in order to resolve the situation.

There are no facts or circumstances which show that Norris had any undue influence or practiced any fraud, deceit, or misrepresentation on Aubke, or exerted any duress in order to reach the settlement. There was no privity or fiduciary relationship between them and, contrary to respondent's contention, Norris was under no duty to advise Aubke that respondent should litigate the matter. The settlement agreement arose out of an open discussion between two parties with differing views of the applicable law. Aubke made a considered choice to settle

and not contest the citation. His choice may have been a risk, but it was deliberate and followed a free choice. Respondent cannot be relieved of its choice because hindsight seems to indicate to it that the decision to settle was probably wrong, considering the views of the court in S & H Riggers, Inc., supra. As stated in Moore's Federal Practice, 2d ed., vol. 7, ¶ 60.22(2), p. 256, and quoted in Rarick v. United Steelworkers of America, 202 F. Supp. 902, 904 (W.D. Pa., 1962):

> [G]enerally speaking a party who makes an informed choice as to a particular course of action will be not be relieved of the consequences when it subsequently develops that the choice was unfortunate.

The denial of complainant's motion would make a mockery of the doctrine of finality. Settlement agreements would have no binding affect on the parties.

Respondent's position is understandable, but no sufficient legal reason is raised whereby the late notice of contest should be accepted by the Commission. Respondent failed to fully protect its legal rights by perfecting a notice of contest. This was a voluntary and deliberate choice on the part of its president to forego litigation. He made an appraisal of the facts of respondent's case, the law as he understood it and concluded that it was in the best interest of respondent to settle the matter. The notice of contest is dismissed.

An ancillary question raised by respondent concerns the admissibility of the depositions of Jose Sanchez and David Norris which were taken on May 13, 1982, a day prior to the hearing. During a conference held on May 10, 1982,[3/] with counsel for the parties, counsel for respondent requested the opportunity to take the depositions of Jose Sanchez and David Norris. Counsel for complainant agreed to make Sanchez and Norris available on May 13, 1982, and their depositions were

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3/ Respondent's brief refers to the conference date as May 9, 1982. This date is incorrect. The conference was held on a Monday, which was May 10, 1982.

taken on that date. The depositions were taken pursuant to Rule 53(a) of the Commission's Rules of Procedure.[4/]

At the hearing, counsel for respondent sought to introduce the transcripts of their depositions into the record as original evidence. Counsel for complainant objected since Sanchez and Norris were in attendance at the hearing and available for questioning by respondent's counsel. The objection was sustained and respondent called Sanchez and Norris as witnesses at the hearing. Respondent renews its request to have the transcripts of Sanchez and Norris accepted into the record as part of the evidence to be considered in reaching a determination in this matter.

The parties in Commission proceedings do not have an unqualified right to take depositions. Rules 53 and 70 of the Commission's Rules of Procedure set forth two types of depositions that are allowable by order of the Administrative Law Judge or the Commission. Rule 53(a) pertains to discovery depositions. Rule 70 covers situations where a party desires to take the deposition of a witness in lieu of oral testimony.[5/] The depositions of Sanchez and Norris were taken pursuant to Rule 53.

Where a party desires to take the deposition of a witness <u>in lieu of oral testimony</u>, it is clear that he must proceed under Rule 70 and not Rule 53 as was done by respondent in this case. The rules differentiate between the types of

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4/ Rule 53(a) provides:

> Except by special order of the Commission or the Judge, discovery depositions of parties, intervenors, or witnesses, and interrogatories directed to parties, intervenors, or witnesses shall not be allowed.

5/ Commission Rule 70(a) provides, in pertinent part, as follows:

depositions and it is clear that the use of a deposition in lieu of oral testimony is not permitted in Commission proceedings unless the ALJ or Commission has previously approved the application. The purport of Rule 70 is to require oral testimony of witnesses at the hearing unless special circumstances are shown which justify their testimony being taken by deposition.

Respondent relied upon the provisions of Rule 32(a)(2) of the Federal Rules of Civil Procedure in support of admission of the depositions in lieu of oral testimony.[6/] Rule 32(a)(2) permits "a party to introduce the deposition of an

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> An application to take the deposition of a witness in lieu of oral testimony shall be in writing and shall set forth the reasons such deposition should be taken, the name and address of the witness, the matters concerning which it is expected he will testify and the time and place proposed for the taking of the deposition, together with the name and address of the person before whom it is desired that the deposition be taken (for purposes of this section, hereinafter referred to as "the officer"). Such application shall be filed with the Commission or the Judge, as the case may be, and shall be served on all other parties and intervenors not less than 7 days (when the deposition is to be taken within the continental United States) and not less than 15 days (if the deposition is to be taken elsewhere) prior to the time when it is desired that the deposition be taken. Where good cause has been shown, the Commission or the Judge shall make and serve on the parties and intervenors an order which specifies the name of the witness whose deposition is to be taken and the time, place, and designation of the officer before whom the witness is to testify.

6/ Rule 32(a)(2) of the Federal Rules of Civil Procedure provides:

> Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:
>
> * * *
>
> (2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

adversary as part of his substantive proof regardless of the adversary's availability to testify at trial." Coughlin v. Capitol Cement Co., 571 F.2d 290, 308 (5th Cir. 1978); see also Pingatore v. Montgomery Ward and Co., 415 F.2d 1138 (6th Cir. 1969), cert. den. 90 S. Ct. 1818 (1970). The deposition may be used as evidence of an admission and may be introduced as independent or original evidence by the adverse party and not merely for purposes of impeachment as provided in Rule 32(a)(1). Fey v. Walston and Co., 493 F.2d 1036 (7th Cir. 1974).

Respondent ignores the import of Rule 70 of the Commission's Rules of Procedure which supersedes Rule 32(a)(2) of the Federal Rules of Civil Procedure. Rule 2(b) of the Commission's Rules of Procedure specifically provides that the Federal Rules of Civil Procedure are not applicable where the Commission has a specific rule covering the particular situation.[7/] Rule 70 of the Commission's Rules of Procedure specifically covers depositions in lieu of oral testimony. The depositions of Sanchez and Norris were taken pursuant to Rule 53 and not Rule 70. While respondent argues that the Federal Rules do not distinguish between depositions for discovery and trial purposes, Commission Rules do make a distinction between the types of depositions. It is clear that the admissibility of depositions in lieu of oral testimony is governed by Commission Rule 70 and not Rule 32(a)(2) of the Federal Rules of Civil Procedure. A ruling admitting the depositions as original evidence would have ignored the clear intent of Rule 70 and

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7/ Rule 2(b) of the Commission's Rules of Procedure provides:

> In the absence of a specific provision, procedure shall be in accordance with the Federal Rules of Civil Procedure.

rendered it meaningless.[8/] The depositions are not admissible pursuant to Rule 32(a)(2) of the Federal Rules of Civil Procedure.

Since Sanchez and Norris testified at the hearing, Rule 32(a)(1) of the Federal Rules of Civil Procedure would permit their depositions to be used for the purpose of contradicting or impeaching their testimony.[9/] At the conclusion of the hearing, the record was held open to allow respondent time to read the transcripts of the depositions to determine if there was any inconsistency between the depositions and their oral testimony (Tr. 129-132). The transcripts were forwarded by letter dated June 23, 1982, from respondent's counsel for inclusion into the record. Respondent alludes to inconsistency on the part of Sanchez as to instructions concerning 29 C.F.R. § 1926.28(a) from the Regional Director. It further points to alleged inconsistency on the part of Norris as to the factual support for the alleged violation prior to the elapsing of the contest period. Even if their testimony on these points was inconsistent, the inconsistencies are not relevant to the issue in dispute. The admission of the depositions for the reasons advanced by respondent would only serve to inject additional irrelevant matter into the record. Respondent's motion to admit the depositions into evidence under Rule 32(a)(1) of the Federal Rules of Civil Procedure is denied. "Useless encumberance of the record cannot be insisted upon in any case." Fey v. Walston, supra, 493 F.2d at 1046.

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8/ If a discovery deposition taken pursuant to Rule 53 is admissible as original evidence, i.e., in lieu of oral testimony, there would never be any need to proceed under Rule 70.

9/ Rule 32(a)(1) of the Federal Rules of Civil Procedure provides:

> Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

The Secretary asks the Commission to assess penalties in accordance with the settlement agreement which was dated November 18, 1981. Since the Commission does not have jurisdiction, the request must be denied. The parties are left to their own agreement.

## FINDINGS OF FACT

1. A serious citation and repeated citation were issued to respondent on November 5, 1981. The citations were received by respondent on November 9, 1981 (Tr. 3-4).

2. On November 18, 1981, respondent's president, James Aubke, met with David Norris, acting area director for OSHA, and Joseph DiMartino, the compliance officer who conducted the inspection, to discuss the citations (Tr. 4).

3. A settlement was concluded as a result of the meeting on November 18, 1981, and a written settlement agreement was executed by the parties on November 18, 1981 (Ex. 1; Tr. 4).

4. The only communication which could be construed as a notice of contest is a letter dated January 14, 1982, from attorney David Feldman, acting on behalf of respondent, to David Norris (Tr. 4).

## CONCLUSIONS OF LAW

1. Respondent, at all times material hereto, was engaged in a business affecting commerce within the meaning of section 3(5) of the Act.

2. Respondent's notice of contest was untimely.

3. The Commission is the proper forum in which to adjudicate the timeliness of a notice of contest.

4. The failure to file a timely notice of contest was a voluntary and deliberate choice on the part of respondent's president to forego litigation in exchange for a reduction in the amount of proposed penalty.

5. Respondent is not entitled to relief pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.

## ORDER

Based upon the foregoing findings of fact and conclusions of law, it is

ORDERED: That the motion to dismiss the untimely notice of contest is granted.

Dated this 24th day of August, 1982.

James D. Burroughs

JAMES D. BURROUGHS
Judge

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
Room 7B11, Federal Building
1100 Commerce Street
Dallas, Texas 75242

NOTICE OF DECISION

Secretary of Labor v. Astro, Astro Resources Corporation, Astro Ecology Corporation (in the alternative)
OSHRC Docket No. 81-1348

1. Enclosed is a copy of my decision. It will be filed with the Commission on August 25, 1982, and will become the final order of the Commission on September 24, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is September 24, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Louis G. LaVecchia
Judge, OSHRC

Date: August 5, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, Complainant, | : | |
| | : | |
| v. | : | OSHRC Docket No. 81-1348 |
| ASTRO, ASTRO RESOURCES CORPORATION, ASTRO ECOLOGY CORPORATION, (in the alternative) Respondent. | : | |

Appearances:

Jordana W. Wilson, Esquire, for the Complainant.

John W. Small, Non-attorney, for the Respondent.

DECISION AND ORDER

This is a proceeding under Section 10(c) of the Occupational Safety and Health act of 1970. After inspection by a compliance officer the respondent was issued a serious citation and a non-serious citation for alleged violations of the safety standards promulgated under the Act. A notice of contest having been entered by the respondent, the matter went to hearing on March 23, 1982 at Houston, Texas.

Citation No. 1 alleges two serious violations of the Act in that the safety standards at 29 CFR 1910.215(a)(2) and (a)(4) were violated. The first alleges that "abrasive wheel(s) used on grinding machinery were not provided with safety guard(s) which covered the spindle end, nut, flange projection: (a) Craftsman 1/3 horsepower bench grinder, located in the shipping room, did not have a safety guard." The second alleges that "grinding machinery was not used with work rest(s) to support off-hand grinding work: (a) Craftsman 1/3 horsepower bench grinder, [above] did not have a tool rest." A proposed penalty of $120.00 was issued in this citation.

Citation No. 2 alleges that the regulations at 29 CFR 1903.2(a)(1) and 29 CFR 1904.2(a) were violated in that the respondent failed to post the OSHA notice for the benefit of its employees, and because a log of all recordable occupational injuries and illnesses was not maintained. No penalties were proposed in this citation.

## The Relevant Testimony

Mr. John Small, called as an adverse witness by the Complainant, stated that the respondent's business is at 801 Link Road, League City, Texas. He owns several companies, and generally is the president of the companies. (Tr. 1-15). Some of the companies are not operational. It appears that Astro Ecology, incorporated in 1971, was the lead company. It was formed for the purpose of manufacturing a water quality monitor. (Tr. 16-17). The witness personally owns the buildings and land at 801 Link Road. (Tr. 18). At times other companies are permitted to perform certain work at 801 Link Road. (Tr. 19). The witness was president of Astro Ecology until a short time before the hearing. (Tr. 23). He has been president of Astro Resources Corporation since prior to the inspection

which resulted in the citations here considered. (Tr. 24-25). The products manufactured by the last-named corporation were shipped to buyers within and without Texas. (Tr. 25). The company employed about 12 or 15 employees in 1981, and presently employs about 35. (Tr. 26).

Philip LaPoma, employed by Lico Incorporated, supervised employees of Astro Resources in May 1981 (the time of the inspection). Lico was paid for the supervisory work performed by the witness. (Tr. 27-28). He recalled the inspection and having conversed with the compliance officer for OSHA at that time. (Tr. 29-30). The grinder shown in exhibit C-2 was the one concerned at the time of the inspection. (Tr. 31). He recalled the inspector mentioning the absence of a side safety guard and a tool rest. (Tr. 32). It was used about once or twice a week, not with any regularity. (Tr. 33). Different employees used it.

David Sapp has worked for Astro Resources since October 1979. He recalled the inspection by the compliance officer in May 1981. At that time his supervisor was Mr. Small. (Tr. 36). He was production manager at the time. He had used the cited grinder prior to the inspection. He was not aware that the grinder required a side guard. (Tr. 36-37).

Edward Solter, compliance officer for the OSHA, testified that he had had 3 years' experience with the federal government in that agency. He had had prior experience in the field of safety, and also had worked as a machine operator at one time. (Tr. 39). He stated that he conducted a general schedule inspection of the respondent's workplace on May 7, 1981. He held an opening conference with Mr. LaPoma, who identified himself as a vice-president of Astro Ecology. (Tr. 42-43).

The compliance officer further testified that he inspected the bench grinder (Ex. C-2)and found that it lacked a tool rest and a side guard. (Tr. 45). The missing elements constituted a hazard to the employees using the grinder because a disintegrating grinding wheel could fly out of the unit with great force from either angle left unprotected. (Tr. 46). The two other violations noted were the absence of the OSHA notice to employees and the log of injuries. (Tr. 48).

The grinder may have had some fixed device which was to have acted as a form of tool rest, but the normal type of tool rest for that type of grinder was not bolted into the slot provided for it. (Tr. 56).

Mr. LaPoma, testifying for the respondent, stated that the cited grinder (Ex. C-2) was equipped with one tool rest at the time of the inspection, but that it was not properly adjusted. (Tr. 58).

Mr. Small, sworn as a witness, made a statement in support of his position. He stated that neither Astro Ecology nor Astro Resources owns the grinder in exhibit C-2, and that it is his personal property. It is used, however, by his companies and by other companies with which he has no connection. (Tr. 61). He further stated that he was not contesting that there was a violation with respect to [the grinder]. (Tr. 62). He does object to bringing Astro Resources Corporation into the litigation.

The motion to amend the complaint to name Astro Resources Corporation had been previously granted. The respondent's motion to dismiss the motion was taken under advisement. No prejudice having been shown, the motion to dismiss is denied.

Ownership of the bench grinder is not essential to the findings in this matter, it appearing quite clearly that the machine was under the control of Astro Resources Corporation at that time of the inspection. It had been used for some time in the work of the company, although it was not in regular use, say on a daily basis. The irregular and infrequent use of the grinder in the condition noted by the compliance officer would tend to lessen the exposure of employees to the hazard presented, and this, in turn, impels me to believe that the $120 penalty proposed was somewhat excessive. The violation was a serious one within the meaning of the Act, however, in view of the type and nature of the physical injuries that could have been sustained by employees because of the missing elements. Considering all factors, I find that a penalty of $50 would be proper for the violations in Citation No. 1.

It is, therefore, ORDERED that:

For the violations found in Citation No. 1 (serious) the respondent Astro Resources Corporation is assessed a penalty of $50.00.

For the violations found in Citation No. 2 (non-serious), no penalty will be assessed.

The citations are affirmed as shown.

Louis G. LaVecchia
Administrative Law Judge

Dated: August 25, 1982
Dallas, Texas.

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

420 JOHN W. McCORMACK P.O. & COURTHOUSE
BOSTON, MASSACHUSETTS 02109

## NOTICE OF DECISION

Secretary of Labor v. Arute Brothers, Inc.
OSHRC Docket No. 81-2766

1. Enclosed is a copy of my decision. It will be filed with the Commission on August 5, 1982, and will become the final order of the Commission on September 24, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is September 24, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Richard DeBenedetto
RICHARD DeBENEDETTO
Judge, OSHRC

Date: August 5, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant | : | |
| v. | : | OSHRC DOCKET NO. 81-2766 |
| ARUTE BROTHERS, INC., | : | |
| Respondent | : | |

Appearances:

Robert J. Murphy, Esq., for Complainant

Charles M. Fox, Esq., for Respondent

DECISION AND ORDER

Respondent, Arute Brothers, Inc. (Arute), was cited for seriously violating the Occupational Safety and Health Act of 1970 (the Act) by failing to comply with the personal protective equipment standard, 29 C.F.R. §1926.28(a), which reads as follows:

> The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

The Secretary has proposed that Arute be assessed a penalty of $240 for the alleged violation.[1/] Arute contested the matter, and a hearing was held on May 12, 1982.[2/]

1/ The parties stipulated that the $240 penalty proposed by the Secretary is appropriate should the citation be affirmed (Tr. 3).

2/ Arute was also cited for nonserious violations of various other construction safety standards. These were not contested by Arute.

On the day of the OSHA inspection on November 5, 1981, Arute was engaged in the construction of a road and an overpass bridge in Trumbull, Connecticut. At the time of the inspection, the compliance officer observed several of Arute's employees in the process of installing wood planking along the bridge's horizontal beams. The employees walked along the top of the 16-inch-wide upper flanges of the I-beams, which were spaced 8 feet apart. The employees also stood on wood planking interspaced along the lower flanges of the I-beams. The height of the beams varied from 16 feet to 22 feet. At the time of the inspection, there was no vehicular traffic or construction vehicles passing under the bridge. The employees were not provided with any form of fall protection (Tr. 13-20, Exhs. C-2, C-37). These facts are not disputed. Arute contends that it cannot be held in violation of the personal protective equipment standard because its methods conformed to the customary conduct of other construction companies in Connecticut.

According to the testimony of Arute's vice president, Adrian Tyler, Arute's policy was not to provide fall protection for its employees working on bridges unless the potential fall distance was at least 25 feet (Tr. 30-31). Tyler testified that Arute's 25-foot fall-protection policy was the same as that followed by other construction firms in Connecticut (Tr. 33). In an effort to buttress Tyler's testimony regarding industry practice, Arute called Thomas Defonse and Albert Brunalli, both of whom are presidents of construction firms based in Connecticut, and each of whom has over 40 years of experience in construction work including the building of bridges.

But their testimony falls far short of supporting Arute's industry practice argument. Defonse testified that it was the custom among bridge builders to provide safety measures only where the potential fall distance

reached the level of 50 feet (Tr. 41-42, 46-47). Brunalli testified that his construction firm did not provide fall protection for employees working on bridges with a drop of less than 25 feet except in "unusual circumstances," such as working above railroad tracks where the danger of passing trains is present (Tr. 51, 53). When questioned by Arute's counsel as to what the common practice was among construction firms in Connecticut, Brunalli's testimony was vague (Tr. 53). And on cross-examination he testified that he would not provide fall protection even where the potential fall distance was 26 feet, and that where the fall distance was 30 feet, "[c]hances are we would have it" (Tr. 56).

If there is a customary precautionary measure taken by bridge builders in Connecticut to guard against fall hazards, it is not discernible from the witnesses presented by Arute. In any event, compliance with customary procedures in the construction industry is not, by itself, determinative of the issue. According to Commission precedent, the test to be applied is whether a reasonable person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts unique to a particular industry, would recognize a hazard warranting the use of personal protective equipment. Bethlehem Steel Corporation, 10 BNA OSHC 1264, 81 CCH OSHD ¶25,839 (No. 16067, Dec. 31, 1981). The Commission's "reasonable person" test has been endorsed by a number of Circuit Courts dealing with the general provisions of either 1926.28(a) or 1910.132, the analogous general industry standard: Southern Ohio Building Systems, Inc. v. OSHRC, 649 F.2d 456, 460 (6th Cir. 1981); Voegele Co., Inc. v. OSHRC, 625 F.2d 1075, 1077-1079 (3rd Cir. 1980); Bristol Steel & Iron Works, Inc. v. OSHRC, 601 F.2d 717, 722-724 (4th Cir. 1979); American Airlines, Inc. v. Secretary of Labor, 578 F.2d 38, 41 (2d Cir. 1978); Brennan v. Smoke-Craft, Inc., 530 F.2d 843, 845 (9th Cir. 1976); Arkansas-Best Freight Systems, Inc. v. OSHRC, 529 F.2d 649, 655 (8th Cir. 1976); and

Cape & Vineyard Division of New Bedford Gas v. OSHRC, 512 F.2d 1148, 1152 (1st Cir. 1975). Only the Fifth Circuit Court has limited the reasonble person test to the custom and practice of the industry rather than evaluating customary industry practice as only one aspect of the reasonable person test. S & H Riggers & Erectors, Inc. v. OSHRC, 659 F.2d 1273 (5th Cir. 1981).

Arute contends that recognition of a fall hazard depends on not only the consequences of a potential fall but also the likelihood of such a fall under the cited working conditions. No support for this contention can be found in the Voegele case, supra, as Arute maintains. In Voegele, the allegedly hazardous condition involved a roof varying in height from 14 to 35 feet, with the major portion of the roof being essentially flat, sloping 2-3 degrees downward from the center for drainage. The court stated:

> The citation in this case issued for a serious violation because the only serious hazard that could occur from the violative condition was falling from the roof to the concrete ground. Obviously, such a fall would result in death or serious harm within the meaning of OSHA's definition of "serious." See 29 U.S.C. §666(j) (1976) [footnote omitted]. The Secretary of Labor argues that since the only likely harm is of a serious nature, there is an obvious recognizable hazard. But this does not answer Voegele's contention concerning the probability of occurrence of this extreme harm in the context of a flat roof. Because substantial evidence suggests that this roof was not an ordinary flat roof, however, we hold that where no protective equipment was provided and where there was a risk of serious injury, there was an obvious hazard.[11]

* * *

11...Jensen Const. v. OSHRC, 597 F.2d 246, 249 (10th Cir. 1979) (obvious falling hazard under §1920.28(a) where employee worked 17-23 feet above ground and astride structural beams with no protective equipment); Usery v. Marquette Cement Mfg. Co., 568 F.2d 902, 909 (2d Cir. 1977) (general duty clause).

625 F.2d at 1079-1080. As can be seen, the court did not regard the question of "probability of occurrence" or likelihood of injury to be a significant factor. Indeed, in the Jensen case referred to by the court in its footnote 11, the facts are remarkably parallel to those in the instant case. In its brief (p. 12), Arute argues that a "crucial" distinction between Jensen and the instant case exists: in the Jensen case, employees worked "above a heavily travelled highway and a fall from even a low clearance bridge in such case could result in serious physical harm due to the possibility of being hit by vehicular traffic below," a condition not present here. This argument is unpersuasive. There is nothing in the Jensen decision to suggest that vehicular traffic was the pivotal factor in upholding a "serious" citation for failure to provide protection against a 17-23-foot fall hazard. The absence of moving vehicles does not eliminate the danger of sustaining serious injury if an employee were to fall from the same height onto either a finished highway or, as here, a "rough graded" roadway. Arute's own witnesses conceded that its employees could have sustained serious physical injuries if they had fallen from their work stations shown in the photographic evidence (Tr. 34, 43-44, 56-57).

Section 17(k) of the Act, 29 U.S.C. §666(k), provides:

> [A] serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

The Secretary need not prove substantial probability of an accident in order to establish a serious violation. A serious violation is established if there is a possibility of an accident which, if it occurs, would have a substantial

probability of resulting in death or serious physical harm. Portland Stevedoring Co., 1 BNA OSHC 1250, 1973 CCH OSHD ¶15,052 (No. 5, July 1973). What the Ninth Circuit Court said in California Stevedore & Ballast Co. v. OSHRC, 517 F.2d 986, 988 (9th Cir. 1975), is equally applicable here:

> Where violation of a regulation renders an accident resulting in death or serious injury possible, however, even if not probable, Congress could not have intended to encourage employers to guess at the probability of an accident in deciding whether to obey the regulation. When human life or limb is at stake, any violation of a regulation is "serious."...

Arute contends further that no attempt was made by the Secretary to introduce "objective evidence" tending to show that the activity in question was a "recognized" hazard. In support of this contention Arute cites Southern Ohio, supra. In that case the Sixth Circuit Court held that the Secretary failed to carry his burden of proving a violation of either the general duty clause or the 1926.28(a) standard. Section 5(a)(1) of the Act, 29 U.S.C. 654(a)(1), the so-called general duty clause, provides that each employer:

> shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

The burdens of proving violations of the general duty clause and the personal protective equipment standard differ to some extent. By the terms of the clause, the Secretary must prove (1) that the employer failed to render its workplace "free" of a hazard which was (2) "recognized" and

(3) "causing or likely to cause death or serious physical harm.[3/] Whether or not a hazard is "recognized" is a matter for objective determination. But even under the general duty clause the test to be applied is not general usage in an industry, as Arute would have it, but the common knowledge of safety experts who are familiar with the circumstances of the industry or activity in question. National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257, 1265 n. 32-1266 n. 37 (D.C. Cir. 1973). In Southern Ohio, the Sixth Circuit Court indicated that it had adopted the definition of "recognized hazard" as enunciated in National Realty, and that in determining whether the employer violated the 1926.28(a) standard, a similar objective test is applied:

> We hold that §1926.28(a) requires an employer to require the wearing of appropriate safety equipment by his employees whenever a reasonably prudent employer, concerned with the safety of his employees, would recognize the existence of a hazardous condition and protect against that hazard by the means specified in the citation. This holding is consistent with our decision in Schriber Sheet Metal & Roofers, Inc. v. OSHRC, 597 F.2d 78 (6th Cir. 1979), adopting a similar test for compliance with the general duty clause (section 5(a)(1) of the Act).

649 F.2d at 460.

3/ The "likelihood"-of-injury element in the general duty clause has not been interpreted by either the Commission or the courts as imposing a 51% probability test. As it was noted in the leading case of National Realty & Constr. Co. v. OSHRC, 489 F.2d 1257, 1265 n. 33:

> Presumably, any given instance of equipment riding carries a less than 50% probability of serious mishap, but no such mathematical test would be proper in construing this element of the general duty clause. See Morey, the General Duty Clause of the Occupational Safety and Health Act of 1970, 86 Harv.L.Rev. 988, 997-998 (1973). If evidence is presented that a practice could eventuate in serious physical harm upon other than a freakish or utterly implausible concurrence of circumstances, the Commission's expert determination of likelihood should be accorded considerable deference by the courts. For equipment riding, the potential for injury is indicated on the record by Smith's death and, of course, by common sense.

None of Arute's witnesses was presented as being a safety expert in the construction field, and none demonstrated that careful thought was given to procedures for limiting employee exposure to fall hazards. On the other hand, the compliance officer had been a construction worker for a number of years before being employed as a safety specialist for some 10 years, initially with the Connecticut labor department and since 1978 with OSHA. While with OSHA, he had conducted almost one thousand construction-site inspections, including some involving bridges (Tr. 8-12). The compliance officer testified that the use of safety belts by Arute's employees was a necessary safeguard against a risk of serious injury. The record supports the conclusion that Arute's failure to require its employees to use safety belts while working on the 16- to 22-foot-high bridge was unreasonable under the circumstances and was a serious breach of the personal protective equipment standard. The $240 proposed penalty is in accord with the penalty criteria of section 17(j) of the Act.[4/]

## FINDINGS OF FACT

1. In November 1981, several of Arute's employees, while installing wood planking along the horizontal beams of an overpass bridge, walked along the top of 16-inch-wide upper flanges of I-beams and stood on wood planking interspaced along the lower flanges of the I-beams.
2. The potential fall distance was 16 to 22 feet.
3. Arute's employees were not provided with any form of fall protection.

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4/ Section 17(j), 29 U.S.C. §666(j), provides:

The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

4. The use of safety belts was feasible.

5. Arute's employees were exposed to the danger of falling 16 to 22 feet to adjacent ground level.

6. Serious physical harm was substantially probable in the event an employee fell from the bridge structure, and Arute should have known of the violative condition.

## CONCLUSION OF LAW

Arute seriously violated the personal protective equipment standard, 29 C.F.R. §1926.28(a), and a penalty of $240 is appropriate.

## ORDER

It is ordered that the citation alleging serious violation of 29 C.F.R. §1926.28(a) is affirmed, and a penalty of $240 is assessed.

Richard DeBenedetto
RICHARD DeBENEDETTO
Judge, OSHRC

Dated: August 25, 1982
Boston, Massachusetts

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

September 27, 1982

**IN REFERENCE TO SECRETARY OF LABOR v.**

Eyelet Specialty Company

**OSHRC DOCKET NO.** 81-503

**NOTICE IS HEREBY GIVEN TO THE FOLLOWING:**

**OF** COMMISSION DECISION AND REMAND

**To wit:** See attached.

**FOR THE SECRETARY OF LABOR**

- Counsel for Regional Litigation
  Office of the Solicitor, USDOL
  200 Constitution Ave., NW. - Rm. S-4014
  Washington, D.C. 20210

- Albert H. Ross, Esq.
  Regional Solicitor, USDOL
  John F. Kennedy Federal Bldg.
  Government Center - RM 1803
  Boston, Mass 02203

**FOR EMPLOYER**

- Diana Garfield, Esq.
  Siegel, O'Connor & Kainen, P.C.
  60 Washington St.
  Hartford, CT 06106

FOR EMPLOYER
George Prenatt
(Adolph Schwartz, Director)
U.S.W.A. Safety & Health Dept.
Five Gateway Center, RM 901
Pgh., PA 15222

- James F. Chieppo, Rep.
  District #1, Sub-Dist. #4
  U.S. Steelworkers of America
  100 South Turnpike Rd
  Wallingford, CT 06492

Judith Delgado, President
Local Union 8298
U. S. Steelworkers of America
- 86 North Main St., 2nd Floor
  Wallingford, CT 06492

**FOR THE COMMISSION**

Ray H. Darling, Jr.

**RAY H. DARLING, JR.**
**EXECUTIVE SECRETARY**

Rev. 10/1/76

Office of the Judge
OSHRC
John W. McCormack
Post Office & Courthouse
RM 414
Boston, Mass 02109

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>EYELET SPECIALTY COMPANY,<br><br>Respondent,<br><br>UNITED STEELWORKERS OF AMERICA, LOCAL UNION 8298,<br><br>Authorized Employee Representative. | OSHRC Docket No. 81-503 |

ORDER OF REMAND

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

The Secretary of Labor and Eyelet Specialty Company submitted to former Administrative Law Judge Barbara L. Hassenfeld a settlement proposal. Judge Hassenfeld had earlier participated in a telephone conference with representatives of the Secretary, Eyelet Specialty and the United Steelworkers of America Local Union 8298. There, the Secretary and Eyelet Specialty informed the judge that they had reached agreement but the union stated that it "had some problem" with the agreement. The judge then ordered "that the union file its written objections . . . by August 17, 1981." (Emphasis in the original.) The settlement was received by the judge on August 10, 1981, and was approved on the same day.

The union represents that it had mailed its letter of objections to the settlement proposal on August 13, 1981. Although the letter was not received

until August 19, 1981, it was nevertheless timely filed because, under Commission Rule 8(c), 29 C.F.R. § 2200.8(c), "[f]iling is deemed effected at the time of mailing." The union's objections should have been considered before the judge approved the settlement proposal. See Hearst Corp., OSHRC Docket No. 80-6051 (August 31, 1982).

We remand for a judge to give consideration to the union's objections in light of our recent decision in Mobil Oil Corp., 82 OSAHRC ____, 10 BNA OSHC 1905, 1982 CCH OSHD ¶ 26,187 (No. 77-4386, 1982); see Wisconsin Steel Corp., OSHRC Docket No. 78-4730 (August 31, 1982). 1/ Accordingly, the judge's decision is vacated and the case is remanded for further consideration of the union's objections. 2/

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: SEP 27 1982

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1/ After Judge Hassenfeld filed her decision approving the settlement, she responded to the union by letter. We do not consider the views expressed in her letter to relate to the merits of the union's objections, but only to the union's right to raise those objections before the Commission.

2/ Chairman Rowland dissents from this order of remand. For the reasons explained in his dissenting opinion in Mobil, the Chairman believes that consideration of the settlement agreement should be limited to any objection the union may have to the reasonableness of the abatement period agreed to by the Secretary and Eyelet Specialty. Since the union's objection does not pertain to the reasonableness of the abatement period in the settlement, a remand for consideration of the adequacy of the settlement is inappropriate. Chairman Rowland would therefore affirm the judge's decision on this ground.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, | : | |
| Complainant | : | |
| v. | : | OSHRC DOCKET NO. 81-503 |
| EYELET SPECIALTY COMPANY, | : | |
| Respondent | : | |

**ORDER**

On January 19, 1981, Respondent was cited for alleged failure to correct violations of the Occupational Safety and Health Act of 1970 (the Act) and was issued a total proposed penalty of $9,000.00. Respondent contested the citation.

Through a Settlement Agreement, executed by the parties, the Complainant moved to reduce the penalty to a total of $3,500.00. The Respondent withdrew its Notice of Contest. The penalty has been paid, the violations will be abated as per the terms of the agreement. Notice was served in compliance with the Act and the union filed no objection nor did it sign the agreement. Objections had been noted orally and the Respondent's attorney conversed with the union in that regard.

The Settlement Agreement, being in accordance with the purposes and objectives of the Act, is hereby approved.

Barbara L. Hassenfeld

BARBARA L. HASSENFELD
JUDGE, OSHRC

Dated: August 10, 1981
Boston, Massachusetts

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
Room 7B11, Federal Building
1100 Commerce Street
Dallas, Texas 75242

NOTICE OF DECISION

Secretary of Labor v. Olson Construction Company, d/b/a Texas Olson Construction Co.
OSHRC Docket No. 81-2741

1. Enclosed is a copy of my decision. It will be filed with the Commission on August 26, 1982, and will become the final order of the Commission on September 27, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is September 27, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Stanley M. Schwartz
Administrative Law Judge

Date: August 6,1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>OLSON CONSTRUCTION COMPANY, d/b/a TEXAS OLSON CONSTRUCTION COMPANY,<br><br>Respondent. | OSHRC DOCKET NO. 81-2741 |

Appearances:

Frances Valdez Valdez, Esq.
Dallas, Texas

For the Complainant.

James D. Sprague
Dallas, Texas

For the Respondent.

## DECISION AND ORDER

Schwartz, Judge:

This is a proceeding brought before the Occupational Safety and Health Review Commission ("The Commission") pursuant to Section 10 of the Occupational Safety and Health Act of 1970, 29 USC §651 et. seq. ("the Act"). Respondent contests a serious citation alleging two violations of the Act and a non-serious violation alleging one violation of the Act.

An inspection was conducted at Respondent's workplace on December 3, 1981. Respondent timely contested the subject citations. A hearing was held on June 18, 1982, at Dallas, Texas. No additional persons desired to intervene in this matter.

Respondent is engaged in a business affecting commerce within the meaning of the Act and the Commission has jurisdiction of the parties and subject matter (T. 8, 29). The issues remaining to be decided are two-fold. First, whether the Respondent was in serious violation of 29 CFR 1926.451(a)(4), 450(a)(10); and non-serious violation of 1926.150(a)(4). If so, the appropriate penalties therefor.

## The Evidence

The Secretary presented its compliance officer, Mr. William E. Rogers. He has been a compliance officer with OSHA for eight years. He conducted an inspection of Respondent's workplace on December 3, 1981 (T. 5-6). Mr. Rogers was assigned to inspect the worksite by his supervisor. The supervisor had observed what he thought was a scaffold on which people were not tied off as he drove by the worksite. Mr. Rogers checked the scaffold and did not issue a citation for this situation. He determined, after consultation with the national office, that the scaffold met the intent of the standards (T. 18-19).

Mr. Rogers testified that he observed two men working on a metal scaffold that was resting on the basement floor. They were slightly below the level of the sidewalk. The trunks of their bodies were extending above the sidewalk. The scaffold was unguarded on all sides (T. 9). Management's representatives told him the scaffold was 11' above the floor level. He understood that the scaffold had been unguarded for a couple of days (T. 10). He did not know if the scaffold had been in the same location for the two days prior to the inspection (T. 19).

The compliance officer also observed a portable ladder resting at an angle against the platform of the scaffold. The ladder was not tied off. It was secured by management during the inspection and prior to the compliance officer's listing of possible violations. There were permanent stairs for access to the basement. The employees could use the stairs to come into the basement and then gain access to the scaffold by climbing the ladder. He did not know how long the ladder had been unsecured and did not observe employees use the ladder. He did not make a determination if employees had used the ladder (T. 13-14). It is an acceptable practice within the construction industry for one employee to hold the ladder while another climbs it. He would consider this to constitute securing the ladder.

The final item involved fire extinguishers on the seventh and eighth floors by the elevator. The extinguishers had a dial indicator at the top which shows whether they had been discharged. Both extinguishers were observed to indicate they had been discharged (T. 16). He was aware that the building being renovated had charged fire hoses available on each floor. He also agreed that the fire extingushers were not required on this job. However as he understands OSHA regulation', if the extinguishers are there, they must be kept operational (T. 20).

Mr. Marlin Allen appeared and testified on behalf of the Respondent. He is the job superintendent at the subject worksite. Mr. Allen has been in the construction business for 14 years (T. 22). He described the circumstances surrounding the lack of guardrails on the platform. The scaffold had originally been underneath the sidewalk in order to collect broken concrete. This would prevent the need to retrieve the concrete from the basement. There were no guardrails or employees on the scaffold during this operation. At the time of the inspection they

were in the process of resetting the scaffold for form work in the new location. They had moved the scaffold the day of the inspection. The employees on the scaffold were in the process of securing the scaffold and would then have put up guardrails (T. 22-24; 26).

He also explained the fire extinguishing system present in the building. There was an active fire department standpipe system in the building with fire hose connections. Fire hoses were at the standpipes. His employees were informed about the makeup and use of this system (T. 25).

Mr. Bill Young, Vice President, Texas Olson Construction Company also appeared and testified. He has 22 years of construction experience and is manager of Texas Olson Construction Company. Respondent has a safety program on a company wide and division by division basis. There is a full time safety director who goes to the job-sites and works with the job superintendents. He testified that the company is very safety conscious and stresses safety with its employees. Incentives are offered for safe work (T. 27-28).

Mr. Young felt that the citation was unwarranted in this instance. He emphasized that they were in the process of resetting a scaffold that had not been completely set up. It had been in a position of 12" under a slab of concrete where you could not put guardrails on it. The inspector happened to come on the job after they had opened a hole for an electrical vault and moved the scaffolding. They were in the middle of resetting the scaffold (T. 29-30).

## Opinion

The Secretary has established that guardrails were not in place on the 11' scaffold in the basement. Two employees were on the scaffold. The Respondent

has explained that these employees were in the process of resetting the scaffold for use. The guardrails would have been installed prior to actual use of the scaffold at the new location. The scaffold had just been moved at the time of the inspection. There is no evidence that it had been used without guardrails, except to collect concrete prior to the compliance officer's visit. Under these circumstances, I conclude that Respondent did not violate 29 CFR 1926.451(a)(4). The employees were on the scaffold for the sole purpose of resetting it for use at the new location.

There is also no question that the portable ladder was not tied, blocked or secured. However the evidence of record does not establish that the two employees used the ladder in an unsecured condition to gain access to the scaffold. It is just as reasonable to infer that one employee held the ladder for the other while they ascended the scaffold. The compliance officer indicated that this is an acceptable alternative. It is also reasonable to infer that the ladder would be tied off after the resetting of the scaffold for future use. Under these circumstances I conclude that a violation of 29 CFR 1926.450(a)(10) has not been established.

The final allegation concerns the defective firefighting equipment noted by the elevators on the seventh and eighth floors. These extinguishers registered as discharged. All parties agreed there were charged water hoses available on each floor of the building under renovation. The compliance officer indicated that the presence of water hoses meant that the cited extinguishers were not required on the site. It was his opinion that if they were there they must be kept in an operational condition.

The undersigned assumes that Mr. Rogers was concerned about an employee grabbing a discharged extinguisher to fight a fire. Respondent established that the building was a renovation project. Respondent had informed all of its employees

about the fire system in effect and how to put out any fires with the hoses. In view of the above I conclude that Respondent was not in violation of 29 CFR 1926.150(a)(4) in the case.

## Conclusions of Law

1. Respondent, Olson Cosntruction Company, d/b/a Texas Olson Construction Company, is engaged in a business affecting commerce and has employees within the meaning of Section 3(5) of the Act. The Commission has jurisdiction of the parties and of the subject matter of the proceeding.

2. On December 3, 1981, Respondent was not in serious violation of 29 CFR 1926.451(a)(4); 1926.450(a)(10), or nonswerious violation of 1926.150(a)(4).

## Order

On the basis of the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that:

1. Items 1(a) and 1(b) of serious citation number 1 and item 1 of non-serious citation number 2 are VACATED.

STANLEY M. SCHWARTZ
Administrative Law Judge

Dated: August 26, 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
Room 7B11, Federal Building
1100 Commerce Street
Dallas, Texas 75242

NOTICE OF DECISION

Secretary of Labor v. General Drywall Contractors, Inc.
OSHRC Docket No. 82-0005

1. Enclosed is a copy of my decision. It will be filed with the Commission on August 26, 1982, and will become the final order of the Commission on September 27, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is September 27, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Stanley M. Schwartz
Administrative Law Judge

Date: August 6, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>GENERAL DRYWALL CONTRACTORS, INC.,<br>Respondent. | OSHRC DOCKET NO. 82-0005 |

Appearances:

George R. Collins, Esq.
Dallas, Texas

For the Complainant.

R. Terry Oates
Houston, Texas

For the Respondent.

DECISION AND ORDER

Schwartz, Judge:

This is a proceeding brought before the Occupational Safety and Health Review Commission ("The Commission") pursuant to Section 10 of the Occupational Safety and Health Act of 1970, 29 USC §651 et. seq. ("the Act"). Respondent contests a serious citation alleging a violation of 29 CFR 1926.304(d).

An inspection was conducted at Respondent's workplace on December 11, 1981. General Drywall timely contested the subject citation. A hearing was held in

Houston, Texas, on June 21, 1982. No additional persons desired to intervene in this matter.

Respondent is engaged in a business affecting commerce within the meaning of the Act and the Commission has jurisdiction of the parties and subject matter (T. 9). The issues remaining to be decided are two-fold. First, whether the Respondent was in serious violation of 29 CFR 1926.304(d) and, if so, the appropriate penalty to be assessed.

## The Evidence

The Secretary presented its compliance officer, Mr. Oscar G. Ray. Mr. Ray has a bachelor's degree in safety and fire protection. He has been a compliance officer with OSHA for the past five years (T. 7-8). He also has previous safety experience with the United States Postal Service.

Mr. Ray conducted an inspection of Respondent's worksite in December 1981. Respondent was engaged in putting up sheetrock in the interior of a building under construction. He observed a chopsaw being used by Respondent's employees. The chopsaw did not have a lower guard on it. Mr. Ray photographed the saw. The photographs depict the saw plugged in and ready for use with a piece of wood inserted in the saw. He described the hazard as involving the possible loss of a limb or severe cuts because of the lack of a lower guard. Abatement could be accomplished by placing a guard on the machine or by taking the saw out of service. The saw could have been unplugged and red-tagged at the site (T. 11-16; Complainant's Exhibits 1 & 2).

Mr. Terry Oates appeared and testified on behalf of the Respondent. He is Respondent's general superintendent and has approximately 15 years construction experience (T. 22).

Mr. Oates described the chopsaw guard as a flimsy clear plastic piece of material which is bolted to one side of the chopsaw. The guards break quite often. Mr. Oates stated that his foreman called him between 7:30 a.m. and 8:00 a.m. on the day of the inspection to report a broken chopsaw guard. Mr. Oates told his foreman that he would replace the saw with a new one and instructed him not to use the saw. The foreman indicated that he would not use the chopsaw. There was ample work to perform at the site that did not necessitate the use of the chopsaw.

Mr. Oates was overseeing 15 jobs on the day of the inspection. He had several stops to make before he could deliver the new chopsaw to the particular worksite. He brought the new chopsaw out to the worksite at approximately 1:00 p.m. that afternoon. OSHA had already conducted a general inspection of the worksite and noticed the unguarded saw. He was essentially contesting the proposed penalty because of the time element involved in reaching the worksite and because he had instructed his people not to use the saw (T. 23-27).

## Opinion

The photographic exhibits clearly depict Respondent's chopsaw plugged in and ready for use at the subject worksite. I have no doubt that Mr. Oates instructed his foreman not to use the chopsaw until he brought a guarded one out to the site. The foreman failed to unplug the saw, red-tag it and remove it from the work area. He left the chopsaw available for use by employees. The foreman's action, must be imputed to management in this case. Consequently, the Secretary has met his burden of proof on the issue.

The violation is also properly classified as serious. Both parties acknowledge that a serious injury could result from contact with an unguarded chopsaw blade.

This was the very reason Mr. Oates instructed the job foreman not to use the chopsaw in question. The Commission has held that a serious violation is established if there is a possibility of an accident which, if it occurs, creates a substantial probability that death or serious injury will result. Portland Stevedoring Co., 73 OSAHRC 30/D2, 1 BNA OSHC 1250, 1973-74, CCH OSHD ¶16,347 (No. 5, 1973). This situation exists in the instant case.

## Penalty Determination

I have observed Mr. Oates and find that he is a safety conscious individual. He has a valid argument, for penalty purposes, concerning the almost simultaneous breaking of the chopsaw guard and OSHA's general inspection at the subject worksite. The record indicates that in accordance with company policy, Mr. Oates was called immediately after the chopsaw guard broke. He instructed his foreman not to use the saw and delivered a guarded saw within a matter of hours. He had other business stops to make before getting to the site of the inspection. The case illustrates the need for a more specific direction to red-tag unguarded saws and other equipment until they can be replaced or fixed. There had been no previous violations of his instructions. I conclude that a large penalty would do little to further the purposes of the Act. The Act requires some penalty for a serious violation. Consequently, I assess a penalty of $1.00 for this particular violation. Reliance has been placed on the above circumstances as well as my belief that Mr. Oates is committed to safety at his worksites.

## Conclusions of Law

1. Respondent, General Drywall, is engaged in a business affecting commerce and has employees within the meaning of Section 3(5) of the Act. The Commission has jurisdiction of the parties and the subject matter of this proceeding.

2. In December, 1981, Respondent was in serious violation of 29 CFR 1926.304(d).

## Order

On the basis of the foregoing Findings of Fact and Conclusions of Law it is ORDERED that:

1. Item 1 of serious citation number 1 is AFFIRMED.

2. A penalty of $1.00 is assessed for the aforementioned item 1 of serious citation number 1.

Stanley M. Schwartz

STANLEY M. SCHWARTZ
Administrative Law Judge

Dated: August 26, 1982

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

September 29, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Whirlpool Corporation

OSHRC DOCKET NO. 78-3930

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

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Allied Industrial Workers of America
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Milwaukee, Wisconsin 53215

OFFICE OF THE JUDGES'
OSHRC
Atlanta, Ga. 30309

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>WHIRLPOOL CORPORATION,<br><br>Respondent.<br><br>INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA, AND ITS LOCAL 370,<br><br>Authorized Employee Representatives. | OSHRC Docket No. 78-3930 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge John S. Patton approving a settlement agreement entered into by the Secretary of Labor ("the Secretary") and Respondent, Whirlpool Corporation, is before the Commission pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Local 370 of the Allied Industrial Workers of America ("the Local Union") and International Union, Allied Industrial Workers of America ("the International Union") both petitioned for review of the judge's order. Both petitioners objected to a provision in the settlement agreement reducing the classification of an alleged violation of the Act from serious to other than serious. Commissioner Cottine subsequently directed review of this case on the issue of whether the judge erred in approving the settlement agreement.

We conclude that the settlement agreement should not be considered for approval without the opportunity of the employee representatives to comment. At

the time this settlement agreement was submitted for approval by the judge, Rule 100(c), 29 C.F.R. § 2200.100(c), of the Commission's Rules of Procedure, provided 1/ as follows:

> (c) Where parties to settlement agree upon a proposal, it shall be served upon represented and unrepresented affected employees in the manner set forth in § 2200.7. Proof of such service shall accompany the proposed settlement.

Commission Rule 7, which is referred to in Rule 100(c), provided (then, as now) in pertinent part as follows:

> (c) Unless otherwise ordered, service may be accomplished by postage prepaid first class mail or by personal delivery. Service is deemed effected at the time of mailing (if by mail) or at the time of personal delivery (if by personal delivery).
>
> * * *
>
> (f) Service and notice to employees represented by an authorized employee representative shall be deemed accomplished by serving the representative in the manner prescribed in paragraph (c) of this section.

In the settlement agreement now before us, Respondent certified that affected employees were notified of the settlement by posting of a copy of the agreement. However, under the Commission's Rules of Procedure, posting of a settlement agreement is adequate service on affected employees only if none of those employees are represented by an authorized employee representative. If any of the affected employees are represented by an authorized employee representative, that representative is entitled to service of a copy of the settlement agreement in the manner prescribed in Commission Rule 7(c), regardless of whether it has previously elected party status in the case. E.g., The Hearst Corp., OSHRC Docket No.

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1/ Rule 100(c) has been amended since this settlement agreement was filed. However, the current rule retains the requirements that the settlement agreement be served on affected employees and that proof of this service accompany the settlement agreement. We note in addition that the criteria for approval of settlement agreements are set forth in Commission Rules 100(a) & (b), 29 C.F.R. § 2200.100(a), (b). Englehard Indus., OSHRC Docket Nos. 78-2880 & 78-3251 (Aug. 30, 1982), pet. for rev. filed, No. 82-3431 (3d Cir. Sept. 15, 1982); Mobil Oil Corp., 82 OSAHRC __, 10 BNA OSHC 1905, 1982 CCH OSHD ¶ 26,187 (No. 77-4386, 1982).

80-6051 (Aug. 31, 1982); Babcock & Wilcox Co., 80 OSAHRC 95/A2, 8 BNA OSHC 2102, 1980 CCH OSHD ¶ 24,812 (No. 78-446, 1980); Reynolds Metals Co., 79 OSAHRC 4/A2, 7 BNA OSHC 1042, 1979 CCH OSHD ¶ 23,295 (No. 78-2485, 1979). Here, the Local Union and the International Union have indicated that they are authorized employee representatives within the meaning of the Commission's rules by filing their petitions for review. Moreover, in its brief on review, Respondent states that it personally served other documents in this case (but not a copy of the settlement agreement) on an unidentified "authorized employee representative." Accordingly, we conclude that the record does not establish that the settlement agreement was served on affected employees in compliance with Commission Rule 100(c). In addition, we note that the Secretary and Respondent, through correspondence with the judge, revised the abatement provisions of the settlement agreement after they had filed the original written agreement with the judge. The record contains no indication that affected employees were notified of this amendment through any means, even though such notification is required. See Babcock & Wilcox, supra. For these reasons, we disapprove the settlement agreement filed in this case and remand for further proceedings. 2/

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2/ We reject the arguments raised by the Secretary and Respondent in opposition to Commission review of this settlement agreement. The direction for review in this case is valid because a Commissioner has the authority to direct review of a case on his own motion. Rule 92(d), 29 C.F.R. § 2200. 92(d) (at the time pertinent, designated Rule 91a(d), 29 C.F.R. § 2200. 91a(d)). In addition, contrary to the arguments of the parties, the Commission does have the authority to review settlement agreements. E.g., Raybestos Friction Materials Co., 80 OSAHRC 111/E14, 9 BNA OSHC 1141, 1980 CCH OSHD ¶ 24,910 (No. 80-2793, 1980) and cases cited. Accordingly, in order that the Commission may effectively exercise this authority, the general policy limiting Commission review to issues raised by a party before the judge is inapplicable to settlement agreements where a union has not had the opportunity to voice objections. Because the direction for review is otherwise valid, any defects in the underlying petitions for review would have no effect on the Commission's authority to review this case. See, e.g., Little Beaver Creek Ranches, Inc., 82 OSAHRC _____, 10

The judge's decision is set aside, the settlement agreement is disapproved, and the case is remanded to the Chief Judge 3/ for further proceedings consistent with this opinion. 4/

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: SEP 29 1982

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(Footnote 2 cont'd)

BNA OSHC 1806, 1809-10 n. 4, 1982 CCH OSHD ¶ 26,125 at p. 32,878 n. 4 (No. 77-2096, 1982).

We need not decide whether the Local Union and the International Union elected party status prior to the time the settlement agreement was filed with the judge. As indicated above, an authorized employee representative is entitled to service of a copy of a settlement agreement regardless of whether it has previously elected party status. Furthermore, we construe the petitions for discretionary review filed by the International Union and its local, as well as the specific election subsequently filed with the Commission, to be effective elections of party status in this case. See Commission Rule 20(a), 29 C.F.R. § 2200.20(a). On remand, the Local Union and the International Union will be provided an opportunity to participate as parties to the proceedings.

3/ Judge Patton has retired.

4/ Chairman Rowland dissents from the Commission's order disapproving the settlement agreement and remanding this case for further proceedings. Notwithstanding any defect in the service of the settlement agreement, the record establishes that the Local Union and the International Union both received actual notice of the agreement and that both have had the opportunity to state their objections to the agreement. Those objections are limited to a provision in the settlement agreement reducing the classification of the alleged violation from serious to other than serious. However, the Chairman believes consideration of the settlement agreement should be limited to any objections the unions may have to the reasonableness of the abatement period agreed upon by the Secretary and Whirlpool. Since the unions have raised no objection to the reasonableness of the abatement period, in the Chairman's opinion, further consideration of the adequacy of the settlement agreement is inappropriate. See Mobil Oil Corp., supra note 1 (dissenting opinion). See also, Englehard Indus., supra note 1 (dissenting footnote) (union party not entitled to hearing on objection to reduction in classification of violation).

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 400
ATLANTA, GEORGIA 30309

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| SECRETARY OF LABOR, | ) | |
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| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 78-3930 |
| | ) | |
| WHIRLPOOL CORP., | ) | |
| | ) | |
| Respondent. | ) | |

## ORDER APPROVING SETTLEMENT AGREEMENT

This case is before the Occupational Safety and Health Review Commission on the complaint of complainant alleging that respondent permitted its employees to be exposed to carbon monoxide gas exceeding the 8-hour time weighted average of 50 parts per million for carbon monoxide, in violation of standard 29 C.F.R. 1910.1000(a)(2).

On May 21, 1979, a settlement agreement settling the issues in the case was filed. In the settlement agreement complainant amends the designation of the alleged violation from "serious" to "other." The penalty is reduced from $800 to $0. It is stated that in order to abate the respondent shall install catalytic converters on 23 forklift trucks. In addition, respondent shall install plexiglass wind deflectors on 15 forklift trucks which have LPG tanks fixed in a horizontal position. The parties, by letters, subsequently amended the provisions to provide for wind deflectors on 14 rather than 15 forklift trucks.

The respondent withdraws its notice of contest to the citation, as amended by the settlement agreement. It is stated that the settlement

agreement has been posted as required by the Rules of the Occupational Safety and Health Review Commission.

It is therefore ORDERED that:

The settlement agreement be and hereby is approved.

The aforesaid amendments to the citation and notification of proposed penalty are approved.

The withdrawal by the respondent of the notice of contest is approved.

The citation and notification of proposed penalty, as said documents are amended by the settlement agreement, are affirmed.

Dated this 11th day of June 1979.

JOHN S. PATTON
Judge

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

September 29, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Babcock and Wilcox Company

OSHRC DOCKET NO. 78-5825

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF ORDER

To wit: See Attached.

FOR THE SECRETARY OF LABOR

- Counsel for Regional Litigation
  Office of the Solicitor, USDOL
  200 Constitution Ave., NW. - Rm. S-4014
  Washington, D.C. 20210

- Marshall H. Harris
  Reg. Sol., USDOL
  Rm. 14480 Gateway Bldg.
  3535 Market Street
  Phila., Pa. 19104

FOR EMPLOYER

- William C. Lucas, Esq.
  Sullivan & Cromwell
  125 Broad Street
  New York, N.Y. 10004

FOR EMPLOYEES

- Mary-Win O'Brien, Esq.
  United Steelworkers of America
  Five Gateway Center
  Pittsburgh, Pa. 15222

- Richard DeBenedetto
  Judge, OSHRC
  John W. McCormack Post Office
  and Courthouse, Rm. 420
  Boston, Massachusetts 02109

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 78-5825 |
| | ) | |
| Babcock and Wilcox Company, | ) | |
| | ) | |
| Respondent. | ) | |

**ORDER**

The Parties' Stipulation and Settlement Agreement is Approved.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

Dated: SEP 29 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

---

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

Complainant,

v.

OSHRC DOCKET
No. 78-5825

BABCOCK & WILCOX COMPANY,

Respondent.

---

UNITED STEELWORKERS OF AMERICA,
LOCAL UNION 1082,

Authorized Employee
Representative.

---

STIPULATION AND SETTLEMENT AGREEMENT

I

The parties have reached agreement on a full and complete settlement of the instant matter which presently is pending before the Occupational Safety and Health Review Commission (Commission.)

II

The parties stipulate as follows:

(a) The Commission has jurisdiction of this matter pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 84 Stat. 1590, 29 U.S.C. §651 et seq. (Act).

(b) Respondent, Babcock & Wilcox Company, is engaged in the business of manufacturing diversified products and maintains corporate offices in New York, New York. On or

about September 27, 1978 through September 29, 1978, Respondent maintained a worksite at East Works 27th Street, Beaver Falls, Pennsylvania, where it was engaged in manufacturing tubular products for shipment to points outside the Commonwealth of Pennsylvania.

(c) As a result of the aforesaid activities, Respondent, on or about September 27, 1978 through September 29, 1978, was an employer engaged in interstate commerce within the meaning of sections 3(3) and 3(5) of the Act, and employed employees within the meaning of section 3(6) of the Act.

(d) An inspection of Respondent's Beaver Falls worksite was conducted by a duly authorized Compliance Officer of the Occupational Safety and Health Administration (OSHA) on or about September 27, 1978 through September 29, 1978. As a result of this inspection, Respondent, on November 6, 1978, was issued three Citations, pursuant to section 9(a) of the Act, and a Notification of Penalty, pursuant to sections 10(a) and 17 of the Act, recommending a total penalty of $12,150.

(e) By letter dated November 28, 1978, Respondent notified the Pittsburgh, Pennsylvania OSHA Area Director of its intent to contest the citations and proposed penalty. Respondent's letter was received by the Pittsburgh OSHA Area Office on December 1, 1978 and thereafter was duly transmitted to the Commission.

(f) A Complaint was filed on filed on December 21, 1978; an answer was filed on January 3, 1979.

(g) By letter dated December 28, 1978, the United Steelworkers of America and its Local 1082 (Union), the authorized bargaining agent for the employees, elected party status in this matter.

III

Complainant hereby withdraws the citations issued on November 6, 1978 and his Petition for Discretionary Review filed August 11, 1980.

IV

Respondent and the Union have no objection to Complainant's withdrawal of the citations and Petition for Discretionary Review.

V

Respondent hereby withdraws its Notice of Contest and makes the following representations and assurances:

(a) With respect to all items of the Citations and Notification of Proposed Penalty alleging violation of the Act, the alleged conditions have been abated and shall remain abated.

(b) Respondent currently is complying, and in the future will continue to comply, with the provisions of the Act and applicable standards promulgated thereunder.

VI

Based on the aforesaid assurances by Respondent, Complainant and the Union have no objection to Respondent's withdrawing its Notice of Contest.

VII

The Union hereby withdraws its Petition for Discretionary Review filed August 15, 1980.

VIII

Complainant and Respondent have no objection to the Union's withdrawing its Petition for Discretionary Review.

IX

Respondent hereby certifies that this Stipulation and Settlement Agreement has been served on affected employees in the manner set forth in Section 7 of the Rules of the Commission by posting, on the 14 day of September, 1982, in a place where the Citation is required to be posted, a copy of this Agreement as to inform employees who are not represented by an authorized employee representative, if any, in accordance with Section 7(g) of the Rules of the Commission.

X

Each party hereby agrees to bear its own fees and other expenses incurred by such party in connection with any stage of this proceeding.

Susan R. John
FOR COMPLAINANT

William C. Lucas
FOR RESPONDENT

Mary Wise Olz
FOR THE AUTHORIZED EMPLOYEE REPRESENTATIVE

Dated this 20th day of September, 1982.

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Stipulation and Settlement Agreement was mailed, postage prepaid to, William C. Lucas, Sullivan & Cromwell, 125 Broad Street, New York, New York 10004, and to, Mary-Win O'Brien, Esquire United Steelworkers of America, Five Gateway Center, Pittsburgh, Pennsylvania 15222 on this 20th day of September, 1982.

/s/ Susan R. Gelman/ams
SUSAN R. GELMAN
Attorney

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1515 Broadway, Room 3800
New York, New York 10036

## NOTICE OF DECISION

Secretary of Labor v. COATINGS, INC.
OSHRC Docket No. 81-2407

1. Enclosed is a copy of my decision. It will be filed with the Commission on August 30, 1982, and will become the final order of the Commission on September 29, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is September 29, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

William E. Brennan
WILLIAM E. BRENNAN
JUDGE, OSHRC

Date: August 10, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR | : | |
| Complainant | : | OSHRC Docket No. 81-2407 |
| v. | : | DECISION AND ORDER |
| COATINGS, INC. | : | |
| Respondent | : | |

APPEARANCES

FOR COMPLAINANT

Marshall H. Harris, Regional Solicitor
U. S. Department of Labor
14480 Gateway Building
3535 Market Street
Philadelphia, Pennsylvania 19104
Attn: Aaron M. Smith, Esq.

FOR RESPONDENT

William D. Fletcher
Safety Consultant
Fletcher Associates, Inc.
31 Covered Bridge Lane
Newark, Delaware 19711

Brennan, W. E., A.L.J.

STATEMENT OF THE CASE

This case arises under the provisions of Section 10(c)[1/] of the Occupational Safety and Health Act of 1970 (hereinafter the Act).[2/] There is at issue a one-Itemed Serious Citation issued pursuant to Section 9(a) of the Act[3/] by the Secretary of Labor through the Area Director of the Occupational Safety and Health Administration (OSHA) for Wilmington, Delaware, (hereinafter Complainant) to Coatings, Incorporated of Wilmington, Delaware, (hereinafter Respondent). A penalty of $630 was proposed by Complainant pursuant to Section 10(a) of the Act.[4/]

After the filing of a Notice of Contest (R.p. 3)[5/] and the perfection of the pleadings, the hearing herein was held in Wilmington, Delaware. No affected employee or representative thereof claimed party status (Tr. 12).

---

1/ 29 U.S.C. 659(c).

2/ 29 U.S.C. 651 et seq.

3/ 29 U.S.C. 658(a).

4/ 29 U.S.C. 659(a).

5/ References herein translate as follows:

R.p. 3 The third numbered document in the official Docket File prior to assignment to the undersigned.

R.p. J-3 The third numbered document in the official Docket File after assignment to the undersigned.

Tr. 27 Page 27 of the hearing transcript.
Exh. C-1 Complainant's Exhibit in evidence.
Exh. R-1 Respondent's Exhibit in evidence.

This Citation arose as the result of a fatal accident to one of Respondent's employees, Lloyd L. Penland, which occurred on August 3, 1981, at Respondent's worksite, a large water intake pipe which extends over 1,000 feet into the Delaware River from the old Atlas Point Treatment Plant, now occupied by a manufacturing concern called I.C.I. Americas, Inc., at New Castle, Delaware.

The Serious Citation alleges as follows:

> Item 1
> 29 CFR 1926.106(c): Ring buoys with at least 90 feet of line were not provided and readily available for emergency rescue operations:
>
> (a) Atlas Point Treatment Plant, river water intake structure; employees performing sand blasting and painting operations on the intake line were working over water at a point about 900 feet out in the Delaware River, 8/3/81

An "immediate" abatement date was ordered and a $630 penalty proposed.

The Occupational Safety and Health Standard which was cited provides:

> 29 C.F.R. 1926.106 WORKING OVER OR NEAR WATER.
>
> * * *
>
> (c) Ring buoys with at least 90 feet of line shall be provided and readily available for emergency rescue operations. Distance between ring buoys shall not exceed 200 feet.

## ISSUES

1. Did the Respondent violate the cited Standard?

2. If so, what penalty is appropriate?

Issue number 1 is answered affirmatively and a penalty, appropriate under Section 17 of the Act, 29 U.S.C. 666(i), is assessed, infra.

## EVIDENCE

The evidence herein reveals that some time in the early part of July, 1981, Respondent was engaged by I.C.I. Americas, Inc. (hereinafter I.C.I.) to sandblast and paint a large water intake pipe servicing the I.C.I. manufacturing plant located at the old Atlas Chemical Plant in New Castle, Delaware. This pipe, which was about 3 feet in circumference, extended out from the I.C.I. plant shoreline some 1,500 feet into the Delaware River. The pipe rested upon a large, permanent pier structure, which also supported a permanent catwalk immediately to the right of the pipe when viewed from the shoreline.

At the beginning of this job, Respondent utilized a large barge as a floating working platform, which was also used to store sandblasting and paint material and equipment. The work began at the river end of the pipe. The pipe was first sandblasted and then spray painted. A large mobile, compressor was used in this operation and was located on the barge. Respondent's employees utilized some type of safety-belt, swing arrangement,

to paint the underside of the pipe as the barge was too large and the rise and fall of the tide too great, to allow the use of the barge under the pipe.

This arrangement for painting the pipe was not satisfactory so approximately one week prior to August 3, 1981, Respondent purchased a 27-foot pleasure boat to be used as a work platform. This boat, shown in Exhibits C-5 and C-7, had a small forward deck, a flying bridge on its cabin top, and an open cockpit, thus providing three to four different levels upon which employees could stand to work on the pipe.

On Sunday, August 2, 1981, the deceased Lloyd Penland and one of his sons, Ricky Penland - both employees of Respondent, went to this worksite to do some painting. After working for a couple of hours, painting from the barge which was moored adjacent to the pipe, they decided to use the pleasure boat to go out and do some fishing in the river.

After the brief fishing trip, the father dropped his son Ricky and a younger son Robert, off at New Castle, and he brought the boat back to the worksite.

The following morning, August 3, 1981, Lloyd Penland, and another son Ray, who was also an employee of Respondent, went to the worksite. Upon their arrival they noticed that the pleasure boat was not tied up to either the barge moored alongside the pipe or to the catwalk. After unlocking a gate on the shore end of the catwalk, they went out onto the catwalk

about 900 feet to which point the work had progressed. They noticed the pleasure boat anchored from 30 to 50 feet away from the catwalk. Evidently, when Lloyd Penland had returned the boat to the worksite the previous day, he had moored it to the pier on which the catwalk was located, rather than tying it to the barge, and also put an anchor out. The tide went out, and because there was not sufficient slack in the mooring lines, these lines pulled the cleats out of the boat's deck which drifted away from the pier the 30 to 50 feet, dragging its anchor until the anchor finally caught.

The father, Lloyd Penland then went aboard the barge and attempted to start the engine of a compressor located thereon. It evidently would not start and both Penlands knew that there was a battery charger on board the pleasure boat, now anchored from 30 to 50 feet away from the catwalk.

Although the son Ray offered to go to the boat (ostensibly to bring it and/or the battery charger back to the pier), the father Lloyd said no. Instead the father disrobed and entering the river from the catwalk, swam over to the boat. Upon arriving at the boat, he attempted to climb out of the water on to it, but the sides were too high. According to his son Ray, the father yelled for help. Ray swam to his father's aid. Upon reaching him, they both were twice pulled under the water presumably from current action. The father told the son to save himself and then disappeared under the surface of the

river. Ray finally swam to shore, went to a brother's home, who called the U. S. Coast Guard (See Exh. C-1, statement of Ray Penland.). Although both the Coast Guard and a local rescue squad responded, Lloyd, the father drowned (See Exh. C-3(b), the Coast Guard Report).

Mr. Palmer C. Tackett, a Compliance Officer (C.O.) with the OSHA Wilmington office heard a news report of the accident. After checking with the Delaware State Police who had investigated the tragedy on the day of its occurrence, C.O. Tackett made an inspection of the worksite on August 5, 1981.

The C.O. first went to the offices of Respondent and spoke with its President, George H. Huber. Mr. Huber was busy attending to details resulting from the accident and told the C.O. to go on ahead of him to the worksite and conduct his inspection and he would join him there later.

The C.O. proceeded to the I.C.I. plant site and met with I.C.I.'s Safety Director and Plant Engineer. This party of three then proceeded to the river bank. The gate which secured the catwalk and pipe pier area was unlocked by the I.C.I. people and the party walked out onto the catwalk. The barge was tied to the pipe side of the pier and the pleasure boat was tied to the barge on its other side. The C.O. took photographs of the pipe-catwalk pier, the barge, boat, and the decks of both vessels (See Exhs. C-4 thru C-9).

The C.O., who had been advised by the Delaware State Police not to go aboard the boat as it had been damaged, conducted his inspection and photographing of the scene from the catwalk. He did not go aboard either the boat or barge. He testified that he was unable to see either life jackets or ring buoys on either the catwalk, barge or boat. No one was present during this inspection except the 3-member inspection party, as the Respondent, as testified to by the President, performed no more work on this project after the accident. The two I.C.I. members of the party advised the C.O. that the scene as observed on August 5, 1981, was just as it had been on August 3, 1981, as nothing had been altered and the entire pier bearing the pipe and catwalk had been secured by keeping the chain-link gate locked at the shoreline. They further advised that their company had not supplied any life jackets, ring buoys or any other safety equipment to Respondent, as that responsibility was Respondent's under its contract with Respondent.

The C.O.'s inspection of the site took approximately 35 to 40 minutes. As he was leaving the I.C.I. plant property, Respondent's President Huber arrived and these two had a brief discussion.

On August 14, 1981, The C.O. went to the office of Mr. Huber where he interviewed the surviving son, Ray Penland, in Mr. Huber's presence. The C.O. reduced Mr. Penland's account of the accident to writing, and Mr. Penland signed this statement.

The C.O. posed two specific questions to Mr. Penland, which, together with Mr. Penland's answers, were added to this statement. These questions and answers were:

> Q. Why didn't you use life jackets or did you have life jackets.
> A. We had them but they were on the boat that had got loose.
> Q. Was there any ring buoys on the pier or barge.
> A. No, there was nothing like that out there. There was nothing I could throw to him.
> (See Exh. C-1)

On August 28, 1981, the C.O. held a closing conference with Respondent's President Huber. C.O. Tackett testified that during this conference Mr. Huber claimed that he did not know that he had to provide life rings, that his insurance company had not so advised him. Further, that Mr. Huber advised that he had stopped work on that job and if he recommenced, he would produce life rings. Additionally, Mr. Huber felt that life rings would not have helped in this case.

On cross-examination, C.O. Tackett stated that the first time he heard anything about ring buoys on the accident scene was during a conference between Respondent and Complainant and their representatives, held a number of months after the accident and prior to the trial (Tr. 21-146).

Respondent, who was represented by Safety Consultant William Fletcher, a non-lawyer, presented Respondent's President Huber as its first witness.

Mr. Huber testified that he inspected the pleasure boat involved when he bought it, about one week prior to the accident. At that time, he stated that this boat was equipped with two life jackets and mooring lines of 30 to 35 feet in length, but no ring buoy.

Additionally, he first testified that he got a ring buoy without any line attached to it from his warehouse and put it aboard the boat, telling Lloyd Penland to put a line on it (Tr. 154-155). However, he then testified that he gave the ring buoy to Lloyd Penland at his shop, early in this job, and it was Penland who first put it on the barge, prior to the purchase of the boat, and after the boat was purchased, Penland put the buoy on board the boat. Mr. Huber testified that the reason the ring buoy was taken to the worksite was because one of his employees, who was to work on this job, Jack Van Sant, could not swim (Tr. 156-157).

Mr. Huber further testified that he assigned Lloyd Penland and his son Ricky as the two-man crew to do the job in question. (Lloyd Penland was a 21-year employee of Respondent, and at least two of his sons, Ricky and Ray, were also employees of Respondent.) However, there were a "couple of days," (later said to be "three or four days") when Ray Penland substituted for his brother Ricky on the job (Tr. 157-158). Additionally, Mr. Huber testified that he went to this job-site every day (Tr. 185).

On cross-examination, Complainant produced the pages of the Gate Log for the I.C.I. plant covering the period when Respondent was working at the job-site, July 6, 1981, through August 3, 1981. This was a book maintained by I.C.I. at its gate, and all individuals, other than I.C.I. employees, were required to sign this log in order to be admitted onto the premises (See Exh. C-10, Tr. 186-238, 312).

This log seriously contradicted Mr. Huber's testimony, in that, he signed in on this log only eight times during the approximate one month period this job had been in progress, not every day as he stated in his testimony. Furthermore, a talley of the entries revealed that Lloyd Penland signed in 22 times during this period and his son Ray, 17 or 18 times, whereas his son Ricky, signed in only four times. Thus, for most of the relevant period, Respondent's work crew at this job-site was Lloyd and Ray Penland, not Lloyd and Ricky, as testified to by Mr. Huber.

This turn of events at trial makes the credibility of Mr. Huber's testimony open to very serious doubt. Thus, his testimony that during his visit to the site on the Friday before the Monday accident, that he saw the ring buoy in the cabin of the boat, cannot be fully credited (Tr. 161-172). During this Friday visit, Mr. Huber testified that he was at the site for approximately 15 minutes and talked with Lloyd Penland as they both stood on the catwalk. Mr. Huber stated

that he did not go aboard the boat that day, but saw the ring buoy in the boat's cabin near the mid-ship helm position from his catwalk position, the boat being tie to the catwalk side of the pier, bow to. A study of the configuration of the forward deck and cabin of this boat, Exhs. C-5 and C-7, and Mr. Huber's relatively high position on the catwalk, additionally strains the credibility of this testimony.

Respondent's second and last witness was Ricky Penland. He testified to the fishing trip on the boat the day before the accident and that a ring buoy was on board this boat that day. He further testified that he worked on this job, "about three -- or four weeks.", (Tr. 268). However, the Gate Log, Exh. C-10, shows that he signed onto the I.C.I. premises, only four times, not the three or four weeks he claimed. Similarly, because of the serious contradiction between his testimony and the I.C.I. Gate Log, as well as the inherent inconsistencies and evasiveness of his testimony throughout (Tr. 252-266), Mr. Ricky Penland's testimony cannot be credited.

In sum, there is no reliable or creditable evidence that any ring buoy was present anywhere on this job-site during the approximate one month period Respondent was engaged in sandblasting and painting the large pipe at this work-site.

## OPINION

The Standard which is the basis for the Citation herein mandates that, "Ring buoys with at least 90 feet of line shall be provided and readily available for emergency rescue operations. . . ." 29 C.F.R. 1926.106(i), emphasis supplied.

As concluded earlier, there is no creditable and reliable evidence establishing that there was any ring buoy, anywhere at this worksite, the worksite obviously including the large pier, the pipe and catwalk built thereon, the barge and the boat.

However, even if the testimony of Messrs. Huber and Ricky Penland is sufficiently creditable to establish the existence of one ring buoy aboard the boat in question, a violation of the cited Standard is nevertheless established in this record.

First, this Standard mandates "Ring buoys," in the plural. Secondly, each buoy must have 90 feet of line attached to it, for the obvious purpose to permit the buoy to be thrown to someone in trouble, and to then pull the person to safety. There is absolutely no evidence that the one ring buoy, supposedly on board the boat, had any line attached to it. To the contrary, the evidence, if believable, best supports the conclusion that the buoy never did have any line of any length attached to it.

Lastly, as this tragic accident conclusively establishes, even if there was one ring buoy on board the boat, it was not ". . . readily available for emergency rescue operations."

The violation as alleged in the Citation herein is established by the creditable evidence and this record considered as a whole.

Further, this violation is accurately denominated as a Serious violation, in that there was ". . . a substantial probability that death . . . could (and tragically did) result . . ." from this violative condition. 29 U.S.C. 661(j).

## PENALTY

After an independent evaluation of the penalty factors set out at Section 17(j) of the Act, 29 U.S.C. 666(i), coupled with the C.O. Tackett's testimony concerning the computation of the penalty as proposed, (Respondent employs approximately 16 employees, and did at the relevant times herein; had gross revenues "in excess of $50,000 in 1981"; and had been once previously cited for an OSHA violation Tr. 8, 9, 72-73), it is concluded that the proposed penalty of $630, because of the seriousness of the violation, is appropriate.

## CONCLUSION

The jurisdiction of the Review Commission in this case is not contested and is established by the pleadings and Stipulations pursuant to Sections 3(3), 3(5) and 10(c) of the Act, 29 U.S.C. 652(3), 652(5) and 659(c).

Based upon the foregoing which constitutes the findings of fact and conclusions of law herein, and pursuant to Sections 10(c) and 12(j) of the Act, 29 U.S.C. 659(c) and 661(i), it is hereby

ORDERED:

1. That the one-Itemed Serious Citation alleging a violation of 29 U.S.C. 654(a)(2) for failure to comply with the Occupational Safety and Health Standard set forth at 29 C.F.R. 1926.106(c), issued to this Respondent on September 10, 1981, is AFFIRMED.

2. The penalty of $630 as proposed is ASSESSED.

William E. Brennan
WILLIAM E. BRENNAN
Judge, OSHRC

Dated: August 30, 1982
New York, New York

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

September 30, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Pratt & Whitney Aircraft

OSHRC DOCKET NO. 13591

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

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Regional Solicitor
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JFK Federal Bldg.
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FOR EMPLOYER

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Farmers, Wells, McGuinn & Sibal
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Hartford, CT 06103

FOR EMPLOYEES

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Judge's Office
OSHRC
John W. McCormack Post Office
and Courthouse, Room 420
Boston, MA 02109

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 13591 |
| PRATT & WHITNEY AIRCRAFT, DIVISION OF UNITED TECHNOLOGIES CORP., | : | |
| Respondent. | : | |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

This case has been remanded to us by the United States Court of Appeals for the Second Circuit. Pratt & Whitney Aircraft v. Secretary of Labor, 649 F.2d 96 (2d Cir. 1981). The court reviewed our decision in Pratt & Whitney Aircraft, Division of United Technologies Corp., 80 OSAHRC 38/A2, 8 BNA OSHC 1329, 1980 CCH OSHD ¶ 24,447 (No. 13591, 1980) and, inter alia, after vacating our action affirming both the alleged violation of 29 C.F.R. § 1910.94(d)(7)(iii) in the serious citation and one of the two alleged violations of 29 C.F.R. § 1910.132(a) in the non-serious citation, remanded for further proceedings consistent with its opinion on those two items. We have examined the briefs of the parties on remand and carefully reevaluated the record. We conclude that the section 1910.94(d)(7)(iii) allegation should be affirmed under the "significant risk" test adopted by the court. We vacate the section 1910.132(a) allegation on the Secretary's motion to withdraw the item.

A.

The section 1910.94(d)(7)(iii)[1/] allegation concerns Pratt & Whitney's ("P & W's") ventilation practices in its plating department. Its seven plating lines contained tanks of both cyanides and acids; one line also contained tanks of hydrogen peroxide, glacial acetic acid, and heated slushing oil. Each tank in each line had a separate exhaust duct, but those ducts merged into a common duct for each line, from which all the chemical exhausts from the line were vented through a stack in the roof. The Secretary alleged that the use of a common duct to ventilate both acid mists and cyanide mists in each line, and the use of a common exhaust duct in one line to ventilate the tanks of hydrogen peroxide, glacial acetic acid, and heated slushing oil constituted noncompliance with the cited standard. Acid mists and cyanide mists used in the plating processes, the Secretary alleged, are exhausted into the common duct system where they can combine into hydrogen cyanide gas ("HCN"), a highly

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1/ Section 1910.94(d)(7)(iii) provides in pertinent part:

§ 1910.94 Ventilation

* * *

(d) Open surface tanks --

* * *

(7) System Design.

* * *

(iii) Two or more operations shall not be connected to the same exhaust system where either one or the combination of the substances removed may constitute a fire, explosion, or chemical reaction hazard in the duct system. Traps or other devices shall be provided to insure that condensate in ducts does not drain back into any tank.

poisonous and explosive substance. Also, the Secretary contends, when hydrogen peroxide and heated slushing oil are mixed there is a possibility of explosion, and the mixture of hydrogen peroxide and acetic acid results in potentially explosive peracetic acid.

Judge Abraham Gold vacated the section 1910.94(d)(7)(iii) allegation for failure of proof. He ruled that the Secretary's evidence does not demonstrate the existence of hydrogen cyanide gas or peracetic acid in the common duct system, and that it does not demonstrate hydrogen peroxide and slushing oil combine in the common duct. The judge stated:

> The Secretary has presented textbook theory, without obtaining readily available information which would show whether there existed at Respondent's facility those specific conditions required for the creation of a fire, explosion, or chemical reaction hazard. He has offered nothing more than conjecture. In addition, he suggests that a hazard might arise . . . by virtue of a ventilation breakdown, malfunction of the heating systems for the various solutions, spontaneous combustion caused by an employee's smoking, heat caused by mechanical failure, a down-draft of effluent or "by some yet unimagined happening." We have no showing of any reasonable likelihood of such mishaps; the Secretary might just as well have suggested the possibilities of arson or insurrection.

B.

The Commission reversed Judge Gold and affirmed the citation item. The Commission concluded that the use of the word "may" in the cited standard requires a violation to be found whenever a hazardous combination of substances in a duct system is possible. The Commission held that it is not necessary for the Secretary to prove that a chemical reaction was reasonably likely or that the prohibited hazards actually threatened employees at the time of inspection. The Commission further found, however, that the Secretary's proof demonstrated the "realistic

possibility" that hazardous HCN gas could be formed and that fire or explosions could result from a reaction in the duct of heated oil and either hydrogen peroxide or peracetic acid.

C.

The Second Circuit, citing the U.S. Supreme Court's decision in Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 100 S.Ct. 2844, 2864-66 (1980) ("the Benzene Case"), held that section 1910.94(d)(7)(iii) can properly be interpreted as proscribing an employer's use of a common exhaust system only where there exists a "significant risk," not a mere possibility, that a combination of the substances removed will cause a fire, explosion, or chemical reaction hazard. Although the court acknowledged that the Commission had also used the term "realistic possibility" in setting out its findings, the court found Commission use of those terms ambiguous and therefore vacated and remanded, stating:

> The OSHRC on remand may conclude that the risk of an explosion, fire, or chemical reaction hazard in Pratt & Whitney's ductwork was, indeed, significant. This decision is best left to the OSHRC in the first instance. It is the agency, not the courts, that possesses the required expertise to make such decisions. . . .

The court further stated, however, that it was

> . . . compelled to point out . . . that implicit in the opinion of the ALJ is a determination that the Secretary failed to establish even the remotest possibility of such mishaps occurring.
>
> * * *
>
> . . . while the OSHRC is not bound to accept the factual findings of the ALJ, the latter's determinations are entitled to some weight and should not be disturbed without explanation.
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> * * *

> In arriving at its determination that the ductwork of petitioner's plant posed a possibility that a hazardous event might occur, the OSHRC relied upon the "textbook theory" rejected by Judge Gold. Additionally, the OSHRC noted that the Secretary's expert, Mr. Padden, had not recalled seeing similar ductwork in the "100 or so" other plating departments he had visited. The latter testimony, however, conflicted with that of petitioner's expert, Mr. Doyle, . . .
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> * * *
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> Furthermore, petitioner conducted scientific tests which revealed not a trace of the dangerous substances that the Secretary claimed might form. On remand, the OSHRC is obligated to weigh carefully all of the latter evidence in determining whether the Secretary has demonstrated by a preponderance of the evidence that the common ductwork at petitioner's plant violated § 1910.94(d)(7)(iii). Again, we express no view as to the proper outcome of this reconsideration: our concern is rather to assure that all the evidence is given appropriate weight and that the conclusion reached is adequately supported by a reasoned explanation.

The Commission invited the parties to file briefs on remand and both parties did so. Their arguments on remand are, for the most part, those made earlier when this case first came before us for decision. The Secretary argues that the record shows the hazard created by P & W's common duct system was the "probable formation" of deadly poisonous hydrogen cyanide gas. The gas could be hazardous to employees working on the roof where the gas was emitted, the Secretary contends, and to plating department employees should down-drafts return gas to the plant floor. The gas in the ducts, the Secretary asserts, presented a fire or explosion hazard. Finally, the Secretary reasserts that the record establishes that the combination of hydrogen peroxide and heated oil, and the combination of hydrogen peroxide and acetic acid presented fire and explosion hazards.

The Secretary also contends that the Second Circuit should not have applied the significant risk concept to this case. He argues that the Supreme Court in the Benzene Case, supra, specifically limited the requirement for a finding of significant risk to "permanent" standards promulgated under section 6(b) of the Occupational Safety and Health Act ("the Act"), as opposed to those standards, like the one involved here, which were promulgated under section 6(a) of the Act.[2/] This view is supported, the Secretary asserts, by the Seventh Circuit Court of Appeals in Super Excavators, Inc. v. OSHRC, 674 F.2d 592 (7th Cir. 1981), cert. denied, 102 S.Ct. 2958 (June 21, 1982).[3/] With the significant risk concept read out of the case, the Secretary argues, any possible vagueness in the cited standard could be cured by the application of the "reasonable person" test to the interpretation of the standard,

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2/ Section 6(a) of the Act authorized the Secretary of Labor to adopt as an occupational safety or health standard any national consensus standard or any established federal standard without the necessity of complying with the procedural requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559, 701-706 (1977). The procedural requirements thus omitted include: publication in the Federal Register of notice of proposed rulemaking, opportunity for interested persons to express their views on the proposed rule, a statement in the rule of its basis and purpose, and publication in the Federal Register of the rule as adopted. The Secretary's authority to adopt standards without adhering to these procedural requirements expired two years after the effective date of the Act. In order to promulgate any standard after that period, the Secretary must comply wth the procedural rulemaking requirements contained in the APA and section 6(b) of the Act, 29 U.S.C. § 655(b), which include, among other things, notice of proposed rulemaking and opportunity for interested persons to comment.

3/ We point out to the Secretary that we must comply with the Second Circuit's order to use significant risk in this case on remand because the Second Circuit's decision constitutes the law of the case. See Briggs v. Pennsylvania R.R., 334 U.S. 304, 306 (1948). Furthermore, the Commission is required to comply with remand orders of the courts of appeals. Butler Lime and Cement Co. v. OSHRC, 685 F.2d 544 (7th Cir. 1981); Frank Irey, Jr., Inc., 77 OSAHRC 192/F11, 5 BNA OSHC 2031, 1977-78 CCH OSHD ¶ 22,283 (No. 701, 1977).

i.e., the standard would be read to require that a reasonable person perceive a hazard under the circumstances of the case.

P & W argues that all the Secretary offered to show was that if acid mists of certain concentrations were to mix with cyanide mists of certain concentrations in the common duct, HCN would evolve; and that if hydrogen peroxide mists of certain concentrations were to mix with heated slushing oil in the common duct at a certain temperature, there would be a fire or explosion potential; and that if peracetic acid mists of certain concentrations formed by the combination of hydrogen peroxide and glacial acetic acid were to combine with heated slushing oil in the common duct at a certain temperature, there would be a fire or explosion potential. P & W asserts that the Secretary utterly failed to prove the factual predicates which support the premises leading to his conclusions. P & W's testing, however, demonstrated that there was no HCN hazard because HCN was not present in the common duct, that the air velocity over the tanks containing oil and hydrogen peroxide resulted in duct temperatures too low to create fire or explosion hazards, and that slushing oil was not entering the common duct to create a fire or explosion hazard.

D.

Our consideration of this case on remand is governed by the instructions of the Second Circuit as quoted above. We interpret the cited standard at section 1910.94(d)(7)(iii), when applied under the "significant-risk" test to encompass the protection of employees from fire, explosion or chemical reaction hazards that are unusual or infrequent. Thus, the absence of proof of the actual existence of hazard-

ous chemical combinations in P & W's common duct system does not conclusively establish that P & W's employees were not exposed to a significant risk of harm.

The Secretary contends that acid mists and cyanide mists from the tanks in P & W's plating department could combine in its common duct to form deadly HCN gas, which poses a fire and explosion hazard because of its low flash point (0° F.). The Secretary also contends that, because HCN is poisonous, the gas could be hazardous to employees working on the roof of the plant should it be vented through the roof stacks, and to employees in the plant itself should a down-draft return the gas to the plating department.

Mr. Padden, the Secretary's expert witness, testified that if the surfaces of the acid or cyanide solutions were agitated by the immersion or retrieval of a part dipped into those solutions "mists and small gobblets [sic] would be readily drawn up into the main trunk line [of the common duct]" because of the about 200 feet per minute velocity of the air in the ventilation system blowing across those tanks. The solutions were heated and testimony indicated that heated solutions gave off more easily-transported mists and vapors than did cold solutions.[4/] Dunstan, P & W's industrial hygienist, acknowledged that it is not good practice to vent cyanide and acid mists through a common duct and that it can lead to HCN formation and fire and explosion hazards. P & W's

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4/ The acid tanks in the plating department ranged in temperature from room temperature to 120° F.; the cyanide tank temperatures went from room temperature to about 150° F. If the steam valves malfunctioned, as they had on occasion, the temperatures of the acids and cyanides could go up even higher. If the temperatures exceeded the boiling point, larger globules of the particular solutions would be carried into the common duct, thereby increasing the potential for HCN formation.

expert witness, Mr. Doyle, acknowledged that cyanide mists could be drawn into the ductwork in the case of highly agitated solutions. Since parts were constantly being immersed into the solutions, we find that the solutions could become sufficiently agitated that cyanide mists could be drawn into the ductwork, react with the acid mists and vapors that were undisputedly already there, and form HCN.

Doyle's conclusion that there was not a hazard of HCN formation must be deemed modified by his acknowledgment that cyanide mists could be drawn into the ductwork in the case of highly agitated solutions. The fact that P & W's testing did not disclose the presence of any HCN gas in the common duct does not rebut this finding. P & W's evidence shows only that HCN was not present when the tests were made. It does not show that the conditions necessary for HCN formation would not arise.

If a down-draft occurred, HCN already formed in the common ducts could be swept back into the plant. The record shows that down-drafts could occur if P & W's ventilation system broke down, such as by a malfunctioning of the belts in the system. It is undisputed that ventilation system breakdowns had occurred in P & W's plant, and that one such breakdown had even occurred during the inspection of the plant. Belts in the system had broken. Further, the ventilation system in the plating department itself had broken down. These hazards were heightened by the fact that P & W had not provided for an alarm system to warn its employees of breakdowns in the ventilation system. Witness Champney, an employee in the plating department when the breakdown there occurred, described how he had become aware of the breakdown: "You started to smell and choke a little bit, and you realized that you were smelling

acid." Because HCN gas is one of the most potent of poisons, employees were therefore subjected to the hazard of being poisoned due to down-drafts occurring after ventilation system breakdowns.

The evidence also indicates that in the event of a down-draft acid mists could flow from the common duct down through the separate cyanide ducts, combine there with cyanide mists and enter the plating department. Thus, employees could be exposed to HCN formation due to a down-draft even if no cyanide mists had entered the common duct. We conclude that the Secretary has therefore proven that there was a significant risk of HCN poisoning from ventilation system breakdowns and resultant down-drafts.

The Secretary also contends, with respect to one of P & W's plating lines, that hydrogen peroxide and heated slushing oil could combine in the common duct to cause a fire or explosion. He alleges further that hydrogen peroxide and acetic acid, both of which were contained in one of the line's tanks, could combine to form peracetic acid; peracetic acid could combine with oil mists in the common duct and create fire and explosion hazards.

P & W's industrial hygienist, Dunstan, admitted that hydrogen peroxide and heated slushing oil entered the common ductwork. He conceded that there was a high hazard of an instantaneous explosion if the two chemicals were mixed. He further testified that peracetic acid was an explosive chemical formed by the mixing of hydrogen peroxide and acetic acid. He acknowledged that it is not good practice to vent the various chemicals in this line through common ducts and that it can result in fire and explosion hazards. Mr. Larsen, an industrial hygienist who

testified for the Secretary and inspected P & W's plant, stated that peracetic acid is an extreme oxidizing agent which should be kept away from organic materials and that exhausting peracetic acid and heated oil through the same duct presented fire and explosion hazards.

Padden, testifying for the Secretary, explained that if P & W's ventilation system failed, and the production of heated slushing oil and hydrogen peroxide continued, small globules of oil and chemicals would be emitted from the plating line tanks which could be drawn through the exhaust system into the common duct and cause a chemical reaction. When Padden was asked about the effect of a failure of P & W's ventilation system on the mixture of peracetic acid and slushing oil mists, he testified that the two substances would meet without diffusion. These reactions could result even if a down-draft did not occur. As noted above, the Secretary's industrial hygienist, Larsen, had testified earlier that exhausting peracetic acid and heated oil through the same duct presented fire and explosion hazards. Mr. Dupre, P & W's safety engineer, testified that a fire had previously occurred in P & W's ductwork.[5/] Consequently, in light of the above testimony and particularly in light of the abundant testimony from both the Secretary's and P & W's witnesses about failures in P & W's ventilation system, we find that the Secretary has proven there was a significant risk of fire and explosion in P & W's common duct system as a result of a combination of the aforementioned substances.

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5/ This fire was attributed to careless smoking. However, ignition sources were not eliminated in the plating department. One employee testified that he smoked there and never had been instructed against it. Thus, there was a demonstrated possibility of ignition of the flammable or combustible mists and vapors by cigarette sparks.

The Court has asked us to consider two other matters: (1) the Court points to an apparent conflict in the testimony of Padden and Doyle with respect to the type of ductwork most commonly used in the ventilation systems of other industrial plating departments; and (2) the Court points out that P & W's scientific testing did not reveal any trace of the dangerous substances the Secretary claimed might form.

Regarding industry ventilation practices, Padden testified that it was not the practice in any of the plants he visited to use separate exhaust ducts flowing into a common duct. In over 400 or 500 visits to 100 or so plants with plating departments in the United States, Padden could not recall any departments that vented acids and cyanides into a common duct. He testified that it was "a very unsafe practice to use a common duct on any type of material that could cause fire or an explosion."

Doyle testified that he had visited "possibly fifteen or twenty plants" that used plating lines similar to P & W's and that some had individual ducts and others had common ducts. However, when asked if he recalled those plants with common ducts, Doyle named one plant that he thought had common ductwork, one that used both kinds of ductwork, and one that he believed had used common ductwork but that he had not visited since the late 1940's. On the basis of Padden's testimony, which we find substantially more compelling, we conclude that the usual practice in the industry was to use individual ductwork. This is hardly surprising in light of the testimony of P & W's own industrial hygienist, Dunstan, noted above, that it was not good practice to vent the chemicals used in P & W's plating lines through a common duct because the

incompatible chemicals could mix, generate HCN, and cause a fire or explosion.[6/]

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6/ Dunstan specifically testified on direct examination by the Secretary as follows:

> Q: Now, did you have any conversations with Mr. Larsen [OSHA's compliance officer] about the common ductwork used for the various chemicals that we have just discussed?
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> A: There may have been.
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> * * *
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> Q: Did you express any opinion as to whether or not these chemicals should be carried out through a common duct?
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> A: I may have.
>
> Q: And what would that opinion be?
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> A: That it would not be good practice.
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> Q: Why wouldn't it be good practice?
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> A: Because of intermixing of incompatible materials.
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> Q: The intermixing of incompatible materials?
>
> A: Yes, sir.
>
> Q: It can cause what?
>
> A: Hydrogen cyanide generation.
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> Q: Could it also cause a fire hazard?
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> A: Could be.
>
> Q: Could it also cause an explosion hazard?
>
> A: Could be.

Larsen testified that he asked Dunstan during the inspection why all the plating lines vented into a common ductwork, and "he just shook his head and he said, well, it was a matter of economics. He further stated that this was a poor excuse, but what can I say."

With respect to the testing issue, the fact that the Secretary did not test scientifically for the presence of the allegedly hazardous combinations of substances and that P & W did so and did not detect any such combinations does not invalidate the Secretary's case. The Secretary's case is not premised on the normal occurrence of hazardous combinations. The standard requires no such proof. The standard's purpose is preventative and its protection extends to unusual conditions and infrequent occurrences. Interpreted with the significant risk requirement mandated by the Second Circuit, the standard requires that the Secretary prove that either one or a combination of the substances removed through P & W's common duct system presented a significant risk of a fire, explosion, or chemical reaction hazard in that ductwork. The evidence discussed above and in our earlier decision convinces us that the Secretary has discharged his burden of proof under the standard.

The Secretary proved that there was a significant risk that unusual conditions would indeed occur. That such conditions were only likely to occur infrequently does not provide any reasonable basis for the administrative law judge to suggest that the possibility of their occurrence was so minimal "that the Secretary might just as well have suggested the possibilities of arson or insurrection." Nor does it preclude a finding of noncompliance with the standard under the significant risk test, nor, more importantly, does it diminish the need to prevent such occurrences. The hazardous substances involved here could combine to quickly, perhaps with virtually no warning, bring death or serious physical harm to P & W's employees. It is our conclusion that

the cited standard was drafted to prevent such eventualities; interpreting it to require proof of the actual existence of hazardous chemical combinations in the duct system undermines the standard's preventative purpose and essentially means that a showing of noncompliance with the standard's terms would have to await employee injuries from hazardous chemical combinations.

We have given due weight to the judge's conclusions. However, we find that the evidence that the usual industry practice is to use separate exhaust ducts for the chemicals involved here, the acknowledgment by P & W's industrial hygienist that common ductwork is not good practice and can result in HCN formation as well as fire and explosion hazards, and the testimony of the Secretary's expert outweigh those conclusions.

Accordingly, we reaffirm our earlier decision on the Secretary's section 1910.94(d)(7)(iii) allegation. We also grant the Secretary's motion to withdraw the section 1910.132(a) allegation concerning the failure of the employee operating the "spider" mechanism to wear a hardhat.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: SEP 30 1982

ROWLAND, Chairman, dissenting:

I dissent from the majority's opinion finding that the Secretary proved noncompliance with section 1910.94(d)(7)(iii) under the "significant risk" test required by the Second Circuit. Despite the majority's claim that it is deciding this case in accordance with the terms of the court's remand order, it in reality applies the test rejected by the court, that the likelihood of occurrence of a hazard be merely possible as opposed to significant. As the court specifically stated, "[t]he occurrence of a freakish event constitutes a possibility, but we believe . . . that safety standards may not be so broadly interpreted so as to embrace such slight risks of harm." Pratt & Whitney Aircraft v. Secretary of Labor, 649 F.2d 96, 104 (2d Cir. 1981). Yet in affirming the citation allegation in issue, the majority reasons that the standard applies to "unusual conditions" and "infrequent occurrences," thereby adopting the broad interpretation which the court has expressly disavowed. Furthermore, despite the court's admonition that the Commission evaluate all of the evidence of record, the majority has not given proper consideration to the evidence submitted by P & W in rebuttal to the Secretary's case.

With respect to the Secretary's contention that acid mists and cyanide mists could combine in the common duct to form hydrogen cyanide ("HCN") gas, the majority cites the testimony of the Secretary's expert witness, Padden, who stated that chemical mists would be drawn into the ductwork if the surfaces of the acid or cyanide solutions were agitated. The majority also notes P & W expert witness Doyle's statement that cyanide mists could enter the ductwork if the cyanide solutions were highly agitated. As the majority itself concedes, however, this evidence shows nothing more than a possibility that acids and cyanides could enter the common duct. The majority states, "[w]e find that the solutions could become sufficiently agitated that cyanide mists could be drawn into the ductwork. . . ." (emphasis added). Furthermore, the record does not

contain any evidence about the extent to which the surfaces of the acid and cyanide solutions were agitated during actual plant operations, nor does the evidence show any appreciable likelihood of HCN being formed as a result of agitation of the surfaces of the acid or cyanide solutions. Indeed, P & W's expert, Doyle, testified from personal experience that the cyanide solutions in the tanks only released water vapor and an ammonium compound into the air to be carried into the ductwork above the cyanide tanks. He further testified that any combination of ammonia with acid would produce only a white salt. 1/ Therefore, Doyle concluded that the plating lines did not present a chemical reaction, fire, or explosion hazard. The opinions of highly qualified witnesses who testify from personal experience are entitled to substantial weight. 2/ Kelly Springfield Tire Co., OSAHRC Docket No. 78-4555 (Aug. 27, 1982) (dissenting opinion).

Moreover, the results of P & W 's testing for HCN corroborate Doyle's opinion. Contrary to the majority, those tests results are entitled to weight. There is no evidence from which to conclude that P & W's tests were not taken under conditions representative of actual plant conditions. 3/ See Snyder

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1/ Dunstan gave similar testimony. See note 3 infra.

2/ Doyle had about twenty years of experience as a chemical engineer, with extensive experience in industrial abatement of chemical hazards. Although the Secretary's expert, Padden, had comparable experience, he did not dispute Doyle's testimony regarding the chemical reactions resulting from the cyanide tanks.

3/ The majority contends that breakdowns in the ventilation system were normal occurrences in P & W's plant and that such breakdowns could create down-drafts, forcing HCN present in the ductwork back down into the plant. However, the record does not demonstrate that ventilation system defects brought about the formation of HCN in the first place. The testimony of employee Champney, cited by the majority, shows only that acid fumes, not HCN, were released into the air when the ventilation system broke down in the plating department. Furthermore, Dunstan, P & W 's industrial hygienist to whom breakdowns in the system were reported, stated that in the event of breakdowns, ammonia vapor released from the cyanide tanks generally would mix with vapors from the acid tanks, thus forming ammonia compounds.

Well Servicing, Inc., 82 OSAHRC 10/C5, 10 BNA OSHC 1371, 1982 CCH OSHD ¶ 25,943 (No. 77-1334, 1982) (concurring and dissenting opinion). As I have previously stated, the burden is on the Secretary to prove by a preponderance of the evidence that there was a significant risk of HCN formation. P & W is not required to prove that there is no such risk.

The majority opinion also asserts that the likelihood of entry of mists into the common ductwork increases as the temperatures of the solutions in the tanks increases. However, other than a reference to the boiling point of the substances in the tanks, which itself is based on an unsupported assumption that the boiling point could be reached, 4/ Padden's testimony about the magnitude of the solutions' temperatures in relation to the increased hazard of HCN formation is nonspecific and conclusory. It is speculative to conclude from his testimony that a significant risk of hazard results from the temperatures to which the tanks were heated.

The majority also concludes that the Secretary proved hydrogen peroxide and heated slushing oil could combine in the common duct to cause a fire or explosion and that hydrogen peroxide and acetic acid could combine to form peracetic acid, which could then combine with oil mists in the common duct to create fire and explosion hazards. I disagree.

Even assuming, as the majority states, that P & W's industrial hygienist Dunstan conceded that hydrogen peroxide and oil entered the common duct, 5/

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4/ Padden testified that he did not know how much steam was available to the tanks. He could not, therefore, testify whether the steam available was capable of bringing the solutions to boiling. Also, the record does not show that the boiling points of the solutions in the tanks had ever been exceeded.

5/ The only testimony which might support the majority's assertion that Dunstan had so conceded is found in the following answers given by Dunstan upon questioning by the Secretary's attorney:

Q: Now, do you use hydrogen peroxide in the Plating Department?

(Continued)

Dunstan did not state that the mixing of hydrogen peroxide and heated oil would therefore occur. Rather, his testimony was to the contrary. Dunstan stated that there were two tanks of cyanide solution between the hydrogen peroxide and the oil tanks and that as the hydrogen peroxide moved through the common duct it would be decomposed to water by the cyanides before it could even reach any oil. In fact, Dunstan further stated that he tested for the presence of oil in the ductwork and found only a dry residue, indicating that oil was not present in the ductwork. Dunstan also testified that a reaction between hydrogen peroxide and slushing oil would require a temperature of about 390° F. The temperature of the oil, however, was no more than about 300° F., while the hydrogen peroxide was not heated. According to Dunstan, he measured the temperature of the air entering the duct from the oil tank at about 85° F. Based on a measured air flow of about 6000 cubic feet per minute, Dunstan estimated the temperature inside the duct to be only about 90° F. He concluded, therefore, that heated oil and hydrogen peroxide did not present a hazard.

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5/ (Continued)

A: Yes, sir.

Q: Do you use heated oil?

A: Yes, sir.

Q: Do they go up a common duct?

A: Yes, sir.

The Secretary's attorney never specifically asked Dunstan if hydrogen peroxide and oil did in fact enter the common duct. In view of the generalized nature of the Secretary's questions and Dunstan's answers, this testimony shows nothing more than the fact that a part of the ventilation system included a common duct. As noted in the text of this opinion, when Dunstan did specifically address the question of whether oil entered the common duct, he testified that oil was not present in the common duct.

The Secretary did not rebut Dunstan's testimony. Indeed, the Secretary's own expert witness, Padden, admitted on rebuttal that he did not actually know if hydrogen peroxide or slushing oil entered the common duct. Padden also admitted that a knowledge of the velocities of the exhaust system would have been helpful to him in arriving at his opinion on the likelihood of the occurrence of hazardous chemical reactions. Yet, neither Padden nor the Secretary's industrial hygienist, Larsen, measured the air flow into the duct system. 6/

The majority opinion also finds that the Secretary proved his allegation of hazards stemming from the formation of peracetic acid. Dunstan, however, testified that a temperature between 140°-180° F. is required for the formation of peracetic acid and that it takes some period of time before any appreciable amount of the acid can be developed. Although Larsen claimed that heat was not required to produce peracetic acid, he did concede, as did Padden, that peracetic acid did not present an explosion hazard unless it was heated to 230° F.; Padden stated that the flash point of peracetic acid is 105° F. Yet, as previously noted, Dunstan estimated the duct temperature to be only at about 90° F. Larsen admitted that he had made no determination regarding the temperature in the ducts.

Nevertheless, the majority states that a source of ignition for the chemical substances in the plating department existed from cigarette smoking. The employee on whom the majority relies, however, did not testify that he smoked in the vicinity of the tanks. In fact, the employee testified that he had been instructed against smoking in one particular area of the department. DuPre, P & W's safety engineer, testified that smoking was prohibited at certain tank locations. Also, the fire caused by smoking to which the majority refers occurred about ten years before the hearing of this case. There is absolutely

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6/ The record does not show any basis for Padden's reference to an exhaust velocity, noted in the opinion of the majority, of 200 feet per minute.

no evidence that any fire had occurred more recently than that.

Accordingly, I conclude the judge properly determined that only a remote possibility of a fire, explosion, or chemical reaction hazard was demonstrated by the Secretary. Since such proof does not establish the "significant risk" required by the court, I would affirm the judge's decision vacating the pertinent citation item. 7/

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7/ In view of my conclusion that the Secretary failed to demonstrate the existence of a significant risk of hazard, I do not reach the question of whether individual or common ductwork was the practice in the industry. See Kansas City Power & Light Co., 82 OSAHRC 13/A2, 10 BNA OSHC 1417, 1982 CCH OSHD ¶ 25,957 (No. 76-5255, 1982) (dissenting opinion). Therefore, I need not consider whether the majority's conclusion that the industry customarily uses separate ductwork is supported by the evidence.

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

September 30, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Brown & Root, Inc.

OSHRC DOCKET NO. 78-127

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION AND REMAND.

To wit: See attached.

FOR THE SECRETARY OF LABOR

- Counsel for Regional Litigation
  Office of the Solicitor, USDOL
  200 Constitution Ave., NW. - Rm. S-4014
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- Louis G. LaVecchia
  Judge, OSHRC
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FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | |
| BROWN & ROOT, INC., | : | |
| Respondent, | : | OSHRC Docket No. 78-127 |
| INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, | : | |
| Intervenor. | : | |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

An order of Administrative Law Judge Louis G. LaVecchia is before the Commission pursuant to section 12(j), 29 U.S.C § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Judge LaVecchia approved a settlement agreement submitted by the Secretary of Labor and Brown & Root, Inc. In the settlement, the Secretary moved to amend his citation and complaint to characterize an alleged section 5(a)(1) violation as serious rather than willful and reduce the proposed penalty from $9,000 to $400.

The International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO ("Iron Workers"),[1/] filed a petition for discretion-

1/ In early 1978, the Iron Workers sought to intervene and, upon interlocutory appeal of an adverse ruling by the judge, a Commission majority granted the petition for intervention. Brown & Root, Inc., 7 BNA OSHC 1526, 1979 CCH OSHD ¶ 23,731 (No. 78-127, 1979).

ary review asserting that the Iron Workers were not given adequate opportunity to present objections to the settlement proposal. Commissioner Cleary granted the Iron Workers' petition for discretionary review.

The Iron Workers, having been granted intervention status by the Commission, 7 BNA OSHC 1526, 1979 CCH OSHD ¶ 23,731, have a right to be heard on objections to a settlement agreement between the Secretary and an employer that involves the cited hazard to which the employees it represents were exposed. See Mobil Oil Corp., 82 OSAHRC ____, 10 BNA OSHC 1905, 1982 CCH OSHD ¶ 26,187 (No. 77-4386, 1982); Englehard Industries, Docket No. 78-2880 (Aug. 30, 1982).[2/] Because the Iron Workers have not been afforded this right, we set aside the judge's order approving the settlement agreement and remand the case for further proceedings consistent with this decision and Commission precedent.[3/] SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: SEP 30 1982

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2/ Chairman Rowland dissents because, for the reasons explained in his dissenting opinion in Mobil Oil Corp., supra, he believes that the union may object only to the reasonableness of the abatement date, and such an objection cannot be made in this case in which immediate abatement is required. Chairman Rowland does not express any individual views on the union's status in this case because the earlier Commission decision, note 1 supra, is the law of the case. Stripe-A-Zone, Inc., 82 OSAHRC , 10 BNA OSHC 1694, 1696, 1982 CCH OSHD ¶ 26,069 at p. 32,783 (No. 79-2380, 1982) (Rowland, Chairman, concurring).

3/ On June 25, 1982, a Joint Stipulation of Complainant and Respondent was filed with the Commission, stating that "this matter may be re-

(continued on next page)

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3/ (continued)

manded to the administrative law judge for the sole purpose of permitting the Intervenor . . . its full ten days to comment on only the reasonableness of the abatement date provided in the settlement agreement." On August 24, 1982, the Commission notified the parties and the intervenor that consideration of the Joint Stipulation would be deferred until the Commission considered the disposition of the case.

The limitation contained in the stipulation would frustrate the basis of the Commission's grant of intervention. Furthermore, the limitation is inconsistent with Commission decisions holding that employee interests in settlement proceedings are not limited solely to the resonableness of the abatement period. See Mobil Oil Co., supra, and Englehard Indus., supra. Accordingly, we decline to limit this remand by the conditions set forth in the Joint Stipulation.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>BROWN & ROOT, INC.,<br>Respondent. | OSHRC DOCKET NO. 78-0127 |

ORDER

The settlement agreement submitted for approval pursuant to Rule 100 of the Commission's Rules of Procedure appearing to meet the requirements of the Commission for hospitable consideration, and no objection having been received from affected employees, it is approved and incorporated herein by reference.

The proceedin · is discontinued.

So ORDERED.

Louis G. LaVecchia
Judge, OSHRC

Dated: December 14, 1981

Dallas, Texas

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

September 30, 1982

**IN REFERENCE TO SECRETARY OF LABOR v.**

STANDARD OIL COMPANY
AMOCO CHEMICALS CORPORATION

OSHRC DOCKET NO. 78-0248 78-0250

**NOTICE IS HEREBY GIVEN TO THE FOLLOWING:**

**FOR THE SECRETARY OF LABOR**

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**OF** COMMISSION DECISION

**To wit:** See attached.

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**FOR THE COMMISSION**

Ray H. Darling, Jr.

**RAY H. DARLING, JR.**
**EXECUTIVE SECRETARY**

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | |
| STANDARD OIL COMPANY, | : | |
| Respondent. | : | OSHRC Docket Nos. 78-248 |
| and | : | and 78-250 |
| AMOCO CHEMICALS CORPORATION, | : | |
| Respondent. | : | |
| OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION and its LOCAL 8-732, | : | |
| Authorized Employee Representative. | : | |

ORDER

These consolidated cases are before the Commission for review pursuant to 29 U.S.C. § 661(i). The issues directed for review pertain exclusively to Docket No. 78-250 (Amoco Chemicals Corporation). No party has taken exception to the judge's disposition of No. 78-248 (Standard Oil Company) and no aspect of the case has been directed for review.

Accordingly, the two cases are severed pursuant to Commission Rule 10, 29 C.F.R. § 2200.10. In Docket No. 78-248, the judge's decision is the final order of the Commission. Docket No. 78-250 remains on review.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: SEP 30 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR | : | |
| Complainant | : | |
| v. | : | OSHRC DOCKET NOS. |
| STANDARD OIL COMPANY (INDIANA) | : | 78-248 & 78-250 |
| Respondent | : | |
| and | : | |
| AMOCO CHEMICALS CORPORATION | : | (Consolidated) |
| Respondent | : | |
| OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION | : | |
| Authorized Employee Representative | : | |

## DECISION AND ORDER

Appearances:

Michael D. Shapiro, Esquire
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U.S. Department of Labor
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for the Complainant

William J. O'Brien, Esquire
Pepper, Hamilton & Scheetz
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for the Respondents

Robert M. O'Connell, Esquire
Standard Oil Company (Indiana)
Chicago, Illinois
for the Respondents

Mr. Steven Wodka, International Representative
Oil, Chemical and Atomic Workers
International Union
Washington, D.C.
for the Union

Mr. Dale Casseday, President
Oil, Chemical and Atomic Workers
International Union
Local Union 8-732
New Castle, Delaware
for the Union

USHER, Judge:

These proceedings were initiated by the Secretary of Labor, United States Department of Labor, pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651, et seq. ("the Act"). The Secretary seeks affirmance of two identical Citations (one issued to each of the Respondents) and proposes that penalties totalling $40,000 be assessed. In each Citation the Secretary charges two "willful" violations of the Act. In Item 1 of the Citations, Respondents are charged with violation of Section 5(a)(2) of the Act because of alleged noncompliance with the safety and health standard codified at 29 CFR 1904.2(a),[1/] and in Item 2 Respondents are charged with violation of Section 5(a)(1) of the Act.[2/]

The Citations resulted from an inspection and investigation of Amoco Chemicals Corporation's ("Amoco") plant at New Castle, Delaware, from February 25, 1977, to December 28, 1977, and were issued on December 29, 1977. Respondents filed timely Notices of Contest, and a Complaint and Answer followed in each case in accordance with the Commission's Rules of Procedure. The issues were tried before me at Philadelphia, Pennsylvania on September 5 and 6, and October 24, 25 and 26, 1978. The Oil, Chemical and Atomic Workers International Union elected party status pursuant to Commission Rule 20(a) and participated fully.

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1/ Part 1904 of Title 29, Code of Federal Regulations, is entitled "Recording and Reporting Occupational Injuries and Illnesses," and at subsection 1904.2 the following requirement is noted:

> Log and summary of occupational injuries and illnesses.
>
> (a) Each employer shall, except as provided in paragraph (b) of this section, (1) maintain in each establishment a log and summary of all recordable occupational injuries and illnesses for that establishment; and (2) enter each recordable injury and illness on the log and summary as early as practicable but no later than 6 working days after receiving information that a recordable injury or illness has occurred. For this purpose form OSHA No. 200 or an equivalent which is as readable and comprehensible to a person not familiar with it shall be used. The log and summary shall be completed in the detail provided in the form and instructions on form OSHA No. 200.

2/ Section 5 of the Act provides:

> (a) Each employer—
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;
> (2) shall comply with occupational safety and health standards promulgated under this Act.

The parties have stipulated the following issues: Amoco, a corporation with its principle offices in New Castle, Delaware, employs approximately 350 employees and manufactures products which are sold in interstate commerce; Standard Oil Company of Indiana ("Standard") is a corporation with principle offices in Chicago, Illinois, and is engaged in the sale of petroleum products on a nationwide basis. Amoco, a wholly owned subsidiary of Standard, has owned and operated the New Castle, Delaware, plant from 1968 until the present; Amoco's medical department is responsible for implementing corporate policy set forth by Standard. The parties also stipulated that the several depositions taken prior to the trial would be used to the extent necessary at the trial.

Complainant, Respondent (Amoco) and the Union have filed post-trial briefs, and Respondent has filed a reply brief.

The Issues.

The following issues are raised by the pleadings, the evidence adduced, arguments of counsel, and the post-trial briefs:

1. Whether the Secretary's action in issuing the Citations is barred by Section 9(c) of the Act and the statute of limitations contained therein.

2. Whether Standard is a proper party to this action.

3. Whether Respondents, or either of them, violated the Act as alleged in the Complaint.

4. If Respondents, or either of them, violated the Act, were the violations "willful" in nature.

5. Are the proposed penalties, or any penalties, appropriate.

In Item 1 of each of the Citations Complainant has charged a violation of Section 5(a)(2) of the Act because of alleged noncompliance with the safety and health standard promulgated by Complainant and codified at 29 CFR 1904.2(a) in that:

> The log of occupational injuries and illnesses (OSHA Form No. 100 [sic] or its equivalent) was not completed in the detail provided in the form and the instructions contained therein:
>
> (a) Illnesses arising from occupational exposure to asbestos (asbestosis/asbestos disease) were not recorded.

A violation of Section 5(a)(1) of the Act is charged in Item 2 of the Citations as follows:

> An employee was required to work, after the employer's diagnosis of a serious medical condition (pleural effusion), under conditions which were likely to cause death or serious physical harm.

Abatement of these conditions was ordered immediately, and Complainant proposed that penalties of $20,000 be assessed against each Respondent.

The Statute of Limitations.

Respondents contend that the provisions of Section 9(c) of the Act bar enforcement of the Citations. I cannot agree. Section 9(c) provides that:

> [n]o citation may be issued under this section after the expiration of six months following the occurrence of any violation.

Respondents maintain that the two violations occurred, if at all, when the records were not properly kept, as charged in Item 1 of the Citations, and when the employee was not told of his condition as charged in Item 2. In Secretary of Labor v. Yelvington Welding Service, OSHRC Docket No. 15958, CCH OSHD ¶23,092 (1978), the Commission held that these types of violations are by their nature ongoing breaches of the employer's duty. It is patent logic that if a regulation requires that an act be done, the infraction occurs as long as the act is not done.

Further, Respondents argue that the Citations are barred because the Secretary should have found and cited the alleged violations at the start of the inspection, and since the inspection was longer than the six-month limitation period the Citations must be vacated. Respondents have offered no evidence of prejudice resulting from the length of the inspection and investigation. Complainant asserts, on the other hand, that the complex nature of the factual and legal questions involved made it impossible to determine until much later whether a violation or violations should be charged.

I am persuaded by Complainant's arguments and assertions. The question at the time of the investigation was not whether Respondents complied with the regulations, but rather whether they should have done so. Such a determination is not prone to summary ascertainment. Absent a showing of prejudice by Respondents, and considering the ongoing nature of the violations, Complainant's delayed action or restraint in the issuance of the Citations cannot support a determination that the limitation specified in Section 9(c) of the Act should apply.

The Proper Party.

Respondents contend that Standard is not a proper party. At the close of Complainant's case counsel for Respondents moved for (among other things) dismissal of

the Complaint and vacation of the Citation against Standard on the ground that Complainant had failed to prove Standard's liability as an employer of the allegedly affected employees. For the reasons which I stated at the time, the Citation against Standard was summarily vacated, and the Complaint against Standard was dismissed (Tr. 264). Complainant admitted that the only allegation against Standard was that it monitored the medical practices used by Amoco at its New Castle plant (Tr. 263). It was proved that Standard and Amoco were distinct and separate corporate entities, that Standard acted only as a consulting firm might have, and that it employed none of the employees involved (Tr. 263-264). There was no testimony to substantiate a finding of violation by Standard. Complainant's subsequent motion for a reconsideration of that ruling was carefully considered and denied by Order, dated December 18, 1978.

Violation of the Act by Amoco.

Respondent is charged with violation of Section 5(a)(1) of the Act, the so-called "general duty clause." To establish liability under that section, "the Secretary must prove (1) that the employer failed to render its workplace 'free' of a hazard which was (2) 'recognized' and (3) 'causing or likely to cause death or serious physical harm'," National Realty and Construction Company, Inc. v. OSHRC, et al. 489 F.2d 1257 (D. C. Cir. 1973). (See also Titanium Metals Corporation of America v. Secretary of Labor, et al., 579 F.2d 536 (9th Cir. 1978)). The establishment of a recognized hazard requires proof either that the employer had actual knowledge of the hazard or that accepted industry standards recognize it as a hazard. (Brennan v. OSHRC, et al., 494 F.2d 460 (8th Cir. 1974)). A condition or practice "likely to cause death or serious physical harm" has been defined as one which "...could eventuate in serious physical harm upon other than a freakish or utterly implausible concurrence of circumstances..." Titanium Metals, supra, at 541. This reasoning is reinforced by the rule that an accident need not actually occur in order to establish a violation of Section 5(a)(1) of the Act, and death or serious physical injury need not actually result before a "serious" violation can be established. (Brennan v. Butler Lime & Cement Company, et al., 520 F.2d 1011 (7th Cir. 1975)).

The general duty violation involved Louis Kofron, an Amoco employee at the New Castle plant. H. Thomas McGuire, M. D., the plant physician for Amoco since it began its operations at the New Castle plant in 1968, testified that Kofron's X-ray evidenced a pleural effusion (Tr. 336). Information concerning that finding was never transmitted to Kofron, even after two subsequent X-rays evidenced the same condition (Tr. 336, 50). It is

clear from the record that Dr. McGuire recognized the significance of that omission and the hazard it presented. He testified that standard medical practice would dictate that a patient with a history of asbestos exposure whose X-ray gave evidence of a pleural effusion should have been diagnosed immediately (Tr. 338). A biopsy is ordinarily performed to determine if the condition is benign or malignant.

Kofron worked for two years thereafter without any restrictions on his employment by Amoco before he became aware of the pleural effusion (Tr. 50). He eventually consulted his personal physician and was immediately hospitalized (Tr. 50). After a biopsy was performed it was determined that the growth was benign, and it was removed. (Tr. 50).

There is abundant evidence that Respondent had knowledge of the potential for hazard to Kofron and recognized the possible urgency of the employee's condition. But for the fortuitous development of a benign growth (rather than a malignant one), the employee may have been suffering from a terminal illness, and Amoco's callous attitude may well have contributed to that condition. Amoco thoughtlessly squandered Kofron's chances for early detection of cancer. The "employee was required to work, after the employer's diagnosis of a serious medical condition (pleural effusion), under conditions which were likely to cause death or serious physical harm." The violation of Section 5(a)(1) of the Act was proved, and the violation is properly characterized as "serious" in accordance with Section 17(k) of the Act.

Regarding the alleged violation of the recordkeeping regulation promulgated under Section 6 of the Act and codified at 29 CFR 1904.2, there is no dispute that the employees' illnesses (asbestos disease or asbestosis) were not recorded on the designated Occupational Safety and Health Administration ("OSHA") forms. Respondent contends that it was not required to report these illnesses because there was never a "diagnosis" of asbestosis. It argues that without a confirmed diagnosis it was impossible to establish that the illness was occupationally related, and the standard requires that only occupational illnesses be recorded on the OSHA forms.

Complainant presented an array of competent and persuasive witnesses. Ruth Lilis, M. D., a professor of medicine at the Mount Sinai Hospital School of Medicine in New York City, has long worked in the field of industrially induced lung disease (Tr. 25). Dr. Lilis has conducted some four to five thousand case studies in asbestosis (Tr. 27), and has achieved the highest grade possible for an X-ray reader (Tr. 27). She testified that there are three essential elements for a diagnosis of asbestos disease, i.e., a history of

asbestos exposure, a positive chest X-ray, and changes in pulmonary function (Tr. 46). She contended that no biopsy is needed for a diagnosis; a chest X-ray would clearly show when the disease is diagnosable (Tr. 46-47). After interviewing and examining 12 of Respondent's employees, Dr. Lilis diagnosed seven patients as having asbestosis (Tr. 74-77, 79).

Lawrence Fine, M. D., a recognized expert in the field of occupational disease, agreed that asbestosis can be diagnosed from an occupational history of exposure to the substance and a complete physical exam, including X-rays (Tr. 153). A biopsy would be helpful where otner factors are confusing, but it is not necessary for a diagnosis, according to Doctor Fine (Tr. 154). After studying the results of the pulmonary function tests and the X-rays of 10 of Respondent's employees, Doctor Fine determined there were four cases of asbestosis among them (Tr. 186-187), and two employees presented other cases suggestive of asbestosis (Tr. 188). Doctor Fine was able to make these diagnoses using the company's own records (Tr. 228).

Doctor Alfred Fishman, a professor of medicine at the University of Pennsylvania Hospital, was hired by Respondent to conduct pulmonary function tests on 220 of Respondent's employees. Doctor Fishman (in an oral deposition) testified that in his professional opinion he could not prove a diagnosis of asbestosis without a biopsy (Dep. 18). He never reported any diagnoses to Respondent; that was not, according to his testimony, the object of his survey (Dep. 4, 17). However, in his view the results he reported to Respondent raised a strong suspicion of asbestosis (Dep. 17).

Respondent claims that at no time was there a diagnosis of asbestosis reported to it. Nevertheless, it is clear from the record that Respondent's physicians had obtained all the information essential to a diagnosis of asbestosis. Whether the diagnosis was absolutely proven by biopsy is unimportant. One purpose of a reporting statute is to serve as an early alert to the end that a pattern of occupational illnesses can be identified and avoided. Respondent has attempted to contravene both the letter and intent of the statute. A violation of Section 5(a)(2) of the Act has been proven. Respondent failed to comply with the requirements of the reporting standard; and that failure created a substantial probability of death or serious physical harm to its employees. The violation was "serious" in nature.

Willfulness.

In both items of the Citation Complainant alleged that Respondent willfully violated the Act. The Review Commission has consistently held a violation is willful when the action is conscious, intentional, voluntary, and deliberate, regardless of venal motives.

Secretary of Labor v. Georgia Electric Company, OSHRC Docket No. 9339, CCH OSHD § 21,613 (1977) and cases cited therein.[3/]

Respondent's reliance upon Frank Irey, Jr., Inc. v. OSHRC, et al., 519 F.2d 1200, is inappropriate in light of the Court's recent pronouncements in The Babcock & Wilcox Company v. OSHRC, et al., _____ F.2d _____ (3rd Cir., May 15, 1980). There the court carefully pointed out that "an 'intentional disregard of OSHA requirements' differs little from an 'obstinate refusal to comply'; nor is there in context much to distinguish 'defiance' from 'intentional disregard'."

Respondent knew of Kofron's pleural thickening and knowingly made the decision not to inform him about his condition or restrict his employment so as to prevent the possible worsening of that condition. In the second situation, Respondent had all the information necessary to make a diagnosis, yet it intentionally omitted all information from the appropriate OSHA forms. Under these circumstances Respondent's violations of the Act were "willful" as that term is used in Section 17 of the Act. In each instance the Company recklessly disregarded the consequences of its acts. The "general duty clause" violation involving Kofron was nothing less than an "obstinate refusal" to assure that employee employment and a place of employment free from a recognized hazard which was causing or was likely to cause him serious physical harm or likely to cause even his death. Respondent has offered no plausible explanation for its failure to inform the employee of his condition or its failure and refusal to restrict his employment activities in order to lessen the possibility of a worsening of that condition. Considering the possible consequences of its actions (or inaction) Respondent evidenced an "intentional disregard" for the employee's health and safety.

The record reflects an equally unconscionable attitude by Respondent regarding the other employees who did in fact suffer from asbestosis, but whose illnesses were not formally diagnosed. Respondent's failure and refusal to make the diagnoses when it had sufficient information to do so amounted to a defiant and reckless disregard for the precautionary requirements of the safety and health standard. It was only the absence of these diagnoses and the asserted uncertainty of the job-relatedness of the illnesses that provided the lame excuse for not reporting them. Respondent — and only Respondent — possessed the information at that time to make the diagnoses, and it obstinately refused to do so.

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3/ Aff'd. 595 F.2d 309 (5th Cir. 1979).

Regardless of whose definition is applied, Respondent's actions were willful, as that term is used in the Act.

The Penalties.

Giving due consideration to the requirements of Section 17 of the Act, I find the proposed penalties reasonable.[4/]

## FINDINGS OF FACT

1. Respondent, Amoco Chemicals Corporation, employs approximately 350 persons at its New Castle, Delaware plant, and goods produced there are sold in interstate commerce.

2. The violations alleged in the Citation are by their nature continuous, and they did in fact continue.

3. The violations alleged in the Citation were not found by the Secretary until sometime during the inspection of Amoco's work site.

4. Respondent, Standard, employed none of the employees who were affected by the violations at Amoco's New Castle, Delaware plant.

5. Respondent, Amoco, had knowledge of its employee's medical condition, viz., pleural effusion, but did not inform him of his condition or restrict his employment to prevent the possibility of a degeneration of his health.

6. Respondent, Amoco, possessed all the facts necessary for a diagnosis of asbestosis, but did not diagnose it, label it as an occupational illness suffered by its employees, or record it on the appropriate OSHA forms.

7. Respondent, Amoco, made a conscious, deliberate and knowing decision to avoid its responsibilities under the Act, and its conduct amounted to a defiant and reckless disregard for the provisions of the Act.

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4/ Section 17 of the Act:

> (a) Any employer who willfully or repeatedly violates the requirements of Section 5 of this Act, any standard, rule, or order promulgated pursuant to Section 6 of this Act, or regulations prescribed pursuant to this Act, may be assessed a civil penalty of not more than $10,000 for each violation.
>
> ***
>
> (b) The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

## CONCLUSIONS OF LAW

1. Jurisdiction of the parties and subject matter herein is conferred upon the Occupational Safety and Health Review Commission by Section 10(c) of the Act.

2. At all times relevant hereto Respondent was an employer engaged in a business affecting interstate commerce, within the meaning of Section 3(5) of the Act, and as such was subject to the requirements of Sections 5(a)(1) and 5(a)(2) of the Act.

3. Respondent, Standard, is not a proper party to this action.

4. The statute of limitations set forth in Section 9(c) of the Act does not bar Complainant's action.

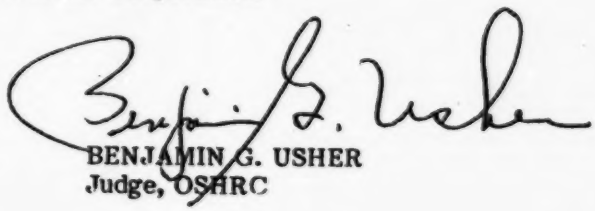
5. Respondent, Amoco, violated Section 5(a)(1) of the Act by its failure to provide a safe workplace for at least one of its employees.

6. Respondent, Amoco, violated Section 5(a)(2) of the Act by not complying with the safety and health standard codified at 29 CFR 1904.2, i.e., by its failure to record an occupational illness on proper OSHA forms.

7. Respondent's violations set forth above were "willful" in nature.

## ORDER

Upon consideration of the foregoing findings and conclusions, it is hereby ORDERED that the Citation issued to Respondent, Standard Oil Company of Indiana, is VACATED; the Citation issued to Respondent, Amoco Chemicals Corporation, is AFFIRMED. A penalty of $20,000 is ASSESSED against Amoco Chemicals Corporation.



BENJAMIN G. USHER
Judge, OSHRC

Dated: July 28, 1980
Hyattsville, Maryland

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

September 30, 1982

**IN REFERENCE TO SECRETARY OF LABOR v.**

TEXACO, INC.

OSHRC DOCKET NO. 78-0737

**NOTICE IS HEREBY GIVEN TO THE FOLLOWING:**

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OF COMMISSION DECISION

To wit: See attached.

**FOR THE COMMISSION**

Ray H. Darling, Jr.

**RAY H. DARLING, JR.**
**EXECUTIVE SECRETARY**

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>TEXACO, INC.,<br><br>Respondent.<br><br>OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION AND ITS LOCAL 4-23,<br><br>Authorized Employee Representative. | OSHRC Docket No. 78-737 |

DECISION

Before: ROWLAND, Chairman; CLEARY, Commissioner. */

BY THE COMMISSION:

An order of Administrative Law Judge Erwin L. Stuller approving a settlement agreement between the Secretary of Labor and Texaco, Inc., is before the Commission for review. The judge held that the Oil, Chemical and Atomic Workers International Union and its Local 4-23 ("the Union") were not entitled to an evidentiary hearing on certain objections they raised to the agreement. Commissioner Cleary directed review of the judge's decision pursuant to section 12(j) of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 661(i)). The principal issue on review is whether an employee party can object to provisions in a settlement agreement between the Secretary of Labor and a cited employer wherein the Secretary agrees to withdraw contested items of a citation.

The two participating members are divided on the disposition of this case. Chairman Rowland would affirm the judge's ruling on the ground that the

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*/ Commissioner COTTINE took no part in the consideration or decision of this case.

Commission lacks authority to consider employee objections that are not related to the abatement period. Mobil Oil Corp., 82 OSAHRC ___, 10 BNA OSHC 1905, 1982 CCH OSHD ¶ 26,187 (No. 77-4386, 1982) (dissenting opinion). Chairman Rowland agrees with Texaco's argument that the Secretary's decision to withdraw the three items at issue eliminates from any possible controversy the one point on which an employee party should be permitted to object to a settlement agreement. 1/ Commissioner Cleary would vacate the judge's order and hold that the Commission has jurisdiction to consider the Union's substantive objections to the settlement agreement. For the reasons stated in his concurring opinion in Mobil Oil Corp., supra, Commissioner Cleary would hold that under section 10(c) of the Act affected employees who have elected party status must be afforded the opportunity to review and raise objections to settlements proposed by the other parties, including objections to matters other than the abatement period specified in a settlement proposal.

In view of the divided vote on the merits of the case, Chairman Rowland and Commissioner Cleary agree to dispose of the case by vacating the direction for review. Baldwin Industries, Inc., 82 OSAHRC __, 10 BNA OSHC 1572, 1982 CCH OSHD ¶ 25,980 (No. 78-741, 1982), appeal filed, No. 82-7178 (11th Cir. May 28, 1982).

Accordingly, the direction for review is vacated and the judge's order is the Commission's final disposition of this case.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: SEP 30 1982

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1/ Under the settlement agreement, a fourth item is to be affirmed and a detailed plan for the abatement of that violation is to be implemented. Nevertheless, the Union has expressly agreed to the settlement agreement's disposition of that citation item, including the abatement period established by the agreement.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, | ) | |
| Complainant, | ) | DECISION AND ORDER |
| v. | ) | Docket No. 78-0737 |
| TEXACO INCORPORATED, | ) | |
| Respondent. | ) | |

APPEARANCES:

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U.S. Department of Labor
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Attorney for Respondent.

STEVEN WODKA, International Representative
Oil, Chemical and Atomic Workers
International Union Local 4-23
1126 16th Street, N.W.
Washington, D.C. 20036

Representative for Affected Employees

ANTHONY MAZZOCCHI, Vice-President
Oil, Chemical and Atomic Workers
International Union Local 4-23
1126 16th Street, N.W.
Washington, D.C. 20036

Representative for Affected Employees

## DECISION

Texaco Inc. has been charged with four violations of the Occupational Safety and Health Act. The charges are contained in a citation that was issued on January 26, 1978. Texaco contested the citation. After the complaint was filed, the authorized representative of the affected employees, the Oil, Chemical and Atomic Workers International Union (OCAW), elected party status. They did not file a pleading.

The case was called to trial on June 6, 1978. It was then continued to July 13, 1978.

At the hearing, the Secretary and Texaco announced that they had reached a basis for the settlement of all issues. All of the parties agreed to the settlement provisions for Item 1 of the citation.[1/] As to the three remaining items, the Secretary and Texaco agreed that prosecution of these items would be withdrawn and moved that the items be vacated. OCAW objected.

OCAW argues that once they elect party status and indicate that they are interested in prosecuting the complaint, no part of the citation or complaiant can be vacated without their approval. They believe that they must be allowed to prosecute the Secretary's citation and complaint when the Secretary refuses to do so.

In his brief, the Secretary cites one case to support his position: Secretary of Labor v. Southern Bell Telephone and Telegraph Co., 77 OSAHRC 83/D1, 5 BNA OSHC 1405, 1977-78 CCH OSHD para. 21,8040, (No. 10340, 1977.). In that case the Commission held that only the Secretary has enforcement power under the Act. The exclusiveness of this power does not allow the affected employees to take over the prosecution or force the Secretary to prosecute. The affected employees do not have the right to prosecute citations. They have no standing to contest the Secretary's withdrawal of a citation. Apparently, in an employer contest, the employees' rights as a party may be exercised only if the other parties wish to go forward with the case. Therefore, OCAW's objection to the withdrawal of three items of the citation is overruled.

OCAW has also requested an order that would require "the Secretary to consult with the authorized employees representative before amending any citations or making any settlement offers in all cases with Texaco Inc., at their facility (Port Arthur, Texas)". This order was requested because there are several such cases presently pending before judges of this Commission. OCAW is fearful that the Secretary may attempt to settle these cases without their assistance or approval.

I do not have the authority or power to require the Secretary to consult with OCAW at any time. They cannot be forced to consult with OCAW, either before or after consulting with the employer, in this or any other case. Therefore, their motion to require consultations is denied.

Although Texaco had argued its position at the hearing, it has not yet had an opportunity to file briefs in this matter. Due to the urgency of the issues, this case will be decided and forwarded to the Commission without first considering Texaco's arguments.

## ORDER

The characterization of the violation alleged in Item 1 is amended from "Serious" to "Nonserious". The abatement provisions and abatement date of the item are stricken and those provisions contained in parties' Settlement Agreement is substituted in their place as if repeated here word for word. Item 1, as amended, is AFFIRMED. The proposed penalty of $1000 is VACATED.

Items 2, 3, and 4 of the citation and the related proposed penalties are VACATED.

Erwin L. Stuller

ERWIN L. STULLER
Judge

DATED: August 28, 1978

## FOOTNOTE

1/ Pertinent provision of the Settlement Agreement for Item 1 of the citation, beginning on page 6 of Transcript of Proceedings, is as follows:

> (A) Item 1 of the Citation will allege a non serious violation of 29 CFR 1910.95(b)(1), with no penalty against Respondent.
>
> * * * *
>
> (4) Respondent will retain the services of a qualified engineering consultant to advise Respondent with respect to potential engineering controls available to reduce noise levels. Respondent represents it already has obtained services of such a consultant.
>
> (5) Respondent agrees to implement engineering controls which are now feasible, in an attempt to reduce sound levels in Respondent's P&S Building (barrel painting facility) to within the levels of Table G-16 or as low as is feasible if it is not possible to reduce levels to within limits of Table G-16.
>
> (6) Respondent agrees to implement feasible administrative controls to regulate employee contact with noise conditions present in Boiler House No. 6.
>
> (7) Respondent represents that its affected employees are currently using and will continue to use, and that Respondent is currently enforcing and will continue to enforce, the use of personal hearing protection by the affected employees during the period of implementation of said engineering and administrative controls, and that other times, when employees are exposed to noise levels in excess of Table G-16.
>
> (8) Respondent agrees within 60 days to submit a proposed plan of feasible engineering and administrative controls of noise control measures to the Area Director, Houston, Texas, that will be implemented to abate the violations alleged in Item 1 of the non serious violation issue, January 26, 1978.
>
> (9) Within 40 days after submission of an abatement plan to the Area Director, Occupational Safety and Health Administration, Houston, Texas, Respondent agrees to complete feasible administrative or engineering controls in order to abate the violations alleged in Item 1 of the citation issued January 26, 1978.
>
> * * * *

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

September 30, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Josam Manufacturing Company

OSHRC DOCKET NO. 78-1448

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION ORDER

To wit: See Attached.

FOR THE SECRETARY OF LABOR

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FOR EMPLOYEES

Russell Manns
President, Local 453
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Michigan City, IN. 46360

Louis G. LaVecchia, Judge
Occupational Safety & Health
Review Commission
Federal Bldg. Rm 7B11
1100 Commerce Street
Dallas, TX. 75242

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>JOSAM MANUFACTURING COMPANY,<br><br>Respondent,<br><br>INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION, AFL-CIO, LOCAL 453,<br>Authorized Employee Representative. | ) | OSHRC DOCKET NO. 78-1448 |

ORDER

This case is before the Commission for review on the merits pursuant to 29 U.S.C. § 661(i), section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678. On September 16, 1982, the Secretary and the Respondent filed a Stipulation and Settlement Agreement for approval by the Commission in which the Secretary withdraws the citation and each party agrees to bear its own fees and expenses. The accompanying letter from the Secretary states that a copy of the agreement "has been posted for the benefit of employees."

The record indicates that the International Molders and Allied Workers Union, AFL-CIO, Local 453, the Authorized Employee Representative of affected employees, previously elected party status and participated at the hearing in this case. There is no indication in this record that the union party was afforded an opportunity to participate in the settlement proceedings or was served with the agreement in accordance with Commission Rule 100(c), 29 C.F.R. § 2200.100(c). See Whirlpool Corp., OSHRC Docket No. 78-3930 (Sept. 30, 1982), and cases cited.

In the past, when presented with a motion for approval of an agreement that has not been properly served on affected employees, the Commission has denied the motion without prejudice, subject to reconsideration upon receipt of adequate proof of service. However, principles of judicial economy dictate a different course in this case. Our review of the record indicates that the terms of the agreement are otherwise consistent with the purposes and provisions of the Act and the criteria for approval of settlements set forth in Commission Rule 100, 29 C.F.R. § 2200.100. Furthermore, our initial review of the record suggests that the disposition of the citation in issue would not differ from that proposed by the Secretary and the Respondent were we to proceed with consideration of the merits of the case.

In order to afford the Authorized Employee Representative its participatory rights, we conclude that the Stipulation and Settlement Agreement shall be approved unless within 13 days[1/] from the issuance of this Order the Authorized Employee Representative indicates an objection to the agreement and requests that its objections be heard. The Executive Secretary shall serve this Order and the attached agreement on the Authorized Employee Representative.

SO ORDERED.

FOR THE COMMISSION

DATED: SEP 30 1982

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

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1/ See Commission Rules 4 and 37, 29 C.F.R. §§ 2200.4, 2200.37.

CLEARY, Commissioner, concurring:

I concur in the disposition of this case. However, I express no opinion at this stage of the proceedings, whether the citation would be vacated if we were to reach the merits of the case.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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RAYMOND J. DONOVAN, SECRETARY OF LABOR,

Complainant,

v.

OSHRC DOCKET
No. 78-1448

JOSAM MANUFACTURING CO.,

Respondent.

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STIPULATION AND SETTLEMENT AGREEMENT

I

The parties have reached agreement on a full and complete settlement of the instant matter which is presently pending before the Commission.

II

The Secretary hereby withdraws the citation in the instant case.

III

Each party agrees to bear his own attorney fees and expenses.

John A. Amodeo

RAYMOND J. DONOVAN
COMPLAINANT, Secretary of Labor

By: John A. Amodeo
Attorney

Martin W. Kus

RESPONDENT, JOSAM MFG., CO.
By: Martin W. Kus
Newby, Lewis Kaminski, & Jones

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|---|
| SECRETARY OF LABOR, Complainant, | : | OSHRC Docket No. 78-1448 |
| v. | : | |
| | : | |
| JOSAM MANUFACTURING COMPANY, | : | |
| Respondent. | : | |

Appearances:

Karen L. Mansfield, Esquire, for the Complainant.

Robert F. Hooper (Pro Se) for the Respondent.

Russell Manns for the Union (International Molders Association of Workers, Local No. 453.

DECISION AND ORDER

LaVecchia, Judge

STATEMENT OF THE CASE

This is a proceeding under section 10(c) of the Occupational Safety and Health Act of 1970 (29 USC 651 et seq.). Respondent seeks review of a citation issued against it by the Occupational Safety and Health Administration.

Based on inspections conducted during the period November 11, 1977 through February 9, 1978 respondent was cited for a serious violation of the health standard set forth at 29 CFR 1910.95(b)(1) dealing with excessive noise levels. A hearing was held on October 16, 1979 at Chicago, Illinois.

Respondent's factory is in Michigan City, Indiana, where it manufactures plumbing and drainage equipment. Frederick Boelter, an industrial hygienist with OSHA's Regional Technical Support Office, visited respondent's foundry on June 8, 1979 in the course of discovery proceedings. His purpose was to review the areas that were under citation. (Tr. 10, 11).

The cleaning room contained five booths, consisting of 3-sided enclosures, along the north wall. At another table, farther to the east, employees were working on interceptors. Along the south wall there were two 30-inch stand grinders, among others. (Tr. 11).

Next to the cleaning area was an area containing a line of six to eight jolt squeeze machines. The witness specifically viewed the cited machine (No. 324). (Tr. 11).

There was a shakeout area northeast of the jolt squeeze area. This was a deck approximately three feet square. Two lines known as the east and west wings fed the molds into the area. The molds were then manually pushed off the conveyor lines onto the shakeout. (Tr. 12).

In the squeeze molder area an employee was making small molds weighing 20 to 35 pounds at the rate of one every 75 seconds. Sand used in the operation was compacted by a jolting action, followed by a squeezing action. (Tr. 15). The noise sources involved were (1) the jolting, in which the table hits against an anvil; and (2) shaking of the pattern vibrator. Carryover noise from other sources was not found to be excessive. (Tr. 14).

The citation showed noise levels in the squeeze molder area between 80 dBA and 110 dBA, with a weighted mean of 93.4 dBA. The witness found vibrator noise of up to 104 dBA. The noise levels in this area were greater than 90 dBA. (Tr. 25). The shakeout table without any castings on it created noise of nearly 96 dBA. When the molds are placed on the table and shaken the noise increases. (Tr. 17). Five employees used in the shakeout operation are those most severely exposed to the noise. (Tr. 19).

The chipping area was about 60 feet long by 25 feet wide, with a ceiling 12 to 15 feet high. Five booths were on the north wall. A free-standing bench created a sixth work station. Several stand grinders were on the south side. (Tr. 23).

The work benches were of steel frame construction. Some had wood tops. (Tr. 23, 31-32)(Ex. C-1A, 1C). Acoustical material had been put on the walls but had deteriorated. (Ex. C-1A, 1B).

Employees used pneumatic chipping hammers and pneumatic grinders to finish and remove defects from the castings. The tools were noisy, showing as high as 96 dBA. Some of the castings radiated additional noise. One of the grinders was new and quieter. (Tr. 23).

The noise carried over from one booth to another, adding to each employee's total noise exposure. (Tr. 23).

The witness was of the opinion that the noise in the chipping area could be significantly reduced by at least three to five dBA. This would be accomplished by using newer, quieter tools or retrofitting the old ones. Kits for retrofitting are available from tool manufacturers; and quieter tools are on the market. (Tr. 23, 24). Employees could be better isolated at their respective work stations. (Tr. 24).

The citation showed noise in the chipping area ranging from 90-115 dBA, with a weighted mean of 102.3 dBA. The witness measured levels of up to 120 dBA in this area.

With respect to the squeeze molding operation the witness stated that other foundries have made use of quiet type vibrators, and they have also used polyurethane pads between the anvil and table. These methods have successfully controlled the noise. (Tr. 14).

To reduce noise from the shakeout, it could be partially enclosed on all sides. A pneumatic-actuated cylinder could be used to push the molds off the east and west conveyor rings onto the shakeout table. (Tr. 18).

The witness found the shakeout system in use at respondent's foundry to be obsolete when compared to other foundries. (Tr. 20). The noise in the shakeout area was measured at 96 dBA. (Tr. 17).

Respondent uses earplugs in its foundry, but there is no hearing protector that will sufficiently reduce noise levels at the inner ear to 90 dBA. Any noise attenuation from earplugs depends upon proper fitting and also upon frequency of the noise. (Tr. 28). The wearing of earplugs was not enforced. (Tr. 89).

Respondent has no hearing conservation program and does not give annual audiometric examinations. (Tr. 87-89). It does not monitor or enforce the wearing of hearing protection. (Tr. 89).

The witness had personally observed several foundries that employ better noise control techniques. (Tr. 29).

## Discussion

The facts are essentially undisputed. Respondent's main contention is that economic feasibility of the proposed remedial measures has not been shown by the complainant. It also questions the absence of the testimony of the inspecting compliance officer. Complainant showed that he was no longer in the employ of the government and was not available for the hearing. If the violation charged had been of a transitory nature, respondent's position might be considered valid, but here the violation is of a continuing nature. This is the type of violation especially suited to discovery proceedings, and the subsequent re-entry of the OSHA industrial hygienist was not without precedent, for the purpose of verifying the findings of the compliance officer and for the opportunity of remedial inspection. Reynolds Metals Co. CCH OSHD para. 20,214 (1975-76), reversed on other grounds CCH OSHD para. 23,137 (1978). Prior rulings adverse to respondent's position during the hearing are affirmed.

The mean noise levels shown in the citation, i.e., above 90 dBA for the squeeze molder, shakeout, and chipping areas, were confirmed by the OSHA expert when he visited the foundry more than a year later. Based upon his experience, the expert testified that controls were feasible. In the squeeze molder area quiet vibrators and polyurethane padding could be used. (Tr. 14). The shakeout could be partially enclosed and lined with fiberglass. It could be converted to semi-automatic operation to reduce the number of employees in the area. (Tr. 18, 22). As an alternative, a quieter shaker could be purchased. (Tr. 21) In the chipping area, quiet tools and improved construction of acoustical booths would achieve a reduction. (Tr. 23, 24).

The abatement measures recommended might not necessarily bring the noise levels within the limits of the standard, but this does not obviate the necessity for using controls. If the controls lead to any reduction at all in noise levels they must be employed. General Electric Co., CCH OSHD para. 21,095 (1976).

Even though controls may be expensive and increase production costs they may be economically feasible. Turner Co. v. Secretary of Labor, 561 F. 2d 82 (7th Cir. 1977). Although the citation in that case was vacated because abatement was not shown to be economically feasible, respondent in that case had an effective hearing conservation program which afforded alternative protection to its employees, and no hearing loss had been shown. In the instant case, respondent had no hearing conservation program, and had done no audiometric testing at all. At any rate, the expert testified that several simple and economical means existed to achieve a significant reduction in noise levels. He stated that new vibrators would cost about $50 apiece, and polyurethane for new acoustical booths would cost about $10 per booth. The respondent's contentions must be rejected.

The violation charged was properly categorized as "serious" within the meaning of the Act (29 USC 666(j)) since the end result of employees being exposed to excessive noise levels would be loss of or damage to hearing. The absence of an effective hearing conservation program added to the problem. An employee showing incipient hearing damage could continue to work in the noisy environment until the condition became total.

The abatement date and penalty were reasonable. One year is sufficient time to permit respondent to bring its operations in the foundry into compliance with the standard. The proposed $640 penalty is in line with the criteria found in 29 USC 666(i)).

## Findings of Fact

1. Respondent operates a foundry at Michigan City, Indiana.

2. Certain areas of the foundry (squeeze molder, shakeout, and chipping) are in violation of the health standard found at 29 CFR 1910.95(b)(1), in view of the excessive noise levels to which certain employees were exposed.

3. Respondent had no hearing conservation program, conducted no audiometric testing, and did not enforce the use of earplugs in areas where excessive noise levels existed.

4. Technologically feasible measures for controlling the excessive noise levels were available to respondent.

5. Economically feasible measures for controlling the excessive noise levels were available to respondent.

## Conclusions of Law

1. At times material hereto respondent was an employer within the meaning of section 3(5) of the Act, engaged in a business affecting commerce.

2. The Review Commission has jurisdiction.

3. The respondent violated the health standard set forth at 29 CFR 1910.95(b)(1).

4. The violation was "serious."

5. The penalty assessed below is reasonable and appropriate.

## ORDER

1. The citation, as amended, is AFFIRMED.

2. A civil penalty of $640 is assessed.

Louis G. LaVecchia
Judge, OSHRC

Dated: January 8, 1980
Dallas, Tx.

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

September 30, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

General Motors Corp. (Terex Division)

OSHRC DOCKET NO. 78-2792

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION AND REMAND

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR EMPLOYER

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FOR EMPLOYEES

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  Local 296
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- Judge Joe D. Sparks, OSHRC
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  Atlanta, GA 30309

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>GENERAL MOTORS CORPORATION,<br>TEREX DIVISION,<br><br>Respondent,<br><br>and<br><br>UNITED AUTOMOBILE, AEROSPACE<br>& AGRICULTURAL IMPLEMENT<br>WORKERS OF AMERICA,<br>LOCAL 296,<br><br>Authorized Employee<br>Representative. | OSHRC Docket No. 78-2792 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

The Secretary of Labor and General Motors Corporation ("GM") submitted to Administrative Law Judge Joe D. Sparks a settlement proposal for approval. Judge Sparks approved the settlement, finding a lack of objection from the United Automobile, Aerospace & Agricultural Implement Workers of America, Local 296, the authorized representative of the affected employees. Inasmuch as we are unable to find on this record that the union, which objects to the settlement, was afforded either the opportunity to participate in the settlement negotiations or received the notice of the settlement proposal to which it was entitled under the Commission's rules, we remand for further proceedings.

Shortly after a hearing was first scheduled, a union representative notified the Commission that he "wish[ed] to participate in the hearing . . . ." Judge

Sparks notified the Secretary and GM of the union's election of party status. About two weeks later, Judge Sparks cancelled the hearing because the Secretary and GM had represented to him that a settlement had been reached. A settlement proposal was later filed with the judge. Although it stated that "[GM] agrees that notice of this settlement has been posted to the affected employees," it was not accompanied by a certificate that the settlement had been served on the union. After Judge Sparks approved the agreement, review of the judge's decision was directed, in part, on whether the union had been "afforded the opportunity for meaningful participation in the settlement process in accordance with Rule 100(c) of the Commission's Rules of Procedure, 29 C.F.R. § 2200.100(c) . . . ." 1/

The union and GM have since submitted affidavits in response to the direction for review. The affidavit of Mr. Richards, the union's safety and health representative, states that "the Union did not have an opportunity to be a party [to] this agreement nor did the Union have any knowledge that an agreement was in the process of being consummated." The affidavit of Mr. Hoover, the administrator of safety and security at GM's Terex division, states that during his frequent contacts with union officials, they did not inform him of objections to the settlement. The affidavit also states that the settlement agreement had been posted and that GM's attorneys had served Mr. Richards with the settlement proposal. The cover letter to Mr. Richards stated that "[e]nclosed for your records is a copy of the stipulation and settlement agreement . . . ."

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1/ Commission Rule 100(c) states:

> Rule 100 Settlement.
>
> * * *
>
> (c) Filing; service and notice. When a settlement proposal is filed with the Judge or Commission, it shall also be served upon represented and unrepresented affected employees in the manner prescribed for notices of contest in §2200.7. Proof of service shall accompany the settlement proposal. A settlement proposal shall not be approved until at least 10 days following service of the settlement proposal on affected employees.

The Secretary states that "[i]t is not clear that the terms of Rule 100(c) were in fact strictly followed . . . . If it appears that the [union] was not afforded the opportunity for meaningful participation in the settlement process, a remand would be in order." We agree.

A union that has elected party status must be afforded the opportunity for meaningful participation in the settlement process, including the opportunity to participate in settlement negotiations. Asarco, Inc., 80 OSAHRC 104/F5, 8 BNA OSHC 2200, 1980 CCH OSHD ¶ 24,913 (No. 79-5557, 1980); ITT Thompson Industries, Inc., 78 OSAHRC 70/D10, 6 BNA OSHC 1944, 1978 CCH OSHD ¶ 22,944 (No. 77-4174, 1978). A union is also entitled under the Commission's rules to be served with a settlement proposal regardless of its party status; posting is insufficient. Commission Rule 100(c)(service of settlement on union); Commission Rule 7(a), 29 C.F.R. § 2200.7(a)(service of documents on parties); Babcock & Wilcox Co., 80 OSAHRC 95/A2, 8 BNA OSHC 2102, 2107, 1980 CCH OSHD ¶ 24,812, p. 30,567 (No. 78-446, 1980). We have also held that the union must be given notice that the served settlement proposal has been filed with the judge or Commission for approval and, thus, that its period for filing objections has begun. Id.; see Hearst Corp., 82 OSAHRC _____, 10 BNA OSHC _____, 1982 CCH OSHD ¶ _____ (No. 80-6051, 1982); American Cyanamid Co., 80 OSAHRC 40/C8, 8 BNA OSHC 1346, 1348, 1980 CCH OSHD ¶ 24,424, p. 29,791 (No. 77-3752, 1980), rev'd on another ground sub nom. Marshall v. Oil, Chemical & Atomic Workers Int'l Union, 647 F.2d 383 (3d Cir. 1981).

We are unable to say on this record that the union was afforded these rights. Certainly, there is no evidence that it was afforded any opportunity to participate in the settlement negotiations. The record also does not show that the service on the union gave notice that the settlement proposal had been executed by the other parties and that it was being filed with the judge for

approval. Under these circumstance, we shall remand this case to Judge Sparks for further proceedings in light of our recent decision in Mobil Oil Corp., 82 OSAHRC _____, 10 BNA OSHC 1905, 1982 CCH OSHD ¶ 26,187 (No. 77-4386, 1982). 2/

Accordingly, the judge's decision is vacated; the case is remanded for further proceedings. 3/

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: SEP 30 1982

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2/ Under Mobil, a union is entitled to be heard on its objections to a settlement agreement and to have the merits of its objections considered by the judge when determining whether the agreement should be approved as consistent with the requirements of Commission Rules 100(a) and (b), 29 C.F.R. § 2200.100(a) and (b). We note particulary the union's objections in this case that the settlement proposal lacks an express provision for quarterly progress reports and interim protective measures while feasible engineering controls are investigated and implemented, that interim and permanent measures should be undertaken in accordance with two of its agreements with GM, that painting employees should continue to be given blood tests for lead every six months, and that GM should "institute a better program to maintain and care [for] . . . [r]espirators in accordance with [29 C.F.R. §] 1910.134(f)."

3/ Chairman Rowland dissents from this order of remand. For the reasons stated in his dissenting opinion in Mobil, the Chairman believes that consideration of the settlement agreement should be limited to any objection a union may have to the reasonableness of an abatement period agreed to by the Secretary and an employer. Inasmuch as the union's objections do not pertain to the reasonableness of the abatement period in the settlement, a remand for consideration of the adequacy of the settlement is inappropriate. Chairman Rowland would therefore affirm the judge's disposition on this ground.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 400

ATLANTA, GEORGIA 30309

| | | |
|---|---|---|
| SECRETARY OR LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 78-2792 |
| | ) | |
| GENERAL MOTORS CORPORATION, TEREX DIVISION, | ) | |
| | ) | |
| Respondent, | ) | |
| | ) | |
| and | ) | |
| | ) | |
| UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 296, | ) | |
| | ) | |
| Authorized Employee Representative. | ) | |

## ORDER

The settlement agreement filed by the parties on November 30, 1978, and without objection from affected employees or their representative, is approved. Accordingly, the citation is amended as provided in the agreement, the proposed penalty of $240 is vacated, and the notice of contest withdrawn.

The abatement date is extended to end two years from the date this order becomes the final order of the Review Commission, unless extended by timely order of the Commission.

SO ORDERED.

Dated this 18th day of December, 1978.

Joe D. Sparks

JOE D. SPARKS
Judge

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

September 30, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Astra Pharmaceutical Products, Inc.

OSHRC DOCKET NO. 78-6247

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

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FOR EMPLOYEES

-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

OFFICE OF THE JUDGES'
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Rev. 10/1/76

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>ASTRA PHARMACEUTICAL PRODUCTS, INC.,<br><br>Respondent. | OSHRC Docket No. 78-6247 |

DECISION

Before: CLEARY and COTTINE, Commissioners. */

BY THE COMMISSION:

This case is before the Commission on remand from the court of appeals. The First Circuit affirmed the Commission's ruling that Astra Pharmaceutical Products, Inc. ("Astra"), committed a serious violation of the standard at 29 C.F.R. § 1910.132(a), but the court remanded the case "for a more particularized finding by the Commission to support its imposition of the $800 penalty." Astra Pharmaceutical Products, Inc. v. OSHRC, 681 F.2d 69, 74 (1st Cir., 1982).

The issuance of a citation in this case was prompted by an accident that occurred at Astra's Worcester, Massachusetts, plant. A 200-gallon reactor vessel used in the production of chloroacetyl xylidine overflowed, spraying toxic chemicals. Paul Sund, the operator of the reactor vessel, was sprayed by the chemicals and seriously injured. The only items of personal protective equipment required to be worn by Astra employees who were working in the area of

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*/ Chairman Rowland was not a member of the Commission when it issued its earlier decision concerning the merits of the alleged violation in this case. He, therefore, declines to participate now in determination of findings in support of a penalty predicated on that violation.

the reactor vessel were goggles, respirators, and gloves. Astra was found to have committed a serious violation of 29 C.F.R. § 1910.132(a) by failing to require such employees to use "full body protection," including boots, jackets, pants, and face shields constructed of materials impervious to the chemicals in the area.

An employer who commits a serious violation under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, must be assessed a civil penalty of up to $1,000. 29 U.S.C. § 666(b). In assessing civil penalties, the Commission is to give due consideration to "the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations." 29 U.S.C. § 666(i).

It is clear that the chemicals involved in Astra's production of chloroacetyl xylidine presented hazards of high gravity. 1/ Chloroacetyl chloride is a strong irritant to the skin, eyes, nose, and throat. If the concentration inhaled is sufficiently high, chloroacetyl chloride can cause a constriction of the throat and consequential cessation of breathing. Benzene, which can be inhaled as well as absorbed through the skin, can cause irritation, dermatitis, disorientation, and, with prolonged exposure, aplastic anemia and leukemia. Xylidine, which also can enter the body through inhalation or absorption, limits the oxygen-bearing capacity of the blood and can cause death even when absorbed only through the skin. Sodium carbonate monohydrate presents a lesser hazard, skin irritation. Three of Astra's employees operated the reactor vessels used

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1/ The process used by Astra to produce chloroacetyl xylidine is described in the prior decisions by the court of appeals and the Commission. Astra Pharmaceutical Prod., Inc. v. OSHRC, supra, affirming in part and remanding in part, 81 OSAHRC 79/D9, 9 BNA OSHC 2126, 1981 CCH OSHD ¶ 25,578 (No. 78-6247, 1981).

to produce chloroacetyl xylidine and were exposed to these chemicals. In addition, employees attempting to rescue an operator following an incident could be exposed to the same hazards.

The incident that Astra reported to OSHA and which led to the inspection in this case illustrates how serious that situation could be. A malfunction in a reactor vessel resulted in the employee on duty in the room, Sund, being covered from head to toe with toxic chemicals. That employee was seriously injured and hospitalized. Other employees who came to his aid were hospitalized for observation. Although the record does not reveal how seriously Sund was injured, see 681 F.2d at 73 n. 6, the potential for severe consequences is clear from the record as a whole. In conclusion, the gravity of the violation must be considered high.

As to the other elements relevant to penalty assessment, Astra did provide some protective equipment, and the compliance officer testified that Astra was very cooperative during his inspection. Thus, Astra demonstrated some good faith in this case. The Secretary introduced no evidence regarding Astra's size, or its history of previous violations, if any. Some penalty reduction is warranted in light of these factors.

In assessing penalties under the Act the Commission need not accord equal weight to the statutory factors discussed above. George J. Igel & Co., 6 BNA OSHC 1642, 1978 CCH OSHD ¶ 22,769 (No. 76-1087, 1978), citing Keyes Associates, 4 BNA OSHC 1794, 1976-77 CCH OSHD ¶ 21,180 (No. 13410, 1976). In our view, the high gravity of the violation, based on the probable severity of resulting injuries in the event of an incident, is the principal factor in determing the appropriate penalty in this case. See Ralston-Purina, 7 BNA OSHC 1302, 1979 CCH OSHD ¶ 23,507 (No. 76-2551, 1979). However, taking into account Respondent's partial abatement efforts, see Del-Cook Lumber, 6 BNA OSHC 1362, 1978 CCH OSHD ¶ 22,544 (No. 16093, 1978), and the lack of evidence regarding size and history, a

greater reduction from the statutory maximum of $1000 for a serious violation than was given by the Commission in its original penalty assessment is appropriate under the circumstances. In lieu of the $800 penalty previously assessed by the Commission, we assess a penalty of $500.

Accordingly, a penalty of $500 is assessed for Astra's serious violation of 29 C.F.R. § 1910.132(a).

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: SEP 30 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant<br>v.<br>ASTRA PHARMACEUTICAL PRODUCTS,<br>Respondent | OSHRC DOCKET NO. 78-6247 |

APPEARANCES:

Robert Yetman, Esq.,
Boston, Massachusetts
For Complainant

William LeDoux, Esq.,
Worcester, Massachusetts
For Respondent

DECISION

On November 7, 1978, an accidental overflow of the chemical ingredients used in the manufacture of xylocaine, an anesthetic drug, enveloped an employee of Astra Pharmaceutical Products (Astra) in its Worcester, Massachusetts, plant. Astra promptly reported this incident to the Occupational Safety and Health Administration (OSHA), the branch of the office of the Secretary of Labor responsible for the enforcement of the Occupational Safety and Health Act of 1970 (hereinafter call the Act), 29 U.S.C.A. §651 et seq., 84 Stat. 1590 et seq.

The next day, November 8, 1978, OSHA's Springfield, Massachusetts, Area Office dispatched an inspector, Michael F. Goyda, an industrial hygienist who testified at the hearing, to Worcester. When he arrived at about 11:00 a.m., he found that none of the equipment at the worksite was being operated so he never had an opportunity to observe the manufacturing process which is the subject of the citation that he recommended be issued.

The only other witness was Ronald S. Ratney, another industrial hygienist employed by the Secretary. His testimony was limited to the conclusions he reached based upon assumptions derived from discussions with Goyda and other similar sources. He has never been in Astra's plant at any time (Tr. 73, 94, 97).

The Respondent declined to offer any evidence.

The jurisdiction of Astra as an employer subject to the provision of the Act was conceded. Of the two citations issued after Goyda's inspection, Astra's notice of contest of Items 1, 2 and 4 of Citation No. 2 was withdrawn at trial so that they have become a final order by operation of law. Item 3 of Citation No. 2 having been withdrawn by the Secretary is vacated. Items 1, 2 and 3 of Citation No. 1 and the respective proposed penalties of $800 each were previously withdrawn by a pretrial motion by the Secretary. This leaves only Item 4 of Citation No. 1 in issue. It alleged:

> 29 CFR 1910.132(a): Protective equipment was not used where it was necessary by reason of hazards encountered in a manner capable of causing injury or impairment in the function of any part of the body:
>
> > ORGANIC SYNTHESIS BUILDING: RAW AREA--OPERATOR OF THE #1 REACTOR: THE FOLLOWING PERSONAL PROTECTIVE EQUIPMENT SHALL BE WORN:

A. FACE SHIELD.
B. GLOVES AND BOOTS IMPERVIOUS TO THE CHEMICALS BEING USED.
C. JACKET AND PANTS IMPERVIOUS TO THE CHEMICALS BEING USED.

Astra pleaded three affirmative defenses:

1. The event which led to the inspection was an isolated incident;

2. The standards are vague;

3. The Secretary failed to grant Astra its statutory right to "...be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any workplace... for the purpose of aiding such inspection."

The evidence revealed that the Secretary did in fact (in violation of §8(e) of the Act) exclude the employer from private conferences with Astra employees during the inspection which is clearly in violation of the Act. (See Tr. 46, 63.) The provisions of §8(e) state that "...the employer... shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection...are mandatory." See Chicago Bridge and Iron Co. v. Secretary of Labor, 535 F.2d 371, 375 (7th Cir. 1976).

The Secretary's assertion that there was no evidence that the Respondent was denied the right to participate in the inspection is grossly inaccurate. The Secretary's inspector deliberately denied the employer the right to be present while interviewing employee Dennis Liveris (Tr. 46, 60, 63). It logically follows that this denial of the Respondent's statutory rights would require vacation of the citation if it were not for the fact

that there is no proof of a violation in the record. For that reason none of the Respondent's affirmative defenses need be decided.

The only witnesses appearing for the Secretary were Goyda and Ronald F. Ratney. Goyda's knowledge of the facts was limited to what he was told the day after the incident. He did not, of his own knowledge, know what kind of protective clothing was usually worn by Astra's employees while operating the reactor. Ratney, although well qualified, intelligent and truthful, knew nothing of the facts. The Secretary failed to present any witness who could testify of his own knowledge of what, if any, protective equipment Astra's employees wore on the date of the incident or at any other time.

In the case at bar the Secretary was put on notice that there was a workplace subject to the Act where an employer might be allowing employees to handle chemicals without wearing protective clothing. The subsequent investigation performed by two highly qualified industrial hygienists was wasted because of the inadequacy of their training in law enforcement procedures and methods of investigation. As a result the benefit of their scientific knowledge was lost. They failed to find out what equipment, if any, was supplied to employees; when and under what circumstances they were told to use it; and, if told, whether this rule was enforced. This could have very easily been accomplished. The witnesses who could have supplied this information could have been found and presented, by subpoena if necessary. Instead all that was offered was the conclusions of Ratney based upon assumptions derived from speculation and hearsay he had gotten from Goyda restricted to one particular incident.

Goyda saw a respirator up on a desk but neglected to find out who it belonged to or what it was used for. The Secretary's only excuse was that an employee named Sund, who was the victim of the accident, was now incapable of appearing. Goyda could have gone back to the plant when it was in full operation and observe the procedures. He could have asked employees in the presence of the employer representative whether protective clothing was not only furnished but required to be used. If he suspected any reluctance of such employees to speak he would know (if adequately trained) that the Secretary has statutory authority under the provisions of §8(b) of the Act to require any material witness to submit to interrogation.

Goyda conceded that he had discussed the wearing of protective clothing with Astra's supervisor, Vince Mandella, and that he was told that protective equipment was worn whenever there was employee exposure (Tr. 56, 57). Whether, as may be inferred from other comments alleged to have been made by Mandella (who was not called as a witness), that employees may have removed the protective clothing during certain phases of the process, the admissions of Goyda that he was told that equipment was worn during exposure and his lack of personal knowledge of anything to the contrary leaves the Secretary without even a prima facie case of §132(a).

Hindsight should not be a criterion in the resolution of OSHA cases. Wisconsin Electric Power Company v. Secretary of Labor, 567 F.2d 735, 741 (7th Cir. 1977), but the isolated incident in which the employee Sund was injured on November 7, 1978, might have thrown some light upon the adequacy of employee protection if Goyda had sought more information about it. Other

employees who were present in the vicinity might have known what, if any, protective clothing Sund wore and what standard safety precautions were used normally. The failure of the Secretary to offer any of these employees as witnesses leaves the allegation that Astra did not require employees to use protective clothing when needed unsupported.

It is therefor hereby ordered that Item 4, Citation No. 1, alleging a violation of 29 CFR 1910.132(a) and the proposed penalty of $800 be vacated.

Ben D Worcester

BEN D. WORCESTER
Judge, OSHRC

Dated: July 31, 1979
Boston, Massachusetts

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

September 30, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

General Electric Company

OSHRC DOCKET NO. 79-504

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR EMPLOYEES

FOR THE COMMISSION

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RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Judge Foster Furcolo, OSHRC
John W. McCormack
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Room 420
Boston, MA 02109

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>GENERAL ELECTRIC CO.,<br><br>Respondent. | OSHRC Docket No. 79-504 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge Foster Furcolo is before the Commission for review pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). At issue before the judge was a citation that alleged a violation of section 5(a)(1) of the Act. 1/ The citation's description of the violation, as amended, was as follows:

> Employees were exposed to electrical hazards by failure to control employee movements in and around high voltage test equipment in the testing area ["Test Area"] with strict enforcement of recognized industry tagging and lockout procedures by:
>
> 1. The use of danger tags;
> 2. Proper instruction of lockout procedures;
> 3. Proper identification of incoming power disconnecting means, circuit breakers and control switches, so their purpose is evident; and
> 4. Proper lockout of power and control devices.

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1/ Section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1), provides that "[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

In his decision, Judge Purcolo concluded that Respondent, General Electric Co. ("G.E."), violated section 5(a)(1) of the Act by exposing its employees to the hazard of electrical shock due to its failure to control employee movements, to use red (danger) tags, to have proper lockout procedures and devices, to identify electrical devices so their purpose was evident, or to have an adequate safety program. Respondent sought review of this holding, and review was directed. For the reasons set forth in this decision, we agree with Judge Purcolo's conclusion that the Secretary established that G.E. violated section 5(a)(1). However, we affirm the citation on a more limited basis than that set forth by the judge.

I

A

At the cited worksite, a plant in Pittsfield, Massachusetts, G.E. manufactured large, high-voltage power distribution transformers, devices designed to increase or decrease the voltage of electrical power going through them. Each transformer weighed up to 500 tons. As part of the manufacturing operation, during each of the three work shifts, Test Operators in G.E.'s Product Test Unit conducted electrical tests on power transformers after they had been assembled. These tests were designed to assure compliance with transformer manufacturing industry standards and customer specifications. Transformers were assembled and tested in Building 100, a very large, high, rectangular structure that was comprised of the Test Area at one end and the Assembly Area at the other. These two areas were separated by a chain-link fence. The Test Area was open in the center but, along the outside edge of at least one side, above the first (ground) floor, it had two additional levels.

The Test Area's first floor consisted primarily of six high voltage test berths and two impulse test berths. At issue in this proceeding are the conditions relating to the use of five of the high voltage test berths. Each of these

berths was surrounded by a chain-link fence 8 feet in height having one pedestrian gate at the first floor level. The chain-link fence separating the Test Area from the Assembly Area constituted part of the outer perimeter of the test berths. The other three sides of the fence around each berth were movable to accommodate transformers of differing sizes. At the second level of each berth, another gate separated a room where electrical controls were located from a catwalk that provided access to the tops of the transformers.

G.E.'s power system was "remote" in that the primary sources of power for the berths were sets of motor generators that were located in another building, Building 100A, and the controls for that power were in Building 100A. The set voltage supplied by the generators to the test berths ranged from 24,000 volts at Berth #5 to 230,000 volts each at Berths #1 & #2. Auxiliary power was also generated and controlled in Building 100A, as was the third source of power, which energized the wire resistance bridge. Each source of power had its own controls. In Building 100A were located the circuit breakers of the generators and about 35 selector board switches that routed the power from the generators to the various berths. The only G.E. employees who had keys to Building 100A were Granville Kemp, who was the Manager of the Product Test Unit, the five Test Foremen, the electrical maintenance crew, and two specialists. The Test Foremen were the supervisors of the Test Area; the first and second shifts each had two Test Foremen, while the third shift had one.

When a transformer was assembled and ready to be tested, it was moved by a huge crane from the Assembly Area to the Test Area, where it was placed in one of the berths. High voltage Test Operators then prepared the transformer for testing while the berth was deenergized. According to Test Operator James Kennedy, before Test Operators took any steps to energize a berth, they made sure that everyone was out of the berth. Kemp, the Manager of the Product Test

Unit, similarly testified that Test Operators were responsible for inspecting the berths before the berths were energized to assure that no unauthorized personnel were in them.

These three steps had to be taken before a berth could be energized: completion of the safety circuit, movement of controls on the second level, and movement of controls in Building 100A. To complete the safety circuit, the Test Operator (1) made sure the fence sections were interlocked, (2) connected leads that were located on the sides of the fence, (3) plugged in the cord at the gate, and (4) closed and locked the gate with a padlock. The berth could not be energized unless the safety circuit was completed. Moreover, if the safety circuit was broken during a test, e.g., by unlocking and opening the gate, the berth was automatically de-energized. Once the safety circuit was completed (but before the berth was energized), the pairs of lights over the pedestrian gates at the first and second levels and on the fence sections at the opposite end of the berth enclosure came on as yellow. The yellow lights alerted employees that the system was ready for the application of power.

Once the Test Operator completed the safety circuit, he or she climbed the stairs to the second level. Tests were conducted from that level by operating the controls located on a console there. The next steps in energizing the berth were for the Test Operator to move a switch on the console (the power change/power lock switch) to the power change position and to call for power from the Test Foreman. To route power from the generator to the designated berth, the Test Foreman moved the appropriate switches in Building 100A. A display board on the console at the second level of the Test Area notified the Test Operator when this power had been directed to the berth. When the Test Operator moved the power change/power lock switch back into the power lock position, he or she gained sole control over the power in the berth. The Test Operator then moved

some switches and breakers, and the various lights around the berth turned red, thereby signalling that the berth was energized. Only after all of these steps had been completed could the necessary tests be performed.

B

Assemblers spent most of their working time in the Assembly Area, where they completed the assembly of transformers before that equipment was sent into the Test Area berths. After the transformers had been moved to Test Area berths, either prior to or as a result of tests conducted on them, certain parts of the transformer often needed adjustment or repair. Presumably upon the request of the Test Operator or Test Foreman, the Assembly Foreman gave certain assemblers such work assignments as assembling cooler equipment and doing external and internal repairs. Assignments were given "probably on a daily basis" for about 15% of the assembler's working hours per week. The assemblers usually worked in pairs in the Test Area and brought with them from the Assembly Area the tools, such as wrenches and power tools, that they used for repairs.

After receiving their assignment, the assemblers entered the Test Area by way of the first-floor gate to the fence separating the Assembly Area from the Test Area. The assemblers were then supposed to climb the stairway to the second level where they could contact the Test Foreman to obtain a pass. Under the provisions of G.E.'s Product Test Unit safety manual, all employees who did not regularly work in the Test Area, a category that included assemblers, were required to get a pass from the Test Foreman before they entered a test berth. Upon receiving a request for a pass, the Test Foreman filled in the blanks on the pass form, usually with either one or both of the assemblers' names, and gave them one copy of the pass, keeping the other copy in the pass book. The pass contained blanks in which to write, among other information, the name(s) of

the employee(s) to whom it was issued, the reason for the issuance, and the date and time during which the pass was valid. 2/

When assemblers followed prescribed procedures in obtaining a pass, the Test Foreman also pointed out to them the berth in which they were to work. The Test Foreman's direction was necessary because the only information that the assemblers usually had on their assigned transformer was the purchase order number. The assemblers did not know the number of the berth that the transformer was in. Even if they did know the berth number, they usually did not know where to go because the berths were not marked by number. In addition, before the assemblers entered a berth, the Test Foreman moved and tagged a few switches located on the first and second floors. The Test Foreman then hooked or tied the cable at either the first- or second-level gate to the berth so that it would not be plugged in and, with a padlock, locked the gate in the open position so that no circuit could be completed and the berth could not be energized. After the assemblers had completed their work or their shift, they were expected to go back up to the second level to return their copy of the pass to the Test Foreman.

Kemp testified that a copy of G.E.'s Power Transformer Product Test Safety Manual had been available in each test berth since 1976. On the fence near the

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2/ In addition, the pass stated that the undersigned Test Foreman certified that employees could proceed to work in safety because all power was off in the designated berth, all the safety gates were padlocked, and all incoming power breakers and switches were open and marked with red safety tags. Some of these precautions, however, were not in fact taken. Because G.E. had been using that same pass form since 1959, which was before Building 100 was constructed, some of the language on it applied only to the older facility, which had a different switching system than Building 100. According to Kemp, the pass, as it was used in Building 100, was intended to represent only the Test Foreman's permission to enter a designated berth and his assurance that the berth was safe, but Kemp admitted that the pass could mislead an employee to think that all of the specific instructions on it applied and were carried out. One assembler, Bernard Gregory, testified that he assumed that by signing the pass the Test Foreman certified that all of the precautions listed on the pass had been taken.

pedestrian gate at both the first and second levels of each berth was a sign reading: "NOTICE - NO ONE ALLOWED IN TEST AREA WITHOUT PERMISSION OF FOREMAN."

C

The testimony of several of G.E.'s assemblers established deficiencies in the nature and execution of G.E.'s pass procedure. When asked at the hearing if he got the permission of the Test Foreman before entering a test berth, Walter Milette responded, "Not necessarily the Test Foreman. We had a job assignment by the Tanking [Assembly Area] Foreman and this is an assignment by a Foreman that is supposed to know what he is doing." Milette further testified that he had not been issued a pass until about one week before the inspection. When asked if the Test Foreman stayed with him, Milette replied, "Periodically to check you out maybe, but he doesn't stay with you." Bernard Gregory testified that he had received passes at times from Kemp rather than from a Test Foreman. Gregory, as well as Stephen Volin, stated that there had been occasions when other employees who did not regularly work in the Test Area had entered through the open gate into the test berth in which the assemblers were already working without first obtaining a pass or having their names added to the assemblers' pass. Gregory stated his opinion that the Test Foreman probably would have assumed that all employees were out of the berth when a pass was returned even though some employees not specifically named on the pass could still be in the berth. Furthermore, Volin testified that, when he and his partner had requested entry, the Test Foreman had on occasions issued them a pass stating that it was for "Volin and company" and giving no other name. He added that a pass issued to "Volin and company" could cover as many as ten people. At the hearing, a pass was shown to Kemp that was completely filled out except that a question mark was in the space for the employees' names. The evidence described above establishes that G.E.'s pass system did not account for each assembler who entered a berth and that

passes were issued by at least one employee who, unlike the Test Foreman, played no part in energizing berths.

Unless the assemblers' job was one of very short duration, the Test Foreman usually did not stay with the assemblers while they worked in a berth, and the assemblers were not able to see the Test Foreman at all times while they were working in the berth. Moreover, when the assemblers performed internal repair work, they went inside the transformers where they were hidden from view. In response to a question as to how long he would stay inside a transformer, Milette testified that "I'd spend the whole night [shift] in there." The evidence also indicates that there was no physical obstruction to prevent an assembler from leaving an assigned berth and entering into any other berth if the gate to that berth were open. In addition, assemblers in one berth could have entered an adjacent berth without having to use the pedestrian gate, for they could have reached another berth by merely opening a section of the fence. One assembler testified that an employee could have crossed from one berth to the other without knowing it when some of the fence sections were not connected.

The record further shows that the assemblers as a group were generally unaware of the precautions that they themselves could take or that other employees were supposed to take and the safety rules that were established by G.E. in order to prevent their exposure to electrical shock. Specifically, the assemblers testified that, as of the time of the Secretary's inspection, they: (1) had not been formally told by management in writing or orally what procedures to follow in the Test Area (instead new employees learned what to do from more experienced workers); (2) had not received any information about the hazards facing assemblers in the Test Area in the Job Hazard Analysis Guide for their job; (3) had not seen G.E.'s Power Transformer Product Test Safety Manual; (4) did not know what some of the language on the pass referred to; (5) had not

received any information, orally or in writing, on the Test Area's circuitry and the location and function of the switches and breakers; and (6) did not know what the power, control, and fence voltages were in the various berths. Assemblers testified that they relied solely on the Test Foreman to assure that the berth was safe.

The testimony of the assembers indicates that they did not understand the hazards in the Test Area berths or the signals installed to alert them of the hazards. Both Gregory and Volin testified that, when they prepared to enter a berth after receiving a pass, they did not know for sure, but rather assumed, that power was out of the berth. Gregory also stated that, even if he had seen someone taking steps to "route the generators out of [the] berth," he would not have known what that person was doing. He indicated that, even if he had seen blinking lights or signals in the Test Area, he would not have known what they signified. Volin, who was a Safety Observer for the Assembly Division, testified that as far as the Test Area was concerned he had not reported any safety problems to anyone because he "wouldn't know what was right and what was wrong in there."

The Secretary's expert witnesses were critical of G.E.'s system of requiring assemblers to rely totally on the Test Foreman without being informed of hazards in the Test Area and means to prevent or avoid them. Bernard Battles, the compliance officer who inspected G.E.'s facility and was qualified as an expert, testified that in his experience supervising employees who worked in high voltage areas in both manufacturing and utility industries he could not recall a system requiring those employees to rely solely on their foreman's word that the area was deenergized before they began working there. When asked if G.E.'s procedures complied with the custom and practice of the utility industry, 3/ Wallace Edwards,

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3/ We recognize that the utility industry differs from the power transformer manufacturing industry in many respects. However, the two industries are similar in that both involve work that at certain times exposes some employees to high voltage electricity.

who had worked as a foreman supervising employees in high voltage areas during his 35 years at Western Massachusetts Electric, testified:

> Absolutely not. I was appalled at what I heard. I cannot believe bringing a human being into a room with the possibility of such voltage where they don't know a darn thing about what is possible . . . .
>
> I think that General Electric Company could do much more in educating these people who go in there who are not electrical trades people.

The testimony of the Secretary's experts as well as that of the assemblers noted above establishes that assemblers were not given training commensurate with the danger of exposure to high voltage electricity that was part of their duties.

II

G.E. argues on review that the judge erred in determining that the Secretary proved by a preponderance of the evidence that G.E.'s employees were exposed to the hazard of electric shock in the test berths because it did not control employee movements, use red (danger) tags, have proper lockout procedures and devices, identify electrical devices so their purpose was evident, or have an adequate safety program. G.E. contends that it need not take those actions because its safety system, including the interlocked safety circuit and the precautions taken by the Test Foreman and the Test Operator, had already eliminated the hazard. Indeed, G.E. asserts that there is no evidence in the record that its employees were or could be exposed to electricity, and therefore electrical shock, while in the Test Area berths. It therefore concludes that the asserted omissions specified by the judge are irrelevant and immaterial because there was no hazard.

G.E. also takes exception to the judge's finding and conclusion that the recognition element of the alleged violation was established because G.E.'s

supervisory personnel knew of "the hazardous conditions that existed." It reasons that its supervisors could not have known of a nonexistent hazard. According to G.E., "[w]here the Secretary relies on the employer's knowledge of a recognized hazard, the Secretary has the burden of demonstrating . . . that the existing safety precautions were unacceptable in a relevant industry," a burden which he did not meet in this case.

G.E. also contends that the Secretary failed to show, as required to establish a section 5(a)(1) violation, that his suggested means of abatement were feasible and that they would eliminate or materially reduce the alleged hazard. G.E. argues that it established that "considerable operating problems and expense would be encountered if locking and tagging were forced into the system where they are not necessary." G.E. further asserts that the Secretary "failed to prove that there is a recognized industry procedure by which to control employee movements as charged in the Complaint." G.E. supports its principal position that there was no hazard by asserting that the Secretary's evidence on abatement measures consists of "arbitrary" opinions from persons inexperienced in the transformer manufacturing industry that certain measures should be taken "in order to prevent hazards which already have been eliminated by a safety circuit system." Finally, G.E. notes that, where necessary and sensible in its view, it did control employee movement, use danger tags, use lockout devices, identify switches, and otherwise follow an adequate safety program.

III

In order to establish a section 5(a)(1) violation, the Secretary must prove that: (1) the cited employer failed to render its workplace free of a hazard; (2) the hazard was recognized either by the cited employer or generally within the employer's industry; (3) the hazard was causing or was likely to cause death or serious physical harm; and (4) there was a feasible means by which the employer could have eliminated or materially reduced the hazard. E.g., Little Beaver Creek

Ranches, Inc., 82 OSAHRC __, 10 BNA OSHC 1806, 1982 CCH OSHD ¶ 26,125 (No. 77-2096, 1982). We conclude that the Secretary sustained his burden of proving each of these elements, and we therefore affirm the Secretary's citation.

A

The hazard in this case is shock or electrocution due to accidental contact by an assembler with an energized transformer undergoing production testing. As evidenced by its pass system, warning lights, and the fences around the berths, as well as the other precautions it has taken, G.E. itself recognized this hazard. Indeed, G.E. in effect conceded this when it made the following statement in its post-hearing brief, which it reiterated before the Commission on review:

> General Electric has recognized that unless properly handled and controlled serious injury or death can result from high voltage electricity. As a consequence it designed, built and operated its Transformer Test facilities with the safety of employees and others of paramount concern.

We reject G.E.'s contention that the Secretary's evidence is deficient because he failed to establish that there was a recognized industry procedure for controlling employee movement. The recognition element of a section 5(a)(1) violation refers to knowledge of a hazard and not recognition of the means of abatement. Kansas City Power & Light Co., 82 OSAHRC __, 10 BNA OSHC 1417, 1982 CCH OSHD ¶ 25,957 (No. 76-5255, 1982). We also reject G.E.'s arguments that (1) the Secretary had the burden of proving that its safety precautions were unacceptable in its industry and (2) the precautions it took rendered its workplace safer than the workplaces of others in the transformer manufacturing industry. Required abatement is determined by feasibility and an abatement order may prescribe practices of a higher standard than those an industry presently considers to be reasonable. Id. We conclude that the Secretary has met his burden of establishing the recognition element of the alleged violation.

B

G.E.'s principal argument on review is that it has satisfied its duty to "free" its workplace of the recognized hazard. G.E.'s use of the interlocking safety circuit and its system of warning lights substantially reduced the danger of an assembler entering a berth after it had been energized. Similarly, the procedures involving completion of the safety circuit, movement of controls in Building 100A, and movement of controls on the second level console reduced the possibility that a berth could be inadvertently energized.

Nevertheless, we do not agree with Respondent that its workplace was free of the hazard of shock or electrocution due to accidental contact by an assembler with an energized transformer undergoing production testing. Assemblers were exposed to this hazard if their presence inside a berth was not detected by the Test Operator or Test Foreman prior to energization of the berth. 4/ For example, an assembler working inside a transformer or behind some obstacle could have been overlooked by a Test Operator during the visual inspection of the berth in preparation for energizing it. In addition, a Test Operator could fail to detect an assembler inside a transformer if the Test Operator failed to conduct a thorough inspection. Such an oversight by the Test Operator would not have been remedied by the Test Foreman if the latter had no pass on file indicating that an assembler was still in the berth. Indeed, the record establishes that

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4/ G.E.'s safety circuit would provide no protection to an assembler who entered a berth before the safety circuit was completed and who remained in the berth when it was energized. Similarly, G.E.'s multi-step procedure for energizing a berth, while effective in preventing inadvertent energization of the berth, would provide no protection to an assembler if a Test Operator intentionally energized the berth without knowing the assembler was in it. To eliminate the risk of an assembler being present inside a berth without the knowledge of the Test Operator and the Test Foreman at the time the berth is energized, it was necessary for Respondent to enforce an effective pass system and to train assemblers in proper Test Area procedures and safety precautions. This it did not do, as discussed <u>infra</u>.

it was not uncommon for an employee to be inside a berth without the knowledge of the Test Foreman, in part because of the Test Foreman's failure to issue a pass to each assembler who entered a berth and his failure to list the name of each assembler who entered a berth under a group pass. Furthermore, the evidence establishes that assemblers did not always get a pass for each berth they entered, assemblers sometimes went into the Test Area without getting any pass at all, and passes could have been returned to the Test Foreman before all of the assemblers were out of the berth. G.E.'s pass system therefore did not render the test berths free of the hazard.

Neither did other aspects of G.E.'s safety program, especially given the fact that the assemblers did not work with electricity or understand its properties. G.E. did not formally communicate the applicable contents of its Test Area safety manual to the assemblers and did not uniformly enforce those rules. Moreover, assemblers were not instructed as to the purpose and design of the safety precautions for the test berths or what steps they themselves could take to prevent exposure to the recognized hazard. 5/ As a result, assemblers were generally unaware of proper procedures in the Test Area and the precautions that could be taken to prevent injury. We therefore conclude that the absence of adequate safety training increased the possibility that an assembler would enter a berth before it was energized without the knowledge of the Test Foreman or the Test Operator, thereby increasing the risk that the assembler would be injured when the Test Operator subsequently energized the berth.

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5/ In Little Beaver Creek Ranches, Inc., 82 OSAHRC ____, 10 BNA OSHC 1806, 1982 CCH OSHD ¶ 26,125 (No. 77-2096, 1982), the Commission recently reiterated its observation that safety rules are more likely to be followed if their rationale is explained and understood. This case is distinguishable from cases such as Jones & Laughlin Steel Corp., 82 OSAHRC 34/A2, 10 BNA OSHC 1778, 1982 CCH OSHD ¶ 26,128 (No. 76-2636, 1982), in which employees knowingly violated company safety rules on crane boarding solely for convenience.

The fact that no one has yet been electrocuted is not proof that G.E.'s safety program was adequate. In the first place, "[t]he keystone of the Act. . . is preventability." Brennan v. OSHRC (Underhill Construction Corporation), 513 F.2d 1032, 1039 (2d Cir. 1975). Inasmuch as "[o]ne purpose of the Act is to prevent the first accident," actual death or injury is not a prerequisite to establishing a violation. Lee Way Motor Freight Inc. v. Secretary of Labor, 511 F.2d 864, 870 (10th Cir. 1975); Brennan v. Butler Lime and Cement Co., 520 F.2d 1011 (7th Cir. 1975). Secondly, an employer may not shift responsibility for employee safety and health onto its employees by undue reliance on employee skill, intelligence, prudence, and the like. An employer's duty to do all it feasibly can to prevent or substantially reduce hazards includes the duty to anticipate and guard against that employee error and misconduct which falls short of the bizarre and uncontrollable. See General Dynamics Corp., Quincy Shipbuilding Div. v. OSHRC, 599 F.2d 453 (1st Cir. 1979); National Realty and Construction Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1974); see also Booneville Division of Ethan Allen, Inc., 78 OSAHRC 105/B4, 6 BNA OSHC 2169, 1979 CCH OSHD ¶ 23,219 (No. 76-2419, 1978). A pass system which is so lax that it ultimately depends on visual inspection by the supervisor for discovery of employees exposed to electrocution hazards does not adequately protect against human error.

C

It is undisputed that the recognized hazard of shock or electrocution from contact with an energized transformer is a hazard that is likely to cause serious physical harm or death. Therefore, the only remaining issue to be determined is whether the Secretary established the feasibility and likely utility of the abatement measures he proposed.

We conclude that inclusion of the name of each assembler who enters a berth on an individual or group pass, uniform enforcement and effective communication

of G.E.'s written rules regarding pass procedures, and improvement in safety training for assemblers were all proven to be feasible and useful measures that would eliminate or materially reduce the hazard in G.E.'s test berths. Accordingly, the Secretary has also established this final element of the alleged violation. 6/

IV

Accordingly, we affirm Judge Furcolo's conclusion that G.E. violated section 5(a)(1) of the Act. Having considered the factors set forth in section 12(j) of the Act, 29 U.S.C. § 666(i), and particularly the good faith shown by G.E. in taking extensive precautions in an attempt to eliminate the hazard, we assess a nominal penalty of $1.

IT IS SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: SEP 30 1982

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6/ In addition to the methods that we have determined to be feasible, other abatement measures were suggested by the Secretary, i.e., using danger tags on switches, identifying switches so that their purpose is evident, locking switches, and permitting each assembler to use his or her own lock on the berth gate. While we do not rule on the feasibility of these measures, we note that G.E. must free its workplace of the hazard by any feasible means. Accordingly, G.E. must select and implement a combination of measures that will reduce the recognized hazard to the extent feasible. See Kelly Springfield Tire Co., OSHRC Docket No. 78-4555 (August 27, 1982).

ROWLAND, Chairman, dissenting:

I disagree with the majority's conclusion that G.E. failed to keep its workplace free from the recognized hazard of electrocution due to accidental contact by an assembler with an energized transformer during production testing. 1/ As the majority correctly observes, the safety circuit and warning lights installed by G.E. made it unlikely that an assembler would enter an energized berth, and these measures together with the sequence of steps required to energize a berth were sufficient to protect an employee against inadvertent reenergization of a berth which had been deenergized. The majority errs, however, in its further conclusion that assemblers were nevertheless exposed to the hazard because the measures required to reenergize a berth might be initiated while assemblers remained within the berth.

The majority's view is based on supposed deficiencies in G.E.'s system for insuring that all employees have left a berth before it is reenergized. As the majority indicates, G.E. required that test operators visually inspect each berth prior to initiating the reenergization procedure and also had a pass system by which the test foreman would be aware of the presence of assemblers in a berth. The majority claims, however, that a test operator might conduct his inspection of a berth in a careless manner or otherwise might overlook an employee. As to the pass procedures, the majority apparently concedes that power would not be restored

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1/ I conclude that this formulation of the recognized hazard gives G.E. sufficient notice of its obligations consistent with my dissenting opinion in Kansas City Power & Light Co., 82 OSHRC 13/A2, 10 BNA OSHC 1417, 1982 CCH OSHD ¶ 25,957 (No. 76-5255, 1982). Accordingly, I need not now consider whether, as the majority states, a recognized hazard cannot be defined in terms of specific abatement methods. Similarly, in view of my disposition in this case, I express no opinion on whether under 29 U.S.C. § 654(a)(1) the Commission can require an employer to institute practices other than those presently understood as reasonable in the employer's industry.

to a barth until an outstanding pass had been returned to the test foreman but finds this assurance inadequate for the reasons that a separate pass was not issued to each individual employee and, in some instances, assemblers entered a barth for which no pass had been issued. The evidence does not support the majority's conclusions.

In describing the visual inspection of the test barth, Kemp, the test unit manager, stated that the test operator has the responsibility to "assure" himself that the test barth is clear prior to initiating reenergization. Test operator Kennedy, who testified as to the manner in which he discharges this responsibility, expressly stated that the inspection he performed was sufficient to insure that no one remained in the barth. In his words, "[i]f we have to walk around the tank or stand on top and walk around the tank, we do it and then we close the gates and then we apply power. First and foremost, we make sure that everyone is out of the area." There is absolutely no testimony to the contrary by any witness that a test operator's inspection of a barth prior to reenergization is not sufficiently thorough, nor is there any evidence that any employee had ever been undetected by a test operator during his inspection. Accordingly, the majority's conclusion that this visual inspection might be inadequate or performed improperly is nothing more than sheer speculation, unsupported by and indeed contrary to the evidence of record.

The same is true of the majority's determination that due to inadequacies in G.E.'s pass system the test foreman might not be aware of the presence of assemblers in a test barth. With the exception of instances in which assemblers are actually escorted and accompanied by either the test operator or test foreman, 2/ all of

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2/ The testimony of Milette to which the majority refers does not establish that the test operator or foreman was unaware of his presence in the barth. In any event, as noted in the text of my opinion there is no evidence that a barth had ever been reenergized while an employee remained in it.

the employees testified either that they would obtain a pass before entering a specific berth or would enter without a pass only to assist other assemblers who had obtained a pass for that berth. 3/ Clearly, while the test foreman might not know the number and identity of all employees who are in a berth at any given time, he would be aware from the fact that a pass had been issued to a least some employees that work was being performed in the berth.

It is of course true as the majority states that the reenergization process can commence once all outstanding passes are returned to the test foreman. However, the record does not support the majority's supposition that passes might be returned before all employees have left the berth. The testimony of the employees indicates that passes are customarily issued to assemblers as opposed to other categories of employees who may have occasion to enter a berth to assist assemblers, and Gregory, who had 11 years experience working in the test building, stated that assemblers normally would be the last employees to leave the berth. 4/ Furthermore, there is no evidence of any instance in which the employees holding a pass had not been the last to leave a berth and, finally, no evidence that at any time a berth had been reenergized before all employees had left. Accordingly, the record fails to support the majority's conclusion that G.E.'s pass system exposed assemblers to the hazard of accidental contact with energized transformers during testing.

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3/ The majority refers to a possibility that an assembler assigned to work in a particular berth could without the knowledge or authorization of a supervisor enter another berth in which he had no assigned duties. The record, however, fails to show that any employee had ever done so, nor is there any evidence from which one can conclude that the employer could reasonably be expected to anticipate such action by an employee. Indeed, at the majority itself indicates, the work is always assigned by the test foreman to a specific berth. Assembler Gregory stated that it is never necessary for non-test personnel to go into more than one berth at a given time and that he had never seen anyone go into a berth without proper authorization.

4/ Gregory mentioned crane operators and oilers as individuals who would on occasion assist him in his work.

Finally, the majority errs in its conclusion that apprising assemblers of the applicable contents of the test area safety manual and instructing them in the purpose and design of the safety precautions including the circuitry and switches would have materially reduced the exposure of assemblers to the hazard in question. On the contrary, the record including the testimony of the assemblers themselves amply demonstrates that they were sufficiently trained for the performance of their duties.

Other than its generalization that employees should be advised of the "rationale" underlying safety rules the majority does not specify what particular information should have been communicated to assemblers, nor does the majority explain how instructions in the "purpose and design" of the safety precautions would eliminate the hazard the majority finds in this case, that is, the possibility of an assembler entering or remaining in a berth without the knowledge of the test operator or test foreman. In any event, the record demonstrates that assemblers are fully aware of the importance of insuring that their presence in a test berth is known to the test operator or test foreman. Gregory, in describing the pass system, characterized it as affording security for an assembler to enter by providing assurance that the berth had been cleared. Similar testimony was given by Volin, who stated that based on the issuance of a pass he would assume that the foreman had taken responsibility for his safety while in the berth. Both Volin and Jordon further stated that the performance of their duties as assemblers did not require that they be familiar with the test area circuitry, and Gregory testifed that any explanation or demonstration of the deenergization procedures prescribed in the safety manual would not be meaningful to him. This employee testimony is consistent with the opinion expressed by Kemp. In testifying that assemblers did not need to be aware of the contents of the test area safety manual or of the location of breakers, disconnect switches and tags, Kemp described the philosophy of G.E.'s system:

> I think [assemblers] need to be provided an area to work in that is totally safe and they need to have that provided for them by someone who is knowlegeable and responsible. The system was desinged around that and we selected a Test Foreman, who had certain chores to do such as moving power from the test berth, which he normally does, and who is knowledgeable enough to know whether that has been accomplished and which gates to lock and which leads to intertwine and which switches to red tag. That is the reason it is written the way it is.

Although the majority notes the Secretary introduced testimony contrary to Kemp's opinion, that testimony is not persuasive. As the majority itself concedes, the Secretary's witness Edwards was limited in his experience to a substantially different industry from that at issue in this case. While witness Battles did have extensive experience with manufacturing facilities, his testimony demonstrates that he specialized in in-plant power distribution systems for plant operations. Kemp testified without rebuttal that G.E.'s test facility is distinguishable from such distribution systems because its function is to supply current on an intermittent as opposed to continuous basis. In view of Kemp's extensive experience and the fact that his testimony is consistent with that of the employees themselves, his opinion is reasonable and entitled to weight. Kelly Springfield Tire Co., OSHRC Docket No. 79-4555 (Aug. 27, 1982)(dissenting opinion); H.E. Wiese, Inc., 82 OSAHRC 18/A2, 10 BNA OSHC 1499, 1511, 1982 CCH OSHD ¶ 25,985 at 32,619 (No. 78-204, 1982) (dissenting opinion).

Based on this evidence, the majority clearly errs in concluding that G.E.'s employees were not sufficiently aware of the established safety procedures and in assuming that the employees could not be expected to comply with those procedures without additional instructions. 5/ See Little Beaver Creek Ranches, 82

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5/ The majority claims that G.E. did not "uniformly enforce" the rules set forth in the test area safety manual but does not specify on what basis it reaches this conclusion. Kemp testified without rebuttal that G.E. maintains a program for disciplining employees who violate its safety rules, and the Secretary presented no evidence to show that this program was not adequately implemented.

(Continued)

OSAHRC 36/A2, 10 BNA OSHC 1806, 1982 CCH OSHD ¶ 26,125 (No. 77-2096, 1982) (dissenting opinion). As the Commission recently held in Jones & Laughlin Steel Steel Corp., 82 OSAHRC 34/A2, 10 BNA OSHC 1778, 1982 CCH OSHD ¶ 26,128 (No. 76-2636, 1982), additional distribution of safety rules and formal discussion of such rules is not necessary when employees indicate that they are familiar with the basic elements of the rule and show appreciation of the hazards to which the rules are directed.

I therefore would vacate the citation for failure of the Secretary to show that G.E.'s worksite was not free form the recognized hazard.

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5/ (Continued)

In any event, as explained in the text of my opinion, the existence of G.E.'s pass system, together with its requirement that berths be inspected prior to reenergization, has been sufficient to protect assemblers from the hazard at issue. Accordingly, G.E. would not have been on notice of a need to take further steps to implement its safety rules. For this reason, I do not at this time consider whether an employer may properly be required to enforce workrules which have been communicated to employees. See Jones & Laughlin Steel Corp., 82 OSAHRC 34/A2, 10 BNA OSHC 1778, 1782-83 & n.9, 1982 CCH OSHD ¶ 26,128 at 32,887-88 & n.9 (No. 76-2636, 1982).

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant<br>v.<br>GENERAL ELECTRIC COMPANY,<br>Respondent | OSHRC DOCKET NO. 79-504 |

APPEARANCES:

Johanna Harris, Atty.,
Boston, Massachusetts
For Complainant

Edward L. Dobbins, Esq.,
Pittsfield, Massachusetts
For Respondent

DECISION

Furcolo, J.:

This case arose under 29 USC §651 et seq., of the Occupational Safety and Health Act of 1970 (the Act). As a result of an inspection by the Occupational Safety and Health Administration (OSHA) of the Respondent's premises on or about December 11-18, 1978, Citation No. 1 was issued on or about January 5, 1979, charging that the Respondent violated §5(a)(1) of the Act by failing to furnish a place of employment free from recognized hazards. As amended, the Complaint alleged that employees were exposed to electrical

hazards by failure to control employee movements in and around high voltage test equipment in the testing area with strict enforcement of recognized industry tagging and lockout procedures by:

1. the use of danger tags;
2. proper instruction of lockout procedures;
3. proper identification of (electrical devices) so their purpose is evident; and
4. proper lockout of power and control devices (see Complaint and Tr. 239, 240).

On or about January 25, 1979, the Respondent filed Notice of Contest to the citation and the penalty proposed therefor.

The pertinent sections of the Act are appended to this decision.

PRELIMINARY

The worksite is a huge building housing very large transformers that are moved by giant cranes from the "Assembly Area" to the "Test Area". There are several "berths" for the generators which vary in size and have voltages running from 24,000 to 230,000. These berths are usually enclosed by movable chain link fences...Tr. 178, 183, 220-221, 254.

The Test Area is under the supervision of a Test Foreman; and no one is supposed to enter it without his knowledge and authorization. Test Area personnel who work in it daily enter routinely without any formal authorization but other employees--such as assemblers, crane operators, hitchers, and oilers--who do not enter daily but only occasionally, are supposed to obtain a "pass" signed by the Test Area foreman before entering and to return it

when leaving.

The hazard was severe injury or death caused by electrical shock.

## ISSUES

The Complainant contended that those employees who entered the Test Area only occasionally were exposed to the hazard of electric shock because the Respondent failed to:

1. follow adequate safety procedures in the use of the "pass" that authorized admission to the Test Area;
2. identify electrical equipment by "danger tags";
3. properly instruct employees in lockout procedures;
4. properly identify various power circuits, switches, and electrical equipment;
5. have an adequate safety training program; and
6. have lockable equipment wherever needed.

The Respondent contended that its procedures and safety program were adequate; and that no employee was exposed to any hazard if its safety system were followed.

## EVIDENCE

Evidence favorable to the Complainant's contentions tended to establish that the various berths differed in size from day to day and were not identified by other than the oral directions of the Test Area foreman or other employees...Tr. 17-19, 227-229; that employees did not know the location of power turn-offs, how generators were routed, and what metal objects were un-

grounded...Tr. 34, 41, 43, Ex. C-9 - 18; that there were no red (danger) tags or tagging of any kind on power turn-offs, disconnects, switches, or breakers ...Tr. 27-29, 42-48, 106-107, 117, 124-126, 146, 227-229, 247-253, Ex. C-9 - 13, 15; that management gave employees no oral or written instructions, or explanation of the hazards, or training in procedures to be followed to avoid the hazardous conditions...Tr. 26, 41-44, 51-53, 108, 131; that red tag and lockout procedures spelled out in the Respondent's Safety Manual were not followed...Tr. 50, 128, Ex. C-4; that employees enter the Test Area without a pass or authorization or knowledge of the foreman...Tr. 20, 25, 59, 58, 79, 121-124, 133, 144; that the Respondent's clearance procedure for employees entering the Test Area was never followed...Tr. 81-85, Ex. C-6; that all safety gates were not locked as they were supposed to be...Tr. 30; that there were several master keys for the padlocked gate...Tr. 173-177; that employees had been refused a key after a gate was locked...Tr. 34, 145; and that various switches were not lockable...Tr. 234-243, Ex. C-9, 17, 18.

Evidence favorable to the Respondent's contentions tended to establish that floor level and auxiliary power panel switches were red-tagged...Tr. 333, 337; that foremen were in the Test Area 85% of the time...Tr. 366; that each test berth had a safety manual available to employees...Tr. 323, 378, Ex. C-18, R-1; that reliance on the safety circuit and the Test Area foreman was the best safety measure...Tr. 324-329, 340; that switches that route power to various test berths were marked...Tr. 172, 173; that a system of yellow and red lights sufficiently alerted employees to the possible hazard of electricity...Tr. 96-99; and that there is no ANSI consensus standard con-

cerning tagout and lockout practices...Tr. 515.

On the question of industry practice, evidence that favored the Complainant's position tended to establish that it was not accepted industry practice to fail to identify switches in high voltage areas; or to have an undetermined number of keys available for locked gates and switches; or to fail to use warning tags; or to rely solely on the foreman's word that power is out...Tr. 307-312.

Evidence that favored the Respondent's position tended to establish that there are no standards or guidelines for the kind of electric system here; that there is no ANSI consensus standard for tagout and lockout practices; and that the Respondent's procedure is safer than that of any competitor... Tr. 391-393, 417, 418, 515.

DISCUSSION

Most of the testimony of the Complainant's witnesses was not contradicted in any way. In addition, supervisory personnel of the Respondent testified that there should have been a red tag on a power change/power lock switch... Tr. 345; the pass said power breakers were red tagged but some were not...Tr. 171; switches that routed the generators were not tagged...Tr. 171; the main power disconnect switch at the console was not red tagged...Tr. 165; some switches were identified in a way that even an electrical engineer could not understand without first consulting the Respondent...Tr. 172, 173; test foremen were out of the Test Area 15% of the time...Tr. 366; several keys for the padlock were held by maintenance men and supervisors...Tr. 173-177; the equipment shown in Exhibit C-9 - 12 was never red tagged...Tr. 373, 374; the Safety

Manual (Ex. R-1) was not communicated to the assemblers...Tr. 339, 340, 381, 382; and explaining the electrical system to employees would have increased safety...Tr. 398.

That testimony from the Respondent's chief witnesses tended to corroborate the Complainant's contentions.

There was also no evidence introduced by the Respondent to contradict the Compliance Officer's testimony that the National Electrical Code clearly indicates that every switch, feeder, and branch circuit device should be clearly marked so its purpose is evident...Tr. 233.

"RECOGNIZED HAZARD"

As far as industry practice is concerned: in my opinion, three or four companies do not constitute an "industry" as that term is used in occupational safety and health cases. Moreover, to be a "recognized hazard" (under §5(a)(1) of the Act) a condition must be acknowledged as such by a substantial portion of commercial enterprises engaged in the same kind of business or operation within a particular industry. Here, the Respondent apparently has only two or three competitors and there is no uniformity of procedures or practices...Tr. 349, 417, 418, 515.

I find that the evidence does not establish a "hazard recognized in the industry".

However, the evidence does establish that a reasonable person familiar with the business of manufacturing and electrical testing of power transformers would have recognized the hazard of exposing employees to the possibility of

electric shock through failure to follow clearance procedures, to control employee movements, to use danger tags, to identify electrical devices so their purpose is evident, to have lockable devices and proper instructions in lockout procedures, and to have an adequate safety program for personnel not familiar with the electrical system. The Respondent's supervisory personnel had knowledge of the hazardous conditions that existed. Its foremen, Unit Manager, Manager of Plant Engineering, and the Manager of Industrial Hygiene and Safety in the Large Transformer Business Division (among other supervisory personnel) all were familiar with the area, the conditions, and the practices of personnel. The Respondent knew, or should have known, of the hazardous conditions. That is sufficient to establish a "recognized hazard". [See Brennan v. OSHRC and Vy Lactos, 494 F(2) 460 and Marshall v. L.E. Myers, 589 F (2) 270.]

Assuming that the Respondent's practices or procedures are safer than those followed by its competitors (Tr. 417): while that is commendable, it does not estaglish that they are proper or safe. The same applies to the Respondent's excellent record concerning injuries.

FEASIBILITY

The hazardous conditions could be easily and economically corrected by establishing and enforcing clearance procedures, identifying and tagging electrical devices, and following an adequate safety program. In fact, most of those steps have already been taken by the Respondent.

## FINDINGS OF FACT

Having heard the testimony, observed the witnesses, and examined the exhibits, the following Findings of Fact are made:

1. At all times concerned, the Respondent regularly received, handled or worked with goods which had moved across state lines;
2. Many of the Respondent's employees were exposed to the hazard of sustaining serious or fatal harm due to electric shock because of the Respondent's failure to control employee movements, or to use danger tags, or to have proper lockout procedures, or to identify electrical devices so their purpose is evident, or to have proper lockout devices, or to have an adequate safety program; and
3. One or more officers or supervisory personnel of the Respondent knew of the hazardous conditions described herein and knew that employees were exposed to such hazards.

## CONCLUSIONS OF LAW

1. At all times concerned, the Respondent was an employer engaged in a business affecting commerce within the meaning of the Act; and that the Occupational Safety and Health Review Commission has jurisdiction over the subject matter and the parties;
2. At all times concerned, the Respondent knew, or with the exercise of due diligence should have known, of the alleged violations;
3. The Complainant has sustained the burden of proving the Respondent violated §5(a)(1) of the Act (§654).

ORDER

The whole record having been considered, and due consideration having been given to 29 U.S.C. §666(j), Citation No. 1 is affirmed and a penalty of $100 is assessed therefor.

So ordered.

Foster Furcolo

FOSTER FURCOLO
Judge, OSHRC

Dated: September 17, 1979
Boston, Massachusetts

## APPENDIX

| | |
|---|---|
| Section 654 | [§5(a)(1)] Employer "...shall furnish...a place of employment...free from recognized hazards...likely to cause death or serious physical harm to his employees; ..." |
| Section 666 | [§17(b)] "...employer who has received a citation for a serious violation...of this Act...shall be assessed a civil penalty of up to $1,000 for each such violation." |
| Section 666 | [§17(j)] "...assess all civil penalties...giving due consideration to...the size of the business... gravity of the violation, the good faith of the employer, and the history of previous violations." |
| Section 666 | [§17(k)] "...a serious violation shall be deemed to exist...if there is a substantial probability that death or serious physical harm could result... unless the employer did not, and could not...know of the presence of the violation." |

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

September 30, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Davis McKee, Inc.

OSHRC DOCKET NO. 79-2698

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

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FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, Complainant, | : | |
| v. | : | OSHRC Docket No. 79-2698 |
| DAVIS-McKEE, INC., Respondent. | : | |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

The Secretary of Labor ("the Secretary") issued to Respondent, Davis-McKee, Inc. ("Davis-McKee"), a citation alleging that Davis-McKee willfully violated the trenching standard at 29 C.F.R. § 1926.652(c). 1/ Administrative Law Judge Cecil L. Cutler, Jr., vacated the citation, and the Secretary petitioned for review of the judge's decision. Commissioner Cottine granted the Secretary's petition under section 12(j) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). We reverse Judge Cutler and affirm the

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1/ The standard provides:

§ 1926.652 Specific trenching requirements.

* * *

(c) Sides of trenches in hard or compact soil, including embankments, shall be shored or otherwise supported when the trench is more than 5 feet in depth and 8 feet or more in length. In lieu of shoring, the sides of the trench above the 5-foot level may be sloped to preclude collapse, but shall not be steeper than a 1-foot rise to each ½-foot horizontal. When the outside diameter of a pipe is greater than 6 feet, a bench of 4-foot minimum shall be provided at the toe of the sloped portion.

citation as a serious violation of the cited standard. We assess a penalty of $500. 2/

I.

Davis-McKee, a subcontractor, was repairing a sewer line in connection with the erection of a convention center in Columbus, Ohio, when compliance officer Charles Perry arrived at the worksite. Perry observed two of Davis-McKee's employees operating an earth compactor in a trench. The trench was quite long and turned in two locations. In the southeast portion of the trench, where Perry observed the employees operating the earth compactor, he measured the trench to be 17 feet, 6 inches deep, and, at the top, 15 feet, 11 inches wide. Perry estimated the width at the bottom as 7 feet.

Perry testified that the type of soil in the trench was hard and compact and that the trench was not shored or otherwise supported or adequately sloped. In his opinion, employees were subject to being "crushed or killed" if a cave-in occurred.

Robert Wilson, Davis-McKee's operations manager, testified that the trench was sloped in accordance with the standard except for an area on one side where a concrete caisson was embedded. The caisson was part of the foundation of the convention center. According to Wilson, the caisson was 10 feet in diameter and was embedded 30 feet into the ground. Wilson testified that the length of wall at the bottom of the trench that was "taken up" by the caisson was 6 to 8 feet.

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2/ In a letter filed in lieu of a brief after review was directed, the Secretary asked that the violation be affirmed as serious and refrained from pursuing his earlier contention that the violation was willful. Therefore, we do not address whether the violation was willful.

A sketch of the trench was prepared by an employee of the general contractor after Perry left the worksite on the first day of the inspection. 3/ Using the measurements shown on this sketch, an engineer prepared for Davis-McKee cross-section diagrams of various segments of the trench, drawn to scale, which Davis-McKee introduced into evidence. One cross-section diagram, labeled exhibit R-4, depicts a section of the trench next to the caisson and shows the trench wall across from the caisson as having a constant slope of 2.3 vertical feet to 1 foot horizontal. 4/ The trench wall located next to the caisson is depicted as having a steep slope, approximately 7½ vertical feet to 1 foot horizontal. Exhibit R-4 also shows the caisson as tangent to or abutting the trench wall only at the top of the trench. The exhibit thus shows a triangular wedge of soil, which widens as the trench depth increases, between the caisson and the trench wall. Wilson testified that exhibit R-4 accurately depicted the trench in the area of the caisson.

Davis-McKee also introduced into evidence two photographs of the trench taken on the day of the inspection. These photographs show rebars protruding from the ground above the caisson. The trench walls are shown in these photographs to consist almost entirely of soil; only a minimal amount of concrete is shown as constituting part of the trench wall next to the caisson.

II.

In his decision, Judge Cutler concluded that the trench wall opposite the caisson in the area where the two employees were working was sloped to a greater degree than required by 29 C.F.R. § 1926.652(c). While the judge found that the

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3/ This sketch was introduced into evidence by the Secretary. Compliance officer Perry, however, stated that some of the measurements shown on the sketch did not agree with the measurements he made.

4/ The slope is labeled as 2.3 to 1 on the diagram. Approximately the same slope also can be derived by measuring the slope depicted in the exhibit.

trench wall near the caisson could not be sloped to any significant extent, he concluded that the caisson, in effect, provided shoring or bracing sufficient to prevent collapse or cave-in of that side of the trench. The judge therefore concluded that Davis-McKee had not violated section 1926.652(c).

III.

The Secretary takes exception to the judge's conclusions that a concrete caisson formed part of the facing of the trench and that the caisson provided, in effect, sufficient shoring or bracing to prevent the trench's collapse or cave-in. The Secretary also asserts that the judge erred in finding that the side of the trench opposite the caisson was adequately sloped. The Secretary requests that the citation be affirmed as a serious violation.

The Secretary argues that the caisson provided insufficient protection on that side of the trench because the caisson did not directly abut the trench wall but instead was separated from it by a volume of soil. The Secretary also contends that, because the caisson was circular, soil was present between the caisson and the trench wall on either side of the caisson's center. The Secretary asserts that the trench should have been shored according to the cited standard since the amount of soil capable of collapsing on exposed employees was not negligible. 5/

Davis-McKee contends that the judge's findings are supported by the record and the Commission should not reweigh the evidence. Davis-McKee asserts that the caisson "minimized any substantial risk of wall collapse" in the area where the employees were working because the caisson had "more inherent strength than

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5/ The Secretary also argues that the judge erroneously concluded that the caisson was 30 feet in length. Since we affirm the citation on other grounds, we need not address this contention.

a normal earth wall." Davis-McKee also argues that the cited standard is not applicable to the side of the trench by the caisson, because that side of the trench consists of the concrete caisson rather than soil.

IV.

The Commission's review authority includes the authority to decide all issues it could have decided as the initial decision-maker. The Commission is not limited to the role of a reviewing court that must sustain factual findings of administrative agencies if such findings are supported by substantial evidence. Little Beaver Creek Ranches, Inc., 82 OSAHRC ____, 10 BNA OSHC 1806, 1982 CCH OSHD ¶ 26,125 (No. 77-2096, 1982). Accordingly, Davis-McKee's argument that we may not disturb the judge's disposition in this case is without merit.

Section 1926.652(c) requires that the walls of trenches more than 8 feet long and 5 feet deep dug in hard or compact soil must be shored or otherwise supported. If shoring or other support is not used, the portions of the walls more than five feet from the bottom of the trench must be sloped. Such sloping must not be steeper than a 1-foot rise to each one-half-foot horizontal. If, however, the trench in question is excavated entirely in solid rock, shale, or cemented sand or gravel, section 1926.652 does not require shoring or sloping. Crawford Construction Co., Inc., 82 OSAHRC 16/A2, 10 BNA OSHC 1522, 1982 CCH OSHD ¶ 25,984 (No. 79-928, 1982); CCI Inc., 80 OSAHRC 127/D4, 9 BNA OSHC 1169, 1981 CCH OSHD ¶ 25,091 (No. 76-1228, 1980), aff'd, 10 BNA OSHC 1718 (10th Cir., June 9, 1982).

It is undisputed that the trench on the side of the wall near the caisson was not sloped in accordance with section 1926.652(c). Exhibit R-4 shows that the caisson was tangent to the trench wall only at the top of the trench and that below this point the trench wall was separated from the caisson by a volume of

soil which increased as the trench depth increased. 6/ Davis-McKee put exhibit R-4 into evidence, and its operations manager testified that it accurately depicted the trench. The configuration of the trench as depicted in exhibit R-4 is not inconsistent with the photographs of the trench or the Secretary's evidence concerning the trench. Therefore, we find that exhibit R-4 accurately depicted the configuration of the trench. From this exhibit, it is apparent that the caisson did not serve as the trench wall and that the amount of soil between the caisson and the trench wall was not insignificant. 7/ See W.N. Couch Construction Co., 76 OSAHRC 44/A2, 4 BNA OSHC 1054, 1056 n.5, 1975-76 CCH OSHD ¶ 20,574 at p. 24,592 n.5 (No. 7370, 1976). Further, because the caisson was not located at the edge of the trench, it was not positioned so as to support the trench wall. Thus, the caisson did not constitute shoring nor did it otherwise support the trench wall. As evidence also establishes that employees were working in the area of the trench close to the caisson, we find that Davis-McKee failed to comply with the requirements of section 1926.652(c) with respect to the part of the trench wall that was located near the caisson.

We also conclude that the trench wall opposite the caisson was not sufficiently sloped. Exhibit R-4 constitutes an admission by Davis-McKee that the trench wall opposite the caisson had a slope of 2.3 feet vertical for each foot horizontal. This slope is steeper than that permitted by the cited standard, which requires that, except for the bottom five feet, the trench be sloped no

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6/ Using the dimensions and slopes of the trench walls shown in the exhibit, our calculations indicate that this triangular wedge of soil had a base at the bottom of the trench of approximately 2 feet.

7/ In addition to exhibit R-4, the photographs of the trench indicate that the amount of soil between the caisson and the trench wall was not insignificant. Further, the photographs indicate that the caisson did not reach to ground level, but rather there was a quantity of soil above the caisson adjacent to the trench wall.

greater than 2 feet vertical for each foot horizontal. Because the trench wall opposite the caisson was not sufficiently sloped above the five-foot mark, it did not comply with section 1926.652(c).

We also find that the violation was serious within the meaning of section 17(k) of the Act, 29 U.S.C. § 666(j). 8/ To prove a serious violation, it need not be likely that an incident occur. It is only necessary to prove that if an incident occurs, the probable result will be either serious injury or death. See, e.g., Andy Anderson, 78 OSAHRC 34/A2, 6 BNA OSHC 1595 (No. 76-4082, 1978). The unrebutted testimony of compliance officer Perry, which we accept, was that the likely result of collapse of the trench would be death or serious bodily harm. We further find that there is ample evidence to establish that Davis-McKee knew or, with the exercise of reasonable diligence, could have known of the presence of the violation.

In assessing a penalty, we consider the factors set forth in section 17(j) of the Act, 29 U.S.C. § 666(i), and determine that a penalty of $500 is appropri-

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8/ Section 17(k) provides:

> For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

The Secretary did not allege a serious violation in the citation or in any pleadings filed prior to the hearing. See note 2, supra. However, at the hearing, compliance officer Perry was questioned about the characterization of the violation, to which he responded that he recommended that the citation be characterized as serious. Davis-McKee did not object to this testimony, nor did it take exception to the Secretary's argument on review that a serious violation be found. Under these circumstances, we find that there was trial by consent of the parties of the seriousness of the violation. See Dye Constr. Co., 78 OSAHRC 51/A2, 6 BNA OSHC 1685, 1978 CCH OSHD ¶ 22,810 (No. 4172, 1978).

ate. In assessing this amount, we find that, while the gravity of the violation is high, Davis-McKee made an attempt to comply with the standard by sloping the trench wall opposite the caisson.

Accordingly, we reverse the judge and find a serious violation of 29 C.F.R. § 1926.652(c). We assess a penalty of $500.

SO ORDERED.

Ray H. Darling, Jr.

RAY H. DARLING
Executive Secretary

DATE: SEP 30 1982

ROWLAND, Chairman, dissenting:

The evidence in this case is insufficient to establish that either side of Davis-McKee's trench violated 29 C.F.R. § 1926.652(c). Therefore, I dissent from the majority's affirmance of the citation. Rather, I agree with the judge that the citation should be vacated.

As the majority notes, section 1926.652(c) does not require an employer to slope the walls of a trench if the trench is excavated in solid rock, shale, or cemented sand or gravel, or if the trench is shored or otherwise supported. In this case, a concrete caisson was embedded next to one of the trench walls. Administrative Law Judge Cecil R. Cutler, Jr., found that this caisson provided, in effect, shoring or bracing sufficient to prevent collapse or cave-in of that side of the trench in the area where employees were working.

Nevertheless, the majority concludes that there was a wedge of soil between the trench wall and the caisson which was "not insignificant," and, therefore, the trench wall should have been shored. However, the Secretary did not put into evidence any measurements or calculations to show that the volume of this soil was significant, nor did the Secretary show that this soil could cause a collapse or cave-in of the trench. Although the Secretary introduced evidence as to the depth and width of the trench, he failed to introduce evidence showing the trench wall's slope or measurements from which the slope of the wall could be derived. Evidence of the slope of the trench wall would be necessary for determining the quantity of soil between the wall and the caisson. The majority relies solely upon Davis-McKee's evidence--in particular exhibit R-4 and two photographs of the trench--to conclude that the trench did not comply with the cited standard.

Exhibit R-4, a cross-section diagram of a portion of the trench, was drawn by Thomas Ashton, an engineer who had never seen the trench.[9/] Ashton drew exhibit R-4

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9/ Davis-McKee's operations manager, Wilson, testified that exhibit R-4 properly (Continued)

based on exhibit C-1, a drawing of the trench made by the general contractor at the site. At the hearing, the compliance officer marked with an "X" the location on exhibit C-1 where he had seen two Davis-McKee employees working in the trench. Exhibit R-4 shows a cross-section of the trench at a location different from that where the compliance officer testified that he observed the employees working. Therefore, the majority's reliance on exhibit R-4 is inappropriate. Further, in exhibit R-4 Ashton apparently set the slopes of both trench walls arbitrarily, because exhibit C-1, the drawing on which exhibit R-4 is based, does not give the slope of either trench wall or provide measurements from which the slopes can be calculated.[10/] Therefore, the quantity of soil between the caisson and trench cannot be reliably determined on the basis of exhibit R-4. Because exhibit R-4 does not depict the trench at the location where the employees were working, and because the evidence does not establish that exhibit R-4 reliably represents the slope of the trench wall by the caisson, I am unable to conclude that there was a significant amount of soil between the caisson and the trench wall.

I do not find the photographs of the trench any more persuasive in showing that Davis-McKee failed to comply with section 1926.652(c). The photographs are too small and indistinct to reveal with any precision the

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9/ (continued)

depicted the trench on the day of the inspection. However, Wilson was not questioned at that point in the hearing about the slopes of the trench walls. Therefore, it cannot be inferred from Wilson's general approval of the exhibit that the slopes depicted in the exhibit were correct.

10/ Ashton testified: "On examination of the photographs, it was apparent that the slope of the soil in the trench near the caissons was much steeper than a one-half to one slope. So we adjusted our cross-section to reflect the fact that this slope was more nearly vertical." Ashton's testimony, however, does not indicate why the particular slopes of approximately 7.5 to 1 on the side of the caisson and of 2.3 to 1 on the opposite side were depicted in the exhibit.

slope of the trench wall or the amount of soil that was present between the caisson and the adjacent trench wall. Further, the record does not indicate whether the photographs depict the portions of the trench where Davis-McKee's employees were working. Therefore, the photographs provide no support for finding that there was a significant amount of soil between the caisson and the trench wall.

I also disagree with the majority's conclusion that the trench wall on the side of the trench opposite the caisson was not sufficiently sloped. The Secretary introduced no evidence of the slope of the trench wall opposite the caisson or any measurements from which this slope can be calculated. Therefore, the majority relies solely upon exhibit R-4 in finding that the trench wall opposite the caisson was too steeply sloped. As noted above, exhibit R-4 does not depict the portion of the trench where the compliance officer testified that Davis-McKee's employees were working, and the slopes of the two trench walls shown in exhibit R-4 apparently were selected arbitrarily. Because exhibit R-4 does not provide reliable evidence of the slope of the trench wall opposite the caisson, and because there is no other evidence of the slope of this wall, I find no basis for concluding that the trench wall opposite the caisson did not comply with section 1926.652(c). Therefore, I would affirm the judge's vacation of the citation.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 400
ATLANTA, GEORGIA 30309

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| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 79-2698 |
| | ) | |
| DAVIS-MCKEE, INC., | ) | |
| | ) | |
| Respondent. | ) | |

APPEARANCES:

William S. Kloepfer, Esquire, Associate Regional Solicitor, U. S. Department of Labor, Cleveland, Ohio, by Saundra Robinson, Esquire, for the complainant.

Robert Wilcox, Esquire, and Lee Durban, Esquire, Wilcox and Schlosser Company, L.P.A., Columbus, Ohio, for the respondent.

## DECISION AND ORDER

Cutler, Judge:

Following an inspection of its work site in Columbus, Ohio, on May 8, 1979, respondent, Davis-McKee, Inc., was issued two citations pursuant to section 9(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, et seq., hereinafter the "Act").

Citation Number 1 alleges a violation of 29 C.F.R. § 1926.28(a)[1/] as follows:

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1/ This section, 29 C.F.R. § 1926.28(a), reads:

"The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees."

"Appropriate personal protective equipment was not worn by employee(s) in all operations where there was exposure to hazardous conditions:

a) The trench, on the southwest side of the new Convention Center at 350 North High Street, there was no foot protection with metatarsals being worn by the two employees while using the earth compactor machines."[2]

A penalty of $800 is proposed for this alleged serious violation.

Under Citation Number 2 respondent is charged with a willful violation of 29 C.F.R. § 1926.652(c)[3] as follows:

"The side(s) of the trench(es) in hard or compact soil, including embankment(s), were not shored or otherwise supported when the trench was more than 5 feet in depth and more than 8 feet in length:

a) The trench being refilled and compacted on the southwest side of the new Convention Center at 350 North High Street, in Columbus, Ohio."

A penalty of $8,100 is proposed.

A hearing was held in this matter on October 18, 1979, in Columbus, Ohio. No affected employee or authorized employee representative elected to participate as a party.

There is no issue as to jurisdiction in that respondent admits it is an employer engaged in a business affecting interstate commerce within the meaning of the Act.

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2/ Variously called tamping machines, compacting machines or "jumping jacks".

3/ This section, 29 C.F.R. § 1926.652(c), states:

"Sides of trenches in hard or compact soil, including embankments, shall be shored or otherwise supported when the trench is more than 5 feet in depth and 8 feet or more in length. In lieu of shoring, the sides of the trench above the 5-foot level may be sloped to preclude collapse, but shall not be steeper than a 1-foot rise to each 1/2-foot horizontal. When the outside diameter of a pipe is greater than 6 feet, a bench of 4-foot minimum shall be provided at the toe of the sloped portion."

I

Davis-McKee is an Ohio corporation engaged in the excavation business. On May 8, 1979, it was a subcontractor for Turner Construction Company repairing a sewer line in connection with the erection of a convention center in Columbus, Ohio.

On that date, Charles Perry, a compliance officer for the Secretary, visited the site pursuant to an imminent danger complaint. Upon his arrival, he saw two workers operating an earth compactor in an excavation and observed the job conditions and equipment. The excavation was not shored or supported. He took several photographs and attempted to take measurements but, as to the latter, he could not do so unassisted because of the configuration of the excavation. He went to his office and returned with another compliance officer, a Mr. Koontz, to assist him (Tr. 11-13).

According to Mr. Perry, the excavation "ran, at the west side of the trench it ran from the north to the south and then made a turn went southeast and made another turn and went northeast." The employees were "in the southeast section of the trench" (Tr. 14). As for its dimensions, "it measured 14 feet 9 inches across at the northeast end sloped down at this end to a depth of 9 feet. The northwest section ofthe trench was 52 feet 4 inches long. The north side of the trench running from east to west was 40 feet 4 inches long. The excavation was 30 feet wide at the west end between the two manholes and was 16 feet 2 inches deep on both the north and south side" (Tr. 15).

At the point where the two employees were using tamping machines, the trench was 17 feet, 6 inches, deep and 15 feet, 11 inches, wide. He did not measure the width at the bottom but estimated it as being 7 feet wide (Tr. 16).

The following morning, Mr. Robert Compton, another compliance officer, who has had considerable experience in the inspection of construction sites, made other measurements of the excavations using a 50-foot steel tape and an optical tape measure. These measurements were given to Mr. Perry (Tr. 103). According to Mr. Perry, these measurements were essentially the same as he had made on the previous day (Tr. 23).

Complainant presented into evidence a diagram of the excavation (Ex. C-1) which was made for Richard Patton, project superintendent for Turner Construction Company at the time. This was given to Mr. Perry by Mr. Patton at the closing conference that morning (Tr. 24). During the closing conference, Mr. Perry also received from Mr. Patton a copy of a warning which had been issued respondent on May 8 concerning the safety of the trench (Ex. C-2).

In further testimony, Mr. Perry stated that both he and Mr. Compton agreed that the type of soil in the trench was hard compact. The trench was not shored or otherwise supported and it was not sloped according to the standard charged (Tr. 29-30). In his opinion, employees in the trench was subject to "being buried if not crushed or killed if a cave-in happened" (Tr. 31).

To establish that the alleged trenching violation was repeated, complainant introduced into evidence, over respondent's objection, Exhibit C-3, copies of citations issued respondent on August 17, 1978, for a serious violation of 29 C.F.R. § 1926.652(e) and a repeated violation of 29 C.F.R. § 1926.652(c). Both citations were affirmed with reduced penalties pursuant to a settlement agreement (Ex. C-4).

With reference to the citation involving lack of foot protection, Mr. Perry testified that if the compacting machine bounced on a worker's foot, it could cause serious injury to the foot (Tr. 38).

Gary R. Rutledge testified he was the architect's representative for the project (Tr. 79). During an inspection trip on April 27, he observed that a trench box which previously been used was not in place. At that time and on May 1, he brought this to the attention of the general contractor's superintendent. On May 8, he observed the trench to be still in an unsafe condition and so reported this to OSHA (Tr. 80-90).

Called by the Secretary as a witness, Virgil Metcalf testified he was employed by Davis-McKee on the project in question and, at the time of the inspection, he was using the tamping machine. A trench box had been used prior to the inspection when pipe was being laid, but it was removed once all the pipe was installed. He believed that the ditch then was safe since it was "already filled up." At that time the depth of the trench was roughly 15 feet (Tr. 91-95).

Upon cross-examination, he testified he was not wearing steel-toed shoes at the time and had never worn them in his 14 years of using the tamping machines or "jumping jacks." He has never heard of anyone getting hurt using them and he considered his work safe without using steel-toed shoes (Tr. 96-97).

Thomas Ashton, called by respondent as a witness, testified he is a licensed civil engineer and employed by Davis-McKee since July 1979. Working with the figures shown in Exhibit C-1 in prepared cross-section segments of the excavation drawn to scale, he used an overlay (Ex. R-7) of a trench with a lay back of one half to one (Ex. R-1 — R-7). The substance of his testimony was that, while not symmetrical in all cases, the sides of the trench complied with the provisions of the regulations (Tr. 116-128).

Robert Wilson, respondent's operations manager, testified to and identified, using photographs (Exs. R-8 — R-9), a caisson 10 feet wide and in excess of 30 feet long which was part of the facing of the trench (Ex. C-1, R-8, R-9; Tr. 132).

According to Mr. Wilson, Davis-McKee started work repairing damaged sewers at the work site about three weeks prior to the day of the inspection. The pipe had been laid and backfilling operations had been started. The trench box was removed because it was contemplated that a heavy roller would be used instead of the compacting machine. After four to six feet of dirt had been placed over the pipe, a soil compaction test showed the soil did not have the proper density. The soil was removed and replaced with alternate layers of dirt and granule. This required the use of the compactor rather than the roller (Tr. 133-138).

Mr. Wilson testified that compacted earth would be less likely to slide in a trench than undisturbed soil. In his opinion, except for the place where the caisson was situated, the angle of repose of the trench was proper under OSHA standards. Concerning exhibit C-2, the warning from Turner, he stated this referred to a two-foot undercut which developed a knot on the slope and it was immediately corrected (Tr. 139-144).

With reference to the footwear worn by the man using the compacting machine, he stated that he was wearing regular laced boots. The company has had very few foot injuries with this type of boot. In his experience of 20 years, he has never heard of any injury in his company or any other company caused by a jumping jack. He has also never heard of anyone in the industry using steel-toed shoes while using the jumping jack (Tr. 136).

Stanley D. Pomeroy is a licensed engineer and surveyor. According to this witness for respondent, an optical tape measure has a margin of error of one foot in either direction. Therefore, there could be an error of at least a foot in a distance of 15 feet. He further stated that, unless the walls were symmetrical, they could not be plotted properly (Tr. 172-173).

II

Under Citation Number 1, respondent is charged with violating 29 C.F.R. § 1926.28(a) by failing to provide foot protection for two employees. There is no dispute that the employees operating an earth compactor were not wearing steel-toed shoes.

Respondent argues that it is not an industry standard to require foot protection and that a reasonably prudent person familiar with the industry would not recognize the need for same.

With respect to industry standards on personal protective equipment under 1926.28(a), the Commission has clearly pointed out that, while industry custom and practice are useful points of reference, they are not controlling. Whether a hazard exists is determined by whether a reasonable person familiar with the factual circumstances surrounding the allegedly hazardous condition, including those applicable to a particular industry, would recognize a hazard warranting the use of personal protective equipment, S & H Riggers and Erectors, Inc, 79 OSAHRC 23/A2, 7 BNA OSHC 1260, 1979 CCH OSHD ¶ 23,480, appeal filed, No. 79-2538 (5th Cir. June 9, 1979).

In the instant case, Mr. Perry testified he has made only seven or eight inspections of construction sites (Tr. 8) and in none of these has he seen workers operating tamping machines (Tr. 38). Upon cross-examination, he admitted he made no attempt to determine what the standard in the industry was as far as requiring the use of protective footwear while using a compacting machine (Tr. 54). Further, he has never heard of an injury by an employee operating a compacting machine (Tr. 55).

Mr. Metcalf, an operator of a compacting machine, testified that in his 14 years of experience, he has never heard of anyone getting an injury while operating

the machine (Tr. 96-97). With 20 years' experience in the industry, Mr. Wilson has never heard of the practice of using steel-toed shoes by tamping machine operators and cannot recall any injuries to employees in his or any other company from use of the machine (Tr. 130-136).

It is abundantly clear that there is no evidence presented to establish that it is industry custom or practice that employees operating tamping machines wear steel-toes shoes. In fact, the opposite has been shown.

Further, following the guidelines set forth in S & H Riggers, supra, no showing has been made that a reasonable person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts unique to this particular industry, would recognize a hazard warranting the use of steel-toed shoes.

Mr. Perry admittedly has had no experience with tamping machine operations. He perceived a hazard through the very nature of the up and down movement of the machine which could cause it to bounce on a worker's foot (Tr. 38). Nevertheless, he has never heard of any injury from this cause and Mr. Metcalf and Mr. Wilson, both with extensive experience in the industry, attested to the same. Mr. Metcalf, who operates the machine for a living, considered the work safe without use of safety shoes (Tr. 97).

The Secretary has not shown that a hazardous condition existed which required the use of steel-toed shoes. The absence of injuries supports a conclusion that a reasonable person familiar with the operation here involved would not recognize the existence of such a hazard.[4/] Accordingly, I do not find respondent in violation of the cited standard.

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4/ General Electric Co., __ OSHARC __, Docket No. 15037, dec. January 31, 1980.

III

Citation Number 2 alleges a willful trench violation. Much of the conflict in the evidence relates to the measurements taken of the excavation and whether it was in fact a trench. A trench is an excavation but an excavation is not always a trench.[5/] It would appear from the evidence that part of the 52-foot excavation was a trench.

However, only one part of the excavation is here involved and that is where the two employees were working when observed by the compliance officer. There is no evidence to suggest that employees were working at other locations since compaction was the only work being performed at the time.

According to Mr. Perry, at this location the trench was measured as being 17 feet, 6 inches, deep and 15 feet, 11 inches, wide. He estimated the bottom width as being 7 feet. While Mr. Perry's figures were substantially verified by those taken the following day by Mr. Compton, there could have been some discrepancy in view of the margin of error associated with the optical tape measure. Further, the lack of summetry of the walls, according to Mr. Pomeroy, could lead to improper plotting.

Assuming, however, the validity of Mr. Perry's measurements, the width at the top would have to be 19 feet to conform to the standards—a fact conceded by Mr. Pomeroy.

Exhibit C-1, the diagram of the excavation introduced by the Government, points to a different conclusion. This exhibit was prepared by a civil engineer after

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5/ Section .653(n) defines a trench as a "narrow excavation made below the surface of the ground. In general, the depth is greater than the width, but the width of a trench is not greater than 15 feet."

the inspection and before the closing conference and thus was contemporaneous with the measurements taken by the compliance officers.

Using the figures depicted in Exhibit C-1, Exhibit R-4 shows that the side of the excavation opposite the caisson was sloped at a greater angle than the required one-foot rise for each one-half foot horizontal distance. The walls obviously could not be sloped to any significant extent on the side which contained the caisson, but this structure itself provided, in effect, shoring or bracing sufficient to prevent collapse or cave-in of the excavation.

Under the circumstances, I cannot conclude that respondent was in violation of the provisions of 29 C.F.R. § 1926.652(c).

In view of the findings herein reached, it is unnecessary to rule on the various motions made by respondent before and during the hearing.

IV

I reach the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Davis-McKee is an Ohio corporation which on the date in question was a subcontractor repairing sewer lines in connection with the construction of a convention center in Columbus, Ohio.

2. On May 8, 1979, Charles Perry, a compliance officer, inspected the work site. Two of respondent's employees were operating tamping machines in an excavation. Neither was wearing steel-toed or safety shoes.

3. There is no evidence presented of a history of foot injuries to respondent's employees caused from the operation of the tamping machine. There was no showing that a hazardous condition existed from which a reasonable person familiar with the factual circumstances could conclude that safety shoes were warranted.

4. At the location of the two employees, Mr. Perry measured the trench as 17 feet, 6 inches, deep and 15 feet, 11 inches, wide. He visually estimated the width at the bottom as being 7 feet. His figures were essentially the same as those taken the following day by another compliance officer using a steel tape and an optical tape measure. The soil was hard compact in nature.

5. The optical tape measure has a margin of error of at least one foot in 15 feet.

6. In the area of the excavation where the two employees were working there was a concrete caisson 10 feet wide and in excess of 30 feet long which was part of the facing of the trench.

7. This caisson provided support on one wall of the trench and the opposite wall was sloped to a greater degree than required under the one-foot rise to one-half foot horizontal formula in the regulations.

8. There is no evidence to establish that respondent's employees at the time and place in question were exposed to the hazard of a cave-in or slide.

## CONCLUSIONS OF LAW

1. Respondent is engaged in a business affecting interstate commerce and this Commission has jurisdiction over the subject matter and parties to this action.

2. Respondent was not in violation of section 5(a)(2) of the Act by failing to comply with the provisions of 29 C.F.R. § 1926.28(a) or 29 C.F.R. § 1926.652(c).

Based upon the foregoing findings of fact and conclusions of law, Citation Number 1 and Citation Number 2 are vacated.

SO ORDERED.

Dated this 20th day of March, 1980.

CECIL L. CUTLER, JR.
Judge

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

September 30, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Amoco Oil Company

OSHRC DOCKET NO. 79-6487

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

FOR THE SECRETARY OF LABOR

OF COMMISSION DECISION

To wit: See attached.

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  USDOL
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FOR EMPLOYER

- Robert H. Buckler, Esq.
  Thompson, Mann & Hutson
  First National Bank Tower
  Atlanta, GA 30303

FOR EMPLOYEES

- Dan C. Edwards, Int'l. Rep.
  Oil, Chemical & Atomic Workers
  Int'l. Union & Local 7-1
  P.O. Box 2812
  Denver, CO 80201

- Judge William E. Brennan
  OSHRC
  1515 Broadway
  Room 3800
  New York, NY 10036

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | |
| AMOCO OIL COMPANY, | : | |
| Respondent. | : | OSHRC Docket No. 79-6487 |
| OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION AND ITS LOCAL 7-1, | : | |
| Authorized Employee Representative. | : | |

ORDER

Before: ROWLAND, Chairman; CLEARY, Commissioner.*/

BY THE COMMISSION:

An order of Administrative Law Judge William E. Brennan approving a settlement agreement between the Secretary of Labor and Amoco Oil Company is before the Commission for review. The judge held that the Oil, Chemical and Atomic Workers International Union and its Local 7-1 were not entitled to an evidentiary hearing on certain objections it raised to the agreement. The principal issue on review is whether an employee party can object to the plan of abatement contained in a settlement agreement between the Secretary of Labor and a cited employer.

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*/ Commissioner Cottine has disqualified himself from participating in the disposition of this case on consideration of the Respondent's motion seeking his disqualification and the memoranda filed in response by the Secretary and the Authorized Employee Representative.

The two participating members are divided on the disposition of this case. Chairman Rowland would affirm the judge's ruling on the ground that the Commission lacks authority to consider employee objections which are not related to the abatement period. Mobil Oil Corp., Docket No. 77-4386 (Aug. 6, 1982) (dissenting opinion). Chairman Rowland notes that the Secretary and Amoco modified the agreement to accommodate the Union's objections to the time permitted for abatement, thus eliminating from any possible controversy the one point on which he would permit an employee party to object to a settlement agreement. Commissioner Cleary would vacate the judge's order and hold that the Commission has jurisdiction to consider the Union's substantive objections to the settlement agreement. For the reasons stated in his concurring opinion in Mobil Oil Corp., supra, Commissioner Cleary would hold that under section 10(c) of the Act affected employees who have elected party status must be afforded the opportunity to review and raise objections to settlements proposed by the other parties, including objections to matters other than the abatement period specified in a settlement proposal.

In view of the divided vote on the merits of the case, Chairman Rowland and Commissioner Cleary agree to dispose of the case by vacating the direction for review. Baldwin Industries, Inc., 82 OSAHRC , 10 BNA OSHC 1572, 1982 CCH OSHD ¶ 25,980 (No. 78-741), appeal filed, No. 82-7178 (11th Cir. May 28, 1982).

Accordingly, the direction for review is vacated and the judge's order is the Commission's final disposition of this case. SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: SEP 30 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|---|
| SECRETARY OF LABOR | : | |
| Complainant | : | |
| v. | : | |
| AMOCO OIL COMPANY | : | |
| Respondent | : | DOCKET NO. 79-6487 |
| and | : | |
| OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION - LOCAL 7-1 | : | |
| | : | |
| Affected Employee Representative | : | |

ORDER GRANTING STIPULATED SETTLEMENT

Brennan, William E.; A.L.J.

This matter comes on for determination pursuant to 29 U.S.C. 659(c) and 661(i) and Commission Rule 100, 29 C.F.R. 2200.100, upon a Settlement Agreement received by the Commission on April 20, 1981 (R.p. J-124)[1], as amended on June 11, 1981 (R.p. J-131), involving one Serious Citation (one numbered Item) and Notification of Proposed Penalty issued to Respondent by Complainant on October 24, 1979 as amended on November 16, 1979.

This Agreement, executed by counsel for Complainant and Respondent herein, complies with the requirements established by the Commission for

[1] References are to the numbered pages in the Commission's Official Docket File of this case, No. 79-6487.

hospitable consideration. (See, Secretary of Labor v. Duncan Brothers Mechanical Contractors, 1 OSAHRC 386, February 22, 1972 and Commission Rule 100, supra.)

This Agreement is not signed by the Union party. Rather, by letter dated April 22, 1981, the International Union filed its objections to numerous provisions of the Agreement reached by Complainant and Respondent. In its objections the Union moved for an evidentiary hearing thereon (R.p. J-125).

The original Settlement Agreement, among other matters, provided for the alleged violative condition to be abated "... 90 days following the date this agreement becomes a final order of the Occupational Safety and Health Review Commission... ."

(Para. 1(b), p. 2, R.p. J-124)

The Union's first numbered objection to this original Settlement Agreement alleged the 90-day abatement period "... is too long and unreasonable."

(Para. 1, p. 1, R.p. J-125)

In response to an Order to Show Cause issued on April 24, 1981, (R.p. J-126), Complainant and Respondent executed and filed an Amendment to the original Settlement Agreement dated June 11, 1981 (R.p. J-131). In this Amended Agreement, the abatement date agreed to was changed to "... immediately following the date this agreement becomes a final order of the Occupational Safety and Health Review Commission... ."

(Para 1(b), p.2, R.p. J-131).

In a letter dated June 16, 1981, the non-signing Union party advised that; "We wish to make it absolutely clear that our Objections to the Settlement Agreement that were filed with you on April 22, 1981 [R.p. J-125],

with the sole exception of objection no. 1, still stand." The Union also, in this letter, "... reiterate[d] the necessity for a hearing in this case."

(R.p. J-132, bracketed material supplied).

In response to a briefing Order dated June 24, 1981, (R.p. J-133), both Complainant and Respondent timely filed their briefs on the question of whether an evidentiary hearing on the Union's objections to the Amended Settlement Agreement, was either necessary or jurisdictionally proper (R.pp. J-135 and J-136).

Thereafter, on July 10, 1981, (R.p. J-137) the Union timely filed its response to both the Complainant's and Respondent's briefs.

The U.S. Courts of Appeals have uniformly held that under the provisions of Section 10(c) of the Occupational Safety and Health Act, 29 U.S.C. 659(c), a union party may object, exclusively, to the reasonableness of an abatement period proposed by Complainant in a Settlement Agreement. See U.A.W. - Local 588 v. OSHRC, 557 F.2d 607 (7th Cir., 1977); Marshall v. Sun Petroleum Products Co., et al., 622 F.2d 1176 (3rd Cir., 1980); Marshall and IMC Chemical Group, Inc. v. OSHRC, 635 F.2d 544 (6th Cir., 1980); Marshall v. Oil, Chemical and Atomic Workers International, et al., ___ F.2d ___ (3rd Cir., 1981), 9 OSHC-BNA 1584.

Here, the Union's original objection to the reasonableness of the original 90-day abatement period, was specifically withdrawn when the Amended Settlement Agreement provided for an "immediate" abatement period. All other objections filed by the Union party here, go to matters other than the reasonableness of the "immediate" abatement period agreed to by Complainant and Respondent in the Amended Settlement Agreement.

It is therefore clear under the uniform precedents cited supra, that the Commission does not have jurisdiction to receive evidence in support of the Union's objections at the requested evidentiary hearing.

Consequently the request of this Union party for an evidentiary hearing must be denied and its objections to the Amended Settlement Agreement must likewise be denied.

The Union's complaint that it did not have an opportunity to participate in the settlement negotiations nor to review and comment on the Settlement Agreement prior to the time that this Agreement was signed by Complainant and Respondent is not borne out by this record.

This case has been the subject of protracted pretrial procedures, the Citation having issued to Respondent late in 1979. The International Union representative has been actively involved in these procedures. This representative evidently was not involved in the relatively recent negotiations leading to the original and Amended Settlement Agreement. However, even if he had participated in these negotiations, his role would have been limited to objecting to the reasonableness of the time period agreed upon for abatement. See the IMC case, supra. Since the filing of the original Settlement Agreement, the Union party has had ample opportunity (three months) and indeed did file its objections to this settlement.

Thus this record establishes that the Union has been afforded ample opportunity to exercise its rights in this settlement case, rights which are limited under the binding, precedential case cited supra.

Now, therefore, pursuant to Commission Rule 100, and the case law cited supra, it is ORDERED:

1. That the Settlement Agreement received by the Commission on April 20, 1981 (R.p. J-124) as amended on June 11, 1981 (R.p. J-131) is hereby expressly incorporated by reference into and made a part of this Order and, based upon the representations set forth therein is APPROVED.

2. That Complainant's Motion to Amend the Amended Serious Citation and Notification of Proposed Penalty, as set forth in this Amended Agreement, is hereby GRANTED.

3. That the Respondent's Motion to Withdraw its Notice of Contest, as set forth therein is hereby GRANTED.

4. That the Citation herein and the penalty proposed thereon, as amended, are hereby AFFIRMED.

5. A penalty in the total amount of $405 is hereby ASSESSED.

6. That the Union party's Motion for an evidentiary hearing and its objections to the Amended Settlement Agreement (R.p. J-125) are DENIED.

William E. Brennan
WILLIAM E. BRENNAN
Judge, OSHRC

Dated: July 14, 1981
Hyattsville, Maryland

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

September 30, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

The Baltimore & Ohio Railroad Co.

OSHRC DOCKET NO. 82-0458

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION AND REMAND

To wit: See attached.

FOR THE SECRETARY OF LABOR

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Judge James D. Burroughs
OSHRC
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FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC DOCKET NO. 82-458 |
| THE BALTIMORE & OHIO RAILROAD COMPANY, | : | |
| Respondent, | : | |
| BROTHERHOOD OF RAILWAY CARMEN OF THE U.S. AND CANADA, | : | |
| Authorized Employee Representative | : | |

ORDER

A September 3, 1982 letter from the Authorized Employee Representative (hereafter "union") to the Commission was construed as a petition for discretionary review and granted by Commissioner Cleary on September 17, 1982.

The record indicates that on May 11, 1982, the union sent the Secretary a notice of intent to participate in the hearing in this case. This letter is properly construed as an election of party status. See IMC Chemical Group, Inc., 78 OSAMRC 95/C14, 6 BNA OSHC 2075, 2076 n. 4, 1978 CCH OSHD ¶23,149, p. 27,989 n. 4 (No. 76-4761, 1978) rev'd on other grounds, 635 F.2d 544 (6th Cir. 1980).

On August 9, 1982, having been advised by the Secretary that "all matters in dispute had been amicably resolved," Administrative Law Judge Burroughs cancelled the hearing which was scheduled for the next day, August 10. On August 18, the citation was affirmed based on Respondent's motion to withdraw its notice of

contest. By letter dated August 18, the Secretary for the first time notified Judge Burroughs that the union had elected party status in this case. The Judge then notified the Authorized Employee Representative that prior to granting the Respondent's motion to withdraw he had been unaware of the union's election of party status. He advised the union that any objection to the disposition of the case should be filed with the Commission.

The union asserts in its September 3 letter that "all matters [have not] been resolved" in this case and expresses its continuing desire to take part in a hearing.

We cannot conclude on the present record that the union has had an adequate opportunity to participate as a party in these proceedings. Accordingly, we set aside the Judge's order of August 18, 1982, and remand the case to him to consider the union's apparent objections*/ and for any further proceedings that may be appropriate.

IT IS SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: SEP 30 1982

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*/ For the reasons stated in his dissenting opinion in Mobil Oil Co., 10 OSHC 1905, 1982 CCH OSHD ¶ 26,187 (No. 77-4386, 1982), Chairman Rowland believes that the only cognizable objections the union may raise relate to the period for abatement contained in the citation.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

| | | |
|---|---|---|
| SECRETARY OF LABOR, | ) | |
| Complainant, | ) | |
| v. | ) | OSHRC Docket No. 82-458 |
| THE BALTIMORE AND OHIO RAILROAD COMPANY, | ) | |
| Respondent. | ) | |

**ORDER GRANTING RESPONDENT'S**
**MOTION TO WITHDRAW NOTICE OF CONTEST**

Respondent, by letter dated April 15, 1982, from its counsel, contested an "other" citation issued to it on April 1, 1982. The citation alleged a violation of 29 C.F.R. § 1910.22(b). No penalty was proposed for the alleged violation.

On August 16, 1982, a motion to withdraw notice of contest was received from respondent. The motion having been read and considered, it is

ORDERED: 1. That the motion is granted; and

2. That the "other" citation issued to respondent on April 1, 1982, is affirmed.

Dated this 18th day of August, 1982.

James D. Burroughs
JAMES D. BURROUGHS
Judge

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

TABLE OF CITATIONS

| OSHRC Docket No. | OSAHRC Reports* | BNA OSHC | CCH OSHD |
|---|---|---|---|
| 1 | 73/15/A2 (2/1318) | 1:1219 | 15,047, 15,687 |
| 2 | 72/1/B5 (1/28) | | 16,092 |
| 3 | 72/2/A2 (1/99) | 1:1007 | 15,025, 15,026, 15,041 |
| 4 | 72/1/B10 (1/33) | 1:1001 | 15,032 |
| 5 | 73/30/A2 (3/1077) | 1:1250 | 15,052 |
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| 81-2457 | 82/43/C14 | 10:1904 | 26,177 |
| 81-2545 | 82/46/A2 | 10:1951 | 26,172 |
| 81-2635 | 82/53/B2 | 10:1984 | 26,225 |
| 81-2651 | 82/39/D14 | 10:1847 | 26,146 |
| 81-2656 | 82/46/C3 | 10:1903 | 26,176 |
| 81-2669S | 82/39/A2 | 10:1843 | 26,129 |
| 81-2716 | 82/28/A14 | | 26,074 |
| 81-2740 (A) | 82/52/E1 | 10:1991 | 26,224 |
| 81-2741 | 82/54/C11 | 10:2022 | 26,246 |
| 81-2750 | 82/58/F4 | 10:2166 | 26,290 |
| 81-2758 | 82/58/F11 | 10:2107 | 26,288 |
| 81-2766 (A) | 82/54/B10 | 10:2055 | 26,232 |
| 82-5 | 82/54/D4 | 10:2068 | 26,255 |
| 82-18-P | 82/53/A3 | | |
| 82-37 | 82/67/B13 | 10:2224 | 26,334 |
| 82-77 (A) | 82/54/A2 | 10:1998 | 26,233 |
| 82-136-S | 82/70/G1 | 11:1096 | 26,363 |
| 82-168 | 82/68/A2 | 11:1046 | 26,331 |
| 82-238 | 82/44/A10 | 10:1880 | 26,169 |
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| 82-337-E | 82/40/C5 | | |
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| 82-562 | 82/65/A2 | 10:2191 | 26,313 |
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| 80-4796 | SHURTLEFF & ANDREWS CONSTRUCTION CO. | 10/21/82 | 57/F2 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
John W. McCormack Post Office and Courthouse, Room 420
Boston, Massachusetts 02109

NOTICE OF DECISION

Secretary of Labor v. The Hale Manufacturing Company
OSHRC Docket No. 80-3013

1. Enclosed is a copy of my decision. It will be filed with the Commission on September 2, 1982, and will become the final order of the Commission on October 4, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is October 4, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

David J. Knight
DAVID J. KNIGHT
JUDGE, OSHRC

Date: August 13, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant<br>v.<br>THE HALE MANUFACTURING COMPANY,<br>Respondent | OSHRC DOCKET NO. 80-3013<br><br>DECISION AND ORDER |

APPEARANCES:

For the complainant,
Albert H. Ross, Regional Solicitor
U. S. Department of Labor
Boston, Massachusetts
By: John Casler, Esq.

For the respondent,
William J. LeDoux, Esq.
Bowditch and Dewey
Worcester, Massachusetts

On February 15, 1980, Brian Hamilton, an employee of The Hale Manufacturing Company (respondent) at its Yantic, Connecticut, plant, fell or jumped from a beam into a mass of yarn being blended in the respondent's Truslow Yellow Blending bin where the yarns were being blended for color (Transcript, hereafter Tr., 5, 7, 18, 60 and Exhibit C-6). Two fellow employees, at the floor level dug into about eight feet of the yarn to Hamilton who was unconscious with a little piece of yarn in his mouth (Tr. 19, 33, 39). He later died (Tr. 43). This is the first fatility in a blending bin in 26 years (Tr. 125-126). Nowhere does the record reveal the cause of death.

The blending bin is 16 feet square and 32 high (two stories) made of corrugated metal. The Truslow blender is at the top and this spews out the blended yarn into the bin. The bin's capacity is 25,000 pounds and on February 15, there was between 16,000 and 18,000 pounds there (Tr. 64). It is removed to be baled from a door at the bottom (Tr. 9, 11, 59-60) shown in Exhibit C-4. Near the top of the bin a door leads to a catwalk below which a structual beam runs across the bin perpendicular to the catwalk (Tr. 8) shown on Exhibit C-2 (Tr. 9, 10). To the inspecting officer, this beam looked like two attached one by eights (Tr. 61). It is about 13 and a half feet from the floor (Tr. 102). As the blender blows the yarn into the bin, it gets caught behind the beam and an employee will go out along the catwalk, step off onto the beam and jump on the yarn until it falls (Tr. 13-14). As the stock or yarn is removed from the bottom, a tunnel is formed and a man will be sent out on the beam to knock the stock down to fill this tunnel (Tr. 52-53).

During the lunch break of the second shift on February 15, 1980, the foreman, John LaFemina, instructed Hamilton to go up to the beam and help employees Dimmock and DuHaine knock the stock down (Tr. 44). He had, on a number of occassions instructed men not to fool around, to act sensibly (Tr. 44-45, 47). To accomplish the "knock down", a man hangs from the beam until it is at shoulder level and jumps on the stock until it falls (Tr. 14, 30-31, 46). It requires about five minutes (Tr. 16) and must be done at least once or twice a day (Tr. 135).

Dimmock heard Hamilton tell DuHaine that he was going to slide down the stock, that is, "he was going to ride down with it" (Tr. 29). And he was gone (Tr. 18). Although Dimmock did not see how Hamilton left the beam, one minute he was there, the next not (Tr. 18). Dimmock and DuHaine ran down the

two flights and dug him out of the yarn unconscious. That took about five minutes. (Tr. 19) The stock had been up to and higher than the beam and sloped 15 feet down or so (Tr. 35, 37).

Dimmock who was 18 years old at the time of the hearing had been with respondent only about two weeks when this event occurred (Tr. 6, 25). Concerning the knock-down procedure, he had received no safety instructions or safety belt and, by the time of Hamilton's descent, he had done it four or five times (Tr. 15). He had never slid down the stock and DuHaine was fired soon after for drinking on the job (Tr. 24-25, 54-55, 131).

The beam is one inch thick at its top and then slopes outwardly, a triangular configuration (Tr. 24, 87). A man walks out on it then climbs off holding onto the beam and knocks down the stock (Tr. 70, 98), and then climbs back (Tr. 40).

Compliance Officer Hatcher, as a result of his inspection on February 18, 1980, testified that employees knocking down the stock should be tied off with a safety belt and six foot lanyard attached to the catwalk's rail or the beam. This is common knowledge since a man could be buried in the stock (Tr. 64, 66, 74, 49) and suffer from the lack of oxygen (Tr. 80), although the material is not densely compacted, there is enough so a man could not breathe (Tr. 81). So attached, if he fell, he would not be buried for he could be pulled out in seconds (Tr. 77). The Officer did not know whether the man would be hanging in open air, if he fell, or would be within the stock; it depends on how much of the stock is there (Tr. 66-68). Other safety measures that could be taken would be handholds such as a rope or U-bolts attached to the beam for a man to hold on to while stepping down the stock. The beam itself is not sufficient (Tr. 61, 88-89).

This was the Officer's first inspection of a bin of this kind (Tr. 70) in his eight years with the Occupational Safety and Health Administration (OSHA) a section within the U.S. Department of Labor (Tr. 57). He was aware that respondent operates five facilities in Connecticut (Tr. 71), that some of these had been inspected in the past -- not this one at Yantic — that citations have been issued but he did not examine them (Tr. 72, 90-91).

On May 2, 1980, OSHA issued a citation[1/] alleging that respondent seriously[2/] violated the safety standard at 29 CFR §1910.132(a) which requires:

> Protective equipment...shall be provided, used, and maintained... wherever it is necessary by reason of hazards of processes...capable of causing injury or impairment...

in that no protective equipment (safety belts), devices, work processes, procedures and/or equivalent means were provided to assure the safety of employees knocking down the stock. This condition was to be abated immediately and a civil penalty of $720 was proposed. On May 21, 1980, respondent contested the citation.[3/]

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1/ Under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§651, et seq., citations are issued after inspection, §658(a), and may be contested within a 15 working-day period, §659(a).

2/ A serious violation exists where there is a substantial probability that death or serious physical harm could result from the condition. 29 U.S.C. §666(j).

3/ See footnote 1, above, Upon contest, a respondent is afforded an opporunity for a hearing, 29 U.S.C. §659(c). At this hearing, both parties were represented, no employee came forward to claim party status, §659(c) (Tr. 4), and post-hearing briefs were filed by December 22, 1980.

Respondent presented three witnesses, its Director of Yarn Manufacturing (Porter) and two plant managers (Adams and Wuorio) whose total experience with respondent is 66 years and 94 years generally in this business covering all aspects (Tr. 93, 95, 119-120, 137). All testified that the stock creates no breathing hazard even when buried in it. The snythetic fibers blended are much lighter than woolen. (Tr. 101, 102, Porter, 129, Adams). Mr. Wuorio, who has 35 years experience, used to go to sleep in the bins capable of holding four times as much with the stock blowing in. The only danger was from a man removing the stock with a pitchfork. He might stab a sleeping employee. (Tr. 139-140) But the material is very fluffy and a man simply walks around in it till it is compact (Tr. 94-95 Porter, 130 Adams).

From the blender, the stock flows down at an angle of 25 or 30 degrees from the back of the beam at approximately the middle of the room to the door at the lower level, similar to a ramp (Tr. 104, 106-107 Porter). As a man hangs onto the beam, his feet would be a maximum of six feet from the floor. There is always stock on that floor (Tr. 116, 118 Porter), two or three feet of it (Tr. 129 Adams). The beams across the four separate bins are unique at the Yantic mill; none of the bins at the other mills have these (Tr. 124, 135 Adams), and at the Ballowville plant, where Wuorio is the plant manager, the employees working in pairs walk off the catwalk, stepping down the stock until it is packed with no problems (Tr. 142-143).

A support rod for the blender extends across the beam two or three feet over it for a man to hang on to which shows on photo Exhibit R-3 (Tr. 97-98, 112 Porter).

All three of these witnesses agree that there is no hazard in the bins and two stated that safety belts are not necessary and would cause more bodily harm

than a six foot fall into the soft stock (Tr. 103 Porter, 128-129 Adams). In his 33 years in this field, Mr. Porter knows of no one injured or killed in a bin (Tr. 107); Mr. Adams knows of no injuries such as a broken limb (Tr. 126-127); and in Mr. Wuorio's 35 years of activity there have been no fatalities or injuries (Tr. 140-141).

There is a safety committee at the Yantic plant supervised by the corporate safety department and safety rules are enforced by, first, a verbal warning, then written and, on the third infraction, the employee will be discharged. The company has a safety handbook which is distributed to all employees (Tr. 127, 130-131, 132-133 Adams).

On this record, complainant argues that a fallen employee suffers the hazards of (1) suffocation since a man "walking down" the stock is in a different position from one who falls and may not be able to gain his feet, or (2) serious injury if he falls on his head or he may break a limb if he strikes that part of the floor cleaned of stock.

Respondent contends that the cited standard is not applicable to these facts because safety belts do not appear to be within those protective devices envisioned and encompassed within the regulation. This, in part was the position approved by Judge Mitchell in Union Oil Company, 78 OSAHRC 21/E4 (3/9/78), BNA 6 OSHC 1433, CCH ¶22,614, affirmed on other issues in Marshall v. Union Oil Co. of California, 616 F.2d 113 (1980). At the time of the hearing of this case, October 1980, the Commission had not passed on this question.

Finally, respondent — relying on the long experience of its witnesses, the fact that there has been no injuries in the bins and that this was the inspecting officer's first exposure to a bin and could only surmise what might happen — argues that no serious physical injury could befall an employee even toppling

the six and a half feet into the stock, i.e., there is no hazard.

In the spring of 1982, a divided Commission ruled that safety belts are within the ambit of 29 CFR §1910.132(a)[4/] Bethlehem Steel Corporation, I and II, 82 OSAHRC 19/C8, BNA 10 OSHC 1470, CCH ¶25,982 (3/31/82), and 82 OSAHRC 24/B7, BNA 10 OSHC 1607, CCH ¶26,043 (4/30/82). The Commission further divided in these cases on whether the standard could apply retroactively and this turned on whether the standard and circumstances of the condition give sufficient notice to respondent that the standard must be obeyed.

In the instant case, there is no dispute that safety belts have never been worn in bins when employees are compacting the yarn. The experience of the respondent and the nature of the event are such that it never perceived the hazard as obvious as complainant argues it is. Respondent is a safety conscious company and enforces its safety policies but the great weight of the evidence smothers complainant's testimony that a hazard of such magnitude exists in these bins that safety belts are or should be a required protection. I find that the alleged hazard is not such that a reasonable person familiar with the circumstances of the activity would recognize a need for the use of the protective equipment, Ed Cheff d/b/a Ed Cheff Logging, 81 OSAHRC 60/A2, BNA 9 OSHC 1883, CCH ¶25,431, and, therefore, conclude that the broad, vague wording of the standard and the nature of employment were not sufficient to put respondent on notice that the regulation required the use of safety belts. The order below vacates the citation on this ground.

Specifically, as to the nature of hazard, I find that

1) An employee is not assigned to step down the yarn at the upper portion of the bin unless there is a great mass of the yarn, 16,000 to 18,000 pounds,

---

4/ Therefore, §5(a)(1), the general duty clause, is not applicable, 29 U.S.C. 654 (a)(1). See Bethlehem Steel Corporation II, above.

collected there;

2) This amount is enough to cushion his fall should he trip off the catwalk or lose his grip on the beam or iron rod supporting the blender (there is no evidence that employees use this as a handhold), falls of 13 to six feet, respectively, so that he would not suffer any greater serious physical harm than would be caused by a safety belt; and

3) Although when immersed in the yarn it would appear that suffocation is a possibility, the preponderance of the evidence proves otherwise. An employee buried in this light, fluffy stock would not be deprived of oxygen.

Based on these findings, I conclude that no serious[5/] violation exists in the bins at the Yantic facility. And at most the alleged violation may result in abrasions which may be termed as de minimis and having no direct or immediate relationship to safety. 29 U.S.C. §658(a). Bethlehem Steel Corporation, 81 OSAHRC 86/A2, BNA 9 OSHC 2177, CCH ¶25,645. Thus, in the alternative should 29 CFR §1910.132(a) be found to bind respondent here, I would affirm the alleged violation as de minimis with no civil penalty or requirement to abate.

Respondent's answer to the complaint admits the jurisdictional facts alleged there (see also Tr. 4) and I conclude that the Commission's power to decide this controversy is proper. 29 U.S.C. 652(5) and 653(a). Having considered the evidence and the parties' contentions on brief, it is ORDERED that the citation issued May 2, 1980, alleging a serious violation of 29 CFR §1910.132(a) be vacated together with the proposed $720 civil penalty.

David J. Knight
DAVID J. KNIGHT
JUDGE, OSHRC

Dated: September 2, 1982
Boston, Massachusetts

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5/ An employer must actually know, or exercise reasonable diligence to learn of the existence of a violation, before it may be termed as serious. 29 U.S.C. §666(j).

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
ROOM 7B11, FEDERAL BUILDING
1100 COMMERCE
DALLAS, TEXAS 75242
FTS 729-5271
COM (214) 767-5271

## NOTICE OF DECISION

Secretary of Labor v. D. C. Well Service, Inc.
OSHRC Docket NO. 81-2428

1. Enclosed is a copy of my decision. It will be filed with the Commission on September 7, 1982, and will become the final order of the Commission on October 7, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D. C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is October 7, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92 and 93.

Administrative Law Judge

Date: August 18, 1982

OSHRC Form 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>D.C. WELL SERVICE, INC.,<br><br>Respondent. | OSHRC DOCKET NO. 81-2428 |

DECISION AND ORDER

Appearances: George Collins, Esq., of Dallas, Texas, for the complainant.

George R. Carlton, Jr., Esq., of Dallas, Texas, for the respondent.

PROCEDURAL HISTORY

The respondent, D.C. Well Service, Inc., [1] was operating its Rig No. 10 near Smyer, Texas, on September 1, 1981, when it was inspected by a compliance officer of the Occupational Safety and Health Administration ("OSHA"). As the result of that inspection, two citations were issued to respondent October 2, 1981, alleging one serious and one nonserious violation of §5(a)(2) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651, et seq. ("the Act") and two standards promulgated under §6(a) thereof, codified at 29 CFR 1910.27(d)(5), pertaining to ladder cages and safety devices, and 29 CFR 1910.157(d)(3)(iv), pertaining to portable fire extinguishers. On

[1] Respondent was cited as D.C. WEll Service Co., Rig No. 10. Its letterhead (see last page of Exhibit R-3) shows its name to be D.C. Well Service, Inc.

October 16, 1981, respondent timely filed notice of contest, initiating this proceeding before the Occupational Safety and Health Review Commission ("the Commission") under §10(c) of the Act. Thereafter a complaint and an answer were filed with the Commission. The case came on regularly for hearing June 27, 1982, at Lubbock, Texas. No affected employee or authorized representative of affected employees took part in the proceeding. Respondent submitted a post-hearing brief; the Secretary did not.

THE ISSUES

Respondent's answer admitted the jurisdictional allegations of the complaint. The issues remaining to be determined are:

1. Whether respondent was in serious violation of 29 CFR 1910.27(d)(5). This subsumes the issues of whether the citation and complaint should be amended to allege a serious violation of 29 CFR 1910.27(d)(1)(ii) in addition to §27(d)(5) and whether respondent has proved its affirmative defense of unpreventable employee misconduct.

2. Whether respondent was in nonserious violation of 29 CFR 1910.157(d)(3)(iv).

3. The appropriate penalty for any violations found.

DISCUSSION AND OPINION

I. <u>The ladder safety device citation.</u>

A.

Item 1 of citation 1 alleges a serious violation of 29 CFR 1910.27(d)(5) in that:

> Cage protection, or ladder safety devices in lieu of cage protection, were not used to tower, water tank or chimney ladders over 20 feet in unbroken length:
>
> > Derrickman ascends up the derrick ladder without climbing safety devices.

The cited standard provides:

> Ladder safety devices. Ladder safety devices may be used on tower, water tank, and chimney ladders over 20 feet in unbroken length in lieu of cage protection. No landing platform is required in these cases. All ladder safety devices such as those that incorporate life-belts, friction brakes, and sliding attachments shall meet the design requirements of the ladders which they serve.

The permissive language of §1910.27(d)(5) allows the use of ladder safety devices in lieu of cages on certain ladders, but for a positive requirement one must look to §1910.27(d)(1)(ii), which provides:

(d) Special requirements.

(1) Cages or wells.

* * *

> (ii) Cages or wells (except as provided in subparagraph (5) of this paragraph) conforming to the dimensions shown in figures D-7,D-8, and D-9 shall be provided on ladders of more than 20 feet to a maximum unbroken length of 30 feet.

It is apparent that these two subparagraphs must be read together, especially since §1910.27(d)(1)(ii) refers specifically to subparagraph (5). Together they require, in effect, that a cage or a ladder safety device be provided for a ladder over 20 feet in unbroken length used on a tower, water tank or chimney. This conforms to the language of the citation, and the respondent was thus on notice that it was the Secretary's position that it was required to, and did not, provide either of these protective devices. The case was fully litigated on that basis.

Moreover, the parties were informed at the hearing that §1910.27(d)(1)(ii) would probably be added to the citation by amendment and that they should adduce any evidence they had available that would be made pertinent by such an

amendment (Tr.32-34).

By letter from the undersigned dated July 9, 1982, the parties were notified that this amendment would be made sua sponte and that if they desired a supplemental hearing they should request it within a week, specifying the evidence they proposed to introduce at such a hearing. No such request was made. Therefore, the amendment will be made.

B.

Compliance Officer Placido Vigil's uncontradicted testimony establishes that a permanent metal ladder extended from the rig floor 35 feet up into the derrick (as shown by a photograph, Exhibit C-1), that the ladder had no cage or safety climibing device, and that he saw the derrickman go up and down the ladder (Tr.8,9,11,48,49).

The standard presumes a hazard, but the compliance officer testified that there had been a number of falls from tubing boards in this region (Tr.10) and that death or serious physical injury could be expected to result from such a fall, especially since the derrick floor beneath the ladder is metal and has many sharp metal objects on it (Tr.10,11).

The compliance officer was accompanied on the walkaround by the rig operator, [2] but the record is not clear as to whether the derrickman went up and down the ladder in his presence. However, the compliance officer discussed the apparent violation with both the operator and the derrickman (Tr.10),

---

[2] There is a question concerning the operator's name. Vigil had it as Richard McKane, but respondent's safety director, Richard McCance, said the operator's name was Leslie McKay. Respondent seeks to discredit Vigil's testimony on the basis of this discrepancy, which I regard as unimportant. It is possible that Vigil was confused by the similarity of the surnames McKay and McCance.

and there is no indication that the operator was unaware of the derrickman's use of the ladder. In any event, the derrickman had access to the hazard, and the respondent is chargeable with knowledge of any violative condition which existed during the inspection and was readily discernible. Weatherhead Co., 76 OSAHRC 61/E7, 4 BNA OSHC 1296, 1976-77 CCH OSHD ¶20,784 (No. 8862, 1976). Here the violative conditions is the unprotected ladder, as is discussed below.

C.

Respondent contends that an OSHA field directive approves an industry practice permitting employees to ride the hoisting equipment on oil well servicing rigs and that the act of its derrickman in using the unprotected ladder amounted to unpreventable employee misconduct.

Exhibit R-2 is Dallas Regional Instruction CPL 2-1.1, which states in pertinent part:

> C. BACKGROUND
>
> In the past, several requests have been made for a written directive allowing employees to ride the traveling blocks or elevators on well servicing rigs.
>
> A recent policy interpretation from the National Office identifies the circumstances under which employees are permitted to ride hoisting equipment on well servicing rigs. The stated policy is similar to that adopted by the Wyoming Occupational Health and Safety Rules and Regulations for Oil and Gas Well Servicing and the recommended practices of the American Petroleum Institute [API].
>
> D. GUIDELINES
>
> 1. Employee riding of hoisting equipment to attain access or egress at an elevated work station in oil and gas well servicing is allowed only in work situations when such action results in the least hazardous exposure to employees.
>
> 2. Riding of the traveling block and/or elevator is allowed only when it is the least hazardous means of hoisting or lowering employees; and is subject to the following:

a. No employee shall ride the traveling block and/or elevator when rods, tubing, or any other downhole equipment is being moved.

b. An employee riding the traveling block and/or elevator shall wear a safety or parachute type safety harness with appropriate lanyard and safety attachment anchored and adjusted to prevent a fall of more than five feet.

Exhibit R-1 is API Recommended Practices for Occupational Safety and Health for Oil and Gas Well Drilling and Servicing Operations, §4.8.3 of which contains language substantially identical to the "guidelines" stated by Exhibit R-2.

Such OSHA directives to its field personnel are not binding on the Commission when they contradict a duly promulgated standard. Bethlehem Steel Corp., 81 OSAHRC 108/A2, 10 BNA oshc 1264, 1982 CCH OSHD ¶25,839 (No. 16067, 1981). However, there may be a question of whether an employer has notice of what the standard requires. Cf., Chesapeake Operating Co., 82 OSAHRC _____, 1982 CCH OSHD ¶26,142 (No. 78-1353, 1982) (Commissioner Cleary's view). Since the respondent here is not charged with violating any standard prohibiting the use of material hoisting equipment to lift personnel, it is unnecessary to resolve the latter question.

The short answer to respondent's contention is that the unprotected ladder was available for employee use and was so used, regardless of whether the employee might have ridden the hoisting equipment. Of course, respondent contends that this amounted to unpreventable employee misconduct. It has not, however, established the elements of that defense.

Unpreventable employee misconduct is an affirmative defense wherein the employer bears the burden of proving that the actions constituting non-compliance

with the standard were (a) unknown to the employer and (b) contrary to both the employer's instructions and a company work rule which the employer had uniformly enforced. Weatherhead Co., 76 OSAHRC 61/E7, 4 BNA OSHC 1296, 1976-77 CCH OSHD ¶20,784 (No. 8862, 1976).

"Work rule" was further defined in J. K. Butler Builders, Inc., 77 OSAHRC 26/A2, 5 BNA OSHC 1075, 1977-78 CCH OSHD ¶21,585 (No. 12354, 1977), as

> . . . an employer directive that requires or proscribes certain conduct, and that is communicated to employees in such a manner that its mandatory nature is made explicit and its scope clearly understood.

Additionally, the work rule must be the equivalent of the standard the respondent is accused of violating. Kansas Power & Light Co., 77 OSAHRC 39/A2, 5 BNA OSHC 1202, 1977-78 CCH OSHD ¶21,696 (No. 11015, 1977).

Richard McCance, respondent's safety director, testified that a parachute-type belt "to ride the blocks with" was at Rig No. 10 on the date of the inspection and that employees were instructed to use it with the lanyard attached to the block to ascend the derrick (Tr.36,37). McCance was not at Rig No. 10 at the time of the inspection (Tr.40).

There was no evidence regarding any work rule or specific instructions to the derrickman not to use the ladder. Indeed, there is some indication that he could not have used the travelling block at the time of the inspection, for the compliance officer testified that the operator told him the derrick was not in use (Tr.8). Nevertheless, the derrickman apparently had a reason to ascend to the tubing board, for the compliance officer testified that the employee attached something after reaching the tubing board (Tr.49).

Respondent's safety manual (Exhibit R-3) contains no work rule on use of the travelling block to ascend into the derrick. It does, however, contain

a safety inspection checklist which includes two items pertaining to the derrick ladder and another for "Derrick ladder climbing device."

The 17-day abatement period proposed by the citation was contested, but the only testimony on this subject was the compliance officer's testimony that the operator agreed 15 days would be sufficient (Tr.15). He also quoted the operator as saying ladder climbing devices were being installed in all of respondent's rigs but that they hadn't gotten around to installing one on Rig No. 10(Tr.13). Safety Director McCance denied that any such devices were being installed by respondent (Tr.36), but it is not necessary to resolve this conflict.

D.

Respondent also contends that the language of §1910.27(d)(1)(ii) requiring cages or wells on "ladders of more than 20 feet to a maximum unbroken length of 30 feet" means that neither that standard nor §1910.27(d)(1)(i) is applicable to respondent's ladder, which was 35 feet in length. All this really means is that, when these two standards are read together with §1910.27(d)(2), respondent's ladder should have had a landing platform as well as a cage or ladder safety device. However, respondent was not charged with this additional violation.

E.

The next question is what would be the appropriate penalty for this violation, the Secretary having proposed a penalty of $420.

Section 17(j) of the Act requires the Commission, in assessing penalties, to consider the gravity of the violation and the employer's size, good faith and history of previous violations. These factors need not be accorded equal

weight, but the gravity is usually of greater significance than the others. Colonial Craft Reproductions, 72 OSAHRC 11/B10, 1 BNA OSHC 1063, 1971-73 CCH OSHD ¶15,277 (No. 881, 1972). Elements to be considered in determining gravity include the number of employees exposed to the risk of injury, duration of the exposure, precautions taken against injury, and the degree of probability of occurrence of an injury. National Realty & Construction Co., Inc., 72 OSAHRC 9/A2, 1 BNA OSHC 1049, 1971-73 CCH OSHD ¶15,188 (No. 85, 1972) rev'd on other grounds, 489 F.2d 1257 (D.C. Cir., 1973).

On balance, after considering the statutory criteria, I find the proposed penalty of $460 to be appropriate.

II. The alleged fire extinguisher violation.

Item 1 of citation 2 alleges a nonserious violation of 29 CFR 1910.157 (d)(3)(iv) in that a portable fire extinguisher did not have attached to it a durable tag showing the maintenance or recharge date.

The inspection date was September 17, 1981, and the cited standard was deleted effective December 11, 1980, in a general revision of Subpart L. See F.R. 60656, September 12, 1980.

The revised standards for portable fire extinguishers contain no counterpart for §1910.157(d)(3)(iv). Sections 1910.157(e)(3) and 1910.157(f)(16) of the revised standards do require that the employer maintain records of maintenance and hydrostatic testing dates for fire extinguishers. However, unlike the former §1910.157(d)(3)(iv) the new standards do not require that this information be recorded on a "durable tag" attached to the extinguisher.

Although the evidence clearly established that the fire extinguisher here involved had no such tag attached (Tr.17-18), it did not establish that

respondent had no records of maintenance and testing of the extinguisher as required by the standards in effect at the time of the inspection. Therefore, there is no basis for an amendment to the citation and complaint.

This item must be vacated.

## FINDINGS OF FACT

1. Respondent, D.C. Well Service Co., is in the business of servicing oil wells and is an employer engaged in commerce within the meaning of §3(5) of the Act.

2. On September 1, 1981, respondent's Rig No. 10 was servicing an oil well near Smyer, Texas, when it was inspected by an OSHA compliance officer.

3. Rig No. 10 had a fixed ladder approximately 35 feet in height which extended up into the derrick from the derrick floor to the tubing board. This ladder was an integral part of the derrick structure. It was not equipped with a cage or a ladder safety device.

4. The compliance officer observed respondent's derrickman as he used the ladder to ascend to and descend from the derrick's tubing board.

5. Respondent's employees were instructed to use a safety harness attached by a lanyard to the travelling block when ascending or descending the derrick, and one such safety harness was provided at Rig No. 10. There is no evidence that their instruction was communicated to the derrickman or that it was uniformly enforced.

6. A regional OSHA directive to field personnel permitted the use of hoisting equipment on oil well servicing rigs to lift employees into the derrick, under certain guidelines.

7. Respondent adduced no evidence that it had a work rule forbidding employees to use the derrick ladder. This ladder was accessible to employees. The derrickman did not violate any work rule or instructions in using this ladder.

8. Respondent knew or in the exercise of reasonable diligence could have known that the derrick ladder violated OSHA standards and that its employees might use it.

9. A penalty of $420 is appropriate for respondent's violation of 29 CFR 1910.§§27(d)(1)(ii) and 27 (d)(5).

10. A portable fire extinguisher on Rig No. 10 bore no durable tag showing the maintenance or recharge date.

## CONCLUSIONS OF LAW

1. The Commission has jurisdiction of the parties and of the subject matter of this proceeding.

2. Item 1 of citation 1 should be amended to allege a serious violation of 29 CFR 1910 §§27(d)(1)(ii) and 27(d)(5), and on September 1, 1981, respondent was in serious violation thereof.

3. The standard formerly codified at 29 CFR 1910.157(d)(3)(iv) was not in effect on the date of the inspection herein.

## ORDER

On the basis of the foregoing discussion and opinion, findings of fact, and conclusions of law, it is ORDERED that:

1. Item 1 of citation 1 is amended to allege a serious violation of 29 CFR 1910.§§27(d)(1)(ii) and 27 (d)(5), and, as so amended, it is AFFIRMED

and a penalty of $420 is ASSESSED.

2. Item 1 of citation 2 is VACATED.

DEE C. BLYTHE
Administration Law Judge

Date: September 7, 1982

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

420 U. S. COURTHOUSE
POST OFFICE SQUARE
BOSTON, MASSACHUSETTS 02109

NOTICE OF DECISION

Secretary of Labor v. Bethlehem Steel Corporation
OSHRC Docket No. 80-2707

1. Enclosed is a copy of my decision. It will be filed with the Commission on September 8, 1982, and will become the final order of the Commission on October 8, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is October 8, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

DAVID W. KNIGHT
Judge, OSHRC

Date: August 19, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant<br>v.<br>BETHLEHEM STEEL CORPORATION,<br>Respondent | OSHRC DOCKET NO. 80-2707<br><br>DECISION & ORDER |

Appearances: For the complainant,
Francis V. LaRuffa, Regional Solicitor
U. S. Department of Labor
New York, New York
By: James A. Magenheimer, Esq.

For the respondent,
Murray N. Shelton, Jr., Esq.
Bethlehem Steel Corporation
Bethlehem, Pennsylvania

For affected employees,
John S. Choinski, Safety Chairman
Local 2601, United Steelworkers
of America
Lackawanna, New York

During the course of an inspection at the Bethlehem Steel Corporation's Lackawanna, New York, plant (respondent) on April 8, 1980, Compliance Officer Joseph P. Smith of the Occupational Safety and Health Administration of the U. S. Department of Labor (complainant or OSHA) saw a puddle of water about 15 to 20 feet from the tap side of vessel 16 which contained molten metal on the second floor. Should that metal come in contact with the water, an explosion could result sending pieces of the metal flying about the area.

Should the molten mass encapsulate (completely cover) the water, it would violently explode. (Tr.[1/] 12, 13, 17)

The puddle was 10 to 15 feet long and five to seven feet wide in places. Its depth ranged from an eighth of an inch to an inch over a relatively smooth concrete floor. (Tr. 13-14, 21) The officer was told by employees that the puddle was there for over a week. He saw four or five employees passing through the area adjacent to the water performing short tasks but no work station was located there and was advised that regularly maintenance workers, or scrap turn men, would pass and these intermittently could amount to 10 employees (Tr. 14, 18).

Mr. Smith could not find the source of the water but there are leaking pipes throughout the building. This puddle he described as standing water covered by a layer of dust (Tr. 19). It is shown as the orange mass on the first two photos of exhibit C-2 (Tr. 15). The overflow of molten metal from vessel 16 would not necessarily be retained in the rubble pit (Tr. 15, 22) and the third photo on exhibit C-2 shows the metal on the floor beyond that pit; it shoots out (Tr. 24-26) and sparks landing in the water popped (Tr. 21).

The closest the molten metal came to the water was six to eight feet which the officer saw, but, if the puddle or overflow from the vessel were larger, there would be contact (Tr. 16). When the molten metal covers the water, it turns it into steam which expands and will blow the metal all over. Only a small portion of the puddle need be encapsulated for this reaction to occur, in fact, any moisture covered will do it. He was told water and molten metal exploded six times at this facility. Water and moisture is one of the biggest hazards in the process of pouring molten metal. (Tr. 28-31)

1/ A hearing was held on January 7, 1981, and "TR" refers to transcript pages.

Mr. Smith characterized the hazard created by the water as serious[2/] for two reasons: (1) the possibility of an explosion causing injuries and burns; and (2) since there are pallets and equipment in this area, an employee slipping on the wet floor could hurt himself (Tr. 23-24). Respondent has received two prior citations alleging violations of the same standard as here and, for that reason, this alleged violation is termed as repeated[3/] (Tr. 20, 22 and exhibit C-1, the prior citations). These citations have become final orders, the parties stipulated (Tr. 6).

As a result of this inspection and investigation, a citation[4/] was issued[5/] on May 8, 1980, alleging that respondent repeatedly violated the standard at 29 C.F.R. §1910.22(a)(2) which commands

> Subpart D: Walking-Working Surfaces
>
> (2) The floor of every workroom shall be maintained in a clean and, so far as possible, a dry condition. Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats, or other dry standing places should be provided where practicable.

A civil penalty of $2,400 was proposed[5/] and the allegedly hazardous condition was to be abated[5/] within one week. Respondent contested[6/] the citation by letter dated May 13, 1980.

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2/ A serious violation exists where there is a substantial probability that death or serious physical harm could result from the condition and the employer knew or, with the exercise of reasonable diligence, should have known of the presence of the violation. Occupational Safety and Health Act of 1970, 29 U.S.C. §§651, et seq., at §666(j).

3/ A repeated violation may carry a civil penalty of up to $10,000. 29 U.S.C. §666(a).

4/ Two citations were issued and contested in their totality. All but the item at issue here (citation 2, item 1) were settled by the parties at the outset of the hearing. These are disposed of in the order below.

5/ Under 29 U.S.C. §658(a). Penalties may be assessed under §659(a) and abatement periods set under §658(a).

6/ Contests must be filed within a 15 working-day period, 29 U.S.C. §659(a), and, thereafter, a hearing is set, §659(c). At this hearing, all parties were represented and complainant and respondent filed their briefs by March 2, 1981.

It presented two witnesses. Jerome Wise, Assistant Superintendent of the Steelmaking Division for the past three and a half years and who has worked in the BOF (basic oxygen furnace) for 15 years, testified that it is impossible to keep the floors dry at all times. Water leaks from broken pipes and pumps and a general cleaning process. This puddle resulted from a clogged drain on the floor above. This happens occasionally in this area but these situations are corrected. In any event, this puddle was not more than a quarter inch deep. (Tr. 32, 33, 37-38, 40, 45) They did not know how long this water was there (Tr. 36) but, over his three and a half years at Lackawanna, it has happened about 24 times and at times it requires a couple of days before it is cleaned up (Tr. 42). Refining steel is not a wet process and an employee would not stand in the water to work (Tr. 36). He would also easily walk around the puddle and there exists no slipping hazard because the floor is of rough concrete (Tr. 33-34).

Mr. Wise doubted that the water would be involved in an explosive situation because: Firstly, the area of the puddle is to the south and the molten metal in a heavy flow, or slopping, would travel into the rubble pit and then eastwardly or westwardly (Tr. 34-35). And secondly, a heavy roll off would push the water before it, turn it into steam and dry it up (Tr. 35-36, 46). There would be no encapsulization for, to accomplish that, the metal must come from above (Tr. 36, 47). Only an encapsulation could lead to an explosion. Here there would be popping as sparks hit the water. (Tr. 46, 47) No one would be injured and there has never been an explosion in this area (Tr. 48-49). He has seen such explosions but no injuries resulted (Tr. 42-43).

Joseph P. Eagan is respondent's Senior Corporate Safety Engineer and testified that the source of the standard cited against respondent is

ANSI Z 4.1-1968 (American National Standards Institute), section 3.1.2 and deals with sanitation not safety. Its purpose is to prescribe minimum sanitary requirements to protect health (§1.2) and "sanitary condition" is a status to prevent the incidence and spread of disease (§2). This standard was not intended to be applied to slipping or exploding hazards. (Tr. 50-54) Steelmaking is not a wet process (Tr. 54). On cross-examination, Mr. Eagan admitted that Subpart D of the OSHA standard covers walking and working surfaces and another section or subpart regulates sanitation (Tr. 55).

Finally, with regard to the repeatedness of the alleged violation, respondent elicited from Compliance Officer Smith that the second of the two prior citations was a non-serious violation (Tr. 20, exhibit C-1) for a wet and slippery surface and did not have a reference to molten metals. He did not know if the first of these referred in any way to the metals (Tr. 22, 23) but there is no hot metal on the sixth floor of the BOF, according to Mr. Wise, the area cited in the first of these citations (Tr. 33).

In rebuttal, John S. Choinski, the affected employee representative, called George A. Brenner, this plant's Superintendent of Steelmaking, who testified that the preventive maintenance program is based on rebuilding equipment to be sure it is all tight. If a leak occurs, corrective measures are taken. But pipes, subject to freezing and bursting, are not wrapped and protected by trace lines and these could burst. (Tr. 57)

The plant has experienced two explosions involving molten metal and moisture at other sections of the BOF (the pit area)--one destroying a crane and injuring an employee and the other shattering windows with no injuries--but in these instances the molten metal covered, not a wet floor, but damp soil (Tr. 58-59, 61-62). Mr. Brenner acknowledged that the union has complained

about the presence of water in the BOF but it is not the greatest safety problem (Tr. 58, 60) and at one time the complaint was directed to footwear worn on wet floors (Tr. 61).

But Mr. Choinski, who has represented employees for 10 years as their safety agent and who works at the plant, testified that water and molten metal is the biggest safety problem in the BOF; he has seen violent explosions resulting from their contact with each other; but the respondent's response to the union's complaints on this subject is that the accumulation of water is a "continuing problem" (Tr. 63). In Mr. Choinski's opinion, there is no such thing as a non-serious violation concerning water and molten metal (Tr. 64).

FINDINGS AND CONCLUSIONS:

Based on this record and having considered the parties' post-hearing proposed findings and conclusions (as these may be contained in their briefs), I find:

1) The puddle of water described by Compliance Officer Smith on the second floor of the BOF does not create a tripping or slipping hazard because

a) No employee passes through or works in it;

b) The floor is made of rough concrete and would not be slippery; and

c) There is no evidence that employees come in contact with the water but only pass by with ample room to do so.

2) The potential for an explosion is so remote as to be non-existent because

a) The molten metal, although it was seen outside the rubble pit, would tend to flow not in the direction of the water, south, but to the east or west and the Compliance Officer saw it no closer than six feet;

b) Unless completely encapsulated, there is little probability of an explosion or violent reaction but some popping from sparks;

c) The molten metal, a large amount, flowing toward the water would push and heat it until the water evaporated or steamed off; and

d) Encapsulation, leading to an explosion, it is reasonable to believe, therefore, must result from a drop of the molten metal from above onto, covering and capturing the water.

For these findings I accept the testimony of Mr. Wise as supported by his years of experience in the BOF and this overcomes the conclusions offered by Compliance Officer Smith's evidence indicating opposite effects from the presence of the water some 10 to 15 feet away from vessel 16. I do not find the latter's testimony persuasive and respondent's evidence refuted the inferences created.

But this is not to say that the standard requiring floors to be kept in a dry condition has not been violated. A preponderance of the evidence leads to the findings

1) The puddle existed for at least a week according to the unrebutted evidence of the Compliance Officer;

2) While leaking pipes, pumps and blocked drains appear to be a common condition, no action was taken by respondent to clear the water to prevent a build-up while the drainage problem on the floor above was attended to. No clean-up work would be done at all until the drain over this area was cleared according to the respondent's evidence. Thus, the floor was not kept as dry, or the water contained, as could be possible; and

3) Employees, up to 10, are in the area on an irregular basis and could be struck by popping sparks from the molten metal falling into the puddle.

The evidence shows that any injuries would be superficial and the evidence is less than convincing that serious burns could result from these pops.

Complainant's burden of proof under the housekeeping standards, 29 C.F.R. §1910.22(a), is to show a condition violating the standard's requirement and employee exposure to that. Thereafter, the hazard is presumed. Bunge Corp. v. Secretary of Labor, 638 F.2d 831 (1981) at 835. I conclude that the complainant has carried this burden to the extent that an other than serious violation has been proven.

By this same token, the prior two violations in May 1973 and September 1974, respectively, concern floors not kept as dry as possible; these are final orders; and this citation may properly be deemed as a repeat of the prior accusations even though, and I find that, the hazards are different, the violations occurred in other areas, and there is no showing that the prior violations involved exposure of molten metal to water. The hazard presented bears on the civil penalty when the violation is of a standard requiring the maintenance of a specific condition, dry floors. Therefore, respondent's attempt here to show a disparity between this and the prior citations, which is its burden, does not hold. See Bunge, above, at 836-837, and that Court's interpretation of the Commission decision in Secretary v. Potlatch Corp., 79 OSAHRC 6/A2, BNA 7 OSHC 1061, CCH ¶23,294, which defines a repeat violations generally in these terms.

The parties stipulated that $2,400 proposed civil penalty meets the statutory criteria, 29 U.S.C. §666(i), except for the element of the gravity of the violation (Tr. 10-11). As found above, the nature of any injury which might occur is not serious and employees are not constantly exposed to the hazard in the area of the puddle. The order below affirms the citation as repeated and non-serious. A civil penalty of $240 is assessed.

Lastly, the cited standard is applicable to the area cited. Respondent's evidence (exhibit R-2, the ANSI Standard) that this is a health and not a safety requirement is not well taken. Under the Act, the Secretary must promulgate any national consensus standard (ANSI) as an occupational safety and health standard

> ...unless he determines that the promulgation...would not result in improved safety or health...29 U.S.C. §655(a)

This standard the Secretary adopted verbatim and made it applicable to circumstances of health and safety. This does not violate his statutory duty. Cf., Modern Drop Forge Company v. Secretary of Labor, No. 81-1579 (7th Cir., July 26, 1982), BNA 10 OSHC 1825. And it serves to enhance the purpose of the Act in promoting "safe and healthful working conditions," 29 U.S.C. §651(b), without violating any notice due process. In Bunge, above, the Court dismissed the argument that this subpart deals only with housekeeping and may not be expanded to include fire and explosion rather than tripping and slipping. The Court found that the condition is determinative, not the hazard created by that condition. Bunge at 834 and footnote 4.

The Commission rejected the respondent's contention that this section governs only disease prevention and may not be stretched to encompass tripping hazards. It ruled that the requirement of keeping places of employment "in a sanitary condition" is in addition to maintaining them as "clean and orderly." 29 C.F.R. §1910.22(a)(1). And the Commission had the ANSI source standard before it. Secretary v. Pratt & Whitney Aircraft, 81 OSAHRC 39/A2, BNA 9 OSHC 1653, CCH ¶25,359.

Respondent here was properly cited under 29 C.F.R. §1910.22(a)(2) for the alleged tripping and exploding hazards.

**ORDER:**

Based on these findings and conclusions and respondent, in its answer, admitting the jurisdictional facts alleged in the complaint so that the Commission's jurisdiction is established, 29 U.S.C. §§652(5) and 653(a), it is ordered that

(1) The citation (No. 2, item 1) issued May 8, 1980, alleging a repeated violation of 29 C.F.R. §1910.22(a)(2) is affirmed as a repeated, non-serious violation with a civil penalty of $240 assessed therefor; and

In accordance with the motions, agreements, and stipulations among the parties (Tr. 4-6):

(2) Citation No. 1, items 3, 4, and 5 are affirmed with civil penalties of $250, $250 and $200, respectively, assessed therefor; and

(3) Citation No. 2, items 2, 3 and 4 are affirmed with civil penalties of $1,400, $2,500 and $400, respectively, and item 3a is amended to read: "B.O.F.-#17 vessel--tap side-2d floor, <u>during rebuilds</u>" (underscored language added).

DAVID J. KNIGHT
Judge, OSHRC

Dated: September 8, 1982
Boston, Massachusetts

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

# NOTICE OF DECISION

**SECRETARY v. ANHEUSER-BUSCH, INC.**

**OSHRC Docket No. 79-5002**

1. Enclosed is a copy of my decision. It will be filed with the Commission on September 9, 1982, and will become the final order of the Commission on October 12, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupationsl Safety and Health Review Commission
   1825 K Street, N. W., Suite 601
   Washington, D. C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is October 12, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92 and 93.

James D. Burroughs
JAMES D. BURROUGHS
Judge

Date: August 20, 1982

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

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| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 79-5002 |
| | ) | |
| ANHEUSER-BUSCH, INC., | ) | |
| | ) | |
| Respondent. | ) | |

APPEARANCES:

Stephen J. Simko, Jr., Esquire, Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia, on behalf of complainant.

A. Graham Allen, Esquire, Freeman, Richardson, Watson, Slade, McCarthy, & Kelly, P.A., Jacksonville, Florida, on behalf of respondent.

## DECISION ON REMAND

Burroughs, Judge: The Commission by order dated May 19, 1982, remanded this case for further proceedings consistent with the opinion of the United States Court of Appeals for the Eighth Circuit. The court reversed a decision by former Administrative Law Judge J. Paul Brenton vacating an "other" citation that alleged a violation of 29 C.F.R. § 1910.23(c)(1), for failure to erect railings around the top of pasteurizers in respondent's Jacksonville, Florida, brewery. Donovan v. Anheuser-Busch, Inc., 666 F.2d 315 (8th Cir. 1981), reh'g denied, 666 F.2d 328 (1982). While the court held the tops of pasteurizers were "platforms" within the meaning of 29 C.F.R. § 1910.21(a)(4), and affirmed a violation of 29 C.F.R. § 1910.23(c)(1), it remanded the case for purposes of determining whether the violation should be classified as de minimis.

The case was assigned to this Judge on May 25, 1982. On May 28, 1982, an order was issued requiring the parties to advise if they had any objection to deciding the issue of whether the violation should be classified as de minimis on the facts of record. Both parties advised that they had no objection to deciding the issue on the facts of record and that they desired to submit briefs on the question for determination. The parties were granted until July 16, 1982, to submit briefs, and briefs were received from both parties no later than July 16, 1982.

The findings of fact, to the extent made by Judge Brenton, are supported by the evidence of record and are accepted for purposes of resolving the dispute; however, he did not make crucial findings of fact as to actual conditions which existed on top of the pasteurizers. Since conditions on top of the pasteurizers have a direct relationship to the safety of employees, additional findings of fact have been made from the evidence of record to reflect actual working conditions to which employees are exposed during the course of performing assigned duties on top of the pasteurizers.

Anheuser-Busch, Inc., operates a brewery in Jacksonville, Florida. The equipment in the brewery includes four "can-line" pasteurizers.[1/] Each "can-line" pasteurizer is 25 to 30 feet in width, approximately 6 feet in height and about 100 feet in length. The tops of the pasteurizers are essentially flat and are composed of a series of stainless steel lids or plates that are removable. Spray heads are located under the lids. Each lid is five feet in length and two feet in width and has an "L" shaped handle at each end for lifting purposes. The lids are laid out in nine

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1/ The citation pertained to seven pasteurizers which included three "bottle-line" pasteurizers. Respondent contested the guardrail requirement only for the "can-line" pasteurizers.

parallel rows, each row containing 18 plates. The layout of each "can-line" pasteurizer is almost identical.

Several different classifications of employees have occasion to be on top of the pasteurizers during the course of their employment. Laboratory technicians perform a number of different functions on a rotating basis. One of their duties involves checking the spray heads in the pasteurizers. This operation is performed on top of the pasteurizer by two laboratory technicians. One of the technicians raises each lid while the other looks inside to check the spray heads. Each "can-line" pasteurizer is inspected for this purpose at two-week intervals. The time each laboratory technician estimated was spent on top of each of the pasteurizers for inspection varied slightly but was estimated to be between 40 and 60 minutes. They were consistent in their testimony that approximately one-fifth of their time was spent "near the edge" of the pasteurizer.

Production personnel are involved in two operations that are generally performed on top of the pasteurizers. They wash and mop the tops of the pasteurizers once each week. The mops have five-foot handles. The cleaning operation takes approximately one hour. Judge Brenton found their exposure to the perimeter, if any, during the cleaning operation to be miniscule.

Production personnel are also involved in carrying aluminum "logs" on top of the pasteurizers. The "logs" are placed on the conveyor belt as the beer enters the pasteurizer to separate changes in the lid type. The "logs" are approximately ten feet in length and weigh from six to eight pounds. As the "logs" exit the pasteurizer, they are placed on top of the pasteurizer at the discharge end. At periodic and infrequent intervals, an employee will ascend to the top of the pasteurizer and carry the "logs" from the discharge end to the entrance of the

pasteurizer. The employee performing this duty will generally walk down the middle of the top of the pasteurizer. Judge Brenton determined that employees performing this duty are never closer than ten feet to the perimeter of the pasteurizer. These same employees occasionally ascend to the top of the pasteurizers to look inside to see when a "log" will be coming out. This duty is performed only when requested by the foreman. Judge Brenton found that the two duties performed by production personnel on top of a pasteurizer required only ten minutes per day.

Maintenance personnel ascend the top of a pasteurizer to repair spray heads. The maintenance work is performed on a "need" basis instead of a regular scheduled basis. Generally, performance of maintenance work is determined by the number of spray heads which need attention. While repairing the spray heads, the mechanic is usually standing inside the pasteurizer up to his hips. This kind of repair operation can occur once or twice a week and is usually performed on weekends when the pasteurizers are shut down.

The cited standard, 29 C.F.R. § 1910.23(c)(1),[2/] clearly prescribes that guardrails shall be provided to protect employees from open-sided platforms four feet or more above an adjacent floor. The standard by its plain terms assumes the existence of a hazard, but noncompliance does not necessarily establish a

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2/ Section 1910.23(c)(1) of 29 C.F.R. provides, in pertinent part:

> Protection of open-sided floors, platforms, and runways. (1) Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. . . .

nonserious violation of the Act, as is alleged in this case. If the hazard does not have a direct or immediate relationship to occupational safety or health, the violation is de minimis. Lee Way Motor Freight, Inc., 74 OSAHRC 22/D12, 1 BNA OSHC 1689, 1973-74 CCH OSHD ¶ 17,693 (No. 1105, 1974), aff'd 511 F.2d 864 (10th Cir. 1975).

The Commission has held violations of the Act to be de minimis where the hazards presented were too "trifling to warrant the imposition of an abatement requirement or the assessment of a penalty." Southwestern Electric Power Co., 80 OSAHRC 81/C7, 8 BNA OSHC 1974, 1975, 1980 CCH OSHD ¶ 24,732 (No. 77-3890 and 77-3891, 1980). In classifying a violation as de minimis, the Commission has considered the nature of the hazard as well as the likelihood of an accident. Fabricraft, Inc., 79 OSAHRC 49/A2, 7 BNA OSHC 1540, 1979 CCH OSHD ¶ 23,691 (No. 76-1410, 1979). In Fabricraft, Inc., supra, the Commission found that some hazard existed from unguarded needles but noted that the only two puncture injuries occurring from 1971 to July 1976 were minor. The fact that only two injuries occurred during this period indicated that the likelihood of an injury was remote.

In National Rolling Mills Co., 76 OSAHRC 121/D7, 4 BNA OSHC 1719, 1976-77 CCH OSHD ¶ 21,114 (No. 7987, 1976), the Commission held a violation of 29 C.F.R. § 1910.22(c), which requires covers or guardrails to protect employees from the hazard of a pit, was de minimis. The Commission stated (4 BNA OSHC at 1721):

> We conclude that the hazard here was, at most, trifling. Particularly persuasive in this regard are the brief periods of exposure, the short fall distance of three feet, and the precautions taken by Respondent in its installation of all-grip plates and its enforcement of the use of nonskid shoes. In these circumstances, we conclude that the violation was of a de minimis nature and does not warrant a requirement of abatement or the imposition of any penalty.

In Van Raalte Co., Inc., 76 OSAHRC 48/B8, 4 BNA OSHC 1151, 197576 CCH OSHD ¶ 20,633 (No. 5007, 1976), the Commission made reference to the fact that no injuries had occurred in the last 38 years as a result of the condition. At the same time, the Commission pointed out in a footnote that this fact "is not necessarily controlling" since a hazard may be found to exist in the absence of any recorded injuries.

Employees are required to be on top of the pasteurizers for various functions associated with their employment. Laboratory technicians must work near the perimeter of the pasteurizer (Tr. 92, 117), since they must lift the lids to check the spray heads. The lids are within four to six inches of the perimeter on the sides of the pasteurizer (Ex. R-1, R-2, R-3, R-5; Tr. 76). The lifting hooks, which are clearly visible in the photographs introduced in evidence as exhibits R-1 and R-2, present a tripping hazard to a careless employee. An employee tripping on the lifting hooks on the lids at the perimeter of the pasteurizer would likely fall off the top.

Production personnel wash and mop the pasteurizers once each week. They have to perform some of this work in close proximity to the perimeter since the mop handles are only five feet in length. A solution of soap and acid is used to clean the top (Tr. 52), and the solution makes the lids, as described by one of the employees, "mighty slippery" (Tr. 105). There is always the possibility of an employee engaged in this type work slipping near the perimeter and sliding over the perimeter. The lifting hooks also present a tripping hazard to employees engaged in this activity.

There is evidence that slime has a tendency to accumulate on the lids at the rear of the pasteurizer (Tr. 42, 49-50, 92, 106). This tends to make the lids slippery.

There is also evidence that some of the lids on top of the pasteurizers are warped or bent (Tr. 37). This condition creates another tripping hazard. Evidence was also presented to show that whenever the spray heads burst, some of the water gets to the top of the pasteurizer through the cracks between the lids (Tr. 41, 112). The water would have a tendency to make the surface slippery.

Joseph Gamber, a maintenance mechanic, testified that it was not uncommon to slip while on the top of a pasteurizer (Tr. 29-30). Milton Hannon, Sr., a laboratory technician, testified that while he had not fallen off of a pasteurizer, he had fallen into one (Tr. 50, 51). While a guardrail will not protect against a fall into a pasteurizer, the incident does indicate that employees do fall while on top of a pasteurizer. It may have been fortunate for Hannon that he fell on the top in the interior of the pasteurizer and not at the perimeter. There is no way respondent can insure that no falls will ever occur at the perimeter.

While the laboratory and production personnel have only brief periods of exposure to the perimeter during a workweek, the existence of slippery conditions and tripping hazards increases the possibility of an unexpected fall. There is no evidence that employees were required to wear nonskid shoes or take any precautions to alleviate the possibility of a fall. At least one employee testified that he wore no type of safety shoes while on the top of the pasteurizer (Tr. 117), and a second employee stated that his shoes were suppose to be safety shoes (Tr. 92).

The evidence does not indicate that anyone has fallen from the top of a pasteurizer since the brewery has been in operation. This fact is commendable, but it is not persuasive of the issue. "One purpose of the Act is to prevent the first accident." Lee Way Motor Freight, Inc. v. Secretary of Labor, 511 F.2d 864, 870

(10th Cir. 1975). In the event an employee fell or slipped at the perimeter, he would be exposed to a fall of six feet to the floor. Depending on how he tripped or slipped, he could fall head first. An injury reulting from such a fall would certainly not be trifling. Accordingly, the violation is determined to be nonserious as alleged in the citation.

## FINDINGS OF FACT

1. The "can-line" pasteurizers in respondent's Jacksonville, Florida, brewery are 25 to 30 feet in width, 6 feet in height and approximately 100 feet in length.

2. The tops of the pasteurizers are flat and are composed of a series of stainless steel lids that are removable. Each lid is five feet in length and two feet in width. The lids have an "L" shaped handle at each end for lifting purposes. The handles protrude above the walking surface of the lids.

3. Several different classifications of employees have occasion to be on top of the pasteurizers during the course of their employment. Laboratory technicians and production personnel are required to perform certain work that necessitates their being near the perimeter for brief periods during the course of a workweek. Maintenance personnel may have to walk near the perimeter of the top of the pasteurizers if spray heads located along the perimeter are in need of repair.

4. The top of the pasteurizers are slippery during the washing and scrubbing of the lids by production personnel.

5. Slime sometimes accumulates on the lids at the rear of the pasteurizer.

6. Whenever spray heads burst, water gets on the top of the lids.

7. Some of the lids on the pasteurizers are warped or bent.

8. Employees have in the past slipped while on top of the pasteurizer.

## CONCLUSIONS OF LAW

1. Respondent, at all times material hereto, was engaged in a business affecting commerce wihin the meaning of section 3(5) of the Act.

2. Respondent, at all times material hereto, was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of the parties and of the subject matter herein.

3. The violation of 29 C.F.R. § 1910.23(c)(1) has a direct relationship to the safety of employees working on top of the pasteurizer. The violation is properly classified as nonserious.

## ORDER

Based upon the foregoing findings of fact and conclusions of law, it is

ORDERED: That the violation of 29 C.F.R. § 1910.23(c)(1) is nonserious.

Dated this 9th day of September, 1982.

James D. Burroughs
JAMES D. BURROUGHS
Judge

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

420 U. S. COURTHOUSE
POST OFFICE SQUARE
BOSTON, MASSACHUSETTS 02109

## NOTICE OF DECISION

Secretary of Labor v. Strathmore Paper Company
OSHRC Docket No. 81-1553

1. Enclosed is a copy of my decision. It will be filed with the Commission on September 14, 1982, and will become the final order of the Commission on October 14, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is October 14, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

DAVID J. KNIGHT
Judge, OSHRC

Date: August 25, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant | : | |
| v. | : | OSHRC DOCKET NO. 81-1553 |
| STRATHMORE PAPER COMPANY, | : | DECISION & ORDER |
| Respondent | : | |

Appearances: For complainant,
Albert H. Ross, Regional Solicitor
U. S. Department of Labor
Boston, Massachusetts
By: Ronald C. Glover, Esq.

For respondent,
Olaf Larsen, Esq.
Berndt, Antonellis & Larsen, P.C.
Westfield, Massachusetts

Respondent, Strathmore Paper Company of Woronoco, Massachusetts, contests[1/] the $300 civil penalty assigned to a citation setting forth a violation of the safety standard 29 CFR §1910.261(a)(3)(vii)[2/] concerning two freight elevators at this mill not equipped with interlocked car gates. That standard incorporates by reference the American National Standards Institute's (ANSI)

1/ Under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§651, et seq., citations, alleging violations, proposing penalties, and setting abatement dates are issued under §§658(a) and 659(a). A respondent may contest any or all of these aspects within a 15-working-day period and an alleged violation not contested becomes a final order by operation of law, §659(a). The citation was issued May 22, 1981, and respondent's contest is dated June 15, 1981.

2/ 29 CFR §1910.261, et seq., governs pulp, paper and paperboard mills. Respondent operates such a mill. (Stipulated Fact 11)

Safety Code for Elevators, Dumbwaiters and Moving Walks, A17.1-1965 as supplemented, rule 204 which requires:

> Rule 204.4a Where required
> A door or gate shall be provided at each entrance to the car.
> Rule 204.4b Car-Door and Gate Electric Contacts
> Each door or gate shall be equipped with a car-door or gate electric contact conforming to the requirement of Rule 111.5, so located as to be inaccessible from inside the car.

The parties stipulated the facts and filed briefs by January 5, 1981. Freight elevators #3 in storage building 8 and #4 in the storage loft were not equipped as required by these rules (Facts 18, 24 and 46).

Freight elevator #3 is controlled by push buttons, serves four floors, has six entrances, a capacity of two tons, and travels at the rate of 50 feet a minute (Facts 19, 31 and 32). Each entrance (7 feet 8 inches wide) is completely covered by a bi-parting door which cannot be opened when the car is not at that landing (Fact 21). In a normal work day, five to ten employees will use this elevator (Fact 23).

Freight elevator #4 serves two floors, has three entrances, a capacity of 2,800 pounds, travels at a rate of 50 feet per minute powered by electricity and is controlled by a shippers rope (Facts 25 and 33). A pull downward sends the elevator up to its second landing; a pull up returns it to the first; and the movement cannot be stopped unless the rope is pulled (Fact 34). Wooden slot-gates, not completely covering each entrance, are interlocked (Fact 27). Normally, up to four employees use this elevator (Fact 29).

From stipulated facts 37 and 39, describing photo exhibits 1 through 4, open areas are shown on elevator #3 between the front of the car and the stationary wall (exhbit 2); and, on elevator #4, there is an open area between the floor of the elevator and a horizontal girder at the second floor landing

(exhibit 4). From these stipulations and exhibits, I find that should an employee's limb be caught in these open areas between the moving elevator and stationary fixtures in either elevator, broken bones or amputations would be the result. This condition exists because neither elevator is equipped with a door or gate on the car to prevent access to the open areas.

This mill was inspected by OSHA on October 2, 1972, November 22, 1976, and February 6, 1979. No citations issued concerning these elevators (Facts 47 and 48). The elevators have been inspected by the appropriate agencies of the Commonwealth of Massachusetts and certificates or licenses have been issued (Fact 56).

Contentions of the Parties:

Respondent, relying on the prior OSHA inspections with no citation issued, claims that it had every reason to believe it was in compliance with the OSHA regulations. With three prior and thorough inspections finding no fault with the elevators, respondent contends that any penalty now is arbitrary and a miscarriage of justice. Furthermore, since Massachusetts certified the use of these elevators, respondent should not be fined by one Agency (OSHA) for relying on another (Massachusetts).

Nor, claims respondent, should the violation be classified as serious.[3/] There have been no accidents and the classification is a judgment by OSHA, perhaps, based on what may have happened at other facilities.

Finally, respondent stresses its good faith in cooperating with OSHA and abating all violations including this item. It seeks to have the penalty eliminated and the status of the violation reduced to non-serious.

3/ A serious violation exists where there is a substantial probability that death or serious physical harm could result from the condition cited and the respondent did not know nor, with the exercise of reasonable diligence could not have known, of the violation. 29 U.S.C. §666(j).

Complainant argues that a serious accident could (footnote 3, above) occur. It need not prove that it will happen. Further, the Commission has interpreted that for a respondent to "...know of the presence of the violation," 29 U.S.C. §666(j), means to know of the physical condition existing and not of the OSHA standard forbidding it. Here it cites Secretary v. Southwestern Acoustics & Specialty, Inc., 77 OSAHRC 25/E7, 141/D10; BNA 5 OSHC 1091; CCH ¶21,582, where the Commission points out, "Knowledge of the requirements of the law is a pertinent factor in determining whether a violation is "willful"...".

Respondent knew or could have known of the physical condition of these elevators. It stipulated the facts showing the obvious conditions and that employees regularly rode the lifts. Complainant insists that respondent knew of both the violative condition and the standard proscribing it since on February 25, 1981, three months before the issuance of this citation, it was issued a citation involving this same standard for a freight elevator at its Turner Falls, Massachusetts, mill. Respondent contested that citation and the matter was settled by agreement dated October 23, 1981, as the instant case was yet pending. See Strathmore Paper Company, OSHRC Docket No. 81-732. Clearly, argues complainant, respondent had the requisite knowledge.

And respondent's reliance on prior OSHA inspections of this mill and the certifications of the elevators by state officials does not exonerate it or prove that it lacked knowledge, states complainant citing Secretary v. GAF Corporation, 81 OSAHRC 29/A2, BNA 9 OSHC 1451, CCH ¶25,281 and Secretary v. Holman Erection Co., Inc., 77 OSAHRC 4/E10, BNA 5 OSHC 2079, CCH ¶22,318. The primary responsibility for compliance is placed squarely on the employer by the Act, 29 U.S.C. §654(a)(1) and (2). This duty exists regardless of prior

inspections and an employer cannot rely on these to deny knowledge of a hazard. The Commission must determine if violations exist and it cannot be bound by prior inspections by the various agencies.

Complainant seeks affirmance of the violation as serious and the proposed $300 civil penalty.

Conclusions and Order:

Respondent's reliance on prior inspections by federal and state officials and on its accident-free history to absolve itself from the stigma of a serious violation and penalty is an attempt to shift the onus of responsibility placed by the Act

> Each employer--shall comply with occupational safety and health standards promulgated under this Act. 29 U.S.C. §654(a)(2).

to those charged with enforcement. To conclude as respondent would have it would be to say that respondent did not know of the requirements of the standard, did not comply with them, was not found out, and, therefore, its failure to observe its duty is excusable. Stated differently, if a tree falls in a forest and no one is about, it makes no noise. But it is bound to know the requirements, obey them, and failing that to be properly charged for the failure.

Respondent's believing itself to be in compliance, for whatever reason, goes to its good faith; such a belief even erases the willfulness of an alleged violation, Secretary v. Wright & Lopez, Inc., 80 OSAHRC 36/A2, BNA 8 OSHC 1261, CCH ¶21,461. But it does not absolve the violation. Regardless of the belief, the Act specifies what must be done. Respondent here has not been diligent as that term has been defined.

> ...reasonable diligence implies, as between the employer and employe, such watchfulness, caution, and foresight as, under all the circumstances of the particular service, a corporation controlled by careful, prudent officers ought to exercise.
> Wabash Ry Co. v. M'Daniels, 107 U.S. 454 (1883) at 460, 2 S.Ct. 932 at 938, 27 L.Ed. 605.

What respondent "ought to exercise" has been set by the Act and with reasonable diligence, i.e., reading the standards, it would have known of the necessity for car gates.

The hazardous conditions--open spaces between a moving elevator and fixed walls or structural beams--is obvious from the photo exhibits and would be to any prudent person on the lift. Why no citations issued as a result of the prior inspections or how state certification was obtained in view of this condition are questions not answered by this record. But here it is not a question because the violation is admitted. The violative conditions are open and admitted.

> Indeed, "if there was a reason hidden from the ordinary mind why this condition of things must have existed, those facts called upon the defendant to make that reason known."
> Salem v. United States Lines Company, 370 U.S. 31 (1962) at 37, 82 S.Ct. 1119 at 1123.

But nothing here has been made known.

If the prior citationless inspections and state certifications are treated as expertise indicating that no hazard existed on the elevators and, therefore, respondent could not have known of the dangerous condition and would not be liable to a serious citation now, the Commission is not bound by that conclusion where the potential danger is fairly obvious. Salem v. United States Lines Company, 370 U.S. at 36, 82 S.Ct. at 1123, and at footnote 6, idem.

I find, based on the conditions described in the stipulated facts, that the open spaces on the unguarded elevators could lead to fracture or amputation should an employee's limb be caught.

I conclude the respondent knew of this obvious condition and could have known with the exercise of any diligence of the required protections. Taking administrative notice of the citation of February 25, 1981, citing this standard

at another of respondent's facilities, it did know of the existence of this standard when this citation was issued. This citation is properly characterized as serious.

The parties stipulated the jurisdictional facts (Nos. 8-13) and I conclude that it is an employer having employees and affecting interstate commerce so that the Commission's jurisdiction is proper. 29 U.S.C. §§652(5) and 653(a). They also stipulated that respondent's size is not relevant to the penalty consideration[4/] (Fact 54). It has never been issued any repeated or willful citations (Fact 55). From this, I infer that it cooperates with OSHA and abates conditions quickly so that its good faith is high since it also appears that inspections occur almost regularly.

Thus the gravity of the violation--the nature of the injuries and up to 14 employees exposed each day--is high as is respondent's good faith. Respondent, resting on the results of the prior inspections, may have relaxed its diligence in bringing these elevators into compliance but this should not be used against it. I conclude, balancing these factors, that a civil penalty of $150 is appropriate.

Based on the foregoing, it is ordered that the citation issued May 22, 1981 (item 1) is affirmed as a serious violation of 29 CFR §1910.261(a)(3)(vii) and a civil penalty of $150 is assessed therefor.

DAVID J. KNIGHT
Judge, OSHRC

Dated: September 14, 1982
Boston, Massachusetts

4/ The components of penalty computation are the (1) gravity of the violation, (2) size, (3) history of previous violations, and (4) good faith of the respondent. 29 U.S.C. §666(j).

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

Consolidated Rail Corporation v. Secretary of Labor
OSHRC Docket No. 82-658-P

1. Enclosed is a copy of my decision. It will be filed with the Commission on September 14, 1982, and will become the final order of the Commission on October 14, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is October 14, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Date: August 25, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| CONSOLIDATED RAIL CORPORATION<br>Petitioner<br>v.<br>SECRETARY OF LABOR<br>Respondent | DOCKET NUMBER 82-658-P |

DECISION AND ORDER

Sommer, Judge

On December 15, 1981, Petitioner was issued a citation for an alleged violation of the standard at 29 C.F.R. § 1910.22(a)(2) alleging failure to maintain the floor of a workroom, so far as possible, in a dry condition. The abatement date set forth in the citation was January 4, 1982.

Subsequently, a petition for modification of abatement date was granted extending the abatement date to June 1, 1982. On June 4, 1982, a second petition for modification of abatement date was filed requesting an extension to August 31, 1982. The Secretary opposes the extension on the ground that the request was untimely filed under Commission Rule 34, 29 C.F.R. § 2200.34. Furthermore the Secretary alleges that the failure to complete was not beyond the reasonable control of petitioner.

A hearing was held in Columbus, Ohio on July 27, 1982. The Secretary was represented by Mark D. Katz, Esquire and the Petitioner was represented by Mark E. Lichty, Esquire. Neither party filed a brief herein.

The general issue to be determined is whether the Petitioner timely filed his petition for modification of the abatement period.[1/] If the petition was untimely filed the further question to be resolved is whether Petitioner made "a good faith effort to comply with the abatement requirements of [the] citation" and "abatement has not been completed because of factors beyond [its] reasonable control."[2/]

There is no dispute that the petition herein which was filed on June 4, was untimely filed (its due date under Rule 34 was June 2). Therefore the factual questions remaining are whether Petitioner has shown "a good faith effort to comply with the abatement requirements and that abatement has not been completed because of facts beyond his reasonable control."

The burden of justifying the extension rests upon the Petitioner. Section 10(a) of the Act; Commission Rule 34, 29 C.F.R. § 2200.34(d)(3).

The evidence is persuasive that the petitioner has not met its burden. Counsel for the Petitioner admitted in his opening statement that failure to abate the violation, and even the late filing was due to what was called a "lack of corporate communication." Of course this nicety hardly rises to the

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1/ 29 C.F.R. 2200.34(c), Petition for modification of abatement period provides:

> c) A petition for modification of abatement date shall be filed with the Area Director of the United States Department of Labor who issued the citation no later that the close of the next working day following the date on which abatement was originally required. A later-filed petition shall be accompanied by the employer's statement of exceptional circumstances explaining the delay.

2/ Section 10(c) of the Act, 29 U.S.C. § 659(c), provides relief "[u]pon a showing by an employer of a good faith effort to comply with the abatement requirements of a citation, and the abatement has not been completed because of factors beyond his reasonable control."

level of a proper defense which is "factors beyond [its] reasonable control" caused the delay in abatement filing. That various divisions of the corporation were uncooperative, dilatory and unwilling for whatever reason to go ahead with the abatement procedures involved does not excuse the gross neglect in seeing that the needed roof repair was carried out.

The testimony of Mr. Mays, an engineer with the Communication and Signal Repair facility amply demonstrates that from the time the citation was received in December, 1981 to as late as May, 1982 the Petitioner still did not know how the violation would be abated. (T. 33). This project was batted about from department to department with no one taking full charge, with alleged problems of departmental funding, with no evidence that there was a real effort being made to face up to repair of the violation. Interestingly enough the testimony of William M. Wehner, a registered professional engineer, who testified for the Petitioner acknowledged not only was the roof involved herein repairable but it could be done in "two - three weeks". In short the preponderance of the evidence herein absolutely demonstrates that the Petitioner was untimely filed, and that abatement of the violation herein was not brought about due to various corporate mismanagements, including neglect, failure to follow up on the problem, failure of management in its divisional control and direction, and just generally a lackadaiscal feeling in management that if left alone perhaps the problem would disappear. This conduct could hardly be called a good faith effort to comply with the abatement requirements due to factors beyond their control.

Accordingly, the petition for an extension of time for modification of abatement date to August 31, 1982, is denied.

## FINDINGS OF FACT

1. On December 15, 1981, Petitioner was issued a citation alleging violation of the standard at 29 C.F.R. § 1910.22(a)(2), and setting forth an abatement date of January 4, 1982.

2. The abatement date was subsequently extended to June 1, 1982.

3. On June 4, 1982, the Petitioner filed a petition to extend the abatement date to August 31, 1982.

4. The petition filed on June 4, 1982, was untimely under Commission Rule 34.

5. Both the untimely filing of the petition and the failure of the Petitioner to comply with the abatement requirements here due to both neglect and deficient management procedures which lead to no serious action being taken to abate the violations.

6. The Petitioner's actions demonstrated a lack of good faith effort to comply with the abatement requirements, and said abatement.

7. Abatement of the violations was within the reasonable control of the Petitioner.

## CONCLUSIONS OF LAW

1. Consolidated Rail Corporation at all times herein was an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Occupational Safety and Health Act of 1970, and the Commission has jurisdiction of the parties and the subject matter herein, pursuant to Section 10(c) of the Act.

2. The petition herein filed for modification of abatement date was untimely filed, and Petitioner has not demonstrated good faith efforts to comply with the citation, nor has it demonstrated factors beyond its reasonable control prevented such efforts.

## ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and upon the entire record, it is ORDERED that the petition for modification of abatement to August 31, 1982, is hereby denied.

IRVING SOMMER
Judge, OSHRC

Dated: September 14, 1982
Washington, D.C.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

# NOTICE OF DECISION

SECRETARY v. SCHNABEL ASSOCIATES, INC.

OSHRC Docket No. 81-2192

1. Enclosed is a copy of my decision. It will be filed with the Commission on September 20, 1982, and will become the final order of the Commission on October 20, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupationsl Safety and Health Review Commission
   1825 K Street, N. W., Suite 601
   Washington, D. C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is October 20, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92 and 93.

Joe D. Sparks

JOE D. SPARKS
Judge

Date: August 31, 1982

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

| | | |
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| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 81-2192 |
| | ) | |
| SCHNABEL ASSOCIATES, INC., | ) | |
| | ) | |
| Respondent. | ) | |

JUDGE'S DECISION
SEP 20 '82
RECEIVED

FINAL ORDER ON
OCT 20 '82

APPEARANCES:

Aaron M. Smith, Esquire, Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, on behalf of complainant.

Michael F. Swick, Esquire, Wasson, Sours & Harris, Atlanta, Georgia, on behalf of respondent.

## DECISION AND ORDER

SPARKS, Judge: During an inspection of respondent's construction site, the compliance officer saw workers nailing down decking near the unguarded edge of a floor ten feet above the ground and saw another worker walk along a block wall of about the same height while aligning an interior wall. A citation was issued charging respondent with two serious violations of the regulations which require standard railings or the equivalent in such circumstances. Penalties of $400 were proposed for each alleged violation. The conditions were corrected during the inspection.

Respondent contends that the employee standing on the wall was an isolated instance of noncompliance with a work rule which could not be foreseen constituting unpreventable employee misconduct. Respondent also asserts that guardrails were not required while workers were nailing down the deck because the work process provided that employees would be working near the edge for only a short period of time and the erection of the walls shortly thereafter would provide the equivalent of guardrails (Resp. brief pp. 5-9). Finally, respondent alleges it had no employees exposed to any hazards as the workers were employed by a related company but not by respondent.

## ISSUES

1. Whether respondent violated 29 C.F.R. § 1926.500(d)(1) in that employees were exposed to an open-sided floor or platform six feet or more above adjacent floor or ground level without a guard or standard railing or the equivalent.

2. Whether respondent violated 29 C.F.R. § 1926.500(d)(2) in that an employee was exposed on a runway four feet or more above floor or ground level without guards on all open sides.

3. Whether the employee on the open-sided runway constituted unpreventable employee misconduct.

4. Whether the workers were employees of respondent or respondent was otherwise responsible for their conduct.

5. The appropriate penalty if any.

Respondent utilizes an established procedure to erect each apartment building. The first floor wall is erected around the entire perimeter of the building.

Next manufactured truss joints are set into place. The pre-manufactured floor truss system which rises 16 inches above the wall is set in place by a crane. Thereafter, 5/8-inch plywood decking sheets are applied to the top side of the truss system which becomes flooring for the second story. The walls for the second story are built in a "lay-down" position with a shoe plate at the bottom and including windows and wood siding. The walls are then raised into position by a crane. The longest section of wall on the Huntington project was 48 feet long and 9 feet high. The walls are usually set into place after decking has been completed on one or two units (Ex. J-1; Tr. 49-54, 68-70, 77-80, 87). The walls are placed into position where the guardrails would go and necessitate the removal of the guardrail (Tr. 57, 75).

Materials are moved from the ground to the upper levels of the building by means of a Pettibone forklift. Guardrails would have to be removed to permit materials to be set down by the forklift or, otherwise, must be taken off the forklift by hand (Tr. 55, 87-89).

Mr. Wayne Woodland, respondent's job superintendent, estimated that a three-man decking crew could lay the decking for a building in one day and the entire process including decking and exterior walls could be completed in three days (Tr. 58). He also estimated it would require about a day and a half for two men to erect standard guardrails although it only took about an hour to erect a rope railing which complainant considered sufficent to abate the hazardous condition (Tr. 58, 74-75).

## 29 C.F.R. § 1926.500(d)(1)

The evidence clearly establishes that workers were engaged in work activities in proximity to the unguarded edge of a building approximately ten feet above

ground level and were thereby exposed to a fall hazard which could result in death or serious bodily injury (Ex. C-1, C-2).

In its defense, respondent points out that the conditions at its jobsite were very similar to those in H. S. Holtze Construction Co. v. Marshall, 627 F.2d 149 (1980), in which the Court of Appeals for the Eighth Circuit reversed a decision of the Review Commission and held that the failure to erect guardrails was not a violation of the Act. The guardrails would have to be removed shortly after having been built and would be replaced by exterior walls. Holtze used construction procedures similar to Schnabel, and in Holtze the court noted that (p. 152):

> . . . Holtze was eliminating the hazard itself by erecting a wall—a functional equivalent that when built would be better than a guardrail to protect against unguarded edges.

Respondent has attempted, with considerable success, to bring itself within the ambit of the rationale of the Holtze decision. However, this tribunal must apply the law as determined by the Review Commission which held that a violation had been established under 29 C.F.R. § 1926.500(d)(1).

The Review Commission (Commissioner Barnako, dissenting) treated Holtze's contentions as raising a greater hazard defense which required the respondent to prove that "(1) compliance with the standard will diminish rather than enhance employee safety, (2) alternative means of protecting the employees are unavailable, or if available, are used, and (3) a variance application under 29 U.S.C. § 655(d) is inappropriate." 1979 CCH OSHD ¶ 23,925 at page 29,007. The Review Commission determined that the affirmative defense had not been established because employees were exposed to a fall prior to the erection of the wall and did not necessarily have to be exposed while erecting a guardrail, as there was no evidence that employees could not use scaffolds or safety belts or that an application for a variance would be inappropriate.

The court of appeals did not determine that the affirmative defense of "greater hazard" had been established, but based its decision reversing the Review Commission on an interpretation of the Act that "...some modicum of reasonableness and common sense is implied."

Although there were some differences in the construction methods of Holtze and Schnabel, the conditions were so similar that application of the rationale is warranted. Judges of the Review Commission are bound by its decisions although there may be contrary decisions by circuit courts of appeals, as the Commission is responsible for establishing uniform national interpretations of the safety regulations. Mobil Oil Corp., ___ OSAHRC ___, ___ BNA OSHC ___, ___ CCH OSHD ¶ ___ (No. 77-4386, Aug. 6, 1982) at footnote 4; S & H Riggers & Erectors, Inc., 80 OSAHRC 27/A2, 8 BNA OSHC 1173, 1980 CCH OSHD ¶ 24,335 (Nos. 76-1104 and 76-1739, 1980) at footnote 9. Accordingly, respondent must prove an affirmative defense, such as "greater hazard," which it clearly failed to do. Respondent did show it would be inconvenient but not impossible to comply.

Respondent also relies upon several other decisions which support its contentions including The Palmer Company, 74 OSAHRC 43/D10, 2 BNA OSHC 3061, 1973-74 CCH OSHD ¶ 17,940 (No. 4870, 1974); Dic-Underhall, A Joint Venture, 75 OSAHRC 35/F10, 2 BNA OSHC 1651, 1974-75 CCH OSHD ¶ 19,328 (No. 2232, 1975); and Robert W. Setterlin & Sons Company, 75 OSAHRC 53/D8, 4 BNA OSHC 1214, 1976-76 CCH OSHD ¶ 20,682 (No. 7377, 1976). The Palmer Company, supra, is an unreviewed Judge's decision, issued prior to the Holtze decision of the Review Commission and therefore lacks value as precedent. Setterlin, supra, and Dic-Underhill, supra, were also decided prior to Holtze and were cited for the proposition that guardrails are not required if they would prevent work. The

evidence shows the guardrails would have to be removed prior to the erection of the walls, but guardrails would not prevent or seriously impede work activity in connection with laying the deck.

29 C.F.R. § 1926.500(d)(2)

During the walkaround inspection, a worker was observed walking along an unguarded eight-inch cinder block wall which was eight feet above the concrete floor. After he had walked to the center of the wall, he stopped and sighted along an apartment partition to determine whether it was straight (Ex. C-3; Tr. 24-26, 41).

The pertinent regulation 29 C.F.R. § 1926.500(d)(2), provides as follows:

> Runways shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f) of this section, on all open sides, 4 feet or more above floor or ground level.

A "runway" is defined in 29 C.F.R. § 1926.502(f) as a ". . . passageway for persons, elevated above the surrounding floor or ground level, such as a footwalk along shafting or a walkway between buildings." The wall was used as a "runway" in this case to enable the worker to reach a location to align the partition. A fall to the concrete floor below could result in abrasions, contusions, fractures or possible death (Tr. 26).

Respondent asserts that it established the defense of unpreventable employee misconduct, and as a result, the alleged violation should be vacated (Resp. brief p. 11). Respondent contends the affirmative defense is established by the following evidence:

> For the Respondent, Mr. Woodland testified that there is a written safety program and manual which is given to all employees including those of subcontractors (T61,62,91, R-1); that job

superintendents are allowed to establish rules in addition to those contained in the manual (T62, 91); that there is a rule regarding the use of approved ladders (T62-63); that there is a rule that walls are to be sited using approved ladders (T64,66,92); and that this rule was violated in this instance (T91, 92). There was testimony by Mr. Woodland that the safety rules were communicated to the employees by formal bi-monthly safety meetings (T65). There was further testimony as to the manner of enforcement of the safety rules by Respondent (T66). An employee who violated safety rules is given a reprimand and for a second violation is suspended for three days without pay (T66). Mr. Woodland testified that he had not observed the alleged condition before the inspection or since the inspection and that he conducted daily site inspections (T67, 71).

The facts relied upon by respondent are not contravened by probative evidence of record although complainant disputes the interpretation to be placed on the evidence (Comp. brief p. 9).

In order to establish the affirmative defense of unpreventable employee misconduct the employer may show (1) its commitment to employee safety represented by the establishment of work rules that effectively implement the requirement of the standard at issue, (2) the effective communication of the work rules to its employees, and (3) through supervision adequate to detect failures to comply with the rules and discipline sufficient to discourage such violations. Stuttgart Machine Works, Inc., 81 OSAHRC 14/A2, 9 BNA OSHC 1366, 1981 CCH OSHD ¶ 25,216 (No. 77-3021, 1981); Floyd S. Pike Electrical Contractors, Inc., 78 OSAHRC 50/E1, 6 BNA OSHC 1675, 1978 CCH OSHD ¶ 22,805 (No. 3069, 1978).

The employee who was standing on the wall did not testify so the best source of information was not questioned and the available evidence is not altogether clear and unambiguous. Mr. Woodland, respondent's job superintendent, was the principal witness to establish the defense. He explained the rule regarding aligning and straightening the walls as follows (Tr. 64, 92):

Q. Are employees instructed as to how this is to be done?

A. Yes.

Q. How was that to be done?

A. They're to use a ladder and go to the particular wall, and site it and move the ladder to the wall.

* * *

Q. Did you have a rule regarding how walls are to be sighted?

A. Yes.

Q. What is that rule?

A. They're to use an approved ladder. Like I said, take tha ladder from point to point in that building to gain access to the wall.

The rule was not written, but respondent contends the rule was orally communicated at safety meetings (Tr. 65-66). Mr. Woodland stated he had not observed the violative condition before and the offending employee was reprimanded in this instance (Tr. 66-67).

Although Mr. Woodland stated he had not observed the condition previously, there is an intimation that standing on the wall to align the partitions was a common practice. The compliance officer testified about his interview with the worker who was standing on the wall (Tr. 27, 29-30):

Q. Did you make a determination of whether this type of — this condition had occurred prior to when you cited it or when you saw it?

A. This is theonly [sic] instance I saw of this, but they [sic] guy told me that this was the easiest —

* * *

Q. . . . did you determine whether or not the condition had occurred prior to your observing it.

A. During my questioning of the employee, he informed that this was the easiest way to see if the walls were straight, there were other building on the project that were further completed than this building — particular building which he was working on.

Considering the above testimony and the fact the employee was observed during the inspection standing on the wall, I conclude the incident was not an isolated occurrence but was frequently done. The explanation that walking across the wall was the easiest way to perform the task inferred that he performed the task in that manner, especially in the context that he was performing the task in that manner at the time he was questioned. The construction project was a small one with supervisor George Mead and superintendent Woodland at the scene, so I further conclude the rule was not effectively communicated to employees nor was it adequately enforced (Tr. 71). In any event, the burden of proof is on the respondent and it has failed to establish the affirmative defense by convincing evidence.

## WAS SCHNABEL RESPONSIBLE FOR THE VIOLATIONS?

Respondent contends it did not have employees exposed to the violative conditions and therefore cannot be charged with violations under the Act. The workers were employed by Harleysville, Inc., a company with a separate legal identity but closely related to Schnabel Associates, Inc. (Tr. 46-47, 72-73). The only employee of Schnabel at the jobsite was Mr. Woodland, the job superintendent (Tr. 71). Any confusion regarding the employer is directly attributable to Mr. Woodland who identified the workers exposed to the unguarded floor as employees of the respondent (Tr. 47). Mr. Woodland testified that he had identified the workers as employees of Schnabel because "Schnabel Associates and Harleysville

are very close-tied" (Tr. 47). I conclude that, under the facts of this case, respondent was an employer of the exposed employees. In addition, as general contractor on the project, respondent could be reasonably expected to detect and abate the violations due to its supervisory authority and control over the work site. Red Lobster Inns of America, Inc., 80 OSAHRC 73/A14, 8 BNA OSHC 1762, 1980 CCH OSHD ¶ 24,635 (No. 76-4754, 1980). Respondent's job superindentent inspected the site daily and should have detected and abated the violative conditions (Tr. 71).

## PENALTIES

The Secretary proposed penalties of $400 for each violation. It is noted that few employees were exposed to the hazards, the maximum distance of a fall was little more than ten feet, the conditions were corrected during the inspection and respondent has no prior history of violations in the State of West Virginia. Under such circumstances, penalties of $200 for each violation are appropriate.

## FINDINGS OF FACT

1. Respondent, Schnabel Associates, Incorporated, has offices in Harleysville, Pennsylvania, and had gross revenues of 30 million dollars in 1981 (Tr. 4-5, 44).

2. Schnabel employs an average of 60 employees (Tr. 5).

3. Prior to the instant citation, there was no history of violations of the Act by respondent in the State of West Virginia (Tr. 5).

4. The construction site involved in this proceeding consisted of four apartment buildings each three-story wood construction with a total of 85 rentable units (Tr. 45).

5. Compliance Officer William H. Perdue conducted a general scheduled inspection of respondent's construction site on July 23, 1981 (Tr. 8-11).

6. Respondent was the general contractor at the work site (Tr. 72).

7. Workers were nailing down plywood sub-flooring on building number three at a height of ten feet, five inches, above the ground and eight feet, eight inches, above a concrete floor. There were no guardrails around the perimeter or other protection to prevent a fall (Ex. C-1, C-2; Tr. 15-17, 37, 42, 45).

8. If a person should fall from the open-sided floor onto the bracing or concrete floor below; contusions, abrasions, fractures or possible death could result (Tr. 17, 34).

9. Workers nailed down the edge of the sub-flooring and in doing so were in close proximity to the unguarded edge of the floor (Tr. 18).

10. Another employee was observed walking across an eight-inch cinder block wall. After he had walked to the center of the wall, he visually sighted down the wall to determine whether the interior walls were straight (Ex. C-3; Tr. 24, 29, 60, 64).

11. The worker on the wall over eight feet, eight inches, above a concrete floor did not have any means of protection to prevent a fall (Tr. 26, 39, 42, 60).

12. The worker indicated he spent about one hour per day sighting in the partitions by standing on the brick wall (Tr. 39).

13. It was not an isolated event for the employee to walk along an unguarded wall to align the partitions.

14. Respondent, Schnabel Associates, Inc., has very close ties with Harleysville Construction Company.

15. Respondent was an employer of employees at the work site.

16. Penalties of $200 for each violation are appropriate.

## CONCLUSIONS OF LAW

1. Respondent is an employer subject to the Act.

2. Respondent violated 29 C.F.R. § 1926.500(d)(1) and 29 C.F.R. § 1926.500(d)(2) under circumstances constituting serious violations of the Act.

3. Penalties of $200 for each violation are appropriate.

## ORDER

1. Items one and two of the serious citation are affirmed.

2. Penalties in the total amount of $400 are assessed.

Dated this 20th day of September, 1982.

/s/ Joe D. Sparks
JOE D. SPARKS
Judge

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

NOTICE OF DECISION

Secretary of Labor v. SHURTLEFF & ANDREWS CONSTRUCTION CO.
OSHRC Docket No. 80-4796

1. Enclosed is a copy of my decision. It will be filed with the Commission on September 21, 1982, and will become the final order of the Commission on October 21, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is October 21, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Quentin P. McColgin
Quentin P. McColgin
Judge, OSHRC

Date: September 1, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>SHURTLEFF & ANDREWS CONSTRUCTION CO.,<br><br>Respondent,<br>- - - - - - - - - - - - - - - - - - - -<br><br>INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 400,<br><br>Authorized Employee Representative. | OSHRC DOCKET NO. 80-4796 |

JUDGE'S DECISION SEP 21 '82 RECEIVED

FINAL ORDER ON OCT 21 '82

APPEARANCES:

Office of the Solicitor
U. S. Department of Labor
On behalf of Complainant
By Jerry R. Atencio, Esquire
Of Denver, Colorado

Ray, Quinney & Nebeker
On behalf of Respondent
By Stephen H. Anderson, Esquire &
W. Cole Durham, Jr., Esquire
Of Salt Lake City, Utah

Vince Bosh, Pro Se
Of Helena, Montana
On behalf of the Authorized
Employee Representative

DECISION AND ORDER

Quentin P. McColgin, Administrative Law Judge:

This is a proceeding under §10(c) of the Occupational Safety and Health Act of 1970 (the Act) 29 U.S.C. §659(c), involving alleged violations of §5(a)(2) of the Act, 29 U.S.C. §654(a)(2).*/

This matter arose out of an inspection of a multi-employer work site at Colstrip Units 3 and 4 in Colstrip, Montana. On the basis of

*/ "Each employer--shall comply with the occupational safety and health standards promulgated under this [Act]."

that inspection, serious and non-serious citations (Citation Nos. 3 and 4 respectively) were issued to respondent charging it with violations of safety standards. The citations were duly contested.*/ Thereafter, a complaint and answer were filed. In its answer, respondent admits those portions of paragraphs 1 and 2 of the complaint wherein it is alleged that respondent is in a business affecting commerce and respondent is an employer within the meaning of the Act. Thus, the jurisdictional issues are admitted.

A hearing was held in this matter on March 10 and 11, 1981, in Billings, Montana. An appearance was entered at such hearing on behalf of the affected employees by Vince Bosh, Business Manager of International Union of Operating Engineers, Local No. 400 (Union). At the outset of the hearing, respondent announced that it withdrew its notice of contest as to Citation No. 4. (Tr. 6)**/ Additionally, respondent moved to amend its answer to raise certain defenses which were not raised in its answer. This motion, which was objected to, in part, by complainant, was granted.***/ (Tr. 14)

At the conclusion of the hearing, the Union made closing argument (Tr. 439-40) However, complainant and respondent waived closing argument. (Tr. 438-39) At the behest of respondent and without objection from the other parties, a sequential briefing schedule was arranged whereby

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*/ The record reflects that only Citation No. 3 was contested. However, the complaint recites that both citations were contested, which allegation is not denied in respondent's answer. In view of respondent's subsequent withdrawal of its notice of contest as to Citation No. 4, it is of no consequence whether or not the citation was in fact contested and the order herein affirms these non-contested violations.

**/ The following abbreviations shall be used in this decision:
Tr. - Transcript page number
C - Complainant's exhibit number
R - Respondent's exhibit number

***/ Complainant's objection was limited to the assertion of the impossibility of compliance and greater hazard defenses. (Tr. 11)

complainant was allowed twenty days in which to file his brief (Tr. 450) and respondent and the Union were granted twenty days thereafter in which to file their briefs. (Tr. 451) Additionally, provision was made for the filing of a reply brief by complainant. (Tr. 451) Thereafter, briefs were filed by all parties. Attached to respondent's brief were proposed findings of fact and conclusions of law. The Union's brief consisted of a statement indicating that the Union joins in and adopts as its own respondent's brief insofar as it relates to the alleged violation of 29 C.F.R. §1926.550(a)(9). The Union took no position with respect to the other charge at issue here. Although authorized to do so, complainant did not file a reply to the post-hearing submissions by the other parties.

Having heard and observed the witnesses and having considered the testimony and other evidence together with the pleadings and arguments presented in this matter, the undersigned hereby issues the findings, conclusions and order set forth in this decision. To the extent that the proposed findings of fact and conclusions of law have not been adopted in this decision, they are rejected as being either inaccurate or unnecessary for the disposition of this case. To the extent that there are any pending motions that have not been specifically granted herein, such motions are denied.

## Discussion

### Alleged Violation of 29 C.F.R §1926.500(d)(1)

The first charge involves an alleged violation of 29 C.F.R.. §1926.500(d)(1) which provides:

> Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing or the eqivalent, as specified in paragraph (f)(1)(i) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder.

The specific allegation, as set forth in Citation No. 3, Item No. 1, is:

> 29 CFR 1926.500(d)(1): Open-sided floors or platforms, 6 feet or more above adjacent floor or ground level, were not guarded by a standard railing or the equivalent on all open sides:
>
> > West side stairway located on Unit No. 3 boiler was not provided with a standard railing at the 2nd, 3rd, and 4th floor platform.

The sole issue presented with respect to this allegation is the applicability of the cited standard. The evidence is clear that respondent did not provide fall protection at any of the three areas specified in the citation; that respondent's employees were exposed to the non-complying conditions and that respondent knew or should have known of such conditions.

Respondent's inapplicability contention is that the unguarded platforms which were cited were part of an integrated steel structure which was still in the process of being erected at the time of the inspection. Respondent then argues that the cited standard is inapplicable to such conditions.

The proof bears out respondent's contention. Respondent was in the process of installing gratings on the three different levels specified in the citation. (Tr. 412-13) The gratings were not bolted in and, at best, constituted a temporary flooring for portions of the specified levels. (Tr. 412-13) This evidence is corroborated by the photographs of the subject at areas which show that at each level, the grating existed in only a portion of the skeletal steel framework of the structure being erected. (C-2, C-3, C-4) Under these conditions the cited standard is inapplicable. Roanoke Iron & Bridgeworks, Inc., 5 BNA OSHC 1391, 1978 CCH OSHD ¶22,522 (No. 10,411, 1977); Car Erectors Inc., 4 BNA OSHC 2009, 1976-77 CCH OSHD ¶21,471 (No. 7247, 1977);

Pima Construction, 4 BNA OSHC 1620, 1976-77 CCH OSHD ¶20,998 (No. 5221, 1976); The Ashton Company, Inc., 3 BNA OSHC 1968, 1975-76 CCH OSHD ¶20,351 (No. 5111, 1976).

Respondent's primary concern with respect to this charge is not the applicability of the cited standard but rather the possibility of a sua sponte amendment to allege a violation of 29 C.F.R. §1926.750 (b)(1)(iii). The latter is a more specific standard applicable to employers engaged in skeletal steel construction. It provides:

> Floor periphery--safety railing. A safety railing of 1/2 inch wire rope or equal shall be installed approximately 42 inches high around the periphery of all temporary-planked or temporary metal-decked floors of tier buildings and other multi-floor structures during structural steel assembly.

Under the facts of this case, such an amendment would violate the Administrative Procedure Act. 5 U.S.C. §554(b)(3) provides in relevant part:

> Persons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted.

Here, respondent has been informed of an asserted violation of 29 C.F.R. §1926.550(d)(1). It has never been informed of an alternative theory of violation. Moreover, as respondent correctly points out in its brief, it has never consented to any amendment of the pleadings, nor has it consented, impliedly or otherwise, to a trial of a violation of 29 C.F.R. §1926.750(b)(1)(iii).

Thus, the sole issue presented here is the applicability of the cited standard. Since that standard is found to be inapplicable, the alleged violation has not been established.

Alleged Violation of 29 C.F.R. §1926.550(a)(9)

The second charge presents, by far, the most vigorously contested and complex issues presented in this case. As set forth in Citation No. 3,

Item No. 2, it is alleged that respondent violated 29 C.F.R. §1926.550 (a)(9) by allowing its oiler within the swing radius of the rear of the rotating superstructure of respondent's crane. The specific allegation is:

> 29 CFR 1926.550(a)(9): Accessible areas within the swing radius of the rear of the rotating superstructure of crane(s) were not barricaded in such a manner as to prevent employees from being struck or crushed by the crane:
>
> > M-16 line between unit boiler 2 and 3 at an American Sky horse crane No. 11320, an oiler operator was allowed within the swing radius of the rotating superstructure of the crane exposing him to the hazard of being struck or crushed.

The standard provides:

> Accessible areas within the swing radius of the rear of the rotating superstructure of the crane, either permanently or temporarily mounted, shall be barricaded in such a manner as to prevent an employee from being struck or crushed by the crane.

While respondent has raised a number of arguments and defenses to to this charge, it is only necessary to deal with the two arguments which relate to the applicability of the standard to the facts of this case. First, respondent argues that the standard does not apply to the crane crew consisting of the crane operator and the oiler. Second, respondent argues that the standard is unconstitutionally vague as applied to such crew members. For the reasons discussed below, it is found that the standard does not apply to such crew members and that even if it does, it is unconstitutionally vague; therefore, it cannot be enforced.

The undisputed facts are that respondent installed a barricade around the circumference of the crane and permitted two of respondent's employees to work within the barricaded area. One of these employees was the crane operator, the other was an employee known as the oiler or assistant crane operator (oiler). During the inspection at respondent's work site, the oiler was observed within the barricaded area.

Before stating with more particularity the position of the parties in this matter, it is believed helpful to first define some of the terms used in the crane industry and to describe some of the physical characteristics of the equipment and to consider some of the key concepts relevant to the issues at hand and to describe the duties of the crane crew. This will be done under the subject headings listed below.

## Definitions*/

Crawler Crane. A crane consisting of a rotating superstructure with power plant, operating machinery, and boom, mounted on a base, equipped with crawler treads for travel. Its function is to hoist and swing loads at various radii.

Base (mounting). The traveling base or carrier on which the rotating superstructure is mounted such as a car, truck, crawlers, or wheel platform.

Boom (crane). A member hinged to the front of the rotating superstructure with the outer end supported by ropes leading to a gantry or "A" frame and used for supporting the hoisting tackle.

Cab. A housing which covers the rotating superstructure machinery and/or operator's station. On truck-crane trucks a separate cab covers the driver's station.

Counterweight. Weight used to supplement the weight of the machine in providing stability for lifting working loads.

Gantry (A-frame). A structural frame, extending above the superstructure, to which the boom support ropes are reeved.

Superstructure. The rotating upper frame structure of the machine and the operating machinery mounted thereon.

Swing. Rotation of the superstructure for movement of loads in a horizontal direction about the axis of rotation.

Travel. The function of the machine moving from one location to another, on a job site.

## The Crane and the Superstructure

The crane involved here is a crawler crane. (Tr. 126) It is a

*/ These definitions are extracted from "The U.S.A. Standard--Safety Code For . . . Crawler, Locomotive and Truck Cranes," published by the American Society of Mechanical Engineers, USAS B30.5--1968 (hereinafter ANSI Standard). A copy of this standard is attached to complainant's brief. It is considered an authoritative source. (Tr. 250) Pursuant to the announcement made at the hearing, official notice is taken of this standard (Tr. 156)

Skyhorse 11320, which is the largest crane of this type. (Tr. 125) The crane is designed so that the crane's boom can rotate 360 degrees; however, under the manufacturer's instructions, it would not rotate more than 180 degrees with a load.*/ (Tr. 126-29)

The counterweight of this crane, which is located opposite the cab and the boom, is a trailing counterweight which is mounted on wheels. (Tr. 118-19, C-4) It rotates as the boom rotates. It, together with the wheels upon which it is mounted, is either a part of the "rotating upper frame structure of the crane or the operating machinery mounted thereon". It is, for all practical purposes, the rear of the rotating superstructure. (Tr. 118-19, C-4)

## The Barricade

As depicted in the photograph admitted into evidence as C-4, the barricade consisted of a single strand of rope approximately waist-high which was mounted on poles stuck into the ground. The barricade extended around the entire circumference of this crane approximately 34 feet from the center of the crane. (Tr. 399) The physical makeup of the barricade obviously will not prevent anyone outside the barricade from gaining access to the area inside the barricade or vice versa. Indeed, anyone could duck under it.

## Capable Swing Radius v. Rear Swing Radius

In order to differentiate between the radius in which the rear of the rotating superstructure (i.e., the trailing counterweight) can rotate and the radius in which it will actually rotate, the phrase "capable swing radius" will be used to describe the former and the phrase "rear swing

*/ Employers are required to "comply with the manufacturer's specifications and limitations applicable to the operation of any and all cranes and derricks." 29 C.F.R. $1926.550(a)(1). (Tr. 127, 129)

radius" will be used to describe the latter.*/ Since the trailing counterweight can rotate or "swing" 360 degrees. the capable swing radius in this case is also 360 degrees. However, the evidence establishes that during normal picking and swinging operations the actual rotation of the trailing counterweight of this crane will not exceed 180 degrees.**/ (Tr. 126)

There are undoubtedly times when the trailing counterweight actually swings more than 180 degrees. Thus, for example, if the crane were to hoist a load and then swing or rotate the load from Point A to Point B, where such load was deposited, and then, as its next assigned task, rotate the boom from Point B to another place (Point C) where a second load would be hoisted and then transmitted to Point D, the path of the trailing counterweight could actually exceed 180 degrees, even though neither picking and swinging operation (from Point A to Point B and from Point C to Point D) exceeded 180 degrees. There is also evidence that during assembly, the rotation of the superstructure could exceed 180 degrees.

The Hazard

The hazard which the standard is designed to prevent is that of the rear of the rotating superstructure (in this case, the trailing counterweight) striking or crushing someone while it is rotating. Being struck or crushed by the counterweight can result from essentially two situations. The first situation which is common to a variety of different types of cranes involves someone being positioned in the pinch-point of the rear of the superstructure and the track of the crane. (Tr. 61-62) Since the track would be stationary and the rear of the superstructure would rotate over

*/ Since the phrase, "capable swing radius" was not used at the hearing, it shall be used in this decision without quotations. However, the phrase "rear swing radius" has been used, and since it is not clear whether it was used in the special sense in which it is used here, that phrase will appear in quotes in this decision.
**/ In the parlance of the industry, "walking", "picking" and "swinging" mean traveling, hoisting, and rotating, respectively.

it, a scissor effect occurs. In this case, the undercarriage of the of the superstructure is 6'2", whereas the oiler was only 5'9". (Tr. 380-81) Thus, there is little risk of the oiler being crushed at the pinch-point while he is standing on the ground. However, the evidence shows that the oiler was observed on the track of the crane. (Tr. 38) Being so positioned, he is clearly in the zone of danger.

The other hazardous situation is one which is unique to cranes with a trailing counterweight. Here, the trailing counterweight is mounted on wheels. (C-4) Obviously, if someone were to be directly in the path of a rotating counterweight, such person could literally be run over by the wheels upon which the counterweight is mounted and could be struck or crushed. (Tr. 172)

## The Oiler

The oiler works with the crane operator in assembling and operating the crane. He is also called the "assistant operator" or the "oiler-operator," which more accurately describes his modern functions. The term "oiler" originated when cranes were operated by steam and required constant lubrication. Then, the crane crew consisted of three essential persons: the operator, who operated the controls; the oiler, who lubricated; and the fireman, who stoked the fire. (Tr. 299) With the advent of electric engines, the position of fireman was eliminated. Further technological advances have reduced the lubrication requirements so that now little lubrication is required while the crane is in actual operation. (Tr. 300)

Now, the oiler's primary functions during operations are safety-related. (Tr. 195) Additionally, there are certain maintenance functions he performs.*/ (Tr. 207, 215, 217, 251) His primary safety-related duties

*/ The position of oiler is also described as an apprenticeship position wherein he gains the experience and knowledge necessary to operate cranes by working with the crane operator.

are to observe the conditions that affect the crane's stability and to take appropriate corrective action if unstable conditions occur.*/ (Tr. 167, 195, 324-25)

Frequently, the appropriate action taken by the oiler is to alert the crane operator to the conditions so that the latter can correct them. Sometimes, the oiler can take direct action, such as to level the ground in the path in which the trailing counterweight is rotating (Tr. 212-13) More frequently, he alerts the operator to a condition which the latter cannot directly observe, such as the unweighting of the carriage rollers above the track which is at ground level. (Tr. 197, 201, 220, 324, 327) To a large extent, the maintenance function and the safety functions of the oiler are interrelated. Thus, he will adjust clutches and brakes during operations which could cause a load to drop if they were not adjusted properly. (Tr. 217)

The foregoing permits a more in-depth analysis of the respective positions of the parties with respect to the proper interpretation of the standard. Complainant advances the theory that the standard requires the employer to do two things: first, an employer must barricade the entire circumference around the crane in all cases where the rear of the rotating superstructure is capable of rotating 360 degrees. (Tr. 255) Second, the employer is required to keep everyone out of the barricaded area while the rear of the superstructure is rotating or is capable of rotating.**/ (Complainant's brief at 9-10)

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*/ One of his other important safety-related duties is to keep others out of the barricaded area. (Tr. 207)

**/ As qualified, the act of the crane operator of going inside the barricade to man the controls would not constitute a failure to comply with the standard if the crane were shut down. However, by this interpretation, the crane must be shut down before the oiler goes inside the barricade in order to either relieve the operator at the controls or to receive instructions on how to operate the ocntrols. Otherwise the foregoing would constitute an instance of non-compliance with the standard.

Complainant disavows any inadequacies in the physical properties or characteristics of respondent's barricade. Respondent barricaded the entire circumference of the crane which by complainant's interpretation of the standard was required. Likewise, complainant does not take issue with the qualitative properties of respondent's barricade. This is so even though the barricade was manifestly insufficient to "prevent" anyone from entering or leaving the barricaded area. Thus, according to complainant's interpretation of the standard, a barricade which merely serves as a warning device is sufficient. (Tr. 169-70)

As expressed by the Union officials who had testified during the hearing, the Union takes the position that it is essential for the safe operation of the crane that a second person be in the immediate vicinity of the crane to observe conditions which affect its safe operation which the crane operator cannot observe himself. The Union further takes the position that to perform these safety-related duties, the oiler must be inside the barricaded area (i.e., within the capable swing radius) and, at times, within the "rear swing radius". The Union further contends that if the oiler is precluded from being inside the barricaded area, he cannot perform his safety-related duties, which will result in the abolishment of the position of oiler on crane crews. This would affect the jobs of literally thousands of oilers, as well as disrupting the current method of training crane operators. Additionally, it would, according to the Union officials, jeopardize the safety of other union members (primarily the crane operators) who would be expected to be seriously injured if the crane were to fall over.

Respondent takes the similar position to that expressed by the Union officials. Respondent also believes that it is essential for the oiler to be in the immediate vicinity of the crane (i.e., within

the barricaded area and, at times, inside the "rear swing radius"). Respondent's concern transcends that of the safety of the crane crew and their job security. In this case, respondent has other employees at the work site engaged in steel erection. These employees are also subjected to hazards associated with accidents involving cranes that have turned over or booms that have collapsed or dropped loads. First of all, a dropped load or a collapsed boom could fall on these other employees. Second, the boom or the load being hoisted can fall on the nearby structures which could cause such structures to collapse, thus, jeopardizing anyone in the vicinity of such structures.

It is possible to interpret the standard as imposing obligations different from those advanced by any of the parties. Arguably, complainant could have taken the position that the standard imposes an obligation to barricade only that portion of the swing radius in which the rear of the superstructure could be expected to rotate at any given time--the "rear swing radius". As a practical matter, the "rear swing radius" does not extend a full 360 degrees at any time other than during the assembly of the crane. More likely, the "rear swing radius" would not exceed 180 degrees. Thus, the zone of danger would not ordinarily extend a full circle around the crane. Under these circumstances, there would be no need to barricade that portion of the circumference around the crane in which the rear of the superstructure was not expected to rotate. Thus, under this possible interpretation of the requirements of the standard, some portion of the immediate vicinity of the crane would be accessible to the oiler and others which is not now accessible under the interpretation of the standard advanced here.

By not asserting this possible interpretation, the question presented is whether the promulgators of the standard drafted specifically for the

crane industry intended to limit the oiler's access to the immediate vicinity of the crane during operations, when both the employer and representative of the employees consider access to such area essential for the safe operation of the crane. It may very well be that there are good and sufficient reasons for complainant to insist upon the entire swing radius being barricaded rather than just the "rear swing radius". It may be that there are hazards in front as well as in the rear of a rotating superstructure. Alternatively, it may be impractical to guard only the "rear swing radius," particularly since such radius may vary from one pick and swing operation to the next. Moreover, in view of the possibility of the crane operator inadvertently swinging the rear of the rotating superstructure beyond the expected swing radius, it might be considered imprudent for an employer to barricade anything less than the capable swing radius. Whatever the reason, it is not suggested in this record and respondent has not had an opportunity to refute the feasibility of guarding anything less than the capable swing radius. Thus, this case shall be decided on the basis of the interpretation advanced by complainant, and any possible alternative interpretation shall not be considered.

The matters relied upon to support the interpretation of the standard advanced by the opponents of this citation begin with complainant's own interpretation of the type of barricade required under the standard. As previously stated, complainant considers adequate a barricade which does not prevent entry into the restricted area, but merely serves as a warning device to those who come near the hazardous area. The obvious beneficiaries of such apparatus are those other than the crew members who might not be aware of the hazards posed by the rear of the rotating superstructure. This coupled with the absence of any

specific requirement that an employer not permit anyone within the restricted area is entirely consistent with the interpretation of the standard advanced by the opponents of the citation that its purpose is to keep out unauthorized persons.*/

This implied exemption interpretation is also consistent with industry practice. By this interpretation, the crane operator while in the cab of the crane which is always inside the barricaded area would be in compliance with the standard. Conversely, under complainant's interpretation, the presence of the crane operator in the cab would constitute a technical non-compliance with the standard.**/ Such interpretation also would preclude the oiler from going inside the barricaded area while the crane was in operation in order to receive training from the crane operator on how to operate the crane. Additionally, it would preclude the crane operator from performing those safety-related duties and maintenance functions that, at crucial times during crane operations, must be performed while the crane is in operation.

The opponents of the citation have identified a number of specific duties which the oiler performs which must be done within the barricaded area. One of these is observing the boom for deflection during "picking

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*/ Respondent's stated position is:
. . . [T]he most plausible reading of the barricade requirement, in light of the practical exigencies involved in the safe operation of a crane is . . .: An employer is required to construct a barricade around a crane so that no one standing outside of it can be struck or crushed by the rear of the crane's rotating superstructure. Such a barricade will have the effect of keeping unauthorized personnel away from the crane and of reminding operating personnel who must work in its proximity of the need to be particularly cautious while performing their normal work inside the swing radius. . . (Respondent's brief at 18, emphasis in original).

**/ This is not to suggest that such non-compliance would constitute the violation of the standard. The cab is always opposite the rear of the rotating superstructure. Thus, there would be no violation despite the non-compliance with the standard because the employee in the cab would not be in the zone of danger.

and swinging" operations involving loads approaching the capacity of the crane. (Tr 204-05, 243) In such instances, the oiler is required to be immediately below the boom in order to observe for deflection. To so position himself, the oiler must be within the barricaded area, although at this point, he is at the front of the rotating superstructure instead of the rear.*/ Other situations where it is essential for the oiler to be inside the barricaded area are to perform observations with respect to the crane's stability. In the case of a crawler crane, it is essential for the oiler to observe the unweighting of the rollers from the track of the crane. (Tr. 160, 162, 197-98, 239, 327) A shift as slight as 1/16 of an inch may indicate crucial unweighting which even the compliance officer conceded could not be seen outside the barricaded area. (Tr. 160, 201) In the case of other types of cranes to which this standard would also apply, there are spirit levels which the oiler must monitor during operation. (Tr. 147, 196-97, 332, 348-49) Again, such monitoring cannot be performed outside the barricaded area. Additionally, there is evidence of maintenance functions such as the adjustment of brakes and clutches which must be performed during actual "picking and swinging" operations. (Tr. 219, see also Tr. 215, 209-10, 251, 324) To accomplish such adjustments, the oiler must be within the barricaded area.

This exemption interpretation is also consistent with the interpretative guides announced by the Commission in S&H Riggers & Erectors, Inc., 7 BNA OSHC 1260, 1979 CCH OSHD ¶23,480, (No. 15,855, 1979) wherein it was announced that occupational safety and health standards "must be interpreted not only in light of existing industry

*/ If the oiler were to remain stationary while the crane continued to rotate, he would ultimately be at the rear of the rotating superstructure. Thus, this case is distinguishable from the crane operator, who is in the cab and is always in the direction opposite the rear of the rotating superstructure.

practice but also in light of the Act's expressed Congressional purpose of providing a safe and healthful workplace."

For the reasons previously stated, this exemption interpretation is consistent with industry practice and it is the interpretation advanced by complainant which is inconsistent with that practice. Further, in balancing the injuries that could be expected to occur if the oiler is permitted in the barricaded area against those that can be expected if he is precluded from such area, it is found that the latter will likely exceed the former.

In balancing these injuries, it must be recognized that the state of the art in the crane industry is such that there is a very real danger of serious injuries resulting in either case. If the oiler is foreclosed from being inside the barricaded area, wherein essential safety-related functions must be performed, there is an increased risk of catastrophic injury resulting from a collapsed boom, a dropped load, or an overturned crane. There is evidence in this record that the vast bulk of fatalities involving cranes are attributable to crane instability. (Tr. 196) Thus, the rate of fatalities could be expected to increase if the oiler were excluded from the barricaded area and could not effectively perform his essential functions.

On the other hand, if excluded from the barricaded area, the possibility of injury occurring to the oiler would be reduced substantially, but not necessarily eliminated. It is true that in such case the hazard contemplated by the standard would be eliminated; however, to the extent that the oiler's position were not eliminated, as is apprehended by the Union, he would nevertheless be subjected to the increased hazards of dropped loads, collapsed booms, and an overturned crane, since he would still be in relatively close proximity to the crane during operations. Thus, without minimizing the dangers to the

oiler posed by the presence of the rotating superstructure, it is found that on balance there is greater risk of serious injury if the oiler is not permitted in the barricaded area than if he is. For this reason, the exemption interpretation, which would exempt from the standard's coverage the crane crew consisting of the crane operator and the oiler, is believed the most reasonable of the alternative interpretations advanced here.

Even if it were found that the interpretation of the standard advanced by complainant was correct, the special circumstances shown by this record compel a holding that the standard is impermissibly vague when retroactively applied to exclude the oiler from the barricaded area. The leading case on this issue is Diebold, Inc. v. Marshall, 585 F.2d 1327 (6th Cir. 1978) (Diebold) wherein the Court found that the point of operation guarding requirement was impermissibly vague as applied to press brakes utilized by respondent there. The Court held that a combination of the following factors established the vagueness of the standard as applied to the particular type of operations involved: (1) inartful drafting of the standard, (2) the common understanding and commercial practice relative to the standard involved; and (3) confirmation of industry practice by a pattern of administrative enforcement of the regulation. Diebold, supra, 585 F.2d at 1336-37.

All three factors are present here. The inartfulness of the language of the standard is essentially a latent condition which becomes evident in the context of the special conditions present in the crane industry.*/ Indeed, without any special knowledge of crane operations,

*/ These special circumstances are an appropriate area of inquiry in construing the standard. Ryder Truck Lines v. Brennan, 597 F.2d 230 (5th Cir. 1974)

a reasonable person would likely conclude that the barricading requirement was designed to exclude everyone from the barricaded area.

With regard to the employees not involved in operating the crane, the standard is clear. A barricade must be set up to prevent such employees from wandering into areas where they might be struck or crushed by the rear of the rotating superstructure. Nevertheless, the standard is ambiguous to the extent that it does not clarify whether an employer's obligation under this standard extends beyond erecting a barricade to include either policing its perimeter to insure that no one goes inside it, or, in the alternative, imposing upon employers an obligation to establish work rules prohibiting its employees from being inside the barricaded area.

Further ambiguity inherent in the standard is demonstrated by complainant's interpretation of its requirements. Here, it is clear that the standard, as interpreted by complainant, does not mean what it says. The standard contemplates the installation of a physical barrier sufficient to "prevent" access to the restricted area. However, complainant does not so interpret and enforce its requirements. Instead, complainant considers adequate a barricade which merely warns of danger and which is only nominally a physical barrier. In light of this enforcement posture, coupled with the prevailing industry practice of permitting both the crane operator and the oiler to have access to the barricaded area, there is a genuine ambiguity as to whether the scope of the standard was intended to include the aforesaid crew members.

The second factor is present here with even greater force. The evidence is unrefuted that until shortly before the issuance of the citation sub judice it was the common understanding of the industry that the

barricading requirement did not apply to the crane crew. (Tr. 227, 307-08, 362-63, 387, 398-99, 407-08) Moreover, there is pervasive evidence that the oiler routinely works within the barricaded area. Indeed, no single duty of an oiler has been identified in this record which is routinely done outside the barricaded area.

Finally, there is evidence here of a pattern of administrative enforcement of the standard which is consistent with the industry's interpretation of the standard. The evidence on this point begins with the absence of a single reported case prior to the issuance of the citation sub judice where an employer has been cited for permitting an oiler to be within the barricaded area. Additionally, there is the testimony of respondent's owner and chief operating officer that both state and federal safety inspectors have, in the past, observed oilers within the barricaded areas of cranes at respondent's various work sites and have never previously cited respondent for such circumstance. (Tr. 398-99, 407-08) Corroborating this evidence is the testimony of Union officials and the compliance officer, none of which are aware of a single citation having been issued based upon the oiler's presence within the barricaded area, until shortly before the issuance of the citation involved here.*/ (Tr. 103-05, 227, 307-08, 362-63) Given the pervasive

*/ A citation was issued to another employer at the same work site alleging a violation of this same standard. This earlier citation was issued July 29, 1980--a week after the completion of the inspection which resulted in the issuance of the citation sub judice. This earlier citation was based upon a fatality investigation where an oiler was crushed by the pinch-point of another crane. It was ultimately affirmed in Bechtel Power Corp., Docket No. 80-4764, issued June 2, 1981.

evidence in this record that oilers routinely work within the barricaded area to perform their assigned duties, it appears that OSHA did not enforce the standard against the oiler until shortly before the inspection which resulted in the issuance of this citation.

Thus, it appears that members of the crane industry have been led to the reasonable belief that the standard did not apply to oilers. Accordingly, the standard does not contain a constitutionally sufficient warning of what complainant contends the standard requires and, therefore, cannot be enforced.

In view of the foregoing, it is found that the standard, properly construed, does not apply to the facts of this case. Moreover, the standard cannot be applied because it failed to give respondent sufficient notice of the full scope of its requirements. For these reasons the alleged violation of 29 C.F.R. §1926.550(a)(9) cannot be affirmed.

ORDER

In view of the foregoing and pursuant to Fed. R. Civ. P. 52(a) which permits the entry of judgment based upon findings of fact and conclusions of law which appear in the decision, IT IS HEREBY ORDERED that:

1. Citation No. 3, Item No. 1, is VACATED.

2. Citation No. 3, Item No. 2, is VACATED.

3. Citation No. 4, Item No. 1, is AFFIRMED, and no penalty is assessed.

4. Citation No. 4, Item No. 2, is AFFIRMED, and no penalty is assessed.

Quentin P. McColgin

Quentin P. McColgin
Judge, OSHRC

Dated: September 21, 1982

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| | (See prior cites at 80/68/B10, 80/105/E11) | | |
| 81-2750 | TRI-STATE STEEL CONSTRUCTION COMPANY | 10/27/82 | 58/F4 |
| 81-2758 | NATIONAL ENGINEERING AND CONTRACTING COMPANY | 10/27/82 | 58/F11 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

October 27, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

J.L. Foti Construction Co., Inc.

OSHRC DOCKET NO. 77-2848

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

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FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>J.L. FOTI CONSTRUCTION COMPANY, INC.,<br><br>Respondent. | OSHRC Docket No. 77-2848 |

ORDER

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

The United States Court of Appeals for the Sixth Circuit remanded this case to the Commission "for reinstatement of the original civil penalty assessed by the administrative law judge against...Foti." J.L. Foti Construction Co. v. OSHRC, 687 F.2d 853 (6th Cir. 1982). The judge had originally assessed a penalty of $500 for a violation of the scaffold guardrail standard at 29 C.F.R. § 1926.451 (d)(10).

Accordingly, a penalty of $500 is assessed.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.
Ray H. Darling, Jr.
Executive Secretary

DATED: OCT 27 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>J. L. FOTI CONSTRUCTION COMPANY, INC.,<br><br>Respondent. | : | OSHRC Docket No. 77-2848 |

DECISION

Before CLEARY, Chairman; BARNAKO and COTTINE, Commissioners.

BY THE COMMISSION:

A decision of Administrative Law Judge James D. Burroughs is before the Commission pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). At issue before the judge was a citation alleging that the Respondent, J.L. Foti Construction Company, Inc., failed to comply with 29 C.F.R. § 1926.451(d)(10) in that standard guardrails and toeboards were not installed at the open sides and ends on three levels of a tubular welded frame scaffold. The Secretary of Labor ("the Secretary") further alleged in this citation that the Respondent's failure to comply with section 1926.451(d)(10) constituted a repeated violation of the Act within the meaning of section 17(a) of the Act, 29 U.S.C. § 666(a).

In his decision, Judge Burroughs concluded that the Respondent had failed to comply with section 1926.451(d)(10), expressly rejecting the Respondent's defenses to this charge, including the following (as stated by the judge):

> (1) there is no credible evidence that employees of respondent were on the scaffold;
>
> (2) equivalent protection was provided by a nylon mesh net; [and]
>
> (3) the cross bracing of the scaffold provided equivalent protection; . . . .

The judge rejected the Respondent's first contention on the basis of his evaluation of the record evidence, entering a finding that employees of the Respondent worked on the three levels of the scaffold that were alleged to be inadequately guarded. With respect to the second contention, Judge Burroughs apparently accepted the Respondent's underlying premise, that is, that a nylon mesh net would provide equivalent protection. Nevertheless, he rejected the defense on the ground that "[t]he preponderance of the evidence supports the conclusion that no nylon mesh netting was in use . . . ." The judge also rejected the third contention of the Respondent, concluding that, although "[t]he cross bracing must be viewed as a type of guardrail," it did not provide "equivalent protection" to that required under the standard. Having rejected these and other defenses to the charge, Judge Burroughs affirmed the Secretary's allegation that the Respondent failed to comply with section 1926.451(d)(10).

However, the judge vacated the Secretary's allegation that the Respondent's noncompliance with the cited standard constituted a repeated violation of the Act. He noted that the Secretary based this allegation on the fact that the Respondent had previously been issued a citation alleging noncompliance with 29 C.F.R. § 1926.451(a)(4), a standard setting forth general requirements applicable to all scaffolds. He further noted that the Commission had "not addressed the question of whether a prior violation of one standard . . . can be construed as presenting circumstances that would result in a repeat violation of another standard . . . ." After considering this issue, Judge Burroughs concluded that "a repeat violation should be determined only in those cases where the same standard has been previously violated by an employer . . . ." Applying this test, he accordingly vacated the repeated allegation in the case before us. He affirmed the citation as modified to allege a serious rather than repeated violation of the Act.

Both of the parties filed petitions for review of the judge's decision and order. The Respondent took exception to the judge's conclusion that it failed to comply with section 1926.451(d)(10) and in particular argued that the judge erred in rejecting the three contentions set forth above. The Secretary took exception to the judge's conclusion that the Respondent's noncompliance was not a repeated violation of the Act. In directing review of Judge Burroughs' decision and order, Chairman Cleary expressly granted both of these petitions for review.

Since the filing of the judge's decision in this case, the Commission has decided several other cases that presented similar issues. For example, in Dick Corp., 79 OSAHRC _____, 7 BNA OSHC 1951, 1979 CCH OSHD ¶ 24,078 (No. 16193, 1979), the Commission rejected an employer's contentions (1) that the back and ends of a scaffold were not "open" within the meaning of section 1926.451(d)(10) because of the presence of cross-bracing and scaffold bucks and (2) that these devices constituted "equivalent protection" within the meaning of the standard. The Commission's decision in that case clearly articulates the respective burdens of the Secretary in establishing his prima facie case and of the employer in establishing that it falls within the "equivalent protection" exception to the standard's requirements. Because the decision in Dick Corp. interprets the requirements of section 1926.451(d)(10), the same standard that is at issue in the case now before us, its relevance to this case is clear. Also relevant to the Respondent's contentions on review is our recent decision in Wander Iron Works, Inc., 80 OSAHRC _____, 8 BNA OSHC 1354, 1980 CCH OSHD ¶ 24,457 (No. 76-3105, 1980). In that case we rejected the employer's contention that the use of safety belts constituted compliance with a standard that requires the use of guardrails. 1/ The discussion in that case as to when an employer may substitute an alternative form of protection for that required under a standard is

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1/ The standard at issue in Wander Iron Works, Inc., supra, and the standard at issue in the case now before us are written using virtually identical language. In essence, they establish the same requirements with respect to two different types of scaffolds.

particularly relevant to the Respondent's contention in the case now before us that employees were protected by a nylon mesh net.

In addition, the Commission has issued a decision, since the filing of Judge Burroughs' decision in the case now before us, that is dispositive of the issue raised by the Secretary on review. In Potlatch Corp., 79 OSAHRC 6/A2, 7 BNA OSHC 1061, 1979 CCH OSHD ¶ 23,294 (No. 16183, 1979), the Commission majority adopted a test for determining whether a violation is repeated within the meaning of the Act. In pertinent part, the Commission stated the following:

> A violation is repeated under section 17(a) of the Act if, at the time of the alleged repeated violation, there was a Commission final order against the same employer for a substantially similar violation.
>
> The Secretary may establish substantial similarity in several ways . . . .
>
> In the absence of evidence that the antecedent and present violations concern noncompliance with the same standard, the Secretary must present other evidence that the violations are substantially similar in nature. In this regard, we think that evidence that the violations involve similar hazards would be relevant . . . . [T]o hold that characterization as repeated is limited to subsequent violations of the same standard could lead to patently absurd results . . . .

7 BNA OSHC at 1063, 1979 CCH OSHD at pp. 28,171-72. Thus, the judge's ruling on whether the Respondent's failure to comply with section 1926.451(d)(10) was a repeated violation of the Act must be set aside and reconsidered under current Commission precedent.

Accordingly, the case is remanded to Judge Burroughs. 2/ On remand, the

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2/ In Potlatch Corp., supra, Commissioner Barnako set forth his test for determining whether a violation is repeated under section 17(a) of the Act. That test differs in some respects from that of the Commission majority. Although Commissioner Barnako adheres to his position in Potlatch Corp., he recognizes that the orderly administration of the Act requires that the Commission's administrative law judges follow precedent established by the Commission. Gulf & Western Food Products Co., 77 OSAHRC 72/A2, 4 BNA OSHC 1436, 1439, 1976-77 CCH OSHD ¶ 20,886 at p. 25,067 (Nos. 6804 & 6805, 1976). For this reason, he joins with his colleagues in the Commission's remand order.

judge should issue a decision and order disposing of the contentions of both parties on review. The judge should reconsider the Respondent's contentions that it provided equivalent protection in light of the Commission's decisions in Dick Corp., supra, and Wander Iron Works, Inc., supra. In addition, the judge should reconsider the Secretary's contention that the violation was repeated in light of the Commission's decisions in Potlatch Corp., supra, and in subsequent cases where the Potlatch test has been applied. 3/ Finally, the judge should reconsider his finding that employees of the Respondent were exposed to the hazard, and any other issue that in his view is within the scope of the direction for review, in light of the record, including the arguments of the parties on review.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: JUN 30 1980

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3/ See, e. g., Stearns-Roger, Inc., 79 OSAHRC _____, 7 BNA OSHC 1919, 1979 CCH OSHD ¶ 24,008 (No. 76-2326, 1979); Communications, Inc., 79 OSAHRC 61/A2, 7 BNA OSHC 1598, 1979 CCH OSHD ¶ 23,759 (No. 76-1924, 1979) appeal filed, No. 79-2148 (D.C. Cir. Sept. 27, 1979); Triple "A" South, Inc., 79 OSAHRC 34/D6, 7 BNA OSHC 1352, 1979 CCH OSHD ¶ 23,555 (No. 15908, 1979). The case now before us is similar to the cited cases in that the Potlatch test is to be applied even though the case was tried prior to the issuance of the Commission's decision in Potlatch Corp., supra. In cases of this type, when the Commission concludes that the Secretary has established his prima facie case, we consider whether it is necessary to afford the employer an opportunity to present additional evidence in rebuttal to that prima facie case. See, e.g., Stearns-Roger, Inc., supra, 7 BNA OSHC at 1924 & n. 15, 1979 CCH OSHD at p. 29,159 & n. 15; Communications Inc., supra, 7 BNA OSHC at 1603 & n. 5, 1979 CCH OSHD at pp. 28,813-14 & n.5. Accordingly, the judge should follow this same procedure on remand of the instant case.

COTTINE, Commissioner, concurring in part and dissenting in part:

I concur in that portion of the lead opinion that remands this case to the judge for reconsideration of whether the violation of §1926.451(d)(10) was repeated under the criteria set forth by the Commission in Potlatch Corp., 79 OSAHRC 6/A2, 7 BNA OSHC 1061, 1979 CCH OSHD ¶23,294 (No. 16183, 1979).[1/] However, a remand to reconsider the merits of the violation constitutes an unauthorized delegation of appellate authority, is wasteful of Commission resources, and is unjustified by any intervening change of law, need to supplement the record, absence of requisite findings or conclusions,[2/] or other reason that legally supports an order requiring the judge to retrace his steps.

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1/ The Commission decision in Potlatch Corp., supra, issued after the judge's decision, represents an intervening change in the rule of decision previously applied by the judge. Moreover, in Potlatch and the cases following it, the Commission has definitively identified the circumstances under which a violation is properly classified as repeated. See, e.g., Communications, Inc., 79 OSAHRC 61/A2, 7 BNA OSHC 1598, 1979 CCH OSHD ¶23,759 (No. 76-1924, 1979); Triple "A" South, Inc., 79 OSAHRC 34/D6, 7 BNA OSHC 1352, 1979 CCH OSHD ¶23,555 (No. 15908, 1979). Therefore, it is appropriate for the judge to re-examine the factual record in light of this change. In addition, it may be necessary in this case to allow the parties to present additional evidence that is relevant to their respective burdens under Potlatch Corp., supra.

2/ See Texaco, Inc., OSHRC Docket No. 77-2014 (June 30, 1980).

Judge Burroughs found that the preponderance of the evidence did not establish the presence of nylon mesh netting on the exterior of the scaffold where the Respondent's employees were working. The judge concluded that the cross-bracing on the scaffold did not constitute equivalent protection under §1926.451(d)(10) because the cross-bracing was not in compliance with the guardrail height requirement of the cited standard and did not have a midrail. The judge also rejected the Respondent's contention that safety belts were being worn by employees.

The rule of decision applied by Judge Burroughs in rejecting the Respondent's argument with respect to the protection afforded by the scaffold cross-bracing is fully consistent with the Commission decision in Dick Corp., 79 OSAHRC 101/E8, 7 BNA OSHC 1951, 1979 CCH OSHD ¶24,078 (No. 16193, 1979), and needs no further examination. The judge's finding with respect to the absence of a nylon mesh net on the exterior of the scaffold obviates any need to determine whether the substitution of a net as an alternative form of protection would be permissible under Wander Iron Works, Inc., OSHRC , 8 BNA OSHC 1354, 1980 CCH OSHD ¶24,457 (No. 76-3105, 1980). Judge Burroughs' factual findings and supporting credibility determinations are fully explained and comply with the requirements set forth both by the Commission and by the Administrative Procedure Act. See P and Z Co., Inc., 77 OSAHRC 211/F5, 6 BNA OSHC 1189, 1977-78 CCH OSHD ¶22,413 (No. 76-431, 1977).

A remand to the judge under these circumstances to consider arguments raised in response to a Commission direction for review issued under 29 U.S.C. §661(i), section 12(j) of the Act,[2/] constitutes an improper delegation to the judge of review authority granted exclusively to Commission members under section 12(j). The Commission is charged with the duty of formulating national policy in adjudications involving occupational safety and health. S & H Riggers and Erectors, Inc., 79 OSAHRC 23/A2, 7 BNA OSHC 1260, 1264, 1979 CCH OSHD ¶23,480 at p. 28,437 (No. 15855, 1979), appeal docketed, No. 79-2358 (5th Cir. June 7, 1979). It is comprised of individuals "who by reason of training, education, or experience are qualified to carry out the functions of the Commission under this Act." 29 U.S.C. §661(a). Congress clearly intended that the Commission members would perform these functions. Furthermore, the delegation of administrative appellate responsibility that this case represents is inconsistent with the specific review provisions of this

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2/ Section 12(j) of the Act, 29 U.S.C. §661(i), provides:

> (j) A hearing examiner appointed by the Commission shall hear, and make a determination upon, any proceeding instituted before the Commission and any motion in connection therewith, assigned to such hearing examiner by the Chairman of the Commission, and shall make a report of any such determination which constitutes his final disposition of the proceedings. The report of the hearing examiner shall become the final order of the Commission within thirty days after such report by the hearing examiner, unless within such period any Commission member has directed that such report shall be reviewed by the Commission.

act, 29 U.S.C. §661(i), and the Administrative Procedure Act, 5 U.S.C. §557(b),[3/] which provide for agency review of the initial decisions of agency employees.

In sum, the decision of the judge on the merits of the violation does not reveal the application of a rule of decision contrary to Commission precedent, see S. J. Groves & Sons Co., 79 OSAHRC 46/C8, 7 BNA OSHC 1481, 1979 CCH OSHD ¶23,650 (No. 78-5084, 1979), nor is there any intervening change in law that requires a reassessment or supplementation of the factual record. Accordingly, the judge's finding that the Respondent failed to comply with 29 C.F.R. §1926.451(d)(10) should be reviewed and decided by the Commission without remand.

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3/ Section 8(a) of the Administrative Procedure Act, 5 U.S.C. §557(b), provides in pertinent part:

> (b) When the agency did not preside at the reception of the evidence, the presiding employee...shall initially decide the case...When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issue on notice or by rule.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 400
ATLANTA, GEORGIA 30309

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| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 77-2848 |
| | ) | |
| J. L. FOTI CONSTRUCTION COMPANY, INC., | ) | |
| | ) | |
| Respondent. | ) | |

## DECISION AND ORDER

APPEARANCES:

Mark D. Katz, Esquire, Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, on behalf of complainant.

Louis H. Orkin, Esquire, Beachwood, Ohio, on behalf of respondent.

## STATEMENT OF CASE

Burroughs, Judge: This proceeding was initiated pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq., 84 Stat. 1590 ("Act"). Respondent timely contested a repeated citation issued to it, pursuant to section 9(a) of the Act, on August 9, 1977. Review is also sought of the penalty proposed for the alleged violation.

Respondent is a corporation engaged in business as a masonry contractor. The repeated citation resulted from visual observations made on July 28, 1977, at the Ohio Bell Telephone Building, Cleveland, Ohio.

The citation alleges that respondent committed a repeat violation by failing to comply with the requirements of 29 C.F.R. § 1926.451(d)(10). The citation described the alleged violation as follows:

> "Standard guardrails and toeboards were not installed at all open sides and ends on tubula. welded frame scaffolds more than 10 feet above the ground or floor:
>
> Scaffold on east face of Ohio Bell Telephone Building at 1015 Huron Road, Cleveland, Ohio, from roof of 6th floor to past 13th floor; men working at tier 5, 6, and 7 seen from the street, each tier's approximately 6 feet high."

A penalty of $1,400 was proposed for the alleged violation.

A hearing was held in this matter on January 3, 1978, in Cleveland, Ohio. No additional persons desired to intervene in the proceeding.

## JURISDICTION AND ISSUES

Respondent concedes that it is engaged in a business affecting commerce within the meaning of the Act and that the Commission has jurisdiction of the parties and of the subject matter herein (Para. II, Complaint and Answer).

The following issues are presented to the Commission for determination:

1. Did respondent violate section 5(a)(2) of the Act by failing to comply with the standard published at 29 C.F.R. § 1926.451(d)(10), in that employees were working on the fifth, sixth and seventh tiers of a scaffold that contained no guardrails or equivalent protection?
2. Was the violation, if it occurred, a repeat violation within the meaning of section 17(a) of the Act?

3. What penalty, if any, should be assessed in the event a violation is determined?

## FINDINGS OF FACT

The following facts are specifically determined in resolving the issues in dispute:

1. Respondent is a corporation engaged in business as a masonry contractor (Para. I, Complaint and Answer; Tr. 99). It employed approximately 26 persons on July 28, 1977 (Tr. 34, 65).

2. On July 28, 1977, Compliance Officer John A. Hutchison conducted visual observations from the street at the Ohio Bell Telephone Building, Cleveland, Ohio[1/] (Tr. 5, 67).

3. The Ohio Bell Telephone Building is over 20 stories tall with setbacks at the sixth and thirteenth floors (Ex. 1; Tr. 5, 55). Respondent's employees were engaged in removing the facing stone of the building to do work on the steel behind the stones. Some replacement of the facing stones was also being made on the building (Tr. 14, 102).

4. Respondent was the general masonry contractor for the job (Tr. 83, 102). The job commenced in the middle of March, 1977, and ended on November 13, 1977 (Tr. 100).

5. Compliance Officer Hutchison held an opening conference with J. L. Foti, respondent's president. He did not conduct a walk-around inspection and held no closing conference (Tr. 66).

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1/ Compliance Officer Hutchison emphasized that he made no inspection but did make certain visual observations from across the street since he was denied access to the work area (Tr. 66-67).

6. Compliance Officer Hutchison was denied access to the scaffold area by J. L. Foti until he secured a search warrant. In lieu of securing a search warrant, Hutchison proceeded to view the scaffold from the ground at a position across the street from the building (Tr. 12-13, 57, 100). He was accompanied across the street by Compliance Officer Paul Cameron, J. L. Foti and Jack Fees, a safety instructor from the Construction Employer's Association (Tr. 13, 146).

7. Hutchison also made some observations from the superintendent's location at the northern base of the scaffold when he was first escorted to that location by the building manager (Tr. 9, 66).

8. J. L. Foti offered to permit Compliance Officer Hutchison to make an informal inspection, but this offer was declined by Hutchison (Tr. 90-91).

9. A multi-tiered scaffold had been erected on the roof of the sixth floor setback of the building (Ex. 2, 3, 4; Tr. 9). The scaffold was new and lightweight (Tr. 67, 101). It was a tubular welded type and one of the best ever seen by Hutchison (Tr. 14-15).

10. The scaffolding was assembled on the outside of the building up to the sixteenth floor. It was approximately 112 feet in height (Exs. 1, P; Tr. 100-101).

11. Each side of the sections of the scaffold contained diagonal cross braces (Exs. 2, 3, 4, C, Y; Tr. 15, 67-68, 87). Many of the scaffold sections were planked and contained toeboards (Exs. 2, 3, 4; Tr. 15, 17).

12. The scaffolding was approximately five feet wide (Tr. 70). The fifth, sixth and seventh sections or tiers of the scaffold had been planked (Tr. 17).

13. Each tier of the scaffold was approximately six feet high. The scaffolding was sturdy and safely tied to the building (Tr. 14-15).

14. A nylon mesh material had been erected at the working face of the building[2/] (Tr. 16, 18, 103-104). Respondent had the net constructed specifically for the job at an approximate cost of $2,700 (Tr. 103-104).

15. Employees of respondent were working at the fifth, sixth and seventh tiers of the scaffold. The scaffold contained no guardrails on these levels (Tr. 13-14, 147).

16. Anyone falling from the scaffold would have landed on the roof which was concrete with an asphalt-type coating (Tr. 70).

17. Three or four safety belts had been shipped to the jobsite, and signs were issued instructing employees to use safety belts (Tr. 117-118).

18. Respondent has a good past safety record and has never had an employee fall off a scaffold (Tr. 125).

19. On October 20, 1975, respondent was issued a non-serious citation alleging that it violated 29 C.F.R. § 1926.451(a)(4) at the Joseph Horne store at Randall Park Mall, Cleveland, Ohio (Ex. 5; Tr. 18-19). Respondent contested the violation of 29 C.F.R. § 1926.451(a)(4) but later settled on a basis that affirmed the violation (Ex. 5).

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2/ Hutchison believed the material to be nylon because of the droop of the material but did not get close enough to formulate a positive judgment (Tr. 16-17, 53). J. L. Foti testified that the mesh material used at the site was made of nylon (Tr. 104).

## OPINION

Complainant alleges that respondent was in violation of 29 C.F.R. § 1926.451(d)(10)[3/] on July 28, 1977, at the Ohio Bell Telephone Building, Cleveland, Ohio. A multi-tiered scaffold had been erected on a setback of the roof of the building above the sixth floor level for purposes of removing facing stone in order to do certain work on the steel behind the stone and to replace some of the facing stones.

Respondent advances several arguments as to why no violation existed on July 28, 1977. These arguments can be summarized as follows: (1) there is no credible evidence that employees of respondent were on the scaffold; (2) equivalent protection was provided by a nylon mesh net; (3) the cross bracing of the scaffold provided equivalent protection; (4) safety belts were being worn by any employees observed by Hutchison to be in an unprotected area. Respondent's arguments are permeated with the assertion that the testimony of Compliance Officer John A. Hutchison lacks credibility.

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3/ 29 C.F.R. § 1926.451(d)(10) provides:

> "Guardrails made of lumber, not less than 2 x 4 inches (or other material providing equivalent protection), and approximately 42 inches high, with a midrail of 1 x 6 inch lumber (or other material providing equivalent protection), and toeboards, shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor. Toeboards shall be a minimum of 4 inches in height. Wire mesh shall be installed in accordance with paragraph (a)(6) of this section."

When Compliance Officer Hutchison arrived at the site, he contacted the building manager to obtain permission to inspect the scaffold erected on the roof of the sixth floor setback of the building. The building manager escorted him to the superintendent's position which was at the northern base of the scaffold. The superintendent informed Hutchison that J. L. Foti, respondent's president, desired to be involved in any OSHA inspection. J. L. Foti was not at the site but was immediately called. He came to the site prior to any inspection being conducted. An opening conference was requested by Foti, and the building manager's office was utilized for this purpose (Tr. 9-10). During the opening conference, Foti requested that Compliance Officer Hutchison contact his Area Director about proceeding with the inspection. Hutchison agreed to contact the Area Director and adjourned the meeting until after lunch (Tr. 11).

During the lunch hour, Compliance Officer Hutchison discussed the inspection with his Area Director and returned to the site. Compliance Officer Paul Cameron accompanied Hutchison on his return to the site. When the two compliance officers arrived at the site, Foti called his lawyer and then advised the compliance officers that they had better get a court order (Tr. 11-12). The compliance officers then proceeded across the street to view the work site from a distance (Tr. 13). The scaffold was on the outside of the building and in public view from the street (Ex. 1). Foti accompanied the compliance officers across the street and was present while they made their observations.

Prior to entering the building on July 28, 1977, Hutchison observed the scaffold from the street. He also took four photographs, which were

introduced into evidence as exhibits one, two, three and four. These photographs were taken at 9:30 a.m., just prior to his entering the building to conduct an inspection (Tr. 6-8). Respondent infers that the photographs were taken in a surreptitious manner and from such a distance that they should be ignored in deciding the issue. The photographs were made from a public street and the Compliance Officer violated no rights of respondent by taking the photographs. See Accu-Namics, Inc. v. OSHRC, 515 F.2d 828 (5th Cir. 1975), cert. den. 425 U.S. 903 (1976).

The photographs taken by Hutchison (Exs. 2, 3, 4) depict certain persons on the scaffold. He testified that he saw employees of respondent working on the fifth, sixth and seventh tiers of the scaffold and identified the persons reflected in exhibits two and three as employees of respondent (Tr. 14). He further testified that Foti and respondent's superintendent identified the persons as employees of respondent (Tr. 14, 44). Foti denied that Hutchison asked him whose employees were on the scaffold. He testified that he could not remember making a statement that the persons observed were his employees (Tr. 134). Compliance Officer Cameron, who accompanied Hutchison and Foti across the street to observe the scaffold, testified that Foti informed them that the persons on the scaffold were employees of respondent (Tr. 146-147).

Respondent submits that there is no credible evidence to indicate that respondent's employees were on the job at the time Compliance Officer Hutchison arrived at the site. Foti testified that he could not identify the persons reflected in exhibits two, three and four as his employees (Tr. 105-106, 134). However, he did not testify that they were not his employees. He

conceded that masonry work was being done on the building on July 28, 1977, (Tr. 132), and it must be noted that respondent was the masonry contractor for the job. Respondent also disputes the finding that employees were working on the fifth, sixth and seventh tiers. However, Foti conceded that employees would have had access to the fifth, sixth and seventh tiers (Tr. 133-134). Michael Phillips, a structural engineer for the consulting engineers on the project, testified that employees of respondent were working from the scaffold on July 28, 1977, while he was at the site (Tr. 86). Phillips was at the site when Hutchison arrived (Tr. 84).

Respondent seeks to counter the testimony of Hutchison, Cameron and Phillips by Foti's testimony that Hutchison never asked Foti whether they were respondent's employees[4/] and by inferring that other persons could have been on the scaffold. Respondent failed to present any direct evidence to establish that the persons reflected in exhibits two, three and four were not its employees. It simply raised the specter that other persons could have had access to the scaffold.[5/] Since the scaffold was under respondent's

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4/ Hutchison also testified that respondent's superintendent, George Lewis Nemeth, told him that the persons on the scaffold were employees of respondent (Tr. 44). The record contains no denial by Nemeth that the persons were not employees of respondent. It should also be noted that Nemeth was on the scene when Hutchison arrived at the site, while Foti had to be called and arrived at the site minutes later.

5/ Respondent's counsel, by cross-examination of Hutchison, raised the inference that the architect, Ohio Bell's construction superintendent, the union steward (an employee of respondent) and the representative of the international union might have had access to the scaffold (Tr. 46-47).

control and supervision, this mere inference[6/] by respondent is deemed insufficient to overcome the testimony of Hutchison, Cameron, and Phillips, and Foti's own admission that masonry work was done on July 28, 1977. Accordingly, it is concluded that the persons reflected in exhibits two, three and four were employees of respondent.

Exhibits two, three and four show no standard guardrails in place on the exterior of the scaffold, and respondent does not contend that it erected standard guardrails. Respondent submits that nylon netting was used as an equivalent protection on the exterior of the scaffold.[7/] The nylon netting is not reflected in exhibits two, three, and four, and Hutchison testified that he saw no netting in use on the exterior of the scaffold. Hutchison's testimony is supported by Michael Phillips.

Phillips testified that he saw nylon mesh netting in use at the site on July 28, 1977. According to him, the mesh was in place at all levels where he saw respondent's employees working. He was uncertain as to the exact working levels of respondent's employees[8/] (Tr. 86). However, he testified

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6/ Since respondent presented no evidence to show the persons were not its employees, the inference is based on conjecture, surmise or a premise which is wholly uncertain.

7/ Compliance Officer Hutchison conceded that nylon mesh of a proper type that is properly installed can be a valid substitute (equivalent protection) for guardrails (Tr. 53).

8/ Phillips testified that he saw the netting being used on the eighth or ninth floors (Tr. 86). It is assumed that this refers to the floors of the building and not scaffold tier level.

that the nylon mesh he observed in use was between the building and the scaffold (Tr. 86). This is the same observation made by Hutchison. He did not recall if nylon mesh was being utilized on the exterior of the scaffold (Tr. 86).

The persons depicted in exhibits two and three are shown to be standing against or next to the cross bracing on the exterior of the scaffolding. Respondent argues that the photographs, which were taken from across the street, were snapped from such a distance that the nylon net would not be reflected. This argument is unpersuasive. A 100-millimeter lens was used to take the photographs and this would magnify the photographed area (Tr. 48-49). The persons in exhibits two and three are wearing light-colored pants that would tend to highlight a net. The photographs reflect a considerable amount of clarity, and there is no net reflected in the photographs.

Joseph L. Foti testified, in general, that a nylon mesh net was specifically constructed for the job and that it was used between the scaffold and the building at the eighth floor to catch falling materials (Tr. 104-105). He further testified, in general, that the netting was used on the exterior in every area where the men were working (Tr. 105). Several exhibits, including C and Y, introduced by respondent into evidence show some nylon mesh netting on the exterior side of the scaffold. Foti testified that the netting was at the fifth, sixth and seventh tiers of the scaffold (Tr. 115-116).

Respondent introduced a photograph as exhibit C to show how the nylon netting was used on the exterior of the building. Foti testified that

the photograph represented an area where employees were to commence work (Tr. 108, 115, 128). He testified that the photograph was either of the sixth or seventh tier (Tr. 115). However, he was at first uncertain that the photograph was taken on July 28, 1977, and there is no indication as to the time of day the photograph was taken (Tr. 108, 116). Respondent also refers to exhibit F as showing netting in place. Foti testified that the netting was reflected in the shadow, but the net is not visible to the naked eye. He later testified that he could not get the netting to come out in the photograph (Tr. 114-115).

Complainant's exhibits two, three and four show no nylon net in use on the exterior of the scaffold. Exhibits introduced into evidence by respondent show nylon netting on the exterior of the scaffold. Complainant's photographs were taken at 9:30 a.m. There is no evidence to indicate the hour of the day respondent's photographs were taken. Respondent's photographs were taken by Foti, who was not at the site at 9:30 a.m. Foti appeared at the site at around 10:30 a.m. (Tr. 45), and Hutchison immediately held an opening conference with him. They conferred until they adjourned for lunch. It seems certain that the photographs could not have been taken before the lunch hour. Francis H. Jones testified that the netting could be installed in approximately half an hour (Tr. 79). Thus, the site could easily have been altered prior to Foti arriving at the site or while he was conferring with Hutchison.

Respondent also seeks to establish that nylon netting was in use on the exterior of the scaffold through the testimony of Francis H. Jones,

Joseph A. Tomaro and George Lewis Nemeth. The testimony of Jones and Tomaro is based on their observations at dates subsequent to July 28, 1977, and is considered to be immaterial as to conditions existing at the time Hutchison was at the site.

Jones, a representative of the Bricklayer's Union, testified that he was at the jobsite on July 29, 1977 (Tr. 74), and that employees of respondent were working on the fourth or fifth tier of the scaffold on July 29, 1977. He observed nylon mesh netting being used on the outside of the scaffold at all areas where employees were working (Tr. 75-76, 79). He had no knowledge as to when the netting was installed (Tr. 77). Since Jones was not on the site on the date of inspection (July 28, 1977), his testimony has no bearing on the credibility of the witnesses. He also conceded that the person shown in exhibit three appears to be leaning against the cross braces and that no nylon mesh is shown in the photograph (Tr. 80).

Joseph A. Tomaro, a safety inspector for the Industrial Commission of the State of Ohio, testified that he inspected respondent's jobsite at the Ohio Bell Telephone Company building on August 9, 1977 (Tr. 93), and that he observed cross bracing and netting in use at the site (Tr. 94). According to him, the netting was on the exterior side of the scaffolding. He testified that, in his opinion, the netting was supported in sufficient manner to prevent an employee from falling to the ground (Tr. 94-95). His testimony is not in conflict with the testimony of Hutchison since his observations were made on August 9, 1977, and not on July 28, 1977.

George Lewis Nemeth, respondent's superintendent for the job, testified that netting was used on the exterior of the fifth, sixth and seventh

tiers of the scaffold on July 28, 1977 (Tr. 141, 143). However, he did not testify that the netting was in place at the time Hutchison arrived at the site. It is also interesting to note that Foti never mentioned netting to Hutchison when they observed the scaffold from across the street.[9/] The preponderance of the evidence supports the conclusion that no nylon mesh netting was in use on the exterior of the scaffold where employees of respondent were working.

Respondent submits that the cross bracing of the scaffold constituted equivalent protection. The cross bracing must be viewed as a type of guardrail. Section 1926.451(d)(10) requires that guardrails be approximately 42 inches high and contain a midrail of 1 x 6 inch lumber. The cross bracing has no midrail and is not at a consistent height of 42 inches. It does not constitute equivalent protection as contemplated by the standard.

Respondent also argues that any employees observed by Hutchison were probably wearing safety belts if they were in an unprotected position. This would constitute an affirmative defense and respondent would have the burden of establishing that the employees were wearing safety belts. Foti simply testified that three or four safety belts were shipped to the site and signs were issued which instructed employees to use safety belts. There is no direct testimony that the employees observed by Hutchison were wearing

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9/ Phillips was present during the conversation and testified that Hutchison informed him and Foti that he did not see any guardrails (Tr. 84). Phillips further testified that he heard no discussions concerning the use of nylon mesh netting (Tr. 87, 91).

safety belts. Respondent simply raises the possibility that safety belts might have been worn. It failed to establish the facts showing safety belts were being worn. The violation is affirmed.

Each tier of the scaffold was six feet in height. Employees were observed on tiers five, six and seven. This means that employees were working at heights ranging from 30 to 42 feet above the roof level. It is now well settled that in determining whether a violation is serious, within the meaning of section 17(k) of the Act,[10/] the only relevant consideration is whether there would be a substantial probability of death or serious physical harm in the event an accident occurs. California Stevedore and Ballast Co., 73 OSAHRC 39/B5, 1 BNA OSHC 1305, 1973-74 CCH OSHD ¶ 16,520 (Dkt. No. 14, 1973), aff'd 517 F.2d 986 (9th Cir. 1975). A fall from heights ranging between 30 and 42 feet is considered to present a substantial probability of death or serious physical harm to an employee. The violation was serious.

Complainant contends that the serious violation was a repeat citation within the meaning of section 17(a) of the Act.[11/] This position is based on the fact that respondent was issued a non-serious citation on October 20,

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10/ Section 17(k) of the Act states:

> "For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."

11/ Section 17(a) of the Act provides:

1975, alleging that it violated 29 C.F.R. § 1926.451(a)(4)[12/] at the Joseph Horne store at Randall Park Mall, Cleveland, Ohio (Ex. 5). The citation was contested and later settled on a basis that affirmed the violation. The citation described the violation as follows:

> "Failed to provide standard safety railing on scaffolds more than 10 feet above adjacent ground or floor:
> Third floor level rear of building, many men working on large scaffold platform with single top rail, slanted rail or no rail at all, no material placement at time of inspection, material was placed and no railings were replaced."

Each Commission member has espoused a separate point of view concerning the elements necessary to establish a repeated violation. George Hyman Construction Company, 77 OSAHRC 67/C7, 5 BNA OSHC 1318, 1977-78 CCH OSHD ¶ 21,774 (Dkt. 13,559, 1977), appeal docketed, No. 77-1591 (4th Cir., May 2, 1977). As a consequence, the Commission has not developed a consistent criteria that is applicable to all cases. Chairman Cleary and Commissioner Barnako both share the view that two prior violations are not essential before a repeat violation can be determined and, to this extent, the

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> "Any employer who willfully or repeatedly violates the requirements of section 5 of this Act, any standard, rule, or order promulgated pursuant to section 6 of this Act, or regulations prescribed pursuant to this Act, may be assessed a civil penalty of not more than $10,000 for each violation."

12/ Section 1926.451(a)(4) provides:

> "Guardrails and toeboards shall be installed on all open sides and ends of platforms more than 10 feet above the ground or floor, except needle beam scaffolds and floats (see paragraphs (p) and (w) of this section). Scaffolds 4 feet to 10 feet in height, having a minimum horizontal dimension in either direction of less than 45 inches, shall have standard guardrails installed on all open sides and ends of the platform."

Commission has declined to follow the decision of the Court in Bethlehem Steel Corp. v. OSAHRC, 540 F.2d 157 (3rd Cir. 1976).[13/] The fact there is only one prior violation, as in this case, is insufficient to conclude that the violation is not repeated.

Commissioner Barnako accepts the view of the Court in Bethlehem Steel, supra, that a repeated violation must consist of particularly flagrant conduct. In his view, the conduct which a repeated violation encompasses is similar to that which would raise an inference of willfulness. A distinction would be made between a willful and a repeated violation with regard to the actual intent of the employer. Proof of actual intent would not be necessary to establish a repeated violation. A repeated violation could be established by proof of objective facts from which it could be inferred that the employer's conduct had been of such a nature as to constitute a disregard of the Act's requirements. There is no evidence of flagrant conduct in this case and Commissioner Barnako's rationale would militate against finding a repeated violation.[14/]

Chairman Cleary rejects the Third Circuit's requirement in Bethlehem Steel, supra, that a repeated violation must consist of particularly flagrant

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13/ The Court in Bethlehem Steel Corp. v. OSAHRC, 540 F.2d 156 (3rd Cir. 1976), concluded that a repeated violation must be based on at least two prior violations.

14/ Commissioner Barnako would also require evidence to show that the employer who has committed a prior violation has failed to take appropriate steps to prevent recurrences of substantially similar violations. See George Hyman Construction Company, supra. He would infer that an employer has disregarded the Act in committing a subsequent violation when that violation occurs under the responsibility of the same supervisor who was responsible for abating the original violation.

conduct. George Hyman Construction Co., supra. He would affirm a repeated violation if there was sufficient similarity between the violation at issue and an earlier violation that had become a final order of the Commission. Eliason & Knuth Drywall Co., 77 OSAHRC 161/B1, 5 BNA OSHC 1757, 1977-78 CCH OSHD ¶ 22,096 (Dkt. 14,226, 1977). A second violation of the same standard would be classified by him as a repeat violation. Williamette Iron & Steel Co., 78 OSAHRC 3/D8, 6 BNA OSHC 1304, 1977-78 CCH OSHD ¶ 22,482 (Dkt. 15,317, 1978). The employer's conduct would have no bearing on whether there was a repeat violation. The employer's flagrant conduct or flaunting of the Act would be considered in determining the amount of penalty to be assessed.

In Hyman Construction, supra, Commissioner Barnako indicated that a repeated violation would have to be a recurrence of a substantially similar prior violation. In Williamett Iron & Steel Co., supra, Chairman Cleary indicated that a violation of 29 C.F.R. § 1915.51(a) in 1975 was a repeated violation because the same standard was violated in 1972. He repudiated the argument that the two violations must be substantially identical for the second violation to be repeated and would consider the time interval between violations only for purposes of assessing a penalty. In Seattle Stevedore Co., 77 OSAHRC 189/A2, 5 BNA OSHC 2041, 1977-78 CCH OSHD ¶ 22,277 (Dkt. 9114, 1977), Chairman Clearly requires "sufficient similarity" between the violation at issue and the earlier violation in order to conclude the violation was repeated in nature.

The Commission has not addressed the question of whether a prior violation of one standard, e.g., 29 C.F.R. § 1926.451(a)(4), can be construed

as presenting circumstances that would result in a repeat violation of another standard, e.g., 29 C.F.R. § 1926.451(d)(10). This is the situation presented by the facts in this case. Sections 29 C.F.R. § 1926.451(a)(4) and 29 C.F.R. § 1926.451(d)(10) are similar in their requirements. Section 1926.451(a)(4), which was violated by respondent in 1975, sets forth general requirements for scaffolds. The standard violated in this case (29 C.F.R. § 1926.451(d)(10)) sets forth specific requirements for tubular welded frame scaffolds. Complainant submits that the prior violation of 29 C.F.R. § 1926.451(a)(4) shows that respondent had knowledge of scaffolding requirements and that this is the criteria to be used in determining if a repeat violation occurred. Respondent argues that a repeat violation should be based on a violation of the same standard.

This Judge is of the view that a repeat violation should be determined only in those cases where the same standard has been previously violated by an employer and the facts surrounding the violation are substantially similar to the previous violation. Substantially similar facts would be essential since many of the standards[15/] are nebulous in their applicability and can be construed to apply to myriad work practices. The employer should be on notice as to what is expected of him to avoid being issued a repeat citation. Accepting complainant's argument that prior knowledge of general scaffolding requirements is sufficient to sustain a repeat violation of a specific scaffolding standard would open up a Pandora's box. There are many standards that could conceivably be utilized by complainant to argue

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15/ E.g., 29 C.F.R. § 1926.28(a) and 29 C.F.R. § 1910.132(a). Section 5(a)(1) of the Act would also fall in this category.

that a subsequent violation of a similar standard is a repeat violation.[16/] Applying complainant's logic would simply interject more uncertainty into the enforcement of the Act.

This Judge accepts the rationale of Chairman Cleary in determining whether a violation is repeat under the Act, but declines to extend his rationale to find a repeat violation of a particular standard on the basis that the employer has previously violated a similar standard. Accordingly, it is concluded that the violation of 29 C.F.R. § 1910.451(d)(10) is not a repeat violation within the meaning of section 17(a) of the Act.

The next question to be resolved is the amount of penalty to be assessed for the serious violation determined to have been committed by respondent. Under section 17(j) of the Act, the Commission is required to find and give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer and the history of previous violations in determing the assessment of an appropriate penalty.

The employees were observed at heights ranging from 30 to 42 feet above the roof level. The exterior portion of the scaffold contained cross braces. These braces provided a good measure of protection to employees. In addition, Compliance Officer Hutchison testified that the scaffold was one of the best he had ever seen (Tr. 14). A penalty of $500 is determined to be appropriate.

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16/ Parts 1910 and 1926 of 29 C.F.R. have many subparts that set forth general standards as well as specific standards. The general requirements of some subparts might conceivably be argued to place an employer on notice for specific standards under other subparts.

## CONCLUSIONS OF LAW

1. Respondent, at all times material to this proceeding, was engaged in a business within the meaning of section 3(5) of the Act.

2. Respondent, at all times material to this proceeding, was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of the parties and of the subject matter herein.

3. On July 28, 1977, respondent's employees were working on the fifth, sixth, and seventh tiers of a scaffold erected at the Ohio Bell Telephone Building, Cleveland, Ohio. The scaffold contained no guardrails or equivalent protection. Respondent was in violation of 29 C.F.R. § 1926.451(d)(10).

4. The violation was serious.

5. A penalty of $500 is assessed for the serious violation.

## ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, it is

ORDERED: 1. That the repeated violation issued to respondent on August 9, 1977, is modified to affirm a serious violation of 29 C.F.R. § 1926.451(d)(10); and

2. That the proposed penalty is modified to assess a penalty of $500.

Dated this 26th day of June, 1978.

James D. Burroughs
JAMES D. BURROUGHS
Judge

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

# NOTICE OF DECISION

Secretary v. TRI-STATE STEEL CONSTRUCTION COMPANY

OSHRC Docket No. 81-2750

1. Enclosed is a copy of my decision. It will be filed with the Commission on September 27, 1982, and will become the final order of the Commission on October 27, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N. W., Suite 601
   Washington, D. C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is October 27, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Paul L. Brady
PAUL L. BRADY
Judge

Date: September 7, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

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| SECRETARY OF LABOR, | ) | |
| Complainant, | ) | |
| v. | ) | OSHRC Docket No. 81-2750 |
| TRI-STATE STEEL CONSTRUCTION COMPANY, | ) | |
| Respondent. | ) | |

APPEARANCES:

Mark D. Katz, Esquire, Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, on behalf of complainant

Larry E. Coey, Esquire, Elyria, Ohio, on behalf of respondent

## DECISION AND ORDER

BRADY, Judge: This proceeding is brought pursuant to section 10 of the Occupational Safety and Health Act of 1970 ("Act") to contest a citation and proposed penalty issued by the Secretary of Labor ("Secretary") pursuant to section 9(a) of the Act. Respondent is charged with violating an excavation standard at a multi-employer construction site. Two dockets were consolidated for hearing which have been severed for decision.

The citation alleges a serious violation of the standard at 29 C.F.R. § 1926.651(c) which states:

> The walls and faces of all excavations in which employees are exposed to danger from moving ground shall be guarded by a shoring system, sloping of the ground, or some other equivalent means.

The violation is described as follows:

> On or before 12/3/81, the employer did not adequately provide protection from falling earth in a large (127' x 129") [sic] deep (65') excavation by means of a shoring system, sloping of the ground or some other equivalent means:
>
> > The specific instance is the foundation excavation for the raw water pump house located just east of Bacon Road and just south of the shore of Lake Erie in Painesville Township, Ohio.

The issues to be resolved are whether employees were exposed to the danger of moving ground and whether Tri-State is liable for the violation in its capacity as a subcontractor.

The evidence of record, which is not in dispute, shows that respondent ("Tri-State") was a subcontractor of the construction site, and National Engineering and Contracting Company ("National Engineering") was the general contractor. Tri-State's sole function was the placement of reinforcement steel in the foundation at the base of the excavation as shown in Exhibits C-1 through C-10.

Witnesses' testimony varied as to the size of the excavation from 125' x 125' x 65' deep to 150' x 150' x 65', and the evidence also reveals that the sides of the excavation had been sloped; there were benches or terraces to catch sloughing; and monitoring devices were installed at certain points to detect ground movement. In addition, tarpaulins were placed around the top level to prevent seepage, and runoff ditches had been installed.

Testimony shows that Tri-State's employees were working in the excavation during the period of the inspection (Tr. 101-102). Also, the day before the inspection commenced, Keith Mast, a geotechnical engineer, visited the construction site. At that time he observed a "movement of earth out of the wall," which he termed a "failure surface." This failure had left a cavity 15 feet wide, 10 feet high and about

5 feet deep. Similar conditions were noted in other parts of the excavation walls (Tr. 68, 71; Ex. C-1 through C-10). He stated that "the soil was in fact not staying in place on the walls. That condition could be expected to continue due to the type of failure that was occurring . . . ." He, therefore, concluded that there was "moving ground" (Tr. 74). He noted that one failure had left a cavity 15 feet wide, 10 feet high and about 5 feet deep (Ex. C-1). In light of the amount of moving ground, and since employees in the excavation were working a few feet from the walls at such a great depth (Tr. 100-101), it must be determined that they were exposed to the "danger of moving ground." Although the evidence shows that the soil that fell remained on the terrace, there was no reason to believe more and larger failures would not occur which somehow would be contained. The Commission has held that the clear purpose of the standard is the prevention of soil movement. M. J. Lee Construction Co., 79 OSAHRC 12/A2, 7 BNA OSHC 1140, 1979 CCH OSHD ¶ 23,330 (No. 15094). Therefore, injury or death of an employee need not occur in order to establish a violation, and it cannot be assumed that the excavation was safe merely because there had not been a more severe failure.

The Secretary having established a prima facie case, the remaining question centers on the responsibility of a subcontractor at a multi-employer construction site when there is a hazardous condition present which it neither creates nor controls.

According to the Anning-Johnson/Grossman rule, the Commission requires a subcontractor in respondent's position to show that it has protected its own employees by realistic alternative measures or that it did not have nor could it have had, with the exercise of reasonable diligence, notice that the condition was hazardous. Anning-Johnson Co., 76 OSAHRC 54/A2, 4 BNA OSHC 1193, 1975-76

CCH OSHD ¶ 20,690 at 24,784, n. 16 (No. 4409, 1976); Grossman Steel & Aluminum Corp., 76 OSAHRC 54/D9, 4 BNA OSHC 1185, 1975-76 CCH OSHD ¶ 20,691 at 24,791 (No. 12775, 1976).

Tri-State argues that the alternatives set forth in the Anning-Johnson/Grossman rule have been met, and complainant failed to establish the alternative methods in use were not effective in providing employees protection from moving ground. Also, even if a violation existed, it should not have the responsibility for its abatement in view of the assignment of liability to the general contractor.

It is not disputed that Tri-State neither created nor controlled the violative condition. Its claim, however, to have instituted "reasonable" and "realistic" alternatives must be treated as an affirmative defense with the burden of persuasion on the employer. Electric Smith, Inc., 666 F.2d 1267 (9th Cir. 1982). In this case an employee testified that respondent provided no safety instruction regarding the hazard of falling earth. Also, there is no evidence Tri-State attempted to rectify the condition or that it demanded National Engineering to abate the obvious hazard.

Based upon the large failures in the excavation walls, there was a "substantial probability that death or serious physical harm could result" to employees working in the excavation. The violation is, therefore, deemed "serious" within the definition of section 17(j) of the Act.

The next question for determination concerns the amount of penalty to be assessed for the violation. Under section 17(j) of the Act, the Commission is required to find and give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of

previous violations in determining the assessment of an appropriate penalty. The gravity of the offense is the principal factor to be considered. Nacirema Operating Company, Inc., 72 OSAHRC 9/A2, 1 BNA OSHC 1049, 1971-73 CCH OSHD ¶ 15,032 (No. 4, 1972). The Commission stated in Secretary v. National Realty and Construction Co., Inc., 72 OSAHRC 9/A2, 1 BNA OSHC 1049, 1971-73 CCH OSHD ¶ 15,188 (No. 85, 1971), that the elements to be considered in determining the gravity are: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury.

Weighing all the foregoing factors in light of the circumstances, it is concluded that a penalty in the amount of $100 is deemed appropriate.

## FINDINGS OF FACT

1. Tri-State Steel Construction Company, at all times hereinafter mentioned, maintained a place of business at 12608 Alameda Drive, Strongsville, Ohio.

2. On December 3 and 4, 1981, authorized representatives of the Secretary conducted inspections of a foundation excavation site east of Bacon Road and south of the Lake Erie shore in Painesville Township, Ohio.

3. Soil had fallen out of the sides of the excavation but remained on the terraces or benches. There was nothing to prevent additional soil failures falling to the base of the excavation where respondent's employees worked within a few feet of the walls.

4. Respondent's employees were exposed to danger from moving ground in the excavation walls that were not guarded by a shoring system, sloping of the ground, or other equivalent means.

5. The hazard of the wall failures could result in serious harm or death to the employees.

6. Although respondent was aware of the hazardous condition, no measures were taken to protect the employees working in the excavation.

## CONCLUSIONS OF LAW

1. Tri-State Steel Construction Company, at all times pertinent hereto, was an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act and the Commission has jurisdiction of the parties and subject matter herein pursuant to section 10(c) of the Act.

2. Respondent is, and at all times pertinent hereto, required to comply with the Act and the safety and health regulations promulgated by the Secretary pursuant to section 6(a) thereof.

3. Respondent was in serious violation of the standard at 29 C.F.R. § 1926.651(c) on or before December 3, 1981.

Upon the basis of the foregoing findings of fact and conclusions of law, and the entire record, it is ORDERED:

The citation alleging serious violation of the standard at 29 C.F.R. § 1926.651(c) is affirmed, and a penalty in the amount of $100 is hereby assessed.

Dated this 27th day of September, 1982.

Paul L. Brady

PAUL L. BRADY
Judge

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET N.E., SUITE 240

ATLANTA, GEORGIA 30309

# NOTICE OF DECISION

Secretary v. NATIONAL ENGINEERING AND CONTRACTING COMPANY

OSHRC Docket No. 81-2758

1. Enclosed is a copy of my decision. It will be filed with the Commission on September 27, 1982, and will become the final order of the Commission on October 27, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N. W., Suite 601
   Washington, D. C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is October 27, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Paul L. Brady

PAUL L. BRADY
Judge

Date: September 7, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

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| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 81-2758 |
| | ) | |
| NATIONAL ENGINEERING AND CONTRACTING COMPANY, | ) | |
| | ) | |
| Respondent. | ) | |

APPEARANCES:

Mark D. Katz, Esquire, Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, on behalf of complainant

Larry E. Coey, Esquire, Elyria, Ohio, on behalf of respondent

## DECISION AND ORDER

BRADY, Judge: This proceeding is brought pursuant to section 10 of the Occupational Safety and Health Act of 1970 ("Act") to contest a citation and proposed penalty issued by the Secretary of Labor ("Secretary") pursuant to section 9(a) of the Act. Respondent, National Engineering and Contracting Company ("National Engineering"), the general contractor, and Tri-State Steel Construction Company ("Tri-State"), a subcontractor, were charged with violating an excavation standard at a multi-employer construction site. The two cases, consolidated for hearing, have been severed for decision.

The citation alleges a serious violation of the standard at 29 C.F.R. § 1926.651(c) which states:

> The walls and faces of all excavations in which employees are exposed to danger from moving ground shall be guarded by a shoring system, sloping of the ground, or some other equivalent means.

The violation is described as follows:

> On or before 12/3/81, the employer did not adequately provide protection from falling earth in a large (127' x 129") [sic] deep (65') excavation by means of a shoring system, sloping of the ground or some other equivalent means:
>
> > The specific instance is the foundation excavation for the raw water pump house located just east of Bacon Road and just south of the shore of Lake Erie in Painesville Township, Ohio.

The issue to be resolved is whether complainant has proved the necessary elements to establish that respondent violated the standard.

The size of the excavation in question, according to witnesses' testimony, was from approximately 125' x 125' x 65' deep to 150' x 150' x 65'. The record discloses in reference to excavation work that National Engineering agreed with the project owner, Lake County, Ohio, in part as follows:

> The Contractor shall be responsible for supporting and maintaining all excavations required hereunder and even to the extent of sheeting or shoring the sides and ends of the excavations with timber or other satisfactory supports. (Ex. C-17)

In support of the allegations, complainant's evidence shows that on the day prior to the inspection Keith Mast, a geotechnical engineer, visited the construction site. At that time he observed a "movement of earth out of the wall," which he termed a "failure surface." This failure had left a cavity 15 feet wide, 10 feet high and about 5 feet deep. Similar conditions were noted in other parts of the excavation walls (Tr. 68, 71; Ex. C-1 through C-10). He stated that "the soil was in fact not staying in place on the walls. That condition could be expected to

continue due to the type of failure that was occurring . . . ." He, therefore, concluded that there was "moving ground" (Tr. 74). Mr. Vrabel, safety specialist who conducted the inspection, testified that he observed "slumping and falling earth" in the sides of the excavation which he also considered "moving ground" (Tr. 52; Ex. C-2).

Mr. Harold Powell, an inronworker for Tri-State Steel working in the excavation during the time of the inspection, testified that he saw soil fall from the excavation walls which remained on a bench or terrace approximately 8 feet wide and 40 feet above the base. At times his duties required him to work approximately four feet from the side of of the wall at the bottom of the excavation (Tr. 101-103; Ex. C-8). The record also shows that National Engineering's project superintendent was seen "in the hole," and laborers were observed working in the excavation (Tr. 37, 97-98).

It is the basic contention of complainant that sloughing and wall failures constituted moving ground which presented a hazard to employees working in the excavation and, thus, the standard was violated.

Respondent maintains that the measures of protection implemented were adequate and constituted "other equivalent means," as shoring and sloping, within the purview of the standard. Respondent's evidence shows that the sides of the excavation were sloped to some extent; benches or terraces were cut, and monitoring devices were placed at certain points to detect ground movement. In addition, tarpaulins were placed around the top to prevent seepage, and runoff ditches had been dug.

In deciding cases arising under the standard, it is important to first understand that its purpose is the prevention of soil movement. M. J. Lee

Construction Co., 79 OSAHRC 12/A2, 7 BNA OSHC 1140, 1979 CCH OSHD ¶ 23,330 (No. 15094). The testimony of witnesses clearly establishes that there was movement of soil in the walls of the excavation. Although the evidence shows the soil that fell remained on the terrace, there is no reason to believe more and larger failures could not occur which would be contained in that manner. In light of the amount of soil moving in the walls, it is obvious employees working at the base of the excavation near the walls were exposed to the "danger of moving ground." In addition, it is important to recognize that soil movement may occur in different forms. In M. J. Lee Construction Co., supra, the Commission stated in footnote 6 that:

> . . . the record establishes that prior to the inspection there had been soil movement in the form of erosion and sloughing in the same excavation.

Whether in the form of sloughing, the presence of which is admitted, or as partially collapsed walls, employees in this case were exposed to danger of moving ground and respondent did not provide adequate means of protection.

The fact that the soil was caught by the terraces cannot be viewed as evidence the system of protection used by respondent was adequate to protect employees working in the excavation. The arguments that the excavation dimensions, soil composition, and angle of repose were not determined are likewise rejected as necessary elements for proof of the violation. As explained by the Commission, the standard does not refer to any specific requirements for sloping or shoring; thus, the question is whether the degree of sloping, shoring, or equivalent means is adequate to protect employees working within the excavation. Seward Construction Company, Inc., 77 OSAHRC 75/C5, 5 BNA OSHC 1422, 1977 CCH OSHD ¶ 21,803 (No. 8684).

Under the circumstances of this case, the liability of respondent also extends to employees other than its own. First, National Engineering is the employer who created and controlled the hazard. Secondly, it could reasonably be expected to prevent or detect and abate the violation due to its authority and control over the work site. Red Lobster Inns of America, 80 OSAHRC 70/A2, 8 BNA OSHC 1762, 1980 CCH OSHD ¶ 24,635 (No. 79-552).

The standard was, therefore, violated as alleged and, based upon the size of the failures in the excavation walls, there was a "substantial probability that death or serious physical harm could result" to employees working in the excavation. The violation is, therefore, deemed "serious" within the definition of section 17(j) of the Act.

During the course of the hearing, complainant moved to amend the citation pursuant to Commission Rule 2(b) and Rule 15(b) of the Federal Rules of Civil Procedure to conform to the evidence. Complainant seeks to amend the citation to allege a "repeat" type violation rather than a "serious" type. The motion is based on Exhibit C-19 which reveals that a citation was issued National Engineering on August 11, 1976, alleging serious violation of the same standard which is the subject of this case. Subsequent to the filing of a notice contesting the citation, an order was entered on June 13, 1977, affirming the citation.

On the basis of the record in this case, the motion to amend the citation is granted.

In determining whether the violation is repeated, the facts must be considered in light of the Commission's clearly stated position in Potlatch Corporation, 79 OSAHRC 6/A2, 7 BNA OSHC 1061, 1979 CCH OSHD ¶ 23,294 (No. 16183, 1979). The Commission held that a violation is repeated if, at the time of the alleged repeated violation, there was a Commission final order against the same

employer for a substantially similar violation. A showing by the Secretary that the past and present violations are for failures to comply with the same standard adequately establishes substantial similarity.

In this case, the Secretary has established the repeat violation within the scope of the Potlatch decision. The arguments advanced by respondent in its brief are not sufficient to preclude application of the Potlatch holding to the instant case.

The next question for determination concerns the amount of penalty to be assessed for the violation. Under section 17(j) of the Act, the Commission is required to find and give "due consideration" to the size of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the assessment of an appropriate penalty. The gravity of the offense is the principal factor to be considered. Nacirema Operating Company, Inc., 72 OSAHRC 9/A2, 1 BNA OSHC 1049, 1971-73 CCH OSHD ¶ 15,032 (No. 4, 1972). The Commission stated in Secretary v. National Realty and Construction Co., Inc., 72 OSAHRC 9/A2, 1 BNA OSHC 1049, 1971-73 CCH OSHD ¶ 15,188 (No. 85, 1971), that the elements to be considered in determining the gravity are: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury.

Weighing the foregoing factors in light of the circumstances, including respondent's efforts at compliance and the type of soil involved, commonality of supervisory control over the violative condition, proximity of the violations and time lapse between violations, it is concluded that a penalty in the amount of $400 is deemed appropriate.

## FINDINGS OF FACT

1. National Engineering and Contracting Company, at all times hereinafter mentioned, maintained a place of business at 12608 Alameda Drive, Strongsville, Ohio.

2. On December 3 and 4, 1981, authorized representatives of the Secretary conducted inspections of a foundation excavation site east of Bacon Road and south of the Lake Erie shore in Painesville Township, Ohio.

3. Soil had fallen out of the sides of the excavation but remained on the terraces or benches. There was nothing to prevent additional soil failures from falling to the base of the excavation where employees worked within a few feet of the walls.

4. Employees were exposed to danger from moving ground in the excavation walls that were not guarded by a shoring system, sloping of the ground, or other equivalent means.

5. The hazard of the wall failures could result in serious harm or death to the employees.

6. On August 11, 1976, respondent was issued a citation alleging serious violation of 29 C.F.R. § 1926.651(c). The citation was affirmed as a final order of the Commission on June 13, 1977.

## CONCLUSIONS OF LAW

1. National Engineering and Contracting Company, at all times pertinent hereto, was an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act and the Commission has jurisdiction of the parties and subject matter herein pursuant to section 10(c) of the Act.

2. Respondent is, and at all times pertinent hereto, required to comply with the Act and the safety and health regulations promulgated by the Secretary pursuant to section 6(a) thereof.

3. Respondent was in repeat violation of the standard at 29 C.F.R. § 1926.651(c) on or before December 3, 1981.

Upon the basis of the foregoing findings of fact and conclusions of law, and the entire record, it is ORDERED:

The amended citation alleging repeat violation of the standard at 29 C.F.R. § 1926.651(c) is affirmed, and a penalty in the amount of $400 is hereby assessed.

Dated this 27th day of September, 1982.

Paul L. Brady

PAUL L. BRADY
Judge

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

NOTICE OF DECISION

Secretary of Labor v. RAMCO WELL SERVICE, INC.
OSHRC Docket No. 82-0243

1. Enclosed is a copy of my decision. It will be filed with the Commission on September 27, 1982, and will become the final order of the Commission on October 27, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is October 27, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

R. M. Child
Judge, OSHRC

Date: September 7, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>RAMCO WELL SERVICE, INC.,<br>Respondent. | OSHRC DOCKET NO. 82-0243 |

Appearances:

For the Complainant -
Ronnie A. Howell, Esquire, Dallas, Texas

For the Respondent -
George R. Carlton, Esquire, Dallas, Texas

DECISION AND ORDER

Child, R. M., Judge, OSHRC:

Statement of the Case

This matter is before the Occupational Safety and Health Review Commission (the Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651 et seq., (the Act). Complainant seeks affirmance of item 1 of Citation No. 1, issued to respondent February 4, 1982, charging a serious violation of section 5(a)(1) of the Act[1/] and of a penalty proposed in the sum of $750.00.

1. The alleged violation and section 5(a)(1) of the Act:

Citation as amended (Tr. 9)

"1. Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or were likely to cause death or serious physical harm to employees, in that:

An employee was not provided with protection from falls ranging from ten to approximately seventy-five fee[t] while ascending to and descending from the rod basket of the Cooper

The Citation resulted from an inspection of respondent's work site near Ames, Oklahoma on January 19 and 20, 1982. Notice of Contest, Complaint, and Answer were filed in due course. Respondent in its pleadings admits jurisdiction in the Commission of the persons and the subject matter of these proceedings and alleges as an affirmative defense that if a violation occurred it was the result of unpreventable employee misconduct.

Hearing was held at Oklahoma City, Oklahoma, on June 22, 1982. Notice of the hearing was duly published by the respondent and, except as they may have been called as witnesses, there was no appearance by or on behalf of affected employees.

At the conclusion of the hearing both parties waived closing argument and announced intention to file briefs in support of their positions. Only the complainant has done so.

Issues:

The issues to be determined are:

1. Was the respondent in violation of section 5(a)(1) of the Act, commonly known as the general duty clause.

2. If a violation of the Act occurred, as alleged, was it the result of unpreventable employee misconduct.

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1. (Contd.)

well servicing unit, Serial No. .093, company rig number nine on January 12, 1982. Acceptable methods of abatement would include the employer's providing and insuring of the use of a safety belt with appropriate lanyard while the employee rode the traveling block or the providing and insuring of the use of an appropriate safety climbing device or climbing assist while the employee utilized the derrick climbing ladder."

The Act

"Section 5(a)(1): (29 U.S.C. 654(a)(1)) Each employer--shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees:"

3. What, if any, penalty would be appropriate.

The Evidence

Hugh Terrel - Compliance officer for complainant, testified that as a result of a reported fatality which occurred on January 12, 1982, he was assigned to inspect a work site of respondent. Respondent services oil wells, and although the rig where the fatality occurred had been moved prior to his investigation, he went with respondent's vice-president, Bob Pitchford, to view and photograph a similar unit to that whereon the fatality occurred, and which was rigged up at the time of the investigation. (Tr. 14-16) Mr. Pitchford told him that the company had "increased" its safety program approximately two and one-half months prior to the accident when an insurance representative began inspecting the various rigs for safety hazards and giving safety talks to the employees. (Tr. 16)

An oil well servicing unit is a truck mounted derrick assembly which can be raised over an existing oil well which requires servicing in order to maintain or renew its production. (Tr. 19) Cables raise and lower a traveling block from which are suspended rigid members known as "bales" which in turn are fastened to a fitting known as the "elevator". (Tr. 23) In pulling pipe from the well, the elevator is fastened to the upper aspect of the well pipe at or near ground level and is then elevated to the tubing board which is a platform on the derrick approximately fifty-five feet above ground level. It is necessary for a member of the rig crew to work on the tubing board during the operation of removing or replacing the well pipe. Mr. Terrell determined that the fatality occurred when the man assigned to work on the tubing board was being raised to that height by standing on the elevator with his arms through

the openings in the upper part of the bales. As he reached the tubing board, he fell off the elevator to the ground. (Tr. 23-24)

Mr. Terrel stated his opinion to be that riding the elevator to or from the tubing board presented a hazard of falling approximately 55 feet to the ground. (Tr. 24) In his opinion the hazard could be abated by ascending to or descending from the tubing board via the derrick ladder utilizing a "climbing assist", or riding the elevator, but while doing so utilizing a safety belt tied off so that a fall could be no more than five feet. (Tr. 30)

Investigation disclosed that the fatally injured worker was not wearing a safety belt at the time he fell from the elevator. (Tr. 30)

The American Petroleum Institute document No. RP-54 provides for riding of the blocks with safety line attached so as to prevent a fall of more than five feet. (Tr. 43; Exhibit C-4) The Occupational Safety and Health Administration in Region VI views compliance with the American Petroleum Institute's published document RP-54 by riding the blocks while wearing a safety belt with a lanyard tied off to prevent a fall of more than five feet as not presenting a hazard recognized by the petroleum producing industry. (Tr. 45; Exhibit C-5)

Bob Pitchford, Vice-President of respondent, was called as a witness by the complainant. He is in charge of operations for respondent and as such he would hire each rig operator, who in turn may be allowed to hire his own men. (Tr. 54-55) In the course of 30 years in the oil field business he has heard of men falling while riding the blocks up and down. (Tr. 55) He first heard of this about 1951 in Odessa, Texas. (Tr. 56)

He is familiar with the American Petroleum Institute and partially familiar with its recommended standards and practices, including RP-54. He is only familiar with RP-54 through safety meetings, safety engineers, and insurance men. (Tr. 55-56) Respondent prefers the men not to ride the elevator, but if they ride they are supposed to have a safety belt and a cable attached to the bales. The employees know this through their supervision--in this case, that would be the rig operator. (Tr. 46-57) Prior to the fatal accident which gave rise to the investigation and citation in question, Mr. Pitchford had never heard of any employee of the respondent being terminated for failure to wear tied-off safety belts while riding the elevator block. (Tr. 58) Although the operator is not considered management, he bosses the other three men on the rig and is in charge from the time he takes the men out until he brings them back in. (Tr. 58-59) Safety rules are verbal instructions pretty well known around the dog houses, at safety meetings, in the waiting room and at tailgate meetings. Whoever is in charge talks about safety and instructs the men on any particular hazard on a certain job. (Tr. 59, 60) About one month prior to this fatal accident, respondent's insurance carrier held a meeting at respondent's place of business. The carrier instructed that it was acceptable to ride the traveling blocks with a safety line attached. This was communicated to the toolpushers, who were in turn to communicate it to the employees. He didn't know whether these instructions were being obeyed. (Tr. 60-61) Approximately 94 percent of the employees attended the meeting where the insurance representative advised it was legal to ride the block as long as they wore safety belts attached to the bales. (Tr. 62-63) At the time of the

accident there was a safety belt on the tubing board, 55 feet above the ground. The injured employee had left it up there when he descended possibly one hour earlier. (Tr. 63-64)

Albert Dean Copeland, called by the complainant, testified that he was the operator on the rig where the fatality occurred and that as such he was the crew chief and operated the controls. (Tr. 66-68) He operated the controls which took the worker up to the tubing board. The fall occurred as the man was stepping off due to slipping as a result of oil and paraffin on the elevator and slick wet gloves. (Tr. 69) The deceased had ridden up on the elevator previously on that date. He had worn the safety belt while riding the elevator several times, but it wasn't tied off. (Tr. 71) On the day of the accident, the wind was blowing but the weather was clear. They were in a hurry to get the job done. (Tr. 72) As operator, he is in charge of the rig while they are in the field. (Tr. 72) The employee who was killed was about 21 years old and had worked about three months. Mr. Copeland attended the meeting where the insurance representative spoke. Although he did not know, he nonetheless believed that the employee who was later killed was not at that meeting. (Tr. 73) The respondent did supply a safety belt for the rig, and he as operator was told to use it, and to see that the employee riding the blocks tied off. (Tr. 74-75) He was discharged by the respondent in March of 1982. (Tr. 75) The reason for discharge does not appear in the record.

Leonard Juliano - called by the complainant as a witness, testified that he was employed as a floor hand on the rig when and where the fatal fall occurred on January 12, 1982. It was cold with a slight breeze. (Tr. 77-78) There was a safety belt on the rig and they had all been

instructed to wear it when riding the blocks. (Tr. 80) There were occasions when he has seen men ride the elevator while not wearing the safety belt. (Tr. 80)

Hugh Terrel - called as an adverse witness by the respondent, explained that the block and elevator ascend through a hole in the bottom of the tubing board. (Tr. 86) Although it does not so appear from Exhibit C-3 which shows an atypical elevator, ordinarily the upper surface of the elevator is sufficiently flat and wide to accommodate both feet of the person riding. (Tr. 88)

## Discussion

Section 5(a)(1) of the Act requires employers to provide their employees workplaces ". . . free from recognized hazards that are causing or are likely to cause death or serious physical harm." To establish a violation of what is referred to as this general duty clause of the Act, the complainant has the burden of showing (1) that the respondent failed to keep the workplace free from a hazard (2) which was recognized (3) the likely consequence in the event of an incident was death or serious physical harm, and (4) there were feasible means available to abate the hazard. National Realty and Construction Company v. OSHRC, 489 F.2d 1257, (1973); Sec. of Labor v. United States Steel Corporation, OSHRC Docket No. 77-1796 (1982).

Here an employee was permitted in the presence of his operator, who was the foreman and direct representative of the respondent at this work site, and with the participation of the operator, to ride the traveling blocks of this oil service rig to a height of 55 feet while standing on a surface which had oil and paraffin on it wearing wet and slippery gloves and without the benefit of a safety belt tied off to prevent a fall.

The hazard of falling is evident to even a casual observer. A hazard is said to be recognized when it is known to the employer or when it is known by the industry in general. Respondent's vice-president testified that he was aware of workers falling from traveling blocks and had been aware of this in the course of some 30 years in the oil field business commencing with an incident in about 1951. (Tr. 17, 55, 56) Thus, the respondent is charged with knowledge of the hazard. It was further demonstrated that the industry has knowledge of the hazard since the American Petroleum Institute's publication, "Recommended Practices for Occupational Safety and Health for Oil and Gas Well Drilling and Servicing Operations," (RP-54) specifically treats the hazard and how to avoid it. (Exhibit C-4; Tr. 43)

That death or serious physical harm would be the likely result if a fall were to occur from the traveling blocks, which lift a man as high as 55 feet, was testified to by the compliance officer and stands unrefuted.

Finally, the evidence shows that there were two available means of abating the hazard. First, the respondent could have enforced its work rule that if employees ride the blocks they do so only while wearing a safety belt tied off to prevent a fall of more than five feet. Second, the employer could have required the worker to ascend the derrick by means of the ladder attached thereto with the aid of the climbing assist shown in Exhibit C-3.

Respondent raises the defense of unpreventable employee misconduct. The Tenth Circuit Court of Appeals has held that in a case where the presence or absence of a violation essentially turns on alleged omissions by a supervisor, the burden of disproving unpreventable employee misconduct rests with the Secretary of Labor. It has further held that the Secretary

can meet this burden by showing that the violation was foreseeable because of inadequacies in safety precautions, training of employees or supervision. Mountain States Telephone & Telegraph Co. v. OSHRC, 623 F.2d 155 (10th Cir. 1980); Capital Electric Line Builders of Kansas, Inc. v. Secretary of Labor, Tenth Cir. No. 80-1711, 678 F.2d 128 (10th Cir. 1982). Here, although the supervisory employee was a party to the violation by permitting it to occur, the presence or absence of the violation does not essentially turn on his conduct. Even if it did, the Secretary has proven by a preponderance of the evidence that a fall from the traveling blocks on one of these rigs was foreseeable because safety precautions were inadequate, neither employees nor their supervisors were properly trained or disciplined in safety, and there was no supervision or enforcement of the verbal safety rule.

Here the evidence shows that the respondent did provide a safety belt with lanyard. However, the evidence shows a laxity in its safety program and procedures. At most there was a "verbal" rule that employees riding the blocks wear a safety belt tied off to prevent a fall. There was evidence that employees frequently rode the traveling blocks while not wearing safety belts (Tr. 80) and even though they may have worn safety belts with lanyards, they frequently did not bother to tie off to prevent a fall. (Tr. 71) All of this was done with the acquiescence of the operator and up until the time of the accident giving rise to the investigation and citation herein, no employee had ever been terminated for non-observance of the "work rule." (Tr. 58)

The Commission, however, places the burden of proving the defense of unpreventable employee misconduct upon the respondent who urges that

defense.[2/] To meet this burden, the Commission has required the respondent to show it had a well established work rule prohibiting the conduct, that the rule was communicated to its employees and that the rule was effectively enforced. Secretary of Labor v. Daniel Construction Company. OSHRC Docket No. 16265 (1982), 10 BNA OSHC 1549; Daniel International Corp., Wansley Project, 81 OSAHRC 71/D6, 9 BNA OSHC 2027, 1981 CCH OSHD ¶25,813 (No. 76-0181, 1981) The Commission has held that a supervisor's knowledge of the violation is imputable to the employer for the purpose of proving employer knowledge of the violation unless the employer establishes that it took all necessary precautions to prevent the violation, including adequate instruction and supervision of its supervisor. See H. H. Hall Construction Co., 81 OSAHRC 91/D12, 10 BNA OSHC 1042, 1981 CCH OSHD ¶25,712 (No. 76-4765). Where a supervisor is involved in the misconduct, this is strong evidence that the employer's safety program was lax. See Daniel International Corp., Wansley Project, supra, at 2031. Where a supervisory employee is involved in the violation, the proof of unpreventable employee misconduct is more rigorous and the defense is more difficult to establish, since it is the supervisor's duty to protect the safety of employees under his supervision. See Floyd S. Pike Electrical Contractor, Inc., 78 OSAHRC 50/E1, 6 BNA OSHC 1675, 1978 CCH OSHD ¶22,805 (No. 3069, 1978).

The evidence is that respondent had "verbal" work rules which were "pretty well known" around the doghouses, in the waiting room, at safety meetings, and at tailgate meetings. Whoever is in charge talks about safety and instructs the men on any particular hazard on a specific job. (Tr. 59-60) Respondent prefers the men not to ride the elevator,

2. The Commission position regarding the burden of proof where the defense of unpreventable employee misconduct has been raised is followed by a majority of the Circuits which have considered this issue. See Daniel International Corporation v. Secretary of Labor, _____ F.2d _____ (Eleventh Circuit, August 19, 1982) and cases there cited.

but if they ride they are supposed to have a safety belt and a cable attached to the bales. The rig operator is supposed to convey this information to workers under him. (Tr. 56-57)

This chain method of passing on a "verbal" work rule was at best haphazard. Nowhere does it appear that an attempt was made to supervise the operators or to determine if they were informing their workers or enforcing the verbal work rules. It is significant that there was no evidence of follow-up or discipline on the part of the respondent to enforce its work rule. Likewise it is significant that the evidence was that not one employee had been terminated prior to the accident giving rise to the citation herein for violation of a work rule. Clearly the evidence is that the violation of riding traveling blocks without wearing a safety belt tied off to prevent a fall of more than five feet was foreseeable and was not the result of unpreventable employee misconduct.

The record is lacking in evidence upon which a penalty can be properly computed as contemplated at Section 17(j) of the Act. A penalty of $750.00 was proposed by the complainant in the citation. At paragraph 5 of the complaint it is alleged that the proposed penalty was arrived at after giving due consideration to the gravity of the violation, the good faith of the respondent, the size of the respondent's business and the history of previous violations, as required by section 17(j) of the Act. However, in its answer, respondent denied said allegations.

That the violation was serious cannot be gainsaid. Only one employee could be exposed to the hazard at any one time on any rig, but death could ensue. We are not informed as to how many such rigs the respondent

had in operation, but from the testimony of Mr. Pitchford it appears that there were at least two. Since we are not informed as to the size of the respondent or its history of previous violations, if any, these factors must be presumed to mitigate in its favor.

On balance and considering the record as a whole, an appropriate penalty would be the sum of $500.00.

---

Having considered the pleadings, the testimony of the witnesses and the exhibits received in evidence--and having observed the demeanor of the witnesses and weighed the credibility thereof--and having considered the post-hearing memorandum, there are hereby entered the following:

Findings of Fact

1. Respondent was at all times pertinent an employer engaged in a business affecting commerce.

2. Employees riding the traveling blocks up or down while standing on the elevator suspended therefrom were exposed to the hazard of falling from the elevator to the ground level unless they wore safety belts tied off by lanyards to prevent falling.

3. Respondent furnished a safety belt and lanyard to the crew working on the well service derrick.

4. Respondent had an unwritten work rule that it preferred employees to ascend and to descend from the tubing board, which was approximately 55 feet above ground level, by means of the derrick ladder with climbing assist. However, if the men ride the elevator, they should wear safety belts with cable attached to the bales.

5. Said work rule was communicated to supervisors or operators who were in turn told to inform the workers of the work rule and to enforce it.

6. Respondent knew of the hazard of riding the blocks without a safety belt tied off.

7. The petroleum drilling and well servicing industry recognized the hazard of riding the blocks without a safety belt properly tied off.

8. A fall from the traveling blocks could be as great as 55 feet, and the likely result would be death or serious physical harm.

9. The operator on the rig in question permitted employees to ride the blocks either while not wearing a safety belt or if wearing same without requiring that it be tied off to prevent a fall. His knowledge is imputed to the respondent.

10. Because of laxity in respondent's unwritten safety program and its failure to supervise its operators in their responsibilities of communicating and enforcing the work rule in question, it was foreseeable that an employee would ride the traveling blocks without the benefit of a tied off safety belt.

11. Respondent's work rule was not well established, but amounted to permission to do a hazardous activity if it was done with caution, i.e., wear a safety belt tied off to prevent a fall.

12. Respondent did not communicate its work rule effectively.

13. Respondent did not enforce its work rule effectively.

14. An appropriate penalty to be assessed in this matter is the sum of $500.00.

## Conclusions of Law

1. The Commission has jurisdiction of the parties and of the subject matter herein.

2. The respondent was in violation of section 5(a)(1) of the Act, commonly known as the general duty clause.

3. The violation was foreseeable and was not the result of unpreventable employee misconduct.

4. Item 1 of Citation No. 1, issued to respondent February 4, 1982, should be affirmed and a penalty of $500.00 should be assessed.

**ORDER**

Item 1 of Citation No. 1, issued to respondent February 4, 1982, is AFFIRMED and a penalty of $500.00 is ASSESSED.

R. M. Child
Judge, OSHRC

Dated: September 27, 1982

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

## NOTICE OF DECISION

SECRETARY v. ACKERMANN ENTERPRISES, INC.

OSHRC Docket No. 80-4971

1. Enclosed is a copy of my decision. It will be filed with the Commission on September 28, 1982, and will become the final order of the Commission on October 28, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupationsl Safety and Health Review Commission
   1825 K Street, N. W., Suite 601
   Washington, D. C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is October 28, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92 and 93.

Joe D. Sparks
JOE D. SPARKS
Judge

Date: September 8, 1982

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

| | | |
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| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 80-4971 |
| | ) | |
| ACKERMANN ENTERPRISES, INC., | ) | |
| | ) | |
| Respondent. | ) | |

APPEARANCES:

F. Benjamin Riek, III, Esquire, Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, on behalf of complainant.

William F. Ultsch, Esquire, Apking and Ultsch, Cincinnati, Ohio, on behalf of respondent.

## DECISION AND ORDER ON REMAND

SPARKS, Judge: By its decision of May 25, 1982, the Review Commission remanded the captioned case for a determination of whether respondent had violated section 5(a)(1) of the Occupational Safety and Health Act of 1970 ("the Act"). The issue was originally briefed by the parties and a supplemental brief has been received from the complainant.

The citation alleged that three employees were riding in the front bucket of a "front end loader and backhoe attachment" at respondent's jobsite. It is further alleged that the employees were exposed to possible falls, or being thrown from the tractor while it was in motion.

I

The factual allegations are established in the record. On June 11, 1980, Compliance Officer Robin Medlock travelled to respondent's work site on Bells Lake Drive, Clermont County, Ohio, where four apartment buildings were under construction (Tr. 15, 117, 118). While waiting in the parking lot for a management representative, Compliance Officer Medlock saw three employees riding in the bucket as the tractor travelled from Building 4500 to Building 4700 (Tr. 22, 107-108, 160). The buildings are next to each other, separated by a few feet. There were no passenger seats in the front bucket and employees were riding in "crouched" positions with their feet placed against the outer lip of the bucket and their hands positioned against the back of the bucket (Tr. 22, 58). Medlock saw employees riding in the bucket eight to ten times during the one hour or more he was in the parking lot (Tr. 21-23).

Photographs were taken by Mr. Medlock, but they could not be located at the time of the hearing (Tr. 35). During a later visit to the jobsite, Mr. Medlock interviewed an employee who recalled that photographs had been taken of him and others who were riding in the bucket of the front-end loader (Tr. 41-41, 46-48).

Employees riding in the bucket were subject to the hazard of being thrown from or falling out of the bucket, especially if the tractor encountered rocks or chuckholes (Tr. 55, 57). There was no equipment to safeguard persons riding in the bucket and their positions were unstable (Tr. 62-63, 95-97, 130).

Respondent conceded it was extremely unsafe to ride in the bucket of a front-end loader and it is a recognized hazard to ride in the bucket (Ex. G-2, G-2, G-3, G-4, G-10; Tr. 65-67, 70-71).

Mr. Westerkamp, respondent's field superintendent, agreed that employees probably would not have been riding in the bucket if he had been present at the work site (Tr. 64, 72, 124, 129, 164). It was not unusual for Mr. Westerkamp to be away from the jobsite (Tr. 156).

Mr. Westerkamp stated there was a verbal rule against riding in the bucket of a loader, but acknowledged that the operator of the loader was Dan Criscillis who is lead carpenter and had been left in charge (Tr. 125-127, 129-130, 157, 161-162).

The condition could be abated by requiring employees to walk about the jobsite. Rules implementing and enforcing such policy were necessary (Tr. 74).

II

Section 5(a)(1) of the Act requires:

> Each employer—
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

In Bomac Drilling, Division of TRG Drilling Corp., 81 OSAHRC 45/A2, 9 BNA OSHC 1681, 1981 CCH OSHD ¶ 25,363 at p. 31,547 (No. 76-450, 1981), the Review Commission stated the elements of proof of a section 5(a)(1) violation as follows:

> In order to establish a section 5(a)(1) violation, the Secretary must show that an employer failed to render its workplace free from a hazard that is recognized, the occurrence of an incident was reasonably foreseeable, and the likely consequence in the event of an incident was death or serious physical harm to its employees. . . . The Secretary must also demonstrate that there were feasible means available to abate the hazard. . . . (citations omitted).

But the requirement that the occurrence of an incident be reasonably foreseeable was specifically overruled in United States Steel, ___ OSAHRC ___, 10 BNA OSHC 1752, 1757, ___ CCH OSHD ¶ ___ (No. 77-1796, June 30, 1982).

The hazard in this case is the danger of injury to workers by falling or being thrown from the bucket. Respondent recognizes the hazard and the manufacturer cautions against persons riding in the buckets or in other unapproved methods. A fall from the bucket would likely result in death or serious injury.

It was entirely feasible for employees to walk the short distances between the buildings thereby abating the hazard.

Respondent suggests the actions were contrary to its safety rules, but the evidence shows the rules were not adequately promulgated nor effectively enforced. Mr. Westerkamp testified the condition would not have occurred if he had been at the work site, but the designated person in charge was operating the tractor with the bucket in which the employees were riding.

The record establishes a violation of section 5(a)(1), the general duty clause.

A penalty of $480 was proposed by the Secretary. Three employees were exposed to the hazard. There was no indication the hazardous practice occurred each day, but the danger was great that serious injury would result in case of an accident (Tr. 76-80). In mitigation, the company promised to end the practice immediately. Respondent is considered small in size as it has fewer than 100 employees. No reduction of penalty was suggested because of the respondent's history of compliance as previous citations for violations had been issued (Tr. 76-81).

Section 17(b) of the Act requires the Review Commission to assess a penalty of up to $1,000 of each serious violation of the Act. Section 17(j) requires the Commission to consider the gravity of the violation, size, good faith and history of previous violations in determining the appropriate penalty. The evidence establishes that, in determining the proposed penalty, the Secretary considered the required elements. It is reasonable and appropriate.

## FINDINGS OF FACT

1. Respondent is an employer subject to the Act.

2. While waiting in respondent's parking lot, Compliance Officer Medlock observed three employees riding in the bucket attached to a backhoe tractor.

3. Riding in the bucket of a tractor is hazardous and is recognized as hazardous by respondent and in the industry.

4. A fall from the bucket of the tractor would likely result in death or serious bodily injury.

5. Respondent did not render its workplace free of a recognized hazard.

6. The condition could be abated by requiring employees to walk the short distances around the jobsite.

7. A penalty of $480 is reasonable and warranted.

## CONCLUSIONS OF LAW

1. The Review Commission has jurisdiction over the parties and the subject matter.

2. Respondent violated section 5(a)(1), the general duty clause.

3. A penalty of $480 is appropriate.

## ORDER

1. The citation for serious violation of section 5(a)(1) is affirmed.

2. A penalty of $480 is assessed.

Dated this 28th day of September, 1982.

Joe D. Sparks

JOE D. SPARKS
Judge

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

55 East Monroe Street
Room 1530
Chicago, Illinois 60603

**NOTICE OF DECISION**

Secretary of Labor v. MIDWEST STEEL ERECTION COMPANY, INC.
OSHRC Docket No. 81-1920

1. Enclosed is a copy of my decision. It will be filed with the Commission on September 28, 1982, and will become the final order of the Commission on October 28, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is October 28, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Ralph B. Maxwell
Judge, OSHRC

Date: September 8, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 81-1920 |
| MIDWEST STEEL ERECTION COMPANY, INC., | : | |
| Respondent. | : | |

## DECISION

These are simplified proceedings conducted pursuant to Subpart M of the Rules of Procedure of the Occupational Safety and Health Review Commission. A conference/hearing was held December 3, 1981. During the conference portion of proceedings, the issues were narrowed to a single question: Was the alleged violation properly classified as a serious violation? Evidence was presented relating to this issue, and written arguments were thereafter filed, the last on February 8, 1982.

The Secretary of Labor was represented by attorney Cyrus Alexander of the Office of the Solicitor, Department of Labor, Chicago, Illinois. Midwest Steel Erection Company (Midwest) was represented at the conference/hearing by its Safety Director, L. Patrick Galway, and in written argument by attorney's Carey, Filter, White and Boland, Chicago.

## FACTS

The stipulation of the parties and the evidence presented at the hearing indicate the facts to be as follows:

On July 14, 1981, an OSHA compliance officer conducted an inspection at one of Midwest's construction sites in Lansing, Illinois, where a one-story building was being constructed. (T 45). The OSHA inspector observed two Midwest steelworkers connecting a horizontal steel beam to the top of a vertical "I" shaped column. The height of the column was 14 feet. (T 13). Upon inquiry he learned that the workers had reached the 14 foot elevation by "shinnying" up the vertical steel column. (T 13). Shinnying is a climbing method whereby the steelworker wraps both his arms and legs around a column and inches his way up. (T 15). To descend, the worker would slide down, again hugging the column with his arms and legs. (T 15, 20). The complainant concluded that this method of going up and down was a violation of safety regulation 29 CFR 1926.450(a)(1). Such regulation reads:

> Except where either permanant or temporary stairways or suitable ramps or runways are provided, ladders described in this subpart shall be used to give safe access to all elevations.

Subsequently a citation was issued charging a serious violation of the quoted safety standard. The citation alleged as follows:

Ladder(s) were not used to give safe access to all elevations:

At the addition on the north side of the main building, two employees who had been connecting steel girders descended approximately 14 feet to the ground by "sliding" down the columns, exposing the employees to the hazards of falls.

A penalty of $300.00 was proposed.

## DISCUSSION

Commission precedent establishes that "shinnying" (sometimes called "cooning") is not an acceptable alternative to compliance with requirements of Sec. 1926.450(a)(1). In Taylor Building Associates, 5 OSHC 1083 (1977), the Commission upheld a serious citation upon evidence that cooning exposed workers to a fall hazard of 60 feet. In Roanoke Iron and Bridge Works, Inc., 5 OSHC 1391(1977) the possible fall distance was 50 feet, and again, the Commission affirmed a serious citation.

The distance of a possible fall is an important factor in assessing the seriousness of a violation. In Kenneth P. Thompson Co., Inc., 8 OSHC 1696 (1980) the Commission ruled that failure to use a ladder to negotiate a height of 44 inches was only a de minimus violation. The Commission stated the facts bore only "a negligible relationship to safety."

In a more recent case, the Commission vacated a citation involving employee exposure to a 10 foot fall while straddling a horizontal beam. The Commission held there was insufficient proof that a recognizable

hazard was present. Bethlehem Steel Corporation., 10 OSHC 1264 (1981). The weight of that case as precedent here, however, is somewhat limited since it involved a safety belt standard where a hazard must be proved, rather than being presumed to exist as in Sec. 1926.450(a)(1).[1]

In the case at hand, I have concluded that although a violation has been shown, it ranks very low in gravity. The evidence indicates only brief exposure to danger by two experienced steelworkers in good physical condition in their mid-twenties. (T 22, 23). The liklihood of their falling while climbing or descending with their arms and legs wrapped around the steel column is remote at best. This was freely conceded by the government safety expert. (T 143). Considering the distances involved, the remoteness of possible serious injury, the brevity of exposure, the experience and physical condition of the workers, and the unrebutted evidence that shinnying is a normal and customary practice in the industry (T 22), I conclude an other-than-serious classification is appropriate, rather than serious.

---

(1) The safety belt standard was 29 CFR 1926.28(a) which reads:

> The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

A housekeeping item in the citation was also contested by respondent. However, since no proof was offered to rebut the government's prima facie case, and since no argument of respondent has been addressed to this item, the same will be affirmed.

The evidence and the record as a whole, support the following findings:

## FINDINGS OF FACT

1. Respondent, Midwest Steel Erection Company, Inc., is a corporation having a place of business at 440 West 43rd Street, Chicago, Illinois, where it engages in the business of steel erection and related activities.

2. Jurisdiction is not contested by respondent.

3. The parties have stipulated to the following facts:

- Two employees of respondent climbed up and down steel columns which were 14 feet high without use of a ladder.

- The ground was hard.

- If a serious violation is affirmed, the proper penalty is $300.00. If the charge is reduced to other-than-serious, no penalty should be imposed.

4. On July 14, 1981, an OSHA compliance office inspected one of respondent's construction sites at Lansing, Illinois, where a one-story building was being constructed.

5. Shinnying is a climbing technique whereby a steelworker wraps arms and legs around a steel column and inches his way up (or slides down to descend).

6. Shinnying is the usual method for steelworkers to go up and down steel columns.

7. Steelworkers must know how to shinny.

8. The two steelworkers involved were in their mid-twenties and were in good physical condition.

9. The possibility of injury under the circumstances of this case was extremely remote.

10. Debris was not kept cleared from the following areas: on the north side of the site, scrap lumber and forms with protruding nails were stacked and stored along a passage route, exposing employees to the hazards of lacerations and puncture wounds.

From the above findings, the following conclusions of law are reached:

## CONCLUSIONS OF LAW

1. Respondent was at all times material an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Occupational Safety and Health Act.

2. Respondent was at all times subject to the requirements of the Act and the standards promulgated thereunder.

3. The Commission has jurisdiction of the parties and the subject matter of this proceeding.

4. As to Item 1 of Serious Citation No. 1, the charge of a serious violation should be reduced to an other-than-serious violation, and as such affirmed without penalty.

5. As to Item 1 of Other Citation No. 2, respondent violated provisions of 29 CFR 1926.25(a) for which no penalty should be imposed.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is now ORDERED that:

1. Item No. 1 of Serious Citation No. 1 is affirmed as an other-than-serious violation, and no penalty is imposed.

2. Item No. 1 of other-than-serious Citation No. 2 is affirmed and no penalty is imposed.

Ralph B. Maxwell
Judge, OSHRC

Dated: September 28, 1982

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

October 29, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Cuyahoga Valley Railway Co.

OSHRC DOCKET NO. 76-1188

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION (REMAND)

To wit: See attached.

FOR THE SECRETARY OF LABOR

- Counsel for Regional Litigation
  Office of the Solicitor, USDOL
  200 Constitution Ave., NW. - Rm. S-4014
  Washington, D.C. 20210

- William S. Kloepfer, Esq.
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FOR EMPLOYER

- David G. Schmidt, Esq.
  Squire, Sanders & Dempsey
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  Cleveland, Ohio 44115

FOR EMPLOYEES

- J. H. Retter, Chairman
  United Transportation Union
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  Parma Heights, Ohio 44130

- C. Richard Grieser, Esq.
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  Fifteenth FL
  Columbus, Ohio 43215

- Office of the Judges
  OSHRC
  55 East Monroe St.
  Room 1530
  Chicago, Il 60603

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | |
| CUYAHOGA VALLEY RAILWAY COMPANY, | : | |
| Respondent, | : | OSHRC Docket No. 76-1188 |
| UNITED TRANSPORTATION UNION, | : | |
| Authorized Employee Representative. | : | |

DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

This is a case under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). An order of Judge Erwin Stuller is before the Commission for review under section 12(j) of the Act, 29 U.S.C. § 661(i). Judge Stuller, at the request of the Secretary, vacated a citation issued to Cuyahoga. We reverse and remand for additional proceedings.

I

Cuyahoga, which operates a railroad for Jones and Laughlin Steel Corporation, was inspected by an official of the Occupational Safety and Health Administration ("OSHA"). As a result of the inspection,

Cuyahoga was cited for a serious violation of section 5(a)(1) of the Act, 29 U.S.C. § 654(a)(1). According to the citation, Cuyahoga had failed to adequately instruct and enforce its rules concerning the coupling and uncoupling of its ingot buggy cars. Respondent had also allegedly failed to maintain adequate clearance between buggy cars.[1/]

At a calendar call hearing on August 24, 1976, the Secretary moved to vacate the citation. The Secretary claimed that the cited working condition was exempt from the Act's coverage due to section 4(b)(1) of the Act, 29 U.S.C. § 653(b)(1).[2/] The Secretary asserted that the Federal Railway Administration ("FRA") had exercised authority over the

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1/ A description of the alleged violation contained in the citation states:

> On and prior to January 14, 1976, the employer failed to furnish his employees working in the area of the BOF Department, a place of employment which was free from a recognized hazard that was likely to cause death or serious harm to his employees in that the employer failed to:
>
> (A) Adequately instruct and enforce rules when employees are required to couple and/or uncouple ingot buggy cars with stools; or
>
> (B) Maintain an adequate clearance between ingot buggy stools to permit employees to perform their duties safely when it requires them to place themselves between two buggies.

2/ Section 4(b)(1) provides, in pertinent part:

> Nothing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

cited working condition, pointing to 49 C.F.R. §§ 217.1 and 217.3(a).[3/] A member of the United Transportation Union ("the Union") appeared at the hearing and objected to the Secretary's motion. The Union, which represents employees affected by the alleged violation, claimed that OSHA authority over the cited working condition was not preempted because Cuyahoga's operation of an intraplant railroad is not covered by regulations of the FRA. Specifically, the Union pointed to 49 C.F.R. § 217.3(b)(1), which says that the FRA's regulations in 49 C.F.R. § 217 do not apply to "[a] railroad that operates only on track inside an installation which is not part of the general railroad system of transportation."

Judge Stuller took the matter under advisement and instructed the Union to submit "something in writing." He did not specify any time to the instruction. On September 1, 1976, an attorney representing the Union wrote to the judge, recounting the proceedings at the calendar call

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3/ These sections provide:

> § 217.1 Purpose.
>
> Through the requirements of this part, the Federal Railroad Administration learns the condition of operating rules and practices with respect to trains and other rolling equipment in the railroad industry, and each railroad is required to instruct its employees in operating practices.
>
> § 217.3 Application.
>
> (a) Except as provided in paragraph (b) of this section, this part applies to railroads that operate trains or other rolling equipment on standard gage track which is part of the general railroad system of transportation.

and informing the judge that, "unless advised to the contrary" the Union would file a brief "at the earliest possible date." On September 28, 1976, Judge Stuller entered an order vacating the citation. Judge Stuller had not given further notice to the parties nor had he received the Union's brief. The judge simply recited the Secretary's concession that the FRA had authority and noted that he had not received the Union's brief. The Union submitted its brief on September 29, 1976.

Commissioner Cleary directed that the judge's order be reviewed[4/] on the following question:

> Whether the administrative law judge erred in vacating the citation and notification of proposed penalty based on the Secretary's determination that pursuant to section 4(b)(1) of the Act the Secretary did not have authority to issue the citation?

II

Cuyahoga argues that the FRA has authority over the matter and not OSHA. Cuyahoga asserts that while part of its operation is an intraplant railroad, it also serves as a common carrier with switching operations for other customers outside the Jones and Laughlin Steel plant. Therefore, Cuyahoga is not an entirely intraplant railroad and does not come under the section 217.3(b)(1) limitation. Cuyahoga argues that OSHA jurisdiction is preempted under section 4(b)(1) because the FRA has statutory authority over the cited working conditions.

Cuyahoga also challenges the Union's right to object to the Secretary's motion to dismiss the case. Cuyahoga claims the Union only has party status to object to the reasonableness of the abatement period, relying on UAW Local 588 (Ford Motor Co.), 76 OSAHRC 58/B8, 4 BNA OSHC

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4/ Former Commissioner Moran also directed review "for error."

1243, 1976-77 CCH OSHD ¶ 20,737 (No. 2786, 1976) ("UAW"), aff'd, 557 F.2d 607 (7th Cir. 1977).

The Secretary agrees with Cuyahoga that an authorized employee representative has no right to object to the Secretary's decision to withdraw a citation. The Secretary also asserts that, on the evidence available, he has determined that a section 4(b)(1) exemption exists for all of the citation except those parts which allege that Cuyahoga failed to enforce coupling and uncoupling rules and failed to maintain an adequate safe clearance between ingot buggy stools. These aspects of Cuyahoga's operations were not covered by FRA regulations but rather Cuyahoga's operating rules. The Secretary states, ". . . that an employer's formulation of rules pursuant to requirements of an agency does not constitute an exercise of statutory authority by an agency under section 4(b)(1)." However, the Secretary states that he also determined that no useful purpose "with respect to employee safety or the proper allocation of the Secretary's resources would be served by litigation of these additional allegations."

III

The Commission recently overruled UAW and held that the interests of an authorized employee representative that has elected party status in a timely manner are not restricted to the reasonableness of the abatement period. Mobil Oil Corp., 82 OSAHRC , 10 BNA OSHC 1905, 1982 CCH OSHD ¶ 26,187 (No. 77-4386, 1982). The Union, as a party in the case, may object to the Secretary's motion to withdraw the citation. See Mobil Oil Corp., supra. Although Judge Stuller properly heard the Union's objections to the Secretary's motion to withdraw, he erred in

ruling on the motion without receiving the Union's brief and considering the merits of its objection.[5/]

Accordingly, we set aside the judge's order and remand the case to the chief administrative law judge[6/] to consider the Union's objections to the withdrawal of the citation.[7/]

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: OCT 29 1982

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5/ Chairman Rowland adheres to his position in Mobil Oil Corp., supra (dissenting opinion). The Chairman believes that the decision to withdraw a citation is within the prosecutorial discretion of the Secretary and therefore he would affirm Judge Stuller's decision.

6/ Judge Stuller has retired.

7/ Commissioner Cottine presumes that the Secretary will proceed appropriately on the merits if the Union's objections are found to be meritorious and the withdrawal motion is denied. See Dunlop v. Bachowski, 421 U.S. 560, 574-76 (1975).

CLEARY, Commissioner, concurring:

I concur in remanding this case for consideration of the Union's objection to the Secretary's withdrawal of the citation. As the Commission has stated: "The Secretary cannot be permitted to exercise prosecutorial discretion in a manner that would interfere with the right of affected employees to be heard as parties protecting their interest." IMC Chemical Group, 78 OSAHRC 95/C14, 6 BNA OSHC 2075, 2077, 1978 CCH OSHD ¶ 23,149 at p. 27,990 (No. 76-4761, 1978), rev'd, 635 F.2d 544 (6th Cir. 1980). If the Secretary chooses not to prosecute a citation in a case in which employees or their authorized representative have elected party status, the citation may be prosecuted by the employee party. Id.; see Mobil Oil Corp., 82 OSAHRC ____, 10 BNA OSHC 1905, 1927-28, 1982 CCH OSHD ¶ 26,187 at p. 33,041 (No. 77-4386, 1982) (concurring opinion).

Although the lead opinion does not refer to the Commission's decision in IMC Chemical Group, that decision remains Commission precedent and the judge is obliged to follow it on remand. Grossman Steel & Aluminum Corp., 76 OSAHRC 56/D9, 4 BNA OSHC 1185, 1975-76 CCH OSHD ¶ 20,691 (No. 12775, 1975). Thus, the judge should grant the Secretary's motion to withdraw the citation only if he concludes that the Union's objections are without merit as a matter of law. If he finds merit in the objections, he should deny the Secretary's motion and schedule the case for a hearing. If the Secretary declines to appear at the hearing to prosecute the citation, the judge should permit the Union to prosecute if it chooses to do so.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>CUYAHOGA VALLEY RAILWAY COMPANY<br>Respondent. | ) | DOCKET NO. 76-1188 |

ORDER

At the calendar call of the above case in Cleveland, Ohio,on August 24, 1976, the parties appeared and indicated that they had a basis for disposing of the case.

Complainant's counsel stated that he has determined that the regulation of the Department of Transportation, Federal Railroad Administration fits the description of the violation alleged herein and therefore pursuant to section 4(b)(1) of the Occupational Safety and Health Act of 1970, (29 U.S.C. 653(b)(1)) the complainant was without authority in issuing the citation in question.

The representative of the affected employees then asked leave to file a legal brief contesting the complainant's position. That brief has not been received. Based on the foregoing the citation and notification of proposed penalty herein are VACATED.

Erwin L. Stuller
Judge

Dated: September 28, 1976

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

October 29, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Farmers Cooperative Grain and Supply Co. OSHRC DOCKET NO. 79-1177

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

FOR THE SECRETARY OF LABOR

Counsel for Regional Litigation
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Washington, D.C. 20210

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FOR EMPLOYER

Derald W. Wiehl, Esq.
May, Johnson, Doyle & Becker, P. C.
412 West Ninth Street
P. O. Box 1443
Sioux Falls, South Dakota 57101

FOR EMPLOYEES

OF COMMISSION DECISION

To wit: See attached.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Judge's Office
Occupational Safety & Health
Review Commission
1050 17th Street, Room 1718
Prudential Plaza
Denver, CO. 80265

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 79-1177 |
| FARMERS COOPERATIVE GRAIN AND SUPPLY COMPANY, | : | |
| Respondent. | : | |
| | : | |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

The Secretary of Labor ("Secretary") cited Farmers Cooperative Grain and Supply Company ("Farmers Co-op") for allegedly violating section 5(a)(1) of the Occupational Safety and Health Act of 1970[1/] by failing to prevent excessive accumulations of grain dust in certain areas of its workplace. Following a hearing on the merits, Administrative Law Judge John A. Carlson vacated the citation on the basis that the Secretary did not prove Farmers Co-op or its industry recognized that the dust conditions at Farmers Co-op's facility were hazardous.

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1/ 29 U.S.C. §§ 651-678 ("the Act"). Section 5(a)(1), 29 U.S.C. § 654(a)(1), provides:

> Sec. 5.(a) Each employer —
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

Commissioners Cleary and Cottine directed review of the judge's decision pursuant to section 12(j) of the Act, 29 U.S.C. § 661(i).

During the proceedings before the judge, the parties discussed the possible applicability of the specific housekeeping standard at 29 C.F.R. § 1910.22(a)(1)[2/] to the conditions that were the subject of the citation. According to the Secretary, the dust accumulations in Farmers Co-op's workplace gave rise to a fire and explosion hazard. Counsel for the Secretary stated that the Secretary was not proceeding under section 1910.22(a)(1) because of the uncertain application of that standard to conditions creating fire and explosion hazards. After this case was directed for review, certain court and Review Commission decisions held that section 1910.22(a)(1) does apply to the allegedly hazardous conditions cited in this case. In Bunge Corp. v. Secretary of Labor, 638 F.2d 831 (5th Cir. 1981), the court rejected the argument that section 1910.22(a)(1) is limited to slipping and tripping hazards and explicitly held that the standard applies to fire and explosion hazards resulting from excessive grain dust accumulations. The Commission subsequently followed Bunge in holding that "the standard is directed not merely to sanitation but to all hazards arising from poor housekeeping . . . ." Pratt & Whitney Aircraft, 81 OSAHRC 39/A2, 9 BNA OSHC 1653, 1659, 1981 CCH OSHD ¶ 25,359 at p. 31,506 (No. 13401,

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2/ This standard provides:

§ 1910.22 General requirements.

(a) Housekeeping. (1) All places of employment, passageways, storerooms, and service rooms shall be kept clean and orderly and in a sanitary condition.

1981), appeal withdrawn, No. 81-4104 (2d Cir. Aug. 3, 1981). Accordingly, the Commission issued a supplemental briefing order asking the parties' views on the potential applicability of section 1910.22(a)(1) as well as other standards.[3/] In response, both parties agree that section 1910.22(a)(1) applies to the facts of this case. The Secretary moves to amend the citation to allege that Farmers Co-op violated section 1910.22(a)(1). Farmers Co-op opposes the amendment.

We agree with the parties that section 1910.22(a)(1) applies to the hazard alleged to exist in this case: the potential for fire and explosion from excessive accumulations of grain dust. See Bunge Corp. v. Secretary of Labor, supra; Pratt & Whitney Aircraft, supra; see also Con Agra, Inc. v. OSHRC, 672 F.2d 699 (8th Cir. 1982). Where a specific standard applies to the facts of a case, citation under section 5(a)(1) is inappropriate. Mississippi Power & Light Co., 79 OSAHRC 109/D2, 7 BNA OSHC 2036, 1980 CCH OSHD ¶ 24,146 (No. 76-2044, 1979). However, for the reasons given in this opinion, we conclude that the parties impliedly consented to try a violation of section 1910.22(a)(1) and therefore grant the Secretary's motion to amend the citation to allege a violation of that standard. We affirm the amended citation as a repeated violation of the Act and assess a penalty of $640.

I

Farmers Co-op operates a grain elevator in Garretson, South Dakota. The elevator is used for the storage of grain and animal feed

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3/ The supplemental briefing order also mentioned standards at 29 C.F.R. § 1910.176(c), which applies to housekeeping conditions in storage areas, and 29 C.F.R. § 1910.141(a)(3), which contains housekeeping requirements directed at maintaining proper sanitation. The parties do not contend that either of these standards applies to this case.

ingredients, such as soybean meal. In March, 1978, the facility was inspected by an OSHA compliance officer, and the Secretary subsequently cited Farmers Co-op for violating section 5(a)(1) of the Act by failing to implement a housekeeping program to prevent excessive accumulations of grain dust. Farmers Co-op contested the citation but, as part of a settlement to resolve that citation together with certain others, Farmers Co-op withdrew its notice of contest and agreed to abate the violation. The abatement program the company implemented consisted of the removal of grain dust accumulations twice a week by the use of vacuum cleaners and brooms.

On February 16, 1979, the compliance officer reinspected Farmers Co-op's Garretson elevator. He observed grain dust accumulations as high as 20 inches deep in two of the same locations that were the subject of the earlier citation. As a result of his observations, the Secretary issued to Farmers Co-op a citation alleging a repeated violation of section 5(a)(1).

According to the compliance officer, the dust accumulations resulted primarily from spillage of material during the storage process. The grain and feed ingredients to be stored are brought to the elevator by local farmers and are dropped through a metal grating in the floor. The material is then raised by a bucket-leg elevator to the top of the facility and is dropped into a turret, from which it is distributed to a series of storage bins through a number of spouts. The compliance officer testified that the major source of spillage resulted from dust located in already-filled bins "boiling up" through the turret when another bin was being loaded. He suggested that this problem could be alleviated by a plate over the turret with an opening for only one

spout. The plate would be rotated so that the spout opening was over the bin being filled and would prevent dust from other bins backing up through the turret. The compliance officer suggested that spillage could be further reduced by making the spouts airtight, and that excessive accumulations could be prevented by a more strenuous program of cleaning up dust that had spilled. The OSHA area director for the Sioux Falls, South Dakota, office, who had accompanied the compliance officer on the inspection, suggested that an aspiration system that would maintain a slight positive pressure in the elevator leg would help control grain dust spillage.

The compliance officer testified that grain dust in the concentrations he observed created a fire and explosion hazard. The dust could spontaneously ignite or could burn or explode if ignited by an outside source.

The manager of Farmers Co-op's Garretson elevator, Mr. Top, testified that spills of material were a problem due to the age of the structure and the equipment. When spills occurred, they were cleaned up and, if the spillage resulted from faulty equipment, the equipment was repaired. Normal accumulations of dust were an inevitable result of their operations, and feed ingredients, which were being handled at the time of the reinspection, were particularly dusty. These normal accumulations were supposed to be cleaned up twice a week, on Tuesdays and Fridays. However, at the time of the reinspection by the OSHA compliance officer, which was on a Friday, the last cleaning had occurred on the previous Friday.

Mr. Moe, the supervisor for Farmers Co-op in direct charge of the housekeeping program, also testified that the last cleaning had oc-

curred a week before the reinspection. He stated that it was the normal policy to clean up on Tuesdays and Fridays, but that they would put it off a day or so if they were exceptionally busy. He did not state any reason why the Tuesday cleaning that was supposed to occur prior to the reinspection did not take place.

II

Rule 15(b) of the Federal Rules of Civil Procedure[4/] seeks to promote resolutions of cases on their merits rather than on the technicalities of pleadings. See Usery v. Marquette Cement Manufacturing Co., 568 F.2d 902 (2d Cir. 1977); National Realty & Construction Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973). Where, as in this case, the amendment seeks to introduce a new legal theory and does not add any new questions of fact, consent to the amendment under Rule 15(b) will be implied where the party opposing amendment has introduced or failed to object to evidence relevant to the unpleaded issue and that party would not be prejudiced by the amendment. See Crawford Construction Co., 82 OSAHRC _____, 10 BNA OSHC 1522, 1525, 1982 CCH OSHD ¶ 25,984 at

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4/ Rule 15(b) provides, in pertinent part:

> Rule 15. Amended and Supplemental Pleadings.
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> * * *
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> (b) AMENDMENTS TO CONFORM TO THE EVIDENCE. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues . . . .

32,605 (No. 79-928, 1982), and cases cited therein. See also Mineral Industries & Heavy Construction Group v. OSHRC, 639 F.2d 1289, 1293 (5th Cir. 1981).

The factual issues relevant to an alleged violation of section 1910.22(a)(1) concern the nature and extent of the grain dust accumulations in Farmers Co-op's workplace. This issue was squarely presented by the citation alleging a violation of section 5(a)(1) of the Act and was fully tried by the parties. Farmers Co-op introduced evidence relevant to the section 1910.22(a)(1) issue and did not object to evidence introduced by the Secretary relating to the issue. In fact, Farmers Co-op introduced the issue of the applicability of section 1910.22(a)(1) into these proceedings. Moreover, Farmers Co-op has had the opportunity, in response to the supplemental briefing order, to show how it would be prejudiced by the amendment and does not contend that it could offer any other evidence relevant to the unpleaded charge or that it was otherwise prejudiced. Accordingly, the Secretary's motion to amend is granted.

We further conclude that Farmers Co-op violated section 1910.22 (a)(1). It is undisputed that the accumulations of grain dust in Farmers Co-op's facility were excessive and gave rise to a fire and explosion hazard. Farmers Co-op's witnesses, Mr. Top and Mr. Moe, questioned the feasibility of certain of the means the Secretary's witnesses suggested to minimize the accumulations, such as the turret cover recommended by the compliance officer and the aspiration system mentioned by the area director. However, the Secretary does not bear the burden of proving the feasibility of a means of abatement under a specific standard as he does under section 5(a)(1). See S & H Riggers

and Erectors, 79 OSAHRC 23/A2, 7 BNA OSHC 1260, 1265-66, 1979 CCH OSHD ¶ 23,480 at p. 28,438 (No. 15855, 1979), rev'd on other grounds, 659 F.2d 1273 (5th Cir. 1981). Under the standard, Farmers Co-op would have to prove, as an affirmative defense, that compliance was either impossible or that it would prevent the performance of necessary work. Id. Although Farmers Co-op's witnesses testified that some accumulations of grain dust were inevitable, they did not assert that the accumulations could not be reduced below the levels present at the time of the reinspection. Indeed, the record shows that those excessive levels resulted from Farmers Co-op's failure to adhere to its own maintenance schedule. Even if full compliance with a standard cannot be achieved, an employer must nevertheless protect its employees to the extent possible against the hazards to which standards are directed. See M. J. Lee Construction Co., 79 OSAHRC 12/A2, 7 BNA OSHC 1140, 1146-47, 1979 CCH OSHD ¶ 23,330 at p. 28,230 (No. 15094, 1979). Thus, even if Farmers Co-op had contended that compliance was impossible, the record would not support that contention.

III

We turn now to the question of whether the violation is properly classified as repeated. This classification is proper if, at the time the violation occurred, there was a Commission final order against the employer for a substantially similar violation. Potlatch Corp., 79 OSAHRC 6/A2, 7 BNA OSHC 1061, 1063, 1979 CCH OSHD ¶ 23,294 at p. 28,171 (No. 16183, 1979).[5/] The requirement of substantial similarity per-

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5/ Accord, J. L. Foti Constr. Co. v. OSHRC, No. 80-3806 (6th Cir. Sept. 7, 1982); Kent Nowlin Constr. Co. v. OSHRC, 648 F.2d 1278 (10th Cir. 1981); Bunge Corp. v. Secretary of Labor, 638 F.2d 831 (5th Cir. 1981); George Hyman Constr. Co. v. OSHRC, 582 F.2d 834 (4th Cir. 1978).

tains to the hazards involved in the present and preceding violations. It is not necessary that the two violations involve the same standard or section of the Act. Id.

In this case, both the present violation and the earlier violation involve the same conditions and the same hazards: excessive grain dust accumulations giving rise to a hazard of fire and explosion. Indeed, the areas in which the present violation occurred were specifically covered in the previous citation. Thus, the violations are substantially similar despite the fact that the earlier citation became a final order under section 5(a)(1) while in this case we are finding that Farmers Co-Op violated section 1910.22(a)(1). Moreover, the first citation was a final order at the time this violation occurred. The settlement agreement affirming that citation was approved by an administrative law judge on Nov. 2, 1978. The judge's order was not directed for review and therefore became a final order of the Commission on December 2, 1978, more than two months before the violation alleged in this case.

We also note that our decision in Potlatch Corp., supra, was issued before the violation in this case occurred. Thus, at all material times, Farmers Co-op was on notice that it could be found in repeated violation of the Act for violations involving a hazard substantially similar to that in the earlier citation regardless of whether the same section of the Act was violated. Accordingly, our granting of the motion to amend does not prejudice Farmers Co-op's defense to the repeated allegation.

In assessing a penalty, we must consider the gravity of the violation together with Farmers Co-op's size, good faith, and history of

previous violations. 29 U.S.C. § 661(i). The gravity of the violation was substantial as the excessive accumulations of grain dust exposed several employees to the possibility of death or serious injury should a fire or explosion occur. Moreover, Farmers Co-op's good faith is questionable as the company offered no satisfactory explanation for the reoccurrence of conditions that had been the subject of a previous citation. However, Farmers Co-op is a relatively small employer. It has only eight employees at its Garretson elevator and operates one smaller grain elevator in addition to the Garretson facility. On balance, we conclude that the Secretary's proposed penalty of $640 is appropriate.

IV

Accordingly, the judge's decision is set aside. The Secretary's motion to amend the citation to allege that Farmers Co-op violated 29 C.F.R. § 1910.22(a)(1) is granted and, as so amended, the citation is affirmed as a repeated violation. A penalty of $640 is assessed. SO ORDERED.

FOR THE COMMISSION

Ray H. Darling Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: OCT 29 1982

ROWLAND, Chairman, dissenting:

Despite the fact that the Secretary declined to try this case under the standard at 29 C.F.R. § 1910.22(a)(1),[1/] the majority concludes that the parties consented to try a violation of that standard. This conclusion is inconsistent both with Rule 15(b) of the Federal Rules of Civil Procedure and with this Commission's role as an impartial adjudicator under the Occupational Safety and Health Act. I would vacate the citation because citation under section 5(a)(1) is inappropriate when a specific standard is applicable and the parties did not consent to try the unpleaded issue of whether Farmers Co-op violated section 1910.22(a)(1).

At the outset of the hearing, Farmers Co-op moved to dismiss the 5(a)(1) charge on the basis that section 1910.22(a)(1) applied to this case. Although the Secretary was aware of long-standing Commission precedent holding that a section 5(a)(1) charge cannot stand where a specific standard applies,[2/] and although the Secretary had previously cited other employers under section 1910.22(a)(1) in circumstances similar to this case,[3/] the Secretary explicitly decided to continue to pursue this case under section 5(a)(1). The hearing that followed focused on the various aspects of a section 5(a)(1) charge, particularly recognition of the hazard and feasibility of the means of abatement. See Jones & Laughlin Steel Corp., 10 BNA OSHC 1778, 1982 CCH OSHD

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1/ See note 2 of the lead opinion.

2/ See, e.g., Brisk Waterproofing Co., 73 OSAHRC 30/E1, 1 BNA OSHC 1263, 1973-74 CCH OSHD ¶ 16,345 (No. 1046, 1973).

3/ See Bunge Corp. v. Secretary of Labor, 638 F.2d 831 (5th Cir. 1981).

¶ 26,128 (No. 76-2636, 1982). Only after this case was directed for review, and after Commission and court decisions held that section 1910.22(a)(1) did indeed apply to the types of hazard alleged to exist in this case, did the Secretary move to amend on the basis that the parties had implicitly "consented" to try the case under the standard.

In agreeing with the Secretary, the majority offers two reasons why Farmers Co-op implicitly consented to the amendment: the company (1) introduced or failed to object to evidence relevant to the unpleaded issue, and (2) would not be prejudiced by the amendment. These reasons are unpersuasive. All of the evidence introduced at the hearing relevant to a charge under section 1910.22(a)(1) was also relevant to the pleaded section 5(a)(1) charge. Therefore, Farmers Co-op's participation in the introduction of such evidence can hardly be taken as implying its consent to try an unpleaded charge.[4/] McLean-Behm Steel Erectors v. OSHRC, 608 F.2d 580 (5th Cir. 1979). Essentially, then, the majority's rationale reduces to the proposition that an employer who proceeds to trial under one legal theory consents to any subsequent change in that theory that will not prejudice the employer. And because an amendment that changes the legal theory is viewed by the majority as a mere "technicality," it is difficult to envision how an

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4/ A party's failure to object to evidence that is relevant to a pleaded issue does not demonstrate that the party believed it was trying an unpleaded issue. McLeod v. Stevens, 617 F.2d 1038 (4th Cir. 1980); 6 C. Wright and A. Miller, Federal Practice and Procedure § 1493 (1971). Indeed, such an objection would lack merit and would only serve to delay the proceedings. A party may, and should, object to evidence that is not relevant to the issues framed by the pleadings. A party's failure to make such an objection is an indication that the party considered the evidence relevant to an unpleaded issue. Niedland v. United States, 338 F.2d 254 (3d Cir. 1964).

employer would be able to show it was prejudiced by such an amendment. Thus, the Secretary is free to proceed to trial under an erroneous legal theory secure in the knowledge that the Commission will view his decision as a "technicality" and will ultimately amend to the correct theory.

Although in this case the Secretary ultimately moved to amend to section 1910.22(a)(1), it is significant that the majority's action in amending the citation does not depend on the Secretary having requested the amendment. In prior cases the Commission has ordered sua sponte amendments under Rule 15(b), saying:

> Despite "the failure of complainant to request an amendment," we have "no course but to amend the citation" if we find that an unpleaded charge has been tried by the express or implied consent of the parties.

Rogers Manufacturing Co., 79 OSAHRC 67/E2, 7 BNA OSHC 1617, 1620, 1979 CCH OSHD ¶ 23,800 at p. 23,878 (No. 76-896, 1979), citing Southwestern Bell Telephone Co., 78 OSAHRC 100/D8, 6 BNA OSHC 2130, 2133, 1978 CCH OSHD ¶ 23,187 at p. 28,033 (No. 14761, 1978). By taking it upon itself to decide under what legal theory an employer should be charged in such cases, the Commission acts as an associate prosecutor to the Secretary. Such actions are not ones that were envisioned by Congress, which expected that the Commission's role under the Act would be that of an impartial adjudicator. See Mobil Oil Corp., 10 BNA OSHC 1905, 1931-32, 1982 CCH OSHD ¶ 26,187 at pp. 33,044-45 (No. 77-4386, 1982) (dissenting opinion).

In my opinion, a finding of consent under Rule 15(b) is appropriate only when the parties squarely recognize at trial that they are try-

ing an unpleaded issue. Crawford Construction Co., 10 BNA OSHC 1522, 1982 CCH OSHD ¶ 25,894 (No. 79-928) (dissenting opinion), appeal filed, No. 82-3350 (6th Cir. May 27, 1982); Vicon Corp., 81 OSAHRC 98/C4, 10 BNA OSHC 1153, 1981 CCH OSHD ¶ 25,749 (No. 78-2923, 1981) (concurring opinion), aff'd, No. 81-2359 (8th Cir. Aug. 2, 1982). In this case, the Secretary's adherence to the section 5(a)(1) charge despite Farmers Co-op's motion to dismiss demonstrates that the parties did not believe the case was being tried under section 1910.22(a)(1). See Western Waterproofing Co. v. Marshall, 576 F.2d 139, 143-44 (8th Cir. 1978). The Secretary's motion to amend should be denied and the citation vacated.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>FARMERS COOPERATIVE GRAIN AND SUPPLY CO.,<br><br>Respondent. | OSHRC DOCKET NO. 79-1177 |

APPEARANCES:

Rochelle G. Stern, Esq. and Jaylynn K. Fortney, Esq., of Kansas City, Missouri, for the Complainant,

Charles N. Nauen, Esq. and Derald W. Wiehl, Esq., of Sioux Falls, South Dakota, for the Respondent.

DECISION AND ORDER

Carlson, Judge, OSHRC:

This contest, heard under provisions of the Occupational Safety and Health Act of 1970 (29 U.S.C. §651 et seq., "the Act"), arose out of a February 16, 1979 inspection of respondent's grain elevator at Garretson, South Dakota by representatives of the complainant Secretary of Labor. Complainant issued a citation charging a "repeated" violation of the "general duty clause" of the Act[1/] because of alleged excessive

1/ The general duty clause, Section 5(a)(1) (29 U.S.C. §654(a)(1)) provides:

(a) Each employer --
(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

accumulations of grain dust at two locations within the facility.

The citation, as pertinent, reads:

> The employer failed to furnish employment and a place of employment which were free from recognized hazards causing or likely to cause death or serious physical harm to employees...in that a preventive maintenance housekeeping program complying with the requirements of Chapter 7 of NFPA No. 61-B "Standard for the Prevention of Fire and Dust Explosions in Grain Elevators and Bulk Grain Handling Facilities" was not in effect, resulting in accumulations of grain dust:
>
> a) In the south elevator headhouse.
>
> b) Near the spouts on the first landing.

Chapter 7 of the NFPA (National Fire Protection Association) No. 61B provides:

> Good housekeeping and clean premises are the first essentials for elimination of dust explosion hazards, consequently this standard is not intended to lessen in any way the responsibility of the owner or operator in this respect. It should also be emphasized that any potential fire cause may produce a dust explosion.
>
> Dust on floors, ledges, girders, machinery, spouting and other surfaces, including all galleries and tunnels shall be removed concurrently with operations to prevent accumulation of such dust.
>
> Spills and chokes shall be cleaned up without delay.
>
> The use of compressed air or other means to blow dust from ledges, walls, and other areas which will create a dust explosion hazard shall not be permitted unless all machinery in the area has been shut down and all sources of ignition removed.

Jurisdiction of the Commission is not in issue. Following the July 27, 1979 hearing of the contest, both parties filed briefs, and complainant also filed proposed findings of facts and conclusions of law.

## BACKGROUND AND DISCUSSION

I

Respondent's facility includes a "south" and "north" elevator. Grains placed in the south elevator were often ground or mixed in an adjoining feed mill; the north elevator serves for handling and storage only (Tr. 144-155). The elevators are of wood-crib construction. During normal operations three employees worked within the elevators.

Complainant's inspecting compliance officer observed and measured grain dust accumulations of up to 20 inches in the headhouse of the south elevator (Tr. 20-24, 28, 31). In the headhouse landing of the north elevator, he saw and measured up to 10-inch accumulations (Tr. 32-33). Photographs taken at both locations tend to confirm these observations (complainant's exhibits 4-10). The compliance officer testified that excessive accumulations of dust could cause or contribute to fire or explosion. Heavy grain dust accumulations, he maintained, could ignite spontaneously, could burn if ignited by an outside source, or could add force to an explosion (Tr. 23-24, 33-36, 43). He was of the opinion that fire or explosion in the grain elevator would result in serious injury or death to employees working in the structures (Tr. 43). His superior, the OSHA Area Director, who was also present at the inspection, confirmed the compliance officer's opinions (Tr. 80-81, 91).

Complainant's witnesses advocated abatement of the south elevator's accumulation by installation of a "turn head plate" which would prevent "boiling" of dust from bins adjoining the bin actually being filled. The Area Director alternatively suggested individual covers. For all areas these witnesses recommended supression of leaks in the spouting system and a pressurized aspiration system to carry away dust before

it settled. These measures all aim toward elimination of sources of dust build-up. Complainant's witnesses also indicated that abatement was possible through periodic but timely use of brooms and vacuum cleaners to remove settled dust before accumulations became excessive (Tr. 24, 26, 29, 32-33, 36-37, 58-59, 83-84, 91, 96, 98).

Respondent's witnesses did not deny the accuracy of the compliance officer's observations concerning the amounts of dust accumulation (Tr. 144). Respondent's manager testified that since the time of the prior citation, employees had removed dust accumulations twice weekly with brooms and a vacuum system (Tr. 122-123). The accumulations found were not uncommon for a 1 to 4 day period (Tr. 126, 152), respondent's witnesses indicated, although dust levels were somewhat elevated because of additional grain handling. This was necessitated by changes in respondent's feed mill operation required as a result of complainant's earlier inspection (Tr. 112, 113, 118, 126).

II

Respondent raises several earnest defenses. First, it contends that because National Fire Protection Association standards mentioned in the citation were never promulgated as federal standards by the Secretary, the citation must fail. In this regard it relies primarily on Morrow County Grain Growers, Inc., No. 78-1938, an unreviewed judge's decision. That decision does mention that the NFPA provisions were not adopted by the Secretary as standards under the Act, but that observation was merely prefatory to the holding that the cited provisions had no effect under a general duty charge. This was so, the case held, because the 1973 version of the NFPA applies only to facilities built

after its adoption.

Under the general duty clause, the Secretary must prove (1) that the employer failed to render its workplace free of a hazard which was (2) recognized and (3) causing or likely to cause death or serious physical harm. National Realty and Construction Co., Inc., 489 F.2d 1257 (D.C. Cir., 1973). A "recognized" hazard is one within the actual knowledge of the employer or the knowledge of the industry of which he is a part. Brennan v. OSHRC and Vy Lactos Laboratories, Inc., 494 F.2d 460 (8th Cir., 1974).

The Commission has held that any applicable national consensus standards[2/] should be considered in determining whether a "recognized" hazard exists under the general duty clause. Betten Processing Corporation, 75 OSAHRC 43/E2, (No. 2648, 1975). Since the Secretary may always seek to show hazard recognition by consensus standards, mere reference to NFPA provisions cannot, of itself, vitiate a citation.

A closely related defense, however, has merit. Respondent maintains that the 1973 NFPA provisions apply only to facilities built after 1973. Respondent built its elevator before 1918 (Tr. 111).

Under the heading "Scope" the standard provides at 61B-6:

> This standard shall apply to facilities erected subsequent to the date of this standard, and is presented as an advisory guide for owners and operators who may wish to avail themselves of the information herein contained in major replacement or renovation of existing facilities.

Respondent stresses that its structures and equipment are old; and that the structures have design and air movement characteristics which differ substantially from those of "tight" terminal elevators and more

2/ See Section 3(9) of the Act.

modern country facilities. Complainant's own witness, respondent points out, acknowledges these differences. Respondent's manager asserted that the design of the elevator would not allow effective use of the means advocated for prevention of accumulations -- particularly "aspiration" or "pressurization." (Tr. 119-121, 125-126, 128-129, 132.) Such problems, respondent suggests, furnish the reason for an NFPA exemption for old elevators.

The exemptive matter was raised by respondent at the outset of the evidentiary hearing (respondent's motion, J-2, Tr. 5-6, 89); ruling was reserved, and complainant asked permission to file a brief (Tr. 6). Despite this, the matter has not been directly addressed by the Secretary.

The words of the NFPA are plain. The standard has no direct application to respondent's elevator. May it somehow apply indirectly? I think not. The doctrine in Betten must surely cut both ways. An employer who has constructive knowledge of the substantive parts of a national consensus standard applying to his industry, must surely be said to have similar knowledge of those parts which exempt his enterprise. Moreover, it is settled that mere "advisory" standards cannot be the basis for a violation of the Act, even where they have been formally adopted by the Secretary. Kennecott Copper Corp., 76 OSAHRC 81/A2, (No. 5959, 1976), aff'd Usery v. Kennecott Copper Corp., 577 F.2d 1113 (10th Cir., 1977). This reasoning must apply with even greater force to exemptive provisions. When he treats the NFPA as authoritative, the Secretary must give similar treatment to respondent's reliance upon its exemptions. The exemptions, too, are authoritative.

Complainant was permitted to introduce the earlier 1959 version of

the NFPA grain elevator standards (complainant's exhibit 17, Tr. 85-89), which also has a chapter on dust removal (Chapter 6). That version is no better, however, since it specifically applies only to facilities built after 1959. Also, of course, it has been superseded; the 1973 version was effective at the times material in this case.

One must now ask whether the record supports a finding of violation without reference to the NFPA. I hold that it does not. That the citation alleged that respondent did not "comply" with the NFPA is not pivotal -- though it is representative of the intensity with which complainant adhered to his NFPA theory of violation. Of pivotal importance is that complainant did not prove the "recognized hazard" element of a general duty clause violation by any other evidence. Respondent's manager made clear his belief that the conditions at its facility did not constitute a hazard recognized by country elevator operators (Tr. 129-132, 144-145). Complainant, in his brief, maintains that his Area Director gave testimony establishing an industry-recognized hazard. The testimony referred to, however, was chiefly his endorsement of the NFPA as "authoritative" (Tr. 85). Beyond that there was only the following:

> Q Mr. Hines, I'd like to know if, in your opinion, or do you know if the industry recognizes poor housekeeping as a hazard in grain elevators?
>
> A I would say a part of the industry doesn't in the State of South Dakota. (Tr. 85.)

Such testimony adds nothing to the sum of complainant's proofs.

III

That the respondent had received a prior citation charging precisely the same violation in the same words (complainant's exhibit 3) adds nothing to the evidence of the present violation. The earlier citation

was contested by respondent, was later settled, and, when approved and affirmed by a Commission judge, became final (complainant's exhibits 1 and 2). This settlement does not diminish the breadth of respondent's rights in the present case, nor does it reduce complainant's burden of proof.[3/] Particularly, respondent's agreement to an affirmation was not a confession that it recognized the hazard for purposes of future charges growing out of a citation for a fresh violation. Complainant does not, in other words, make out a case for "actual knowledge" of a hazard because of respondent's abatement efforts stemming from an earlier citation based upon the inapplicable NFPA.

IV

One more matter deserves mention. Nothing in this record warrants amendment by this judge to charge a violation of any of the Secretary's specific safety standards in lieu of the general duty clause. The question collaterally intrudes since respondent has contended that the general duty clause had no application; and that if any violation occurred, complainant should have looked in the direction of specific standards at 29 C.F.R. §1910.22(a)(1) or §1910.141(a)(3).[4/] Counsel for the Secretary declined to amend when an opportunity presented itself early in the hearing (Tr. 8), has never since asked to amend, and has not briefed the matter. A sua sponte amendment under Rule 15(b) of the Federal Rules of Civil Procedure under these circumstances is inappropriate. The issue was not tried by the consent of either party. Complainant clearly wished to

3/ Cf. York Metal Finishing Co., 74 OSAHRC 19/D2, (No. 245, 1974).

4/ See Brisk Waterproofing Co., Inc., 73 OSAHRC 30/E1, (No. 1046, 1973).

rely on the general duty clause; respondent's potential defenses against any alleged violation of a specific standard are unknown.

## FINDINGS OF FACTS

Upon the entire record, it is found:

(1) Respondent operates a grain handling facility at Garretson, South Dakota.

(2) The facility includes two adjoining elevators, both made of wood and built in about 1918. Three employees ordinarily worked within the elevators.

(3) In a safety inspection conducted on February 16, 1979, representatives of the Secretary of Labor found accumulations of grain dust measuring a maximum of 20 inches on the headhouse floor in the south elevator. The inspectors found a maximum of 10 inches of dust on the first landing in the north elevator.

(4) The cited areas in both elevators had been cleaned by broom and vacuum on a twice-weekly basis commencing on October 20, 1978 when a settlement stipulation was executed resolving a citation issued April 5, 1978. That citation charged a violation virtually identical to that charged in the present contest.

(5) The preponderant evidence of record fails to show that respondent actually recognized the dust conditions existing in the cited areas as posing a hazard likely to cause death or serious physical harm, or that the industry of which respondent was a part recognized such a hazard.

## CONCLUSIONS OF LAW

It is concluded that:

(1) The Commission has jurisdiction to decide this case.

(2) The 1973 version of the National Fire Protection Association "Standard for the Prevention of Fire and Dust Explosions in Grain Elevators" exempts respondent's elevators.

(3) Respondent was not in violation of Section 5(a)(1) of the Act as charged in this case.[5/]

## ORDER

Accordingly, the citation and notification of proposed penalty are ORDERED vacated.

John A. Carlson
Judge, OSHRC

Dated: November 5, 1979

5/ Complainant's proposed findings of facts and conclusions of law, to the extent they differ with those entered above, are rejected.

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

October 29, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Senco Products, Inc.

OSHRC DOCKET NO. 79-3291

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION (REMAND)

To wit: See attached.

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FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 79-3291 |
| SENCO PRODUCTS, INC., | : | |
| Respondent. | : | |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

This case is before the Commission for review under section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Before a hearing on the merits, Administrative Law Judge George Taylor granted Respondent's ("Senco") motion to dismiss, holding that the standard under which Senco was cited had been improperly promulgated. We reverse Judge Taylor's decision and remand for further proceedings consistent with this decision.

I

In May 1979, a compliance officer of the Occupational Safety and Health Administration ("OSHA") inspected the Senco workplace. As a result of the inspection, the Secretary of Labor ("Secretary") issued a citation alleging that several Senco employees were exposed to a mixture of methyl ethyl ketone, xylene and acetone at levels that exceeded

the applicable limit for a mixture of these air contaminants specified in 29 C.F.R. § 1910.1000(d)(2)(i).[1/]

The history of section 1910.1000 is crucial to an understanding of this case. The Secretary promulgated section 1910.1000, originally codified at 1910.93, pursuant to section 6(a) of the Act.[2/] Section

---

1/ 29 C.F.R. § 1910.1000(d)(2)(i) provides:

> § 1910.1000 Air contaminants.
>
> An employee's exposure to any material listed in table Z-1, Z-2, or Z-3 of this section shall be limited in accordance with the requirements of the following paragraphs of this section.
>
> * * *
>
> (d) Computation formulae:
>
> * * *
>
> (2)(i) In case of a mixture of air contaminants an employer shall compute the equivalent exposure as follows:
>
> $Em = (C_1 \div L_1 + C_2 \div L_2) + \ldots (C_n \div L_n)$
>
> Where:
>
> Em is the equivalent exposure for the mixture.
>
> C is the concentration of a particular contaminant.
>
> L is the exposure limit for that contaminant, from table Z-1, Z-2, or Z-3.
>
> The value of Em shall not exceed unity (1).

2/ Section 6(a) provides, in pertinent part, that:

> Without regard to chapter 5 of Title 5 or to other subsections of this section, the Secretary shall, as soon as practicable during the period . . . ending two years after [the effective date of the Act] . . . by rule promulgate as an occupational safety

(continued on next page)

1910.1000 was based on an established Federal standard, 41 C.F.R. § 50-204.50, promulgated under the Walsh-Healey Public Contracts Act (41 U.S.C. §§ 35-45). See 29 C.F.R. § 1910.1499; see also 36 Fed. Reg. 10523 (May 29, 1971). The Walsh-Healey standard, section 50-204.50,[3/] referred to the pamphlet entitled "Threshold Limit Values ("TLV") of Airborne Contaminants for 1968" of the American Conference of Governmental Industrial Hygienists ("ACGIH"). The OSHA standard promulgated May 29, 1971 was very similar to the Walsh-Healey standard's references to the ACGIH pamphlet, except that the OSHA standard referred to the 1970 ACGIH TLVs rather than the 1968 ACGIH TLV's. Moreover, unlike the Walsh-Healey standard's reference to the ACGIH pamphlet, the OSHA standard explicitly set forth the substances listed in the ACGIH booklet and the TLVs for these substances. The TLVs were those listed in the 1970 ACGIH booklet rather than the 1968 version.

Neither the Walsh-Healey standard nor the May OSHA standard specifically referred to the mixtures provision contained in an appendix to the ACGIH table of TLVs.[4/] In August 1971, the Secretary repromul-

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2/ (continued)

> or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. . . .

According to section 3(10) of the Act, an established Federal standard is "any operative occupational safety and health standard established by an agency . . . or contained in any Act of Congress . . . ."

3/ The pertinent portions of section 50-204.50 are quoted in the text infra.

4/ The mixtures provision in the appendices of both the 1968 and 1970 ACGIH pamphlets stated:

(continued on next page)

gated section 1910.1000 after revision "in the interest of greater intelligibility and accuracy."[5/] This repromulgated standard did not refer to any ACGIH publication but instead contained tables listing specific substances and their TLVs. Most of the TLVs were taken from the 1968 ACGIH table. Additionally, the repromulgated standard now explicitly set forth the mixtures provisions pertinent to this case. The new mixtures section provided,

> An employee's exposure to any material listed in table G-1 . . . shall be limited in accordance with the requirements of the following paragraphs of this section.

---

4/ (continued)

> When two or more hazardous substances are present, their combined effect, rather than that of either individually, should be given primary consideration. In the absence of information to the contrary, the effects of the different hazards should be considered as additive. That is, if the sum of the following fractions,
>
> $$\frac{C1}{T1} + \frac{C2}{T2} + \text{------} \frac{Cn}{Tn}$$
>
> exceeds unity, then the threshold limit of the mixture should be considered as being exceeded. . . .
>
> Exceptions to the above rule may be made when there is good reason to believe that the chief effects of the different substances are not in fact additive, but independent as when purely local effects on different organs of the body are produced by the various components of the mixture. In such cases the threshold limit ordinarily is exceeded only when at least one member of the series
>
> $$\left(\frac{C1}{T1} + \text{ or } + \frac{C2}{T2} \text{ etc.}\right)$$
>
> itself has a value exceeding unity. . . .

(Emphasis added)

5/ See 36 Fed. Reg. 15101 (Aug. 13, 1971).

* * *

(d) Computation formulae:

* * *

(2)(i) In case of a mixture of air contaminants an employer shall compute the equivalent exposure as follows:

$$Em = C_1 \div L_1 + C_2 \div L_2 + \ldots C_n \div L_n$$

Where:

Em is the equivalent exposure for the mixture.

C is the concentration of a particular contaminant.

L is the exposure limit for that particular contaminant, from table Z-1, Z-2, or Z-3.

The value of Em shall not exceed unity (1).

(Emphasis added)

II

In promulgating standards under section 6(a) of the Act, the Secretary was not required to adopt the source standards verbatim but he was not empowered to make substantive changes from the source standards. George C. Christopher & Sons, 82 OSAHRC , 10 BNA OSHC 1436, 1443, 1982 CCH OSHD ¶ 25,956 at p. 32,531 (No. 76-647, 1982). Senco argues that the mixtures provision under which it was cited was not a part of the Walsh-Healey standard, section 50-204.50, and therefore its inclusion in section 1910.1000 represents a substantive change from the source standard.

Senco also asserts that the standard is invalid if its source is considered to be the ACGIH document. The company contends that the ACGIH document is not an established federal standard or national consensus standard and therefore could not have been validly adopted un-

der section 6(a) of the Act. Senco also contends that there are substantive differences between the mixtures provision in section 1910.1000 and the ACGIH document. The OSHA mixtures provision, unlike the corresponding provision in the ACGIH document, is mandatory rather than advisory, and it also omits a specific exception for non-additive substances contained in the ACGIH mixtures provision. These changes, according to Senco, are substantive because they place different and more stringent obligations upon employers.

The Secretary contends that the source of section 1910.1000 was the Walsh-Healey standard and that the alterations made to the standard were insubstantial. The Walsh-Healey standard and the current standard essentially impose the same obligations on the employer. In making this contention, the Secretary points to several cases, including Deering Milliken, Inc., 78 OSAHRC 101/A2, 6 BNA OSHC 2143, 1978 CCH OSHD ¶ 23,191 (No. 12597, 1978), aff'd, 630 F.2d 1094 (5th Cir. 1980), in which the courts and the Commission have found certain changes in source standards to be insubstantial.[6/]

III

In granting Senco's motion to dismiss, Judge Taylor held that the source of the mixtures provision was the ACGIH document and concluded that the mandatory nature of the mixtures provision in section 1910.1000 represented a substantive change from the advisory nature of the cor-

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6/ We reject the Secretary's argument that Senco may not challenge the procedural validity of an OSHA standard in an enforcement proceeding. In Rockwell International Corp., 81 OSAHRC 118/A2, 9 BNA OSHC 1092, 1980 CCH OSHD ¶ 24,979 (No. 12470, 1980), the Commission held that the employer can raise such a challenge. We adhere to that holding. See George C. Christopher & Sons, supra.

responding provision in the ACGIH document. However, we conclude that the source of section 1910.1000 was the Walsh-Healey standard, not the ACGIH document. See Chlorine Institute v. OSHA, 613 F.2d 120 (5th Cir. 1980). The May promulgation explicitly stated that the basis for the OSHA air contaminant standard was an earlier Walsh-Healey standard. See 36 Fed. Reg. 10523. In the explanation to the August repromulgation, OSHA did not say it was based on the Walsh-Healey Act, but the stated purpose was to clarify the earlier standard. Also, 29 C.F.R. § 1910.99 set forth the source standard for 1910.93 and continued to identify the source as 41 C.F.R. § 50-204.50. See 29 C.F.R. § 1910.1499. Therefore, the basis of the repromulgated standard remained the Walsh-Healey standard.

While it is clear that the Walsh-Healey standard is the basis of the current OSHA standard, it is less clear what the original Walsh-Healey standard contained. Senco argues that the OSHA standard is invalid because it contains a mixtures provision which is not explicitly contained in the Walsh-Healey standard.

The Walsh-Healey standard, section 50-204.50, provides:

> Exposures by inhalation, ingestion, skin absorption, or contact to any material or substance (i) at a concentration above those specified in the 'Threshold Limit Values of Airborne Contaminants for 1968' of the American Conference of Government Industrial Hygienists . . . shall be avoided.

The booklet, "Threshold Limit Values of Airborne Contaminants for 1968," contains several appendices, one of which contains a mixtures provision similar to the one contained in the OSHA standard. Essentially, Senco argues that when the Walsh-Healey standard and the original May 1971 OSHA standard referred to the ACGIH pamphlet, they incorporated only the body, and not the appendices of the pamphlet.

However, we conclude that the Walsh-Healey standard incorporated the mixtures provision. The Walsh-Healey standard incorporated "concentration[s] above those specified in the 'Threshold Limit Values of Airborne Contaminants for 1968." Accordingly, the Walsh-Healey standard incorporated any limits on airborne concentrations appearing anywhere in the ACGIH document. Logically, reference to the "concentrations" in the pamphlet would include the computation methods set forth in the appendix, including the mixtures provision that describes the method of calculating TLVs when confronted with the common problem of exposures to multiple air contaminants. In fact, the ACGIH Committee in the preamble to the 1968 ACGIH document refers to the mixtures provision as a method for "developing threshold limit values for mixtures." The ACGIH formula is commonly used to calculate the limits for mixtures, and the TLVs make little or no sense when applied to many real life industrial situations without the proper methods to calculate the TLVs of mixtures. 3 F.Patty, Industrial Hygiene and Toxicology, 235-6. Finally, throughout the introductory notes of the ACGIH pamphlet general reference is made to the appendices. This indicates that the appendices are an integral part of the pamphlet.

Assuming that the mixtures provision has been incorporated, Senco still contends that the standard is invalid because the language of the present standard's mixtures provision is mandatory while the mixtures provision in the source standard is merely advisory.

The Commission has found, in some instances, that changing advisory language to mandatory language is a substantive change. See Kennecott Copper Corp., 76 OSAHRC 81/A2, 4 BNA OSHC 1400, 1976-77 CCH OSHD

¶ 20,860 (No. 5958, 1976), aff'd, 577 F.2d 1113 (10th Cir. 1977). However, Senco's argument incorrectly assumes that the source of the OSHA standard is the ACGIH pamphlet. The source of the OSHA standard is the Walsh-Healey standard and both of these standards are mandatory. The Walsh-Healey standard states, "Exposures . . . to any material or substance . . . at a concentration above those specified in [the ACGIH document] . . . shall be avoided. . . ." (Emphasis added.) As the Fifth Circuit in Deering Milliken v. Marshall, 630 F.2d 1094 (5th Cir. 1980), observed:

> Whether the Threshold Limit Values mandated by Walsh-Healey were only advisory when originally established by the American Conference of Governmental Industrial Hygienists . . . is irrelevant; Walsh-Healey incorporated those values as mandatory exposure limits, and maintenance of their mandatory character through promulgation of section 1910.1000 was not a modification of the pre-existing Walsh-Healey standard.

630 F.2d at 1102.

The analysis that the court used in Deering Milliken v. Marshall, supra, applies to this case. The Walsh-Healey standard incorporated any concentrations included in the appendices of the pamphlet by reference. Just as the Walsh-Healey standard transformed the advisory TLVs to mandatory TLVs, the Walsh-Healey standard transformed the advisory ACGIH mixtures formula to a mandatory one. When the OSHA standard was promulgated with a mandatory mixtures formula, this was not a change from its Walsh-Healey source standard.

IV

The final question in this case is whether the OSHA standard is invalid because it does not include the explicit exception for non-additive substances found in the mixtures formula which was part of the Walsh-Healey standard. See note 4 supra.

For a period of two years following the effective date of the Act, the Secretary was authorized to summarily adopt established federal standards and national consensus standards as occupational safety and health standards. Section 6(a), 29 U.S.C. § 655(a). Any substantive modification of a source standard requires the use of the rulemaking procedures set forth in section 6(b). The original Walsh-Healey standard, by adopting the ACGIH and its appendices, allowed for exceptions from the general rule that substances are additive when "there is good reason to believe that the chief effects of the different substances are not in fact additive." Therefore, section 1910.1000(d)(2)(i), adopted under section 6(a), is unenforceable to the extent it modified the substantive requirements of its source standard by imposing on an employer a duty to treat all toxic substances as additive. See Diebold, Inc. v. Marshall, 586 F.2d 1327, 1332 & n.6 (6th Cir. 1978).

However, we are unable to determine on the record in this case whether Senco's substantive duties are in any way affected by the Secretary's deletion of the exception for nonadditive mixtures. See Market Street Railway Co. v. Railroad Comm., 324 U.S. 548, 562 (1945), cited in Daniel Int'l Corp. v. OSHRC, 656 F.2d 925, 930 & n.9 (4th Cir. 1981). Nothing in the record indicates whether methyl ethyl ketone, xylene and acetone are in fact additive or not additive. If the cited substances are nonadditive, the cited subsection may not validly be applied. However, if Senco's compliance responsibilities are not altered, the standard may be validly applied. Senco cannot profit from the Secretary's failure to adopt an exception to a standard's requirements when it could not claim benefit of the exception even if adopted.

Accordingly, the judge's order granting Senco's motion to dismiss is set aside. The case is remanded to the chief judge[7/] for further proceedings consistent with this opinion.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: OCT 29 1982

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7/ Judge Taylor is no longer with the Commission.

ROWLAND, Chairman, dissenting:

I dissent from the majority's decision to remand this matter for further proceedings. In my view, the Walsh-Healey standard at 41 C.F.R. § 50-204.50, on which the OSHA standard now published at 29 C.F.R. § 1910.1000 is based, cannot reasonably be construed to include the mixtures provision appearing in the appendix to the ACGIH publication. Even assuming the Walsh-Healey standard can be so interpreted, the Secretary impermissibly changed the substance of the ACGIH mixtures provision by deleting language regarding non-additive substances when he promulgated the OSHA standard at issue in this case. Finally, the majority errs in concluding that despite the Secretary's deletion of that language, the standard is still enforceable as to substances which are additive, since that conclusion in effect rewrites the Secretary's standard.

As the majority notes, the Walsh-Healey standard prohibited exposure to "<u>any</u> material or substance" at a concentration in excess of that specified in the ACGIH publication. 41 C.F.R. § 50-204.50 (emphasis added). That standard, however, also prohibits exposures to concentrations above those set forth in two specifically designated tables, Table I and Table II. [1] The latter table is essentially the same as a listing entitled "Mineral Dusts" which appears in the ACGIH document and lists concentrations for certain silica compounds,

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[1]The full text of 41 C.F.R. § 50-204.50(a)(1) as follows:

> Exposures by inhalation, ingestion, skin absorption, or contact to any material or substance (i) at a concentration above those specified in the "Threshold Limit Values of Airborne Contaminants for 1968 " of the American Conference of Govenmental Industrial Hygienists, except for the ANSI Standards listed in Table I of this section and except for the values of mineral dusts listed in Table II of this section, and (ii) concentrations above those specified in Tables I and II of this section, shall be avoided, or protective equipment shall be provided and used.

graphite, and nuisance particulates. [2]

As the majority opinion indicates, the mixtures provision as it appears in the ACGIH publication applies only to worksites having at least two toxic air contaminants and requires that the employer consider the cumulative rather than individual effect of those substances. That is, the mixtures provision is a special provision under which a hazard may exist even if the concentration of each substance involved does not exceed the level prescribed for that substance by the ACGIH. The Walsh-Healey standard, however, gives no indication that it is intended to include such situations. Rather, it expressly refers the employer only to the concentrations specified by the ACGIH. In my view, the reasonable employer who reads this language together with the standard's references to the concentrations for individual substances as enumerated in certain tables would conclude that the purpose of the standard is to protect employees from exposure to such substances at levels above those expressly prescribed in the ACGIH booklet. Furthermore, the standard states that the employer is required to prevent exposure to "any" material or substance above the concentration specified. In view of the absence of any mention of mixtures of more than one substance or of the posssible cumulative effect of mixtures, an employer could not reasonably be said to

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[2]Table I has no counterpart in the ACGIH document.

understand that his duty extends to detecting and eliminating hazardous exposures to combinations of toxic substances when no substance individually exceeds the concentration prescribed by the ACGIH for that substance. As I have previously stated, standards cannot be construed to mean what the drafters might have intended but did not adequately express. Rather, employers must have fair notice of the obligations imposed by such standards. E.g., Bethlehem Steel Corp., 82 OSAHRC 19/C8, 10 BNA OSHC 1470, 1474, 1982 CCH OSHD ¶ 25,982 at 32,594 (No. 79-310, 1982) (concurring opinion).

The conclusion that the Walsh-Healey standard does not include the mixtures provision of the ACGIH publication is supported rather than weakened by the preamble to that publication on which the majority relies. Considering that the cumulative effects of mixtures of air contaminants may well have a significant effect on the health of employees, the ACGIH was aware that strict application of the threshold limit values prescribed for individual substances would not necessarily protect employees, and it so specifically stated. [3] Therefore, the Secretary was on notice that the ACGIH did not consider the concentrations otherwise specified to be adequate in the case of mixtures of more than one substance. The Secretary clearly had the opportunity to provide in the Walsh-Healey standard for the specific circumstances presented by mixtures of air contaminants as did the ACGIH, but failed to do so.

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[3]According to the ACGIH preamble, "[s]pecial consideration should be given also to the application of [threshold limit] values in assessing the health hazards which may be associated with exposure to mixtures of two or more substances."

Finally, the subsequent history of the air contaminant standard suggests that even the Secretary had doubts as to whether he nad in fact adopted the mixtures provision under Walsh-Healey. As the majority observes, when the Secretary first promulgated an air contaminant standard under OSHA in May, 1971, he essentially used the language that appeared in the Walsh-Healey standard. Thus the original OSHA standard, like the Walsh-Healey standard, contained no references to mixtures of substances or to the cumulative effect of such mixtures. When the standard was repromulgated in its present form in August, 1971 its wording was extensively changed. The Secretary deleted any mention of the ACGIH publication and, for the first time, expressly included a mixtures provision. Since the Secretary largely abandoned the wording as it had appeared in the earlier OSHA standard and preceding Walsh-Healey standard, and since the changes were ostensibly to improve the "accuracy" of the OSHA standard, one could reasonably conclude that the Secretary's intention was to conform his standard more closely to the provisions of the ACGIH document. Accordingly, it would appear that the Secretary's adoption at this time of a mixtures provisions is an implicit recognition that when he had first sought to implement the ACGIH document in the Walsh-Healey standard he had not included the mixtures provision appearing therein. As the majority observes, the Secretary is not permitted under 29 U.S.C. § 655(a) to modify the substantive requirements of OSHA source standards.

In any event, regardless whether the mixtures provision of the

ACGIH publication may properly be considered to have been incorporated in the original Walsh-Healey standard, the Secretary's subsequent OSHA standard at issue in this case is invalid because it deletes language regarding the application of the mixtures provision to combinations of substances which do not have cumulative or additive effect. The deletion constitutes an impermissible substantive change in the language of the Secretary's source standard.[4]

As indicated above, the purpose of the mixtures provision as set forth in the ACGIH publication is to account for those situations in which, due to the additive or cumulative effect of several substances, strict application of the threshold limit values prescribed individually for those substances would not be adequate to protect employees. Accordingly, the ACGIH publication expressly provides that the mixtures formula is not to be applied to combinations of substances which do not in fact have an additive or cumulative effect. As the majority itself correctly concludes, the Secretary acted improperly in modifying his source standard so as to make the mixtures provision applicable to non-additive as well as additive situations.

The majority errs, however, in holding that the standard is nevertheless valid if the combination of substances involved in this case has an additive effect and in remanding for litigation of that

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[4]In view of my conclusion that the standard is invalid for this reason, I need not consider as does the majority whether the standard is also invalid for the reason that the mixtures provision as it appeared in the ACGIH publication was only advisory rather than mandatory.

question. The standard as adopted by the Secretary [5] draws no distinction between additive and non-additive situations. Rather, it mandates application of the mixtures formula in all cases where different air contaminants exist in combination. The majority's action, therefore, requires that the parties litigate a matter which is not an element of the cited standard and to which that standard is not directed. [6] By so doing, the majority rewrites the Secretary's standard. The effect of their result in this case is to insert into the Secretary's standard a limitation on the use of the mixtures formula which the Secretary himself deleted from the ACGIH publication when he promulgated the OSHA standard at issue here. Such action, for the purpose of saving the Secretary's standard from invalidity, is clearly contrary to the Commission's function under the Act as an impartial adjudicator. The Commission does not have regulatory authority and is not empowered to write into standards provisions which the Secretary did not adopt. See Mobil Oil Corp., 82 OSAHRC , 10 BNA OSHC

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[5]See note 1 of the lead opinion.

[6]The majority's reliance on Market Street Ry. v. Railroad Comm'n, 324 U.S. 548 (1945) is misplaced. As the court noted in Daniel Int'l Corp. v. OSHRC, 656 F.2d 925, 930 n.9 (4th Cir. 1981), that case concerned issues of procedural due process which did not substantially affect the rights of the parties. As I have explained above, in the case now before us the Secretary's deletion of language which had appeared in the ACGIH publication resulted in a substantial alteration of the employer's duty. As the court in Daniel itself recognized, substantive modifications in the requirements of source standards adopted as OSHA standards under 29 U.S.C. § 655(a) are inherently prejudicial because they effectively deny employers the right to comment on the standards. Id. at 930 & n.10.

1905, 1931-32, 1982 CCH OSHD ¶ 26,187 at 33,044-45 (No. 77-4386, 1982) (dissenting opinion); Shenango Co., 82 OSAHRC , 10 BNA OSHC 1613, 1982 CCH OSHD ¶ 26,051 (No. 78-4723, 1982) (dissenting opinion).

Since the Walsh-Healey source standard did not incorporate the ACGIH mixtures provision and since in any event the OSHA standard substantively modified the terms of the ACGIH provision, I would vacate the citation in this case.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 79-3291 |
| SENCO PRODUCTS, INC., | : | |
| Respondent. | : | |

DECISION AND ORDER

Taylor, Judge:

This case involves an amended citation that alleges several serious violations. The parties have filed a settlement agreement as to items 1 and 2 of the citation. The settlement agreement filed on November 30, 1979, is approved.

Item 3 of the citation consists of three subitems. The gravamen of all the subitems is the exposure of respondent's employees to excessive levels of a mixture of air contaminants, that is, methyl ethyl ketone, xylene, and acetone. The health standard that governs whether there has been exposure to excessive levels of a mixture of air contaminants is presently codified at 29 C.F.R. § 1910.1000(d)(2)(i). The respondent has moved for a dismissal of item 3 on the basis that 29 C.F.R. § 1910.1000(d)(2)(i) was not properly promulgated. For reasons that follow, the respondent's motion is granted.

When initially promulgated under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq., the pertinent air contaminant standards were codified at 29 C.F.R. § 1910.93. 36 Fed. Reg. 10503 (May 29, 1971). As so promulgated, the standards did not contain a provision regarding a mixture of air contaminants. Subsequently, § 1910.93 was "revised in its entirety, in the interest of greater intelligibility and accuracy." 36 Fed. Reg. 15101 (August 13, 1971). The revision added the following requirement at 29 C.F.R. § 1910.93(d)(2)(i):

> In case of a mixture of air contaminants an employer shall compute the equivalent exposure as follows:
>
> $$E_m = \frac{C_1}{L_1} + \frac{C_2}{L_2} + \ldots \frac{C_n}{L_n}$$
>
> where:
>
> $E_m$ is the equivalent exposure for the mixture.
> C is the concentration of a particular contaminant.
> L is the exposure limit for that contaminant, from table G-1, G-2, or G-3.
>
> The value of $E_m$ shall not exceed unity (1).

36 Fed. Reg. 15102 (August 13, 1971). This standard was subsequently recodified as 29 C.F.R. § 1910.1000(d)(2)(i). 40 Fed. Reg. 23072 (May 28, 1975).

The initial promulgation of 29 C.F.R. § 1910.93 was under 29 U.S.C. § 655(a). Section 655(a) authorized the complainant, within a two-year period following the effective date of the Occupational Safety and Health Act of 1970, to adopt national consensus standards and establish

Federal standards as occupational safety and health standards without regard to the provisions in the Administrative Procedure Act, 5 U.S.C. § 553, for public participation in the rulemaking process. Otherwise, to promulgate a standard, the complainant is required to publish the proposed standard in the Federal register and to afford interested persons the opportunity to submit written objections thereto and to participate in a public hearing thereon. 29 U.S.C. § 655(b).

The source of 29 C.F.R. § 1910.1000(d)(2)(i) is the "Threshold Limit Values of Airborne Contaminants for 1970" of the American Conference of Governmental Industrial Hygienists (ACGIH). Appendix B of that publication provides that:

> When two or more hazardous substances are present, their combined effect, rather than that of either individually, should be given primary consideration. In the absence of information to the contrary, the effects of the different hazards should be considered as additive. That is, if the sum of the following fractions,
>
> $$\frac{C_1}{T_1} + \frac{C_2}{T_2} + \cdots \frac{C_n}{T_n}$$
>
> exceeds unity, then the threshold limit of the mixture should be considered as being exceeded. $C_1$ indicates the observed atmospheric concentration, and $T_1$ the corresponding threshold limit. . . .

> Exceptions to the above rule may be made when there is good reason to believe that the chief effects of the different harmful substances are not in fact additive, but independent as when purely local effects on different organs of the body are produced by the various components of the mixture. In such cases the threshold limit ordinarily is exceeded only when at least one member of the series $\left(\frac{C_1}{T_1} + \text{or} + \frac{C_2}{T_2} \text{ etc.}\right)$ itself has a value exceeding unity . . . . (Emphasis added.)

A comparison of this provision with 29 C.F.R. § 1910.1000(d)(2)(i) shows significant substantive differences. Not only does 29 C.F.R. § 1910.1000(d)(2)(i) completely omit the second paragraph of the ACGIH provision, but it transforms an advisory rule into a mandatory rule by the substitution of the word "shall" for the word "should" in two places. Since the complainant made these changes without following the rulemaking procedures provided in 29 U.S.C. § 655(b), 29 C.F.R. § 1910.1000(d)(2)(i) is invalid and unenforceable.[1/] Kennecott Copper Corp., 76 OSAHRC 81/A2 (No. 5958, 1976), aff'd, 577 F.2d 1113 (10th Cir. 1977).

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1/ In his response to the respondent's motion, the complainant contends that the source standard is an "established Federal standard" published under the Walsh-Healy Act, 41 U.S.C. § 35 et seq. The standard referred to by the complainant, which was published at 41 C.F.R. § 50-204.50, does not contain a specific provision concerning a mixture of air contaminants. Except for some exceptions that are not pertinent here, that standard prohibited exposure to air contaminants "at a concentration above those specified in the 'Threshold Limit Values of Airborne Contaminants for 1968' of the American Conference of Governmental Industrial Hygienists." 34 Fed. Reg. 7953 (May 20, 1969). This quoted language is identical to

Relying on National Industrial Constructors, Inc., v. OSHRC, 583 F.2d 1048 (8th Cir. 1978), the complainant asserts that the respondent's "challenge to the procedural validity of the standard is not properly before the Commission" because 29 U.S.C. § 655(f) authorizes the raising of such claims only if they are presented to an appropriate United States court of appeals within 60 days after a standard has been promulgated. The portion of the National Industrial Constructors decision relied on by the complainant holds that construction safety standards promulgated under the Construction Safety Act,[2/] 40 U.S.C. § 333, were not invalid because they were not published in the Federal Register for at least 30 days prior to their effective date as required by the Administrative Procedure Act, 5 U.S.C. § 553.

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1/ Footnote continued

that found in the original version of 29 C.F.R. § 1910.93(a) except that the year "1970" was substituted for the year "1968" in § 1910.93(a). Since the Walsh-Healy standard referred to by the complainant did not contain a specific provision regarding a mixture of air contaminants and since the August 13, 1971, revision of 29 C.F.R. § 1910.93 was made "in the interest of greater intelligibility and accuracy," as opposed to making significant substantive changes, the 1970 version of ACGIH publication, rather than the Walsh-Healy standard, must be the source of 29 C.F.R. § 1910.1000(d)(2)(i), unless the provisions in the 1968 and 1970 versions of the ACGIH publication did not differ significantly in substance. In the latter event, the basic issue and its resolution would not be affected.

2/ On the basis of being established Federal standards, these standards were subsequently promulgated as occupational safety and health standards under 29 U.S.C. § 655(a).

Whether the respondent's claim in this case has been properly characterized by the complainant as relating to the "procedural" validity of the standard need not be resolved. It is so abundantly clear that the situation in National Industrial Constructors differs in many respects from the situation in the instant case that the differences should not need to be spelled out in detail. Because the cases are so readily distinguishable, the National Industrial Contractors decision is not controlling here. See Marshall v. Pittsburgh-Des Moines Steel Co., 584 F.2d 638 (3d Cir. 1978); Kennecott Copper Corp., supra.

The complainant also contends that the respondent has not been prejudiced by the omission of the second paragraph of the ACGIH provision from 29 C.F.R. § 1910.1000(d)(2)(i) because the "Industrial Hygiene Field Operations Manual" published by the Occupational Safety and Health Administration (OSHA) contains a provision similar to the omitted paragraph and that the manual provision was considered before issuing the citation. In my opinion, that is not relevant since the standard is invalid because of the omission. The manual cannot breathe life into an invalid standard as it is only an internal administrative guide for OSHA and is not binding on the complainant or the Commission. See FMC Corp., 77 OSAHRC 153/D4 (No. 13155, 1977). Furthermore, even if the complainant's contention were meritorious, the standard is unenforceable because of changing the word "should" to the word "shall." Marshall v. Pittsburgh-Des Moines Steel Co., supra; Kennecott Copper Co, supra.

## Order

Item 3, Citation Number 1, is vacated. Pursuant to the settlement agreement, item 1, Citation Number 1, is vacated. Also pursuant to the settlement agreement, the violations alleged in item 2, Citation Number 1, are affirmed as nonserious violations, and a penalty of $50 is assessed for that item.

George O. Taylor Jr.
GEORGE O. TAYLOR, JR.
Judge, OSHRC

Dated: December 26, 1979
Hyattsville, Maryland

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| | [remand] | | |
| | (Judge's decision) | | 60/C4 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

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|---|---|---|---|---|

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

OCT 29 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Purolator Sky Courier, Inc.

OSHRC DOCKET NO. 80-1468

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

FOR THE SECRETARY OF LABOR

Counsel for Regional Litigation
Office of the Solicitor, USDOL
200 Constitution Ave., NW. - Rm. S-4014
Washington, D.C. 20210

William S. Kloepfer, Esq.
Assoc. Reg. Sol., USDOL
1240 East 9th Street
Cleveland, OH 44119

OF ORDER

To wit: SEE ATTACHED

FOR EMPLOYER

Jack Hagenmayer
Air Division Manager
Purolator Courier Corp.
Sky Courier Division
4273 E. 17th Ave.
P.O. Box 19760
Columbus, OH 43219

Keith A. Ashmus, Esq.
Thompson, Hine & Flory
National City Bank Bldg.
Cleveland, OH 44114

FOR EMPLOYEES

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Office Of the Judges
OSHRC
1365 Peachtree Street
Room 240
Atlanta, GA 30309

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br><br>v.<br><br>PUROLATOR SKY COURIER, INC.,<br>Respondent. | ) | OSHRC DOCKET NO. 80-1468 |

ORDER

The Commission grants the Secretary's motion for leave to withdraw citation since the Commission has received notification of compliance with Commission Rules 7 and 100.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED OCT 29 1982

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

| | | |
|---|---|---|
| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 80-1468 |
| | ) | |
| PUROLATOR SKY COURIER, INC., | ) | |
| | ) | |
| Respondent. | ) | |

APPEARANCES:

Theodore J. Pethia, Esquire, Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, on behalf of the Complainant.

Keith Ashmus, Esquire, Cleveland, Ohio, on behalf of the respondent.

Ken Carpenter, on behalf of intervening employees.

## DECISION AND ORDER

PATTON, Judge:

This is a proceeding pursuant to section 10 of the Occupational Safety and Health Act of 1970 (29 U.S.C. §651, et seq., 84 Stat. 1590, hereinafter referred to as the Act), contesting a citation issued by the complainant against the respondent under the authority vested in complainant by §9(a) of the Act.

The citation alleges that as a result of the inspection of a workplace under the ownership, operation and control of the respondent, located at Columbus, Ohio, the respondent has been charged with violating §5(a)(2) of the Occupational Safety and Health Act by failing to comply with Standard 29 C.F.R. 1910.132(a). It is alleged that in the freight handling areas, the employees that handled freight did not have adequate foot protection.

A hearing was held on November 14, 1980. Complainant and respondent appeared and presented evidence. Mr. Ken Carpenter, an employee of respondent, intervened on behalf of the affected employees.

## ISSUES IN THE CASE

It was alleged that the respondent violated Standard 29 C.F.R. 1910.132(a) in that respondent did not require employees handling freight to wear safety shoes. The respondent defends on the ground that jurisdiction is with the Federal Aviation Administration and that the Occupational Safety and Health Act, therefore, has no application. Respondent further defends on the ground that safety shoes are unnecessary. The intervening employees also oppose the wearing of additional foot protection.

## EVIDENCE AND EVALUATION OF CASE

The respondent is engaged in the business of transporting small freight ranging from less than two pounds in weight to 70 pounds. Approximately 120 employees are employed with approximately 110 of the employees handling packages at the site (TR 21). The packages are sorted by employees in a terminal and are conveyed by a conveyor belt. Other employees load the packages on and off of airplanes. Between 9,000 and 10,000 packages a night are handled (TR 26). Approximately 55% of the packages are what are known as "sky pack" packages. The sky pack packages weigh not over two pounds. Approximately 19% of the packages weigh more than five pounds (TR 192).

The packages are sorted and exchanged as they come off the plane and then are shipped out of Columbus, Ohio (TR 146-147). Approximately 96% of the employees are part time employees, primarily college students (TR 147-148). The respondent also employs on a part time basis, school teachers, bus drivers, policemen, firemen and other types of employees (TR 148). The employees are both men and women (TR 149). Part time employees in the terminal work from midnight to 3:00 a.m. and outside employees work from midnight to 3:30 a.m. (TR 145). The inside crew takes the freight from metal carts that come into the building following which it is put on a conveyor belt. Certain individuals who are

assigned to the sorting area remove the freight from the belt and sort it (TR 150). People that work outside are divided into four crews. They remove the freight from the aircraft and load the aircraft (TR 150). The pilot has the ultimate responsibility for supervising the loading (TR 151). Some of the packages weigh as much as 70 pounds (TR 24). The packages are picked up and placed in hampers outside the plane and employees on ground level receive them (TR 25). Some go directly into the hampers and some go to other employees to put in the hampers (TR 25).

Respondent is required to have a transportation manual which must be approved by the Federal Aviation Administration. The manual includes a page to "Columbus Airmeet Personnel". It reads as follows:

> "Appropriate Dress Code"
>
> Please be advised that beginning May 14, 1979, the following dress code will go into effect:
>
> 1. Proper footwear must be worn at all times. Sandals, thongs, clogs, or any type of open footwear that exposes any part of the foot are not acceptable.
>
> 2. Shorts, cutoff T-shirts, or any clothing that exposes midsection or legs are not acceptable.
>
> The purpose of this program is to eliminate human suffering. It is our desire to reduce to a minimum the accidents that could have been prevented."

It was undisputed that the respondent's employees did not wear safety shoes, it being the contention of respondent that they are unnecessary. The compliance officer testified that he saw some of the employees with canvas-type shoes (TR 34). It was stated that the packages were handled the same way outside the building as inside the building (TR 68). The sorters handle all sizes of packages. Some are metal, some are paper, cardboard, and wood (TR 119). The packages would jam and fall on the floor at times (TR 120). A person would have to have an area three or four feet to avoid them (TR 124). This was testified to by Mr. Robert

Thomas, a sorter at respondent's place of business. Mr. Kenneth L. Carpenter, a sorter, testified that the belt does not move at a high speed and the majority of the packages that fall off of it are light (TR 200). He said there are enough people to take care of the problem if a jam begins to develop and that they never have a real jam (TR 200). The heavy packages, according to Mr. Carpenter, do not fall off of the belt (TR 201). He said that at times they would have as much as fifty envelopes in a plastic bag. This bag might fall off but the plastic bag would be similar to a sleeping bag and he did not consider that a hazard (TR 201). He was of the opinion that safety shoes should not be required (TR 201). He said the heavy packages pushed the lighter ones off the belt and that a little envelope would not push a ten pound package off (TR 200). He has not seen anything heavier than a sky pack fall on anyone's feet (TR 205). He does not feel that the hazard of falling objects is any worse than if someone was shopping in a grocery store (TR 206).

The testimony was to the effect that safety shoes are not customarily worn in the industry (TR 166-167). They are not usually worn by United Parcel Service (TR 166-167). Gelco does not require employees to wear safety shoes (TR 175) and Mr. Robert Owen, Vice-President and Director of Safety for respondent testified that he knew of no small package handling system that had such requirements (TR 175). He stated that Eastern Airlines and TransWorld Airlines do not require it (TR 176).

Mr. Fredrick Graff, industrial engineering manager of respondent, explained the differences in United Parcel Service and the respondent's business. He said they were similar in that there was a large volume of packages coming in by aircraft, that the packages are brought into a building where they are sorted to various destinations and then sent back out again by tractor trailers. He testified, however, that that there were differences. The Purolator's handling of the freight

was much simpler so far as the conveyance system was concerned. The Purolator system was a single level conveyor system and United Parcel had a multi-conveyor system which handled 50,000 to 100,000 packages per night. He said at United Parcel, some of the conveyors would be 20 feet high and if something fell off a conveyor, it might fall 20 feet before it hit something (TR 164). The height of the conveyor at the respondent's terminal was 32 inches (TR 165). The percentage of sky packs and envelopes in respondent's business is significantly higher than in United Parcel. United Parcel's volume of sky pack and envelope size freight was approximately 20% whereas it was around 50% for respondent (TR 165). United Parcel Service, however, had a maximum of 50 pounds whereas respondent's maximum was 70 pounds. United Parcel's heavier packages were primarily heavy iron and steel packages with such things as plow blades, gas tanks for cars, and paint cans. They also handle tires (TR 165). He did not observe these particular types of freight in respondent's business (TR 165-167). The freight at United Parcel Service is generally segregated with the heavier articles in a designated area. A man running a tram, which is a type of train, would take the packages and place them in a trowl and wheel them to the outbound location. These packages would not be placed on the conveyor system but would be handled separately by a designated individual (TR 166). There is no person at respondent's terminal who is assigned to handle this type package (TR 166). It was testified that at the present time United Parcel Service requires safety shoes only for a tram operator at the St. Louis terminal (TR 167). This employee handles iron and steel (TR 167).

It was testified that by Mr. Maglicic, the compliance officer, that an employee could have a smashed toe if wearing leather shoes (TR 79). He testified that a ten pound weight falling 2 1/2 feet in an area three inches by one-half inch, would be the equivalent of 2880 pounds, 4 feet - 3840 pounds (TR 80). A seven

pound package would be the equivalent to 2,016 pounds if dropped from three feet (TR 81).

Mr. Owens testified that he does not say that no heavy packages fall off but a greater percentage of those falling off are light (TR 183). Mr. Richard Greismer, an employee of respondent, testified that most of the things that fall off of the conveyor belt are very light packages (TR 138).

Mr. Greismer testified that when he was wearing cowboy boots, a toebar connecting the baggage cart to a motorized vehicle fell down onto his boot. He stated that it fell, as best as he could recall, from knee height (TR 133-135). He continued to work the rest of the shift and his ability to walk was not impaired (TR 136). He stated that the cart is no longer used (TR 136). The hitches on the front of the carts now are stationery and do not move and he could not be exposed to this type of injury now (TR 136-137).

Mr. Richard Leece, a former employee of respondent, stated that a cannister weighing approximately 40 pounds fell on the bridge of his foot (TR 142). The foot was injured. Steel-toed shoes would not have prevented this injury as it was not the toes which was struck (TR 143, 154). Employee James Rice, a sorter-loader, (Exhibit C-6), injured the large toe of his left foot when a package he was handling while unloading an aircraft slipped from his hands, falling on his left foot, causing him to lose five work days. He was not working on the conveyor belt but was engaged in unloading operations. Sorter-loader Roland A. Dike, while unloading an aircraft, injured his right foot. The bottom of a box containing a 50 pound motor gave way and fell on his foot, causing injury to the toe (Exhibits C-8 and C-11). The respondent testified that a repetition of this injury would be unlikely because the respondent requested its customers to meet DOT regulations for packaging (TR 152).

The first issue for determination is whether the Occupational Safety and Health Act applies to the respondent's operations. §4(b)(1) of the Occupational Safety and Health Act provides that if another federal agency has legal jurisdiction and exercises that jurisdiction, the Occupational Safety and Health Administration is without jurisdiction. It is the contention of the respondent that the Federal Aviation Administration has jurisdiction in this case.

The Federal Aviation Administration requires the respondent to have a manual which must be approved by said agency. The manual of respondent incorporates a page dealing with clothing including the type of shoes which must be worn. This requirement for a manual to be kept is found in the Federal Register, Regulation 14 C.F.R. §121.133. Said regulation states the manual must be provided for the guidance of "ground operations" as well as certain other operations of a company so regulated.

Regulation 14 C.F.R. 121.135(a) reads as follows:

> "Each manual required by §121.133 must . . . . (1) include instructions and information necessary to allow the personnel concerned to perform their duties and responsibilities with a high degree of safety."

The respondent cites the case of Northwest Airlines, Inc. _____ OSAHRC _____, 8 BNA OSHC 1982, _____CCH OSHD ¶_____ (No. 13649, Sept. 3, 1980). In that case the Occupational Safety and Health Review Commission stated that the requirement for a manual which must be approved by said agency constituted an exercising of authority and therefore, the mechanics who serviced and repaired the airplanes were within the jurisdiction of the Federal Aviation Administration and the Occupational Safety and Health Administration was ousted from jurisdiction.

The employees involved in the Northwest Airlines, Inc., supra, had a more direct relationship to flight than do the employees in the case at bar. The mechanics who keep an airplane in such condition as to make it possible for the plane to safely fly, are an integral part of flight itself. On the other hand,

employees who sort freight and load and unload freight are not as directly related to flight. The Federal Aviation Administration in regulations 14 C.F.R. 61-67, sets forth various types of employees who the agency must certify for their positions. Mechanics are included but baggage handlers are not. No authority has been cited by counsel for any party in the proceeding which definitely determines whether employees loading and unloading planes or sorting freight would come under the "ground operations". This judge has found no decision expressly determining the point. It would appear, however, that the certification by the Federal Aviation Administration of certain employees and not of other employees constitutes an affirmance of jurisdiction only over the employees certified. It has not been established that the Federal Aviation Administration exercises authority over employees engaged in the work of the employees involved in the case at bar and therefore, the Occupational Safety and Health Act applies to said operations. In view of this fact, the position of the respondent that the Occupational Safety and Health Act does not apply because of §4(b)(1) of the Act is without merit and must be overruled.

The cited standard, 29 C.F.R. 1910.132(a) reads as follows:

> "Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices and protective shields and barriers shall be provided, used, and maintained in a sanitary and reliable condition whenever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact."

It will be observed that said standard does not specifically require safety shoes in an industry such as that of respondent but such equipment would be required "whenever it is necessary by reason of hazards of processes or environment, etc." The test is whether it is "necessary by reason of hazards of

processes". It is the position of the respondent that the accident frequency is so slight as compared to the total number of man hours worked and total number of packages handled that safety shoes should not be required. Respondent further points out that the great majority of the packages handled are of a small nature weighing very few pounds and that those that generally fall off of the conveyor belt are only those weighing two pounds or less.

The respondent takes the position that those few instances in which there had been injuries represented problems which no longer existed. The hand baggage cart now has a stationery tongue, the weight of packages has been reduced from 90 to 70 pounds, and improper packaging has been forbidden. The change in the tongue of the cart would alleviate the possibility of an injury resulting from the tongue falling. The caution to customers to properly package their freight does not, however, insure that in all instances, the instructions of the respondent will be carried out. The reduction in weight from 90 to 70 pounds still leaves sufficient weight to cause substantial injury to a foot if an article fell on it and, therefore, it cannot be said that this weight reduction amounts to more than a slight mitigation of the hazard.

The respondent further points out that there is a substantial turnover of its employees, with the average time worked probably not being over two and a half months and that it would be a substantial burden on the employees to purchase shoes for such a short period of employment. The respondent also takes the position that because of the rapid turnover, it would constitute substantial burden on the respondent if the respondent, itself, had to buy the shoes each time an employee was employed.

The case of United Parcel Service of Ohio v. Occupational Safety and Health Review Commission, 570 F.2d 806 (8th Cir. 1978) was very similar on its facts to the case involved. The United Parcel Service is engaged in the business of

receiving, handling, transporting and delivering in interstate commerce parcels and packages of up to 50 pounds in weight and having maximum outside dimensions of 108 inches. It maintains a number of establishments throughout the country at which establishments, parcels are loaded in trucks, unloaded, sorted and dispatched for ultimate delivery in smaller trucks to the consignees of the packages. Three hundred and seventy five employees are classified as unloaders and sorters and they physically unload and sort the packages received at the facility. Of the 375 people employed in this work, only 10 worked at full shifts. These 10 spent 1/2 of a workday unloading parcels from trucks and the other half washing vehicles. The other 365 unloaders and sorters worked only a few hours each day. Many of them were young people attending college, trade schools, or high schools. The employment turnover among unloaders and sorters was extremely high. About 40% quit within the first 30 days of their employment and 50% or more quit within six months. The United Parcel Service handled an average of 175,000 to 200,000 parcels a day at the terminal in question. 60% of the parcels weighed 10 pounds or less and only 15% weighed more than 25 pounds. The parcels were removed from the trucks by the unloaders and placed on large conveyor belts which moved them into the interior of the facility where the sorters removed the parcels from the conveyor belts and placed them on smaller belts which conveyed them to various departments. Some of the smaller belts were above the head of the sorters. Parcels had a tendency to pile up on the belts and might fall from them.

In said case, 9 employees sustained job injuries over an 18 month period of time.

The administrative law judge held that a violation had been established and the Occupational Safety and Health Review Commission refused to grant administrative review. The case was thereupon appealed to the Court of Appeals for the 8th Circuit.

The Court held a violation had been established but the requirement of abatement that all employees handling said freight must wear safety shoes was an overly broad abatement requirement. The Court stated:

> "Upon reconsideration, the Commission may conclude that substantial workshoes, other than steel-toed shoes, may suffice to protect adequately the feet and toes of all the unloaders and sorters, or it may conclude that some of those employees need to wear steel-toed shoes whereas others do not. Or, the Commission may decide to direct its requirements at the hazard that has been described rather than to a protection of workers from the hazard."

The case was remanded for further consideration by the Review Commission.

It will be observed that the facts are substantially similar to the case now before this judge. In the United Parcel Service case, some of the conveyance belts were at a higher elevation than those of respondent in this case. There was also a somewhat higher percentage of heavier packages handled although the maximum weight was only 50 pounds whereas it is 70 pounds for the respondent.

The case at bar does not arise within the jurisdiction of the Court of Appeals for the 8th Circuit and, therefore, said case while persuasive, is not binding in this case. While it is true as contended by the respondent that the large majority of the freight is of a small and light nature, approximately 9% of the freight is over 10 pounds and some of the freight is as much as 70 pounds. With the very small number of injuries in comparison to the amount of freight handled, it becomes a close question as to whether a reasonable prudent man would be put on notice that the condition was such as to require the wearing of safety shoes. It will be observed, however, that while the number of injuries in the cases of Ryder Truck Lines, Inc. v. Brennon, 497 F.2d 230 (5th Cir. 1974); MacLane Trucking Company v. OSHRC, 503 F.2d (4th Cir. 1974) and the case of United Parcel Service, supra, was greater than in the case at bar, the percentage of injuries as compared to the amount of freight handled was in all of said cases extremely small. In all of said cases a violation was found notwithstanding the infrequency of injury. While it is

true that there was slightly more danger established in the United Parcel Service case than in the case of respondent, the difference is very slight and the facts are remarkably similar. The fact that a large majority of the packages are light does not alter the fact that heavy packages which could injure feet are handled. In the United Parcel case, both the Review Commission and the United States Court of Appeals for the 8th Circuit found that a violation had been established.

The Court of Appeals for the 8th Circuit did disapprove the remedy of the Review Commission in the light of the facts of that case. It was found there, as the evidence establishes in this case, that the cost of safety shoes is substantial. Testimony in the case at bar was that the cost was in excess of $50 per pair of shoes. In both cases there was a constant turnover of employees which would make the necessity of buying shoes, either by the employees or by the respondent, a rather substantial item. In the United Parcel Service case, the employees who handle the heavy objects were different employees than those who handled most of the smaller objects. That situation led itself to a remedy which would require the wearing of safety shoes only by those employees handling heavy parcels. If most of the employees, as in that case, handled only very light parcels, there would be no need for safety shoes for such employees. Unfortunately, in the case at bar, the evidence establishes that all of the employees involved in this case handled parcels of all sizes. It is therefore impossible in a remedy to designate certain employees as those required to wear safety shoes and to hold that safety shoes need not be worn by other employees.

The compliance officer testified that toe plates which could be inserted over the toes of normal shoes would be acceptable. Toe plates would not be as complete a protection as metal toed shoes but would certainly be a greater protection than no metal protection at all. The problem pointed out by the respondent that the expense would be substantial because shoes would have to be constantly purchased

as a result of the constant change of employees would be alleviated if toe plates were used in lieu of safety shoes. The toe plates could be reused, being slipped over the toes of shoes of first one employee and then another. In its brief, the respondent points out that a number of its employees are women. The record does not establish whether toe plates are available on womens shoes. It would appear however, that a woman's flat heel shoe built somewhat similar to a man, is available and that the toe plates could be used over such shoes. The shoes upon which the toe plates are placed should be substantial leather shoes.

In view of the substantial expense, due to employee turnover, if safety shoes are required, and the small number of accidents per man hour worked, safety shoes will not be required. The handling of packages up to 70 pounds in weight does, however, constitute some hazard to the employee's feet and therefore, toe plates will be required.

The violation would appear to be a non-serious violation and therefore, no penalty will be assessed.

## FINDINGS OF FACT

1. Respondent is engaged in the business of interstate transportation by air of articles of freight weighing between two pounds and 70 pounds.

2. Over 50% of articles of freight handled by respondent weigh two pounds or less. Nineteen percent weigh in excess of five pounds and 9% weigh in excess of 10 pounds. The maximum weight of articles handled is 70 pounds.

3. The respondent's employees are engaged in taking freight on and off of airplanes and sorting the freight in the respondent's terminal.

4. The freight is placed on a conveyor belt in the respondent's terminal and at times, will fall from the conveyor belt.

5. The conveyor belt is 32" high.

6. The great majority of the packages falling from the conveyor belt are of a light nature although some heavy packages fall from the conveyor belt.

7. There have been only three or four injuries to employees feet from falling objects over a period of several years.

8. The Federal Aviation Administration does not exercise jurisdiction over employees loading and unloading airplanes or sorting freight to be transported on airplanes.

9. The respondent's employees do not wear safety shoes nor shoes which are covered by metal toe plates.

10. The transportation manual of respondent prohibits said employees from wearing sandals, thongs, clogs or any type of open footwear that exposes any part of the foot.

11. The failure to wear metal protection over the toes of said employees constitutes some hazard of foot injury which should have been recognized by respondent.

12. Either safety shoes or toe plates over shoes would constitute a substantial additional protection to the employees toes against falling objects.

## CONCLUSIONS OF LAW

1. Respondent is engaged in a business affecting interstate commerce and is within the jurisdiction of the Occupational Safety and Health Act.

2. The Federal Aviation Administration does not exercise jurisdiction over the employees involved in this case and the Occupational Safety and Health Act therefore applies.

3. The respondent was, on or about February 27 and 28, 1980, in violation of Standard 29 C.F.R. 1910.132(a) by failing to require its employees to wear either safety shoes or toe plates over leather shoes.

## ORDER

It is therefore ordered that:

Respondent was, on or about February 27 and 28, 1980, in non-serious violation of Standard 29 C.F.R. 1910.132(a) in that its employees handling and sorting freight did not have adequate foot protection.

The respondent is not ordered to require its employees to wear safety shoes but is ordered to, within 30 days of the date this decision becomes a final order, require its employees handling freight to wear toe plates over leather shoes. No penalty is assessed.

Dated this 6th day of April, 1981.

JOHN S. PATTON
Judge

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

October 29, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Carl M. Geupel Construction Company

OSHRC DOCKET NO. 81-55 & 81-56

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION AND REMAND

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR EMPLOYEES

-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

- OFFICE OF THE JUDGES'
  Occupational Safety & Health Review Commission
  1515 Broadway - Rm. 3800
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Rev. 10/1/76

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>CARL M. GEUPEL CONSTRUCTION CO.,<br>Respondent. | OSHRC Docket Nos. 81-55 & 81-56 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

This case is before us on interlocutory appeal from a decision of Judge George O. Taylor. The Carl M. Geupel Construction Co. ("Geupel") contends that Judge Taylor erroneously denied its motion to suppress evidence obtained by the Occupational Safety and Health Administration ("OSHA") in an inspection of Geupel's highway construction site on the West Virginia Turnpike.

I.

On August 8, 1980, compliance officers from OSHA arrived at Geupel's worksite after receiving an employee's complaint concerning certain allegedly hazardous conditions. 1/ Geupel denied their entry. On October 7, 1980, OSHA applied in the United States District Court for the Southern District of West

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1/ The employee's complaint asserted the following:

1. No back-up alarms on Mack dump truck;
2. Excessive dust and insufficient use of water trucks;
3. Operation of trucks within three feet of loaded and primed holes;
4. Operation of two-way radios in proximity to loaded holes;
5. Improper transportation of explosives.

Virginia, on an ex parte basis, for a warrant to inspect Geupel's entire worksite. A warrant to inspect the entire worksite was granted on October 14, 1980. Following OSHA's inspection, Geupel was issued citations alleging several serious and other-than-serious violations of various safety and health standards.

After assignment of these cases to Judge George O. Taylor, Jr., Geupel moved to suppress the evidence obtained in the inspection and to vacate the citations. As grounds for its suppression motion, Geupel asserted that OSHA's warrant was invalid because the regulation that authorized OSHA to obtain an ex parte warrant was promulgated improperly. Geupel also contended that the scope of OSHA's inspection was overbroad because it was not limited to the conditions described in the employee's complaint.

On April 3, 1981, Judge Taylor denied Geupel's motion to suppress the evidence and vacate the citations. The judge concluded that OSHA's 1978 amendment to its inspection regulations to define "compulsory process" as including ex parte warrants was interpretive and, thus, its adoption without notice and comment was proper. The judge also concluded that OSHA's inspection was not overbroad. He reasoned that "a general inspection of a worksite is permissible when a warrant application establishes a reasonable belief that hazardous conditions may exist as to specific operations conducted at a worksite." According to the judge, a contrary conclusion would frustrate the purpose of the Act.

II.

Geupel then petitioned the Commission for interlocutory appeal of the judge's decision. On May 14, 1981, the Commission granted its petition and remanded this case to the judge for reconsideration in light of Sarasota Concrete Co., 81 OSAHRC 48/A2, 9 BNA OSHC 1608, 1981 CCH OSHD ¶ 25,360 (No.

78-5264, April 27, 1981), appeal filed, No. 81-5621 (5th Cir. June 23, 1981). In Sarasota Concrete, the Commission adopted the position that, when probable cause for an inspection is based solely on specific evidence of an existing violation, to accommodate the fourth amendment the inspection generally should be limited to the alleged violative condition. The Commission also held that, when a warrant is not tailored to the showing of probable cause, evidence obtained thereby that is not supported by probable cause would be excluded from the record. In determining whether to apply the exclusionary rule, the Commission further held that the ultimate issue is not whether the Secretary proceeded in good faith in obtaining the evidence in question but rather whether the evidence was lawfully obtained under the fourth amendment. In Sarasota Concrete, the Commission was not confronted with a situation where violations other than those alleged in the employee's complaint were in plain view and thus did not address the issues arising out of such a situation.

After reconsidering his prior decision in light of Sarasota Concrete, the judge "vacated" that part of the decision upholding the validity of OSHA's warrant authorizing an inspection of Geupel's entire worksite based on specific evidence of five allegedly violative conditions. The judge otherwise adhered to his prior decision in which he denied Geupel's suppression motion. Citing United States v. Peltier, 422 U.S. 531 (1975), the judge reasoned that Sarasota Concrete should not be applied retroactively to suppress evidence obtained in good faith in an inspection that occurred before the scope limitation of Sarasota Concrete was announced. The judge noted that federal courts were sharply divided on whether an employee complaint concerning specific conditions constituted probable cause for a wide-ranging inspection of a worksite. In the judge's view, retroactive application of the exclusionary rule would not further the rule's deterrent effect.

III.

Geupel petitioned the Commission for interlocutory appeal of the judge's reconsidered decision. This petition was granted and is now before us for resolution. On review, Geupel argues that the judge misapplied Sarasota Concrete by failing to give effect to the scope limitation announced in that decision. Geupel further contends that the judge erred in failing to apply the exclusionary rule based on the good faith of OSHA's compliance officers, since the Commission in Sarasota Concrete rejected the argument that good faith precludes the application of the exclusionary rule. Geupel contends that retroactive application of the exclusionary rule would be consistent with Supreme Court precedent and appropriate in this case because: (1) the Commission's decision in Sarasota Concrete was not a "sharp break" with prior authority as that term has been defined by the Court, and (2) the Court has held that the exclusionary rule will be applied to exclude evidence in all cases not yet final, even though the evidence was obtained in good faith reliance on constitutional standards then applicable. Geupel also argues the inspection was invalid because the regulation under which OSHA obtained its ex parte warrant was improperly promulgated.

The Secretary contends that the exclusionary rule should not be applied retroactively to suppress evidence obtained where a warrant, based on an employee's complaint, had been executed prior to issuance of a decision in Sarasota Concrete, because: (1) the exclusionary rule's purpose--deterrence of unlawful conduct--would not be furthered, and (2) the Commission's decision in Sarasota Concrete was a "sharp break" with prior precedent upon which the Secretary relied in good faith in seeking and obtaining a full-scope warrant. In any event, the Secretary contends that suppression of all of the evidence would not be appropriate since at least one item for which Geupel was cited was

specified in the employee's complaint. Finally, the Secretary argues that evidence relating to the other items may be admissible under other theories -- employee complaints were so pervasive as to justify a full-scope warrant, the Secretary was required to conduct an investigation to determine the location of the alleged violations, violations other than those complained of were in plain view, or the company has no reasonable expectation of privacy in that its activities were conducted in the "open fields." 2/

IV.

The primary issue to be decided is whether the judge erred in declining to retroactively apply the exclusionary rule of Sarasota Concrete in this case. 3/ We conclude that he did. Under Sarasota Concrete, the "ultimate issue" is not the Secretary's good faith, as the judge found, but whether the evidence was legally obtained under the fourth amendment. As the Commission held in Sarasota Concrete, evidence is not insulated from operation of the exclusionary rule if probable cause is found lacking, even though the Secretary proceeded in good faith in obtaining it. 4/

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2/ The Secretary also contends that the Commission erred in Sarasota Concrete in holding the exclusionary rule applicable to Commission proceedings. We reject this argument for the reasons given in Sarasota Concrete. The Secretary additionally argues that the Commission does not have authority to review a judicial officer's issuance of a warrant. This argument was rejected by the Commission in Sarasota Concrete, supra, and in Davis Metal Stamping, Inc., 82 OSAHRC 37/A2, 10 BNA OSHC 1741, 1982 CCH OSHD ¶ 26,134 (No. 78-5775, 1982).

3/ Geupel's argument that the warrant is invalid because it was issued ex parte was rejected by the Commission in Roberts Consolidated Indus., Inc., 82 OSAHRC 38/A2, 10 BNA OSHC 1761, 1982 CCH OSHD ¶ 26,135 (No. 78-5775, 1982).

4/ A similar "good faith" argument against retroactive application of the fourth amendment exclusionary rule was recently rejected by the Supreme Court in United States v. Johnson, 102 S.Ct. 2579, 2592-2593 (1982).

We likewise reject the Secretary's argument that application of the exclusionary rule in this case would not further the purpose of the rule, i.e. deterrence of further unlawful conduct. In Sarasota Concrete, the Commission noted that the potential deterrent effect inherent in applying the exclusionary rule outweighs the adverse effect on enforcement and that exclusion of evidence under the rule is the most practical remedy in our proceedings. We adhere to this view.

Indeed, the Commission's position in Sarasota Concrete, as reaffirmed in this decision, finds ample support in the recent Supreme Court decision in United States v. Johnson, 102 S.Ct. 2579 (1982). In that case, the Court stated:

> If, as the Government argues, all rulings resolving unsettled Fourth Amendment questions should be nonretroactive, then, in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior. Official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice would be excluded only in the one case definitively resolving the unsettled question. Failure to accord any retroactive effect to Fourth Amendment rulings would "encourage police or other courts to disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided approach." Desist v. United States, 394 U.S., at 277 (Fortas, J., dissenting).

102 S.Ct. at 2593-2594 (footnote and citation omitted; emphasis in original).

The Secretary also argues that Sarasota Concrete constituted a "sharp break" with prior precedent on which he had relied, and thus retroactive application of it should be precluded. We disagree. As stated by the Court in United States v. Johnson, a decision does not constitute a sharp break:

> [U]nless that ruling caused "such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one,".... Such a break has been recognized only when a decision explicitly overrules a past precedent of this Court,...or disapproves a practice this Court arguably has sanctioned in prior cases,...or overturns a longstanding and widespread practice

> to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved.

102 S.Ct. at 2588 (citations omitted). Prior to the Commission's decision in Sarasota Concrete, the decisions of appellate and district courts were divided as to whether the scope of an inspection must be limited to the conditions described in an employee's complaint. 5/ Thus, there was not a "near unanimous body of lower court authority" on the issue of scope of an inspection from which Sarasota Concrete constituted a sharp break. Similarly, as the Commission noted in Sarasota Concrete, the courts at that time were divided on the application of the exclusionary rule to OSHA cases. 6/ Moreover, the Commission had used the exclusion of evidence as a sanction against governmental misconduct prior to Sarasota Concrete, albeit in a different context. Metropak Containers Corp., 80 OSAHRC 98/C13, 8 BNA OSHC 2112, 1980 CCH OSHD ¶ 24,813 (No. 77-3861, 1980) (violation of protective order). Thus, Sarasota Concrete also was not a sharp break on the issue of application of the exclusionary rule. For these reasons,

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5/ Compare North American Car Co. v. Marshall, 626 F.2d 320 (3d Cir. 1980) (inspection must bear reasonable relationship to violations alleged in employee's complaint); Marshall v. Trinity Indus., Inc., 7 BNA OSHC 1851, 1979 CCH OSHD ¶ 23,943 (W.D. Okla. 1979) (inspection must be limited to areas complained of); and Whittaker Corp. v. OSHA, 6 BNA OSHC 1492 (M.D. Pa. 1978) (same); with Marshall v. Berwick Forge & Fabricating Co., 474 F.Supp. 104 (M.D. Pa. 1979) (broad scope inspection approved); and In re Seaward Int'l, Inc., 510 F.Supp. 314 (W.D. Va. 1980) (same), aff'd, 644 F.2d 880 (4th Cir. 1981). Cf. Burkart Randall Div. of Textron, Inc. v. Marshall, 625 F.2d 1313, 1323 (7th Cir. 1980) (collecting cases) (broad scope inspection approved).

6/ Compare Todd Shipyards Corp. v. Secretary of Labor, 586 F.2d 683 (9th Cir. 1978) (suggesting exclusionary rule not applicable to OSHA proceedings) with Savina Home Indus., Inc. v. Secretary of Labor, 594 F.2d 1358 (10th Cir. 1979) (indicating exclusionary rule applicable); see also In re Inspection of Central Mine Equipment Co., 7 BNA OSHC 1185, 1979 CCH OSHD ¶ 23,309 (E.D. Mo. 1978) (suppressing evidence obtained outside proper scope of OSHA inspection), rev'd on other grounds, 608 F.2d 719 (8th Cir. 1979); Weyerhaeuser Co. v. Marshall, 6 BNA OSHC 1811, 1978 CCH OSHD ¶ 22,900 (E.D. Wis. 1978) (suppressing evidence obtained in OSHA inspection), aff'd, 592 F.2d 373 (7th Cir. 1979).

we find that the judge's refusal to apply Sarasota Concrete to this case was in error. 7/

V.

Since the judge held Sarasota Concrete inapplicable in this case, he did not consider arguments concerning whether probable cause existed for the specific evidence the Secretary wished to introduce below. Thus, in applying Sarasota Concrete on remand the judge must determine: (1) what, if any, part of the inspection was supported by probable cause in light of the criteria contained in Sarasota Concrete; (2) the merits of the Secretary's "plain view" argument; 8/ and, (3) what, if any, evidence should be suppressed.

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7/ Although in United States v. Johnson, the Court set forth definitive rules governing when a decision construing the fourth amendment is to be applied retroactively, it also noted that questions of civil retroactivity continue to be governed by Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) ("Chevron"). As the case before us concerns the retroactive application of a fourth amendment decision, we have been guided by United States v. Johnson. However, we conclude that application of the criteria for retroactivity articulated in Chevron would yield the same result.

8/ On the issue of "plain view," see Ackermann Enterprises, Inc., 82 OSAHRC 29/A2, 10 BNA OSHC 1709, 1982 CCH OSHD ¶ 26,090 (No. 80-4971, 1982). In that case the Commission held that, when a compliance officer is granted permission to be in a particular area, his observation of objects in plain view from that area is not a constitutional violation.

Accordingly, we reverse the judge's holding with respect to the retroactive application of the exclusionary rule and remand this case 9/ for further proceedings consistent with this decision. 10/

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
Executive Secretary

DATED: OCT 29 1982

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9/ Based on his separate views stated in Roberts Consolidated Indus. Inc., 82 OSAHRC 38/A2, 10 BNA OSHC 1761, 1763 n.5, 1982 CCH OSHD ¶ 26,135 at pp. 32,906-32,907 n. 5 (No. 78-5775, 1982), Chairman Rowland would find that OSHA's inspection of Geupel's worksite was invalid and vacate the Secretary's citation. However, although Chairman Rowland does not join in the Commission's order of remand in this case, he does agree that Sarasota Concrete's exclusionary rule is entitled to retroactive application.

10/ We remand this case to the Chief Administrative Law Judge for assignment since Judge Taylor is no longer employed by the Commission.

COTTINE, Commissioner, concurring:

On May 14, 1981, the Commission remanded this case to the administrative law judge for reconsideration in light of the Commission decision in Sarasota Concrete Co., 81 OSAHRC 48/A2, 9 BNA OSHC 1608, 1981 CCH OSHD ¶25,360 (No. 78-5264, 1981), appeal filed, No. 81-5621 (5th Cir. June 23, 1981). In view of this specific direction by the Commission, the judge was without authority to deny retroactive application of Sarasota Concrete Co.. See United States v. Impson, 535 F.2d 286 (5th Cir. 1976); see also Chapman v. United States, 547 F.2d 1240, 1246-47 (5th Cir. 1972). Accordingly, I concur in the Commission remand of this case for application of Sarasota Concrete Co., for a determination on the remaining issues relevant to the Respondent's suppression motion,[1/] and for appropriate further proceedings.

However, my colleagues err in concluding that the holding of United States v. Johnson, 102 S.Ct. 2579 (1982), regarding the retroactive application to criminal enforcement proceedings of decisions construing the Fourth Amendment, is controlling in this administrative proceeding. In United States v. Johnson the Court expressly stated,

> all questions of civil retroactivity continue to be governed by the standard enunciated in Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107 (1970).

102 S.Ct. at 2594-95. Although Fourth Amendment prohibitions apply to

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1/ The Commission does not directly review the validity of a magistrate's warrant but undertakes a de novo inquiry to determine the existence of probable cause for an inspection and whether to use all or part of the evidence obtained. Sarasota Concrete Co., supra; see Babcock & Wilcox Co. v. Marshall & OSHRC, 610 F.2d 1128 (3d Cir. 1979); cf. United States v. Christine, No. 81-2077 (3d Cir. Aug. 30, 1982)(It is appropriate to sever the invalid portions of a warrant and suppress illegally seized evidence while leaving the valid portions of a warrant intact and legally seized evidence admissible.); United States v. Cook, 657 F.2d 730 (5th Cir. 1981)(same).

civil as well as criminal investigations, Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); See v. City of Seattle, 387 U.S. 541 (1967), the Fourth Amendment standards governing these investigations differ. Marshall v. Barlows, Inc., supra; United States v. Robson, 477 F.2d 13, 19 (9th Cir. 1973). Proceedings before the Commission are civil in nature. Atlas Roofing Co. v. OSHRC, 430 U.S. 442 (1977); Frank Irey, Jr., Inc. v. OSHRC, 519 F.2d 1200 (3d Cir. 1974), aff'd on rehearing en banc, 519 F.2d 1215 (3d Cir. 1975).[2/] The appropriate criteria to be applied in this civil administrative proceeding, Marshall v. Barlow's, Inc., supra; see U.S. v. Thriftimart, Inc., 429 F.2d 1006 (9th Cir.), cert. denied, 400 U.S. 926 (1970), are those set forth in Chevron Oil v. Huson, supra, and cited by the Court in United States v. Johnson:

> In the civil context, in contrast [to a criminal proceeding], the "clear break" principle has usually been stated as the threshold test for determining whether or not a decision should be applied nonretroactively. See, e.g., Chevron Oil Co. v. Huson, 404 U.S. 97, 106, 92 S.Ct. 349, 355, 30 L.Ed.2d 296 (1971). Once it has been determined that a decision has "establish[ed] a new principle of law, either by overruling clear past precedent on which litigants may have relied. . .or by deciding an issue of first impression whose resolution was not clearly foreshadowed," the Court has gone on to examine the history, purpose, and effect of the new rule, as well as the inequity that would be imposed by its retroactive application. Id., at 107, 92 S.Ct., at 355. See also Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 499, 88 S.Ct. 2224, 2234, 20 L.Ed.2d 1231 (1968).

102 S.Ct. at 2587 n.12; see also Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S.Ct. 2858, 2880 (1982).

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2/ My colleagues indicate that because this case concerns the retroactive application of a Fourth Amendment ruling, United States v. Johnson is the appropriate guide. However, the nature of the issue does not change the nature of the proceeding. In Zweibon v. Mitchell, 606 F.2d 1172 (D.C. Cir. 1979), the court of appeals applied the Chevron Oil Co. criteria to determine the retroactive application of the Fourth Amendment warrant requirement to national security surveillances in the context of a civil damage action. In addition, although the court reached the same result, it criticized the "District Court's overemphasis on criminal law concepts in rejecting retroactivity in this civil case." 606 F.2d at 1179 (emphasis in original).

The initial inquiry is whether the adjudicatory body established a new rule of law, either by overruling precedent or by announcing a rule that was "not clearly foreshadowed." Because Sarasota Concrete Co. did not overrule a prior ruling of the Commission, the inquiry is whether the ruling was "not clearly foreshadowed."

In Sarasota Concrete Co. the Commission applied established Fourth Amendment principles governing inspections under regulatory statutes previously set forth by the Court in Marshall v. Barlow's, Inc., supra, Camara v. Municipal Court, 387 U.S. 523 (1967), and See v. City of Seattle, supra, and concluded that the inspection initiated by an employee complaint was overbroad. Although the issue decided by the Commission was one of first impression in this forum, its resolution was based on Fourth Amendment principles of controlling significance.[3/] Accordingly, it cannot be said that Sarasota Concrete Co. established a new principle of law that was "not clearly foreshadowed," so as to justify prospective effect only. See Zweibon v. Mitchell, 606 F.2d 1172, 1177-79 (D.C. Cir. 1979).[4/] Accordingly, I concur in the disposition of this case.

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3/ As the administrative agency charged with the responsibility of formulating a uniform national body of occupational safety and health law, the Commission need not acquiesce in views of the federal lower courts that conflict with those of the agency. However, the Commission is bound to follow and apply decisions of the United States Supreme Court. See Raybestos Friction Materials Co., 80 OSAHRC 111/E14, 9 BNA OSHC 1141, 1143, 1980 CCH OSHD ¶24,910 at p. 30,719 (No. 80-2793, 1980); Farmer's Export Co., 80 OSAHRC 66/A2, 8 BNA OSHC 1655, 1656 n.4, 1980 CCH OSHD ¶24,569 at p. 30,080 n. 4 (No. 78-1708, 1980) and cases cited.

4/ The Secretary's reliance on its past inspection practice under its implementing regulations, 29 C.F.R. § 1903.11, to establish that Sarasota Concrete Co. represented a sharp break in the law does not compel a different result.

> Appellees' claimed reliance on prior Executive practice does not bear directly on our determination, since Executive actions cannot represent an authoritative source of constitutional standards. Zweibon I, supra note 6 [516 F.2d 594 (D.C.Cir. 1975) (en banc), cert. denied, 425 U.S. 944 (1976)], 170 U.S.App.D.C. at 25-26, 516 F.2d at 618-619.

Zweibon v. Mitchell, 606 F.2d at 1179 n. 36. But see Weinberg v. Mitchell, 588 F.2d 275 (9th Cir. 1978).

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
6525 BELCREST ROAD, SUITE 1005
HYATTSVILLE, MARYLAND 20782
(301) 436-8870

IN REFERENCE TO SECRETARY OF LABOR v.

CARL M. GEUPEL CONSTRUCTION COMPANY, INC. OSHRC DOCKET NO. 81-55 and 81-56

NOTICE IS HEREBY GIVEN TO THOSE LISTED BELOW:

FOR THE SECRETARY OF LABOR

Marshall H. Harris, Regional Solicitor
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3535 Market Street
Philadelphia, Pennsylvania 19104
attn: Mark V. Swirsky, Esq.

FOR EMPLOYEES

FOR EMPLOYER

Roger L. Sabo, Esq.
Knepper, White, Arter & Hadden
180 East Broad Street
Columbus, Ohio 43215

OF Decision and Order Upon Reconsideration.

TO WIT: See the attached.

George O. Taylor Jr.
GEORGE O. TAYLOR, JR.
Judge, OSHRC

Dated: June 12, 1981

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC DOCKET NOS. 81-55 and 81-56 |
| CARL M. GEUPEL CONSTRUCTION COMPANY, INC., | : | |
| Respondent. | : | |

## DECISION AND ORDER UPON RECONSIDERATION

Taylor, Judge:

This case has been remanded to me to reconsider, in light of Sarasota Concrete Co., OSHRC Docket No. 78-5264 (April 27, 1981), my April 3, 1981, decision denying the respondent's motion for vacation of the citations and suppression of evidence. In Sarasota, the Commission held "that, when probable cause for an inspection is based solely on specific evidence of an existing violation, . . . the inspection should be limited to the alleged violative condition." My April 3, 1981, decision is contrary to the Sarasota decision insofar as it upholds the validity of the inspection warrant authorizing an inspection of the respondent's entire worksite on the basis of specific evidence of five violative conditions. Accordingly, that portion of my prior decison is vacated. However, I otherwise adhere to my decision of April 3, 1981, including the denial of the respondent's motion. In my opinion, the holding in Sarasota, which was rendered on April 27, 1981, should not be applied to suppress evidence obtained before April 27, 1981, as the result of a good faith inspection that exceeded the scope limitations announced in Sarasota.

The question of what constitutes adequate probable cause for the issuance of administrative inspection warrants is far from settled by the Federal courts. This is a developing area of the law. In particular, as indicated in my prior decision, the Federal courts are widely divided on the scope issue resolved by the Commission in Sarasota. The warrant application in this case was filed on October 7, 1980, the warrant was issued on October 14, 1980, and the inspection of the respondent's worksite on the West Virginia Turnpike began on October 15, 1980. Before any of these actions, a United States District Court located within the judicial circuit whose jurisdiction includes West Virginia upheld the validity of a full scope warrant issued on the basis of a limited scope employee complaint. In re Seaward International, Inc., No. 80-98 (W.D. Va., September 19, 1980),[1/] aff'd, No. 80-1708 (4th Cir., March 11, 1981). Considering this in conjunction with the unsettled state of the law on probable cause for the issuance of administrative inspection warrants, I conclude that the complainant acted in good faith in applying for a warrant to inspect the respondent's entire worksite and in conducting such a broad inspection.

As the Commission so correctly recognized in Sarasota, the primary purpose of the exclusionary rule is to deter future illegal conduct of law enforcement personnel. The Sarasota decision will achieve this purpose in the future, but retroactive application of that decision will not enchance Sarasota's salutary effect, particularly in situations where governmental officials have acted in good faith.[2/]

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1/ Unofficially reported at 1980 CCH OSHD ¶ 24,794.

2/ It is well-settled that the exclusionary rule should not be applied in those instances where governmental officials acted in a good faith, although mistaken, believe that their conduct was lawful. See, e. g., United States v. Peltier, 422 U.S. 531 (1975); Michigan v. Tucker, 417 U.S. 433 (1974); United States v. Williams, 622 F.2d 830 (5th Cir. 1980).

The respondent's contention that "[t]he non-retroactivity issue is concerned with only those cases where there were convictions already obtained" is incorrect. See, e. g., Michigan v. Tucker, supra; Desist v. United States, 394 U.S. 244, 254 (1969).

I addressed the respondent's argument that 29 U.S.C. § 657(f)(1) limits the complainant's inspection authority in my prior decision in which I held that "section 657(f)(1) merely states the minimum action that must be taken by the complainant when there has been an employee complaint." This conclusion is supported by a portion of the lead opinion in Burkhart Randall Division of Textron, Inc. v. Marshall 625 F.2d 1313, 1326 (7th Cir. 1980), to which neither of the two separate opinions takes exception.

Accordingly, after reconsideration of my prior decison, the respondent's motions for vacation of the citations and suppression of evidence is again denied.

George O. Taylor Jr.
GEORGE O. TAYLOR, JR.
Judge, OSHRC

Dated: June 12, 1981
Hyattsville, Maryland.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
6525 BELCREST ROAD, SUITE 1005
HYATTSVILLE, MARYLAND 20782
(301) 436-8870

IN REFERENCE TO SECRETARY OF LABOR v.

CARL M. GEUPEL CONSTRUCTION COMPANY, INC.

OSHRC DOCKET NO. 81-0055 & 81-0056

NOTICE IS HEREBY GIVEN TO THOSE LISTED BELOW:

FOR THE SECRETARY OF LABOR

Marshall H. Harris, Regional Solicitor
U. S. Department of Labor
14480 Gateway Building
3535 Market Street
Philadelphia, Pennsylvania 19104
Attn: Mark V. Swirksy, Esq.

FOR EMPLOYEES

FOR EMPLOYER

Roger L. Sabo, Esq.
Knepper, White, Arter & Hadden
180 East Broad Street
Columbus, Ohio 43215

OF Ruling on respondent's request for certification of interlocutory appeal.

TO WIT: Denied. In my opinion, the portion of my April 3, 1981, decision pertaining to the validity of the ex parte inspection warrant does not present an issue about which there is a substantial ground for difference of opinions. Moreover, I conclude that the proceedings will not be expedited by an immediate appeal of any of my rulings in that decision. Even if I were reversed as to the portion of my opinion regarding the scope of the warrant, there should be no dismissal of any of the charges without an evidentiary hearing. Such a hearing is necessary to determine the applicability of the plain view rule. The respondent's attempt to distinguish the noise citation in Docket No. 81-55 lacks merit. The citation indicates that the respondent's worksite was located on the West Virginia Turnpike, which apparently was public land. Therefore, dismissal of that citation would be inappropriate without an evidentiary hearing to ascertain whether there was an intrusion of sufficient magnitude to violate the Fourth Amendment. I also note the material quoted by the respondent from Marshall v. Central Mine Equipment Co., 608 F.2d 719, 721 (8th Cir. 1979), is dictum.

George O. Taylor Jr.
GEORGE O. TAYLOR, JR.
Judge, OSHRC

Dated: April 13, 1981

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
6525 BELCREST ROAD, SUITE 1005
HYATTSVILLE, MARYLAND 20782
(301) 436-8870

IN REFERENCE TO SECRETARY OF LABOR v.

CARL M. GEUPEL CONSTRUCTION COMPANY, INC.

OSHRC DOCKET NO. 81-0055 & 81-0056

NOTICE IS HEREBY GIVEN TO THOSE LISTED BELOW:

FOR THE SECRETARY OF LABOR

Marshall H. Harris, Regional Solicitor
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14480 Gateway Building
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FOR EMPLOYEES

FOR EMPLOYER

Roger L. Sabo, Esq.
Knepper, White, Arter & Hadden
180 East Broad Street
Columbus, Ohio 43215

OF Decision and Order on Respondent's Motions to Suppress Evidence and Vacate Citations

TO WIT: See Attached.

George O. Taylor Jr.
GEORGE O. TAYLOR, JR.
Judge, OSHRC

Dated: April 3, 1981

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UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVEIW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket Nos. 81-55 & 81-56 |
| CARL M. GEUPEL CONSTRUCTION COMPANY, INC., | : | |
| Respondent. | : | |

## DECISION AND ORDER ON RESPONDENT'S MOTIONS TO SUPPRESS EVIDENCE AND VACATE CITATIONS

Taylor, Judge:

In motions to suppress evidence and vacate the citations in these cases, the respondent contends that the inspection warrant obtained by the complainant was "improper and illegal" for several reasons. For reasons that follow, the respondent's motions are denied.

The complainant's inspection was conducted pursuant to an inspection warrant issued by a Federal magistrate of the United States District Court for the Southern District of West Virginia. The warrant application asserts that the complainant received an employee complaint that alleged that the following unsafe conditions existed at the respondent's worksite:

> no back-up alarms on Mack dump trucks, excessive dust and insufficient use of water trucks, operation of trucks within three feet of loaded and primed holes, operation of two-way radios in proximity to loaded holes, and improper transportation of explosives.

A copy of the employee complaint, which indicates the complaint was filed by an employee representative, was attached to the warrant application.

The respondent does not contend that there was inadequate probable cause to support the issuance of an inspection warrant authorizing an inspection of the conditions referred to in the complaint. Instead, the respondent contends that the inspection warrant was defective in that it authorized inspection of the entire worksite,[1/] rather than limiting it to the hazards alleged in the complaint.

The complainant contends that he may be permitted to make an inspection of all activities at a worksite after demonstrating probable cause to believe that violations of the Act are occurring in connection with only some of the operations being conducted at an employer's worksite. I agree with the complainant's contention where, as here, the warrant limits the inspection to safety and health matters that fall within the purview of the Act[2/] and conforms to the reasonableness requirements prescribed in the Act. See In re Blocksom and Co., No. S 76-170 (N. D. Ind., November 1, 1977).[3/]

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1/ The warrant authorized the complainant to:

> inspect and investigate in a reasonable manner and to a reasonable extent . . . the workplace or environment where work is performed by employees of the employer and all pertinent conditions, structures, machines, apparatus, devices, equipment, materials, and all other things therein (including records, files, papers, processes, controls, and facilities) bearing on whether this employer is furnishing to its employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical injuries to its employees, and whether this employer is complying with the Occupational Safety and Health Standards promulgated under the Act and the rules, regulations, and orders issued pursuant to the Act. (Emphasis added.)

2/ See footnote 1, supra.

3/ Unofficially reported at 6 BNA OSHC 1001. See especially 6 BNA OSHC 1012-1013.

My conclusion that the inspection warrant is not overly broad is consistent with the Supreme Court's recognition that probable cause for an area inspection of private property may be established by an agency's "appraisal of conditions in the area as a whole," rather than on the agency's "knowledge of conditions in each particular building" to be inspected.[4/] Camara v. Municipal Court, 387 U. S. 523, 536 (1967). Of course, the probable cause requirements for inspecting business premises are even less strict than those for inspecting private homes. See v. City of Seattle, 378 U. S. 541, 545–546 (1967).

In the See case, the Supreme Court indicated that probable cause for issuing an inspection warrant is to be measured "against a flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved." 387 U. S. at 545. In Camara, the Court recognized that "the public interest demands that all dangerous conditions be prevented or abated." 387 U. S. at 537. I have considered these principles in concluding that a general inspection of a worksite is permissible when a warrant application establishes a reasonable belief that hazardous conditions may exist as to specific operations conducted at a worksite. See Dravo Corp. v. Marshall, Civil Action No. 77–284 (W. D. Pa., April 5, 1977),[5/] aff'd, 578 F.2d 1373 (3d Cir. 1978). A contrary conclusion would frustrate the Act's purpose of assuring "so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our business resources"[6/] and, therefore, be adverse to the public interest in preventing and abating hazardous conditions. See In re Gilbert & Bennett Manufacturing Co., 589 F.2d 1335, 1343 (7th Cir. 1979); In re

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4/ As a corollary to this, it follows that, when the probable cause requirement is satisfied as to particular activities at a worksite, a reasonable basis is provided for a belief that the same or other hazardous conditions may exist as to other activities at the worksite.

5/ Unofficially reported at 5 BNA OSHC 2057.

6/ 29 U.S.C. § 651(b).

Chicago Magnet Wire Corp. No. 77 C 3025 (N. D. Ill., October 27, 1977).[7/] As the Supreme Court acknowledged in Camara, "reasonableness is . . . the ultimate standard." 387 U. S. at 539. A general inspection was reasonable in the instant case. Just as hazardous conditions in a dwelling "may not be apparent to the inexpert occupant himself,"[8/] safety and health hazards at a place of employment may not be apparent to employees who normally do not possess any expertise in safety and health matters. Therefore, employees cannot be expected to complain about many hazardous conditions that exist in their work environment.

A number of Federal court decisions, some of which are cited by the repondent, support the respondent's position. However, I believe those decisions do not adequately recognize that administrative inspection warrants, rather than search warrants, were in issue in those cases and that the establishment of "[p]robable cause in the criminal law sense" is not required for issuance of an administrative inspection warrant. Marshall v. Barlow's, Inc., 436 U. S. 307, 320 (1978). In my view, a better approach on the scope of administrative inspection warrants has been taken in decisions such as Burkart Randall Division of Textron, Inc. v. Marshall, 625 F.2d 1313, 1322-1326 (7th Cir. 1980); In re Seaward International, Inc., No. 80-98 (W. D. Va., September 19, 1980),[9/] aff'd, No. 80-1708 (4th Cir., March 11, 1981); In re Marsan Co., No. S 79-90 (N. D. Ind., June 21, 1979);[10/] and In re Chicago Magnet Wire Corp., supra.

The respondent also contends that 29 U.S.C. § 657(f)(1) precludes a general inspection in this case. Section 657(f)(1) requires the complainant to make a "special inspection" upon receipt of an employee complaint if he determines there are reasonable grounds to believe that a violation or an imminent danger exists at a

7/ In re Chicago Magnet Wire Corp. is unofficially reported at 5 BNA OSHC 2024.

8/ Camara v. Municipal Court, supra, 387 U.S. at 537.

9/ Unoffically reported at 1980 CCH OSHD ¶ 24,794.

10/ Unofficially reported at 7 BNA OSHC 1557.

worksite. As the Seventh Circuit indicates in Burkart Randall Division of Textron, Inc. v. Marshall, supra, 625 F.2d at 1326, section 657(f)(1) merely states the minimum action that must be taken by the complainant when there has been an employee complaint. I do not view the provision as a limitation on the authority of the complainant to make general inspections. I find nothing in the legislative history of the statute that supports the respondent's position.

Relying principally on Cerro Metal Products v. Marshall, 620 F.2d 964 (3rd Cir. 1980), and that decision's interpretation of Marshall v. Barlow's, Inc., supra, the respondent contends that the issuance of the warrant was invalid because it was issued ex parte without affording the respondent notice of the warrant application and an opportunity to oppose it. The district court initially held in Cerro[11/] that the complainant was not authorized to apply for an ex parte inspection warrant under an unamended version of 29 C.F.R. § 1903.4. After amendment of that regulation, the district court held[12/] that the complainant was still not authorized to seek an ex parte warrant because the amendment of 29 C.F.R. § 1903.4[13/] to define "compulsory process" as including ex parte warrants was invalid in that the amendment was promulgated without first affording the public with notice of the

11/ 467 F. Supp. 869 (M. D. Pa. 1979).

12/ Id.

13/ The regulation was amended on December 22, 1978. 43 Fed. Reg. 59838 (1978). Under paragraph (a) of 29 C.F.R. § 1903.4, as amended, when an inspector is refused entry into a worksite selected for inspection, he is required to render a report to the area director who, after certain consultations, "shall take appropriate action, including compulsory process, if necessary." Except for minor deletions, this paragraph made no changes in the prior version of § 1903.4. Paragraphs (b), (c), and (d) were added to § 1903.4 by the amendment. The Cerro decisions focus on paragraph (d) which provides the following:

> For purposes of this section, the term compulsory process shall mean the institution of any appropriate action, including ex parte application for an inspection warrant or its equivalent.

After purportedly following the rulemaking procedures provided in 5 U.S.C. § 553, the complainant again amended 29 C.F.R. § 1903.4. 45 Fed. Reg. 65916 (October 3, 1980). This version also indicates that compulsory process includes ex parte applications for inspection warrants. The latest amendment is not relevant to the instant cases as the inspection warrant was issued before November 3, 1980, the effective date of the amendment.

contemplated amendment and an opportunity to comment upon it as required by 5 U.S.C. § 553. The Third Circuit affirmed the district court. 620 F.2d at 983.

In my opinion, the amendment of 29 C.F.R. § 1903.4 is exempt from the rulemaking requirements of the Administrative Procedure Act by the interpretive rule exception contained in 5 U.S.C. § 553(b)(A). Marshall v. W. and W. Steel Co., 604 F.2d 1322 (10th Cir. 1979); In re Seaward International, Inc., supra; Amoco Oil Co. v. Marshall, Civil Action No. G-80-45 (S. D. Tex., September 9, 1980);[14/] In re S. D. Warren, Division of Scott Paper, No. Misc. 79-69 P (D. Me., December 14, 1979).[15/] Moreover, since the term "compulsory process" is broad enough to include ex parte warrants, an application for an ex parte warrant would be lawful even if 29 C.F.R. § 1903.4 had not been amended. Stoddard Lumber Co. v. Marshall, 627 F.2d 984, 989-990 (9th Cir. 1980).

"Compulsory" means "involuntarily, . . . coerced by legal process." Black's Law Dictionary 359 (Rev. 4th ed. 1968). An inspection warrant meets this criteria. As the district court recognized in footnote 9 of its Cerro decision, " 'compulsory process' does not have to connote adversary process." Traditionally, search warrant proceedings have been ex parte.[16/] See In re Sauget Industrial Research and Waste Treatment Association, Civil No. 79-4105 (S. D. Ill., September 12, 1979);[17/] McCormick on Evidence 383 (2d ed. 1972).

To support their conclusions in Cerro that "compulsory process" as used in the unamended version of 29 C.F.R. § 1903.4 did not include ex parte warrants, both the district court and the Third Circuit refer to footnote 15 in the Barlow's decision, which provides the following at 436 U. S. 320:

14/ Unofficially reported at 8 BNA OSHC 2030.

15/ Unofficially reported at 7 BNA OSHC 2010.

16/ It has been said that "[t]he issuance of an inspection warrant is, of necessity, an ex parte proceeding." Marshall v. Horn Seed Co., No. CIV-78-1308-T (W. D. Okla., March 16, 1979), unofficially reported at 7 BNA OSHC 1182. This is consistent with the Supreme Court's observation in Barlow's that "the Act . . . regulates a myriad of safety details that may be amenable to speedy alteration or disguise." 436 U. S. at 316.

17/ Unofficially reported at 7 BNA OSHC 1773.

> Insofar as the Secretary's statutory authority is concerned, a regulation expressly providing that the Secretary could proceed ex parte to seek a warrant or its equivalent would appear to be as much within the Secretary's power as the regulation currently in force and calling for "compulsory process."

Both Cerro decisions also rely on the Solicitor General's arguments before the Supreme Court in concluding that "compulsory process" as used in the unamended version of 29 C.F.R. § 1903.4 did not include ex parte warrants. As acknowledged in the Cerro decisions, however, the Court's interpretation of § 1903.4 was "dictum." Equally significant at least, is the Court's pronouncement in Barlow's that:

> The District Court did not address the issue whether the order for inspection that was issued in the case was the functional equivalent of a warrant, and the Secretary has limited his submission in this case to the constitutionality of a warrantless search of the Barlow establishment authorized by [29 U.S.C. § 657(a)]. He has expressly declined to rely on 29 C.F.R. § 1903.4 and upon the order obtained in this case.

436 U.S. at 325 n. 23. Thus, it is clear that the meaning of the unamended version of § 1903.4 was not fully litigated before the Court and that the Court's dictum relates to a matter that only peripherally touched the ultimate issue of the validity of warrantless searches.[18/] In re S. D. Warren, Division of Scott Paper, supra.

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18/ The Barlow's decision notes that provisions in the 1972 Compliance Operations Manual for OSHA inspectors pertaining to ex parte warrants and to the obtaining warrants upon anticipating an entry refusal were deleted from that manual's successor, OSHA Field Operations Manual, Vol. V, at V-4-V-5, "leaving only the details for obtaining 'compulsory process' after an employer has refused entry." 436 U. S. at 318 n. 13. However, since change 2 of the Field Operations Manual was published in January 1976, paragraph D1c(8), in Chapter V of the manual, has indicated that "[e]xcept in unusual circumstances, . . . there shall be no advance notice to the employer concerning compulsory process." This tends to negate the Court's equivocal conclusions that "the kind of process . . . apparently anticipated by the regulation provides notice to the business operator." 436 U.S. at 318 (emphasis added). Moreover, the complainant has demonstrated that he construed § 1903.4 as encompassing ex parte warrants by submitting, before issuance of the Barlow's decision, numerous applications for such warrants. See, e. g., Pelton Casteel, Inc. v. Marshall, 588 F.2d 1182 (7th Cir. 1978); Weyerhaeuser Co. v. Marshall, 452 F. Supp. 1375 (E. D. Wis. 1978), aff'd 592

(Footnote Continued)

In addition to the cases cited above, several other decisions rendered after the Barlow's decision have approved what appear to be ex parte warrant applications. See, e. g., In re Gilbert & Bennett Manufacturing Co., 589 F.2d 1335 (7th Cir. 1979); Pelton Casteel, Inc. v. Marshall, 588 F.2d 1182 (7th Cir. 1978); Marshall v. Miller Tube Corp. of America, No. 78-C-1591 (E. D. N.Y., October 12, 1978).[19] Pelton Casteel and Miller Tube were decided before the amendment to 29 C.F.R. § 1903.4 was published. Gilbert & Bennett was decided 11 days after the amendment was published, making it doubtful that the court was aware of the amendment when the decision was rendered. No concern was expressed in any of the three decisions as to the necessity for clarifying the term "compulsory process" as used in § 1903.4.

Sound logic dictates the conclusion that a prior amendment to § 1903.4 was not necessary to validate applications by the complainant for ex parte warrants. Such a requirement would unduly elevate form over substance and conflict with the Act's purpose of achieving safe and healthful working conditions for employees.[20] Simply put, the Supreme court has indicated in Barlow's that ex parte inspection warrants are permissible,[21] the issuance of ex parte warrants is consistent with

18/ (Footnote Continued)

F.2d 373 (7th Cir. 1979); In re Quality Products, Inc., No. 77-0075 M-00 (D. R. I., May 30, 1978), unofficially reported at 6 BNA OSHC 1663, rev'd, 592 F.2d 611 (1st Cir. 1979); Marshall v. Multi-Cast Corp., No. C77-414 (N. D. Ohio, January 10, 1978), unofficially reported at 6 BNA OSHC 1486; Marshall v. Silberline Manufacturing Co., Civil Action No. Misc. 77-24 (M. D. Pa., October 20, 1977); Marshall v. Chromalloy American Corp., 433 F. Supp. 330 (E. D. Wis. 1977), aff'd, 589 F.2d 1335 (7th Cir. 1979); In re Gilbert & Bennett Manufacturing Co., Civ. No. 77 C 856 (N. D. Ill., April 12, 1977), unofficially reported at 5 BNA OSHC 1375, aff'd, 589 F.2d 1335 (7th Cir. 1979).

19/ Unofficially reported at 6 BNA OSHC 2042.

20/ In those situations where entry was denied, a contrary conclusion would leave employees unprotected from worksite hazards while the complainant went through the formality of amending the regulation. Of course, requiring the complainant to resort to the time-consuming rulemaking procedures required by 5 U.S.C. § 553 would extend even further the time that these employees were not protected.

21/ 436 U. S. at 320.

congressional intent to achieve surprise and to avoid delay,[22/] and the term "compulsory process" is sufficiently broad to include ex parte warrants. Accordingly, I find no merit in the respondent's argument that the Commission should adopt the Cerro holdings.

The respondent contends that the inspection warrant was improperly issued because the warrant application did not comply with 28 U.S.C. § 1746. The respondent also points out that the employee complaint attached to the application did not reveal the name of the complaining employee. There is not a scintilla of merit in the respondent's contention.

The warrant application is signed by one of the complainant's area directors. The application also indicates that it was sworn to before the United States Magistrate and subscribed in his presence. This constitutes proper execution of the warrant application. When so executed, there is no necessity to support the application with an employee complaint, much less reveal the name of the complaining employee. See Marshall v. Milwaukee Boiler Manufacturing Co., 626 F.2d 1339, 1345 (7th Cir. 1980); In re Gilbert & Bennett Manufacturing Co., supra, 589 F.2d at 1339.

The respondent alleges that the warrant application is defective because neither it nor the employee complaint contains the following statement specified in 28 U.S.C. § 1746(2):

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22/ In this connection, the United States Court of Appeals for the Fifth Circuit has stated:

> [I]t seems likely that Congress, desiring an enforcement scheme based on surprise and undelayed searches, would very much prefer immediate execution of duly-issued ex parte warrants to the litigation-ladened delays urged on us by the search-shy Secretary in this case. By denying jurisdiction for injunctive suits initiated by the Secretary, Congress postpones and reduces the adversary litigation that otherwise might undermine the efficient and speedy implementation of the Act. In addition, Congress puts pressure on the Secretary to implement the Act unburdened by the excessive bureaucratic caution and paperwork which plague so much of our govenement.

Marshall v. Shellcast Corp., 592 F.2d 1369, 1372 (5th Cir. 1979).

"I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct."

However, 28 U.S.C. § 1746, merely provides that this language may be used in the United States instead of other declarations required by law, including sworn declarations. This case is distinguishable from Tran-Tec Corp., OSHRC Docket No. 80-1308 (November 26, 1980),[23/] cited by the respondent. In Tran-Tec, neither the employee complaint nor the warrant application was executed under oath. Here, the warrant application was executed under oath.

Accordingly, the respondent's motions for vacation of the citations and suppression of evidence are denied.

George O. Taylor Jr.
GEORGE O. TAYLOR, JR.
Judge, OSHRC

Dated: April 3, 1981
Hyattsville, Maryland

23/ Unofficially reported at 9 BNA OSHC 1203.

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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(A) - Notes a case presently under appeal to a U.S. Circuit Court of Appeals.
(D) - Notes a case in which a decision has been issued by a U.S. Circuit Court of Appeals.

* Citations for OSAHRC Reports are listed according to microfiche cites. When applicable citations for the printed volumes of OSAHRC Reports are listed in parentheses.

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

November 3, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

J. L. Manta Plant Services

OSHRC DOCKET NO. 78-4923

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

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Room 1530
Chicago, IL 60603

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>J.L. MANTA PLANT SERVICES COMPANY,<br>Respondent. | OSHRC Docket No. 78-4923 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

The Secretary of Labor ("the Secretary") issued to J.L. Manta Plant Services Company ("Manta") two citations alleging that Manta had violated several parts of the coke oven emissions standard at 29 C.F.R. § 1910.1029 including section 1910.1029(c), which regulates employee exposure to coke oven emissions, and section 1910.1029(g)(3), which requires a respiratory protection program. 1/

Before the hearing, Manta moved to vacate both citations on the ground that section 1910.1029 could not be validly applied to non-coke oven employees. Judge Louis J. Rubin granted Manta's motion and vacated the citations. 2/ In his petition for review, the Secretary sought review of the judge's decision.

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1/ This case was consolidated before the judge with four other cases: Nos. 78-4731, 78-5043, 78-5051 and 78-5060. The Secretary petitioned for review of the Manta case and Furnco Construction Co., No. 78-4731. Commission review was granted. Later, the Commission approved a settlement agreement in Furnco and granted the parties' joint motion to sever Furnco from this case.

2/ The judge relied on American Iron & Steel Institute v. OSHA, 577 F.2d 825 (3d Cir. 1978). In that case, the court remanded section 1910.1029 to the Secretary for further proceedings as to whether the standard applied to non-coke oven employees. We have been unable to find any subsequent rulemaking actions by the Secretary that would have cured the problem that has made the standard unenforceable as to non-coke oven employees such as Manta's.

In the last paragraph in his petition, the Secretary also moved to amend in the alternative to allege violations of the general industry standards at sections 1910.1000(a)(2) and (e), which regulate employee exposure to coal tar pitch volatiles ("CTPV"). The motion was evidently made under Federal Rule of Civil Procedure 15(a). 3/ Commissioner Cleary directed the case for review on the following issues:

> [1] In light of American Iron and Steel Institute, 577 F.2d 825 (3d Cir. 1978), did the administrative law judge properly vacate the citation alleging a violation of the coke oven emissions standard, 29 C.F.R. §1910.1029?
>
> [2] Whether §9(c) of the Act precludes amendment of the citation to 29 C.F.R. §§1910.1000(a)(2) and (e)?

The first of these issues is no longer before us. In the Secretary's brief before the Commission, the Secretary abandoned his argument that the judge erred in holding that section 1910.1029 could not be validly applied to Manta. He also changed his position on the amendment issue. Although stating that he was withdrawing one of the two citations, the Secretary asked to amend the other citation. However, he did not ask to amend to the general industry standards mentioned in his petition for review. Instead, he asked that the citation be amended under Federal Rule 15(a) to allege violations of the construction industry standards at sections 1926.55(a)(CTPV standard), 1926.103(c)(1)(instruction on the use and care of respirators) and 1926.21(b)(2)(instruction on avoidance of unsafe conditions and applicable regulations), and the general industry standards at 1910.134(b)(1)(written standard operating procedures for selection and use of respirators) and 1910.134 (b)(6)(storage of respirators in a convenient, clean, and sanitary location). The Secretary explained in a footnote

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3/ Rule 15. Amended and Supplemental Pleadings.

(a) Amendments.

* * *

[A] party may amend his pleadings only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

* * *

in his brief that "[a]fter further evaluation the Secretary has determined that Part 1926 (construction) standards are more properly cited in [this case] because [Manta] was engaged in construction, repair and maintenance work . . . ."

We deny the motion to amend. The Secretary did not request amendment under Federal Rule 15(a) before the judge. Indeed, the motion to amend now before us was not made until the Secretary filed his brief on review; as we have noted, the Secretary's petition first sought amendment to different standards. Under Commission Rule of Procedure 92(d), 29 C.F.R. § 2200.92(d), 4/ the Commission ordinarily reviews only those issues that have been raised before the administrative law judge. See Willamette Iron & Steel Co., 81 OSAHRC 59/A2, 9 BNA OSHC 1900, 1904, 1981 CCH OSHD ¶ 25,427, p. 31,699 (No. 76-1201, 1981). This common rule of orderly procedure embodies the view that it is sounder practice to not pass on issues that the hearing judge has not had an opportunity to consider unless there are extraordinary circumstances. Similarly, courts have held that where a party had an opportunity to move to amend under Federal Rule 15(a) before an appeal and did not, the motion comes too late. See Swan v. Board of Education, 319 F.2d 56, 61 (2d Cir. 1963).

There are no circumstances here excusing the Secretary's failure to move to amend before the judge. Employers have often filed pre-hearing motions to vacate citations because the cited standard is invalid or inapplicable. The ordinary course is for the Secretary to then move to amend his citation to alternatively allege violations of other arguably applicable standards. The Secretary not only had the opportunity to so amend, he did not do so even though the construction standard at section 1926.55 would have been at least arguably applicable to construction contractors if the judge were to find that section

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4/ Rule 92 Review by the Commission.

* * *

(d) . . . Except in extraordinary circumstances, the Commission's power to review is limited to issues of law or fact raised by the parties in the proceedings below.

1910.1029 could not be validly applied. The record supplies no reason why counsel for the Secretary could not have foreseen that the judge might have disagreed with his validity argument, and taken the elementary step of moving before Judge Rubin to alternatively amend to the construction standard. 5/

In short, the Secretary had an opportunity to raise the amendment issue before the judge and did not do so. Inasmuch as he has not shown any circumstances excusing this failure, we deny the motion to amend. 6/ The judge's decision is affirmed.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: NOV 3 1982

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5/ This lack of foresight was particularly inexplicable here because the possible application of section 1926.55 has figured prominently in coke oven litigation involving construction contractors. The United States Court of Appeals for the Third Circuit had remanded section 1910.1029 as to construction contractors because the court had "serious reservations concerning the broad construction of the standard's applicability to independent contractors contained in" a March 3, 1977, letter by Bert Concklin, then Acting Assistant Secretary of Labor for Occupational Safety and Health. American Iron & Steel Institute v. OSHA, 577 F.2d 825, 840 (3d Cir. 1978). In that letter, a request by the National Erectors Association for a stay of section 1910.1029 as to construction contractors and interim enforcement of the construction standard at section 1926.55 was rejected by Mr. Concklin on the sole ground that there was no applicable construction standard.

This point also appeared in the background of this case. The Secretary had appended the Concklin letter to his brief before Judge Rubin. In addition, both parties to this litigation had included in their stipulation of facts an unpublished supplemental statement by the Labor Department of reasons for the applicability of section 1910.1029. Like the Concklin letter, this supplemental statement declared that "the construction standards do not deal with the health hazard of carcinogenic coke oven emissions . . . ." Yet, now the Secretary evidently thinks otherwise. The Labor Department's failure to follow a consistent course on this question unnecessarily delayed the final disposition of this case and prevented an orderly resolution of the merits.

6/ Because we deny the motion on this ground, we need not consider whether the Secretary's motion should be denied because it raises issues different from those in the petition. See Commission Rule 92(c), 29 C.F.R. § 2200.92(c).

COTTINE, Commissioner, dissenting:

The majority narrowly construes Commission Rule of Procedure 92(d) which was meant to encourage orderly procedure and yet not unnecessarily foreclose a decision on the merits. Rather than precipitously dismissing this case, I would remand to the judge to consider whether the second motion to amend should be granted. 7/

Under Commission Rule of Procedure 92(d), review is ordinarily limited to issues raised before the administrative law judge. However, this case has only progressed to pre-hearing motions before the judge. In fact, this case was in the early stages of preparation for the hearing when the citations were vacated on a pre-hearing motion. Although the Secretary had an opportunity to alternatively amend to section 1926.55 at that early stage, the parties' attention was then focussed on the larger issue of whether the new coke oven standard applied to non-coke oven employees. Under these circumstances, the Secretary's failure to move to amend was not so egregious as to warrant dismissal. 8/

---

7/ I do not agree with the intimation in the majority opinion that the amendment issue might not properly be on review under Commission Rule 92(c). The rule states in part that "review shall be limited to the issues specified in the petition . . . ." Although the majority does not mention it, §§ 1926.55 and 1910.1000 have precisely the same threshold limit values for CTPV and require the same abatement methods. The Secretary's motions to amend to the general industry standard and to the precisely equivalent construction industry standard do not present different issues that would frustrate Commissioner Cleary's exercise of discretion in directing review on whether section 9(c) of the Act precludes amendment to the general industry standard and implicitly whether amendment is proper under Fed. R. Civ. P. 15(a).

8/ In note 5 of the lead opinion, the majority maintains that the Secretary's failure to move to amend was "inexplicable" because the applicability of § 1926.55 had "figured prominently in coke oven litigation" and had "appeared in the background of this case." The Secretary's actions are inexplicable to my colleagues because they mischaracterize the role that § 1926.55 has played here. The applicability of § 1926.55 did not occur to either party when this case was before the judge. The papers relied on by the majority were introduced as mere background to another issue. To magnify their significance now is inappropriate.

The majority's conclusion that the Secretary's positions have been inconsistent is also incorrect. The Secretary's statements that § 1926.55 was

(cont'd)

The majority's mechanical invocation of Commission Rule 92(d) is particularly unfortunate here. Federal Rule of Civil Procedure 15(a) states, among other things, that "leave [to amend] shall be freely given when justice so requires." The Supreme Court has construed this clear language as allowing liberal amendments, even after a complaint has been dismissed, so that the parties are given an opportunity to have their claims decided on the merits. See Foman v. Davis, 371 U.S. 178, 182 (1962). It is in this light that Commission Rule 92(d) should be applied here.

Accordingly, I would remand this case for consideration of whether the second motion to amend should be granted. Manta claims that its new officers and directors did not have knowledge of the corporation's activities at the time of the alleged violations and would have to rely on records which do not contain information on the amended citation. The judge is in a better position to resolve these factual matters and determine whether amendment would be proper.

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(Footnote 8 cont'd)

inapplicable reflected nothing more than his completely plausible view that because the new coke standard comprehensively addressed the matter of coke ovens, the old construction standard had been pre-empted to that extent. This reasoning should be familiar to the majority. See, e.g., John T. Brady & Co., 82 OSAHRC 9/D10, 10 BNA OSHC 1385, 1982 CCH OSHD ¶ 25,941 (No. 76-2894, 1982), rev'd, No. 82-4082 (2d Cir. October 14, 1982). It was only when Judge Rubin held that the new standard could not be validly applied that the Secretary sought to apply the old standard. There is no inconsistency in that.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket Nos. 78-4731 |
| | | 78-4923 |
| FURNCO CONSTRUCTION CO. | : | 78-5043 |
| J. L. MANTA INC. | | 78-5051 |
| GENERAL DRAINAGE, INC. | : | 78-5060 |
| M & O INSULATION COMPANY | | |
| McAULIFFE MECHANICAL CONTRACTORS | : | |
| Respondents. | : | |

ORDER ON MOTION TO DISMISS

Respondent's Motion to Dismiss citations issued under the coke oven emissions standards (29 CFR 1910.1029) is granted.

The chronology and factual background is briefly summarized, setting forth facts not in dispute and stipulated by the parties:

1. On October 19, 1976, the Secretary of Labor promulgated a new health standard governing employee exposure to coke oven emissions (29 CFR 1910.1029).

2. Petitions for review were filed by several coke producers and their trade associations with the United States Court of Appeals for the Third Circuit. The Court issued its opinion and order

on March 28, 1978, American Iron and Steel Institute, et al. v Occupational Safety and Health Administration, 577 F.2d 825 (3rd Cir. 1978) which held in pertinent part, "the Secretary's coke oven emissions standard (is) affirmed except: . . . . . (3), application of the standard to non-coke oven employers." The court remanded the case for further proceedings consistent with its opinion as to the application of the standard to non-coke oven employers.

3. Respondents are non-coke oven employers who were engaged in construction and maintenance services, as independent contractors, at the Inland Steel plant, East Chicago, Indiana, in August 1978.

4. They were cited in September and October 1978, for violation of the standard.

5. In December 1978, OSHA issued a "Supplemental Statement of Reasons" which states, "This notice delineating the precise application of the standard to non-coke producing employers is in response to the remand ordered by the Court."

6. On January 12, 1979, OSHA published a notice in the Federal Register at page 2725 stating that the Advisory Committee on Construction Safety and Health, (Advisory Committee) would meet on January 31 and February 1, 1979 to consider the application of the

coke oven standard to non-coke oven employers. The Supplemental Statement was then presented to the Advisory Committee.

7. The Advisory Committee met on May 17, 1979, pursuant to a notice in the Federal Register on April 27, 1979, and formulated its recommendations. The Advisory Committee accepted OSHA's determination that the scope and application of the standard, (29 CFR 1910.1029) (a)) applied to all employers. Some disagreement was expressed with parts of the Supplemental Statement. The areas of disagreement have no direct bearing on the issue raised here.

Complainant's position is that the order of remand did not stay enforcement proceedings against non-coke oven employers. Consistent with its position, the Secretary did not institute any rule making proceeding. Instead, a "Supplemental Statement of Reasons" was drafted for public consideration for the purpose of informing the Court of the precise application of the standard to independent contractors.

Respondents maintain that the citations were issued in violation of the Court order and are invalid. Respondents argue that the Court was concerned with due process rights to notice and they were not afforded such notice. Respondents were cited in the interim period between the Court order and publication in the Federal Register of the "Supplemental Statement of Reasons."

The Court's opinion, section VI, deals with the application of the standard to non-coke oven employers. The Court recites the arguments favoring the Secretary's position; announces its conslusion that, despite these arguments, notice was inadequate; and finally gives reasons for its conclusion (577 F.2d at 840). The case was remanded for further proceedings consistent with the opinion. A plain and logical reading would indicate that the Court was indeed concerned with due process rights to notice.

The case law submitted by the parties in support of their interpretations of the opinion and order is inconclusive. The decision cited do not involve notice of rule making, or the court specifically vacated or remanded with specific instructions for proceeding, or specifically ruled that the challenge should be pursued in an enforcement proceeding. However, I find respondent's argument and analogy to the Review Commission decision, in American Urethane Corp., 5 BNA OSHC 1543, 1977-78 CCH OSHD para. 21, 903 (1977) to be persuasive. In American Urethane Corp., the Review Commission interpreted the Third Circuit opinion in Synthetic Organic Chemical Mfrs. Ass'n (SOCMA II), 506 F.2d 385 (3rd Cir. 1974) cert. denied 423 U.S. 830 (1975). The Review Commission held that a Court order of remand does not stay enforcement proceedings where

the basis for the remand is the Court's desire to ascertain the reasons for the agency action. In contrast, when the basis for remand is failure to afford adequate notice, remand was predicated on the conclusion that the promulgation did not meet the requirements of section 6 of the Act and necessitates vacation of the relevant provisions. This conclusion is in accord with the view that an administrative rule not promulgated in accordance with the notice requirements of section 553 of the Administrative Procedure Act is not enforceable. N.L.R.B. v Wyman-Gordon Company, 394 U. S. 759 (1969); Wagner Electric Corp. v Volpe, 446 F.2d 1013 (3rd Cir. 1972); Texaco, Inc.v Federal Power Commission, 412 F.2d 740 (3rd Cir. 1969).

The Court has ruled that respondents did not receive adequate notice. Proceedings, in accordance with the Court order of remand, were not held prior to the issuance of the citations. The defect in promulgation precludes enforcement of the standard against respondents in this case. It is noted that the same issue was before Judge Sparks, Review Commission Judge, in C. H. Heist Corporation et al. (OSHRC Nos. 79-0749 et al., decided November 16, 1979). Judge Sparks held that lack of notice was a fundamental defect and that the standard should not be enforced until the defect has been remedied.

It is ORDERED:

1. The citations alleging violations of 29 CFR 1910.1029 are vacated.

2. General Drainage, Inc., No. 78-5043; M & O Insulation Company, No. 78-5051; and McAuliffe Mechanical Contractors, No. 78-5060 will be notified of the hearing date with respect to those items cited under standards other than 29 CFR 1910.1029.

3. This constitutes a final order with respect to Furnco Construction Co., No. 78-4731; and J. L. Manta, Inc., No. 78-4923.

Louis J. Rubin
Judge, OSHRC

Dated: December 7, 1979

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

Secretary of Labor v. Decora, Inc.
OSHRC Docket No. 81-2390

1. Enclosed is a copy of my decision. It will be filed with the Commission on October 4, 1982, and will become the final order of the Commission on November 3, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is November 3, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

DAVID G. ORINGER
JUDGE, OSHRC

Date: September 14, 1982
New York, New York

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR<br><br>Complainant,<br><br>v.<br><br>DECORA, INC.<br><br>Respondent. | OSHRC DOCKET<br><br>NO. 81-2390 |

Appearances:

FOR THE COMPLAINANT

Francis V. LaRuffa, Regional Solicitor
U.S. Department of Labor
1515 Broadway, Room 3555
New York, New York 10036
Att: James A. Magenheimer, Esq.

FOR THE RESPONDENT

J. Edward Goff, Vice-President
Legal Department
Decora, Inc.
P.O. Box 269
Millville, New Jersey 08332

DECISION AND ORDER

ORINGER, JUDGE: This is a proceeding under Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq., (hereinafter referred to as "the Act"), to review a citation issued by the Secretary of Labor (hereinafter sometimes referred to as "Complainant") pursuant to Section 9(a)

and a proposed assessment of penalties thereon issued, pursuant to Section 10(a), of the Act.

As a result of an inspection that took place between May 21 and June 2, 1981, the Secretary issued the Respondent a citation charging serious violations of sixteen standards in six items of the citation together with subparts thereof. The Secretary proposed penalties of $4,680 for the alleged violations.

After the case was reassigned from Judge Cerbone to the undersigned and after discovery had been requested, this tribunal scheduled a prehearing conference for April 8, 1982 and, on request of the parties, rescheduled it to April 12, 1982. Thereafter, on request of the parties, the case was again rescheduled to April 21, 1982, in New York, City, at which time the pretrial conference took place.

At the pretrial conference Counsel for Mr. Wheaton stated that he wished to put the Respondent's position on record and wanted a formal decision after considering the position of Mr. Wheaton, the owner.

During the pretrial conference, the Respondent's representative conceded that all of the allegations of violation were true. The Respondent's representative argued that no issue of fact remained for resolution. The tribunal advised that there was an issue of fact as to the penalty and that a penalty could not be assessed unless the facts concerning the violation were heard.

It is the opinion of the tribunal that the parties were looking for a ruling on the law and the tribunal requested the submission of briefs by the parties. No briefs were submitted by

the parties and, after the Commission had spoken on another similar case, the matter was set down for hearing for July 7, 1982 in New York City. Subsequent thereto, the Complainant moved for an adjournment on the grounds that the compliance officer would be testifying in another case on the same day. The motion also stated that the Respondent and his counsel had changed its position and were going to attempt to amicably resolve the case. The parties were ordered to draw up an Order and the tribunal adjourned the case sine die.

Subsequent thereto, on September 1, 1982, this tribunal received a settlement agreement worked out between the parties and, in consideration of the parties pleadings, pretrial conference, adjourned hearing, representations, de facto motions and all pertinent matters herein, the settlement agreement is disposed of as follows:

1. The Secretary's de facto motion to modify and amend the proposed penalty and the complaint so as to reflect a reduction of the original proposed penalty from $4,860 to an aggregate proposed penalty of $3,240 for all allegations of violation, is GRANTED.

2. The Respondent, having certified that all violations alleged in the complaint have been abated; that it will comply with the Act in futuro; that it has tendered the modified proposed penalty of $3,240 to the Secretary; that on August 31, 1982, the settlement agreement was posted where affected employees might see it and on August 27, 1982, a copy was served on the authorized employee representative; sufficient time having elapsed

and no objections having been filed thereto, the Respondent's de facto motion to withdraw its notice of contest to the allegations of violation as set forth in the citation and the modified proposed penalty of $3,240, is GRANTED.

3. Based on all of the above, the matter appears to be disposed of.

4. The allegations of serious violation by this Respondent of the standards set forth at 29 CFR 1910.1000(b)(1), 29 CFR 1910.1000(e), 29 CFR 1910.1025(c)(1), 29 CFR 1910.1025(f)(1), 29 CFR 1910.1025(d)(2), 29 CFR 1910.1025(e)(3)(ii(f), 29 CFR 1910.1025(g)(1), 29 CFR 1910.1025(h)(1), 29 CFR 1910.1025(i)(2)(i), 29 CFR 1910.1025(i)(2)(ii), 29 CFR 1910.1025(i)(3)(iii), 29 CFR 1910.1025(i)(4)(iii), 29 CFR 1910.1025(i)(4)(iv), 29 CFR 1910.1025(i)(1)(i), 29 CFR 1910.1025(i)(1)(ii), and 29 CFR 1910.1025(j)(1)(i), are all AFFIRMED and a total aggregate penalty of $3,240 is ASSESSED therefor.

SO ORDERED.

DAVID G. ORINGER, JUDGE, OSHRC

Dated: October 4, 1982
New York, New York

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
ROOM 7B11, FEDERAL BUILDING
1100 COMMERCE
DALLAS, TEXAS 75242
FTS 729-5271
COM (214) 767-5271

## NOTICE OF DECISION

Secretary of Labor v. Rodgers Construction, Inc.
OSHRC Docket NO. 82-0503 and 82-0504

1. Enclosed is a copy of my decision. It will be filed with the Commission on October 4, 1982, and will become the final order of the Commission on November 3, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D. C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is November 3, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92 and 93.

Administrative Law Judge

Date: September 14, 1982

OSHRC Form 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>RODGERS CONSTRUCTION, INC.,<br><br>Respondent. | OSHRC DOCKET NO. 82-0503 and 82-0504 |

DECISION AND ORDER

Appearances: Robert A. Fitz, Esq., and Anne F. Watson, of Dallas, Texas, for the complainant.

David J. White, Esq., of Dallas, Texas, for the respondent.

BLYTHE, Judge:

PROCEDURAL HISTORY

This consolidated [1] proceeding resulted from two inspections conducted by compliance officers of the Occupational Safety and Health Administration ("OSHA") of a workplace at 2401 East Lamar Boulevard, Arlington, Texas, where the respondent, Rodgers Construction, Inc. [2] ("Rodgers"), as general contractor, was constructing a Hilton hotel.

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[1] The cases were consolidated at the hearing on complainant's unopposed motion (Tr.3).

[2] In Docket No. 82-0503, respondent's name was incorrectly stated as Rodgers Construction Co. in the citations and complaint. This was corrected at the hearing (Tr.6).

The first inspection, conducted March 1-12, 1982, after a fatal accident, resulted in the issuance of a single citation to Rodgers by the Secretary of Labor ("the Secretary") on April 6, 1982, alleging two serious violations of §5(a)(2) of the Occupational Safety and Health Act of 1970, 29 USC §651, et seq. ("the Act"), and the standard at 29 CFR 1926.28(a) for failure to use safety belts.

The second inspection, conducted March 9-11, 1982, was a general schedule inspection which resulted in the issuance to Rodgers of two citations on April 13, 1982, alleging serious and nonserious violations of several safety standards.

Rodgers timely contested the citations in both cases April 30, 1982, initiating this proceeding before the Occupational Safety and Health Review Commission ("the Commission") under §10(c) of the Act. Thereafter a complaint and an answer were filed in each case.

The cases came on regularly for hearing July 15, 1982, at Dallas, Texas. No affected employee or authorized representative of affected employees participated in this proceeding.

Rodgers submitted a posthearing brief; the Secretary did not.

## THE ISSUES

The issues to be determined are:

1. Whether Rodgers is engaged in a business affecting commerce so that the Commission has jurisdiction of the proceeding.

2. Whether Rodgers was in serious violation of §1926.28(a) and/or §1926.105(a) (Docket No. 82-0503).

3. Whether Rodgers was in nonserious or serious violation of §1926.28(a) and/or §1926.105(a) (Docket No. 82-0504), including whether the Secretary should be allowed to amend the citation to allege a serious violation.

4. Whether Rodgers was in serious violation of §1926.451(m)(6).

5. Whether Rodgers was in serious violation of §1926.550(a)(4) and American National Standards Institute ("ANSI") Standard B30.2-1943(R.1952), ¶¶3021-3024.

6. Whether Rodgers was in nonserious violation of §1926.350(j) and ANSI Standard Z49.1-1967, §3.2.4.3.

7. Whether Rodgers was in nonserious violation of §1926.602(a)(9)(i).

8. Whether Rodgers has made out its affirmative defense of unpreventable employee misconduct to any of the citations.

9. The appropriate penalties for any violations found.

DISCUSSION AND OPINION

I. The jurisdictional issue.

Although Rodgers' brief does not discuss the jurisdictional issue, it was raised in its answer to the complaint and will therefore be discussed.

The answer denies that §10(c) of the Act confers jurisdiction on the Commission and that it engaged in a business affecting commerce within the meaning of §3(5) of the Act, which provides, in pertinent part:

> The term "employer" means a person engaged in a business affecting commerce who has employees..."

Rodgers' answer admits that it is engaged in construction as a general contractor. The uncontradicted evidence also establishes that it is a Tennessee corporation with headquarters in that state; that at the time of the inspection it was constructing a Hilton hotel in Arlington, Texas; and that

the job superintendent of the Arlington job makes frequent reports to Rodgers' headquarters in Tennessee (Tr.12).

The Secretary also requested that official notice be taken of the fact that Hilton hotels accommodate interstate travelers (Tr.197). Rodgers objected to this on the ground that it was a matter on which proof should be adduced. The matter was taken under advisement.

I find it unnecessary to decide the official notice issue. The facts that Rodgers is a Tennessee corporation doing business in Texas and that frequent reports are made on the Texas operation to Rodgers' headquarters in Tennessee are sufficient to put Rodgers directly into interstate commerce. Edward W. Vander Linden dba Shorecrest Concrete Contractors, 3 BNA OSHC 1739, 1975-76 CCH OSHD ¶20,166 (No. 3249, 1975). Therefore, its business automatically "affects" commerce, and the Commission has both personal and subject matter jurisdiction.

II. The alleged violations of §1926.28(a) and/or §1910.105(a).

Item 1 of citation 1, as amended, of Docket No. 82-0503 alleges two serious violations of §1926.28(a) [3] and/or §1926.105(a) [4], while item 1

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[3] This standard provides:

§1926.28—PERSONAL PROTECTIVE EQUIPMENT

(a) The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees.

[4] This standard provides:

§1926.105—SAFETY NETS

(a) Safety nets shall be provided when workplaces are more than 25 feet above the ground or water surface, or other surfaces where the use of ladders, scaffolds, catch platforms, temporary floors, safety lines, or safety belts is impractical.

of citation 2, (Docket No. 82-0504) as amended at the opening of the hearing, alleges a nonserious violation of these standards. Therefore, they will be discussed together.

A.

Item 1 of citation 1 (Docket NO. 82-0503), as amended, alleges that §§1926.28(a) and/or 1926.105(a) were violated in that

> Safety belts with lanyards attached to adequately secured lifelines or other suitable supports are not worn by employees exposed to the hazard of falling from elevations:
>
> a. during the removal of guard rails from floor edges;
> b. from the upper part of building column forms located near the outer building sides and corners while pouring and vibrating concrete in the forms on the 9th and 10th floors of the building being constructed at 2401 E. Lamar Street, Arlington, Texas.

Subitem 1a. involves the fatality which precipitated the inspection. Carpenter Foreman Dennis E. Stephens fell nine floors to his death and Carpenter's Helper Bobby Wright [5] was injured in a one-story fall when the decking from which they were preparing to remove a guardrail collapsed due to removal of 4 x 4 supports beneath it. Stephens was wearing a safety belt and lanyard which was not tied off (Tr.25,26,37). Wright, who was subpoenaed as a witness by the Secretary but did not appear and testify, apparently was not wearing a safety belt (Tr.25,36). No safety net, ladder, scaffold, catch platform, temporary floor, or safety line was provided for fall protection, and Compliance Officer Henry R. Slagle testified without contradiction that such

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David W. Swain, Rodgers' assistant superintendent with safety duties, described Wright as doing "nothing but safety" (Tr.180), but apparently this meant carpentry work on such things as guardrails.

devices would have been impractical. Thus the only full protection advocated by the Secretary is the safety belt.

Rodgers' position is that since the guardrail was still in place at the time of the accident safety belts were not required; Stephens and Wright were just preparing to remove the guardrail when they walked out on the unsupported decking.

The fallacy of this argument lies in the assumption that the citation is limited to the facts of this accident as they occurred. Such is not the case.

> Although evidence concerning the occurrence of and circumstances surrounding an accident is not necessary for the Secretary to establish a prima facie case, and certainly such evidence is not necessarily conclusive in finding a violation, the occurrence of and circumstances surrounding an accident may be probative evidence of a violation.

Ralston-Purina Co., 79 OSAHRC 22/C11, 7 BNA OSHC 1302, 1979 CCH OSHD ¶23,507 (No. 76-2551, 1979).

Guardrails on this job were constructed in 16-foot sections so that they could be detached and hoisted to the next floor. The standard operating procedure was for two or three carpenters to detach the guardrails—without safety belts or other fall protection—and for two others to lift them with ropes to their new position (Tr.26,29,31). Stephens and Wright were apparently preparing to follow this procedure when the decking collapsed.

It was possible for carpenters engaged in the detaching operation to tie off safety belts to 4 x 4 supports which were about two feet from the edge, though Luke M. Linscott, one of Rodgers' carpenters, testified he wouldn't trust his life to these supports (Tr.39). It was possible to tie

off to other supports with the use of 12-foot lifelines, which were available and sometimes used in other operations (Tr.26,33).

Safety belts have been required for the erection of a guardrail on an open-sided roof or floor. Bevo Insulation & Roofing Co.,81 OSAHRC 108/E6, 1982 CCH OSHD ¶25,851 (No. 81-1015, 1981) (Schwartz, J.): Peck & Hiller Co., 80 OSAHRC 52/C1 8 BNA OSHC 1740, 1980 CCH OSHD ¶24,508(No. 79-3189, 1980) (Brennan, J.). It stands to reason that employees removing a guardrail are equally in need of protection.

Rodgers is presumed to have knowledge of this violation because of the long-standing practice and because its foreman, Stephens, participated. His knowledge is imputable to Rodgers. Ocean Electric Corp., 75 OSAHRC 6/C14, 6 BNA OSHC 1030, 1975-76 CCH OSHD ¶20,167 (No. 5811, 1975).

The next issue is whether the Secretary has met the "reasonable person" test laid down by the Commission in S & H Riggers & Erectors, Inc., 79 OSAHRC 23/A2, 7 BNA OSHC 1260, 1263, 1979 CCH OSHD ¶23,480, P. 28,436 (No. 15855, 1979), rev'd 659 F.2d 1273 (5th Cir. 1981). There the Commission said that, in order to establish a §1926.28(a) violation the Secretary must prove, among other things, that

> a reasonable person familiar with the factual circumstances surrounding the allegedly hazardous conditions, including any facts unique to a particular industry, would recognize a hazard warranting the use of personal protective equipment.

In reversing the Commission in S & H Riggers, the 5th Circuit said,

> [I]n order to sustain a citation under this regulation, the Secretary bears the burden of proving either that the employer failed to provide personal protective equipment to its employees under circumstances in which it is the general practice in the industry to do so or that the employer had clear actual knowledge that personal protective equipment was necessary under the circumstances.

(Emphasis supplied.) 659 F.2d at 1285.

The Commission has not receded from its position. See Daniel Construction Co., 82 OSAHRC _____, 10 BNA OSHC 1549, 1982 CCH OSHD ¶26,027, p. 32,671 (No. 16265, 1982). The Commission's judges are bound by Commission precedent, even in a circuit which is contra. Grossman Steel & Aluminum Corp., 76 OSAHRC 54/D9, 4 BNA OSHC 1185, 1975-76 CCH OSHD ¶20,691 (No. 12775, 1976).

Here neither the Secretary nor Rodgers introduced evidence regarding industry practice or whether a reasonable person familiar with the circumstances would recognize the hazard. However, in S & H Riggers the Commission found a violation where employees were working near the unguarded edge of the 4th floor of a building without fall protection and were thus exposed to "an obvious fall hazard." P.28,439 of CCH OSHD. Here the fall hazard was equally as obvious.

Rodgers also contends that any violation of §1926.28(a) by Stephens and Wright was an isolated incident, or unpreventable employee misconduct.

Unpreventable employee misconduct is an affirmative defense wherein the employer bears the burden of proving that the actions constituting non-compliance with the standard were (a) unknown to the employer and (b) contrary to both the employer's instructions and a company work rule which the employer has uniformly enforced. Weatherhead Co., 76 OSAHRC 61/E7, 4 BNA OSHC 1296, 1976-77 CCH OSHD ¶20,784 (No. 8862, 1976).

"Work rule" was further defined in J. K. Butler Builders, Inc., 77 OSAHRC 26/A2, 5 BNA OSHC 1075, 1977-78 CCH OSHD ¶21,585 (No. 12354, 1977), as

> . . .an employer directive that requires or proscribes certain conduct, and that is communicated to employees in such a manner that its mandatory nature is made explicit and its scope clearly understood.

Additionally, the work rule must be the equivalent of the standard the respondent is accused of violating. Kansas Power & Light Co., 77 OSAHRC 39/A2, 5 BNA OSHC 1202, 1977-78 CCH OSHD ¶21,696 (No. 11015, 1977).

Rodgers contends in its brief (p.4) that its safety booklet (Exhibit R-1) "requires the wearing and tieing off of safety belts when working at heights." It does not, however, point out the precise rule it refers to, and the only one bearing on the subject appears to be the following:

> 33. No employee shall work on scaffolding higher than ten feet without proper guard rails, toe boards and proper flooring except when proper precautions such as lifelines with harnesses, barricades, etc. have otherwise been made. Scaffold platforms should be at least forty-eight inches wide when possible.

This "work rule" is hardly the equivalent of the standard allegedly violated. It pertains primarily to guardrails on scaffolds [6] and applies "except when proper precautions such as lifelines with harnesses, barricades, etc. have otherwise been made." Not only is this not a work rule here applicable, but it makes improper exceptions even as it applies to guardrails.

In addition, there is no evidence of the communication of this purported work rule, or of any specific instructions on the use of safety belts, to Stephens and Wright, except that a copy of the safety booklet was given to new employees (Tr.180). Also, evidence regarding enforcement of the claimed rule is very sparse. Assistant Superintendent Swain testified that he reprimanded one employee for a safety belt violation (Tr.193), and Crane Operator Roger Choate said he had told another one to use his belt (Tr.169).

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[6] The structure here involved was decking for a floor, not a scaffold, though Rodgers' brief refers to it as the latter.

The very fact that a supervisory employee, Stephens, saw fit to violate the purported rule can be taken as evidence that it was not effectively communicated or enforced. United Geophysical Corp., 81 OSAHRC 77/D6, 9 BNA OSHC 2117, 1981 CCH OSHD ¶25,579 (No. 78-6265, 1981).

Rodgers introduced into evidence a number of minutes of "tool box" safety meetings, but, significantly, none of them dealt with the topic of safety belts until after the fatal accident. See Exhibit R-28, dated April 21, 1982, and Exhibit R-29, dated April 28, 1982.

I find this violation proved and that it was serious under §17(k) of the Act in that there was a substantial probability that death or serious physical harm could result therefrom.

B.

Subitem 1b of citation 1, as amended, Docket No. 82-0503, alleges another violation of §1926.28(a) and/or §1926.105(a). While investigating the Stephens fatality, Compliance Officer Slagle saw a Rodgers employee, Vernon Trailer (sic), clinging to the top of an 8-foot-high column form on the edge of the 10th floor while he released concrete into the form from a bucket suspended from a crane (Tr.49,52). He then saw another Rodgers employee, Jeff Flanagan, climb the form and use a vibrator on the freshly-poured concrete (Tr.52). Neither employee had any form of fall protection, though a safety belt and lanyard could have been tied off to the reinforcing steel ("rebars") protruding from the top of the form (Tr.54). Other forms of fall protection, such as a safety net, scaffold, catch-platform or temporary floor, would have been impractical, and a ladder would have been equally as dangerous as the method employed, Slagle testified (Tr.53,54).

When Slagle called attention to Flanagan's situation atop the form,

Dennis E. Gee, Rodgers' project superintendent, who was with Slagle on the walkaround, had another employee get a safety belt for Flanagan and ordered the latter to tie off (Tr.57,58).

Flanagan and Gee testified about this incident substantially as did Slagle, but they differed somewhat with each other. Flanagan, a general laborer who went to work for Rodgers in January 1982, testified that he started using the vibrator about a week after he was hired, that he didn't use a safety belt when on top of the forms because he had observed others using the vibrator without using safety belts, that the carpenters had the belts and others had to borrow them when they needed them (there not being enough to go around), and that after the OSHA inspection he wore a safety belt when he could get one (Tr.62-68). Flanagan also testified that when Trailer tripped the concrete bucket to fill the forms he used no safety belt and rode the bucket from one form to another (Tr.66,67).

Gee testified that Flanagan was basically a scando (personnel-hoist) operator, that he was issued a safety belt, that he later became a laborer, that he usually worked at ground level, and that he was not supposed to be on the column where Slagle saw him (Tr.140-144).

Swain, Rodgers' assistant superintendent who also had safety duties, testified that they tried to keep Flanagan on the ground or on the scando, that he probably operated the vibrator atop the column at the time of the inspection because a number of employees walked off the job temporarily after Stephens' death, that he (Swain) did not know Flanagan was on the vibrator job, and that his being there without a safety belt was "an isolated instance" (Tr.191). He said that Trailer had previously been reprimanded for failure to wear a safety belt (Tr. 193).

Rodgers does not argue that Flanagan and Trailer did not need safety belts when atop the column. Instead, it attacks Flanagan's credibility and seeks to make out a defense of unpreventable employee misconduct, the elements of which have already been discussed.

Here again, Rodgers has failed to prove the elements of this affirmative defense. It has not established that it had a work rule on this subject which was effectively communicated and implemented. There is evidence that both Flanagan and Trailer were told at least once each to wear safety belts (Tr. 169,193), but this hardly suffices to establish the elements of this defense.

Rodgers contends that Flanagan was not authorized by any supervisor to work on the column where he was at the time of the inspection. It says nothing, however, about Trailer, who was seen by Reina on the same column without a safety belt before Flanagan climbed it. Also, when the testimony of Gee and Swain is analyzed it fails to establish that Flanagan disobeyed any orders in being where he was. Gee said he wasn't aware that Flanagan was on the column and that Trailer (who was not a foreman) probably brought him up there due to a shortage of personnel after the fatal accident (Tr.142). Swain testified that Flanagan "seldom went up top," that Flanagan's presence there was probably due to the shortage of personnel mentioned by Gee, that he didn't know Flanagan was there until he walked up with the inspector, and that "to my knowledge" no supervisor knew Flanagan was up there on the column (Tr.191-192).

Apparently Flanagan was not told not to work on the column when we was discovered there during the inspection; he was only ordered to put on a safety belt. This further indicates that he was not violating any orders by being there.

To the extent that Flanagan's testimony contradicted that of Gee and Swain, I credit Flanagan's because he had less to gain and more to lose than did the supervisory employees. Also, Flanagan's testimony coincides more with the known facts, including the instances in which Rodgers employees exposed to fall hazards either had no safety belts or did not tie off.

At most, Gee's and Swain's testimony might tend to prove lack of employer knowledge of the violative condition as far as Flanagan is concerned, but there is no doubt but that Trailer was where he was supposed to be.

There is a presumption that the employer knew or in the exercise of reasonable diligence could have known of violative conditions which existed at the time of the inspection and were readily discernible. Weatherhead Co., supra. This presumption has not been rebutted by Rodgers.

What has been said above about the "reasonable person" test applies here. There was an obvious fall hazard, and a reasonable person familiar with the circumstances would recognize it as such. There was a substantial probability that death or serious physical harm could result from a 10-story fall, so the violation was serious.

C.

Item 1 of citation 2, (Docket No. 82-0504), as amended at the beginning of the hearing, alleges a nonserious violation of §1926.28(a) and/or §1926.105(a). At the close of the hearing, the Secretary moved to amend this item again to allege that the violation was serious rather than nonserious (Tr.205). Rodgers objected strenuously .(Tr.207) The motion was taken under advisement.(Tr.221)

In view of the disposition to be made of this item, the amendment issue is unimportant. However, for the record in the event of a reversal, I find and conclude that the amendment should be allowed.

The motion was based on Rule 15(b), F.R.Civ. P. [7] to conform the pleadings to the evidence, which showed that there was a hazard of a 6-floor fall which probably would result in multiple, severe injuries (Tr.98,99). This evidence was introduced without objections.

Rodgers objected to the motion on the grounds that the proposed amendment was too late, that additional evidence is required to prove a serious violation, that it was not prepared to meet a serious citation, and that it would have subpoenaed a former employee involved in this item had it known that a serious violation would be charged. The hearing was reopened (Tr.210) to allow Rodgers to introduce any evidence it had available that would be made pertinent by this amendment. Over the Secretary's objecton, Rodgers was allowed to introduce evidence on the existence as well as the characterization of the alleged violation. The record was then closed, with leave to Rodgers to move to reopen should it discover additional pertinent evidence on this item.

Rodgers has not sought leave to reopen the record to introduce additional evidence.

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[7] Rule 15(b), F.R. Civ. P., provides:

> Amendments To Conform To The Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Under the circumstances of this case, a sua sponte posthearing amendment by the judge would have been in order. Rodney E. Fossett, dba Southern Lightweight Concrete Co., 79 OSAHRC 92/D2, 7 BNA OSHC 1915, 1979 CCH OSHD ¶23,989 (No. 76-3944, 1979). Therefore, there is no reason for denying the Secretary's motion to amend made at the close of the hearing, especially since Rodgers was allowed to reopen its case in chief and given leave to move for a supplemental hearing. Its argument that it would have subpoenaed a former employee to testify if it had known the citation would be amended to allege a serious violation is therefore without merit.

Compliance Officer Reina saw an "eyebrow", or materials catch platform, being built on the perimeter of the 6th floor to protect masons and others working below from falling materials. This eyebrow was constructed of 4 x 4 timbers spaced 8 to 10 feet apart and extending about 8 feet beyond the perimeter and with plywood sheets nailed to the 4 x 4s to make a platform (without guardrails) (Tr.94-99). At Reina's request, Ray Foster, a Rodgers employee identified as being in charge of this work, demonstrated how the plywood sheets were pushed out onto the 4 x 4s and nailed in place (Tr.96). Foster had no form of fall protection. Reina testified that a safety belt and lifeline could have been used and that a ladder, scaffold, safety net or catch platform would not have been practical.

Superintendent Gee testified that Foster, whom he characterized as a "safety man", was in charge of building this eyebrow with a carpenter and a helper doing the actual work; that at the time of the inspection the eyebrow was complete and that neither Foster nor anyone else went out on the eyebrow at that time; but that he did not hear the conversation between Reina and Foster (Tr.211-214).

Rodgers contends that during the inspection nobody went out on the eyebrow and that if Foster did so it was at Reina's suggestion so it should not be held responsible. Since Gee did not hear the Reina-Foster conversation, it is possible that he did not see Foster demonstrate the method of fastening the plywood to the 4 x 4s. There is no reason to doubt Reina's testimony that Foster did so without fall protection, but it is significant that Reina did not ask Foster about his usual practice with regard to the use of safety belts in this operation. Under these circumstances, the violative conduct may have been induced unwittingly by the compliance officer. Therefore, the citation will be vacated.

However, in the event this disposition should be found to be erroneous, I find that the practice of nailing the plywood sheets to the 4 x 4 beams without the use of safety belts is an obvious hazard which a reasonable person familiar with the circumstances would recognize as such. Cf. Tri-State Roofing & Sheet Metal, Inc., v. OSHRC, 4th Cir. #81-1778, June 21, 1982, 1982 CCH OSHD ¶26,173. I also find that Foster's knowledge is imputable to Rodgers.

D.

Section 17(j) of the Act requires the Commission, in assessing penalties, to consider the gravity of the violation and the employer's size, good faith and history of previous violations. These factors need not be accorded equal weight, but the gravity is usually of greater significance than the others. Colonial Craft Reproductions, 72 OSAHRC 11/B10, 1 BNA OSHC 1063, 1971-73 CCH OSHD ¶15,277 (No. 881, 1972). Elements to be considered in determining gravity include the number of employees exposed to the risk of injury, duration of the exposure, precautions taken against injury, and the degree of

probability of occurrence of an injury. National Realty & Construction Co., Inc., 72 OSAHRC 9/A2, 1 BNA OSHC 1049, 1971-73 CCH OSHD ¶15,188 (No. 95,1972) rev'd on other grounds, 489 F.2d 1257 (D.C. Cir., 1973).

The Secretary has proposed an aggregate penalty of $490 for the two serious violations of §1926.28(a) alleged in Docket No. 82-0503. On balance, after considering the statutory criteria, I find $490 to be an appropriate penalty.

III. The alleged serious violation of §1926.451(m)(6).

Item 1 of citation 1 (Docket No. 82-0504) alleges a serious violation of §1926.451(m)(6) [8] in that the open ends and sides of a carpenter's bracket scaffold on the 10th floor did not have standard guardrails and toeboards.

Actually, the evidence shows that the scaffold in question had a guardrail on the open side but not the ends. Compliance Officer Reina so testified (Tr.80-82). A photograph introduced by Rodgers, Exhibit R-53, shows this scaffold or a similar one.

William C. Pollack, Jr., who was a carpenter employed by Rodgers at the time of the inspection (but not at the time of the hearing), was called as a witness by the Secretary and testified that this scaffold had had guardrails on the ends at one time but that they interfered with access to the scaffold and were removed a month or so before the inspection (Tr.111,112). This scaffold was used when exterior walls were poured and was moved up from floor to floor as needed.

Rodgers says at p.11 of its brief, "Mr. Pollack also testified that

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[8] The cited standard provides:

§1926.454(m) Carpenters' bracket scaffolds

* * *

(6) Guardrails made of lumber, not less than 2 x 4 inches (or other material providing equivalent protection), approximately 42 inches high, with a midrail, of 1 x 6 inch lumber (or other material providing equivalent protection), and toeboards, shall be installed at all open sides and ends on all scaffolds more than 10 feet above the ground or floor. Toeboards shall be a minimum of 4 inches in height. Wire mesh shall be installed in accordance with paragraph (a)(6) of this section.

at any previous time that any employee had been on the scaffold, they [sic] wore tied-off safety belts. Thus, there have been absolutely no demonstration of employee exposure to any hazard here", citing Humphreys & Harding, Inc., 74 OSAHRC 28/C2, 1 BNA OSHC 1700, 1973-74 CCH OSHD ¶17,784 (No. 621, 1974). I do not so read Pollack's testimony nor is Humphreys & Harding pertinent.

Pollack's testimony about the use of safety belts is ambiguous. He testified (Tr. 112) that the guardrail was removed from one end for access, and when asked about the other end he replied,

> No, there is no brackets there. We need—they are really in the way. You know, I'm saying they should have been there, and we needed access. We tied our safety belts on so we could get around up there and we just took them off so we could get to the nuts and bolts that were outside the end of that.

Pollack did not, as Rodgers asserts, testify that any employee on the scaffold wore a tied-off safety belt. Also, it is unclear whether he meant the guardrail or the safety belts were removed to get to the nuts and bolts.

In any event, Rodgers has not proved, and does not contend it has proved, the affirmative defense of impossibility of compliance, and safety belts are not a substitute for guardrails. Warnel Corp., 76 OSAHRC 41/C6, 4 BNA OSHC 1034, 1975-76 CCH OSHD ¶20,576 (No. 4537, 1976).

In view of the length of time the scaffold had been used without guardrails, Rodgers is chargeable with constructive knowledge of the violative condition. Also, it appears that Assistant Superintendent Swain was aware of it (Tr.189-190).

Rodgers contends that the citation must be vacated because the Secretary did not prove that the violative condition existed on the inspection date,

the compliance officer did not see any employee on the scaffold, and information obtained from an employee is insufficient to establish employee exposure, citing Mel Jarvis Construction Co., Inc., 9 BNA 2123, (No. 77-207, 1981). (Carlson, J.)

It is not necessary that the violation occur on the inspection date or that it be observed by the compliance officer. Circle Industries Corp., 76 OSAHRC 121/F4, 4 BNA OSHC 1724, 1976-77 CCH OSHD ¶21,119 (No. 4356, 1976). However, the violative condition (absence of guardrails) did exist on the inspection date. The question is one of access to the hazard. Circle Industries, supra. Here there definitely was access. Rodgers' reliance on Mel Jarvis, supra, is misplaced. There an employee's hearsay representation of exposure to the compliance officer was held insufficient by the judge. Here the employee came to the hearing and testified. Moreover, hearsay is admissible in our proceedings. United Technologies, Power Systems Div., 81 OSAHRC 40/C13, 9 BNA OSHC 1813, 1981 CCH OSHD ¶25,350 (No. 79-1552, 1981).

In view of the potential 10-floor fall and Compliance Officer Reina's testimony regarding the likely consequences thereof (Tr.81), I find the violation to be serious.

Under the statutory criteria previously discussed, I find a penalty of $300 to be appropriate rather than the $490 proposed by the Secretary.

IV. The alleged serious violation of 29 CFR 1926.550(a)(4).

Item 2 of citation 1 (Docket No. 82-0504) alleges a serious violation of §1926.550(a)(4) and "the applicable ANSI standard for the type of crane or derrick in use" in that "inappropriate hand signals" were given to a crane operator in the center of the 11th floor of the building.

The cited standard provides:

> Hand signals to crane and derrick operators shall be those prescribed by the applicable ANSI standard for the type of crane in use. An illustration of the signals shall be posted at the job site.

The Secretary introduced into evidence, without objection from Rodgers, excerpts from ANSI B30.3-1975, American National Standard, Hammerhead Tower Cranes, §3-3.3.2 of which (Exhibit C-6) provides:

> Hand signals shall be in accordance with Figure 4 [Exhibit C-7] and shall be posted conspicuously.

Compliance Officer Reina testified that, while he was on the 11th floor talking to two employees, someone tapped him on the shoulder (he was in a bent-over position) and pointed to a concrete bucket suspended over his head on the hammerhead crane's hoisting line. Reina perceived this as a life-threatening situation. He testified (Tr.85) that two non-English speaking employees (apparently the two with whom he had been conversing) were giving the crane operator improper hand signals which he characterized as mere "motions" indicating the desired direction of movement.

The crane was being operated by remote control, and the operator, Roger Choate,was located on the edge of the 11th floor. Choate testified (Tr.157-165) that he knew he was supposed to lower the concrete bucket between the two employees and that he could see them but not Reina who was behind a column. Choate's testimony is somewhat conflicting within itself, but at one point he conceded that the two employees simply indicated by pointing down or up when they wanted him to lower or raise the bucket. According to Exhibit C-7 (and also Rodgers' Exhibit R-51, which apparently was taken from a different ANSI standard) the correct signal for such a maneuver is to point down or up, as the case might be, making a circular motion with the fore-finger of the right hand. Thus it appears from both charts (Exhibit C-7 and

and R-51) that improper hand signals were given by the two employees.

However, the matter does not end there. ANSI B30.3-1975 was not in existence when §1926.500(a)(4) was promulgated in 1972 (37 FR 243, December 16, 1972, p. 27545) and a subsequently-promulgated standard is not automatically incorporated. Clifford B. Hannay & Son, Inc., 78 OSAHRC 12/A2, 6 BNA OSHC 1336, 1978 CCH OSHD ¶22,525 (No.15983, 1978). Reference must therefore be made to the predecessor standard, ANSI B30.3-1975,on the cover of which is a notation that it is a partial revision of B30.2-1943(R.1952), ¶3021 of which provides:

> Signals to the operator shall be in accordance with the standards set forth in Pars. 3022, 3023, and 3024. Whistle signals may be used only when a single crane is in operation. A mechanical or electric gong is recommended in preference to a whistle. A copy of the signals in use shall be posted in a conspicuous place on or near the crane or derrick.

Paragraphs 3022 and 3023 provide for either one-hand signals or two-hand signals, including the following

> 3022 One-Hand Signals
>
> * * *
>
> (1) Hoist. With forearm vertical, forefinger pointing up, move hand in small horizontal circle.
> (2) Lower. Arm extended, palm down, wave hand down and up.
>
> 3023 Two-Hand Signals
>
> * * *
>
> (11) Hoist. Hold both arms horizontal at sides, fully extended, and move upward and return.
> (12) Lower. Hold both arms at sides, fully extended, and move out and return.

For swinging the boom, ¶3022 provides:

> Arm extended, point with finger in the direction of motion.

It will be seen from these examples that the 1975 revision makes some changes in the prescribed signals, although the one-hand signal for "hoist" remains the same. It is also apparent that the two employees gave the correct signal for swinging the boom. Nevertheless, they gave improper hand signals to raise and lower the load.

However, that still does not end the matter. The next question is whether Rodgers, as general contractor, has the responsibility of seeing to it that all the subcontractors' employees who give signals to its crane operator employ the prescribed signals.

At the time of the inspection, there were 7 or 8 subcontractors on the job (Tr.76), and Rodgers had about 30 employees there (Tr.151). Rodgers provided the crane and two operators (Tr.156). Anyone could give signals; no employees were specifically designated for this purpose (Tr.92). At the time of the inspection, 6 to 8 employees of a cement finishing subcontractor, Terry J. Fricks, were working a concrete slab being poured on the 11th floor (Tr. 84), and it was two of Fricks' employees who gave the signals complained of by Reina.

Choate, the crane operator on duty at the time, testified for Rodgers. He testified that the hand signal chart introduced as Exhibit R-51 was posted on the bulletin board at Rodgers' job office (Tr.155) and conceded on cross examination he made no effort to find out if the two Fricks employees knew these hand signals (Tr.174).

As previsouly noted, Exhibit R-51 is not the set of signals prescribed by ANSI B30.2-1943 (R.1952),¶¶3021-3024. Also, ¶3021, quoted above, provides that "[a] copy of the signals in use shall be posted in a conspicuous place

on or near the crane or derrick", not in the jobsite office. Thus Rodgers posted the wrong signals in the wrong place and apparently did nothing else to insure that its own employees or those of subcontractors knew and used the appropriate signals. This is something a general contractor, in its supervisory capacity, is in a position to control. Knutson Construction Co., 75 OSAHRC 131/F3, 4 BNA OSHC 1759, 1976-77 CCh OSHD ¶21,185 (No. 765, 1976).

Just how much the general contractor can be expected to do is less clear. However, under the standard it should at least post the correct signals on or near the crane. It also seems to me that a general contractor should require all its employees who signal the crane operator to demonstrate proficiency in giving these signals and should request all subcontractors to do likewise.

I find this violation proved, and the next question is whether the violation is serious as charged.

Although the compliance officer characterized the violation as serious, I find it to be nonserious. The crane operator was not in his lofty perch on the crane but was operating it by remote control from a short distance away. The chances of mistaking a hand signal and dropping a load on someone were minimal. Therefore, no penalty will be assessed.

V. The alleged nonserious violation of §1926.350(j) and ANSI Z49.1-1967, §3.2.4.3.

Item 2 of citation 2 (Docket No. 82-0504), as amended, alleges a nonserious violation of §1926.350(j) [9] and ANSI Standard Z49.1-1967, §3.2.4.3, [10] in that

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9 The cited standard, under subpart J, Welding and Cutting, provides:

§1926.350(j) Additional rules

For additional details not covered in this subpart, applicable technical portions of American National Standards Institute, Z49.1-1967, Safety in Welding and Cutting, shall apply.

10 The cited ANSI standard provides:

§3.2.4.3 Oxygen cylinders in storage shall be separated from fuel-gas cylinders or combustible materials (especially oil or grease), a minimum distance of 20 feet or by a noncombustible barrier at least 5 feet high having a fire-resistance rating of at least 1/2 hour.

oxygen and fuel-gas cylinders were stored together in the center of the 6th floor.

Compliance Officer Reina's uncontradicted testimony (Tr.100-105) establishes that an oxygen cylinder and an acetylene cylinder were stored about 2 inches apart, with no wall between them, about 20 feet from a stairwell used by Rodgers' employees and the same distance from a Rodgers employee who was working in the area, posing a hazard of fire and explosion.

In the exercise of reasonable diligence, Rodgers could have known of this violative condition. I find this item proved.

VI. The alleged violation of §1926.602(a)(9)(i).

Item 3 of citation 2 (Docket No. 82-0504) alleges a nonserious violation of §1926.602(a)(9)(i) [11] in that a Ford 445 front end loader, a bidirectional earthmoving machine, was not equipped with an operable horn.

Here again, Compliance Officer Reina's testimony is uncontradicted. It establishes that a front-end loader, capable of moving in either direction, and operated by a Rodgers employee, was equipped with a horn which was not in an operating condition (Tr.105-108). Reina quoted the driver as saying that the horn had not been operational in the 2 or 3 weeks he had driven the loader (Tr.106). One Rodgers employee was walking alongside the loader to direct it, and there were several other persons in that general area (Tr. 107-108). The hazard was that an employee might have been struck or run

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[11] The cited standard provides:

§1926.602-MATERIAL HANDLING EQUIPMENT

(a) Earthmoving equipment; general

* * *

(9) Audible alarms

(i) All bidirectional machines, such as rollers, compactors, front-end loaders, bulldozers, and similar equipment, shall be equipped with a horn, distinguishable from the surrounding noise level, which shall be operated as needed when the machine is moving in either direction. The horn shall be maintained in an operative condition.

over by the loader (Tr.108).

In the exercise of reasonable diligence, Rodgers could have known of this violation.

FINDINGS OF FACT

1. Rodgers is a corporation organized, and with headquarters in, the state of Tennessee, has a place of business in Texas, and at the time of the inspections herein was engaged as general contractor in the construction of a Hilton hotel in Arlington, Texas, the job superintendent on which project made frequent reports to Rodgers' Tennessee headquarters.

2. On March 1, 1982, Rodgers' carpenter foreman, Dennis E. Stephens, was killed and Bobby Wright, his helper, was injured when floor decking on the 9th floor collapsed, due to removal of supports, as they prepared to remove guardrails. Neither Stephens nor Wright was tied off, though Stephens was wearing a safety belt. It was standard operating procedure for guardrails to be removed without fall protection. Use of safety belts was feasible, but use of ladders, scaffolds, catch platforms, temporary floors or safety nets was not practical. Rodgers knew or in the exercise of reasonable diligence could have known of this violation, and Stephens' knowledge is imputable to Rodgers. There was a substantial probability that death or serious physical injury could result from this violation.

3. While investigating the Stephens fatality, the compliance officer saw two Rodgers employees, Vernon Trailer and Jeff Flanagan, climb an 8-foot column form on the periphery of the 10th floor without any fall protection, Trailer to release concrete from an overhead bucket into the form and Flanagan to use a vibrator on the freshly-poured concrete. Use of safety belts was feasible, since they could have been tied off to the rebars,

but use of ladders, scaffolds, catch platforms, temporary floors, safety lines or safety nets was impractical. The performance of the operations in which Trailer and Flanagan were engaged without safety belts was a common practice, and in the exercise of reasonable diligence Rodgers could have known about it. Rodgers did not supply safety belts to all its employees, and they frequently had to borrow safety belts from each other. There was a substantial probability that death or serious physical injury could result from this violation.

4. A reasonable person familiar with the circumstances would have recognized the hazards found in findings of fact Nos. 2 and 3.

5. Rodgers has not established its affirmative defense of unpreventable employee misconduct to either of the violations found in findings of fact Nos. 2 and 3.

6. The proposed penalty of $490 for the violations found in findings of fact Nos. 2 and 3 is appropriate.

7. A materials catch platform,or "eyebrow", was being erected on the perimeter of the 6th floor, and at the request of a compliance office a Rodgers employee, Ray Foster, who was in charge of this operation, demonstrated, without fall protection, how plywood sheets were pushed out onto 4 x 4s projecting about 8 feet beyond the floor's edge and nailed in position. There is evidence that this work was being done without safety belts or other form of fall protection prior to the demonstration by Foster, and the compliance officer may have unwittingly induced a violation.

8. There were no guardrails on the open ends of a carpenter's bracket scaffold on the 10th floor. This scaffold was used in the pouring of exterior walls and was moved up from floor to floor as needed. It had formerly

had end rails, but they were removed a month or more before the inspection because they interfered with access to the scaffold and nuts and bolts underneath it. In the exercise of reasonable diligence, Rodgers could have known of this violation. There was a substantial probability that death or serious physical harm could result from this violation. A penalty of $300 is appropriate.

9. The compliance officer observed two employees of a cement-finishing subcontractor, Terry J. Fricks, using inappropriate hand signals to Rodgers' crane operator for movement of a concrete bucket. Rodgers had 30 employees on this job, and there were 7 or 8 subcontractors. Rodgers posted an illustration of hand signals to crane operators in the job office but not on or near the crane, which was a hammerhead tower crane, and the signals so posted were not those incorporated by reference by §1926.500(a)(4). Rodgers made no other efforts to insure that persons giving signals to the crane operator used approved signals. The violation was nonserious, and no penalty shall be assessed.

10. Rodgers stored an oxygen cylinder and an acetylene cylinder about 2 inches apart, with no wall between them, about 20 feet from a 6th floor stairwell used by Rodgers employees. One Rodgers employee was working in this area and was exposed to the hazard of fire and explosion. Rodgers knew or in the exercise of reasonable diligence could have known of this violation.

11. A bidirectional front end loader, an earthmoving machine, had an inoperable horn. At least one Rodgers employee was exposed to the hazard of being struck or run over. The condition had existed at least 2 weeks. Rodgers knew or in the exercise of reasonable diligence could have known of this violation.

## CONCLUSIONS OF LAW

1. Rodgers at all times material hereto was engaged in a business affecting commerce within the meaning of §3(5) of the Act.

2. Rodgers at all times material hereto was subject to the requirements of the Act and the standards promulgated thereunder.

3. Rodgers violated §5(a)(2) of the Act by committing violations of the following standards:

Docket No. 82-0503 -

§1926.28(a) (two serious violations)

Docket No. 82-0504 -

§1926.451(m)(6) (serious)

§1926.350(j) and ANSI Z 49.1-1967, §3.2.4.3. (nonserious)

§1926.550(a)(4) and ANSI B 30.2 1943(R.1952), ¶3021 (nonserious)

§1926.602(a)(9)(i) (nonserious)

4. Rodgers was not in violation of §1926.28(a) and/or §1926.105(a) as alleged in item 1 of citation 2 (Docket No. 82-0504).

## ORDER

On the basis of the foregoing discussion and opinion, findings of fact, and conclusions of law, it is ORDERED that:

1. Item 1 of citation 1, as amended (Docket No. 82-0503), alleging serious violations of 29 CFR 1926.28(a) and/or §1926.105(a), is AFFIRMED insofar as it alleges violations of §1926.28(a), and a penalty of $490 is ASSESSED.

2. Item 1 of citation 1 (Docket NO. 82-0504), alleging a serious violation of 29 CFR 1926.451(m)(6), is AFFIRMED and a penalty of $300 is ASSESSED.

3. Item 2 of citation 1 (Docket No. 82-0504) alleging a serious violation

of 29 CFR 1926.550(a)(4) and ANSI B 30.2-1943 (R.1952),§§2031-3024, is AFFIRMED as a nonserious violation.

4. Item 1 of citation 2, as amended (Docket No. 82-0504), alleging a serious violation of 29 CFR 1926.28(a) and/or §1926.105(a) is VACATED.

5. Item 2 of citation 2, as amended (Docket No. 82-0504), alleging a nonserious violation of 29 CFR 1926.350(j) and ANSI Z 49.1-1967, ¶3.2.4.3, is AFFIRMED.

6. Item 3 of citation 2 (Docket No. 82-0504),alleging a nonserious violation of 29 CFR 1926.602(a)(9)(i), is AFFIRMED.

DEE C. BLYTHE
Administrative Law Judge

Date: October 4, 1982

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| | (Judge's decision) | | 63/A2 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

November 4, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

United States Steel Corporation

OSHRC DOCKET NO. 77-3378

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

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FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

William E. Brennan, Judge
Occupational Safety & Health Review
Commission
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UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | |
| UNITED STATES STEEL CORPORATION, | : | OSHRC Docket No. 77-3378 |
| Respondent, | : | |
| UNITED STEELWORKERS OF AMERICA AND ITS LOCAL 4889, | : | |
| Authorized Employee Representative. | : | |

DECISION

Before: ROWLAND, Chairman; CLEARY, Commissioner.*/

BY THE COMMISSION:

A decision of Administrative Law Judge William E. Brennan is before the Commission for review pursuant to section 12(j)1/ of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (the "Act"). In his decision, Judge Brennan ruled on the issues raised in five separate citations issued by the Secretary of Labor (the "Secretary") after the Secretary's inspection of United States Steel Corporation's ("USS") coke oven facility at Fairless Hills, Pennsylvania. The inspection began on March 22, 1977, two months and two days after the effective date

*/ Commissioner Cottine took no part in the consideration or decision of this case.

1/ 29 U.S.C. § 661(i).

of the coke oven emissions standard at 29 C.F.R. § 1910.1029. The citations issued as a result of the inspection mainly contain allegations of noncompliance with that standard. The judge affirmed nearly all the cited instances of alleged noncompliance and assessed penalties totaling $33,250. We affirm in part and reverse in part, as outlined below.

I

Coke is a porous, cellular by-product of the destructive distillation or carbonization of coal.[2/] It is used primarily by the steel producing industry as a fuel for its blast furnaces and foundries. A coke oven battery is a large, generally rectangular structure, typically 200 or more feet long, 40 to 60 feet wide, and up to 50 feet in height. The battery is divided by refractory brick walls into a series of narrow ovens or coking chambers, about 18 inches wide and from 13 to 20 feet high, extending the full width of the battery and separated from the adjoining ovens by a heating chamber. Heating and oven chambers alternate with each other so that there is a heating chamber on either side of an oven. This heating process causes the carbonization of the coal within the ovens and results in the production of coke and various distillates.

Coke production consists of three basic operations: "charging," "coking," and "pushing." The charging cycle begins with the loading of coal into the individual ovens to a predetermined level (the coal line) which allows free space above the coal so that the gases may be removed from the oven and collected. This charging procedure is done with the use of a large, mechanical "larry car" which operates on rails on the

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2/ This description of the coke production process is largely taken from the judge's decision and from the preamble to the coke oven emissions standard. 41 Fed. Reg. 46742-44 (1976).

top of the battery. The larry car has three or four hoppers which are fed a premeasured load of coal obtained from a coal bunker located at the end of the battery. The number of hoppers in a larry car corresponds to the number of charging holes in the roof of the ovens. The loaded larry car moves away from the coal bunker and is positioned over the oven to be charged. The charge hole lids are removed and the larry car hoppers are emptied into the oven through its charging holes. After the coal is in the oven, a small door called a "chuck" door, is opened through which a leveler ram is inserted into the oven to level the coal within the predetermined coal line. During this charging process, the oven is placed under steam "aspiration" (forced or induced draft) by the use of steam jets located in vertical pipes called standpipes. This aspiration system is designed to induce a draft within the oven to increase the exhausting effect and thus reduce or limit the escape of volatile gases from the oven into the ambient air during the charging process and is called "charging on the main." The gases are removed from the ovens through the vertical standpipes and through "gooseneck" pipes to one or two large, horizontal ducts called "collector mains." After the charging is completed, the charging lids and chuck doors are closed, the aspiration is shut off and the "coking" operation begins.

There are a number of variables which determine the desired coking time, such as width of the ovens, the ovens' condition, coal moisture, and the nature of the coal used. The time varies from about 16 to 20 hours. Coking time is selected so that the coke adjacent to the oven walls has a temperature from 1900° F. to 2000° F. The heating chamber temperatures range from about 2600° F. to 2800° F.

When the coal is sufficiently coked, doors on each side of the oven, known as the "push side doors" and "coke side doors," are removed by mechanical door machines (the door machines run on rails at what is called the "bench level" of the battery). With both doors removed, a mechanically operated ram, mounted on a pusher door car, pushes the incandescent coke out through the coke side of the oven into a large boxcar called a "quench car". The coke-filled quench car then moves on rails to the quench tower where the coke is cooled with water and then dumped onto the coke wharf. When the oven doors are put back onto the oven, the procedure begins over again.

At Fairless Hills, USS maintains a steel mill which includes coke oven batteries numbered 1 and 2. The batteries were built in 1952 and were manufactured by the Wilputte Company. Each battery consists of 87 coke ovens. The ovens are each 12 feet 2 inches high, 40 feet 7-5/8 inches long and 18 inches wide. Each oven has three charging holes. Approximately 16 tons of coal are dropped into each oven and heated to an average temperature of 2000° F. The average coking time at the time of the OSHA inspection was 16-1/2 hours.

USS's ovens are operated 24 hours a day, seven days a week and are manned by three eight-hour shifts, called "turns," of coke oven employees. Eighty-one ovens are normally pushed during each turn.

The larry cars for the batteries were built by Wilputte in 1952. In 1976, the larry car for battery no. 1 was modified to include new drop sleeves, new volumetric controls and a new drive for its central turntable. Both larry cars have three hoppers, each of which is filled with coal from a coal bunker located between the batteries.

The pusher and coke side door machines for both batteries were built in 1952 by Wilputte (each battery has one push side and one coke side door machine), as was the quench car which services both batteries. There were no significant modifications to either the push side door machine, the coke side door machine, the quench car, or the larry car for battery no. 2 between 1952 and the time of the Secretary's inspection in this case.

II

A major hazard to coke oven employees is the risk of certain types of cancer and other diseases caused by exposure to coke oven emissions. The primary hazards are briefly presented in the following quotation from the preamble to the coke oven emission standard (29 C.F.R. § 1910.1029):

> The evidence in the record conclusively supports the finding that coke oven emissions play a causal role in the induction of cancer of the lung and genito-urinary tract in the exposed population. Constituents of coke oven emissions and coal tar, a by-product of the coking process, are known animal skin carcinogens and have been related to increased skin cancer mortality in human populations similar to coke oven workers. This information is sufficient to warrant protective measures designed to reduce employee exposure to coke oven emissions.

41 Fed. Reg. 46748 (1976).

Coke oven emissions can leak out of coke ovens at any unsealed point, such as charging holes, doors, door frames, standpipes and goosenecks. Emissions also result whenever the gas-tight integrity of coke ovens is necessarily disturbed, like during the charging and pushing procedures. Emissions are released into the air as well while coke is in the quench car, prior to being cooled.

Because of the hazards inherent in coke oven operations, employee exposure to coke oven emissions has been, and is, regulated. The Secretary

promulgated the first "coke oven" standard in 1969 under the Walsh-Healey Act, 41 U.S.C. §§ 35-45. That standard adopted a 1967 recommendation of the American Conference of Governmental Industrial Hygienists and set an exposure limit of 200 micrograms of coal tar pitch volatiles per cubic meter of air (200 $ug/m^3$) for an eight-hour work day. In 1971, the standard was adopted as an "established Federal standard"[3/] under section

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3/ The standard was published at 29 C.F.R. § 1910.93 and will subsequently be referred to as the 1971 standard. It has since been redesignated section 1910.1000:

> § 1910.1000 Air contaminants.
>
> An employee's exposure to any material listed in tables Z-1, Z-2, or Z-3 of this section shall be limited in accordance with the requirements of the following paragraphs of this section.
>
> (a) Table Z-1:
>
> * * *
>
> (2) Other materials -- 8-hour time weighted averages. An employee's exposure to any material in table Z-1, the name of which is not preceded by "C", in any 8-hour work shift of a 40-hour work week, shall not exceed the 8-hour time weighted average given for that material in the table [Table Z-1 assigns coal tar pitch volatiles (which material is not preceded by a "C") a time weighted average of 200 ug/m3]. [§ 1910.98 provided that the effective date of § 1910.93 was August 27, 1971.]
>
> * * *
>
> (e) To achieve compliance with paragraph (a) through (d) of this section, administrative or engineering controls must first be determined and implemented whenever feasible. When such controls are not feasible to achieve full compliance, protective equipment or any other protective measures shall be used to keep the exposure of employees to air contaminants within the limits prescribed in this section. Any equipment and/or technical measures used for this purpose must be approved for each particular use by a competent industrial hygienist or other technically qualified person. Whenever respirators are used, their use shall comply with § 1910.134.

6(a) of the Act, 29 U.S.C. § 655(a). Section 1910.93 provided that feasible engineering and administrative controls be used to reach the standard's limits but did not specify particular controls.

Later in 1971, the American Iron and Steel Institute (AISI), of which USS is a member, petitioned the Secretary for a standard specifically directed at coke ovens. Also that year the United Steelworkers of America petitioned the Secretary for a more stringent standard directed at coke oven emissions. Although the Secretary denied both petitions, he did request the National Institute of Occupational Safety and Health (NIOSH) to expedite research relating to employee exposure to coke oven emissions. In February of 1973, NIOSH issued a report recommending the use of specific engineering controls and operating procedures, supplemented by respiratory protection programs, for coke oven plants.

In 1974, the Secretary empanelled a standards advisory committee on coke oven emissions to review the NIOSH report and make recommendations for a new coke oven emissions standard. That committee submitted a 3,500-page report to the Secretary in 1975.

The Secretary published his proposed standard for coke oven emissions in the Federal Register on July 31, 1975. From November 4, 1975 to January 8, 1976, and from May 4, to May 14, 1976, hearings were held on the proposed standard pursuant to section 6(b) of the Act, 29 U.S.C. § 655(b).

On October 22, 1976, the Secretary published the new coke oven emissions standard, to become effective on January 20, 1977, 41 Fed. Reg. at 46742-90. The standard lowered the permissible exposure level limit for coke oven emissions to 150 micrograms per cubic meter of air (150 ug/m3) averaged over an eight-hour period. 29 C.F.R. § 1910.1029(c).

To attain the new permissible exposure limit, the standard mandated an extensive list of particular engineering and work practice controls to be implemented ". . . at the earliest possible time, but not later than January 20, 1980. . . ." 29 C.F.R. § 1910.1029(f)(1)(i)(a).

III

As mentioned earlier, this case involves the issuance of five citations by the Secretary to USS in September 1977. Citations 1 and 2, both designated serious, were directed at USS's coke oven batteries 1 and 2, respectively. Each citation charged employee exposure to excessive amounts of coke oven emissions, as well as USS's failure to provide numerous controls mandated by section 1910.1029(f). Citation 3, also designated serious by the Secretary, included allegations of noncompliance with sections 1910.1029(g) (respirators), 1910.1029(h) (cleaning of protective clothing), and 1910.1029(i) (hygiene practices), and with provisions of section 1910.1029 dealing with written procedures and schedules required to be included in USS's training program. Citation 4 was alleged to be repeated and citation 5 other than serious. The latter two citations include allegations of noncompliance with certain requirements for respirators and with the requirement that hot and cold, or tepid, running water should be provided in lavatories. Before discussing the merits of the individual citation items, we must first address an overriding legal issue common to many of the items.

A

Certain of the items in citations 1 and 2 involve allegations that USS failed to implement various specific controls required by section 1910.1029(f). USS contends that it did not have time and was therefore not required to implement some of these controls in the two months

between the 1977 standard's effective date and the inspection.[4/] The Secretary does not dispute that two months was an insufficient time to install these controls but contends that USS was obligated to implement the controls under the 1971 standard and that this obligation continued under the 1977 standard. According to the Secretary, USS had sufficient time to implement the controls under the 1971 standard and may be found in violation of the 1977 standard for not doing so. The United Steelworkers of America and its Local 4889 ("the Union") have elected party status in these proceedings, and support the Secretary's reasoning on this issue.

This issue centers on the following language from section 1910.1029(f)(1)(i)(a):

> The employer shall institute the engineering and work practice controls listed in paragraphs (f)(2), (f)(3) and (f)(4) of this section in existing coke oven batteries at the earliest possible time, but not later than January 20, 1980, except to the extent that the employer can establish that such controls are not feasible. In determining the earliest possible time for institution of engineering and work practice controls, the requirement, effective August 27, 1971, to implement feasible administrative or engineering controls to reduce exposures to coal tar pitch volatiles,[5/] shall be considered. . . . (Emphasis added).

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4/ The citation items to which this issue pertains are: Citation 1, item 2, and Citation 2, item 2 (absence of stage charging); Citation 1, item 3, and Citation 2, item 3 (steam aspiration system did not provide sufficient negative pressure and flow volume); Citation 1, item 4, and Citation 2, item 5 (absence of mechanized gooseneck and standpipe cleaners); Citation 1, item 5, and Citation 2, item 6 (inadequate spare push side and coke side doors); Citation 1, item 12, and Citation 2, item 14 (positive pressure, temperature controlled filtered air not provided for cabs of equipment); Citation 1, item 13, and Citation 2, item 15 (stand-by pulpits equipped with positive pressure, temperature controlled air not provided); and Citation 2, item 4 (larry car not equipped with individually operated drop sleeves and slide gates).

5/ Coal tar pitch volatiles as used in the 1971 standard are identical to the benzene soluble fraction of total particulate matter used in 1910.1029 as the standard of measurement for the permissible exposure limit. 41 Fed. Reg. at 46752, col. 3.

USS's primary argument is that, at the time of the inspection, it had not yet been obligated to implement the engineering and work practice controls required by the 1977 standard because the short two-month period between the effective date of that standard and the inspection did not allow it enough time to do so. USS argues that the 1977 standard gave it until January 20, 1980 to install the mandated controls.

USS argues that absent evidence its employees were exposed to CTPV emissions in excess of the 200 $ug/m^3$ limit in the 1971 standard, it was not obligated to adopt and implement any controls or work practices prior to January 20, 1977.[6/] This being so, the Secretary's citation items alleging USS's failure to implement controls like stage charging, modified larry cars, improved steam aspiration systems, mechanized standpipe and gooseneck cleaners, adequate door supplies, and filtered air for cabs and pulpits are improper because the Secretary has never contended that those items could have been implemented in the period between the publication of the 1977 standard and the inspection.

USS also contends that its failure to install the specific controls mandated by the 1977 standard cannot be considered a violation of the 1971 standard's requirement to install feasible engineering and administrative controls. If such controls had been required by the 1971 standard then, according to USS, there would have been no need to have them spelled out in detail by the 1977 standard.

The Secretary argues that USS failed to implement the engineering and work practice controls required by section 1910.1029 at the earliest

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6/ USS contends that the only evidence of record concerning the emissions to which its employees were exposed is contained in a stipulation that, at the time of the inspection, employees were exposed to concentrations in excess of 150 $ug/m^3$.

possible time. He states that USS has been legally obligated to adopt all feasible engineering controls to reduce coke oven emissions since the effective date of the 1971 standard, and that if USS had begun to implement the controls mandated by the 1977 standard when those controls first became feasible, the controls would have been in place by the time of the inspection. The Secretary maintains that "the obligation to implement all generally feasible engineering or administrative controls under the 'old' standard is the legal equivalent of the responsibility to implement the specifically mandated controls and work practices under the 'new' standard." In support of this position, the Secretary points to that section of the 1977 standard's preamble that refers to the obligations of employers under the 1971 standard and sets out the view that recalcitrant employers not get the benefit of an extended time frame for institution of controls under the 1971 standard.[7/]

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7/ The relevant portion of the preamble states:

> Finally, a difficult compliance issue presented by the promulgation of the new standard involves its relationship, within the context of enforcement, to the employer's legal obligations under the prior standard (29 C.F.R. § 1910.1000, 1002). The present standard, at paragraph (f)(1)(i) requires the implementation of specific engineering controls and work practices at the earliest possible time but not later than January 20, 1980. To this end, employers are presently required to develop written programs and to implement specific controls. However, the agency recognizes that employers had a legal obligation under the prior standard to reduce coke oven emission exposures by means of feasible engineering and administrative controls. It is not the intention of the agency, through the promulgation of this standard, to vitiate the legal requirements under

(continued on next page)

B

Judge Brennan agreed with the Secretary's interpretation of section 1910.1029(f)(1)(i)(a). He held that, in determining whether an employer had installed the controls required by the 1977 standard in the "earliest possible time," it was appropriate to consider whether an employer had the obligation to install such controls under the 1971 standard, prior to the 1977 standard going into effect. The judge further concluded that USS had had an obligation to install controls under the 1971 standard. Although the judge conceded the record does not establish that USS failed to comply with the exposure limit in the 1971 standard, he stated that USS's argument essentially asked him to rule that the Fairless coke ovens were in compliance with the 1971 standard. But that claim, the judge concluded, was not supported by the record either. The judge construed USS's argument as an affirmative defense and placed upon USS the burden of proving compliance with the 1971 standard in order

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7/ (continued)

> the old standard. Rather, OSHA views the two standards as representing continuum of enforceable obligations which have been crystallized in the standard's promulgation.
>
> More specifically, in evaluating whether the employer has instituted controls at the earliest possible time, OSHA compliance personnel would consider not only the employer's performance under the new standard but also his prior obligations under its predecessor. It is OSHA's view that recalcitrant employers who have implemented only a few or no controls or work practices under the prior CTPV standard should not benefit from a newly extended time frame established under the new standard. Rather, cognizant of their prior legal obligations, such employers would be subject to citation under the new standard for failure to implement controls at the earliest possible time.

41 Fed. Reg. 46773 (October 22, 1976)

to establish the defense. He ruled that USS had not carried that burden, and that in fact the record best supports the contrary conclusion. The judge stated that it "strains credulity" to conclude that the Fairless batteries had no coke oven emissions on January 19, 1977, while just sixty days later, at the time of inspection, the batteries were producing extensive coke oven emissions. The judge also stated USS had not shown that any of the "feasible engineering or administrative controls" required by the 1971 standard had been implemented prior to the promulgation of the 1977 standard, whereas well-known engineering controls like stage charging and quickly implementable work practices like proper inspections and repairs had not been implemented at the time of the inspection.

On review, the parties adhere to the interpretations of the standard they advanced before the judge. In addition, USS takes particular exception to the judge's conclusion that it had been under an obligation to install controls under the 1971 standard. USS reiterates its argument that there is no evidence it ever violated the 1971 standard, and contends that the judge improperly shifted the burden to USS to prove that it had been in compliance with the 1971 standard. The Secretary, on the other hand, contends that the judge properly regarded this claim as an affirmative defense. The Secretary contends that it would be nearly impossible for him to now show that USS exceeded the CTPV exposure limits under the 1971 standard, whereas USS could more easily show it had complied with the 1971 standard — if USS had indeed been in compliance with that standard. Moreover, the Secretary reiterates, the 1977 standard presumes that all coke oven employers had failed to comply

with the 1971 standard, citing the preamble to the 1977 standard at 41 Fed. Reg. 46756, col.1:

> Although the industry generally has failed to utilize emissions control technology which has been available for some time . . . and have exceeded the existing permissible exposure limit of [200 ug/m3] (Exh. 68), exposure levels below 150 ug/m3 have been reached at various times on various batteries for various job classifications. . . .

The Secretary then points out that USS's Fairfield, Alabama, plant had implemented many of the controls mandated by the 1977 standard and that "[i]t begs credulity to argue that Respondent's Fairless, Pennsylvania Works, which had implemented virtually none of these controls and work practices, was in compliance with the 200 microgram limit of the old standard particularly in light of the fact that Respondent's engineers had concluded in 1974 that the Fairless batteries had to be rebuilt, as well as the dilapidated condition of the batteries in March 1977." A similar argument is advanced by the Union.

The Union also agrees with the judge's conclusion. It states that the coke oven emissions standard itself and the preamble to that standard create a presumption of noncompliance with the 1971 standard by USS and the other members of the coking industry, citing 41 Fed. Reg. at 46760. In support of this position, the Union advances the following reasons:

> 1) The evidence relied upon by the Secretary in setting the standard indicates that employee exposures were uniformly in excess of the 1971 standard. This was true even after the implementation of stage charging at USS's model plant in Fairfield, Alabama;
>
> 2) If the Fairless plant was in compliance with the 1971 standard, knowledge of such compliance is uniquely with USS;
>
> 3) USS introduced evidence showing that its employees were exposed to excessive amounts of CTPV under

> the 1971 standard when its own witnesses testified that respirators had been required at Fairless since 1971. USS would not have issued respirators if it had been in compliance with that standard.

The Union also suggests that, rather than vacating for lack of evidence on the issue, the Commission should remand the case for the limited purpose of taking evidence on compliance with the 1971 standard if the Commission finds that further evidence on the issue is required.

C

Prior to the effective date of the 1977 standard, employers whose employees were exposed to coke oven emissions in excess of 200 $ug/m^3$ were required by the 1971 standard to implement feasible engineering and administrative controls to reduce that exposure. The 1977 standard reduced the exposure limit to 150 $ug/m^3$, specified various engineering and work practice controls for achieving this exposure level, and imposed additional obligations that did not exist under the 1971 standard, such as requirements for medical surveillance of employees. Thus, the purpose of the 1977 standard was to strengthen the protection afforded to employees exposed to coke oven emissions. In providing that employers had to install specific controls "at the earliest possible time, but not later than January 20, 1980," the Secretary did not intend to "wipe the slate clean" for employers who were not then in compliance with the 1971 standard. He made this explicit by also providing that, "[i]n determining the earliest possible time for institution of engineering and work practice controls, the requirement, effective August 27, 1971, to implement feasible administrative or engineering controls to reduce exposures to coal tar pitch volatiles, shall be considered." 29 C.F.R. § 1910.1029(f)(1)(i)(a).

The 1971 standard mandated those controls which are feasible but only where controls were necessary to "achieve compliance" with the exposure limit specified in that standard. In this case, USS was required to implement controls between 1971 and 1977 only if, and when, USS's employees were exposed to CTPV in excess of the eight-hour time-weighted average of 200 $ug/m^3$. It was employee overexposure that triggered the need to implement controls under the 1971 standard. Judge Brennan found, and the Secretary does not dispute the finding, that the record does not establish USS's employees were exposed to CTPV emissions in excess of the 200 $ug/m^3$ limit of the 1971 standard. We agree with this finding of the judge, and reject the argument of the Secretary and the Union that the judge properly characterized as an affirmative defense USS's argument that it was not obligated to implement controls before the effective date of the 1977 standard. The burden of proof rests with the Secretary to prove all essential elements of a violation. See National Realty and Construction Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973). In this case, the Secretary must prove that USS failed to implement controls by the earliest possible time. In order to meet this burden, the Secretary would have to show either that USS had sufficient time to install the controls after the effective date of the 1977 standard, a burden the Secretary does not contend he has met, or he would have to show that USS had an obligation to install the controls before the 1977 standard went into effect. To show the latter, the Secretary would have to prove that USS's employees had been exposed to CTPV in excess of the 200 $ug/m^3$ limit of the 1971 standard. Such proof is an essential element of the Secretary's case, not an affirmative defense.

The only evidence concerning the levels of coke oven emissions to which USS's employees were exposed at any time is a stipulation of the parties that, at the time of the inspection, the concentrations exceeded 150 $ug/m^3$ on an 8-hour time weighted average basis. The evident purpose of this stipulation was to establish excessive exposures under the 1977 standard. But such a stipulation cannot give rise to an inference that exposures exceeded 200 $ug/m^3$ either during the inspection or at any time prior thereto. The Secretary contends that evidence of exposures prior to the inspection is peculiarly within the knowledge of USS and that the burden of proof should therefore be on USS. However, that an employer may have superior knowledge of certain facts does not relieve the Secretary from meeting his burden of proof. If USS has information concerning the levels of CTPV to which its employees were exposed prior to 1977, the Secretary could have sought to obtain this information through discovery. See Commission Rules 52 and 53, 29 C.F.R. §§ 2200.52 and 53. Additionally, levels of exposures at the time of the inspection, coupled with evidence that conditions and practices in USS's coke ovens had remained substantially unchanged over a certain period of time, could give rise to an inference that the levels of exposures existing at the inspection had also existed prior to the inspection. However, the Secretary did not attempt to prove that the exposures during the inspection exceeded 200 $ug/m^3$. We cannot infer that the levels prior to the inspection exceeded those at the inspection.

We also reject the Secretary's argument that the 1977 standard creates a presumption that all coke oven employers had failed to comply with the 1971 standard, in support of which the Secretary has cited that portion of the 1977 standard's preamble which reads, "[a]lthough the

industry generally (emphasis added) has failed to utilize emissions control technology . . . and have (sic) exceeded the existing permissible exposure limit of [200 ug/m$^3$,] . . . exposure levels below 150 ug/m$^3$ have been reached . . ." 41 Fed. Reg. 46756 (1976). The Secretary's burden of proof must be discharged in the course of a formal proceeding before the Commission, and the Commission's decision must be made on the record produced in that proceeding. See National Realty, supra. The Secretary's evidence must be introduced under circumstances that allow USS the opportunity to cross-examine the Secretary's witnesses and put on its own case. Instead, however, the Secretary and the Union would short circuit this process by substituting as proof statements made by the Secretary in the 1977 standard's preamble which do not specifically address themselves to USS's Fairless Works and which were not tested by the cross-examination of USS's attorneys. That is improper. Further, the statements in the preamble are not written in such definite terms as to make us think that the Secretary ever intended to create an industry-wide presumption of noncompliance with the 1971 standard — even if he thought he had the power to do so.

We also reject the Union's argument that USS's issuance of respirators to the coke oven workers at Fairless prior to the 1977 standard should be taken as proof that USS was not in compliance with the exposure limits of the 1971 standard. Several courts have held that an employer's own safety precautions, absent other evidence, do not establish that the employer believed that such precautions were necessary in order to comply with a particular standard. S & H Riggers & Erectors, Inc. v. OSHRC, 659 F.2d 1273, 1284 (5th Cir. 1981); Diebold, Inc. v. Marshall,

585 F.2d 1327, 1338 (6th Cir. 1978); Cape and Vineyard Division v. OSHRC, 512 F.2d 1148, 1154 (1st Cir. 1975). We agree.

Finally, we reject the Union's suggestion that we should remand for further evidence on whether USS was in compliance with the 1971 standard. The Secretary and the Union either were or should have been aware at the time of the hearing that it was necessary to prove that USS had violated the 1971 standard in order to sustain the allegation that USS had not implemented engineering and work practice controls at the earliest possible time. There is no contention that there has been any newly discovered evidence, nor does the case involve any change in the controlling law since the time of the hearing to justify reopening the record for additional evidence. See Seattle Crescent Container Service, 79 OSAHRC 91/A2, 7 BNA OSHC 1895, 1979 CCH OSHD ¶ 24,002 (No. 15242, 1979). Cf. Samson Paper Bag Co., 80 OSAHRC 60/A2, 8 BNA OSHC 1515, 1980 CCH OSHD ¶ 24,555 (No. 76-222, 1980) (remand to reopen the record when controlling precedent had changed since the hearing). Under the circumstances, the necessity of bringing an end to litigation is pre-eminent. Seattle Crescent Container Service, supra.

Accordingly, we vacate items 2, 3, 4, 5, 12 and 13 of citation 1 and items 2, 3, 4, 5, 6, 14 and 15 of citation 2.[8/]

IV

In addressing the remaining items in citations 1 and 2, we first consider the argument raised by USS that the Secretary may not issue separate citations of the same alleged violations for batteries 1 and

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8/ See note 4 supra.

2. As indicated earlier, in citation 1 the Secretary cited alleged instances of noncompliance with standards at battery 1. In citation 2, the Secretary, for the most part, cited USS for noncompliance with the same standards involved in citation 1, but for instances of noncompliance alleged to have occurred at battery 2. USS contends that this procedure improperly subjected it to being penalized twice for noncompliance with a single standard.

The judge found that the Secretary's action in issuing separate citations for batteries 1 and 2 was a proper exercise of administrative discretion. Judge Brennan observed that section 1910.1029(b) defines a coke oven battery as a "structure containing a number of slot-type coke ovens" and that USS had two such structures at Fairless — which it had designated as batteries 1 and 2. He also found that the coke oven industry generally considers each battery a distinct entity and noted that section 1910.1029(f)(3)(i)(a) uses the words "each battery." More importantly, observed the judge, each battery is a potential source of emissions and each battery must therefore be equipped with the controls required by the standard. The judge also added that the Secretary could justifiably have cited each oven separately.

USS argues that the judge erred by refusing to combine citations 1 and 2 on the ground that those citations duplicate one another. It points out that the two batteries are but two parts of a single physical structure and that compliance officer Stranahan testified, "They are like two rectangular boxes placed end to end with a coal bunker separating them. . . . Physically, they are connected. . . ." USS contends that the batteries do not individually meet the definition of a coke oven battery in section 1910.1029(b): a "structure containing a number

of slot-type ovens. . ." The fact that it has itself designated the batteries as 1 and 2 should not be dispositive, USS asserts, because the Commission should not be "overly impressed by nomenclature." To support its argument that the judge erroneously failed to combine citations 1 and 2, USS points to the stipulation of the parties that the involved "batteries" are both Wilputte combination, double-divided underjet batteries with 87 ovens per battery; that all the ovens are the same size, take the same amount of coal, have the same coal line, and have the same coking temperatures and coking time; that both batteries have double collector mains, three charging holes, larry cars and door machines.

The Secretary argues that differentiation of the violations on a battery by battery basis is within his administrative discretion. Choosing to cite batteries 1 and 2 separately in this case helps assure meaningful penalties designed to effect employer compliance with the standards, the Secretary contends. He also contends that section 1910.1029(f)(1) contemplates the battery as an appropriate unit to which the standard's requirements apply because it states that employers shall institute the engineering and work practice controls "in existing coke oven batteries."

The Secretary also argues that the structure of USS's coking operations demonstrates the appropriateness of his separate citations. He finds it "significant" that USS designated the batteries as 1 and 2, and even more significant that USS uses two sets of machinery for the two parts of its coking operations. USS was, therefore, able to shut down and rehabilitate battery 1 while continuing to operate battery 2 in April of 1977.

To the extent that the judge's action on this issue permits the assessment of more than one penalty against USS for the same conduct, the judge's action is reversed by the Commission. In resolving this issue, Chairman Rowland points out that it is necessary to understand the structure of 29 C.F.R. § 1910.1029(f). Section 1910.1029(f) is entitled "Means of compliance." Subsection (f)(1) is entitled "Priority of compliance methods," and is itself divided into three subsections: (f)(1)(i) is entitled "Existing coke oven batteries"; (f)(1)(ii) is entitled "New or rehabilitated coke oven batteries"; and (f)(1)(iii) is entitled "Beehive ovens." Because USS's batteries existed when the standard took effect, subsection (f)(1)(i) is relevant in this case. It provides that the employer "shall institute the engineering and work practice controls listed in paragraphs (f)(2), (f)(3), and (f)(4) of this section in existing coke oven batteries. . . ." Paragraphs (f)(2), (f)(3), and (f)(4) contain a number of specific steps the employer must take to reduce its employees' exposure to coke oven emissions.

The focus of section 1910.1029(f) is thus the controls employers must institute, not the number of batteries in a particular facility. Indeed, the reference to "existing coke oven batteries" in subsection 1910.1029(f)(1)(i) is only to contrast that subsection with those governing new or rehabilitated batteries and beehive ovens, not to indicate a regulatory intent that each separate "battery" within a facility can be the subject of a separate citation involving the same alleged conduct.

Chairman Rowland further notes that the Secretary's position in this case is inconsistent with his own administrative guidelines. The

Secretary contends that he has discretion to issue separate citations for each battery, each employee, or each job classification, and chose the former as a "reasonable" middle ground. However, the Secretary has issued internal guidelines that limit his authority to issue multiple citations and proposed penalties to an employer for a violation of a single standard. Chapter X, sec. C.1(a) of the Secretary's Field Operations Manual provides that "[a]ll violations of a single standard found during the inspection of a single establishment or worksite should be combined into one alleged violation." Similarly, in discussing citations for violations of the air contaminant standard at 29 C.F.R. § 1910.1000, the Secretary's Industrial Hygiene Field Operations Manual states that "[w]hen more than one employee is exposed to the same hazard, the operation would be listed as separate instances for the same item." Chapter I, sec. H.2(b). With regard to citations under the coke oven standard, at the time the violations in this case occurred there was in effect a program directive providing that separate citations should be issued for violations of certain sections for each battery inspected, but that only one citation per plant should be issued for violations of other sections. OHSA Program Directive # 300-10 (Sept. 6, 1977), reprinted in BNA Occ. Saf. & Hlth Rptr Ref. File, p. 21:9107. In arguing that he has unlimited discretion to issue separate citations for each battery, employee, or job classification, the Secretary is ignoring his own guidelines.

Chairman Rowland also believes that the Secretary's Field Operations Manual and Industrial Hygiene Field Operations Manual represent an acknowledgement that it is fundamentally unfair to assess multiple

penalties against an employer for the same conduct. Thus, to the extent that the separate citations for batteries 1 and 2 were issued in conformity with Program Directive # 300-10, Chairman Rowland does not agree that the directive is appropriate. He notes that the Secretary's internal instructions and guidelines are not binding on the Commission. George C. Christopher & Sons, Inc., 82 OSAHRC _____, 10 BNA OSHC 1436, 1445, 1982 CCH OSHD ¶ 25,956 at p. 32,533 (No. 76-647, 1982).

Chairman Rowland would, therefore, in those instances where the Commission finds that USS violated particular subsections of section 1910.1029(f) by failing to implement certain controls in both batteries, combine the items as part of a single citation and assess a single penalty. See Safeway Stores, Inc., 74 OSAHRC 92/D1, 2 BNA OSHC 1439, 1974-75 CCH OSHD ¶ 19,161 (No. 454, 1947), vacated upon reconsideration on other grounds, 75 OSAHRC 54/C2, 3 BNA OSHC 1123, 1974-75 CCH OSHD ¶ 19,694 (No. 454, 1975).

Commissioner Cleary finds it unnecessary to consider whether the Secretary's action in issuing separate citations for batteries 1 and 2 was a proper exercise of administrative discretion. Ultimate authority for assessment of penalties lies with the Commission, 29 U.S.C. § 666(j), and the Commission may, when it deems it appropriate, assess a single penalty for two or more violations. See H. H. Hall Construction Co., 81 OSAHRC 91/D12, 10 BNA OSHC 1042, 1981 CCH OSHD ¶ 25,711 (No. 76-4765, 1981); Hoffman Construction Co., 78 OSAHRC 2/A2, 6 BNA OSHC 1274, 1978 CCH OSHD ¶ 22,489 (No. 4182, 1978). Commissioner Cleary would find it sufficient to assess single penalties in the amounts specified below, for those items which involve identical violations on the two batteries.

V

We will now address the merits of those items in citations 1 and 2 that we have not already vacated on the basis that USS did not have sufficient time to implement particular controls. We will then address the balance of the contested citation items in the case.

Citation 1, Item 1 and Citation 2, Item 1

These items of serious citations 1 and 2 allege noncompliance with the standard at section 1910.1029(c)[9/] in that the following classifications of employees were exposed to coke oven emissions in batteries 1 and 2 at concentrations greater than 150 micrograms per cubic meter of air for an average eight-hour period: (1) the larry car operator,

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9/ The standard at section 1910.1029(c) provides:

§ 1910.1029 Coke oven emissions.

* * *

(c) Permissible exposure limit. The employer shall assure that no employee in the regulated area is exposed to coke oven emissions at concentrations greater than 150 micrograms per cubic meter of air (150 ug/m3), averaged over any 8-hour period.

(2) lidmen, (3) the coke side jamb cleaner, (4) the coke side door machine operator, and (5) the push side door machine operator (citation 1 only). A $1000 penalty was proposed for each item.

The parties stipulated that the employees in the cited job classifications "were exposed to coke oven emissions, without regard to the use of respirators, at concentrations greater than . . . 150 $ug/m^3$ . . . averaged over 8-hour periods. . . ." The judge found that USS violated the standard based on this stipulation and assessed the proposed $1000 penalties for each of these items.

USS contests the judge's action for two reasons: 1) the employees in the cited job classifications were all wearing respirators that brought the level of contaminants actually breathed by the employees to a level below the permissible exposure limit. Thus, there was no violation, USS argues, citing Administrative Law Judge Chaplin's decision in FMC Corp., 74 OSAHRC 80/E2, 2 BNA OSHC 3216, 1974-75 CCH OSHD ¶ 18,735 (No. 4871, 1974), and 2) since the Third Circuit found in American Iron and Steel Institute v. OSHA, 577 F.2d 825 (3d Cir. 1978), cert. dismissed, 448 U.S. 917 (1980), that no coke oven battery in the country had ever consistently reduced contaminants to the permissible exposure level, and since USS had until January 20, 1980 under the 1977 standard to implement all the controls required by that standard, USS should not be cited in 1977 for exceeding the permissible exposure limit.

The Secretary contends that the stipulation referred to above established a prima facie violation of section 1910.1029(c), particularly since section 1910.1029(f)(1)(i)(a) states respirators may be used as supplemental protection only. Even though section 1910.1029(g), entitled

"Respiratory Protection," contains an exception that does allow respiratory protection to be used during the time period necessary to install controls, the Secretary argues that USS cannot avail itself of this exception because USS had ample time to install controls before the inspection. The Secretary also points out that in an analogous situation the Commission has rejected a contention that an employer failed to violate the noise exposure standard at section 1910.95 because its employees were wearing ear protective equipment and therefore not actually subjected to noise in excess of the required limits, citing Turner Co., 76 OSAHRC 108/A2, 4 BNA OSHC 1554, 1564, 1976-77 CCH OSHD ¶ 21,023 (No. 3635, 1976), remanded on other grounds, 561 F.2d 82 (7th Cir. 1977). Further, the Secretary argues, some 25-50 per cent of USS's employees did not regularly wear respirators; included in this number were one of the larry car operators in battery 1 who did not wear his respirator although engulfed by visible emissions and one of the coke side door machine operators in battery 2, who was seen walking through visible emissions without a respirator.

We vacate these items. The cited standard states USS's general duty to protect its employees from excessive coke oven emissions exposure levels. To the extent that this duty can be discharged by implementation of specific engineering and work practice controls, item 1 in citations 1 and 2 is duplicative of the items discussed below which pertain to the specific engineering and work practice controls mandated by sections (f)(2) and (f)(3) of section 1910.1029.

However, section 1910.1029(g)(1)(i)(a) requires that respirators be used during the time period necessary to install or implement feasible

engineering or work practice controls. Section 1910.1029(g)(1)(ii), though, effectively stays, in part, the operation of section 1910.1029 (g)(1)(i)(a) by the following terms:

> Notwithstanding any other requirement of this section, until January 20, 1978, the wearing of respirators shall be at the discretion of each employee where the employee is not in the vicinity of visible emissions.

Therefore, with respect to the cited instances of alleged noncompliance that involve employees overexposed to coke oven emissions, but not exposed to visible emissions, we vacate because section 1910.1029 (g)(1)(ii) makes respirators use in such circumstances voluntary only. With respect to instances of alleged noncompliance that involve employees working in visible emissions, we note that the Secretary has made that same allegation in item 1c of citation 3,[10/] where noncompliance with section 1910.1029(g)(2)(i) is alleged. Because the latter standard is more specifically applicable to employees working without respirators in visible emissions, we vacate this remaining portion of the section 1910.1029(c) allegation and address the merits of the visible emissions charge under the section 1910.1029(g)(2)(i) allegation of item 1c in citation 3.

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10/ Item 1c of citation 3, discussed *infra*, alleges that USS did not select and assure use of appropriate respirators by employees at certain enumerated work stations where they were in the vicinity of visible emissions. Citation 3, item 1c includes some but not all of the work stations alleged in item 1 of citations 1 and 2. Those work stations appearing in the latter items but not in citation 3, item 1c accordingly represent employees whom the Secretary does not allege to have been in the vicinity of visible emissions.

Citation 1, Items 6, 7, 9 and Citation 2, Items 7, 8, 10

The Secretary alleges in citation 1, item 6 and citation 2, item 7 that USS failed to comply with section 1910.1029(f)(2)(ii)(d)[11/] in that batteries 1 and 2 were not equipped with chuck door gaskets to control door emissions until the chuck doors could be repaired.

The judge found noncompliance with the cited standard and assessed $1000 penalties for each item. The judge pointed out that the parties stipulated there were leaking chuck doors at each battery and that USS was not using chuck door gaskets at the time of inspection. The judge rejected an argument made by USS that it was not using gaskets because it was experimenting with sealing the chuck doors by "luting" them, i.e., applying a tar-like material to joints at which leakage could occur. He stated that luting is not at all experimental, and that it is instead a very old method of plugging leaks.

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11/ The standard at section 1910.1029(f)(2)(ii)(d) reads:

§ 1910.1029 Coke oven emissions.

* * *

(f) Methods of compliance.

* * *

(2) Engineering controls.

* * *

(ii) Coking. The employer shall equip and operate existing coke oven batteries with all of the following engineering controls to control coke oven emissions during coking operations;

* * *

(d) Chuck door gaskets to control chuck door emissions until such door is repaired, or replaced. . . .

The Secretary alleges in citation 1, item 7 and citation 2, item 8 that USS failed to comply with section 1910.1029(f)(3)(i)(a)(2)[12/] at batteries 1 and 2 in that, prior to each charge, push side and coke side goosenecks and standpipes were not inspected and cleaned to a specified minimum diameter sufficient to effectively remove evolved gases from the ovens to the collector mains and thereby help control emissions during charging operations. A $1000 penalty was proposed for each item.

The judge affirmed both items and assessed a $1000 penalty for each item. He found that USS's work schedule for the inspection and cleaning of standpipes and goosenecks, if carried out, only provided for the inspection and cleaning of each of the 348 goosenecks and standpipes on the 174 ovens at both batteries once per week. Each oven, however, has

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12/ The standard at section 1910.1029(f)(3)(i)(a)(2) provides:

§ 1910.1029 Coke oven emissions.

* * *

(f) Methods of compliance.

* * *

(3) Work practice controls. (i) Charging. The employer shall operate existing coke oven batteries with all of the following work practices to control coke oven emissions during the charging operation:

(a) Establishment and implementation of a detailed, written inspection and cleaning procedure for each battery consisting of at least the following elements:

* * *

(2) Inspection and cleaning of goosenecks and standpipes prior to each charge to a specific minimum diameter sufficient to effectively move the evolved gases from the oven to the collector mains.

about ten coking cycles per week. USS's program therefore did not comply with the cited standard, which requires inspection of each standpipe and gooseneck prior to each of the ten charges and requires their cleaning whenever it becomes necessary to maintain unobstructed passages for the evolved gases.

The Secretary alleges in citation 1, item 9 and citation 2, item 10 that USS failed to comply with section 1910.1029(f)(3)(iii)(a)[13/] at the push side of coke oven batteries 1 and 2 in that the work practice of shoveling spilled coke into heated ovens was not discontinued to help control coke oven emissions. A $1,000 penalty was proposed for each item.

The judge affirmed both items, assessing $1000 penalties for each. He found that when pusher rams were retracted from the ovens after pushing coke, some of the coke spilled as a result of being brought out with the ram. He also found that certain employees were observed shovel-

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13/ The standard at section 1910.1029(f)(3)(iii)(a) provides:

§ 1910.1029 Coke oven emissions.

* * *

(f) Methods of compliance.

* * *

(3) Work practice controls.

* * *

(iii) Pushing. The employer shall operate existing coke oven batteries with the following work practices to control coke oven emissions during pushing operations:

(a) Coke and coal spillage quenched as soon as practicable and not shoveled into a heated oven. . . .

ing spilled coke back into the ovens, and that USS's instructions to its employees consistently changed. Sometimes those instructions prohibited the proscribed practice; sometimes they sanctioned it.

The Commission affirms all of these items. Chairman Rowland affirms the judge's disposition without reaching the merits of the items. He notes that USS did not brief the items even though it had petitioned for review of them and the items had been included in the direction for review. Chairman Rowland concludes therefore that USS has abandoned any interest in review of the items. Commissioner Cleary affirms the items for the reasons given by the judge. The Commissioners assess a total penalty of $1,800 for these three sets of items, i.e., $600 is assessed for citation 1, item 6 and citation 2, item 7; $600 is assessed for citation 1, item 7 and citation 2, item 8; and $600 is assessed for citation 1, item 9 and citation 2, item 10.

Citation 1, Item 8 and Citation 2, Item 9

The Secretary alleges USS's failure to comply with section 1910.1029 (f)(3)(ii)(d)[14/] at batteries 1 and 2 in that the batteries were not

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14/ The standard at section 1910.1029(f)(3)(ii)(d) reads:

§ 1910.1029 Coke oven emissions.

* * *

(f) Methods of compliance.

* * *

(3) Work practice controls.

* * *

(continued on next page)

operated pursuant to an inspection system and corrective action program designed to achieve maximum control of the emissions from the push side (batteries 1 and 2) and coke side (battery 1 only) oven doors during coking. A $1000 penalty was proposed for each item.

The judge affirmed each item, assessing $1000 penalties. The judge found that over 50 per cent of all the oven doors on both batteries had been leaking emissions for at least a year prior to inspection. He also found that USS employed only two patchers (each with a helper) working on one shift five days a week to patch defective doors; door leakage was so extensive, however, that the patchers could not keep up with the deteriorated conditions. The judge therefore concluded that although USS did have a functioning door inspection and repair program, the program was not adequate to cope with the badly deteriorated condition of the door frames in both batteries.

USS argues that the judge uses the same evidence in finding noncompliance with this standard as he does in finding noncompliance with

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14/ (continued)

> (ii) Coking. The employer shall operate existing coke oven batteries pursuant to a detailed written procedure established and implemented for the control of coke oven emissions during coking, consisting of at least the following elements.
>
> * * *
>
> (d) An inspection system and corrective action program to control door emissions to the maximum extent possible.

section 1910.1029(f)(2)(ii)(c)[15/] regarding insufficient spare doors, and that one of these two sets of items should be vacated as being duplicative.

USS concedes that "there was a significant problem with doors," but the problem was "caused not by the conditions of the doors themselves but rather by the condition of the structure of the battery itself, which was coming to pieces.. The actual brickwork of the battery was crumbling in various places. This deterioration of the battery caused the door jambs (or door sills) to become warped. Warpage in the door sills, of course, was the direct cause of emissions and an indirect cause as well because damage to the door sills resulted in further damage to the doors, thus giving rise to even more emissions."

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15/ Noncompliance with section 1910.1029(f)(2)(ii)(c) was alleged in citation 1, item 5 and citation 2, item 6. The latter two citation items were vacated earlier in this decision on the basis that USS did not fail to comply with the "earliest possible time" requirement of § 1910.1029(f). Section 1910.1029(f)(2)(ii)(c) provides:

> § 1910.1029 Coke oven emissions.
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> * * *
>
> (f) Methods of compliance.
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> * * *
>
> (2) Engineering controls.
>
> * * *
>
> (ii) Coking.
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> * * *
>
> (c) An adequate number of spare doors available for replacement purposes;

USS asserts that the only solution to this problem was to rebuild the battery, replace the brickwork, and thus create a sound foundation for the door sills. USS contends that the battery was rehabilitated in 1977 after the Secretary's inspection, and that plans had been made to shut down the battery for rehabilitation as early as the fall of 1976. A lack of bricks, however, resulted in those plans being postponed for three months to the first quarter of 1977. When that time elapsed, USS had to order a further postponement of three months because of problems caused by the severity of the winter.

USS argues that its door emissions control program required: (1) the cleaning of all doors before the start of each coking cycle, (2) the adjustment of doors if door emissions were not the result of unclean doors, (3) the replacement of doors and, (4) the replacement of door jamb castings and their underlying brick work.

USS also points out that it even took steps beyond those called for by its program to reduce door emissions: (1) since 1975, an employee had been on special assignment to deal with emission control programs, (2) both an outside contractor and USS's own employees had attempted to eliminate the carbon problem existing between oven walls and door frames and which caused the door frames to bow, (3) a contractor had been hired to clean the doors with high pressure hoses, and (4) USS was working to develop a more effective door.

The Secretary supports the judge's reasoning. He argues that noncompliance with the cited standard is established by the fact that USS was attempting to do patch work on the 41 leaking doors observed during the inspection with just six employees working on only one shift for five days a week.

Commissioner Cleary would affirm these items and assess a total penalty of $1000. He finds that USS knew the doors were a "significant problem" yet only assigned six employees working five days a week on the 8 a.m. to 4 p.m. shift to work on them while the ovens remained in operation seven days a week, 24 hours a day. Commissioner Cleary concludes that this was not a corrective action program designed to "control door emissions to the maximum extent possible," in spite of the other elements of USS's door repair program. He finds that the Secretary proved noncompliance with the cited standard by establishing the great extent of the door problems and the insufficiency of the number of employees assigned to service those problems.

USS's allegation that the instant items are duplicative of item 5 in citation 1 and item 6 in citation 2 is rejected by Commissioner Cleary. He finds that the latter items (item 5 in citation 1 and item 6 in citation 2) deal only with the number of doors available while the instant items (item 8 in citation 1 and item 9 in citation 2) concern the requirement for an "inspection system and corrective action program." Further, as noted above, item 5 in citation 1 and item 6 in citation 2 have been vacated in this decision.

Chairman Rowland would vacate this item because he finds the record does not show USS failed to take sufficient steps to control door emissions. He also finds that the record does not show that the doors were not rebuilt to the maximum extent possible. A comparison of exhibit C-18, which lists the number of doors having problems in 1974, with the number of doors stipulated as leaking at the time of the inspection (40 out of the total of 348 doors), demonstrates that the percentage of leaking doors had actually diminished. The judge's finding that 50

per cent of the doors had been leaking does not find support in the record. Although employees Offenheiser and Siminitus testified that 50 per cent of the doors needed replacement, it does not follow as the judge found that 50 per cent of the doors were leaking. Offenheiser based his estimate that 50 per cent of the doors required replacement on two factors: (1) his observation of emissions coming from the doors and (2) USS's replacement of all the doors when the battery was rebuilt. Neither factor supports Offenheiser's conclusion, however. During the door rebuild, the size of the door plugs and depth of the smoke channels was changed in an effort to produce a door with a more effective seal. It was, therefore, only this attempt at reducing future emissions that necessitated the rebuilding of all the doors. Further, Chairman Rowland would consider it unfair to penalize USS for its decision to rebuild the entire battery. Also, the fact that Offenheiser observed emissions coming from the doors does not establish that any particular door needed replacement. Clearly, a door may leak from causes other than defects in the door itself, such as the presence of deposits which merely need to be cleaned.

It should also be noted that the credibility of both Offenheiser and Siminitus had been downgraded by the judge, who stated that he did not place exclusive reliance on their testimony. Offenheiser had testified that there was no program to adjust the doors, that millwrights were not present to repair and replace doors, that patching was not performed, and that at the time of the inspection USS had no program for adjusting doors. Offenheiser's testimony about the doors not being adjusted at inspection time even conflicts with that of fellow em-

ployee Siminitus. Further, both USS foreman Yuhas and USS superintendent Seidenberger gave testimony contrary to the aforementioned testimony given by Offenheiser. Seidenberger's testimony about USS's door repair program is supported by documentary evidence indicating USS did in fact replace doors and provide patching.

The Secretary's burden of proof under this standard is to show that emissions were not controlled to the maximum extent possible. Obviously, what is possible will depend upon the physical condition of the battery involved. The Secretary presented no evidence to show that the leaks could have been more effectively controlled by assigning more employees to patcher crews. Insofar as the replacement of doors is concerned, USS's facility only had the capability to repair and replace two doors every 16 hours. Exhibit R-14 shows that, generally speaking, doors were in fact replaced at about this level of frequency, although the frequency of actual replacement declined in 1977, as the projected time for the entire battery rehabilitation approached. In this regard, Seidenberger testified that because of the deteriorated condition of the battery, changing doors would not have materially reduced emissions anyway. Because Chairman Rowland does not construe the standard to require measures which would not reduce emissions, he would not penalize USS for electing not to change doors in view of its impending battery rebuild. Furthermore, Chairman Rowland notes that were it not for intervening factors beyond USS's control, like a brick shortage and an exceptionally cold winter, USS's rehabilitation program would have been in progress at the time of the Secretary's inspection.

Citation 1, Items 10 and 11 and Citation 2, Items 11, 12, 13a ,13b

A

All these items involve different subsections within section 1910. 1029(f)(3)(iv)'s maintenance and repair procedures.[16/]

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16/ The standard at section 1910.1029(f)(3)(iv) reads, in pertinent part:

§ 1910.1029 Coke oven emissions.

* * *

(f) Methods of compliance.

* * *

(3) Work practice controls.

* * *

(iv) Maintenance and repair. The employer shall operate existing coke oven batteries pursuant to a detailed written procedure of maintenance and repair established and implemented for the effective control of coke oven emissions consisting of the following elements:

(a) Regular inspection of all controls, including goosenecks, standpipes, standpipe caps, charging hold lids and castings, jumper pipes and air seals for cracks, misalignment or other defects and prompt implementation of the necessary repairs as soon as possible;

* * *

(c) Regular inspection of the damper system, aspiration system and collector main for cracks or leakage, and prompt implementation of the necessary repairs;

* * *

(e) Prevention of miscellaneous fugitive topside emissions;

* * *

(i) Repairs instituted and completed as soon as possible, including temporary repair measures instituted and completed where necessary, including but not limited to:

(1) Prevention of miscellaneous fugitive topside emissions.

The Secretary alleges in citation 1, item 10 and citation 2, item 12, that USS did not regularly inspect and promptly repair the cracks and leakage in its damper system, aspiration system, and collector main, thereby failing to comply with the maintenance and repair work practice control set forth at section 1910.1029(f)(3)(iv)(c).

The judge affirmed, finding that USS's repair program for certain components of the collector main, the Corliss valves,[17/] was not adequate because effective repairs were not promptly made. He assessed $1000 penalties for each item.

In citation 1, item 11 and citation 2, item 13b, the Secretary alleges that USS failed to comply with section 1910.1029(f)(3)(iv)(i)(1) at both batteries in that repairs were not instituted and completed as soon as possible for the prevention of miscellaneous fugitive topside emissions. In citation 2, item 13a, the Secretary alleges noncompliance with section 1910.1029(f)(3)(iv)(e) in that coke oven battery 2 was not operated under a detailed written procedure of maintenance and repair established and implemented to prevent miscellaneous fugitive topside emissions.

The judge ruled that the evidence established noncompliance with the cited standards as alleged. He assessed a $1000 penalty for item 11 in citation 1 and a $1000 penalty for item 13 (a and b) in citation 2.

The judge accepted as reasonable the Secretary's interpretation of "miscellaneous fugitive topside emissions," i.e., any coke oven emissions

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17/ Corliss valves are housed between the goosenecks and the collector mains, and function as part of the damper system to stop gases from going into the collector main.

"from a source not specifically covered by the standard," including emissions leaking from either door frames or standpipes and rising to the topside of the ovens. He found that, as to battery 1, the evidence establishes that the door frames on ovens B-12, B-13, and C-12 were leaking emissions for weeks and could have been replaced in four or five days, and that the standpipe on the coke side of oven A-5 had also been leaking for weeks and could have been repaired in four hours.

As to battery 2, the judge found that the push side standpipe caps on ovens C-1, C-3, C-5, C-26 and C-27 were all leaking emissions at least one or more hours after charging, and that the door frame on oven B-26 had been broken and leaking emissions for about six months. He also found that the coke side oven door frames on ovens B-8 and B-14 were broken and leaking emissions.

In citation 2, item 11, the Secretary alleges that at battery 2 USS failed to regularly inspect and promptly repair cracks, misalignment, and other defects in goosenecks, standpipes, standpipe caps, charging hole lids, and castings, as required by section 1910.1029(f)(3)(iv)(a).

The judge, finding that USS had failed to promptly repair certain leaking standpipes and goosenecks, affirmed the item and assessed a $1000 penalty. He found that the standpipe on the coke side of oven B-9 was misaligned, and that this condition had developed over a six-month period; the condition could have been corrected in about four hours. He also found that the goosenecks on the coke sides of ovens B-8 and B-9 and the push side of oven C-29 had been leaking for over a month; they could all have been replaced or repaired in four or five hours.

B

USS contends that the judge based his findings of noncompliance for these five items on the word of certain employees who testified that noncomplying emissions had existed over a period of time. USS points out, however, that the judge indicated in his decision that he was discrediting the testimony of those same employees. USS also contends that CO Stranahan did not have personal knowledge of the length of time the emissions continued and had to rely, for his conclusion that the leaks had continued for a long time, on the testimony of employee Offenheiser and other employees. USS suggests, therefore, that since these items cannot be affirmed without testimony showing that leakage had existed over a period of time, the items should be vacated. USS contends that it did indeed prove it had both an inspection and corrective action program. It also contends that there is nothing in the cited standard which requires a coke oven operator to make permanent, as opposed to temporary, repairs of a condition, so long as the operator is taking action to eliminate emissions.

With specific reference to citation 2, item 13a, USS asserts that the CO testified he based this item on the fact that luting materials had not been applied to seal leaking standpipes even though the standpipes had only been leaking since the ovens had been charged. USS argues that its job procedures for lidmen called for standpipe lids to be luted and that just because one of its employees had not done his job that day is no reason for this citation item to be affirmed. USS states that there were buckets of luting material available for the lidman to use on the day of inspection, and that it had issued a written warning to

a lidman for failure to lute an emissions source. USS also states that the judge improperly focused on the fact that USS did not require its lidmen to lute standpipe lids until sometime after mid-January 1977 and that therefore the judge was condemning it for not having complied with the 1971 standard.

USS also argues that citation 1, item 11 and citation 2, item 13 should be dismissed as duplicative of the door emissions charges in citation 1, item 8 and citation 2, item 9. It states CO Stranahan testified that the sources of these emissions, with one exception,[18/] were all door frames. It then claims that the CO admitted that the door frame emissions upon which he based these items had also been used by him in citing USS for failing to maintain a door emission control corrective action program. The Secretary, USS states, attempts to justify this action on the ground that door frames or door jambs are not included in the door emission corrective action program. Yet, USS points out that section 1910.1029(f)(3)(ii), which deals with door requirements, specifically covers oven doors, chuck doors and door frames (jambs), and that the coke oven standard's preamble, at 41 Fed. Reg. 46766, states that the "door emission control program includes appropriate maintenance and repair of the metal components on the ovens, the doors and their components (emphasis supplied by USS), door handling machinery and inspection and cleaning methods." Thus, USS argues, door jamb emissions are covered under the door emission section and not

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18/ One cited emission (citation 1, item 11) emanated from a standpipe in battery 1. USS argues that if the Commission agrees with it that there is only one battery here and that citations 1 and 2 should therefore be combined, this item more properly belongs under the allegations made in citation 2, item 11 dealing specifically with standpipe emissions.

the miscellaneous fugitive topside emissions section. Indeed, USS contends, even the Secretary finally conceded that his interpretation of the terms "miscellaneous fugitive topside emissions" was incorrect when he stated at closing argument:

> However, in following a philosophy of fundamental fairness, we don't wish to try to cite Respondent two times for the same problem in that abatement is only needed to be established once, and we would be relying on the door frames in view of the fact that we don't believe that may be otherwise covered.

USS also contends that the miscellaneous fugitive topside emissions standard is impermissibly vague, since not even the CO knew the meaning of the disputed terms.

The Secretary argues, with respect to citation 1, items 10 and 11 and citation 2, items 11-13, that USS's primary means of attempting to stop the leakage of defective Corliss valves, standpipes, goosenecks and door frames was to apply luting material. The method was not successful, the Secretary contends, because USS did not have enough employees luting to fully alleviate the emissions problem. Further, the Secretary adds, the patchers assigned to luting were often spending so much time trying to deal with the many leaking coke oven doors that they were unable to lute emissions sources on the topside of the batteries like Corliss valves, standpipes or goosenecks.

The Union states that, contrary to USS's argument, the CO did not base his testimony solely upon the employee representative's statements. Instead, the CO's practice was to record a particular time estimate if the employee representative's estimate was concurred in by the accompanying employer representative. When there were differing time estimates, the CO would record a figure representing a compromise between the

estimates of the two representatives. The Union also disputes USS's contention that repair work was being done promptly under its maintenance program.

C

The Commission vacates item 11 in citation 1 and items 13a and 13b in citation 2 but is divided in its action on item 10 in citation 1 and items 11 and 12 in citation 2. To the extent item 11 in citation 1 and item 13a and 13b in citation 2 (failure to prevent "miscellaneous fugitive topside emissions") are directed at emissions through door frames, both Chairman Rowland and Commissioner Cleary vacate those items as duplicative of item 8 in citation 1 and item 9 in citation 2, as discussed above. Emissions caused by door frame/door jamb leakage are more specifically covered by section 1910.1029(f)(3)(ii)(d)'s "door emissions" language, than by the fugitive emissions language of section 1910.1029(f)(3)(iv)(a) and (i)(1). To the extent item 11 in citation 1 and items 13a and 13b in citation 2 are directed at emissions through standpipes and standpipes caps, Commissioner Cleary would vacate those items as duplicative of item 11 of citation 2, discussed below. Emissions caused by standpipes and standpipe caps are more specifically covered by section 1910.1029(f)(3)(iv)(a).

With respect to item 10 in citation 1 and item 12 in citation 2 (failure regularly to inspect and repair damper systems, aspiration systems, and collector mains for cracks or leakage) and item 11 of citation 2 (failure regularly to inspect and repair all controls, including standpipes and standpipe caps for cracks, misalignment or other defects), Commissioner Cleary would affirm and Chairman Rowland would

vacate. Commissioner Cleary acknowledges Judge Brennan's action in reducing the weight given to employee Offenheiser's testimony and therefore would base his affirmance of these items on the testimony of compliance officer Stranahan, who testified that certain certain Corliss valves had been leaking for over a month and that certain standpipe caps had been leaking for three to fifteen hours. Commissioner Cleary observes that the substantial number of emission leaks is plainly documented by the photographic exhibits and that four to six workers, one shift per day, are not adequate to assure a regular program of inspection and repair for 174 ovens operating seven days a week, twenty-four hours a day.

Chairman Rowland would vacate all three of these latter items (item 10 in citation 1 and items 11 and 12 in citation 2) concerning alleged defects in USS's inspection, maintenance, and repair program because the record clearly shows that USS did have an ongoing inspection and corrective action program and, as a result, only a very small number of Corliss valves, standpipes, standpipe caps, and goosenecks were observed to have defects. The judge relied on evidence showing that only four Corliss valves were or had been leaking prior to the inspection, yet there were a total of 174 such valves in both batteries. Only two standpipes and five standpipe caps were shown to be leaking out of all those used with USS's coke ovens. Just three goosenecks were found to be defective at the time of inspection out of 174 goosenecks. Chairman Rowland would conclude, therefore, that the fact that the number of leaking Corliss valves, standpipes, standpipe caps, and goosenecks was so small actually establishes the adequacy of USS's repair program.

Further, the Chairman would observe that USS's repair program depended on the actions of its employees who did the inspecting, maintaining, and repairing of the different component parts of the battery. Chairman Rowland does not require that an employer insure against every instance of employee noncompliance with an established safety program. Borton, Inc., 82 OSAHRC 17/E13, 10 BNA OSHC 1462, 1982 CCH OSHD ¶ 25,983 (No. 77-2115, 1982) (Rowland, Chairman, disenting), appeal filed, No. 82-1661 (10th Cir. May 26, 1982)

Chairman Rowland would further observe that the Secretary has not shown that necessary repairs to Corliss valves were not implemented as promptly as required by standard. Section 1910.1029(f)(3)(iv)(i)(1), note 16 supra, specifies the timing for the institution of necessary repairs. As the preamble to the coke oven standard indicates, that section requires repairs be instituted as soon as possible and that temporary repairs be completed before the charging of the ovens for the next coking cycle takes place. See 41 Fed. Reg. 46769.[19/] There is no

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19/ The pertinent section of the preamble reads:

> [Section 1910.1029(f)(3)(iv)(i)] requires that repairs shall be instituted as soon as possible. This is based on evidence in the record which indicated that there is no set time frame applicable to these repairs but rather, because some repairs may require replacement or rebuilding of battery components over a substantial period of time. . . . However, since any delay in the implementation of these repairs can effect employee exposure to coke oven emissions, e.g. leaks from standpipes, chuck doors, or oven brickwork, the standard requires that temporary repair measures be instituted prior to charging the oven for the next coking cycle. Examples of the types of repairs contemplated by his section are luting, sealing, or welding of offtake equipment leaks, or

(continued on next page)

evidence that USS failed to treat leaking Corliss valves prior to charging the ovens for the next cycle. With respect to the standpipes that the judge found were leaking and which he believed could have been replaced in four hours, Chairman Rowland would point out that, contrary to the judge's latter conclusion, Yuhas testified without contradiction that the deteriorated bases of the standpipes were caused by a shift in the battery's collector main and that the leakage problem could only be corrected by rehabilitation of the entire battery. Finally, with respect to the one gooseneck about which Offenheiser testified that permanent repairs were necessary, the preamble expressly states that permanent repairs do not necessarily have to be completed within any particular period of time. Therefore Offenheiser's testimony alone is not sufficient to show that USS's repair program was inadequate. There is no evidence showing when the condition of this gooseneck was first detected or showing that the gooseneck would not have been temporarily repaired again once detected. Accordingly, Chairman Rowland would vacate these items.

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19/ (continued)

> installation of chuck door gaskets. . . . While industry representatives generally stated that immediate repairs are not possible, that factor must be balanced against the risk of continued employee exposure in setting a time frame for control of these emissions. Therefore, while acknowledging that permanent repairs may not be capable of immediate implementation, the standard requires both temporary and permanent repairs to be performed as soon as possible.

Citation 3, Item 1a, b and c

Item 1a of serious citation 3 alleges noncompliance with section 1910.134(f)(2)(i),[20/] as adopted by section 1910.1029(g)(3),[21/] in that all respirators at batteries 1 and 2 were not routinely inspected before and after each use. Item 1b alleges noncompliance with section 1910.134(f)(3),[22/] as adopted by section 1910.1029(g)(3) in that provisions

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20/ The standard at section 1910.134(f)(2)(i) provides:

§ 1910.134 Respiratory protection.

* * *

(f) Maintenance and care of respirators.

* * *

(2)(i) All respirators shall be inspected routinely before and after each use. A respirator which is not routinely used but is kept ready for emergency use shall be inspected after each use and at least monthly to assure that it is in satisfactory working condition.

21/ The standard at section 1910.1029(g)(3) provides:

§ 1910.1029 Coke oven emissions.

* * *

(g) Respiratory protection —

* * *

(3) Respirator program. The employer shall institute a respiratory protection program in accordance with section 1910.134 of this part.

22/ The standard at section 1910.134(f)(3) provides:

§ 1910.134 Respiratory protection.

* * *

(continued on next page)

were not made for the collection of routinely used respirators, and cleaning or disinfecting agents were not provided for use on respirators at batteries 1 and 2. Item 1c alleges noncompliance with section 1910.1029(g)(2)(i)[23/] in that USS did not select and assure the use of appropriate required respirators, in the vicinity of visible emissions, for (subpart a of 1c) the door machine operators on the coke sides of batteries 1 and 2 and (subpart b of 1c) the larry car operator on the topside of battery 1. Subpart c of Item 1c was deleted by stipulation of the parties.

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22/ (continued)

(f) Maintenance and care of respirators.

* * *

(3) Routinely used respirators shall be collected, cleaned, and disinfected as frequently as necessary to insure that proper protection is provided for the wearer. Each worker should be briefed on the cleaning procedure and be assured that he will always receive a clean and disinfected respirator. Such assurances are of greatest significance when respirators are not individually assigned to workers. Respirators maintained for emergency use shall be cleaned and disinfected after each use.

23/ The standard at section 1910.1029(g)(2)(i) provides:

§ 1910.1029 Coke oven emissions.

* * *

(g) Respiratory protection --

* * *

(2) Selection. (i) Where respirators are required under this section, the employer shall select, provide and assure the use of the appropriate respirator or combination of respirators from Table I below. . . .

The judge ruled that the evidence established noncompliance with 1a, b, and c as alleged. He found the proposed $1000 penalty excessive and assessed $500.

The judge found that USS's respirator training program consisted solely of a slide presentation that was shown to employees. The presentation did not, however, make it clear to employees that the respirators each employee was provided with had to be routinely inspected before and after each use; as a consequence, the employees did not routinely inspect their respirators. Further, the judge stated, employees were observed who were not wearing properly fitted respirators and 50 per cent of the coke oven workers, as well as 25 per cent of the foremen or supervisors, were not wearing respirators at all times within areas designated for their use.

The judge also found that the respirators were neither collected, cleaned nor disinfected by USS, but that these tasks were delegated to individual employees. He stated that USS's training program made no specific mention of cleaning or disinfecting respirators, and that USS's training program was deficient in not instructing employees on how to clean or disinfect their respirators. The judge also stated the evidence established that the employees mentioned in item 1c were not properly wearing their respirators.

USS argues, with respect to item 1a on the alleged failure of employees to routinely inspect their respirators after each use, the Secretary failed to carry his burden of proving noncompliance. It contends evidence it submitted contains detailed instructions for the inspection and cleaning of respirators before and after each use, and employee

Lepionka testified he checked his respirator before using it. USS also contends the judge's finding that employees did not wear respirators at all times does not establish a failure to inspect the respirators before and after each use. Further, USS argues, foreman Yuhas' testimony that he occasionally observed employees wearing respirators whose straps had lost their elasticity does not establish that the straps had failed prior to use, and use of such respirators does not indicate noninspection, since the straps could have lost their elasticity while the respirator was being worn.

With respect to item 1b on the alleged failure to provide for the collection and cleaning of respirators, USS argues the judge affirmed this item because USS's training program did not require the cleaning and disinfecting of respirators and because some employees only disinfected their respirators eight times a year. USS argues, however, that the judge did find that USS provided both Calgon soap and a disinfecting agent for its employees and that the collection and cleaning of respirators was unnecessary because each employee had his own respirator.

With respect to item 1c on the alleged failure to select and assure the use of appropriate required respirators, USS argues that this item is duplicative of item 1a in citation 4.

The Secretary argues the evidence clearly establishes that employees, even employee Lepionka, did not systematically inspect their respirators for defects prior to each use. The Secretary also agrees with the judge's finding that USS did not provide guidance to its employees on how to conduct routine inspections of their respirators.

The Secretary also argues the Commission should correct an oversight of the judge and affirm subparts a and b of item 1c. The Secre-

tary contends the judge inadvertently vacated all of item 1c in the order section at the end of his decision after the parties stipulated to vacate only subpart c of item 1c, and after the judge had affirmed subparts a and b of item 1c in the body of his decision.

The Union argues USS had only a paper respiratory program that never operated in fact. It claims "[t]he most vivid illustration of the divergence between the paper program and the actions of Respondent" is in the introductory paragraph to USS's training program slide presentation which refers to the 1977 standard as a "law . . . imposed by the Occupational Safety and Health Administration upon all people who work in coke plants throughout the United States."

The Union contends neither supervisors nor employees were sufficiently trained to be able to implement the requirements in USS's respirator training program. One employee was not convinced that after 25 years of work on the coke ovens a respirator would be of any use to him. Further, although USS did verbally warn employees to use respirators, it did nothing to solve the difficulties encountered in trying to use respirators while talking or while working in extreme heat.

The Union also contends USS allowed its employees to dispense with respirator use in the foreman's office at bench level between the outer walls of the batteries even though the standard required respirator use there. This exception to the standard's requirements, the Union alleges, further contributed to employee opposition to the respirator requirement.

The Commission is divided in its decision on these subitems. Commissioner Cleary would affirm subitems 1a and 1b for the reasons advanced by the judge. Further, with respect to subitem 1b, Commissioner

Cleary would find that section 1910.134(f)(3) is plainly worded to require the collecting, cleaning and disinfecting of respirators even when those respirators are assigned for the use of particular employees.

Chairman Rowland would vacate subitems 1a and 1b. Although the ALJ relied in affirming subitem 1a on the fact that the slide program USS showed its employees on safety did not specify that respirators had to be inspected before and after each use, Chairman Rowland rejects the judge's action because he does not find evidence that the slide program was the only training given to employees. In fact, employee Lepionka stated that he checked his respirator prior to each use, that he would adjust his respirator if it was leaking, and that he had always been able to eliminate leaks by adjusting the respirator. Lepionka also testified that he would clean his respirator at the beginning of each day, that he would insert a new filter if required, and that he could tell if his respirator was malfunctioning. Chairman Rowland also observes that section 1910.134(f)(2)(i) does not specify the scope or nature of the required inspection. Since the Secretary did not present any evidence to show that the inspection as performed by Lepionka was not sufficient to detect defects affecting the proper operation of the respirator, Chairman Rowland would vacate subitem 1a.

Similarly, Chairman Rowland would vacate subitem 1b. Once again, the judge, in affirming, improperly focused on the supposed defects in USS's formal training program instead of giving proper significance to the program's substance. See Jones & Laughlin Steel Corp., 82 OSAHRC , 10 BNA OSHC 1778, 1982 CCH OSHD ¶ 26,128 (No. 76-2636, 1982). Yuhas testified that he instructed employees on how to clean and disinfect respirators and, indeed, the judge conceded that USS made cleaning

and disinfecting material available to employees and Yuhas and his crew disinfected their respirators eight times a year. There is no evidence to show that more frequent disinfecting was necessary to insure proper protection for employees. Lepionka testified that he had been instructed regarding cleaning and, as mentioned above, Lepionka also testified that he cleaned his respirator daily. Accordingly, the judge's findings are contrary to the record and subitem 1b should be reversed.

With respect to subitem 1c, Commissioner Cleary would affirm the subitem and Chairman Rowland would vacate it. Commissioner Cleary would affirm citation subitem 1c because two of the Secretary's industrial hygienists who inspected the worksite testified they had observed three different employees working in the midst of visible emissions while not wearing respirators. Commissioner Cleary rejects USS's argument that subitem 1c of citation 3 is duplicative of item 1a in citation 4. As will be discussed below, the latter item requires a determination of whether USS had a systematic inspection program to assure that respirators were properly selected, used, cleaned, and maintained. Item 1c of citation 3, as mentioned above, was proven by the showing that employees worked in visible emissions without respirators. Finally, Commissioner Cleary would correct the judge's action inadvertently vacating all of item 1c in the order section of the judge's decision. The judge's order should properly show, as does the body of his decision, that subparts a and b of subitem 1c are affirmed, while only subpart c of subitem 1c is vacated.[23a/]

Chairman Rowland would vacate the subitem because he finds that USS's program to assure the use of respirators was adequate. The record

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23a/ Chairman Rowland agrees that this clerical correction should be made but vacates subparts a and b on the merits for the reasons that appear in the text.

shows that USS prepared and presented a slide program to its employees emphasizing that respiratory protection would be provided and required. Foreman Yuhas testified that he began enforcing the use of respirators in 1976-77 under the new coke oven standard. He testified that he would inform an employee not wearing a respirator to put one on unless the employee had removed his respirator to speak to another employee.[24/] Yuhas characterized his actions in requiring employees not wearing respirators to put them on as verbal reprimands and stated that because such actions resulted in the employees replacing their respirators, he saw no need for more severe discipline. He concluded that 50 per cent of the employees customarily wore their respirators at all times, other than when it was necessary to remove them.

Tellado, another foreman, stated that as a nonsupervisory employee he had been told to put his respirator on by a supervisor who observed him not wearing it. As a supervisor, Tellado testified, he in turn gave the same admonition to employees under him. As did Yuhas, he estimated that 50 per cent of the employees wore respirators on a regular basis without intervention by the supervisors. Half of the remaining 50 per cent would comply with an instruction to put their respirators on; the balance of the employees tended to be somewhat resistant. In the few cases where verbal warnings had been ineffective, Tellado testified, he issued written warnings to the employees, who had then complied. Finally, employee Lepionka testified that he had been told to wear a

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24/ Compliance officer O'Malley testified that an employee would have to remove his respirator to talk. The preamble to the coke oven standard recognizes that the need to communicate to insure safe work operations is a limiting factor in the wearability of respirators. See 41 Fed. Reg. at 46773.

respirator while working on the coke oven battery and had worn one "most" of the time, but not when he had to remove the respirator to communicate with a co-worker.

Although two other employees, Siminitus and Offenheiser, also stated that they had been told to wear respirators while working on the battery, both in their testimony disputed the effectiveness of USS's respirator program. Chairman Rowland notes, however, that in response to USS's argument regarding the credibility of the Secretary's witnesses the judge found Siminitus and Offenheiser to be biased and concluded that because of inconsistencies in their testimony it was not entitled to dispositive weight. Accordingly, the Chairman finds no evidence to rebut USS's showing that it took adequate steps to assure that its employees wore respirators.[25/]

Chairman Rowland's conclusion that these items should be vacated is reinforced by the fact that the coke oven standard provides a grace period for the implementation of a respirator program. With the exception of employees located "in the vicinity of visible emissions," the wearing of respirators was voluntary until January 20, 1978 under section 1910.1029(g)(1)(ii). The preamble to the coke oven standard explains that

> it is necessary to mitigate some of the problems associated with implementing a program of respira-

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25/ Chairman Rowland does not now find it necessary to consider the propriety of Commission precedent giving an employer the duty to enforce as well as to communicate work rules to employees. For a discussion of the question whether an employer should be required to do anything more than give instructions to employees regarding the proper use of safety equipment, see General Electric Co. v. OSHRC, 540 F.2d 67, 69 (2d Cir. 1976); Borton, Inc., supra.

> tory protection such as the fitting and training of employees. . . . The proposal required use of respirators whenever employees were exposed in excess of the permissible exposure limit. This would have essentially required the wearing of respirators by large numbers of coke oven workers for the entire work shift. The one-year period of voluntary respirator use will alleviate this burden while the necessary adjustments for implementation of a respirator program are made.

41 Fed. Reg. at 46775. Since the inspection at issue in this case occurred early within the one-year voluntary period, the degree of efforts undertaken by USS to require respirators to be worn is consistent with the gradual implementation of a respirator program envisioned by the Secretary. Since there is no question that USS selected and provided an appropriate type of respirator,[26/] Chairman Rowland finds that USS complied with the requirements of cited section 1910.1029(g)(2)(i). Chairman Rowland moreover would specifically disavow the gratuitous remark made by the judge that "visible emissions existed . . . throughout the regulated areas at the batteries." (JD 64, n. 20) The Chairman finds the quoted remark not only unsupported by the evidence of record, but also contrary to the Secretary's allegation that visible emissions existed at only a few employee work stations.

Citation 3, Item 2

The Secretary alleges USS failed to comply with the standard at section 1910.1029(h)(2)(vi)[27/] in that persons who cleaned or laundered the

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26/ There is no dispute that respirators were adequate to protect employees from emissions levels up to 1500 ug/m3. The Secretary does not contend that emissions levels in the ambient air exceeded this level.

27/ The standard at section 1910.1029(h)(2)(vi) reads:

§ 1910.1029 Coke oven emissions.

(continued on next page)

protective clothing required by the cited section were not informed of the potentially harmful effects of exposure to coke oven emissions. The citation specifies in subsections a and b of item 2 that the persons involved were (a) the families of employees in coke oven batteries 1 and 2 and (b) the employees of Arrow Uniform Services Division of Work Wear Corporation. A $1000 total penalty was proposed.

Judge Brennan found the evidence established noncompliance with the cited standard and assessed a total penalty of $1000. With respect to the allegation in subpart a, the judge found USS did not inform its employees of the hazards in handling emissions-contaminated work clothes when, between January 20, 1977 and April 2, 1977, employees took their clothing home for laundering. The judge concluded that if the employees had been warned about the hazards they in turn would have warned their wives about them and thus protected their wives and children. The judge also inferred that some of the employees may have laundered their own emissions-contaminated clothing.

With respect to subpart b, the judge acknowledged USS's April 3, 1977 contract with Arrow Uniform Service for the laundering of protec-

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27/ (continued)

* * *

(h) Protective clothing and equipment.

* * *

(2) Cleaning and replacement

* * *

(vi) The employer shall inform any person who cleans or launders protective clothing required by this section, of the potentially harmful effects of exposure to coke oven emissions.

tive clothing contaminated with coke oven emissions. He noted that the purchase order for the laundering contained the following statement in capital letters:

> This order is notification to vendor that the protective clothing to be laundered has been used in regulated areas of U.S. Steel's coke oven operations and is designated contaminated from exposure to coke oven emissions and may cause potentially harmful effects such as described in the OSHA standard covering coke oven emissions (29 C.F.R. § 1910.1029), effective January 20, 1977.

The judge found that the above paragraph did not notify Arrow of <u>what</u> the potentially harmful effects were, and was therefore inadequate. The judge concluded that the evidence fails to show USS advised Arrow either that skin cancer was a possible hazard, or that there were increased risks of lung and genito-urinary cancer.

The judge rejected USS's arguments that since the preamble to the emissions standard declares there is no clearly demonstrated excess mortality from skin cancer in coke oven workers and also provides that the word cancer is not required to appear on the label affixed to laundry bags of contaminated clothing, the purchase order statement referred to above is more than sufficient. The judge stated that even though the word cancer is not required on laundry labels, cancer risk information should be conveyed to persons handling contaminated clothing. "Otherwise," the judge continued, "the cited provision of the standard is not only meaningless, but a rather cruel exercise in double talk . . ."

The judge also rejected USS's argument that any provision of the standard which purports to cover a nonemployee is juricdictionally beyond the provisions of the Act. . . ." The judge stated that USS was required to inform its own employees of the hazard and that if they had

been so informed they would have warned their wives. He stated that the wives of the employees stood in essentially the same position as Arrow Laundry, and that USS was obligated to warn Arrow of the hazards because Arrow was its subcontractor.

USS argues in its review brief that the judge found USS guilty of a violation with which it was not charged when he found it had not told its employees of the hazards of contaminated clothing. Subpart a of this citation item, USS points out, refers only to the "families of employees." USS admits it did not give notice to family members but contends that the standard may not be validly interpreted to require notice to either a nonemployee or the employee of another person. USS states that the Secretary did not intend for notice to go to nonemployees because the Secretary required employers to launder emissions-contaminated clothing by section 1910.1029(h)(2)(ii), which provides: "The employer (emphasis supplied) shall clean, launder, or dispose of protective clothing required by paragraphs (h)(1)(i) and (ii) of this section."

With respect to the sufficiency of its notice to Arrow Uniform Services, USS reiterates the preamble's passages mentioned above concerning the unlikely possibility of coke oven workers contracting skin cancer and the lack of a requirement to put the word cancer on the labels of laundry bags containing contaminated clothing. It then asserts, in contending that its notice to Arrow was sufficient, that the containers for laundry sent to Arrow were affixed with proper notice under the cited standard, i.e., "Caution. Clothing Contaminated with Coke Emissions. Do Not Remove Dust by Blowing or Shaking." USS also contends that further notice of the contaminated nature of the clothing was contained in

the purchase order referred to above as set out in the stipulations of the parties. Finally, USS asserts that management official Seidenberger told one of Arrow's officials that the clothing was contaminated, and that Seidenberger even thought he used the terms "cancer threat."

The Secretary argues that the intent of the cited standard is to apprise persons of the nature of the hazard to which they are potentially exposed so that they will use greater care in handling contaminated clothing. He asserts the information given to Arrow by USS was meaningless in apprising Arrow's employees of the need to handle the clothing with greater care. He argues that even though the preamble to the coke oven standard does not require use of the word cancer on the labels of laundry bags, USS was still required to inform the employees who cleaned contaminated clothing that they were being exposed to a carcinogenic hazard.

The Commission affirms subpart a and vacates subpart b of citation 3, item 2. With respect to subpart a, the parties' stipulation establishes that at least some USS employees took their contaminated clothing home for laundering. Testimony also shows that some employees were not warned of the potentially harmful effects of laundering their contaminated clothing. We agree with the judge that informing employees of this hazard would have been equivalent to warning the families of those employees. Therefore, although the allegation in the citation is made as to the "[f]amilies of employees," this allegation is sufficiently broad to encompass the employees themselves. Because the Commission's finding of noncompliance is based on USS's failure to warn its own employees, the Commission does not reach USS's argument that the

cited standard may not validly refer to "any person." We assess a $250 penalty for noncompliance with subpart a of item 2.

The Commission vacates subpart b because USS did comply with the cited standard by USS's purchase order statement and the notice it affixed to the laundry containers, as quoted above. Although USS might have drafted warning notices more explicitly dwelling on cancer and carcinogens, the Commission finds, in light of the sections cited by USS from the preamble at 41 Fed. Reg. 46747-48 and, particularly, 46781, the notices USS did provide were sufficient.

Citation 3, Item 3

The Secretary alleges that USS failed to comply with section 1910.1029 (i)(3)[28/] in that the old lunchroom located at bench level between coke oven batteries 1 and 2 did not have a temperature controlled, positive pressure, filtered air supply. The penalty proposed was $1000.

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28/ The standard at section 1910.1029(i)(3) reads:

§ 1910.1029 Coke oven emissions.

* * *

(i) Hygiene facilities and practices.

* * *

(3) Lunchrooms. The employer shall provide lunchroom facilities which have a temperature controlled, positive pressure, filtered air supply, and which are readily accessible to employees working in the regulated area.

USS admits it did not provide a temperature controlled, positive pressure, filtered air lunchroom but contends that the item should be vacated because it did not have sufficient time to do so. USS argues that it diligently attempted to comply with section 1910.1029(i)(3). In December of 1976, USS decided to build a new lunchroom equipped with an air filtered unit in its roof. This decision was subsequently implemented by the following steps: the preparation of design drawings for the new lunchroom, requests made to suppliers on the availability of air filtered units, price quotations received from suppliers, advice requested from USS headquarters on special filtered units, invitations to bid extended to four suppliers, environmental control equipment ordered from supplier Busch, approval of Busch's drawings, and repeated contacts made with Busch to determine why the ordered equipment had not been sent. Busch had the order for an air filtered unit for about eight months without managing to fill it, USS states.

The judge found the evidence established noncompliance and assessed a $500 penalty. He cited the parties' stipulation that the old lunchroom did not have positive pressure, temperature controlled, filtered air at the time of the inspection, and that it was technically feasible to install such a system in the new lunchroom, which had replaced the old one on May 20, 1977. The judge found that, even though USS decided in December of 1976 to build a new lunchroom, when the new lunchroom was finally built, after a long series of design changes and delays, it too was without filtered air. The judge concluded USS "obviously did not consider this employee protective device something which should have been expedited," and if USS had been interested in expediting the matter

it might have called for copies of the plans and specifications of the environmentally controlled lunchrooms at its plants in Fairfield, Alabama; Gary, Indiana; or Clairton, Pennsylvania.

In response to the judge's statement about its failure to study the plans of similar lunchrooms at other USS plants, USS contends that the statement ignores unrefuted testimony of its engineer Orloski, who testified that in ordering the filtered air unit for the lunchroom, he was acting on the advice of officials in USS's Pittsburgh headquarters who were seeking the best units for all of USS's coke operations. Therefore, USS argues, Orloski could have learned nothing further by either visiting the other plants or by examining the plans of their lunchrooms. USS further argues that each lunchroom has to be designed to fit the particular structure in question. Besides, USS continues, the major delay here was in acquiring the environmental control equipment from the supplier, and USS did not know what the judge expected it to do to expedite delivery from the supplier.

The Secretary argues that the technology to provide employees with a clean environment in which to eat had been available to USS since the early 1960's. He further argues that even though the cited standard is not specifically discussed in the coke oven emissions standard's preamble with respect to the "continuum of obligations" USS was under, USS must be held accountable for failing to comply with the cited standard because it had been obligated by the 1971 standard to implement all feasible controls.

We vacate this item. We reject the Secretary's argument that USS was required to provide an environmentally controlled lunchroom by the

1971 standard. First, as discussed above, the requirement of controls under the 1971 standard was triggered by excessive exposure to CTPV, and there is no evidence of such exposure. Second, the provision in section 1910.1029(f)(1)(i)(a) that requires the employer's obligation under the 1971 standard to be considered only applies to the controls listed in the subsections (f)(2), (f)(3), and (f)(4). The requirement for an environmentally controlled lunchroom is not found in those subsections.

Thus, whether USS may be found in violation of section 1910.1029 (i)(3) must be based on whether USS could have complied with the standard in the two-month period between the standard's effective date and the Secretary's inspection. We find that USS has established it could not have provided the required environmentally controlled lunchroom in that relatively short period of time. USS diligently took the series of steps listed above to achieve compliance with the cited standard. The fact that the diligence reflected by those steps was not successful in gaining compliance demonstrates that it was not possible to comply with the cited standard before the Secretary's inspection.

Citation 3, Items 4 and 5

Item 4 alleges USS's noncompliance with section 1910.1029(i)(4)(i)[29/] in that employees working in the regulated areas of coke oven batteries 1

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29/ The standard at section 1910.1029(i)(4)(i) reads:

§ 1910.1029 Coke oven emissions.

* * *

(i) Hygiene facilities and practices.

(continued on next page)

and 2 did not wash their hands and face before eating. Item 5 alleges USS's noncompliance with section 1910.1029(i)(5)(i)[30/] in that USS did not assure that food and/or smoking products were not consumed in two different regulated areas, the old lunchroom and the topside of batteries 1 and 2. Penalties of $1000 for each item were proposed. USS moved to withdraw its notice of contest to the merits of these items, but did contest the penalties. The judge granted USS's withdrawal-of-contest motion and assessed the proposed $1000 penalties.

With respect to item 4, the judge acknowledged that USS's training program directed employees to wash their face and hands before eating, drinking, or using tobacco products after being in a regulated area, but stated that the directive was not enforced. He also stated that the

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29/ (continued)

* * *

(4) Lavatories. (i) The employer shall assure that employees working in the regulated area wash their hands and face prior to eating.

30/ The standard at section 1910.1029(i)(5)(i) reads:

§ 1910.1029 Coke oven emissions.

* * *

(i) Hygiene facilities and practices.

* * *

(5) Prohibition of activities in the regulated area. (i) The employer shall assure that in the regulated area, food or beverages are not present or consumed, smoking products are not present or used, and cosmetics are not applied, except that these activities may be conducted in the lunchrooms, change rooms and showers required under paragraphs (i)(1)-(i)(3) of this section.

employees, including "foreman" Lepionka, did not always follow the directive. The judge further found that the lack of hot water during some periods in winter served to discourage employees from washing.

With respect to item 5, the judge also found that although USS did have a section of its training program drafted to obtain compliance with the cited standard, USS failed to establish enforcement of that section.

USS argues that the judge made two clearly erroneous factual findings in his consideration of the appropriate penalty figures: 1) although the judge found Lepionka was a foreman, Lepionka was only a bargaining unit employee, and 2) although the judge found that hot water was not always available, the evidence on the lack of hot water relates to a lavatory at the east side of the coke oven battery, quite distant from the lunchroom, and there is no evidence that employees used that particular lavatory prior to eating lunch. Both the Secretary and the Union argue that the judge's penalty assessments were proper.

We believe that the judge's penalty assessments are inappropriately high. With respect to item 4, the judge substantially downgraded USS's good faith as a result of his belief that employee Lepionka was a foreman. However, Lepionka was shown to be an employee but not a foreman. USS's contention that the judge's factual finding about the unavailability of hot water being clearly erroneous is rejected, however. Lepionka's testimony is that only cold water was provided for the wash facilities in the patcher's lunchroom located on the ground level between the two batteries. We assess a $150 penalty based on the low gravity of this violation.

With respect to item 5, a full page of text and two slides in USS's training program cautioned employees against eating and smoking in regu-

lated areas. This demonstrates a significant measure of good faith on USS's part even though enforcement of the smoking and eating prohibitions presented obvious difficulties among employees who found it difficult to refrain from smoking or eating over any extended period of time.[31/] The gravity of this violation was low, and we assess a $150 penalty.

Citation 3, Item 6b and 6c[32/]

Item 6b alleges noncompliance with section 1910.1027(f)(7)[33/] in that written procedures and schedules required under section 1910.1029 (f) were not incorporated into USS's information and training program mandated by section 1910.1029(k). Item 6c alleges noncompliance with

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31/ Since USS contests only the penalties and not the merits of items 4 and 5, Chairman Rowland does not find it necessary to consider the propriety of Commission precedent giving an employer the duty to enforce as well as to communicate work rules to employees. See General Electric Co. v. OSHRC, supra; Borton, Inc., supra.

32/ The Secretary withdrew item 6a.

33/ The standard at section 1910.1029(f)(7) reads:

§ 1910.1029 Coke oven emissions.

* * *

(f) Methods of compliance.

* * *

(7) Training in compliance procedures. The employer shall incorporate all written procedures and schedules required under this paragraph (f) in the information and training program required under paragraph (k) of this section and, where appropriate, post in the regulated area.

section 1910.1029(k)(1)(iv)(d)[34/] in that USS's training program did not include a review of the following written procedures and schedules required by section 1910.1029(f):

a) the written inspection and cleaning procedure for each battery, as required by sections 1910.1029(f)(3)(i)(a)(1) - (7);
b) the written charging procedure for each battery, as required by sections 1910.1029(f)(3)(i)(b)(1) - (3);
c) the written procedures for the control of coke oven emissions during coking, as required by sections 1910.1029(f)(3)(ii)(a) - (e);
d) the written procedure for the control of emissions during pushing, as required by sections 1910.1029(f)(3)(iii)(b)(1) - (3);
e) the written procedure of maintenance and repair for coke oven batteries, as required by sections 1910.1029(f)(3)(iv)(a) - (i);
f) the written program and schedule to reduce exposures solely by means of engineering and work practice controls, as required by sections 1910.1029(f)(6)(i) and (ii)(a) - (e).

After comparing USS's training program with section 1910.1029(f), the judge found the program did not include the written procedures regarding work practice controls from the following parts of the standard:

1) section 1910.1029(f)(3)(i)(a)(1),
2) " " (2),
3) " " (5),
4) " " (7),

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34/ The standard at section 1910.1029(k)(1)(iv)(d) reads:

§ 1910.1029 Coke oven emissions.

* * *

(k) Employee information and training — (1) Training program.

* * *

(iv) The training program shall include informing each employee of:

* * *

(d) A review of all written procedures and schedules required under paragraph (f) of this section. . .

5) section 1910.1029(f)(3)(i)(b)(1),
6) " " (2),
7) " " (3),
8) section 1910.1029(f)(3)(ii)(b),
9) " " (iii)(b)(1),
10) " " (iv)(a),
11) section 1910.1029(f)(6)(i),
12) " " (ii)(6)

He, therefore, found noncompliance with the cited standard and assessed a total penalty of $1000. In response to USS's argument that the deficiencies in its training program were corrected after the inspection, the judge stated that they were required as of the time of inspection.

USS admits that the initial version of its training program did not include all the required work practices, but it contends the September 20, 1977 revised version of its training program did. USS notes Seidenberger's unrebutted testimony that the more detailed information contained in the latter program was not included in the initial program because USS had not had time to write up all the operating procedures in question. According to USS, Seidenberger testified that its training program was not the only method used to train employees on the work practices required by the standard. Rather Seidenberger stated that employees were given standard operating procedures which described some of the work controls and that employees were also individually trained with respect to certain work practices through the use of safe job procedures. USS asks dismissal of these items on the basis of not having had adequate opportunity to comply with the requirements of the standards and of having made a good faith effort at compliance.

The Secretary points out that USS admits its original training program, in effect during the period of inspection, did not comply with section 1910.1029(k)(1)(iv)(d). In addressing USS's argument that the

defects in its training program were cured by other training methods, such as its standard operating procedures, the Secretary contends that these procedures were not communicated to the employees in any systematic fashion that would indicate all employees received such communications.

We vacate items 6b and 6c. USS has established that it did not have sufficient time to comply with the cited standards. Section 1910.1029(f) encompasses more than 525 lines of regulations in the Code of Federal Regulations. Although USS made good faith efforts at compliance, USS could not realistically have incorporated into its training program by the time of inspection all the written procedures and schedules, together with a review of these procedures and schedules, required under section 1910.1029(f). Chairman Rowland further concludes, for the reasons stated in his discussion of items 8, 10, and 11 of citation 1 and items 9, 11-13 of citation 2, supra, that USS adequately implemented its program for controlling coke oven emissions.

Citation 4, Items 1a and 1b

Item 1a alleges USS's failure to comply with section 1910.134(e)(4),[35/] as adopted by section 1910.1029(g)(3),[36/] in that frequent ran-

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35/ The standard at section 1910.134(e)(4) reads:

§ 1910.134 Respiratory protection.

* * *

(e) Use of respirators.

* * *

(4) Respiratory protection is no better than the respirator in use, even though it is worn conscientiously. Frequent random inspections shall be conducted by a qualified individual to ensure that respirators are properly selected, used, cleaned, and maintained.

36/ The standard at section 1910.1029(g)(3) reads:

(continued on next page)

dom inspections were not conducted by qualified individuals to assure that respirators were properly selected, used, cleaned, and maintained.

Item 1b alleges USS's failure to comply with section 1910.134(e)(5)(i),[37/] as adopted by section 1910.1029(g)(3), in that every respirator

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36/ (continued)

§ 1910.1029 Coke oven emissions.

* * *

(g) Respiratory protection.

* * *

(3) Respirator program. The employer shall institute a respiratory protection program in accordance with section 1910.134 of this part.

37/ The standard at section 1910.134(e)(5)(i) reads:

§ 1910.134 Respiratory protection.

* * *

(e) Use of respirators.

* * *

(5) For safe use of any respirator, it is essential that the user be properly instructed in its selection, use, and maintenance. Both supervisors and workers shall be so instructed by competent persons. Training shall provide the men an opportunity to handle the respirator, have it fitted properly, test its face-piece-to-face seal, wear it in normal air for a long familiarity period, and, finally, to wear it in a test atmosphere.

(i) Every respirator wearer shall receive fitting instructions including demonstrations and practice in how the respirator should be worn, how to adjust it, and how to determine if it fits properly. Respirators shall not be worn when conditions prevent a good face seal. Such conditions may be a growth of beard, sideburns, a skull cap that projects under the facepiece, or temple pieces on glasses. Also, the absence of one or both dentures can

(continued on next page)

wearer was not given demonstrations and practice in how respirators should be worn, and was not given instructions in how respirators were to be adjusted and in how to determine if respirators fit properly. A total penalty of $1400 was proposed for items 1a and 1b.

The judge found that, as to item 1a, the evidence conclusively establishes there were no frequent, random inspections conducted to determine if the respirators were properly cleaned, used, and maintained. As to item 1b, the judge found the evidence supports the charges made. He stated that the two fit tests specified by USS in its respirator program were neither effective nor appropriate for the Dustfoe 66 type of respirator supplied the employees by USS. He also stated that the evidence fails to reveal any opportunity afforded the workers to practice the fit tests under proper supervision, and that at least one employee had devised his own test. Finally, the judge modified the citation from repeated to serious and reduced the proposed penalty to $1000.

USS contends that insofar as item 1a relates to the usage of respirators, it is duplicative of item 1 in citation 3. Insofar as it is nonduplicative, USS argues the record does not support the judge's findings, but shows instead that its program for ensuring the maintenance and cleaning of respirators was adequate.

USS argues that no compliance officer testified to seeing any employee wearing a respirator which was improperly cleaned or maintained.

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37/ (continued)

> seriously affect the fit of a facepiece. The worker's diligence in observing these factors shall be evaluated by periodic check. To assure proper protection, the facepiece fit shall be checked by the wearer each time he puts on the respirator. This may be done by following the manufacturer's facepiece fitting instructions.

USS states that the only evidence on the point was testimony by witnesses Siminitus, that no one ever checked his respirator, and Offenheiser, that supervisory employees were not taking action to see if respirators were cleaned and maintained. Siminitus' evidence is of questionable value, USS argues, because he never contended that he failed to regularly clean and maintain his respirator, and Offenheiser's testimony is directly contradicted by witness Yuhas. The latter testified, USS asserts, that he checked for defects in the respirators of his crew, and that he instructed certain employees about how to remove patching material stuck on respirators. Further, the Secretary's witness Lepionka testified USS's training program "did show to remove the rubber face piece and to wash it out with warm soapy water and to reassemble it."

With respect to item 1b, USS argues that the negative pressure and positive pressure fit tests contained in its training program and used with its Dustfoe 66 respirators complied with the requirements of the cited standard. USS states that witness Baumann, an industrial hygienist with 38 years of experience, testified that even though there were better tests available for use with the Dustfoe respirators, USS's tests had been recommended by the manufacturer of the respirators and were adequate. USS also argues that the standard as construed by the Secretary would permit the use of only two specified fit tests on the Dustfoe respirators, yet nowhere does the standard contain such a restriction.

The Secretary argues that, with respect to item 1a, the testimony of USS foreman Yuhas establishes USS had no systematic inspection program, and that all Yuhas did was to require employees to fix or replace

respirators with obvious defects. The Secretary also argues that proof any particular employees maintained their respirators properly does not establish the presence of a systematic inspection program required by the cited standard.

The Secretary also contends the judge properly affirmed subitem 1b and the judge properly credited witness O'Malley who testified that the fitting instructions given employees by USS were inappropriate. The Secretary also contends USS industrial hygienist Baumann admitted the negative pressure test recommended by USS was somewhat difficult for him to perform, and that the test would be even more difficult for an unsupervised employee to perform. Also, the Secretary argues that there is no evidence of adequate training, and that USS did not have an industrial hygienist capable of providing such training at Fairless.

The Commission is divided in its action on these items. Commissioner Cleary would affirm both item 1a and item 1b, while Chairman Rowland would vacate both items. With respect to item 1a, Commissioner Cleary points to the testimony of USS foreman Yuhas, who stated that it was part of his job to observe whether employees were wearing respirators and whether the straps of the respirators were in place. Yuhas testified that the problems he detected were all "visual problems, a broken strap or a missing clip. . . ." It was not his practice, however, to request an employee who was wearing a respirator to take it off so that he (Yuhas) could examine it. Yuhas also testified that he never went into the men's locker room to examine the condition of the respirators. Yuhas further testified that he never examined any of the respirators to see if all their parts were properly in place. Finally,

employee Siminitus testified that management personnel never checked his respirator to see that it was properly used, cleaned or maintained. Commissioner Cleary finds, therefore, that USS did not have the systematic program of inspection required by the cited standard to assure that employee respirators were properly selected, used, cleaned, and maintained. As mentioned above, Commissioner Cleary also finds that subitem 1a of citation 4 is not duplicative of subitem 1c of citation 3. The Secretary proved noncompliance with the citation 3 subitem by showing that employees worked in visible emissions without respirators; the Secretary proved noncompliance with the citation 4 subitem by showing the inadequacy of USS's respirator inspection program.

Chairman Rowland would vacate item 1a. He observes that the cited standard is not specific as to the frequency of inspections, the percentage of employees who must be inspected, and the scope of the required inspection. As USS correctly observes, there is no evidence that any employee's respirator ever was dirty, defective, or improperly used. Therefore, Chairman Rowland finds that the testimony by foreman Yuhas is sufficient to demonstrate that respirators were inspected for proper use, cleanliness, and maintenance. Yuhas testified that he would see each employee at least once during each shift and, based on a visual inspection of each employee, Yuhas would be able to tell if the straps of a respirator were tight and if the filter was secure. Yuhas also instructed employees regarding the use of cleaning fluid to clean respirators whenever he observed an employee wiping a dirty respirator with a paper towel. Chairman Rowland further observes that the employees who testified to the contrary, Siminitus and Offenheiser, have been discredited by the judge.

With respect to item item 1b of citation 4, Commissioner Cleary, who would affirm the item, observes that not only was there no adequately trained industrial hygienist at Fairless to give instructions on fit and to check employees for properly fitted respirators, but supervisory personnel who were responsible for inspecting respirators, like Yuhas, did nothing more than check respirators for readily observable defects.

Commissioner Cleary does not base his finding of noncompliance on the alleged inadequacy of the fit tests suggested for use by USS with its Dustfoe 66 respirators. Those fit tests were undisputedly recommended by the manufacturer of the respirators, and he does not interpret the cited standard to require USS to reevaluate the manufacturer's recommendations. In fact, he observes that the last sentence in cited section 1910.134(e)(5)(i) provides that "the manufacturer's facepiece fitting instructions" may be followed to check proper fit.

Chairman Rowland would vacate item 1b. He points out that the cited standard requires respirator instructions be given by "competent persons," but does not define "competent persons." He also finds that no evidence was presented by the Secretary to show that an industrial hygienist or environmental engineer is required under the standard. The Chairman further finds that USS's safety slide program did in fact provide employees with the instruction required by the cited standard. USS's company-wide industrial hygienist, Baumann, whose competence was established, assisted in the development of that program and there is no evidence in the record to show that those administering the slide program at Fairless were not competent to read the instructions developed

by Baumann while the slides were being shown.[38/] Further, the Chairman does not agree that USS failed to comply with the cited standard by not evaluating or checking the adequacy of the fit of the respirators on each employee. He finds that this conclusion goes beyond the Secretary's allegation on this item.

Nonserious Citation 5, Item 1

The Secretary alleges noncompliance with the standard at section 1910.141(d)(2)(ii)[39/] in that USS failed to provide hot and cold or tepid running water for the lavatory on the east side of the coke battery. The Secretary does not propose a penalty.

The judge found the Secretary's allegations supported by the evidence. He referred first to an amended stipulation of the parties that the lavatory at the cited location had only cold water, and that its hot water pipe was not operative on the day it was inspected. The judge

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38/ Chairman Rowland agrees with Commissioner Cleary that the instructions USS gave its employees on proper fit of the Dustfoe 66 respirators were in compliance with the terms of the standard, since those instructions were recommended by the manufacturer of the respirators.

39/ The standard at section 1910.141(d)(2)(ii) reads:

§ 1910.141 Sanitation.

* * *

(d) Washing facilities --

* * *

(2) Lavatories.

* * *

(ii) Each lavatory shall be provided with hot and cold running water, or tepid running water.

found that the water pipes servicing the lavatory frequently froze up during cold weather, stopping all the lavatory's water supply. He also found that, occasionally, the water pipes would be shut off purposely to prevent their freezing, and that this condition probably existed for over a year.

Although the Secretary did not propose any penalty, the judge assessed $250. The judge found that the nonfunctioning water pipes made cleaning respirators and washing before eating, as required by the standards cited for items 1b and 4 of citation 3, impossible or inconvenient and forced employees to go elsewhere to wash.

USS concedes that the lavatory's hot water pipe froze up frequently. It argues, however, that the evidence does not support a finding by the judge that the lavatory's water supply would be shut off deliberately to prevent freezing, and cites hearing testimony implying possible vandalism. USS argues for reversal of the judge's penalty assessment. It states that the employees did their washing in the lunchroom and cleaned their respirators in the shower room, and that, therefore, the lavatory's frozen pipes did not prevent employees from complying with the hygiene requirements of other standards.

We affirm item 1. The judge's ruling of noncompliance is supported by the amended stipulation referred to above. His finding that the water pipes were shut off to prevent freezing, however, is neither supported by the record nor necessary to the establishment of noncompliance with this standard, and therefore is rejected. Finally, we agree with the Secretary that the violation does not warrant the assessment of a penalty.

VI

Severity of the Violations and Propriety of the Penalty Assessments

A

The judge found that all the violations set forth in citations 1, 2, 3, and 4, as modified by him, are properly denominated as serious because of the cancer and other health risks inherent in coke oven emissions. He found citation 5 was properly denominated as nonserious. In conjunction with his penalty assessments, the judge addressed each of the four penalty factors enumerated in section 17(j) of the Act.[40/] With respect to size, he stated that USS is the nation's largest steel producer, with approximately 167,000 employees and 1976 gross sales of about nine billion dollars. He also stated that USS is a large, if not the largest, coke oven operator in the country.

The judge found that the gravity of the violations was high. He relied on the preamble to the coke oven standard to conclude that overexposure to coke oven emissions results in an increased risk of cancer to the genito-urinary and pulmonary systems, skin cancer, and other harmful pulmonary conditions. He found the Fairless employees had been exposed to "massive and continuous" coke oven emissions for at least a

---

40/ Section 17(j) of the Act, 29 U.S.C. § 666(i), provides:

Sec. 17. PENALTIES

* * *

(j) The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

year after USS's own engineers had recommended the rebuilding of the Fairless batteries. He added that the "emissions were so massive that visibility atop the batteries, at times, was so reduced that the workers could not see."

With respect to good faith, the judge found that Fairless's management had shown a "striking" lack of good faith, and that there was "interminable" delay and "resistance" in complying with the 1977 standard. He found that USS's Clairton facility had implemented stage charging in 1973, that mechanized gooseneck cleaners had been in use at other USS plants for years but had not been installed at Fairless, that air-conditioned booths and standby pulpits had been installed at other USS plants but not at Fairless, and that years had gone by before Fairless detected that subcontractor work done on its aspiration system was faulty. The judge found that Fairless's failure to rebuild its batteries for over a year after its engineers had recommended rebuilding meant that oven doors, jambs, and frames became so badly deteriorated that it was impossible to produce adequate spare doors or to make many of the existing doors seal properly. The judge further found that USS's corrective action program of patching the ovens to keep them going was carried out by a totally inadequate number of employees and was a "desperate effort to get more coke from the ovens -- regardless of the amount of coke oven emissions caused by the holes, cracks, broken frames, and smoking and burning doors and frames."

Also on the question of whether USS exhibited good faith, the judge stated that USS failed to enforce the use of respirators, and that USS dispensed Dustfoe respirators without providing its employees with

adequate use instructions. He cited as an example of bad faith the opening paragraphs of USS's training program:

> You are here to be informed about a new federal law. . . This law was imposed by the Occupational Safety and Health Administration upon all people who work in coke plants throughout the United States.
>
> They say there is an increased risk of acquiring cancer for those who are exposed to coke emissions, and this is an attempt to reduce this risk.

The judge stated that the quoted paragraph had "obvious" implications, and that the result was "a lack of conviction by the employees that real hazards exist at the coke ovens. . ." Finally, the judge stated that USS's lack of concern for the health of its employees was expressed by USS's failure to warn them of the dangers inherent in laundering their work clothes.

With respect to history, the judge concluded that USS had "a rather poor record. One hundred four citable conditions (not counting the violations in this case — approximately 40), found in five years, can not realistically or reasonably be labeled 'excellent,'" as USS claims.

B

USS argues that citations 1, 2, 3 and 4 should be designated non-serious. It calls the Commission's attention to Usery v. Hermitage Concrete Pipe Co., 584 F.2d 127 (6th Cir. 1978), a case dealing with employee exposure to excessive levels of silica dust. USS alleges the court there rejected the Secretary's argument that to prove a serious violation he need only show that silica existed in excess of the TLV, that employees had been exposed to silica, and that exposure to silica can cause death or serious physical harm. Rather, USS asserts, the court

said the issue is whether the degree of exposure experienced by employees in the particular plant could result in silicosis.

Applying the court's test to this case, USS argues that the Secretary presented no evidence with respect to the length of time USS's employees had been exposed to any specific amount of CTPV. Further, the Secretary presented no evidence as to what amount of CTPV one must be exposed to — and for what period of time such exposure must last — for it to be concluded there is a substantial probability that death or serious physical harm could result from such exposure. USS also contends that its employees were only exposed to excessive amounts of coke oven emissions temporarily, that the violative conditions were corrected long before the hearing, and that the period of temporary overexposure did not cause "any real cancer threat."

USS contends that the judge erred in upholding the Secretary's penalty proposals. It reasserts that the gravity of the alleged violations is not high because there is no evidence that any particular violation had the possibility of causing exposed employees to get cancer. With respect to past history, USS alleges that its Fairless Works had been inspected 33 times between mid-1973 and mid-1977 and that as a result of all those inspections, the Secretary only alleged 104 violations of the Act. The Secretary had alleged only eighteen serious violations and eighty-six nonserious violations, USS asserts. Further, USS states, penalties had only been proposed for eighteen of the nonserious allegations, with the highest penalty being $130. USS argues that this past history constitutes an excellent record, and that the judge's finding its history was "poor" should be reversed.

USS argues it acted in good faith because of the actions it took to abate conditions giving rise to the citations. Those actions include: 1) the call in its compliance program for implementation of all engineering controls required by the standard except mechanized standpipe cleaners, which USS considers infeasible, 2) the use of chuck door gaskets to replace the luting of chuck doors, 3) the termination of the practice of shoveling coal back into the ovens and the installation of chutes on the pusher side door machines to funnel coal directly into the ovens, 4) the installation of a new door rebuild facility, 5) goosenecks and standpipes being cleaned more frequently, 6) the September 20, 1977 revision in its training program to include all required practices, and 7) written warnings issued to employees not using their respirators.

USS states it disagrees with the judge's finding that USS's "interminable" delays in complying with the new standard demonstrate its lack of good faith. Although the judge downgraded its good faith because other USS plants had implemented stage charging before Fairless, USS points out that it has seven plants with coke batteries and that not everything could be done everywhere concurrently. USS also states that even though the judge sought to create the impression that Fairless was always the last USS plant to acquire controls required by the standard, such was not the case. Fairless was not the last plant to get either stage charging or air filtration units, and Fairless was one of five other plants that had not obtained mechanized gooseneck cleaners. It also reasserts that its delays in rehabilitating the coke oven battery were caused by its inability to obtain bricks and by its need to have an energy source to operate the plant in the cold winter of 1977-1978.

With respect to respirators, USS argues that it could hardly have been in bad faith by virtue of its having instructed employees to use a fit test recommended by the manufacturer of the respirators and that it had made efforts to get employees to wear respirators but that resistance was widespread, as exemplified by the testimony of Siminitus who stated, "If I can get away with it, I won't wear it [his respirator]." In spite of employee recalcitrance, USS argues, it had been effective in getting 50 per cent of the employees to wear respirators when required.

USS adds that the laundering of employees' work clothes was done by the families of employees for only the brief January 20 - April 4, 1977 period before plans for the commercial laundering of those clothes had been implemented, and that its training program statement about the coke oven standard being "imposed" on employees was accurate and not indicative of bad faith.

The Secretary relies on the judge's discussion of the penalties' appropriateness. The Secretary argues that lower penalties would be inappropriate in light of USS's size and the gravity of the violations.

The Union argues that the judge's penalty assessments are proper. It states that the test for whether a particular violation is serious is set forth in California Stevedore & Ballast Co. v. OSHRC, 517 F.2d 986, 988 (9th Cir. 1975):

> Where violation of a regulation renders an accident resulting in death or serious physical injury possible, however, even if not probable, Congress could not have intended to encourage employers to guess at the probability of an accident in deciding whether to obey the regulation. When human life or limb is at stake, any violation of a regulation is "serious."

The Union argues that the Hermitage case, supra, does not support USS's argument that citations 1-4 should be designated nonserious. The

Union reads Hermitage as holding that the decision whether a violation is serious is within the Commission's discretion under the substantial evidence test. The Union also argues that the record in this case does contain evidence on the questions raised in Hermitage about proof of the length of employee exposure to a harmful substance and about proof of the duration of employee exposure needed to create the possibility of death or serious harm. On the former question, the Union contends, employee exposure commenced when the batteries started operations in 1952 and 1953 and continued through the date of inspection. On the latter question, the Union contends that there is really no safe exposure limit for a carcinogen, but that the Secretary has established 150 $ug/m^3$ as the feasible CTPV limit to which employees can be exposed without suffering material impairment of health. The Union states that the exposure limit was arrived at under the section 6(b) standard-setting procedure of the Act, as discussed in the coke oven emission standard's preamble, and that USS's breach of that limit constitutes a per se serious violation.

The Union then seeks to refute USS's argument that the respirator penalties should be reduced because of employee resistance to wearing respirators. The Union states that 75 per cent of the employees wore respirators, and that USS's claim of employee resistance to respirators is not supported by the record. The Union asserts that USS has failed to deal fairly with the employees on the matter of respirators, and that the reason supervisors gave employees for wanting them to wear respirators was that the government was "getting on their [USS's] tails."

C

The Commission is divided in its characterization of citations 1-4. Commissioner Cleary concludes that the citations are properly characterized as serious. Commissioner Cleary notes that the violations contained in these citations resulted in the overexposure of USS's employees to carcinogenic coke oven emissions and therefore to the possibility of life-threatening cancer, the disease which the coke oven emissions standard was primarily promulgated to protect employees against. Commissioner Cleary also finds that the condition of the coke ovens was poor during the period of inspection, that the condition had been poor over an extended period of time — so poor that employees had sometimes to work in areas of visible coke even emissions — and that USS knew about the poor condition of the ovens for an extended period of time. Commissioner Cleary further finds that the Secretary has proven the exposures existing during the inspection, stipulated by the parties to be in excess of 150 $ug/m^3$, were representative of typical exposures experienced by the employees. See Hermitage Concrete Pipe Co., 82 OSAHRC , 10 BNA OSHC 1517, 1982 CCH OSHD ¶ 25,975 (No. 4678, 1982). Consequently, because the carcinogenic nature of the coke oven emissions threatened employees with the possibility of contracting cancer and because the exposures in excess of 150 $ug/m^3$ existing during the inspection were proven to be representative of the exposures suffered by employees over the extended past, Commissioner Cleary would find that these violations are serious in nature. See Anaconda Aluminum Co., 81 OSAHRC 27/A2, 9 BNA OSHC 1460, 1477, 1981 CCH OSHD ¶ 25,300 at p. 31,349 (No. 13102, 1981); Hermitage Concrete Pipe Co., supra.

Chairman Rowland would find the violations in citations 1-4 to be nonserious. He does not agree with the presumption stated in Anaconda Aluminum Co., supra, that any overexposure to a carcinogen which is life-threatening is serious in nature. Instead, the Chairman would require the Secretary in all instances to demonstrate under section 17(k)[41/] of the Act that a substantial probability exists that a life-threatening disease could result from the exposure of the employees in question. The Chairman notes that the preamble to the coke oven standard specifically states that duration of exposure is a significant factor in determining the risk that an employee will contact cancer. 41 Fed. Reg. at 46745-46. The record in this case shows only that employees were exposed to coke even emissions in excess of 150 $ug/m^3$ at the time of the inspection. There is no evidence concerning the duration of employee exposure to coke oven emissions in excess of the limit provided in the standard. There is also no evidence regarding the amount or duration of exposure to coke oven emissions that would render substantially probable the contraction of cancer. Thus, the Chairman would

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41/ Section 17(k) of the Act, 29 U.S.C. § 666(j), provides:

Sec. 17. PENALTIES

* * *

For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

conclude that none of the violations were shown to be serious in nature. The Chairman would also observe incidentally that citation 4 was affirmed as a serious violation by the judge even though the citation issued by the Secretary was designated repeated, not serious. On its face, this result appears contrary to Toler Excavating Co., 75 OSAHRC 76/C8, 3 BNA OSHC 1420, 1975-76 CCH OSHD ¶ 19,875 (No. 2637, 1975).

In setting the penalties, we have not relied on the judge's finding that USS acted in bad faith and that its prior history was poor. Instead, we believe that USS's good faith and history are neither remarkably good nor bad. USS faced obvious problems in complying with all of the detailed requirements of the 1977 standard at an old facility. As we have noted, immediate compliance with many of the requirements would not have been feasible and was not required. In general, the steps USS took toward compliance, while certainly not "heroic," did demonstrate a certain amount of diligence. The penalty assessments are therefore based primarily on the gravity of the violations and on the large size of USS. For violations of lesser gravity, such as that involving the failure to assure that employees wash their hands and face before eating, we assess lesser penalties.

VII

Was USS Accorded a Fair Hearing?

USS argues that the "hostility and prejudice" of the judge deprived it of a fair hearing. It contends that the hearing resembled "a grand inquisition in which the . . . Judge assumed the role of Torquemada," and that the judge's decision is based on "twisted logic, strained interpretations of the law, distortion of evidence, and general capricious and arbitrary disregard of the facts." It states that the judge's

cross-examination of its witness Seidenberger goes on for thirty pages in the transcript and was conducted in a heavy-handed manner. USS contends that the judge asked USS witnesses 1045 questions during the four days in which they testified and claims that the judge asked its witnesses and counsel questions about their personal beliefs on certain matters in the hope of using the information to justify his decision.

USS argues that the judge's questioning reveals a "sarcastic hatred and contempt for large corporations" and illustrates with the following remark made by the judge while asking about USS's corporate hierarchy: "To what corporate officer do you believe that Mr. Smith reports to, or does he report right to God?" USS also argues that the judge identified himself with the Secretary and the Union by making complimentary statements about the Union's attorney. USS states that one of the most glaring examples of the judge's prejudice is revealed in the disparate treatment he accorded to witnesses Offenheiser and Siminitus, who testified for the Secretary, and witness Seidenberger, who testified for USS. Although the judge finds that Offenheiser and Siminitus gave contradictory testimony, USS states, the judge tended to excuse them for doing so because they were upset about USS's lack of concern for employee safety. When Seidenberger gave what the judge considered to be "evasive and nonresponsive answers," however, USS states that the judge exhaustively grilled him on cross-examination.

Although the Secretary does not brief the fair hearing issue, the Union argues that Commission procedural rule 66(j), 29 C.F.R. § 2200.66(j), authorizes the judge to "[c]all and examine witnesses and to introduce into the record documentary or other evidence" and that rule

66(f) allows the judge to regulate the course of the hearing. In a complex case like this one, the Union continues, the judge's questions were needed for the preparation of a clear, complete record. With respect to the judge's questioning of USS's witnesses about their "personal beliefs," the Union contends that it was important to certain issues in the case, like good faith, for the judge to learn how USS personnel viewed the coke oven problem. The Union also states that judges are allowed to have their own opinions, citing United States v. Morgan, 313 U.S. 409, 421 (1941).

USS's contention that it did not receive a fair hearing is rejected. We have reviewed the entire transcript and conclude that the judge did accord USS a fair hearing. Although some of the statements made by Judge Brennan deserve to be characterized as intemperate and devoid of judicial decorum, we find that the judge did not prejudge any specific issue in this case but did rely on the proofs presented at the hearing to resolve the disputed issues for him. See United States v. Morgan, supra; United Steelworkers of America v. Marshall, 647 F.2d 1189 (D.C. Cir. 1980).

The transcript reveals that Judge Brennan was almost invariably courteous to all those who participated in the case's nine-day evidentiary hearing. His questioning of witnesses and attorneys was, in the vast majority of instances, designed to elicit necessary material that the attorneys had not obtained, give him a better understanding of the coke manufacturing process, and assemble a more complete record in this complex case. Also, although the judge did compliment the Union's attorney, we view the compliment as a tribute to the attorney's competence rather than an illustration of the judge's predisposition for her side

of the case. Further, the judge's allegedly disparate treatment of the Secretary's witnesses Offenheiser and Siminitus as opposed to USS's witness Seidenberger does not bear out a charge of prejudice. The judge acknowledged that Offenheiser and Siminitus made some contradictory statements and downgraded their credibility somewhat as a result. The fact that the judge might have spent more time cross-examining Seidenberger than Offenheiser or Siminitus does not sustain USS's prejudice allegation.

As mentioned above, however, the judge did make certain ill-considered remarks. Such remarks have no place in our proceedings and we admonish Judge Brennan to comport himself in a manner more compatible with his judicial office.

VIII

Where the Commission members are divided on the disposition of an item, they agree to affirm the judge's disposition of that item. See Marshall v. Sun Petroleum Products Co., 622 F.2d 1176 (3d Cir. 1980), cert. denied, 449 U.S. 1061 (1982). The following items are affirmed and penalties assessed:

| | | |
|---|---|---|
| Citation 1, item 6; Citation 2, item 7 | — | $ 600 |
| Citation 1, item 7; Citation 2, item 8 | — | $ 600 |
| Citation 1, item 8; Citation 2, item 9 | — | $1000 |
| Citation 1, item 9; Citation 2, item 10 | — | $ 600 |
| Citation 1, item 10; Citation 2, item 12 | — | $1000 |
| Citation 2, item 11 | — | $1000 |
| Citation 3, items 1a, 1b, 1c(a and b) | — | $ 500 |
| Citation 3, item 2a | — | $ 250 |
| Citation 3, item 4 | — | $ 150 |
| Citation 3, item 5 | — | $ 150 |
| Citation 4, items 1a and 1b | — | $1000 |

The Commission also affirms item 1 of other than serious citation 5, but does not assess any penalty. The total of the penalties assessed in the decision is $6,850.

The following citation items are hereby vacated:

Citation 1, items 1, 2, 3, 4, 5, 11, 12, 13;
Citation 2, items 1, 2, 3, 4, 5, 6, 13a, 13b, 14, 15;
Citation 3, items 1c(c), 2b, 3, 6b, 6c.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: NOV 4 1982

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| | (Judge's decision) | | 63/A2 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
|---|---|---|---|---|

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR | : | |
| Complainant | : | |
| v. | : | DECISION AND ORDER |
| UNITED STATES STEEL CORPORATION | : | OSHRC Docket No. 77-3378 |
| Respondent | : | (Expedited) |
| and | : | |
| UNITED STEELWORKERS OF AMERICA, AFL-CIO and LOCAL 4889 | : | |
| Authorized Employee Representative | : | |

APPEARANCES

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Brennan, W. E., A.L.J.

STATEMENT OF THE CASE

This expedited case arises under the provisions of Section 10(c)[1] of the Occupational Safety and Health Act of 1970 (the Act),[2] and involves the "new" Coke Oven Emissions Standard.[3] There are involved five Citations, Serious Citation No. 1 - 13 numbered Items; Serious Citation No. 2 - 15 numbered Items; Serious Citation No. 3 - six numbered Items;[4] Repeat Citation No. 4 - one numbered Item and Nonserious Citation No. 5 - four numbered Items, only Item No. 1 of which was contested (R.p. 3), issued pursuant to Section 9(a) of the Act[5] by the Secretary of Labor through the Area Director of the Occupational Safety and Health Administration (OSHA) for Philadelphia, Pennsylvania (Complainant), to United States Steel Corporation at its Fairless Hills, Pennsylvania steel plant (Respondent). Penalties totalling $35,700 were proposed by Complainant pursuant to Section 10(a) of the Act.[6] Neither Items 2, 3 or 4 of Nonserious Citation No. 5 nor the $100 proposed penalty for each of these three Items were contested, and consequently, these Items and the penalties proposed thereon have become a final Order of the Review Commission by operation of Section 10(a) of the Act. Consequently, only proposed penalties totalling $35,400 are at issue herein.

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1/ 29 U.S.C. 659(c).

2/ 29 U.S.C. 651 et seq.

3/ See "Background" infra.

4/ At the close of the receipt of evidence, Respondent's Motion to withdraw its Notice of Contest to Items 4 and 5, as to the violation only but not as to the penalty, was granted. Tr. 1649.

5/ 29 U.S.C. 658(a).

6/ 29 U.S.C. 659(a).

On March 17, 1976, OSHA received an employee complaint requesting an inspection of Respondent's coke oven batteries. On March 22, 1977, an OSHA inspection party, divided into a number of teams including five field Industrial Hygienists, arrived at Respondent's Fairless Hills coke oven facility, to determine compliance, or a lack thereof, with the "new" Coke Oven Emissions Standard, 41 F.R. 46784-46790, Oct. 22, 1976; 29 C.F.R. 1910.1029.

The on-site inspection, begun on March 22, 1977, was substantially completed on April 4, 1977. On September 12, 1977, a closing conference was held with Respondent's representatives, followed on September 14, 1977 with the issuance of the five Citations at issue herein.

By letter dated October 20, 1977, United Steelworkers of America - AFL-CIO and Local 4889 (the Union) elected party status (R.p. 5). After the filing of a Complaint (R.p. 7) and Answer thereto (R.p. 8), Respondent's Motion for An Indefinite Postponement of the hearing, pending a decision by the Third Circuit Court of Appeals in its review of the "new" Coke Oven Emissions Standard, (AISI et al. case infra), (R.p. 8) was denied by written Order dated January 23, 1978 (R.p. J-3). The Union's Motion for an Expedited Proceeding, dated January 27, 1978, (R.p. J-4) was granted by the Review Commission by Order dated February 9, 1978 (R.p. J-5).

Thereafter pretrial discovery was conducted, and two prehearing conferences were held, the first on February 21, 1978, the second on May 1, 1978, during which numerous Motions for Summary Judgement were denied. The parties entered into a lengthy (66 pages with attachments) Joint Stipulation of Facts (Stipulation), which is attached hereto and specifically incorporated herein as Appendix A.

Pursuant to the agreement of the parties, trial began on May 15, 1978, and continued for eight additional work days, finally terminating on May 26, 1978, producing a transcript of 1789 pages. All parties were ably represented by counsel.

All post trial briefs, from the three parties, were received by July 10, 1978.

## BACKGROUND

The following information may assist in an understanding of this case.

### The "New" Coke Oven Emissions Standard

29 C.F.R. 1910.1029

The first "Coke Oven Standard" was promulgated by the Secretary of Labor (Secretary) in 1969, under the Walsh-Healy Act, 41 U.S.C. 35-45, adopting a 1967 recommendation of the American Conference of Governmental Industrial Hygienists. (34 F.R. 788-796). In 1971, this Standard was adopted as an "established Federal standard" under Section 6(a) of the Act, 29 U.S.C. 655(a) (36 F.R. 10466, 15101, 1971).

In June of 1971, the American Iron and Steel Institute (AISI), in which United States Steel Corporation is a member, petitioned the Secretary of Labor for a standard specifically for coke ovens, followed a month later by a petition from the United Steelworkers of America for a more stringent standard - a major point of difference relating to proposed safe exposure limits of coal tar pitch volatives (the emissions created by the coking process). In September, 1971, the Secretary denied both petitions and requested the National Institute of Occupational Safety and Health (NIOSH) to expedite research relating to employee exposure to coke oven emissions.

In February of 1973, NIOSH issued its report, "Criteria for a Recommended Standard - Occupational Exposure to Coke Oven Emissions." This report recommended, in part, the use of specified engineering controls and operating procedures, supplemented by respiratory protection.

In August of 1974, the Secretary empanelled a Standards Advisory Committee on Coke Oven Emissions to review the NIOSH report and to make recommendations for a new Coke Oven Emissions Standard. After lengthy hearings, on-site inspections and review of documents, the Committee submitted its report (3,500 pages in length) to the Secretary on May 24, 1975.

On July 31, 1975, the Secretary published his Proposed Standard for Coke Oven Emissions in the Federal Register. From November 4, 1975 to January 8, 1976, and from May 4, to May 14, 1976, hearings were held on the proposed Standard, all pursuant to the provisions of Section 6(b) of the Act, 29 U.S.C. 655(b).

On October 19, 1976, the Secretary published the new Coke Oven Emissions Standard, to become effective on January 20, 1977 (41 F.R. 46742-46790).

In December, 1976, AISI and others applied to the Secretary for a stay of the effective date of this Standard, which was denied in January, 1977. The United States Court of Appeals for the Third Circuit was then petitioned for a stay of the Standard by AISI and other members of the steel industry, including Respondent herein. On February 18, 1977, the Third Circuit Court vacated an interim stay which it had granted a month earlier, and reviewed the new Standard, as petitioned, under the provisions of Section 6(f) of the Act, 29 U.S.C. 655(f).

On March 28, 1978, the Circuit Court affirmed the new Coke Oven Standard, except for three particulars not relevant here. This Judgment was amended in a particular not relevant here on May 1, 1978 (R.p. J-41).

> American Iron and Steel Institute, et al. v. OSHA et al., ____F.2d____ (3rd Cir., 1978) (Nos. 76-2358 et al., March 28, 1978), as amended by Order dated May 1, 1978; (AISI case). See Slip Opinion at record page J-21 (Vol. II) of this Docket file.

Coke and Coke Ovens

Coke is a porous, cellular by-product of the destructive distillation or carbonization of coal. It is used primarily by the steel producing industry as a fuel in its blast furnaces and foundries.

A coke oven battery is a large, generally rectangular structure, typically 200 or more feet long, 40 to 60 feet wide, and up to 50 feet in height. The battery is divided by refractory brick walls into a series of narrow ovens or coking chambers, about 18 inches wide and from 13 to 20 feet high extending the full width of the battery, separated from the adjoining oven by a heating chamber. Heating and oven chambers alternate with each other so that there is a heating chamber on either side of an oven. This heating process causes the carbonization of the coal within the ovens, and results in the production of coke and various distillates.

Each oven has three or four "charging" holes in its roof through which the coal is inserted into the oven. Each oven has a large door at each end. At the end of the coking cycle, both doors are removed and the incandescent coke is "pushed" out of the oven (from the "push" side, out the "coke" side) into a "quench" car, taken to a quench tower, cooled with water and stored until used.

The coking process produces a substantial amount of gases and other distillates. These are captured, part of the gases being used as fuel for the coke ovens, the remainder for various coke by-products. These gases are removed from the ovens by one or two vertical pipes, called standpipes or ascension pipes, through horizontal pipes called goosenecks, to one or two collector "mains" (large, horizontal ducts).

Coke production consists of three basic operations: "charging," "coking," and "pushing."

The "charging" cycle begins by loading the individual oven, with coal, to a predetermined level (the coal level), to allow free space above the coal so that the gases may be moved from the oven and collected. This "charging" procedure is done with the use of a large, mechanical "larry car" which operates on rails on the top of the battery. The larry car receives a premeasured load of coal, into its three or four hoppers from a coal bunker located at the end of the battery. The number of hoppers correspond to the number of charging holes in the ovens. The loaded larry car moves away from the coal bunker and is positioned over the oven to be charged. The charge hole lids are removed and the larry car hoppers are emptied into the oven. After the coal is in the oven, a small door at the top of the pusher door, called a "chuck" door, is opened and a leveler ram, or arm, part of the equipment on the pusher door car, is mechanically inserted into the oven to level the coal within to the predetermined "coal line." During this charging process, the oven is placed under steam "aspiration" (forced or induced draft) by the use of steam jets located in the standpipes. This aspiration system is designed to induce a draft within the oven to increase the exhausting effect and thus reduce or limit the escape of gases from the oven into the ambient air

during the charging process and is called "charging on the main." After the charging is completed, the charging lids and chuck doors are closed, the aspiration shut off and the "coking" operation begins.

There are a number of variables which determine the desired "coking" time, such as width of the oven, its condition, coal moisture and nature of the coal used, and this time varies from about 16 to 20 hours, averaging about 17 or 18 hours. Coking time is selected so that the coke adjacent to the oven walls has a temperature from 1900° F to 2000° F. The heating chamber temperatures range from about 2600° F to 2800° F.

When the coal is coked all the way through, the doors on each end of the oven are removed by large, mechanical door machines, which run on rails at the "bench level" of the battery. With both doors removed, a large, mechanically operated ram, mounted on a pusher car, pushes the coke out the coke side of the oven, through the coke guide into a large quench car or hot car. The hot car then moves on rails to the quench tower where the coke is cooled with water and then dumped onto the coke wharf. When the oven doors are put back onto the oven, the procedure begins all over again. (See preamble to "new" Coke Oven Emissions Standard, 41 F.R. 46742-46744).

## Coke Oven Emissions

A major hazard to coke oven employees is the risk of certain types of cancer and other diseases caused by exposure to coke oven emissions, the violatile gas by-products, created by the coking procedure. This is succinctly stated in the preamble to the Standard as follows:

III. Coke Oven Emissions-Exposure Hazards

The overwhelming scientific evidence in the record supports the finding that coke oven emissions are carcinogenic. This finding rests on epidemiological surveys as well as animal studies and chemical analyses of coke oven emissions. As discussed more fully below, coke oven workers have an increased risk of developing cancer of the lung and urinary tract. In addition observations of animals and of human populations have shown that skin tumors can be induced by the products of coal combustion and distillation. Finally, chemical analyses of coke oven emissions reveal the presence of a large number of scientifically recognized carcinogens as well as several agents known to enhance the effect of chemical carcinogens especially on the respiratory tract.

In addition, recent updates of the major epidemiological study of coke oven workers show an elevated risk of nonmalignant respiratory diseases such as bronchitis or emphysema.

41 F.R. 46744

* * *

In conclusion, there is an overall excess mortality rate for cancer of the genito-urinary system for coke oven workers that is statistically significant at the one percent level... .

41 F.R. 46747

* * *

H. Conclusion. The evidence in the record conclusively supports the finding that coke oven emissions play a causal role in the induction of cancer of the lung and genito-urinary tract in the exposed population. Constituents of coke oven emissions and coal tar, a by-product of the coking process, are known animal skin carcinogens and have been related to increased skin cancer mortality in human populations similar to coke oven workers. This information is sufficient to warrant protective measures designed to reduce employee exposure to coke oven emissions.

41 F.R. 46748 [7]

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[7] For a detailed review of the evidence underlying these conclusions, see the preamble to the Standard at the cited pages.

Coke oven emissions can leak out of the coke ovens at any unsealed point, such as charging holes, doors, door frames, standpipes and goose-necks, and are emitted whenever the gas-tight integrity of the oven is broken deliberately, during the charging and pushing procedures. Of course, emissions are given off into the ambient air during the coke push and while in the quench car prior to being cooled.

Because of the hazards inherent in coke oven operations (supra), employee exposure to coke oven emissions has been limited since at least 1969 (when the Secretary adopted a 1967 recommendation of the American Conference of Governmental Industrial Hygienists) to 0.2 $mg/m^3$ for an eight hour day.[8/]

As finally promulgated, the "new" Coke Oven Standard set a "permissible exposure limit" (PEL) to the benzene-soluble fraction of total particulate matter of .15 $mg/m^3$,[9/] averaged over any eight hour period. It further established "Regulated areas," with access limited to authorized persons.

In order to attain the new "permissible exposure limit," an extensive list of engineering and work practice controls are mandated in the new Standard, to be implemented (as far as existing coke oven batteries are concerned), "... at the earliest possible time, but not later than January 20, 1980 ... ." 29 C.F.R. 1910.1029(f)(1)(i)(a), 41 F.R. 46785.

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8/ Two-tenths of a milligram of coal tar pitch volatiles per cubic meter of air, the so-called Threshold Limit Value (TLV).

9/ Translated as 150 micrograms per cubic meter of air, or 150 $\mu g/m^3$.

Because of the length (16 pages with its attachments) and amount of detail set forth therein, and in order not to unduly enlarge this decision, this "new" Coke Oven Standard is attached hereto and the relevant Sections are specifically incorporated herein, as Appendix B.

Its general design is as follows:

29 C.F.R. 1910.1029

(a) Scope and application.

(b) Definitions.

(c) Permissible exposure limit - to coke oven emissions not to exceed 150 micrograms per cubic meter of air averaged over any eight-hour period.

(d) Regulated areas - essentially the coke oven battery, its topside, pushside and coke side and attendant machinery, the battery ends, the wharf and screening station.

(e) Exposure monitoring and measurement. Employers are directed to monitor coke oven employees in regulated areas to determine exposure to coke oven emissions. Employees are to be notified of the results.

(f) Methods of compliance.

The employer shall control employee exposure to coke oven emissions by the use of engineering controls, work practices and respiratory protection as follows:

(1) Priority of compliance methods.

(i) Existing coke oven batteries.

(ii) New or rehabilitated coke oven batteries.

(f) Engineering controls.

Specific engineering controls are mandated covering the:

(i) Charging of coke ovens - including "stage charging" and the necessary controls to accomplish this type of charging, such as:

(b) Drafting from two or more points in the oven

(c) Adequate aspiration systems

(d) Mechanical volumetric controls on larry cars

(e) Devices to accomplish a rapid charge

(f) Individually operated larry car drop sleeves

(g) Mechanized gooseneck and standpipe cleaners; and others not relevant herein.

(ii) Coking phase - In order to control emissions during this phase, certain controls are mandated, such as:

(c) An adequate number of spare doors

(d) Chuck door gaskets; as relevant herein.

(f)(3) Work practice controls.

(i) For charging.

(a) Detailed, written work practices are specified covering, inspection, cleaning and prompt and effective repair of all engineering controls - covering goosenecks, standpipes, oven roof carbon build-up, aspiration system, standpipe caps and charging holes and their lids.

(b) Specific charging procedures are mandated.

(1) How larry cars are to be filled with coal.

(2) Aligning larry car over charge holes with use of drop sleeves.

(3) Seven specified charging procedures.

(ii) For coking - detailed procedures during coking cycle.

(iii) For Pushing - detailed procedures during push cycle.

(iv) Maintenance and repair - detailed written maintenance and repair procedures, with repairs "completed as soon as possible".

(f)(4) Filtered Air.

Employers are to provide positive pressure, temperature controlled, filtered air for the larry cars, pusher machine, door machine, and quench cars with similar type standby pulpits on the battery topside, wharf and screening station.

(f) (6) Compliance program.

Employers are directed to "establish and implement a written program to reduce exposures solely by means of the engineering and work practice controls..." required under the Standard, with specified minimal provisions.

(f) (7) Training in compliance procedures.

All written procedures and schedules mandated under Section (f) of the Standard (engineering and work practice) must be included in a training program required under Section (k) of the Standard.

(g) Respiratory protection.

(1) Provision for providing of and use.

(2) Cleaning and replacement of.

(i) Hygiene facilities and practices.

(1) Change rooms

(2) Showers.

(3) Lunchrooms - must be temperature controlled, positive pressure with filtered air.

(4) Lavatories.

(5) Prohibition of activities in the regulated areas - no eating, drinking (except water) or smoking.

(j) Medical surveillance - periodic medical examinations with results thereof to specified persons including the employee.

(k) Employee information and training - training program for employees to be instituted and given at specified times covering procedures mandated under the Standard.

(l) Precautionary signs and labels.

(m) Record keeping.

(n) Observation of monitoring by employees or their representatives.

(o) Effective date - January 20, 1977.

The Fairless Hills Coke Ovens

At Fairless Hills, Pennsylvania, Respondent maintains a steel manufacturing facility which includes two coke oven batteries, No. 1 and No. 2. Both batteries were built in 1952 of the Wilputte design, Battery No. 1 going into service in 1952 and Battery No. 2 in 1953. Each battery consists of 87 coke ovens, each oven having the following dimensions: 12 feet 2 inches high, 40 feet 7-5/8 inches long and 18 inches wide. Approximately 16 tons of coal are charged into each oven to a calculated coal line of 11 feet 2 inches. The coke was heated to an average temperature of 2000° F and the average coking time was 16-1/2 hours at the time of the OSHA inspection.

These ovens are operated 24 hours a day, seven days a week and are maned by three eight hour shifts (called "turns") of coke oven employees, the "day turn," and two "back turns." Eighty-one ovens were normally pushed each turn at the time of the inspection.

The following is a description of Fairless battery equipment:

1. Both batteries have double collector mains, each oven having three charging holes.

2. The larry car for Battery No. 1 is a turntable design built by Wilputte in 1952. Between August 23, 1976 and October 18, 1976, this

larry car was modified to include: 1) New drop sleeves, 2) New volumetric controls and 3) a new drive in the central turntable.

3. The larry car for Battery No. 2 is a turntable design built by Wilputte in 1952.

Both larry cars have three hoppers each of which are filled with coal from a coal bunker located between the two batteries.

4. The pusher machine for both batteries were each built in 1952 by Wilputte.

5. The pusher and coke side door machines for both batteries were all built in 1952, by Wilputte (each battery has one push side and one coke side door machine), as was the quench car which services both batteries.

There were no significant modifications to the equipment listed in subparagraphs three through five, supra between 1952 and the time of the inspection. (Stipulation, pp. 4-7).

The Citations at issue are discussed next. Due to the number of Items as well as cited Sections of the Standard, neither the "Description" of the alleged violations as they appear in the Citations, nor the cited Sections of the Standard are quoted verbatim. However, each "Description" is quoted in the Stipulation (Appendix A, attached) and the cited Sections of the Standard are readily available in the copy of the Standard attached as Appendix B.

Serious Citation No. 1 deals with Respondent's Coke Oven Battery No. 1, whereas Serious Citation No. 2 pertains to Battery No. 2. The contested Items will be dealt with seriatim and, where possible, Items from both Serious Citations No. 1 and No. 2 will be coupled when each deals with a common factual situation.

## THE CITATIONS

### SERIOUS CITATION NO. 1 - ITEM NO. 1

### SERIOUS CITATION NO. 2 - ITEM NO. 1

These Items charge that specified employees, on both Batteries were exposed to concentrations of coke oven emissions in excess of the PEL of 150 micrograms per cubic meter of air for an average eight-hour period, prohibited by Section .1029(c) of the Standard.

The Stipluation at pages 8, 8a, 27 and 27a, the only evidence introduced as to these Items, establish these violations as alleged.

### SERIOUS CITATION NO. 1 - ITEM NO. 2

### SERIOUS CITATION NO. 2 - ITEM NO. 2

These Items charge that Respondent had neither equipped nor operated either Battery No. 1 or No. 2 with stage charging - one engineering control method mandated by Section .1029(f)(2)(i)(a) of the Standard.

The stipulated facts establish among other things, that stage charging was considered by Respondent as applicable to both batteries, and that it was not being performed at either location during the inspection. (See Stipulation, pp. 9, 10, 28, 29).

One major defense of Respondent to these Items, as well as the other Items involving failure to implement the engineering and work practice controls mandated in Sections .1029(f)(2), (f)(3) and (f)(4) of the Standard, is that under Section .1029(f)(1)(i) of the Standard which sets forth the priority of compliance, it legally has until January 20, 1980, to have these controls in place at Fairless.

Complainant's position is that Respondent, under Section .1029 (f)(1)(i) must implement these controls "at the earliest possible time,"

and under the facts of this case, "the earliest possible time" had expired as of the March-April, 1977 OSHA inspection, and thus the absence of the cited engineering and work practice controls, constitute violations of the Standard.

Respondent argues that such a construction of the Standard, nullifies the "January 20, 1978" time limit, and is improper.

However, Respondent's argument, if followed, would nullify the "at the earliest possible time" requirement for implementing controls.

Thus, there is presented, in effect, a quasi-legislative or administrative policy question, best determined by the Secretary, who is charged with enforcing the provisions of the Act. As long as his determination is reasonable and carries forward the objectives of the Act, it receives great deference by the Courts. (See "Respondent's Defenses" section, infra, and Brennan, Secretary of Labor v. Southern Contractors Service et al., 492 F.2d 498, 501 (5th Cir., 1974)).

It is concluded that the requirement to implement the mandated engineering and work practice controls "at the earliest possible time," because of the grave health conditions attempted to be dealt with by these requirements, is a reasonable exercise of the Secretary's discretion. When "the earliest possible time" occurs, as to any coke oven operation, must be determined on a case by case basis, upon the evidence of record.

## GENERAL HISTORY OF STAGE CHARGING

In 1973, a private research concern, the Battelle Columbus Laboratories, conducted a second research project of coke oven emissions, (the first was done by them in 1970), under the sponsorship of the AISI, which produced

a "Summary Report on Control of Coke Oven Emissions," dated December 31, 1973. (Parts of this report were admitted as Exhibit C-1 herein).

Personal observation and evaluation visits were made by Battelle personnel to 32 coke oven plants in the United States, Canada, Japan, West Germany, the Netherlands and Great Britain. As stated in this Report,

* * *

> In general, Battelle found the state of the art to be greatly advanced since Battelle's previous study prepared in 1970. Techniques available as of 1973 are capable of doing an excellent job of reducing or preventing the former massive emissions of the process.
>
> (Exhibit C-2, p. 1)

In the section of this Report dealing with charging coke ovens, the following observation is made:

> . . . it is Battelle's position that the 1973 state of the art is best represented by an operating technique [stage charging] that was fully disclosed (and thoroughly ignored) in 1961[10/] (bracketed material supplied).
>
> (Exhibit C-1, p. 13)

After a thorough explanation of the stage charging techniques and equipment modifications necessary to effect this method, the Report states:

> The British operations were not seen to make any smoke, at all, during observation periods in three plants. The American operations were subject to occasional small wisps of smoke.

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10/ This reference is explained at p. 30 of this Report as follows:

> In adopting staged charging as the generic term for this report, we apologize to the British operators who created both the technique itself and the terminology herewith abandoned. Let it suffice that good, effective, adequate smokeless charging was practiced and reported in the English Midlands fully 12 years ago, and universally ignored by others until recently on the grounds that it was "only a variation" of charging on the main.

> Overall, every staged or sequential charge observed in every plant under every condition was clearly superior to every other charge observed during the course of this study. Furthermore, in our opinion, the conditions of observation did not permit 'rigging' of a good show at any point; we believe we saw matters as they are, day in and day out. Finally, staged and sequential charging operations were in every instance apparently within the reasonable expectations of reasonable regulations.
>
> Battelle's evaluation is, therefore, that staged charging, in its many variations, is a superb approach to the control of charging emissions, short of sealing of the process. It can be recommended unequivocally as an approach to solving charging problems at most conventional coke plants. (Underling in original).
>
> (Exhibit C-1, p. 33)

Thus, historically, stage charging has been reported in the coke oven literature, and successfully practiced since 1961. Its advisability as a combination of engineering controls, (i.e., equipment modifications such as drop sleeves and volumetric controls on the larry cars, and adequate steam aspiration pipes and nozzles) and work practice controls, (i.e., control or sequence of charging, maintenance of clean standpipes and goosenecks) was recommended to the U. S. coke oven industry, via the first Battelle report in 1970 - as a result of their first study sponsored by AISI, and "recommended unequivocally" in its second report in 1973.

HISTORY OF STAGE CHARGING BY U. S. STEEL CORPORATION

United States Steel, initially investigated stage charging beginning in July, 1972, at its Fairfield, Alabama Coke Works, which resulted in the "successful application" of this technique at both its Fairfield Works and its coke facilities at Clairton, Pennsylvania, in 1973.

In a paper entitled "Stage Charging on a Single Collector Main Battery: A Total System Concept," presented by a Mr. Frank Clark of United States

Steel's Fairfield Works at a "1973 Ironmaking Conference," there is a rather extensive discussion of this charging technique. The following excerpts are relevant herein:

> Stage charging is the ordered pouring of coal into the oven so that a space for gas exit is consistently maintained regardless of coal flow. Emissions are effectively contained in the ovens and collecting mains by steam aspiration and then exhausted through the regular gas handling equipment. Stage charging requires the design of larry car hoppers, such that each will contain a measured portion of the total coal volume required to charge an oven. The hoppers are then discharged into the oven in an ordered sequence so that an open tunnelhead, or gas exit, is maintained at the top of the oven until the last hopper is discharged, thereby insuring that the resultant blockage is always in the same location prior to leveling. Stage charging as described was used first on double collector main batteries. Fairfield Works has adapted this method to single collector main batteries.
>
> A Total Systems Approach
>
> In order to achieve optimum smokeless charges using the stage charging methods, Fairfield has used a total systems approach. The following system components were identified and developed:
>
> 1. A free space for gas exit to the collector main must exist on either side of the charging hole containing the coal for leveling.
>
> 2. Coal level and peak height must be controlled to maintain the gas exits.
>
> 3. There must be sufficient steam aspiration to evacuate the gases.
>
> 4. There must be a continuing program of cleaning and maintenance.
>
> 5. Proper operating practices must be adhered to consistently.
>
> Conclusion
>
> In conclusion, stage charging has been operational on Batteries 5 and 6 since March, 1973. The overall operating schedule has not been affected, and larry

maintenance problems have decreased. This system is now in operation on a total of five batteries at Fairfield and offers a practical means of controlling charging emissions. Batteries 5 and 6 were chosen by EPA as a basis for its recommended new source standards. (First, second and next to last unnumbered pages, Exhibit C-1)

Exhibit C-1, a United States Steel document, thus establishes that stage charging, was in fact, successfully practiced at two of Respondent's coke oven locations, Clairton and Fairfield, not later than March, 1973.

Further significant insight concerning research and development of stage charging, done by U. S. Steel, is set forth in Exhibit C-3, a paper presented at the annual meeting of the Air Pollution Control Association at Denver, Colorado, on June 12, 1974, by members of U. S. Steel's Clairton Works, and Pittsburgh headquarters offices. The following excerpts are relevant:

"CHARGING EMISSION CONTROL BY USE OF STAGE CHARGING"

There is general agreement among the operators of the conventional slot type by-product recovery coke ovens that the major source of emissions occurs during the charging of coal into the oven at the beginning of the coking cycle. This paper describes the work that has been done at the Clairton Works of United States Steel Corporation to effectively reduce charging emissions.

Clairton Works is located fifteen (15) miles south of Pittsburgh, Pennsylvania, on the banks of the Monongahela River. It is listed as the world's largest coke plant, charging about 30,000 net ton of coal per day, and has highly advanced facilities for coke oven gas processing and coal chemical refining equipment. Coke making operations were begun at the plant in 1916 and expanded over the next 30 years. In 1946 a complete rebuilding program for all its coke ovens was undertaken. This was completed in the late 1950's. The coke ovens incorporated well-established designs, and all were equipped with double collector mains and steam aspiration for on-the-main charging.

* * *

In 1969 an intensified research and development program was undertaken jointly by Clairton Works and the USS Research Laboratory, aimed at finding reliable methods to effectively control charging emissions which could be adapted without major alterations to the existing coke ovens. It was recognized that in addition to controlling charging emissions, the effects on coal carry-over into the collector mains, on tar quality, on excess air infiltration into the gas system, on lengthening of the machinery cycle, and loss of control of the oven coal line, would have to be taken into account.

Investigation and analysis of the configuration of facilities and practices then current, plus a careful review of the work that had been done by others, led to the conclusion that charging emission control could best be achieved by containing the emissions in the ovens and exhausting them through the regular gas handling system. To accomplish this would require more effective aspiration and a constantly unrestricted tunnel head in the oven (the space between the top of the coal charge and the oven roof) during the charging cycle. To maintain an open tunnel head it was recognized that control of coal flow from the charging hoppers on the larry car into the ovens would be required. These principles were not new. Coke plant operators had experimented previously with various types of so-called 'sequential charging,' as we had done at Clairton in the 1960's. For example, Meades and Randell described their work based on these principles in an article in the June, 1961, issue of THE GAS WORLD entitled, 'Smokeless Charging.'

However, the objective of the investigational program at Clairton was to develop a specific charging system that would work effectively and reliably under the conditions existing at that location. This has now been accomplished and the system has been designated as 'stage charging.'

* * *

The first problem was to obtain adequate aspiration during charging. Initial studies of Clairton aspiration systems showed that they were not capable of aspirating all of the gases generated during charging. Standpipe and gooseneck size and configuration, type of damper valve, size of oven, plus other factors, all had to be taken into consideration in establishing the aspiration needed to control emissions effectively. Similar work in this area had been done under AISI sponsorship at J & L's Pittsburgh Works.[1] The techniques developed in that program were adapted and modified for use in conducting test programs at Clairton.

* * *

To obtain this gas flow it was necessary not only to increase the size of the steam aspirating nozzles, but also the nozzle pressure which, in turn, required new and larger steam supply headers. As mentioned above, these parameters are dependent on the standpipe-gooseneck configuration and the size of the oven. Furthermore, it is essential that the aspirators be kept clean to be effective, and this requires a regular well-supervised cleaning program. The importance of clean goosenecks and standpipes cannot be overemphasized.

* * *

These improvements in the steam aspiration system resulted in appreciable reduction of charging emissions, however, it was apparent that even with double collector mains, adequate steam aspiration and optimum conventional charging practices, consistent 'smokeless' charging could not be realized with gravity-feed larry cars, because of frequent tunnel-head blockage brought about by erratic flow of coal from the hoppers.

As a matter of interest, extensive tests were made using 'sequential charging.' By installation of a time relay system on the larry car, the control of the discharge of the coal was taken out of the hands of the larry car operator.

* * *

As a result of these tests, the conclusion was reached that absolute control of coal volume in each hopper, and a pouring practice that minimized the effect of variable rate of coal flow on the distribution of coal in the oven, were mandatory for a smokeless charging system.

Based on extensive tests conducted on a scale model of the charging system, it was learned that coal from the No. 1 and No. 4 hoppers could be dropped simultaneously into the oven with little or no interaction. After these hoppers emptied, No. 3 hopper was dumped, and when empty, was followed by No. 2 hopper. Thus, a coal hang-up or rate of flow from the hopper would not affect distribution in the oven. Since the hoppers were of essentially equal capacity, the test work made it apparent that the amount of coal put into each of the four would have to be changed considerably for stage charging. To do this, a procedure was developed for measuring the actual angle of repose of coal after it was

dropped into the operating ovens. This information was then used to calculate the coal volume to be placed in each of the hoppers.

The next step was to translate this information into actual practice on the battery. Two major alterations were required to the gravity feed larry. First, the volumetrics were modified to permit the outside hoppers (No. 1 and 4) to hold approximately 67% of the coal charge, with No. 3 hopper to contain 13% and No. 2 hopper, 20%.

* * *

The second change was to develop and provide a full apron with the easily adjustable volumetric to control the angle of repose of the coal in the hopper as it is loaded from the bunker (Photo II). This permits control of volume fluctuations due to changes in flow characteristics. A series of tests were conducted with coal blends in which moisture, size, and bulk density were varied, and it was determined that the angle of repose never exceeds 45°, therefore, the aprons are set at this angle. The aprons extend from the base of the individual stationary sleeve to the perimeter of the hoppers. Coal from the bunker will always flow outward to meet and be contained by the apron. Deviations such as partial restriction of the bunker gate opening by the larry car operator can also affect this volume control system, therefore, it was necessary for the bunker gate opening to be automatically controlled.

A specially designed smoke box was developed for the leveler bar to insure a nearly perfect seal over the chuck door opening. This maximized aspiration during the leveling operation (Photo III). These were the basic component changes for the charging system which, at Clairton, is called 'stage charging.'

The steps of the stage charging operation are as follows:

Step 1. After loading at the bunker the larry car travels to the oven. The operator performs the required offtake cleaning, and waits for the pusher operator to pour the charge. Upon receiving the signal which indicates that the pusher is

in position to level, the larry car operator lowers the drop sleeves over the open charging holes. The lidman turns steam into the goosenecks, places the oven on the main, being sure that the standpipe caps are seated properly, and signals the larry car operator when this step is completed (Illustration I).

It is extremely important that the drop sleeves totally enclose the charging holes and that the standpipe caps are sealed securely in order to reduce the possibility of pulling air into the aspiration system. This would effectively increase the total volume of gas beyond the capabilities of the system and force the excess volume into the atmosphere.

Step 2. To attain smokeless charges it is necessary to provide at all times during the charging cycle, a route for the gas to escape from the oven through the offtakes; thus the pouring procedure is of prime importance.

* * *

Step 4. No. 2 hopper is now discharged. After the No. 2 hopper has stopped running, and with sufficent coal remaining to assure a level charge, the signal is given to begin the leveling operation (Illustration IV). It is critical to the success of the operation that the chuck door remain closed until this time because premature opening or cracking will adversely affect the aspirating system.

A significant procedural step which must be emphasized is the prompt and complete replacement of the Nos. 4, 1, and 3 lids as each hopper empties. This action directs the full aspiration to the center of the oven where it is most needed. If careless or tardy lid replacement practices exist, the air above the charging holes is drawn into the gas offtakes at the expense of gas from the center of the oven; consequently, this gas will seek a vent into the atmosphere. These lids must be replaced before the leveling operation begins.

* * *

> The stage charging system is now in full operation on all batteries at Clairton. To date there have been no serious problems resulting from the practice in either the gas or the tar systems, and the lengthening of the machine cycle for charging has been accomplished without affecting over-all (sic) operating schedules.
>
> In conclusion, U. S. Steel's efforts to develop a practice to eliminate charging emissions at Clairton have resulted in the development of technology which, if matched to the basic oven characteristics, will control charge emissions effectively. The techniques are basic but require knowledge of the characteristics of the coal used, adequate and properly maintained aspirating systems including clean offtake piping, control of coal volume in the individual hoppers, and last, and probably most important, adherence by the operating crew to specific charging and leveling practices. If all these practices are followed, stage charging will achieve charging of coal into the oven without emissions to the atmosphere.

(Exhibit C-3, dated June 12, 1974)

(1) "Control of Coke Oven Emissions" by T. E. Dancy, presented at the 78th General Meeting of the AISI, May 27, 1970.

Exhibit C-3 thus reflects the extensive research, engineering and actual conversion work done at U. S. Steel's Clairton Works, beginning in the 1960's which resulted in successful stage charging in 1973, as reported in this paper in 1974.

STAGE CHARGING AT FAIRLESS WORKS

The documentary evidence of record further establishes that as early as October, 1971, the headquarters research organization of U. S. Steel, called the "USS Applied Research Laboratory" (ARL), conducted

a "preliminary" investigation of the steam aspiration system on the coke ovens at Fairless, to determine the aspirating capacity and any modifications to improve the capacity. The goosenecks at Fairless were equipped with "Corliss" dampers, essentially a damper utilizing a bowl with fluid as a seal, rather than a "Pullman" type damper, a slightly different configuration, used at U. S. Steel's Clairton and Fairfield Works. ARL's fear that the Corliss type damper might interfere with increased aspiration capacity proved groundless as desired aspiration was found capable of achievement, with the Corliss dampers, by increasing the steampipe and nozzle size and hence the rate of steam flow on the offtake system. (Exhibit C-4)

This increased aspiration capacity at Fairless, with the Corliss dampers in place, was actually accomplished within approximately 30 days, on four of the coke ovens by increasing steampipe and nozzle size and reported in the ARL Progress Report dated November 8, 1971. (Exhibit C-5)

This resulted not only in greatly improved emission control at the test ovens while charging ("low emission level") but additionally a recommendation from ARL that all Fairless aspiration systems be upgraded. Funds to accomplish this upgrading were "approved." Significantly, the success of this research project, establishing that significantly increased aspiration was attainable even with the Corliss dampers in place, reduced the anticipated cost of the aspiration upgrading from $450,000 (which included conversion from "Corliss" to "Pullman" dampers) to $100,000. (Exhibit C-6, dated November 29, 1971)

Thus, as early as November, 1971, all the necessary research and engineering to increase the aspiration systems at Fairless had been accomplished, larger steampipes and nozzles on four ovens actually installed and funds approved to upgrade the entire aspiration systems. Evidently, this upgrading was accomplished sometime in 1972. (Exhibit C-9, second paragraph).

In February, 1974, funds were included in the Fairless budget to implement stage charging at these two batteries. (Exhibit C-7, dated February 7, 1974). Consultation with various U. S. Steel personnel began on February 18, 1974. (Exhibit C-8, dated February 22, 1974, and Exhibit C-9, dated February 22, 1974).

In March, 1974, air flow measurements of the Fairless aspiration system were taken and the 1971 predicted capacities were found. However, it was determined that the existing steam "regulators" (one per battery) were too small and new regulators were ordered. (Exhibit C-10, dated March 15, 1974).

Also during this period, the angle of coal repose (which effects larry car hopper modifications) was determined, as well as a decision reached not to replace the Corliss values as it was not necessary to accomplish stage charging. (Exhibit C-11, dated March 22, 1974).

By March 29, 1974, the larry car hopper configuration and size had been determined. (Exhibit C-12, dated March 29, 1974).

These determinations were in part, slightly altered in April 1974, because of a coal spillage problem. (Exhibit C-14, dated April 5, 1974)

Recommendation for ". . . modifications to the larry cars, steam-aspiration facilities, and associated equipment (including new operating procedures) for the two coke batteries at Fairless Works", were finalized by June 12, 1974. (Exhibit C-15, dated June 12, 1974)

ARL design and research engineers met with Fairless engineers to review "preliminary drawings of the larry car modifications required for implementing stage charging," on September 10, 1974. (Exhibit C-16, dated September 13, 1974)

The new steam regulators for the aspiration systems had been installed, tested and found satisfactorily adequate by September 20, 1974. (Exhibit C-17, dated September 27, 1974)

From October 15 to 25, 1974, a detailed inspection of the two Fairless Coke Oven Batteries was done by two U. S. Steel engineers and a co-op student. They concluded that,

SUMMARY

> Both batteries were found to be in exceptionally good condition for 22 year old units. This is directly attributable to the stable operation and maintenance practices being utilized at Fairless Works. Oven doors are well maintained and kept clean and, except for a few minutes following a charge, door leakage is non-existent. Oven offtake and collecting mains are well maintained and overall battery emissions are being held at a very low level, with the exception of charging and pushing emissions.
>
> * * *
>
> The projected rehabilitation date (of both Fairless Batteries) is the first quarter of 1976. It is estimated that a rehabilitation in 1976 should result in extending the life of the battery ten years beyond the rehabilitation date. Operating practices that would help maintain the battery in good condition are recommended and discussed in more detail in the recommendation section of this report.

(Exhibit C-18, pp. 3,4, dated November 27, 1974)

These conclusory summary statements are subject to some significant questions, however, in light of detailed statements contained within the body of this report.

For example, refractory brick deterioration at certain locations had caused door jamb casting to "sag" or "drop". (p. 5) "The battery tops are heaved in line with the charging holes from north to south. Several buckstays[11] on both sides of each battery are distorted. ... All the jamb castings on the coke side of each battery are hourglassed. Some castings are hourglassed on the pusher side...." Sixteen jamb castings were found "broken." (p. 6) Forty-one doors (out of 174-87 ovens, 2 doors per oven) or 24% of all doors were identified as needing either repairs or replacement. (p. 7) Two standpipes on each battery were found to be leaking (p. 8) and 26 standpipe expansion joints were also found leaking (p. 9). One hundred thirty-two buckstays on Battery No. 1 and 132 on Battery No. 2 were listed as needing replacement (p. 13), with 131 jamb castings for each battery needing replacement (p. 14). All standpipes and their heat shields needed replacement and 25% (90) Corliss valves and goosenecks needed replacement. All other goosenecks and valves needed reconditioning (p. 15). One hundred percent of the charging hole castings and lids needed replacement (p. 15). One hundred percent of the larry car rails, door machine traction rails, quench car traction rails and 50% of the railroad ties needed replacement (p. 16).

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11/ Buckstays are large, vertical steel beams, part of the support structure for the ovens.

At any rate, of greater significance herein, the report recommended modifying the larry cars by adding a second turntable motor for independent operation of the hoppers. It then stated;

> With this arrangement 'stage charging' can be accomplished to eliminate or reduce charging emissions.
> This modification should be initiated as soon as possible (p. 20).

A detailed work schedule was proposed to accomplish the recommended rehabilitation of the two Batteries, (with only a total loss of 10.8% of coke production), beginning in March, 1976, with completion in September, 1976 - a seven month period (pp. 21-25). (Exhibit C-18, dated November 27, 1974).

The foregoing exhibits,[12/] clearly establish that the Respondent herein, U. S. Steel, as early as sometime in the 1960's began experimenting with coke oven charging methods to reduce charging emissions at its Clairton Works. It "intensified" its research at this location in 1969. By March, 1973, stage charging had been fully developed and put into practice at both its Clairton and Fairfield Works.

U. S. Steel's central research group began studies at the Fairless Works as early as 1971 concerning the aspiration systems. By November of 1971, all the necessary research and engineering work on upgrading

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12/ All U. S. Steel documents are non-hearsay, admissions against interest under Federal Rule of Evidence 801(d), and are thus substantive evidence. Exhibit C-2, the Battelle Report, is clearly admissible under Federal Rules of Evidence 803 (18-Learned treatises) and 803 (24). Because U. S. Steel, as the largest steel producer in the United States, is a member of AISI, the sponsoring organization for the Battelle Study and Report, Exhibit C-2 is probably admissible non-hearsay under Rule 801.

this aspiration system had been completed and the aspiration on four Fairless ovens actually upgraded. The entire aspiration system at Fairless was upgraded by some undisclosed date in 1972.

In February, 1974, funds were budgeted to implement stage charging at Fairless. By April, 1974, the configuration and size of the Fairless larry cars had been finalized. Final recommendation for stage charging at Fairless were made by June 12, 1974. Specific design work on the larry cars began, with ARL assistance, in September, 1974. The following month, November, 1974, as a result of the extensive in-house inspection of the Fairless Works by U. S. Steel engineers, final larry car modifications were spelled out and recommended to be accomplished ". . . as soon as possible." These engineers further recommended the reconditioning of both Fairless Batteries, which was scheduled for completion in September, 1976.

Thus, if the recommendations of its own engineers had been followed, Respondent could have fully implemented stage charging at Fairless by the end of the rehabilitation program for the two Fairless Batteries, September, 1976. It did not.

Complainant produced as its expert witness a Mr. Hopkins, a 1973 graduate of the University of Maryland with a Bachelor of Science Degree in Mechanical Engineering, currently employed with the U. S. Environmental Protection Agency (EPA), as an Environmental Engineer. After graduation, Mr. Hopkins was employed in the plant engineering construction department of Bethlehem Steel's Sparrow Point Steel Mill and participated in their management training program. At Bethlehem he was involved in designing the conversion of a larry car, control

devises for coke oven battery stacks and clean air rooms for coke oven workers. These activities occupied about 20% of his professional time. After two and a half years he went with EPA, where he has spent 90% of his time involved with coke ovens and coke oven control devises, keeping abreast of the state of the art of air pollution control devises available or used in industry, assisting EPA Regional Offices in enforcement cases and conducting research and studies of various control systems. He has made over ten visits to various coke oven installations in this country, including a two week observation of the coke oven door cleaning and other practices at U. S. Steel's Fairfield Works, and two, one week visits at U. S. Steel's Gary Works as the manager of the National Coke Battery Evaluation Program. In early May, 1977, in preparation for this case, he visited the coke oven batteries at the Fairless Works.

Mr. Hopkins, after describing stage charging and coke oven emissions (Exhibit C-28), relying both on his observations of the coke oven batteries at Fairless and on the documents produced by U. S. Steel, (Exhibits C-1 through 20) testified that stage charging technology was available within U. S. Steel by the early 1970's. Because U. S. Steel had implemented stage charging at two of its sites, Clairton and Fairfield, by early 1973, he opined that stage charging could have been achieved at Fairless by the beginning of 1974, which included an 18 to 20 month period to order or fabricate and install necessary equipment. (Not considering costs or production factors) (Tr. 354-470)

Thus, the evidence of this record establishes that stage charging could have been implemented at Fairless, at the earliest by 1974 (Mr. Hopkins), or at the latest, by September, 1976 (Respondent's own documents). When inspected by OSHA, in March-April, 1977, stage charging had not been implemented "at the earliest possible time."

It is therefore concluded that the evidence of record cited supra, establishes the violations set forth in Items No. 2 of Serious Citations No. 1 and No. 2.

SERIOUS CITATION NO. 1 - ITEM NO. 3

SERIOUS CITATION NO. 2 - ITEM NO. 3

These Items charge insufficient aspiration systems on both Fairless Batteries. As pointed out previously, one essential element of effective stage charging is an efficient aspiration system. The Standard at .1029 (f) (2) (i) (c) therefore mandates the design and operation of an aspiration system "... to provide sufficient negative pressure and flow volume to effectively move the gases evolved during charging into the collector mains, including sufficient steam pressure ...."

The Stipulation establishes the insufficient aspiration system on both Fairless Batteries. (Stipulation pp. 11, 12, 30)

Further, Respondent's own studies of the Fairless aspiration system, beginning in 1971 resulted in the upgrading of the system in 1972 (Exhibits C-5, C-6, C-9), with the Corliss dampers in place (Exhibit C-11).

It was not until October, 1976, when stage charging was attempted at Fairless, that it was detected that certain ovens did not have proper aspiration. The steam pressures varied on those ovens which emitted

emissions compared to those where there were no emissions. The steam pressure was not consistent for all ovens. Investigation revealed that in 1972, when the system had been upgraded (believed to have been done by an independent contractor), the work was improperly done on some branch lines - which restricted the steam pressure to the poorly - aspirated ovens. This situation was corrected during the 1977 repair of the batteries (after consultation with ARL and Clairton visiting teams). (Tr. 908-912)

The record is not clear why Fairless management did not detect the improperly performed work on some branch lines for four years. At any rate, it was management's responsibility to assure itself that the entire upgraded aspiration system was installed properly in 1972 and cannot now claim the misfeasance of the (unidentified) independent contractor as a justifiable reason for not having an adequate, properly functioning aspiration system in place and fully operable during the March-April, 1977 inspection.

Respondent defends against these Items, (as well as Items numbered 4, 5, and 6 of Citation No. 1, and Items numbered 5, 6, and 7 of Citation No. 2) on the grounds that these Items charge a failure to have implemented some (but not all) of the necessary procedures for stage charging. Since Items No. 2 in both Citations No. 1 and 2, charge the absence of stage charging on both Batteries, this is an improper method to manufacture additional violations, which are, in effect, all incorporated in the "no stage charging" violations in Item 2 of both Citations No. 1 and No. 2.

Respondent's argument is not pursuasive because, each failure to comply with each provision of the Standard, is a citable violation of the Act.

The violations, as alleged, are established.

SERIOUS CITATION NO. 2 - ITEM NO. 4

This Item charges that the larry car for Battery No. 2 was not equipped with individually operated drop sleeves - a necessary element of stage charging, mandated by Section .1029(f)(2)(i)(f) of the Standard.

The Stipulation establishes the lack of this equipment on larry car No. 2 and hence this violation, as alleged, is established. (Stipulation p. 31)

SERIOUS CITATION NO. 1 - ITEM NO. 4

SERIOUS CITATION NO. 2 - ITEM NO. 5

These Items charge that the goosenecks and standpipes on both batteries were not equipped and operated with "mechanized" cleaners, as mandated by Section .1029(f)(2)(i)(g) of the Standard.

A necessary part of stage charging is an offtake system, i.e. standpipes and goosenecks connecting the oven to the collector main, which provides an unobstructed passage for charging smoke and emissions to be drafted, or aspirated (exhausted) out of the oven into the collector mains, during charging.

The coking cycle produces a relatively light "fluff" carbon (easily cleaned) and/or hard carbons, on the underside of the oven roof, as well as within the standpipes and goosenecks. The type and amount of carbon so produced, varies depending on a number of factors, such as type of coal being coked, coal line levels, and the type of heating utilized in the ovens.

A number of methods have been used for many years in the coke industry to clean away these carbon deposits, i.e., decarbonizing.

First, for approximately the last hour of the coking cycle, (when most of the volatile matter has been coked off), and before the coke is pushed from the oven, lids on the standpipes are opened and the oven doors or charging hole lids are "cracked", i.e., slightly opened.

This "vents" the oven which allows the increased flow of ambient air to aid in burning away much of the accumulated carbon. Depending on the amount of carbon buildup, this "venting" process can take from 10 minutes to approximately 24 hours to effectively clean the standpipes. Thus, most coke oven operations routinely have two or three ovens, "venting" or decarbonizing at any given time.

Second, manual cleaning. After the coke is pushed, employees using long-handled scrapers, scrape the carbon from the interior of the standpipes and goosenecks gaining access thereto through the open standpipe lids. This procedure of course, requires the employees to be exposed to emissions emanating through the standpipe lids as they perform this cleaning process.

Another method practiced in both the United States and Japan is to equip the pusher ram with compressed air, thus interejecting oxygen and burning the carbon off the oven roofs. This method appears inappropriate for standpipe cleaning because the air nozzles would have to remain positioned below the standpipe which, because of the rate of burning, could or very possibly would, burn the refractory lining at this point in the oven roof as well as within the standpipe.

Pusher arms have also been equipped with serrated steel teeth which have been effective in cleaning hard carbon from oven roofs.

Two additional cleaning methods have been tried by U. S. Steel at various coke oven plants since 1970.

A ball and chain, mounted on the larry cars, is mechanically dropped down the standpipe for the purpose of knocking off hard carbon. It has proven not to be successful on any significant buildup of hard carbon as the ball merely bounces off the carbon. (It apparently is successful in removing "fluff" - i.e., light carbon).

One highly successful method of keeping standpipes clean of hard carbon buildup has been practiced at U. S. Steel's Provo, Utah coke ovens since 1942. It involves injecting steam into the standpipe at its base, thus aspirating the standpipe and burning the carbon from within the standpipe. When done with sufficient frequency - this method has been completely successful.

There was some question raised at the hearing herein as to whether this method would qualify as a "mechanized" standpipe cleaner.

Because of its efficiency, and because this devise does not require any employees near the standpipe when in operation - as is required for employees to manually clean the standpipes with scrapers, it is concluded that this system satisfies the requirements of the Standard and can be legitimately labeled one type of "mechanized" standpipe cleaner.

This effective system could have been installed at the Fairless batteries by equipping the standpipes with steam nozzles at their base.

However, because Respondent was justified in questioning whether the Secretary would accept this method of cleaning standpipes as a "mechanized" standpipe cleaner, the only effective method set forth in the evidence in this case, the absence of this system at Fairless was justified. Thus this portion of these two Items must be vacated.

"Mechanized" gooseneck cleaners, however, present a different picture.

A "Cooky Cutter" type of gooseneck cleaner (essentially a ram mounted on the larry car with a round disc which is inserted into the gooseneck to cut the accumulated carbon), was first used at U. S. Steel's Gary ovens in 1970. Additional "Cooky Cutters" were installed at Gary in 1975 and 1976. They appear to have been effective so long as the standpipes and goosenecks are in proper alignment. (These items go out of alignment because of the high thermal stress to which they are subjected). If carbon is allowed to build up the cutters appear not to be effective.

However, another type of gooseneck cleaner, in use at Fairfield since 1973, does appear to be effective, called a "Flail" type cleaner. This type consists of rotating knives which, when inserted into the gooseneck, are effective in cutting carbon away. Respondent's ovens at Gary and Clairton have been equipped with this "Flail" type of cleaner, and after initial adjustments were made, have been effective. (See testimony of Respondent's Chief Staff Engineer for coke ovens, Mr. Hill, who has been closely associated with U. S. Steel's coke oven operations at Provo, Utah and elsewhere for over 25 years, Tr. 974-1182).

The Stipulation establishes that no "mechanized" gooseneck cleaners were installed at the two batteries at Fairfield at the time of the inspection and concedes that the installation of them is "technically" feasible. (Stipulation, pp. 13, 32).

It is therefore concluded that this violation, as to mechanized gooseneck cleaners, is established by the evidence of record herein.

SERIOUS CITATION NO. 1 - ITEM NO. 5

SERIOUS CITATION NO. 2 - ITEM NO. 6

These Items, as to both batteries, charge that an adequate number of spare doors were not available for replacement purposes as mandated by Section .1029(f)(2)(ii)(c) of the Standard.

A major source of coke oven emissions, industry wide, have been the oven doors, both on the push side and coke side, during the coking cycle. (41 F.R. 4676)

These doors are large, steel devises, extending generally from the top to the bottom of the oven. They are removed and replaced by a door car, which runs on rails at the bench level of the ovens. A door consists of the outer steel shell to which is affixed large steel, adjustable, spring loaded latches which force the sealing edges of the door into mating sealing edges in the steel door frame or jamb. These sealing edges must be maintained in proper condition to effect the designed sealing of the door. For approximately one half hour after a door has been put into place, it will leak to some degree until the coking process produces tar or other products which assist in completing the seal. Thereafter, a door (and its jamb) in proper condition will not leak emissions. The interior of each door consists of a refractory plug. (See photos 19, 21, 35, 36, 38, 51, 55, 57, 58, 59, Exhibit C-26).

Both the doors and their frames, (which are large vertical steel griders, with refractory brick between frames), are subject to thermal

warping during the coke cycle and mechanical damage when the doors are removed to push the coke and replaced for the next coke cycle. Consequently, adequate door repair facilities and practices are essential to produce spare doors, which are to be used on any given oven to replace that oven's door during its repair.

The Stipulation establishes that the 87 ovens of Battery No. 1 were equipped with 174 doors (two per oven), and 28 of these doors were noted to be leaking emissions at the time of the inspection. Battery No. 2 was similarly equipped with 174 doors, 12 of which were noted to be leaking. (Stipulation, pp. 14, 33). All doors noted by the OSHA inspection team as leaking, had been in place more than one hour into the coking cycle; and a list thereof was supplied by the inspection team to Respondent. (See Exhibit C-2 attached to Stipulation). At the time of the inspection there were approximately 15 spare door frames available for both batteries.

There was one door repair facility available at the time of the inspection[13/] which was producing two reconditioned doors per week utilizing a door repair crew consisting of two millwrights and two patchers who worked on doors only during the day shift, five days a week. It took 16 hours to make a door frame into a spare door.

Door racks were located at both batteries, and although some doors were noted in these racks, these doors were awaiting reconditioning and were not available for use. Long experienced coke

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13/ This old facility was admittedly inadequate. Thus a new, additional facility was under construction and placed into service during the rehabilitation of Battery No. 1, in the latter part of April, 1977.

oven employees, for over two years prior to the inspection, had been providing management with lists of leaking doors. Little effective action was taken to correct the leaking door problem - essentially because the batteries had deteriorated so badly - that a complete rebuild was the only solution and was long over due.

The door condition situation clearly shows what had happened at the Fairless Batteries.

As referred to earlier, U. S. Steel engineers conducted a detailed, in-house inspection of these Batteries in October, 1974, reporting their findings in November, 1974, in Exhibit C-18. As of the time of that inspection, it was patently clear that these Batteries, having been in constant operation for over 20 years (since 1952 or 1953) were in dire need of rebuilding, and this rebuilding was recommended to begin in March, 1976, to be completed by September, 1976. As this report notes, (p. 6), all the door jamb castings on the coke side of each battery were "hourglassed", i.e., bent out of true alignment by age and thermal stress. Some castings, i.e., door jambs were "hourglassed" on the pusher sides. Sixteen door jamb castings were found "broken." Thirteen door jamb castings were listed as needing replacement. Twenty-four precent of all oven doors needed either repairs or replacement. A number of door jamb castings were found to have "dropped" or "sagged" because of a loss of steel to brick bearing around the door jambs.

Thus, the oven door frames or jambs on both sides of both Batteries were found in 1974 by this U. S. Steel inspection, to be in a badly deteriorated condition. When the recommendation of the U. S. Steel

engineer-inspectors, to rebuild and repair both Batteries, (to be completed by September, 1976), was not followed, the deteriorated conditions worsened, so that by the time of the 1977 OSHA inspection, the Batteries were in a serious state of disrepair, dispite efforts to keep the batteries in operation by temporary patching and repair work (see Exhibits R-6, 7, 8, 14A and 14B).

Thus, as accurately described by the coke oven worker witnesses, and as the OSHA photographs depict (Exhibit C-26), the Batteries were "burning down" at the time of the OSHA inspection, three years after U. S. Steel's oven engineers recommended the rehabilitation of the Batteries. (This rehabilitation was begun in April, 1977, after the OSHA inspection).

The long experienced coke oven workers testified that in excess of 50% of the oven doors on both batteries needed replacement. This condition obviously was aggravated by the broken and badly mishapen door frames, which made a tight seal between a door and such a frame practically impossible. No doors had been replaced on Battery No. 1 for the two weeks prior to the inspection because of the impending rebuild of this Battery. At the time of the OSHA inspection, the need for rebuilt doors was so great that as soon as a door was repaired or rebuilt, it was immediately placed into service. For a period of from six months to two years before the OSHA inspection, there were never more than one or two rebuilt spare doors in the battery racks ready for use. These doors would be pressed into immediate service as soon as the ovens for which they had been designated were pushed and that ovens leaking doors removed. Forty-one leaking doors

were noted during the OSHA inspection. Thus, the one or two rebuilt or repaired spare doors being produced per week, was not an adequate number.

Therefore, these violations, as alleged, are established by the evidence of this record.

SERIOUS CITATION NO. 1 - ITEM NO. 6

SERIOUS CITATION NO. 2 - ITEM NO. 7

These Items charge, as to both Batteries, that chuck door gaskets, to control chuck door emissions until the leaking chuck door is repaired or replaced, were not in use, as mandated by Section .1029(f)(2)(ii)(d) of the Standard.

The Stipulation establishes that during the OSHA inspection, certain chuck doors were leaking on both batteries. Although Respondent's coke oven Compliance Program (mandated by Section .1029 (f)(6)) stated that chuck door gaskets were in service, they in fact were not. (Stipulation, pp. 15, 35)

These facts are not contested by Respondent. Rather it argues in its brief that in lieu of the chuck door gaskets, it was "experimenting" with luting the chuck doors to find a better method of controlling emissions, and that this experimentation was "required" under Section .1029(f)(i)(b) of the Standard.[14/]

There is no merit to Respondent's argument. First, luting is a well-known, very old process of applying a clay-like slurry to leaks to patch them. It is not an unknown or untried method of plugging

14/ This provision was found wanting by the Third Circuit Court of Appeals in the AISI et al. case, supra, and was vacated.

leaks and cracks - in fact - at Fairless the luting of leaking charging lids, standpipes, goosenecks and other leaks in its ovens was a standard operating procedure. Secondly, the requirement for coke oven operators to "research, develop and implement" new engineering or work practice controls, vested only "after implementing all controls required ..." in the Standard (Section .1029(f)(i)(h), second sentence). Thus, Respondent, even if it believed that the research provisions of the Standard might survive judicial review, (which did not) nevertheless did not follow the Standard. It merely stated on paper that it was using chuck door gaskets when in fact, it did not.

These violations as alleged, are established.

SERIOUS CITATION NO. 1 - ITEM NO. 7

SERIOUS CITATION NO. 2 - ITEM NO. 8

These Items allege, as to both batteries, that Respondent did not follow the mandated "work practice" of inspecting and cleaning goosenecks and standpipes prior to each charge to a specified minimum diameter sufficient to move evolved gases from the oven to the collector mains, in violation of Section .1029(f)(3)(i)(a)(2) of the Standard.

The Stipulation sets forth the following facts.

A. Standpipes on Coke Oven Battery #1

Battery No. 1

1. The inside diameter of a standpipe on Battery #1 is 13 inches.

2. The respondent has not specified a minimum diameter opening to be maintained for standpipes to effectively remove the gases from the ovens to the collector mains.

3. Respondent has not supplied employees with the necessary tools to measure the effectiveness of cleaning standpipes to a minimum diameter.

4. Respondent's Job Breakdown from LC-4 dated May 6, 1960 and revised February 14, 1977 states that prior to each charge, the larry car operator is to 'scrape or chop carbon, tar or other buildup from underside of standpipe cap' and to repeat that step on standpipes.

5. At the time of the OSHA inspection, employees were not cleaning each standpipe prior to each charge.

6. At the time of the inspection during each shift, approximately 40 ovens were charged. Each oven has two standpipes.

B. Goosenecks on Coke Oven Battery #1

1. The inside diameter of a gooseneck is 13 inches.

2. The respondent has not specified a minimum diameter opening to be maintained for goosenecks to effectively remove the gases from the ovens to the collector mains.

3. Respondent has not supplied employees with the necessary tools to measure the effectiveness of cleaning goosenecks to a minimum diameter.

4. Respondent's Job Breakdown from L-8 dated January 14, 1977 and revised February 14, 1977 for stage charging on ovens states that the lidman is to inspect goosenecks to insure they are clean.

5. At the time of the OSHA inspection, employees were not cleaning each gooseneck prior to each charge.

6. At the time of the inspection during each shift, approximately 40 ovens were charged. Each oven has two goosenecks.

(Stipulation, pp. 16, 17)

Battery No. 2

Essentially identical facts were Stipulated as to Battery No. 2 as are set out under Battery No. 1, supra.

(Stipulation, pp. 36, 37, 37A)

Under the "Timken" work schedule followed at Fairless, (four separate crews, A, B, C, and D each working one shift per day, five days a week, making one crew available for each of the three shifts, seven days a week), the scheduled responsibility of the larry car operators included inspecting and cleaning 44 standpipes and goosenecks during one week. This number constituted 1/4 of the total number of goosenecks and standpipes on each Battery (each of the 87 ovens per Battery was equipped with two standpipes and two goosenecks). Thus, even if the larry car operators were able to discharge their inspecting and cleaning responsibilities in addition to their larry car jobs, each of the 348 goosenecks and standpipes on both Batteries would be inspected and cleaned one time each week. With the coking cycle for each oven lasting about 16 hours, each oven would accomplish close to 10 coking cycles per week. Under the cited provision of the Standard, each standpipe and gooseneck should have been inspected prior to each of these 10 charges and cleaned whenever necessary to maintain an unobstructed passage for the evolved gases.

This obviously was not done and these violations, as alleged, are established.

SERIOUS CITATION NO. 1 - ITEM NO. 8

SERIOUS CITATION NO. 2 - ITEM NO. 9

These Items charge that Respondent did not follow the work practice, of operating its ovens pursuant to an inspection and corrective action program which would control door emissions (during the coke cycle) to the maximum extent possible, as mandated by Section .1029(f)(3)(ii)(d) of the Standard.

Exhibit C-2 attached to the Stipulation identifies some 40 doors on both batteries noted to be leaking emissions at the time of the OSHA inspection. This list was not intended by the OSHA inspection team to be all inclusive, but rather merely representative, documentary evidence of the excessive leaking door problem encountered during the inspection.

As noted earlier, due to the badly deteriorated conditon of both batteries, and particularly the broken, bent and "sagged" or "dropped" door frames, over 50% of all the oven doors on both Batteries were leaking emissions, a condition which existed for not less than one year prior to the inspection. (See Exhibit C-26, photos 15, 16, 18, 19, 21, 38, 41, 42, 51, 53, 55, 58, 59, 79 and 80).

Under these conditons, although Respondent did have a door inspection and repair program operating, it was totally inadequate to cope with the problem.

The evidence reveals that the adjustment of doors while in place, (one way of stopping a leak in a door and frame which is not out of alignment), was not routinely carried on, (in all probability because so many doors and frames were so seriously deteriorated that no amount of adjustment could have stopped the leaking). Some adjustments were attempted after employees complained of leakage,

but some of these attempts were halfhearted and not effective - only some, but not all, adjustment screws on a door would be adjusted. The cracked and broken door frames, evidently most acute on the coke side of Battery No. 1 were not repaired or replaced nor were those doors within those frames, but rather patching was attempted, which was far from an all-out effort. Two patchers each with a helper worked only five days a week, during one shift. The leaking was so extensive that the patchers could not keep up with the deteriorated conditions.

The evidence reveals that the reconditioning of both Batteries, was first scheduled by Fairless management for September of 1976, which was postponed reportedly because of an insufficient supply of new refractory brick, to January, 1977, which in turn was further postponed until April, 1977, reportedly because of a shortage of natural gas used to fire the ovens.[15/]

Thus, Respondent's door inspection and corrective action program to control door emissions, such as it was, was totally inadequate in light of the very poor condition of the door frames and jambs, and an admittedly inadequate door repair facility to cope with the conditions of the batteries.

The evidence establishes the violations as alleged.

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15/ This information was supplied to this record by a coke oven employee called as Complainant's witness. Respondent supplied no detailed evidence on the postponements of the rehabilitation of its Batteries.

SERIOUS CITATION NO. 1 - ITEM NO. 9

SERIOUS CITATION NO. 2 - ITEM NO. 10

These Items charge that Respondent failed to institute the work practice on the push side of both Batteries, of not shoveling spilled coke back into the coke ovens, as mandated by Section .1029(f)(3)(iii)(a) of the Standard.

Coke spillage on the push side of the Fairless ovens is caused when the pusher ram is retracted after a push and some coke is brought out with the ram.[16/]

The evidence reveals that during the OSHA inspection, two identified employees (Galambos and Brogan), and others were observed shoveling spilled coke back into the ovens. (Exhibit C-26, photos B-9, B-10). Management instructions to its Fairless employees (the jamb cleaner and door machine operator) consistently changed - from - shovel the spilled coke (push side) back into the oven - to - shovel it onto the bench level or to the ground below.

Respondent's Safe Job Procedure for its door cleaner - push side, issued in January, 1977 - directed that spilled coke be shoveled back into the empty oven, directly contrary to the Standard's prohibition. (See Exhibit R-18, last page). Its Standard Operating Procedure #4 for its door machine operator - push side dated December 7, 1977 - gave the same instruction, eight months after the OSHA inspection herein. (See Exhibit R-13A).

16/ Spilled coke on the coke side of the Fairless ovens is not at issue here in that a spillage box is provided into which spilled coke is shoveled.

The evidence establishes the violations as alleged.

SERIOUS CITATION NO. 2 - ITEM 11

This Item charges Respondent with a failure, as to Battery No. 2, to regularly inspect and promptly repair cracks, misalignment or other defects in goosenecks, standpipes, standpipe caps, charging hole lids and castings, as required by Section .1029(f)(3)(ii)(a) of the Standard.

The evidence reveals that the standpipe, coke side on oven B-9 was misaligned as its brick base had disintegrated. This condition had developed over approximately six months and could have been corrected in about four hours by replacing the standpipe and its base. (See Exhibit C-26, photo 68). Further, the goosenecks, coke side on ovens B-8 and B-9 had holes in them which were emitting flames. This condition had existed for about one month and could have been corrected by replacing the goosenecks, about a five hour task. (See Exhibit C-26, photo 67). An emission leak was detected at the push side gooseneck on oven C-29 during this inspection and had been leaking in excess of four months. This could have been repaired in approximately four hours.

Due to Respondent's failure to promptly repair these leaking standpipes and goosenecks, the violation as alleged is established.

SERIOUS CITATION NO. 1 - ITEM NO. 10

SERIOUS CITATION NO. 2 - ITEM NO. 12

These Items allege that Respondent failed to regularly inspect and promptly implement necessary repairs of its dampers, aspiration systems, and collector mains, on both batteries, as a mandated maintenance and repair work practice of Section .1029(f)(3)(iv)(c) of the Standard.

The Stipulation sets forth the following facts.

At the time of the inspection, components of the collector mains, (the Corliss valves), were observed to be cracked and leaking coke oven emissions (oven B-7, push side). It takes three to four hours to replace a defective Corliss valve including setup and cleanup time. On December 7, 1977, Respondent revised its compliance program to incorporate procedure No. 1 which included maintenance and repair of Corliss valves. (Stipulation, pp. 20, 41)

The evidence establishes that on Battery No. 1, oven B-7, and on Battery No. 2, ovens C-9, C-1 and C-11, all had Corliss valves which had been leaking for a long enough period of time (not less than one month) to allow the build up of escaping tar on the outside of the Corliss damper housings. (See Exhibit C-26, photos 27, 63, 64, 65, 28, 47, 48, 73).

The Corliss valves are housed between the goosenecks and collector mains, as part of the damper system, and function to stop gases from the ovens from going into the collector mains.

For a considerable period of time prior to the inspection, (about one year) patching crews were assigned to patch leaking Corliss valves, rather than replacing the defective valves. These patches did not last beyond two shifts before burning out. This patching work was spotty however, because the patching crews spent the great majority of their time patching leaking door frames.

A more permanent type of repair was to weld the leaks, which took approximately one and a half hours to complete. Although some weld-patching was done, it was not the most frequent type of patching done.

The replacement of a Corliss valve could have been accomplished in about four hours. However, because of the impending rehabilitation program, replacement of valves, at the time of the OSHA inspection, was not taking place.

Thus, although Respondent did inspect and patch the leaking Corliss valves, these repairs were not effective for any length of time which resulted in emissions from these locations.

These Items also reflect the consequences of the badly deteriorated condition of the two Batteries. Rather than promptly implementing effective repairs to make all the Corliss valve housings emission tight or replace defective valves, Respondent was trying to patch these housings, as well as numerous other parts of the batteries, and the ovens were in such bad shape, it did not succeed in controlling the leaks.

Thus Respondent's repair program for its Corliss valves was not adequate because effective repairs were not promptly made. The violations as alleged are established by the evidence.

SERIOUS CITATION NO. 1 - ITEM NO. 11

SERIOUS CITATION NO. 2 - ITEM NO. 13

These Items charge that Battery No. 2 was not operated in accordance with a detailed, written procedure of maintenance and repair, nor were repairs promptly effected on either Battery No. 1 or No. 2 to prevent miscellaneous, fugitive topside emissions, as required under Sections .1029(f)(3)(iv)(e) and (f)(3)(iv)(1) of the Standard.

Complainant's theory as to these Items is that the Standard is silent as to coke oven emissions leaking from either door frames or standpipes. Where such leaks occur, due to ambient heat, these emissions will rise to the topside of the ovens, and may be properly labeled "miscellaneous fugitive topside emissions." In short, any coke oven emission, from a source not specifically covered by the Standard, becomes a "miscellaneous" emission and is covered by the cited Sections of the Standard.

Because of the grave hazard attempted to be dealt with under this Standard (increased risk of cancer and other physical disabilities), such a construction of the Standard is consistent with the objectives of the Act, is reasonable, and a proper exercise of the Secretary's administrative discretion.

The evidence establishes that a number of door frames were leaking emissions, the frames on ovens C-12, B-13 and B-12 are completely documented in this record (See Exhibit C-26, photos 42, 38, and 53). These leaks were caused by the warped or hourglassed condition of the frames, and had existed for periods of from three weeks to four months. Door frames could have been replaced within a period of four to five days.

The standpipe on oven A-5, coke side, Battery No. 1 was out of alignment. Its brick base was deteriorated and leaking emissions (See Exhibit C-26, photo 9). This condition had existed for not less than two weeks prior to the inspection and could have been repaired within a four hour period.

In December of 1977, Respondent revised its compliance program to include a topside maintenance and repair program. (Stipulation, pp. 21, 42)

As to Battery No. 2, the evidence reveals that the push side standpipe caps on ovens C-26, C-27, C-1, C-3 and C-5 were leaking emissions, at least one or more hours after charging. Photos 61 and 73 (Exhibit C-26) show leaking caps which had not been luted.

Respondent's own job procedure for its lidman, dated January 14, 1977, at step 10, directs the lidman to "Inspect pusher and coke side standpipe caps for emissions and lute as required." (Exhibit C-27). However, the luting of leaking standpipes had not been a standard practice prior to January, 1977, and although luting material had been supplied thereafter, no consistent, systemized luting practice had been instituted and followed (or properly supervised), at the time of the inspection.

Thus, Respondent had failed to enforce its own job procedure as of the time of the inspection, resulting in leaking standpipe caps.

Further, as to Battery No. 2, the door frame on oven B-26 was broken and leaking emissions, and had been broken for about six months. (See Exhibit C-26, photo 21). The coke side oven door frames on ovens B-14 and B-8 were broken and leaking emissions. (See Exhibit C-26, photos 16, 31).

Based upon this evidence of record, it is concluded that the violations as alleged are established.

SERIOUS CITATION NO. 1 - ITEM NO. 12

SERIOUS CITATION NO. 2 - ITEM NO. 14

These Items charge that positive pressure, temperature controlled, filtered air cabs were not provided for the following equipment:

a) Quench car (one serving both batteries)

b) Pusher machines (one for each battery)

c) Larry cars (one for each battery)

d) Push side door machines (one for each battery)

e) Coke side door machines (one for each battery)

as mandated by Section .1029(f)(4)(i) of the Standard.

The Stipulation establishes that although it is technically feasible to install positive pressure, temperature controlled, air filtered cabs on all the machines cited, none of the machinery was so equipped during the inspection. Further, that Respondent's "Compliance Program" scheduled the installation of such cabs on the cited machinery at various times from the third quarter of 1978 to the fourth quarter of 1979. (Stipulation, pp. 32-36, 59-61)

The evidence is uncontroverted that the use of positive pressure, temperature controlled filtered air cabs or booths, to isolate employees from either air contaminants or excessive noise, is a basic and recognized industrial hygiene and facilitates engineering technique which has been successfully utilized to reduce employee exposure to air contaminants or excessive noise for a number of years.

What is involved here is designing and fabricating booths, which, because they are intended to be used on top or alongside of coke ovens (which operate at high temperatures), are capable of being

effectively air conditioned, (or heated in the winter time), with filtered air and positive pressure so that if the booths leak (or doors are opened so that employees can perform work tasks), the controlled environment within the cab does not become permeated with ambient, coke oven emissions.

The engineering principles and techniques, of air conditioning and heating, filtering air, and sealing a cab or booth, are well-known principles and techniques, generally commerically available in the United States for not less than 15 years (and probably for many more years). To comply with the cited provisions of the Standard, requires the adaptation of these well-known principles and techniques to the coke oven equipment at issue.

Environmentally equipped cabs have been used on cranes, since at least 1975 at the Shenango Inc. Foundry in Pittsburgh, at Wheeling-Pittsburgh's Allenport Works and at Stackpole Carbons Plant at St. Mary's, Pennsylvania.

These adaptations have been made for coke oven equipment, and environmentally controlled cabs successfully used, since at least 1974 at National Steel's Weirton coke ovens; Browns Island coke oven facility; Bethlehem Steel's coke ovens at both its Franklin and Rosedale Plants, and at Wheeling-Pittsburg's coke oven facility. In 1976, Bethlehem's coke works at Bethlehem, Pennsylvania, were equipped with such cabs.

In 1975, U. S. Steel "experimented" with such a cab on one of its larry cars and a quench car at its Clairton Works. The "experiment" failed, in part at least, because the cabs were not insulated, (they operated, of course, on top of or right alongside of the coke ovens

in very high temperatures) they were not sealed, making positive pressure impossible, and there is some indication that they may have been operated at times with their doors and windows open. Thus, not surprisingly, the "experiment" failed, as the air conditioning compressors and electric drive motors, being operated 24 hours a day, burned out.

It was not until either late in 1976 or perhaps after January 1, 1977, that U. S. Steel, retained the services of an outside air conditioning firm, "Busch" in Pittsburgh to produce the environmental booths with scheduled delivery in three to four months after an order was placed. The unit finalized upon by U. S. Steel, and being produced by Busch is roughly 2-1/2' x 3' x 5' high, and is intended to be utilized on all the coke oven machinery as well as constituting stationary standby pulpits, dealt with infra.

Respondent agrues that it is equipping the Fairless Batteries, "at the earliest possible time" and thus can not be held in violation as alleged. This argument is not persuasive.

These Items, (as well as the next two dealt with infra), clearly depict Respondent's attitude regarding compliance with the new Coke Oven Standard.

Respondent's "Compliance Program"[17/] (mandated by Section .1029 (f)(6) of this Standard), called for installation of these types of cabs at various times, beginning in the third quarter of 1978 with

17/ The evidence reveals that this "Compliance Program" was drafted by management and promptly filed away, not circulated to those at Fairless who might be involved in actually accomplishing compliance with the Standard, "as soon as possible."

completion by the second quarter of 1979 - a period of nine months. However, after the OSHA inspection, the completion time for its push side door machines, both batteries was "revised" from the first quarter of 1979 to the fourth quarter of 1979 - not less than a six month delay - despite the fact, that Busch's delivery schedule for such cabs, was from three to four months. Similarly, the contemplated accomplishment "date" for its coke side door machines, both batteries, under its "Compliance Program", was "revised" after the inspection herein from the second quarter of 1979 to the last quarter of 1979 - a period of not less than six months. (Stipulation, pp. 34, 35, 60, 61)

Such an action by Respondent, unexplained in this record, clearly establishes that Respondent is not committed to providing its Fairless coke oven employees with coke oven emission free cabs, "at the earliest possible time."

Furthermore, the evidence demonstrates that Respondent's attitude in this regard has existed from at least 1975, i.e., since its Clairton "experiment." This "experiment" was obviously doomed to failure from the outset, when it is remembered that coke ovens operate at temperatures in the 2000° F range. How anyone, layman or engineer, could possibly expect to effectively air condition cabs on a larry car - operating atop the ovens, or a quench car - which operates alongside the ovens and is filled with the incadescent coke, when the cabs are neither insulated nor sealed, boggles the mind.

Lastly, compliance with these requirements of the Standard require nothing more than applying long established insulating, air conditioning, and heating knowledge and techniques to coke oven

machinery. To be sure, where such environmental cabs might have to be placed on moving machinery to allow necessary clearances, (a matter of taking measurements and establishing the outside dimensions of the machinery to allow passage by obstructions), or the location of the cabs so that the employees may effectively perform their duties, requires some engineering efforts. However, to expect to take three years to accomplish these engineering tasks as well as to fabricate and install these cabs, (from January, 1976, to the end of 1979) clearly establishes that U. S. Steel at Fairless intends to comply with these requirements, "at the latest possible time"[18/] not "at the earliest possible time."

The violations as alleged are established by the evidence of record.

SERIOUS CITATION NO. 1 - ITEM NO. 13

SERIOUS CITATION NO. 2 - ITEM NO. 15

These Items charge that Respondent failed to provide positive pressure, temperature controlled, filtered air standby pulpits on the topside of both batteries, and at the coke wharf, as mandated by Section .1029(f)(4)(i) of the Standard.

The Stipulation establishes the absence of the required standby pulpits at the specified locations. (Stipulation, pp. 37, 38, 61)

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18/ The "latest possible date" for implementation of the engineering and work practice controls, is January 20, 1980, see Section .1029(f)(1)(i).

Additionally, the Stipulation sets forth, that, "Respondent's compliance program at the time of the inspection contained an anticipated installation dated of the fourth quarter of 1977. The equipment has been ordered and Respondent anticipates installation in the third quarter of 1978." (Stipulation, pp. 37, 38, 62)

According to Respondent's witness Mr. Hill, the anticipated delivery time for these units, which are identical to the units (i.e., cabs) that U. S. Steel intends to install on its mobil equipment at each battery, discussed in the prior two Items, is from three to four months. Thus, the conflicting statement in the Stipulation quoted above, (i.e., the nine month time lag between the two "installation" dates) unexplained in this record, again demonstrates the lack of a commitment by U. S. Steel to provide these environmentally controlled, standby pulpits to its coke oven employees, "at the earliest possible time."

This lack of commitment is even clearer in these two Items than in the preceding two, in that, these pulpits are stationary. Thus, the "clearance" problems, such as they might have been, with the cabs on the mobil equipment, are not present here.

Further, environmentally controlled pulpits, (or booths) as alluded to in the preceding two Items, have been a means of removing employees from hazardous environments, recognized by competent industrial hygienists and facility engineers for not less than two years prior to the inspection herein. In fact, the evidence reveals that not less than three such booths or pulpits have been in use at the Koppers Company coke oven batteries in St. Paul, Minnesota since 1975.

It is therefore concluded that utilization of environmentally controlled standby booths has been a technique to reduce coke oven employees exposure to coke oven emissions which was available since 1975 and known to competent industrial hygienists and facility engineers. Respondent's failure to provide its coke oven employees with such booths, at the time of the inspection, (and which will not be supplied, at best, until the third quarter of 1978), was a failure to implement this control "at the earliest possible time."

The violations as alleged are established in this record.

SERIOUS CITATION NO. 3 - ITEM 1(a), (b) and (c)[19/]

Item 1(a) and (b) charge that respirators were not inspected routinely before and after each use (1(a)), and were not collected, cleaned and disinfected as frequently as necessary to insure that proper protection was provided the coke oven employees on both batteries. Item 1(c) charges that Respondent did not assure the use of respirators by the door machine operators on the coke side of both batteries and by the larry car operator on Battery No. 1, in the vicinity of visible emissions. Section .1029(g)(3) of the coke oven Standard mandates the institution of a respiratory program in accordance with the Standard set forth at 29 C.F.R. 1910.134. The 1910.134 Standard, in relevant part, mandates the inspection and cleaning procedures set forth supra.

No operative facts were stipulated to as to Items 1(a) or 1(c). The evidence reveals, however, that Respondent's "Script for Training Program," (Exhibit C-24), which embodied, in part, its formal respirator

19/ In the Stipulation, the parties agreed to "delete" subsection (c) of Item 1(c). This Stipulation is construed as an unopposed Motion to Vacate, and as such is Granted. (Stipulation, p. 50).

training at pages 3 through 6, directs each employee to conduct his own test to assure the proper fit of his respirator, giving the particulars of such tests. However, this training program does not make it clear to employees, that either they should "routinely" inspect their own respirators before and after each use, or institute a policy under which this "routine" inspection was to be done by supervisory personnel. This "Training Program" was the exclusive formal training given to employees. Employees, (each of whom had a respirator given to him for his own use) did not "routinely" inspect their own respirators before and after each daily use. Further, as Respondent's own foreman witness, Mr. Yuhas (Tr. 1227-1240) testified, occasionally he would casually observe a member of his own crew with a respirator, the straps of which had lost their elasticity, and thus could not be properly or effectively fitted around the man's nose and mouth. He would then put new straps on the respirator for the employee. At the time of the inspection, 50% of the coke oven workers, and approximately 25% of the foremen or supervisors were not wearing their respirators at all times within the area designated by Respondent for such use.

Similarly, because each employee had a respirator assigned to him for his own use by Respondent, these respirators were not routinely collected, cleaned nor disinfected by management. Rather these tasks were delegated to the individual employees, under Respondent's Training Program (Exhibit C-24, pp. 3-6). (Stipulation, p. 49). Calgon lotion soap was available to employees to wash the face piece of the respirators and a disinfecting solution

was available in the foreman's office, located between the two Batteries. However, Respondent's Training Program makes no mention of cleaning or disinfecting respirators, nor were employees otherwise properly trained in this regard. Thus, Respondent's training program is deficient in this regard. Further, the testimony of Mr. Yuhas, formerly a coke oven rank and file employee and since 1973, a foreman, establishes that he, and his crew since 1969, disinfected their respirators approximately eight times a year, less than once a month. The evidence further establishes that during the inspection, the coke oven employees specified in Item 1(c) were not properly wearing their respirators. Thus, the evidence establishes the violations of Item 1(a), (b) and (c) as alleged.

The respirator problems at all coke ovens, including Fairless, is a difficult problem, and so recognized by the Secretary in the preamble to the coke oven Standard (41 F.R. 46773-46775).[20/] Employees find it impossible to wear respirators for the entire eight-hour work shift, because of the high temperatures within which they work, resulting in perspiration and skin rash around the face piece, and the need to communicate with fellow workers while performing their work tasks, impossible when the respirator is in place. Further, the face shields worn to protect against intense

20/ Because of these problems, Section .1029(g)(ii) of the Standard provides that until January 20, 1978, the wearing of respirators shall be at the discretion of each employee where the employee is not in the vicinity of visible emissions. Because the Fairless batteries were in such bad condition, visible emissions existed during the inspection throughout the regulated areas at the batteries. Thus, respirators should have been worn in those areas.

heat (i.e., when coke is pushed, etc.) interfere with respirator use. Thus, the need to institute the engineering controls "at the earliest possible time," that is, to stop or dramatically reduce coke oven emissions from escaping from the ovens into the workers environment, becomes crystallized. Further, the wearing of respirators is to a significant degree, dependent upon the employees understanding of the cancer and other health hazards present, and a certain degree of self-preservation - which translates into worker cooperation with management's efforts to enforce an effective respirator program. The evidence establishes that some, old-time employees, are not convinced of the increased health hazards caused by coke oven emissions (perhaps caused in part by the weakness of Respondent's training program - which is covered infra) or because after many years of coke oven work, they have not contracted cancer. Thus, they are lax about wearing their respirators. At any rate, under these circumstances, and because Respondent's respirator training program, on its face, is deficient as to the subject matter of this Item, a violation is established. The proposed penalty is excessive however, and will be reduced from $1,000 to $500.

SERIOUS CITATION NO. 3 - ITEM NO. 2

This Item charges that persons who cleaned or laundered protective clothing required by the coke oven Standard were not informed of the potentially harmful effects of exposure to coke oven emissions, those "persons" being the families of the Fairless coke oven workers or employees of the laundry who ultimately took over the cleaning duties,

Arrow Uniform Services. Section .1029(h)(2)(vi) of the Standard mandates that such information be provided by coke oven employers.

The Stipulation at pages 51, 51(a) and 51(b) provides the following:

1. During the period from January 20, 1977 to April 2, 1977 some of the employees took their clothing home or to other locations off plant property to launder it.

2. On April 3, 1977, pursuant to contract with Respondent, Arrow Uniform Service, Division of Work-Wear Division laundered coke oven employees' 'protective clothing.'

3. In the purchase order attached hereto, Respondent stated the following concerning the potentially harmful effects of exposure to coke oven emissions:

STANDING ORDER

FOR LAUNDERING AND REPAIR OF SUCH QUANTITIES OF

USS SPEC FLAME RESISTANT PANTS
USS SPEC FLAME RESISTANT JACKETS

SEW ALL HOLES AND PATCH, IF NECESSARY, FROM 1-20-77 TO 2-28-78 OR UNTIL NOTIFICATION OF CANCELLATION BY UNITED STATES STEEL CORP PRIOR TO 2-28-78.

ALL PURCHASES TO BE BILLED AND ITEMIZED INCLUDING THE RELEASE NUMBERS ON THE INVOICE IN TRIPLICATE, ON THE 25TH OF EACH MONTH.

'VENDOR, AS AN INDEPENDENT CONTRACTOR, SHALL PROVIDE ALL SUPERVISION, LABOR, TOOLS, EQUIP., MATERIALS AND SUPPLIES, AND DO AND PERFORM ALL WORK AND/OR SERVICES NECESSARY FOR THE IN-PLANT PICKUP, HANDLING, LAUNDERING, REPAIR AND RETURN OF PROTECTIVE CLOTHING USED BY PURCHASER'S EMPLOYEES AS BELOW PROVIDED.'

THIS ORDER IS NOTIFICATION TO VENDOR THAT THE PROTECTIVE CLOTHING TO BE LAUNDERED HAS BEEN USED IN REGULATED AREAS OF U.S. STEEL'S COKE OVEN OPERATIONS AND IS DESIGNATED CONTAMINATED FROM EXPOSURE TO COKE OVEN EMISSIONS AND MAY CAUSE POTENTIALLY HARMFUL EFFECTS SUCH AS DESCRIBED IN THE OSHA STANDARD COVERING COKE OVEN EMISSIONS (29 CFR #1910.1029), EFFECTIVE JANUARY 20, 1977.

EACH EMPLOYEE'S PROTECTIVE CLOTHING SHALL BE REMOVED AND CLEANED NO LESS FREQUENTLY THAN ONCE WEEKLY. USED CLOTHING FOR PICKUP AND LAUNDERING WILL BE CONTAINED IN SEPARATE CLOSED CONTAINERS SUCH AS SEALED PLASTIC BAGS. ALL PRECAUTIONARY AND IDENTIFYING MARKS AND LABELS ON SUCH CLOTHING AND CONTAINERS RESPECTING EMPLOYEE NAME, HANDLING AND EXPOSURE OF SUCH CLOTHING TO COKE OVEN EMISSIONS SHALL BE RETAINED. VENDOR SHALL BE SOLELY RESPONSIBLE FOR THE PROPER CARE, HANDLING AND LAUNDERING OF SUCH PROTECTIVE CLOTHING AND RETURN OF THE SAME TO USS IN FULL COMPLIANCE WITH ALL CONDITIONS HEREOF AND LAWS AND REGULATIONS APPLICABLE THERETO.

VENDOR SHALL ALSO GIVE ITS EMPLOYEES NOTICE OF THE NATURE OF THE EXPOSURE OF THE CLOTHING COVERED BY THIS ORDER.

ALL PERMANENT FLAME-RESISTANT CLOTHING SHALL BE CLEANED IN A MANNER SO THAT FLAME-RESISTANT PROPERTIES ARE MAINTAINED AND NECESSARY REPAIRS MADE IN ORDER TO INSURE EFFECTIVENESS OF SUCH GARMENT. ALL PANTS AND JACKETS WILL BE IDENTIFIED WITH EMPLOYEE NAME.

The evidence establishes that Respondent's employees were not advised by management, prior to April 3, 1977, of the potentially harmful effects of handling outside work clothes, soiled with coke oven emissions. At about this date, Respondent contracted with the Arrow Uniform Services, a large commercial laundry firm located in Philadelphia, to pick up the employees outside work clothes,

clean and repair them, and deliver them back to the work site. Between January and April, 1977 - (and perhaps for years prior thereto), it was the practice of the coke oven employees to take their outside work garments home with them to be laundered.

The potentially harmful effects of handling coke oven soiled garments is either skin cancer - (not a well documented hazard - as yet by the scientific community) and inhalation of dust if the clothing is handled to any degree before laundering or cleaning with the resultant increased hazards of lung and other forms of cancer and other pulmonary illnesses.

Because the employees were not warned of these hazards, they in turn could not alert their wives to these potential hazards.

Two questions are posed by this Item. First, is the "notification" set forth in the purchase order to the Arrow laundry an adequate notification of the "potentially harmful effects of exposure to coke oven emissions?"

Second, were the employees adequately notified? The answer to both is no.

The fourth paragraph in the purchase order set out in the Stipulation - the "notification to the vendor," absent a creditable showing of telling the vendor <u>what</u> the potentially harmful effects are, is inadequate on its face. There is no creditable showing in the evidence that Respondent did tell the Arrow Company that the chance of skin cancer, although slight and not well documented, is present in handling coke oven soiled clothing as well as an increased risk of lung and genito-urinary cancer and other lung ailments in such handling.

Respondent argues in brief that the preamble to the Standard, 41 F.R. 46747-48 declares that, "... there is no clearly demonstrated excess mortality[21/] from skin cancer in U. S. Coke oven workers. However, from epidemiological surveys of British coke workers and similar studies involving employees in related processes in the United States and other countries, the possibility of a skin cancer hazard cannot be dismissed."

Further, the preamble provides, at page 46781, that, "The word 'cancer' is not required to appear on the label (to be affixed to bags of coke oven soiled clothes) because in these circumstances, we believe it would be unduly alarming. On the other hand, * * * OSHA believes it is appropriate that individuals who are engaged in handling and laundering the contaminated clothing be apprised of the hazard and practices to be avoided when handling the clothing."

Thus, Respondent argues, the purchase order statement to the Arrow laundry is more than sufficient. This argument is not persuasive.

Although the Standard does not mandate that the word "cancer" appear on laundry labels, obviously this cancer risk information should be conveyed to persons handling such work. Otherwise, the cited provision of the Standard is not only meaningless, but a rather cruel exercise in double talk, an exercise I decline to attribute to the Secretary in the coke oven Standard.

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21/ The preamble also points out that skin cancer is easily treated and death therefrom is not the usual course of this condition.

Lastly, Respondent agrues that any provision of the Standard which goes beyond an employee, is jurisdictionally beyond the provisions of the Act and not authorized thereunder.[22/]

This argument is also not persuasive. Respondent is obligated to inform its employees of the hazards in handling soiled coke oven work clothes. This was not done in this case according to the evidence. (See Exhibits C-24 and R-11, two versions of Respondent's "Training Program," and C-25 its "Compliance Program"). If the employees had been so warned - then the employees, if they were do disposed, could have warned their wives and thus protected them, and their children from exposure.[23/] Further, there is no evidence that some of the employees might launder their own clothes, a practice not unknown in America.

Clearly the Arrow laundry was a subcontractor of Respondent, and because Respondent's coke ovens created the potential hazards, Respondent is obligated to at least inform the subcontractor of these potential hazards. Indeed, the wives of the coke oven employees, washing the coke oven emission clothing prior to instituting the commercial laundry service, stood in the same position as the

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22/ An argument evidently not advanced to the United States Third Circuit Court of Appeals which was asked to review the legal validity of the Coke Oven Standard. See the AISI case decision cited supra.

23/ There is no showing in this record, that the Fairless coke oven employees had such lack of concern for their wives and children, that they would not pass on warnings to them - or at least advise them to exercise great caution.

Arrow laundry later occupied. Thus, Respondent, at a bare minimum, owed to its own coke oven employees, a warning of the potential hazard. It gave none.

The evidence establishes the violation as alleged.

SERIOUS CITATION NO. 3 - ITEM NO. 3

This Item charges that Respondent did not provide lunchroom facilities, i.e., its "old" lunchroom, with temperature controlled, positive pressure and filtered air, readily accessible to employees working in the regulated area, as mandated by Section .1029(i)(3) of the Standard.

The Stipulation establishes that the "old" lunchroom was located in the regulated area between Batteries No. 1 and No. 2 at the bench level. It did not have temperature controlled, positive pressure and filtered air at the time of the inspection.

Respondent defends this violation on the grounds that it was impossible to so equip the "old" lunchroom because it was in such poor condition that it was beyond rehabilitation. Thus, in December, 1976, a decision was reached to construct a "new" lunchroom, i.e., to convert a then existing building, located at bench level, 15 feet away from the "old" lunchroom, by putting a new roof on this structure and moving a preexisting partition, providing a lunchroom 13' x 45' with about a 9' high ceiling. From the time this decision was reached, in December, 1976, to the date that Respondent's witness, Mr. Orloski (a drafting engineer having some responsibility in implementing the "new" lunchroom facility) testified, May 25, 1978, there ensued a torturous course of drawings, contract proposals,

bids, work orders, changes in design and delays, with the net result, that the "new" lunchroom, as of this 1978 date, still was not equipped with the environmental controls mandated by the Standard. (Tr. 1390-1415; 1421-1441; 1442-1452; Exhibit R-10). Respondent obviously did not consider this employee protective devise something which should have been expedited and clearly did not expedite this matter. One method Respondent might have used to expedite the implementation of an environmentally controlled lunchroom at Fairless, was to have Mr. Orloski go to U. S. Steel's Fairfield, Alabama, Gary, Indiana or Clairton, Pennsylvania, coke works and observe such lunchrooms which had been installed at those sites - or perhaps - call for copies of plans and specifications those facilities had developed in providing this type of lunchroom - and thus reduce the inordinate length of time taken at Fairless in supplying its workers with an adequately equipped lunchroom. These steps were never taken.

Thus, the evidence clearly establishes the absence of an environmentally controlled lunchroom (either "old" or "new") available to Respondnet's coke oven employees at the time of the inspection (and as late as May, 1978). Thus the violation as alleged is established.

However, the proposed penalty of $1,000 is excessive, because the failure to provide this facility was in part at least caused by the failure of the subcontractor (Busch) to supply the air conditioning-heating units as agreed. Some delay was understandable because in February, 1977, Mr. Orloski changed the design requirements

for the three ton capacity unit from a steam heat coil to an electrically heated coil. Thereafter, however, Respondent did little to force the subcontractor to expedite delivery other than to telephone and obtain new, ever lengthening delivery dates. Under these circumstances, a penalty of $500 is appropriate.

SERIOUS CITATION NO. 3 - ITEMS NO. 4 AND 5

On the final day of trial, May 26, 1978, Respondent in effect moved to withdraw its notice of contest as to these violations, but not as to the $1,000 penalty proposed for each Item. (Tr. 1649). Respondent's oral motion is hereby granted and the violations as alleged are affirmed.

There remains the question of appropriate penalties. Item 4 charges that coke oven employees on both batteries did not wash their hands and faces prior to eating, a "Hygiene" practice mandated by Section .1029(i)(4)(i) of the Standard. This Section mandates that employers "shall assure" that employees follow this hygiene practice, which, the evidence reveals, and the record establishes, Respondent failed to do.

Respondent's "Training Program", Exhibit C-24 at page 11 states as follows:

* * *

> After being in a regulated area, the regulations require washing hands and face before eating or drinking anything or using any tobacco product or chewing gum. Washing facilities in areas in or near lunchrooms, change rooms, shower rooms, etc. must be used to wash hands and face before eating or drinking anything except drinking water.

However, there is no showing in the record that Respondent enforced this training directive, and all employees did not follow it, including at least one of Respondent's foremen, Mr. Lepionka (Tr. 796, 812-814). One reason revealed in the record, why this hygiene practice was not followed, is that at certain times, no hot water was available with which to wash, a disincentive during cold winter months (Tr. 816-818).

The proposed penalty is appropriate.

Item No. 5 charges that Respondent did not assure that employees did not consume food or beverages or smoking products in the regulated areas - i.e., the topside of both Batteries - and the substandard "old" lunchroom, as mandated by Section .1029(i)(5)(i) of the Standard.

The Stipulation establishes that employees were observed during the inspection eating and smoking in the "old" lunchroom, in the regulated area - which was not environmentally controlled. Further, the evidence reveals that eating and smoking took place "anywhere" the employees decided was appropriate.

Although Respondent's "Training Program", Exhibit C-24, at page 10, lists prohibitions that the "regulations" i.e., the Standard mandated about eating and drinking, there is no showing in this record that these prohibitions were enforced by Fairless management.

The proposed penalty is appropriate.

SERIOUS CITATION NO. 3 - ITEM NO. 6(b) AND (c)[24]

Section .1029(f)(7) of the Standard provides as follows:

[24] Item 6(a) was deleted in an amended Citation dated October 3, 1977.

> (7) Training in compliance procedures. The employer shall incorporate all written procedures and schedules required under this paragraph (f) in the information and training program required under paragraph (k) of this section and, where appropriate, post in the regulated area.

Item 6(b) alleges a failure to incorporate in Respondent's Training Program, all written procedures and schedules mandated by Section .1029(f) of the Standard.

Section .1029(k)(1)(iv)(d) of the Standard mandates that Training Programs include, inter alia,

> (d) A review of all written procedures and schedules required under paragraph (f) of ...

the Standard. Item 6(c) alleges Respondent's Training Program did not have provision for such a review, specifying six deficient areas.

The Stipulation, at pages 57-59, quotes pages 17, 18 and 19 of Respondent's Training Program, Exhibit C-24, initially issued on January 7, 1977 and revised on January 14, 1977.

A comparison of Respondent's Training Program, with Section .1029(f) of the Standard, reveals that the Training Program does not include all written procedures regarding work practice controls as follows:

.1029(f)(3)(i)(a)(1) - Prompt and effective repair or replacement of all engineering controls.

(a)(2) - Inspection and cleaning of goosenecks and standpipes prior to each charge etc. -

(a)(5) - Inspection of steam nozzles and liquor sprays prior to each charge etc. -

(a)(7) - Inspection of charging holes and lids - prior to each charge etc. -

.1029(f)(3)(i)(b)(1) - Proper filling of larry cars.

(b)(2) - Proper alignment of larry car oven charging holes.

(b)(3) - The charging of the oven following seven specified steps.

.1029(f)(3)(ii)(b) - Regarding the coking cycle - the repair, replacement and adjustment of oven doors, chuck doors and oven doors and door jambs to provide a continuous metal-to-metal fit.

.1029(f)(3)(iii)(b)(1) - Regarding pushing - five specified steps not mentioned.

.1029(f)(3)(iv)(a) - Regarding maintenance and repair - nine specified procedures not included.

.1029(f)(6)(i) - The requirement for employers to establish and implement a written program to reduce exposures solely by means of engineering and work practice controls required in paragraph (f) of this section.

.1029(f)(6)(ii)(6) - The written program shall include at least five specified categories of information.

(See Exhibit C-24, Tr. 479-491)

Respondent defends that the deficiencies noted were corrected, after the inspection, either by another revision of the Training Program script, or by Safe Job Procedures or other types of documents such as Operating Procedures. This argument is not persuasive because the cited provisions of the Standard mandates that the missing information be incorporated in writing, in the training program. They were not at the time of the inspection.

The violation as alleged is established by the record herein.

REPEAT CITATION NO. 4 - ITEM 1(a) AND (b)

This Item alleges that frequent random inspections were not conducted by qualified individuals to assure that respirators were properly selected, used, cleaned and maintained (Item 1(a)); and every respirator wearer did not receive fitting instructions including demonstrations and practice in how the respirator should be worn, adjusted and properly fitted (Item 1(b)), as to the employees on both batteries, mandated by 29 C.F.R. 1910.134(e)(4) and (e)(5)(i), made applicable by Section .1029(g)(3) of the Standard.

The Stipulation establishes that Respondent was previously cited, under the 1910.134(e)(4) and (e)(5)(i) Standard on December 23, 1976, and did not contest these prior Citations. (Stipulation pp. 61, 62). Thus the 1976 Citations became a final Order of the Commission by operation of Section 10(a) of the Act, 29 U.S.C. 659(a).

As to Item 1(a), the evidence conclusively establishes that at the time of the inspection, there were no frequent, random inspections conducted to determine if the respirators used by the coke oven employees were properly used, cleaned and maintained.

As to Item 1(b), a dust type respirator, known as the Dustfoe 66, had been issued to the coke oven employees at Fairless. Complainant's Industrial Hygienist, who participated in the inspection, Mr. O'Malley, after analyzing the fit instructions given by Respondent to its workers concluded that the fit tests were not appropriate for the Dustfoe 66 type respirators.

The purpose of a fit test is to determine if the respirator face piece forms a sufficiently tight seal against the wearers face, to prevent leakage and thus have the respirator operate as designed.

The "negative" pressure test recommended by Respondent requires sealing the rectangular filter inlet with the palm of the hand, while wearing the respirator. A breath is then drawn in, (creating a negative pressure) and will remain negative if the seal is proper. The Dustfoe 66 respirator can not be effectively sealed in this type of test because the filter is rectangular and air is designed to come thru the filter not only from the bottom of the rectangular filter holder, but also from both sides. Thus, it is extremely difficult to cover both the rectangular inlet as well as the side inlets. (See Exhibit C-24A, photo. 13).

The "positive pressure" test involves exhaling with the respirator in place, (thus creating a positive pressure) with the exhalation ports covered with the palm or fingers. This test is not effective with the Dustfoe 66 respirator because the exhalation ports are covered by a plastic cover, which prevents the sealing of the ports with the hand or fingers. (See Exhibit C-24A, photo 14).

Thus, these two tests, specified by Respondent in its respirator program Exhibits C-22, C-23, and Training Program Exhibit C-24, are neither effective nor appropriate for the type of respirator supplied to the workers by Respondent. Mr. O'Malley pointed out, that these types of tests are appropriate for cartridge type respirators, but not for the Dustfoe 66 type. Further, Mr. Bauman, an industrial hygienist with U. S. Steel testified that he had difficulty conducting these types of tests himself and recognized that there are more efficient types of tests available for the Dustfoe 66 type of respirator. Further, the evidence does not reveal any opportunity afforded the workers to practice the fit

tests under proper supervision, and, at least one witness devised his own test - if he could breath and the respirator "felt right," he concluded it fit properly.

The evidence establishes the conditions as alleged.

As to the accurate categorization of these violations as "Repeated," the Review Commission, to date, has not established its position as to what constitutes a "Repeat" violation.[25/]

The record establishes that the prior, 1976 respirator violations, were all connected with U. S. Steel's open hearth operations at Fairless, not its coke oven operations. Thus, because there is no clear Review Commission precedent, as yet, as to the elements of a "Repeat" violation, and because the respirator violations herein determined to exist involve, at least to a significant degree, the Fairless coke oven employees resistance to wearing respirators, it is concluded that these violations are accurately denomininated as Serious, not Repeated, and they are so modified. Further, the proposed penalty for this violation, is reduced from $1400 to $1000.

NONSERIOUS CITATION NO. 5 - ITEM NO. 1[26/]

This Item alleges that hot and cold, or tepid running water was not provided in the lavatory at the East side of the Coke Battery, contrary to the Standard set forth at 29 C.F.R. 1910.141(d)(2)(ii).

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25/ The Commissioners have different views. See, Secretary of Labor v. Bethlehem Steel Corp., 20 OSAHRC 227(1975) and Secretary of Labor v. George Hyman Construction Co., OSHRC Docket No. 13559 (1977). Neither is their agreement by the Courts.

26/ This Nonserious Citation set forth four alleged violations. Respondent contested only Item No. 1. Thus, Items numbered 2 through 4 and the $100 penalty proposed for each have become the final Order of the Review Commission by operation of Section 10(a) of the Act, 29 U.S.C. 659(a).

It was stipulated that there was a lavatory at the cited location and that at the time of the inspection, it only had cold running water, the hot water pipe was not operative. (Stipulation, p. 63; as amended Tr. 639).

The evidence reveals that the water pipes servicing this lavatory would, with some degree of regularity, freeze during cold weather, stopping all water supply. Upon the employees complaints, they would be thawed by steam, but shortly freeze up again. On occasion, the water to the pipes would be shut off to prevent freezing - and of course, during these periods, no water would be available at the lavatory. This condition had existed for a long time - probably in excess of a year.

The violation as alleged is established in the evidence. The zero penalty proposed is inappropriate. Because the nonfunctioning water pipes made cleaning of the respirators, and washing before eating (established in other Items in this case) either impossible or inconvenient - the workers would have to go elsewhere to wash - a penalty of $250 is appropriate for this violation.

THE PENALTIES

With the exceptions noted supra, all proposed penalties are reasonable and appropriate.

Section 17(j) of the Act, vests in the Review Commission the authority to assess all civil penalties under the Act, giving due consideration to the size of the business of the employer being charged, the gravity of the violations, the good faith of the employer and the history of previous violations.

## SIZE

Respondent, U. S. Steel Corporation, is the largest domestic steel producer in the United States, with approximately 167,000 employees (located at various locations in this country, one of which the work site here involved, Fairless Hills, Pennsylvania), and had gross 1976 sales of approximately nine billion dollars.[27/] It has seven coke oven installations throughout the country, one of which, Clairton, reportedly being the largest such facility in the country. One of its coke oven plants is located at its Fairless Works and consists of two Batteries, with a total of 174 ovens with the usual attendant machinery and facilities. Thus, Respondent is a large, if the not the largest, coke oven operator in this country. The evidence is not conclusive on this point. It is the largest steel producer.

## GRAVITY OF THE VIOLATIONS

Contrary to Respondent's argument in brief, the gravity of the violations is high. The increased risk of cancer of the genito-urinary and pulmonary systems, and perhaps a lesser, but nevertheless an increased risk of skin cancer, as well as the risk of other pulmonary conditions, is fully discussed and extensively documented in the preamble to the new Coke Oven Standard. (41 F.R. 46744-46748 - III Coke Oven Emissions - Exposure Hazard). Thus, the cancer producing potential of coke oven emissions is not open to question in this case, and indeed, "... was not disputed by participants at the rulemaking proceeding [which

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27/ See Decision and Order, Secretary of Labor v. U. S. Steel Corporation, OSHRC Docket No. 77-1796, dated April 24, 1978, pp. 4, 5; docketed for review by Commission Order dated May 25, 1978.

preceded promulgation of the Coke Oven Standard], including the five largest steel companies [thus including U. S. Steel], and the American Coke and Coal Chemical Institute." (41 F.R. 46746 - bracket material supplied.

At the present time, the seriousness of cancer to humans, even the usually non-lethal, treatable skin cancer, is so well recognized, not only by the qualified medical and scientific community but by the community in general, to be a proper subject for administrative notice, not necessary of any proof.

Respondent's argument that, "Nothing in the evidence before the Review Commission, however, indicated that a moment's exposure to a coke oven emission would cause cancer. There is no support in the record for a 'one-shot' theory.", (Brief, next to last page). This argument not only misses the mark, but is yet another demonstration of this Respondent's attitude relative to the Coke Oven Standard generally - disbelief, disagreement and noncompliance.

First, it is common knowledge that the precise ways that various types of cancer, are either initiated or progress, is not well-known, even to those qualified in the field of cancer research and treatment. Thus, a considerable amount of time - i.e., years, may elapse from the time of either initial or continued exposure to cancer causing elements and the appearance of its symptoms.

Secondly, the evidence of this record conclusively establishes that the coke oven workers at Fairless were not exposed to "a coke oven emission," nor to any type of "one-shot" exposure. Rather, the evidence establishes that these workers, for over a year at the very minimum, (and

in all probability for some considerably longer period) were exposed to massive and continuous emissions. Because Respondent decided not to rehabilitate its batteries, as recommended by its own engineers, for over a year after the recommended time frame, the batteries were in such an atrocious state of disrepair that they were literally burning up. The emissions were so massive that visibility atop the batteries, at times, was so reduced that the workers could not see. The photographic exhibits clearly show the "smoking ovens" - visible coke oven emissions.

Further, the evidence establishes that all the coke oven workers were exposed to these massive emissions, for extended periods of times, because of Respondent's failure to implement or enforce an adequate respirator program or to expeditiously provide environmentally controlled machine cabs or standby booths. Thus, the gravity of the violations is concluded to be high.

RESPONDENT'S GOOD FAITH

The record in this case establishes a striking lack of this Respondent's good faith, that is, as a practical matter, Fairless Management's lack of good faith. It is a record of interminable delay in complying with the new Coke Oven Standard. Thus, each violation herein determined, and the number of such violations, paint a graphic picture of Respondent's lack of conviction that its coke oven workers were exposed to an increased risk of cancer, and its resultant resistance and delay in implementing the provisions of the Standard.

Thus, stage charging - a well known engineering control to reduce emissions, was not implemented at Fairless - whereas it had been implemented at the Fairfield coke ovens in 1974, at the Provo, Utah, ovens in 1975, and

at the Clairton ovens in 1973. Fairless management's track record in this area puts them near if not in last place among U. S. Steel's seven coke oven plants.

Although U. S. Steel's own Pittsburgh engineers had, years ago, determined that adequate aspiration of the off-take system was possible even with the Corliss valves in place, and Fairless increased the aspiration capacity of its system, (through larger pipes installed by an outside contractor), years went by before Fairless management detected that some of the work of the outside contractor was improper and the aspiration system was not adequate.

Mechanized gooseneck cleaners were not used at Fairless yet had been used successfully at other U. S. Steel coke plants for years.

Because of the decision not to rehabilitate the batteries as recommended by its own Pittsburgh engineering inspection team, until over a year after the scheduled rebuild, the oven doors, jambs and frames became so badly deteriorated, that it was impossible to produce adequate spare doors in the admittedly inadequate door facility, nor to make many of the existing doors seal properly. Chuck door gaskets simply were not used - in clear and plain violation of the Standard.

Inspection of the standpipes and goosenecks was not done prior to each charge, and was not intended to be so carried out, in direct violation of the Standard. Rather, Respondent, scheduled such cleaning only once a week. Further, a clogged standpipe would be detected only after the coke cycle began - and could not be cleaned for 16 hours - until after the coke was pushed - allowing 16 hours of coke oven emissions to escape - hardly a "one-shot" emission.

The corrective action program - patching the ovens to keep them going, and putting out the door and frame fires, was a desperate effort to get more coke from the ovens - regardless of the amount of coke oven emissions caused by the holes, cracks, broken frames, and smoking and burning doors and frames. Even this vital (for production) activity was unsuccessfully attempted with a totally inadequate number of workers. Three patching crews, on the day shift only, totalling six men, worked five days a week. One crew's time was totally taken casting door plugs. Thus only two patchers, each with a helper, were available to try to patch all the leaks in both batteries. Such a minimum crew was obviously doomed to failure from the outset in the face of the magnitude of the patching tasks which they were expected to perform. This case conclusively establishes, among other things, the woefully inadequate staffing of these coke ovens.

Respondent's approach to respiratory protection of its coke oven workers, obviously critically required in the presence of such extensive emissions, similarly displays its lack of good faith. The workers were given the Dustfoe 66 respirators, initially without adequate instructions. Management thereafter incorporated some instructions on respirator use, maintenance and fit in its Training Program. However, the fit test was inappropriate for the type of respirators issued. More importantly however, was management's failure to enforce the use of the respirators, which resulted in half of the workers and a significant number of foremen, not utilizing them correctly. This dismal condition was at least in part caused by a lack of proper training.

One major cause of the problems encountered at the Fairless coke oven facility is precisely management's lack of concern for the health of its coke employees.

An encapsulated example of this lack of good faith is clearly set out in the opening paragraphs of its Training Program, which states:

> You are here to be informed about a new federal law which became effective January 20, 1977. This law was imposed by the Occupational Safety and Health Administration upon all people who work in coke plants throughout the United States.
>
> They say there is an increased risk of acquiring cancer for those who are exposed to coke emissions, and this is an attempt to reduce this risk.
>
> (Exhibit C-24)

One need not have a university degree to catch the obvious implications of such statements. The result, of course, is a lack of conviction by the employees that real hazards exist at the coke ovens, and Respondent's failure to comply with the Coke Oven Standard - which this case clearly demonstrates.

Further, because respirators are admittedly difficult to wear in the extremely hot, ash laden coke oven environment, the Standard provides for air conditioned booths on the mobil equipment and standby pulpits on the topside of the ovens - places where employees might go briefly - to catch their breaths in a relatively emission free atmosphere. This case establishes that although such booths and cabs had been supplied at three other U. S. Steel coke oven facilities, none were in place as of the time of trial herein (May, 1978), at Fairless. Rather than utilize the specific engineering knowledge, drawings and techniques which must have existed at U. S. Steel's headquarters offices in Pittsburgh, Fairless management

started at ground zero to design, and negotiate contracts, to have these booths produced and supplied. Rather than expediting this process, the evidence shows extensive delays, with little or nothing being done to get these booths in place.

Further, Respondent's lack of concern for its coke oven employees' health is also dramatically demonstrated by its failure to warn its employees of the dangers inherent in laundering their outside work clothes. Thus, the employees, unaware of these risks, took their work clothes home to be washed by their wives, - perhaps in the family wash, prior to the time that laundering was contracted out to a commerical laundry. Consequently, these employees were deprived of the opportunity of warning their loved ones of the potential dangers - and of making arragements to protect their families.

Such a course of calloused inaction is the antithesis of good faith.

HISTORY

Exhibit C-31 consists of six pages of a computer printout showing some information concerning previous inspections of the Fairless works by OSHA. Between July, 1972, and July, 1977, approximately 33 inspections had been conducted. Twenty-four of these inspections were made upon employee complaints, six because of accidents and three in the routine general manner. Eighteen inspections revealed no citable violations whereas citations did issue after 15 such inspections, involving 104 alleged violations, of which 18 were labeled serious. (The exhibit does not reflect how these citations terminated).

Respondent in brief, argues, "Given the size of the plant, Respondent submits that this is an excellent record." (Brief, second next to last, unnumbered page).

Exhibit C-31 establishes, not an excellent record, but a rather poor record. One hundred four citable conditions (not counting the violations in this case - approximately 40), found in five years, can not realistically or reasonably be labeled "excellent."

Thus, for the foregoing reasons, the penalties proposed, except where indicated supra, are appropriate and reasonable.

DENOMINATION OF THE VIOLATIONS

Section 17(k) of the Act, 29 U.S.C. 666(j) provides:

> (k) For purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

The evidence establishes that all the violations set forth in Citations numbered 1, 2, 3, and, as modified, 4 are properly denominated as Serious because of the cancer and other health risks inherent in coke oven emissions. Citation number 5 is properly denominated as Nonserious.

THE UNION'S POSITION

The United Steelworkers of America, AFL-CIO, Local 4889 is a party in this case.

In general, the Union supports the Complainant regarding the existence of the violations, as alleged, with some modifications.

First, the Union asks that a violation of Section .1029(c) - the permissible exposure limit (PEL) be found for each employee exposed to coke oven emissions in excess of the PEL, rather than as charged as

one violation per battery, for all such exposed employees in Items No. 1 of Citation No. 1 and 2. Further, that Respondent's inadequate respirator program, charged under Item No. 1(a) and (b)[28/] of Citation No. 3, should additionally be constructed as a violation of the PEL Section .1029(c), because respirator use is allowable under Section .1029(g) of the Standard only during the period necessary to install and implement the engineering and work practice controls. Because Respondent has gone beyond this necessary time, respirators may not be relied upon to reduce employee exposure (even if the respirator program was effective), hence a PEL violation should be found. Separate penalties should consequently be assessed.

This coke oven case, perhaps the first brought to trial under the new Coke Oven Standard, was evidently closely monitored by OSHA supervisory personnel in Washington, DC, to attempt to assure an evenhanded and consistent approach to the potentially numerous coke oven cases which may follow. (See testimony of Regional Industrial Hygienist Garecke, Tr. 492-535). The purpose was to develop a coherent, national policy to fairly implement this new Standard. Thus, although the Unions position is inventive, the manner in which the foregoing violations have been charged is considered to be the proper exercise of the Secretary's administrative discretion, and entitled to great weight. See; GAF Corporation v. OSHRC; 561 F.2d 913(D.C. Cir., 1977). The Secretary's position is legally proper and

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28/ Item 1(c) was deleted by Stipulated Agreement (Stipulation, p. 50).

will accomplish the purposes of the Act - employee health and safety. Thus, this position of the Union is not adopted.

Second, the Union asks that abatement dates, for the installation of the required air filtered equipment, (Citation No. 1, Items No. 12, 13; Citation No. 2, Item No. 14) be established at a minimum date consistent with Complainant's Program Directive No. 300-10.

The subject of reasonable abatement dates was not the subject of any extensive evidence of record, and was not fully litigated. Thus, it is inappropriate, and because of the lack of evidence impossible, at this stage of the proceedings to alter the abatement dates set forth in the Citations.

Lastly, the Union asks the Commission, under the authority of Section 10(c) of the Act, (29 U.S.C. 659(c)), to direct "other appropriate relief" in the form of an order ..."directing the Respondent to discuss with the Union the details of (such) a personnel program and to implement a sufficient increase in manpower within a reasonable time period."

There is no question that the record herein establishes that one of the major problems at Fairless (but only one) was an inadequate number of coke oven employees to carry out the work practices mandated by the coke oven Standard. Thus, Respondent's failure to provide an adequate number of spare oven doors, its failure to inspect and clean standpipe and goosenecks prior to each charge, its failure to control door emissions, its failure to regularly inspect and promptly repair the damper and aspiration systems, its failure

to regularly inspect and promptly repair standpipes and their caps and to implement temporary repairs to prevent miscellaneous fugitive topside emissions, all were due, in part, to a woefully inadequate number of employees to carry out these tasks.

However, inadequate employees was only one major cause of the cited violations. Of equal importance was Fairless management's lack of commitment to implement the coke oven provisions, "at the earliest possible time."

Thus, although an Order, such as requested by the Union, may possibly be authorized under Section 10(c) of the Act,[29/] or under either the Third Circuit's opinion in the Atlantic and Gulf Stevedores v. OSHRC, case, 534 F.2d 541 (3rd Cir., 1976), or the Commission case of Secretary of Labor v. General Electric Company, OSHRC Docket No. 2739, aff'd 540 F.2d 67 (2nd Cir., 1976), it is concluded that such an Order in this case is not appropriate. The number of employees necessary to legally conduct a business is a matter more appropriate for the collective bargaining table. However, if this Respondent continues to be in violation of the Coke Oven Standard, for any nonjustifiable reason - and inadequate personnel is such a legally inadequate reason, it will be subject to further citation. Thus, this request of the Union is denied.

Additionally, the Union asks for a similar Order from the Commission to direct the Respondent to consult with the employee representatives to correct serious deficiences in its respirator

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29/ As pointed out, the legislative history of the Act is silent on this "other appropriate relief" provision.

program, i.e., a correct definition of the "regulated area" in its Training Program (to include the "old" lunchroom and foremen's offices between the two batteries - not so classified) and to correct its inadequate respirator practices.

Although the Union is to be congratulated for its offer to assist Fairless management in understanding and implementing these respirator requirements of the Standard, (this record could support a conclusion that Fairless management may need some help and does establish that Union counsel has an outstanding grasp of this Standard),[30/] the responsibility for understanding and implementing the Standard's provisions rests with Respondent's management as a matter of law. Thus, the requested Order is legally unnecessary. However, nothing in the Act prevents, indeed, Section 2(b)(1) of the Act, 29 U.S.C. 651(b)(1) encourages, cooperation between employers and employees to accomplish healthful working conditions. Thus, enlightened management might avail themselves of the Union's offer of help. In the end however, failure of this Respondent to accept and discharge the responsibilities placed upon it by the Act, may well result in further citations for violations thereof.

RESPONDENT'S DEFENSES AND ARGUMENTS

Respondent's first argument involves the question of when the obligation to implement the engineering and work practice controls

30/ The preparation for (i.e., Stipulation, etc.) and trial of this case was significantly aided by the high professional competence and devotion of Union counsel, Mary-Win O'Brien, Esquire.

and respirator use under the new Coke Oven Standard becomes legally binding upon it, "at the earliest possible time," or January 20, 1980.

Section .1029(f)(i)(a) and (b) of the Standard sets forth the requirements for the Priority of Compliance Methods - for existing coke oven batteries, in the following language:

> (f) Methods of compliance.
>
> The employer shall control employee exposure to coke oven emissions by the use of engineering controls, work practices and respiratory protection as follows:
>
> (1) Priority of compliance methods.
>
> (i) Existing coke oven batteries.
>
> (a) The employer shall institute the engineering and work practice controls listed in paragraphs (f)(2), (f)(3) and (f)(4) of this section in existing coke oven batteries at the earliest possible time, but not later than January 20, 1980, except to the extent that the employer can establish that such controls are not feasible. In determining the earliest possible time for institution of engineering and work practice controls, the requirement, effective August 27, 1971, to implement feasible administrative or engineering controls to reduce exposures to coal tar pitch volatiles, shall be condsidered. Wherever the engineering and work practice controls which can be instituted are not sufficient to reduce employee exposures to or below the permissible exposure limit, the employer shall nonetheless use them to reduce exposures to the lowest level achievable by these controls and shall supplement them by the use of respiratory protection which complies with the requirements of paragraph (g) of this section.
>
> (b) The engineering and work practice controls required under paragraphs (f)(2), (f)(3) and (f)(4) of this section are minimum requirements generally applicable to all existing coke oven batteries.

* * *

> Wherever the engineering and work practice controls which can be instituted are not sufficient to reduce employee exposure to or below the permissible exposure limit, the employer shall nonetheless use them to reduce exposures to the lowest level achievable by these controls and shall supplement them by the use of respiratory protection which complies with the requirements of paragraph (g) of this section.[31]

What the Secretary meant, by the phrase "at the earliest possible time," is explained, at length in the preamble to the new Standard, at pages 46760, 46772. His position, essentially, is set forth at page 46773 of the preamble, as follows:

> Finally, a difficult compliance issue presented by the promulgation of the new standard involves its relationship, within the context of enforcement, to the employer's legal obligations under

---

31/ Section .1029(g) in relevant part provides:

(g) Respiratory protection.

(1) General.

(i) Where respiratory protection is required under this section, the employer shall provide and assure the use of respirators which comply with the requirements of this paragraph (g). Compliance with the permissible exposure limit may not be achieved by the use of respirators except:

(a) During the time period necessary to install or implement feasible engineering and work practice controls; or

(b) In work operations such as maintenance and repair activity in which engineering and work practice controls are technologically not feasible; or

(c) In work situations where feasible engineering and work practice controls are not yet sufficient to reduce exposure to or below the permissible exposure limit; or

(d) In emergencies.

> the prior standard (29 C.F.R. 1910.1000, 1002). The present standard, at paragraph (f)(1)(i) requires the implementation of specific engineering controls and work practices at the earliest possible time but not later than January 20, 1980. To this end, employers are presently required to develop written programs and to implement specific controls. However, the agency recognizes that employers had a legal obligation under the prior standard to reduce coke oven emission exposures by means of feasible engineering and administrative controls. It is not the intention of the agency, through the promulgation of this standard, to vitiate the legal requirements under the old standard. Rather, OSHA views the two standards as representing continuum of enforceable obligations which have been crystallized in the standard's promulgation.
>
> More specifically, in evaluating whether the employer has instituted controls at the earliest possible time, OSHA compliance personnel would consider not only the employer's performance under the new standard but also his prior obligations under its predecessor. It is OSHA's view that recalcitrant employers who have implemented only a few or no controls or work practices under the prior CTPV standard should not benefit from a newly extended time frame established under the new standard. Rather, cognizant of their prior legal obligations, such employers would be subject to citation under the new standard for failure to implement controls at the earliest possible time.
>
> (41 F.R. 46773, October 22, 1976)

Respondent argues that because there is no evidence in <u>this</u> record that Fairless employees were exposed to coal tar pitch volatiles in excess of the 1971 TLV (Threshold Limit Value) prior to the effective date of the new Standard, January 20, 1977, there is thus no

basis to conclude that it had any obligation to implement any engineering controls, work practices or "even" respirators prior to January 20, 1977.

Although, technically correct concerning the state of the evidence herein, this argument, in essence, asks for a determination that the Fairless coke ovens were in complete compliance with the old Standard covering coke oven emissions. As Respondent points out, there is no evidence in this record to support such a conclusion. Even if one assumes such a state of facts however, this does not mean that Respondent, prior to the new Coke Oven Standard, had no legal obligation to reduce, and maintain the old coal tar level emissions, below the TLV. Respondent's argument is construed as an affirmative defense and thus the burden of establishing complete compliance with the "old" Standard, rests upon Respondent, not accomplished by it in this record. In fact, the evidence of this record, best supports the contrary conclusion. Respondent asks too much with this argument, as it strains credulity to conclude that the Fairless Batteries, on January 19, 1977, had no coke oven emissions, when at the time of the inspection, some 60 days later, they were admittedly in such a seriously deteriorated condition, that they were "burning down," being held together with "rubberbands and chewing gum" (Tr. 792), and were producing extensive coke oven emissions.

Further, there is absolutely no showing by Respondent, of what "feasible engineering or administrative controls" were actually implemented prior to the new Standard, which it had a legal obligation

to do, and yet, when inspected in March-April, 1977, well-known engineering controls, i.e., stage charge, and quickly implementable work practices, i.e., proper inspections and repairs, were not in place.

It is concluded that this argument of Respondent is not persuasive.

Secondly, Respondent's next major argument it entitles "The Statute of Limitations Problem." (Brief, Section H). This argument, essentially, is that Section 9(c) of the Act, 29 U.S.C. 658(c), provides that, "No citation he issued under this section after the expiration of six months following the occurrence of any violation." (Emphasis supplied). Respondent then argues that because Complainant's position is that Respondent did not implement "feasible engineering or administrative controls" under the "old" Standard, prior to January 20, 1977, Complainant, in the Citations herein, is, in effect, citing Respondent for "violations" prior to the six month statute of limitations.

This argument confuses the terms "obligations" and "violations." Section 9(c) prohibits the issuance of any "citation" for any "violation" more than six months old. It is silent as to preexisting "obligations."

The Citations at issue here conform to the statutory mandate of Section 9(c) of the Act. The "violations" set forth in the Citations herein occurred at or about the time of the inspection, March-April, 1977. These "violations" were a failure to comply with many provisions of the new Coke Oven Standard, "at the earliest possible time" - that is, at the time of the inspection.

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| 77-3378 | UNITED STATES STEEL CORPORATION | 11/4/82 | 62/A2 |
| | (Judge's decision) | | 63/A2 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
|---|---|---|---|---|

Since 1971 Respondent, under the "old standard," had a legal "obligation" to reduce coal tar pitch emissions (synonymous to the new coke oven emission) to the old TLV level. This "obligation" was to be discharged by utilizing "feasible engineering and administrative controls," and Respondent was under this "obligation" from 1971 to January 19, 1977. Thus, when the inspection herein took place in March, 1977, and it was found that historically well-known and available engineering controls such as stage charging, and work practices (i.e., administrative controls) such as inspections and repairs, mandated under the new Standard had not been implemented, such a lack of these controls were cited as "violations." In determining whether this Respondent was legally obligated to have these controls, in place, at the time of the OSHA inspection, that is, "at the earliest possible time," nothing in Section 9(c) of the Act precludes a consideration of how well or whether Respondent discharged its pre-1977 "obligations" under the prior Standard.

Consequently, because the Fairless ovens, at the time of the inspection, were found to be "burning down," and producing extensive emissions, and because the OSHA inspectors found a lack of pre-1977 "feasible engineering and administrative controls," in place, even as late as March, 1977 - when the "obligation" to implement them had existed since 1971, it was concluded that Respondent had not complied with the new Standard "at the earliest possible time," and thus, was in "violation" of the new Standard. Nothing in Section 9(c) of the Act prohibits such a procedure.

This argument of Respondent is not supported by either the law or logic.

Respondent's next major argument, is labeled "The Constitutional Problem." In essence, the argument is that the Secretary's interpretation of the "at the earliest possible time" requirement in the new Standard, is an attempt to impose the new Standards requirements retroactively to 1971 and this constitutes "ex post facto" lawmaking, prohibited by Article I, Section 9 of the Constitution.

This argument is not persuasive because, the "at the earliest possible time" phrase, does not make the new Coke Oven Standard requirements, retroactively effective, nor does it effect prior legal obligations. As discussed supra, coke oven operators, since 1971 under the "old" Standard, had the legal obligation to reduce employee exposure to coal tar pitch volatiles by utilizing feasible engineering and administrative controls.

Because of the high gravity of the cancer risk caused by exposure to coke oven emissions, the Secretary concluded that the specific engineering and work practice controls mandated under the "new" Standard, must be implemented as soon as possible but not later than January 20, 1980. Some of the specific controls mandated under the "new" Standard, i.e., stage charging and inspection and repair measures, have been well-known, feasible, available, and utilized by some coke oven operators, for a number of years, that is, they have been available for implementation under the label of "feasible engineering or administrative controls," as used in the "old" Standard, for many years. Thus, in order to determine whether any given coke oven operator has implemented the specified "engineering and work

practice" controls spelled out in the "new" Standard, as soon as possible, nothing in the Constitution prohibits a consideration of whether an operator has discharged its preexisting legal obligations.

Further, as pointed out by the Union the ex post facto prohibition in the Constitution has been interpreted by the Courts to be applicable to laws which are criminal or penal in nature and must alter the situation of the accused to his disadvantage.

Further, the Review Commission, the Courts teach, does not have jurisdiction to decide questions involving the constitutionality of the Act. (See American Smelting and Refining Company v. OSHRC et al. 501 F.2d 504 (8th Cir., 1974)).

Lastly, there is no indication that this "constitutional" argument was presented to the appropriate Court for resolution; the United States Third Circuit Court of Appeals, when the coke industry, including Respondent herein, asked that Court to review the legality of the new Coke Oven Standard. Thus, this argument can well be construed as a collateral attack upon the Standard, prohibited in an enforcement action, such as this action.

This argument must be disallowed.

The next major argument by Respondent is labeled "The Two Battery Issue." This argument, essentially is, that because the two batteries at Fairless are really one operation, the Secretary should not have issued two Citations, Serious Citation No. 1 dealing with the violations found at Battery No. 1, and Serious Citation No. 2 dealing with the violations found at Battery No. 2, but rather only one Citation.

This argument is not persuasive for a number of reasons.

The Standard defines a coke oven battery as "... a structure containing a number of slot-type coke ovens."

29 C.F.R. 1910.1029(b)

Respondent had two such structures at Fairless, which it has designated as "Battery 1 and Battery 2.", (Stipulation, p. 5), and which it has considered to be two distinct entities, at least until this argument has appeared.

The coke oven industry generally considers each Battery a distinct entity, and the Secretary has adopted such a distinction in the Standard. (See .1029(f)(3)(i)(a) - use of term "each battery").

Most important, however, is the fact that each Battery is the potential source of emissions, and consequently, each Battery must be equipped with the specified engineering controls and the mandated work practices must be followed on each Battery. (Theoretically, each oven could have been the unit of measuring the extent of emissions and consequently number of violations - but the Secretary has not so determined).

Further, the Review Commission's function under the Act is, to exclusively, adjudicate, not to engage in rule making.

It is concluded that the Secretary's determination to use a coke battery as the appropriate unit for regulation, in light of coke oven industry practice (including this Respondent) is reasonable, will accomplish the purposes of the Act, and is the proper exercise

of his administrative discretion. Nothing in this record warrants overruling, or changing this administrative determination, and this argument by Respondent is found to be unpersuasive.

The last main argument of Respondent concerns the creditibility of two of Complainant's witnesses, (who were also two, longtime coke oven employees at Fairless) Messrs. Offenheiser and Siminitus. In over four pages of its Brief, (Section III, R.p. J-47), Respondent argues that this testimony is unreliable and should not be relied upon.

It is true, that these two men gave some contradictory testimony and, after a close anaylsis of the testimony as well as their demeanor while testifying, coupled with the record of this case in its entirety, it is concluded that these two employees were (and probably still are) angry with Fairless management for its lack of concern for the coke oven employees health and safety.[32/] Because of these inconsistencies, the weight of this testimony is reduced and exclusive reliance thereon has not been made, just as the weight of one of Respondent's witnesses, Mr. Seidenberger, has been reduced, because of his evasive and non-responsive answers, and little reliance placed thereon.

All other arguments put forth by Respondent have been individually considered and analyzed, and it is determined that they are not

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32/ This anger is not completely unjustified. See the section herein concerning managements failure to warn its employees about laundering coke oven soiled clothes at home, i.e., "Penalty" - "Good Faith" section.

persuasive as not being supported by the creditable evidence of this record or the law.

## CONCLUSION

The jurisdiction of the Review Commission in this case is not contested and is established by the pleadings and stipulated facts, pursuant to Sections 3(4)(5) and 10(c) of the Act.[33/]

Based upon the foregoing and pursuant to Sections 10(c) and 12(j) of the Act,[34/] it is hereby

ORDERED:

That the following violations of 29 U.S.C. 654(a)(2), for failure to comply with the identified Sections of the Coke Oven Standard set forth at 29 C.F.R. 1910.1029, are determined to have existed as alleged in the Citations specified below, which Citations and penalties proposed thereon, except as specifically noted, are

AFFIRMED:

1. Serious Citation No. 1 - Items numbered 1 through 13 except Item No. 4, in part.
2. Serious Citation No. 2 - Items numbered 1 through 15 except Item No. 5, in part.
3. Items numbered 4 in Citation No. 1 and 5 in Citation No. 2, so far as they relate to "mechanized standpipe cleaners," are VACATED. The proposed penalty of $1,000 for each of these Items is reduced to $500 for each.

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33/ 29 U.S.C. 652(4)(5) and 659(c).

34/ 29 U.S.C. 659(c) and 661(i).

4. Serious Citation No. 3 - Items numbered 1 through 6 except Item No. 1(c), which is VACATED. The proposed penalty of $1,000 for Item No. 1 is reduced to $500.
The proposed penalty of $1,000 for Item No. 3 is reduced to $500.

5. "Repeat" Citation No. 4, is modified to a "Serious" Citation and the proposed penalty of $1,400 is reduced to $1,000.

6. Nonserious Citation No. 5, Item No. 1. A penalty of $250 is appropriate.

7. A total penalty in the amount of $33,250 is ASSESSED.

William E. Brennan
WILLIAM E. BRENNAN
Adm. Law Judge, OSHRC

Dated: August 24, 1978
Hyattsville, Maryland

# APPENDIX A

## JOINT STIPULATION OF FACTS

A. Procedural History of the Case

1. On October 22, 1976, the Assistant Secretary of Labor for Occupational Safety and Health (hereinafter Assistant Secretary) promulgated a final standard for exposure to coke oven emissions at 29 CFR 1910.1029 (41 FR 46742).

2. This standard was effective January 20, 1977 except as set forth in paragraphs 4, 5 and 6 below.

3. On January 18, 1977, the Assistant Secretary issued corrections to the final coke oven emissions standard (42 FR 3304).

4. These corrections, among other items, included in #81 a change in the effective date for the initial training program from January 20, 1977 to January 27, 1977.

5. On January 18, 1977, the United States Court of Appeals for the Third Circuit issued an interim stay of the following sections of the standard:

a) 29 CFR 1910.1029(e) - exposure monitoring and measuring;

b) 29 CFR 1910.1029(g) - respiratory protection;

c) 29 CFR 1910.1029(h) - protective clothing and equipment;

and

d) 29 CFR 1910.1029(i) - hygiene facilities and practices.

A copy of the interim order has been submitted by the respondent pursuant to Judge Brennan's request at the February 21, 1978 pre-hearing conference.

6. On February 18, 1977, those portions of the standard that had been stayed became effective when the United States Court of Appeals for the Third Circuit vacated the interim order and denied motions for a permanent stay pending judicial review. A copy of the Court's order has been submitted by respondent pursuant to Judge Brennan's request at the February 21, 1978 prehearing conference.

7. On March 17, 1976, OSHA received an employee complaint requesting an inspection of respondent's coke oven batteries. A copy of the complaint is attached as Exhibit A-1. NOT ATTACHED

8. On March 22, 1977, representatives of the Occupational Safety and Health Administration (hereinafter OSHA) initiated an inspection at respondent's Fairless Works.

9. The opening conference, and walkaround participation by employer and employee representatives, complied with the provisions of the Occupational safety and Health Act (hereinafter the Act), applicable regulations and relevant provisions of the OSHA Field Operations Manual.

10. The on-site inspection continued from March 22, 1977 through April 4, 1977.

11. On September 12, 1977, a closing conference was held in accordance with applicable regulations and relevant provisions of the Field Operations Manual.

12. As a result of the inspection, on September 14, 1977, complainant issued five (5) citations and a Notification of Penaly assesing a total penalty of $35,700.

13. On October 3, 1977, complainant amended certain items of the citations.

14. On October 5, 1977, resondent filed a timely notice of contest to all citations, abatement dates and proposed penalties except, Respondent did not contest Items 2 through 5 of citation 5.

15. On October 20, 1977, the authorized employee representatives served a Notice of Election of Party Status on respondent and complainant.

16. Complainant served his complaint in a timely fashion on November 21, 1977.

17. Respondent's answer was timely served on December 5, 1977.

18. On December 5, 1977, respondent also served a Motion for an indefinite postponement of the trial date which was objected to by the authorized employee representatives on December 14, 1977 and by the complainant on December 20, 1977.

19. Respondent served a response to these objections on December 30, 1977.

20. Respondent's motion for indefinite postponement was denied on January 23, 1978 and a pre-hearing conference scheduled for February 21, 1978.

21. The authorized employee representatives filed a motion to expedite this proceeding pursuant to Commission Rule 101 on January 27, 1978.

22. Commissioner Cleary granted the employee representatives' motion by order dated February 9, 1978.

23. On March 28, 1978, the United States Court of Appeals for the Third Circuit affirmed the coke oven standard in all aspects relevant to this proceeding.

24. The hearing in this case is scheduled to begin on May 15, 1978.

B. Description of Respondent's Coke Oven Batteries

1. Respondent, United States Steel Corporation, is engaged in the production of steel and steel products.

2. Respondent is an employer engaged in a business affecting commerce as defined by Section 3(5) of the Act.

3. Respondent's home office is at 600 Grant Street, Pittsburgh, Pennsylvania.

4. Respondent maintains a steel manufacturing facility at Fairless Hills, Pennsylvania (hereinafter Fairless Works).

5. There are two coke oven batteries at respondent's Fairless Works.

6. Both batteries are Wilputte, combination, double divided, underjet batteries with eighty-seven (87) ovens per battery.

7. The dimensions of the ovens are as follows: each oven is 12 feet 2 inches high, 40 feet 7-5/8 inches long and an average of 18 inches wide.

8. Both batteries were built in 1952. Battery No. 1 was put into service in 1952 and Battery No. 2 was put into service in 1953.

9. Approximately 16 tons of coal is introduced into the oven per charge allowing for a calculated coal line of eleven feet, 2 inches.

10. The coke was heated to an average temperature of 2000° Fahrenheit and the average coking time was 16-1/2 hours at the time of the inspection.

11. Eighty-one (81) ovens were normally pushed each turn at the time of the inspection.

12. The following is a description of battery equipment:

a) Both batteries have double collector mains and three charging holes;

b) The larry car for Battery #1 is a turntable design built by Wilputte in 1952. Between August 23, 1976 and October 18, 1976, the Larry Car for Battery #1 was modified to include: (1) New drop sleeves, (2) New volumetric controls; (3) a new drive in the central turntable.

c) The larry car for Battery #2 is a turntable design built by Willputte in 1952.

d) The pusher machine for Battery #1 was built in 1952 by Wilputte;

e) The pusher machine for Battery #2 was built in 1952 by Wilputte;

f) The pusher and coke side door machines for Battery #1 were built in 1952 by Wilputte;

g) The pusher and coke side door machines for Battery #2 were built in 1952 by Wilputte;

h) The quencher car serving both batteries was built in 1952 by Wilputte.

i) There were no significant modifications to the equipment listed in subparagraphs (c) through (h) of this paragraph between 1952 and the time of the inspection.

CITATION 1 - Serious

| Violation | Abatement Date | Penalty |
|---|---|---|
| 1<br>29 CFR 1910.1029(c): Employees were exposed to coke oven emissions at concentrations greater than 150 micrograms per cubic meter of air for an average 8-hour period: | 3/15/79 | $1,000 |

a) Coke oven battery #1, Larry Car operator

b) Coke oven battery #1, Lidmen

c) Coke oven battery #1, coke side jamb cleaner

d) Coke oven battery #1, coke side door machine operator

e) Coke oven battery #1, push side door machine operator

Stipulation

1. At the time of the inspection, the following employees were exposed to coke oven emissions without regard to the use of respirators at concentrations greater than 150 micrograms per cubic meter of air (150 ug/m$^3$) averaged over 8-hour periods: TR 64, 65.

a) Larry Car Operators - Battery #1

(i) N. Eckert
(ii) T. Dredge

b) Lidmen - Battery #1

(i) Caldwell
(ii) R. Dylienski
(iii) K. Fillman

c) Coke side jamb cleaner - Battery #1

(i) D. Michael

d) Coke side door machine operator - Battery #1

(i) J. Babij

e) Push side door machine operator - Battery #1

(i) J. Galambos

| Violation | Abatement date | Penalty |
|---|---|---|
| 2<br>29 CFR 1910.1029(f)(2)(i)(a): The existing coke oven battery was not equipped and operated with one of the methods of charging outlined in subparagraphs (1) Stage Charging, (2) Sequential charging, (3) Pipeline charging, of this paragraph to control coke oven emissions during charging operations:<br><br>a) Coke oven battery #1, charging operations where employees were exposed to coke oven emissions | 10/15/77 | $1,000 |

Stipulation

1. Stage charging as described in 29 CFR 1910.1029(f)(3)(i)(b) was the charging procedure respondent considered applicable to Battery #1.

2. Stage charging as defined by the standard was not being performed on Battery #1 at the time of the OSHA inspection in that:

a) The center hopper contained more coal than either of the outer hoppers thereby increasing the likelihood of blocking the gas passage to the offtake system.

b) All charging hole lids were open at the same time.

c) All coal hoppers were discharged at the same time.

d) The drop sleeves were not operated individually.

3. Respondent's job breakdown form LC-8 for stage charging dated January 14, 1977 and attached as Exhibit C-1 contains a description of stage charging.

4. Respondent's compliance program at the time of the inspection stated that stage charging would be in operation by the third quarter of 1977.

5. The abatement date in the citation is reasonable in that respondent's compliance plan submitted to the Commission and the parties on January 4, 1978 states that stage charging was in effect on Battery #1 as of July 2, 1977.

| Violation | Abatement date | Penalty |
|---|---|---|
| 3<br>29 CFR 1910.1029(f)(2)(i)(c): The aspiration system was not designed and operated to provide sufficient negative pressure and flow volume to effectively move the gases evolved during charging into the collector mains, including sufficient steam pressure, and steam jets of sufficient diameter:<br><br>a) Coke oven #1, steam aspiration system, where employees were exposed to coke oven emissions | 3/15/78 | $1,000 |

Stipulation

1. At the time of the OSHA inspection, the steam aspiration system was inadequate to provide sufficient negative pressure and flow volume to move the evolved gases into the collector mains on Battery #1.

2. The steam jets or nozzles were 5/8 inch in diameter at the time of the OSHA inspection.

3. This nozzle size was inadequate to provide sufficient negative pressure and flow volume to move the evolved gases into the collector main on Battery #1.

4. Respondent's compliance plan submitted in connection with the motion for postponement of the trial date states that the aspiration system was increased during the repairs completed June 30, 1977.

5. The current nozzle size is 3/4 inch in diameter and the current pressure in the steam aspiration system is 70 to 75 p.s.i. measured at the header.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 4. 29 CFR 1910.1029(f)(2)(i)(g): The existing coke oven battery was not equipped and operated with mechanized gooseneck and standpipe cleaners to control coke oven emissions during charging operations:<br><br>a) Coke oven battery #1, where employees were exposed to coke oven emissions | 9/15/78 | $1,000 |

Stipulation

1. Battery #1 was not equipped with mechanized gooseneck cleaners.

2. In the absence of these cleaners, the larry car operators manually cleaned the goosenecks with metal bars.

3. Respondent has installed mechanized gooseneck cleaners at some coke oven batteries at Respondent's Clairton, Gary and Fairfield Steel Works.

4. It is technically feasible to install mechanized gooseneck cleaners on Battery #1 at Fairless Works.

5. Respondent's compliance program at the time of the inspection contains an installation date for mechanized gooseneck cleaners of the last quarter of 1979.

| Violation | Abatement date | Penalty |
|---|---|---|
| 5<br>29 CFR 1910.1029(f)(2)(ii)(c): An adequate number of spare doors was not available for replacement purposes to control coke oven emissions during coking operations:<br><br>a) Coke oven battery #1, push side and coke side doors, where employees were exposed to coke oven emissions | 10/15/77 | $1,000 |

Stipulation

1. Battery #1 has 87 ovens with a total of 174 doors.

2. At the time of the inspection, all doors were Wilputte doors with spring loaded latches.

3. Of the 174 doors, 28 were noted as leaking coke oven emissions at the time of the inspection. (See Exhibit C-2.)

4. A list of the doors that were leaking was submitted to respondent on September 22, 1977.

5. A coke oven door consists of among other parts, a door frame, a door plug and sealing edges.

6. At the time of the inspection, respondent had around 15 spare door frames available for both batteries.

7. At the time of the inspection, it took 16 hours to make a door frame into a spare door.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 6<br>29 CFR 1910.1029(f)(2)(ii)(d); The existing coke oven battery was not equipped and operated with chuck door gaskets to control chuck door emissions until such door could be repaired or replaced:<br><br>a) Coke oven battery #1, chuck door -- Battery #1 employees were exposed to coke oven emissions | 9/22/77 | $1,000 |

Stipulation

1. At the time of the inspection, certain chuck doors were leaking on Battery #1.

2. Respondent's compliance program at the time of the inspection stated that chuck door gaskets were in service.

3. Respondent was not using chuck door gaskets at the time of the inspection.

4. Chuck door gaskets were used on coke oven battery #1 beginning between July 14, 1977 and September 15, 1977.

5. The abatement date set forth in this Citation is reasonable.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 7<br>29 CFR 1910.1029(f)(3)(i)(a)(2): Inspection and cleaning of goosenecks and standpipes was not conducted prior to each charge to a specified minimum diameter sufficient to effectively remove the evolved gases from the oven to the collector mains to control coke oven emissions during the charging operations:<br><br>a) Coke oven battery #1, push side and coke side goosenecks and standpipes, Battery #1 employees were exposed to coke oven emissions | 9/15/78 | $1,000 |

Stipulation

A. Standpipes on Coke Oven Battery #1

1. The inside diameter of a standpipe on Battery #1 is 13 inches.

2. The respondent has not specified a minimum diameter opening to be maintained for standpipes to effectively remove the gases from the ovens to the collector mains.

3. Respondent has not supplied employees with the necessary tools to measure the effectiveness of cleaning standpipes to a minimum diameter.

4. Respondent's Job Breakdown form LC-4 dated May 6, 1960 and revised February 14, 1977 states that prior to each charge, the larry car operator is to "scrape or chop carbon, tar or other buildup from underside of standpipe cap" and to

repeat that step on standpipes.

5. At the time of the OSHA inspection, employees were not cleaning each standpipe prior to each charge.

6. At the time of the inspection during each shift, approximately 40 ovens were charged. Each oven has two standpipes.

B. Goosenecks on Coke Oven Battery #1

1. The inside diameter of a gooseneck is 13 inches.

2. The respondent has not specified a minimum diameter opening to be maintained for goosenecks to effectively remove the gases from the ovens to the collector mains.

3. Respondent has not supplied employees with the necessary tools to measure the effectiveness of cleaning goosenecks to a minimum diameter.

4. Respondent's Job Breakdown form L-8 dated January 14, 1977 and revised February 14, 1977 for stage charging on ovens states that the lidman is to inspect goosenecks to insure they are clean.

5. At the time of the OSHA inspection, employees were not cleaning each gooseneck prior to each charge.

6. At the time of the inspection during each shift, approximately 40 ovens were charged. Each oven has two goosenecks.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 8<br>29 CFR 1910.1029(f)(3)(ii)(d): The existing coke oven battery was not operated pursuant to an inspection system and corrective action program to control door emmissions to the maximum extent possible for the control of coke oven emissions during coking:<br><br>a) Coke Oven battery #1, push side and coke side oven doors -- Battery #1 employees were exposed to coke oven emissions | 10/15/77 | $1,000 |

Stipulation

1. Exhibit C-2 is a true and correct copy of the list of doors noted to be leaking during the course of the inspection and a description of the nature and extent of the leaks.

2. On 12/7/77 respondent revised its compliance program to incorporate Maintenance Procedure No. 1 which included a door emission inspection and corrective action program.

3. The abatement date in the citation is reasonable.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 9<br>29 CFR 1910.1029(f)(3)(iii)(a): The work practice of shoveling spilled coke into a heated oven was not precluded in the control of coke oven emissions:<br><br>a) Coke oven battery #1, coke side where employees were exposed to coke oven emissions | 9/22/77 | $1,000 |

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9 (instance description modified)

a) Coke oven battery #1, (or #2) push side, where employees were exposed to coke oven emissions -- as amended 10/3/77 and parenthesis deleted by paragraph VIII of the complaint at page 5

Stipulation

1. Respondent's Job Breakdown form DMOPS-2 dated August 6, 1976 and revised February 14, 1977 states that coke and coal spillage is to be shovelled onto the pusher pad.

2. The abatement date in the citation is reasonable.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 10<br>29 CFR 1910.1029(f)(3)(iv)(c): Regular inspection of the damper system, aspiration system and collector main for cracks or leakage, and prompt implementation of the necessary repairs was not conducted:<br><br>a) Coke Oven battery #1, where employees were exposed to coke oven emissions | 10/15/77 | $1,000 |

Stipulation

1. At the time of the inspection, components of the collector main (i.e., the Corliss valve) were observed to be cracked and leaking coke oven emissions. (Oven B-7 Pusher side)

2. It takes 3 to 4 hours to replace a defective Corliss valve including set-up and clean-up time.

3. On 12/7/77 respondent revised its compliance program to incorporate Maintenance Procedure No. 1 which included maintenance and repair of Corliss valves.

4. The abatement date in the citation is reasonable.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 11<br>29 CFR 1910.1029(f)(3)(iv)(i)(1): Repairs, not instituted and completed for the prevention of miscellaneous fugitive topside emissions as soon as possible:<br><br>a) Coke oven battery #1, where employees were exposed to coke oven emissions | 11/15/77 | $1,000 |

Stipulation

1. On 12/7/77 respondent revised its compliance program to incorporate Maintenance Procedure No. 1 which involved a topside maintenance and repair program.

2. The abatement date in the ciation is reasonable.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 12<br>29 CFR 1910.1029(f)(4)(i): Positive-pressure temperature controlled filtered air was not provided for the cabs of the following equipment:<br><br>a) Quench car<br><br>b) Pusher machine, Coke Oven battery #1<br><br>c) Larry Car, Coke oven battery #1<br><br>d) Push door machine, Coke oven battery #1<br><br>e) Coke door machine, Coke oven battery #1<br><br>Battery #1 employees were exposed to coke oven emissions | 3/15/79 | $1,000 |

Stipulation

1. Quench car

a) The quench car serving batteries #1 and #2 was not equipped with positive-pressure temperature controlled filtered air at the time of the inspection;

b) It is technically feasible to install such a system for the quench car cab;

c) Respondent's compliance program at the time of the inspection contained an anticipated installation date of the 4th quarter of 1978;

2. Pusher machine - battery #1

a) At the time of the inspection, the pusher machine was not equipped with positive-pressure temperature controlled filtered air;

b) It is technically feasible to install such a system for the pusher machine cab;

c) Respondent's compliance program at the time of the inspection contained an anticipated installation date of the 3rd quarter of 1978;

3. Larry Car Battery #1

a) At the time of inspection, the #1 larry car cab was not equipped with positive-pressure temperature controlled filtered air;

b) It is technically feasible to install such a system for the larry car cab;

c) Respondent's compliance program at the time of the inspection contained an anticipated installation date of the 3rd quarter of 1978;

4. Push-side door machine - battery #1

a) The cab of the push-side door machine for battery #1 was not equipped with positive-pressure temperature controlled filtered air at the time of the inspection;

b) It is technically feasible to install such a system for the push-side door machine cab;

c) Respondent's compliance program at the time of the inspection contained an anticipated installation date of the 1st quarter of 1979. After the inspection, Respondent revised this date to the 4th quarter of 1979.

5. Coke side door machine battery #1

a) The cab of the coke side door machine was not equipped with positive-pressure temperature controlled filtered air at the time of the inspection;

b) It is technically feasible to install such a system for the coke side door machine cab;

c) Repsondent's compliance program at the time of the inspection contained an anticipated installation date of the 2nd quarter of 1979. After the inspection, Respondent revised this date to the 4th quarter of 1979.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 13<br>29 CFR 1910.1029(f)(4)(ii): Stand-by pulpits equipped with positive-pressure, temperature controlled filtered air were not provided in the following required locations:<br><br>a) Top side of coke oven battery #1<br><br>b) Coke wharf<br><br>c) Coke screening station -- Battery #1 employees were exposed to coke oven emissions | 3/15/78 | $1,000 |

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13 (instance "c" deleted) -- amended 10/3/77

Stipulation

1. Top side standby pulpit - battery #1

a) There was no standby pulpit on battery #1 with positive-pressure temperature controlled filtered air at the time of the inspection.

b) It is technically feasible to install such a stand-by pulpit;

c) Respondent's compliance program at the time of the inspection contained an anticipated installation date of the 4th quarter of 1977. The equipment has been ordered and Respondent anticipates installation in the 3rd quarter of 1978.

2. Coke wharf

a) At the time of the inspection, there was no positive-pressure temperature controlled filtered air stand-by pulpit at the coke wharf;

b) It is technically feasible to install such a stand-by pulpit;

c) Respondent's compliance program at the time of the inspection contained an anticipated installation date of the 4th quarter of 1977. The equipment has been ordered and Respondent anticipates installation in the 3rd quarter of 1978.

CITATION 2 - Serious

| Violation | Abatement Date | Penalty |
|---|---|---|
| 1<br>29 CFR 1910.1029(c):Employees were exposed to coke oven emissions at concentrations greater than 150 micrograms per cubic meter of air for an average 8-hour period; | 3/15/79 | $1,000 |

a) Coke oven battery #2, Larry car operator

b) Coke oven battery #2, Lidmen

c) Coke oven battery #2, coke side

d) Coke oven battery #2, coke side door machine operator

Stipulation

1. At the time of the inspection, the following employees were exposed to coke oven emissions without regard to the use of respirators at concentrations greater than 150 micrograms per cubic meter of air (150 ug/$m^3$) averaged over 8-hour periods: Tr. 64, 65.

a) Larry Car Operator - Battery #2

(i) S. Niebudek

b) Lidman - Battery #2

(i) R. Dylinski
(ii) K. Fillman
(iii) J. Haravitch

c) Coke side jamb cleaner - Battery #2

(i) J. Cifelli

d) Coke side door machine operator - Battery #2

(i) J. Louis

| Violation | Abatement Date | Penalty |
|---|---|---|
| 2<br>29 CFR 1910.1029(f)(2)(i)(a): The existing coke oven battery was not equipped and operated with one of the methods of charging outlined in subparagraphs (1) Stage charging, (2) Sequential charging, (3) Pipeline charging of this paragraph to control coke oven emissions during charging operations:<br><br>a) Coke Oven battery #2, charging operations where employees were exposed to coke oven emissions | 3/15/78 | $1,000 |

Stipulation

1. Stage charging as described in29 CFR 1910.1029(f)(3)(i)(b) was the charging procedure respondent considered applicable to Battery #2.

2. Stage charging as defined by the standard was not being performed on Battery #2 at the time of the OSHA inspection in that:

a) The center hopper contained more coal than either of the outer hoppers thereby increasing the likelihood of blocking the gas passage to the offtake system.

b) All coal hoppers were discharged at the same time.

3. Respondent's job breakdown form LC-8 dated January 14, 1977, and attached as Exhibit C-1 contains a description of stage charging.

4. Respondent's compliance program at the time of the inspection stated that stage charging would be in operation by the third quarter of 1977.

5. Stage charging has not been implemented as of March 31, 1978.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 3<br>29 CFR 1910.1029(f)(2)(i)(c): The aspiration system was not designed and operated to provide sufficient negative pressure and flow volume to effectively move the gases evolved during charging into the collector mains, including sufficient steam pressure, and steam jets of sufficient diameter:<br><br>a) Coke oven battery #2, where employees were exposed to coke oven emissions | 3/15/78 | $1,000 |

Stipulation

1. At the time of the OSHA inspection, the steam aspiration system was inadequate to provide sufficient negative pressure and flow volume to move the evolved gases into the collector mains on battery #2.

2. The steam jets or nozzles were 5/8 inch in diameter at the time of the OSHA inspection.

3. This nozzle size was inadequate to provide sufficient negative pressure and flow volume to move the evolved gases into the collector main on Battery #2.

4. The current nozzle size is 3/4 inch in diameter and the current pressure in the steam aspiration system is 70 to 75 p.s.i. measured at the header.

5. Respondent's compliance plan, submitted in connection with the motion for postponement of the trial date, states that the aspiration system was increased during the repairs completed October 31, 1977.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 4<br>29 CFR 1910.1029(f)(2)(i)(f): The existing coke oven battery larry car was not equipped and operated with individually operated drop sleeves and slide gates designed and maintained so that the gases were effectively removed from the coke oven into the collector mains to control coke oven emissions during charging operations:<br><br>a) Coke oven battery #2, number 2 larry car where employees were exposed to coke oven emissions | 11/15/77 | $1,000 |

Stipulation

1. The larry car for battery #2 was not equipped with individually operated drop sleeves at the time of the inspection.

2. Respondent's compliance program at the time of the inspection contained an estimated completion date for this item of October 1, 1977.

3. The larry car for Battery #2 has not been equipped with individually operated drop sleeves as of March 31, 1978.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 5<br>29 CFR 1910.1029(f)(2)(i)(g): The existing coke oven battery was not equipped and operated with mechanized gooseneck and standpipe cleaners to control coke oven emissions during charging operations:<br><br>a) Coke oven battery #2, where employees were exposed to coke oven emissions | 9/15/78 | $1,000 |

Stipulation

1. Battery #2 was not equipped with mechanized gooseneck cleaners.

2. In the absence of these cleaners, the larry car operators manually cleaned the goosenecks with metal bars.

3. Respondent has installed gooseneck cleaners at some coke oven batteries at Respondent's Clairton, Gary and Fairfield Works.

4. It is technically feasible to install mechanized gooseneck cleaners on Battery #2 at Fairless Works.

5. Respondent's compliance program at the time of the inspection contains an installation date for mechanized gooseneck cleaners of the last quarter of 1979.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 6<br>29 CFR 1910.1029(f)(2)(ii)(c): An adequate number of spare doors was not available for replacement purposes to control coke oven emissions during coking operations:<br><br>a) Coke oven battery #2, push side and coke side doors, where employees were exposed to coke oven emissions | 10/15/77 | $1,000 |

Stipulation

1. Battery #2 has 87 ovens with a total of 174 doors.

2. At the time of the inspection, all doors were Wilputte doors with spring loaded latches, with the exception of several beam plug doors.

3. Of the 174 doors, 12 were noted as leaking coke oven emissions at the time of the inspection. (See Exhibit C-2).

4. A list of the doors that were leaking was submitted to Respondent on September 22, 1977.

5. A coke oven door consists of among other parts, a door frame, a door plug and sealing edges.

6. At the time of the inspection, Respondent had an approximate total of 15 spare door frames available for both batteries.

7. At the time of the inspection, it took 16 hours to make a door frame into a spare door.

8. In addition, when battery #1 shut down for repairs on April 1, 1977, the good doors from that battery would have been available for battery #2.

9. The abatement date in the citation is reasonable.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 7<br>29 CFR 1910.1029(f)(2)(ii)(d): The existing coke oven battery was not equipped and operated with chuck door gaskets to control chuck door emissions until such door could be repaired or replaced:<br><br>a) Coke oven battery #2, chuck doors, battery #2 employees were exposed to coke oven emissions | 9/22/77 | $1,000 |

Stipulation

1. At the time of the inspection, certain chuck doors were leaking on Battery #2.

2. Respondent's compliance program at the time of the inspection stated that chuck door gaskets were in service.

3. Respondent was not using chuck door gaskets at the time of inspection.

4. Chuck door gaskets were used on coke oven battery #2 beginning between July 14, 1977 and September 14, 1977.

5. The abatement date set forth in the citation is reasonable.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 8<br>29 CFR 1910.1029(f)(3)(i)(a)(2): Inspection and cleaning of goosenecks and standpipes were not conducted prior to each charge to a specified minimum diameter sufficient to effectively remove the evolved gases from the oven to the collector mains to control coke oven emissions during the charging operations:<br><br>a) Coke oven battery #2, push side and coke side goosenecks and standpipes, Battery #2 employees were exposed to coke oven emissions | 9/15/78 | $1,000 |

Stipulation

A. Standpipes on Coke Oven Battery #2

1. The inside diameter of a standpipe on battery #2 is 13 inches.

2. The respondent has not specified a minimum diameter opening to be mainatined to effectively remove the gases from the ovens to the collector mains. See Respondent's Job Breakdown L-4 and L-8 for Lidman dated October 25, 1974 and revised February 14, 1977.

3. Respondent has not supplied employees with the necessary tools to measure the effectiveness of cleaning to a minimum diameter.

4. Respondent's Job Breakdown form LC-4 dated May 6, 1960 and revised February 14, 1977 states that prior to each

charge the larry car operator is to "scrape or chop carbon, tar or other buildup from underside cap" and to repeat that step on standpipes.

5. At the time of the OSHA inspection, employees were not cleaning each standpipe prior to each charge.

6. At the time of the inspection, during each shift, approximately 40 (check out) ovens were charged. Each oven has two standpipes.

B. Goosenecks on Coke Oven Battery #2

1. The inside diameter of a gooseneck on battery #2 is 13 inches.

2. The respondent has not specified a minimum diameter opening to be maintained for goosenecks to effectively remove the gases from the ovens to the collector mains.

3. Respondent has not supplied employees with the necessary tools to measure the efffectiveness of cleaning goosenecks to a minimum diameter

4. Respondent's Job Breakdown for L-8 dated January 14, 1977 and revised February 14, 1977 for stage charging on ovens states that the lidman is to inspect goosenecks to insure they are clean.

5. At the time of the OSHA inspection, employees were

not cleaning each standpipe prior to each charge.

6. At the time of the inspection, during each shift, approximately 40 ovens were charged. Each oven has two goosenecks.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 9. 29 CFR 1910.1029(f)(3)(ii)(d): The existing coke oven battery was not operated pursuant to an inspection system and corrective action program to control door emissions to the maximum extent possible for the control of coke oven emissions during coking: | 10/15/77 | $1,000 |
| a) Coke oven battery #2, push side doors, battery #2 employees were exposed to coke oven emissions | | |

Stipulation

1. Exhibit C-2 is a true and correct copy of the list of doors on battery #2 noted to be leaking during the course of the inspection and a description of the nature and extent of the leaks.

2. On 12/8/77, respondent revised its compliance program to incorporate Maintenance Procedure No. 1 which included a door emission inspection and corrective action program.

3. The abatement date in the citation is reasonable.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 10<br>29 CFR 1910.1029(f)(3)(iii)(a): The work practice of shoveling spilled coke into a heated oven was not precluded in the control of coke oven emissions:<br><br>a) Coke oven battery #2, coke side and push side, Battery #2 employees were exposed to coke oven emissions | 9/22/77 | $1,000 |

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10 (instance description modified)

a) Coke oven battery #1, (or #2) push side, where employees were exposed to coke oven emissions -- as amended 10/3/77 and paragraph VIII of the complaint at page 5 amended it to read:

a) Coke oven battery #2, push side, where employees were exposed to coke oven emissions

Stipulation

1. Respondent's Job Breakdown form DMOPS-2 dated August 6, 1976 and revised February 14, 1977, states that coke and coal spillage is to be shovelled onto the pusher pad.

2. The abatement date in the citation is reasonable.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 11<br>29 CFR 1910.1029(f)(3)(iv)(a): Regular inspection of all controls, including goosenecks, standpipes, standpipe caps, charging hole lids, and castings, jumper pipes and air seals for cracks, misalignment or other defects and prompt implementation of the necessary repairs was not conducted as soon as possible:<br><br>a) Coke oven battery #2, where employees were exposed to coke oven emissions. | 11/15/77 | $1,000 |

Stipulation

1. On 12/7/77, respondent revised its compliance program to incorporate Maintenance Procedure No. 1 which includes a procedure for inspection and implementation of repairs.

2. The abatement date in the citation is reasonable.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 12<br>29 CFR 1910.1029(f)(3)(iv)(c): Regular inspection of the damper system, aspiration system and collector main for cracks or leakage, and prompt implementation of the necessary repairs was not conducted:<br><br>a) Coke oven battery #2, where employees were exposed to coke oven emissions | 10/15/77 | $1,000 |

Stipulation

1. It takes three (3) to four (4) hours to replace a defective Corliss valve including set-up and clean-up time.

2. On 12/7/77, respondent revised its compliance program to incorporate Maintenance Procedure No. 1 which included maintenance and repair of Corliss valves.

3. The abatement date in the citation is reasonable.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 13a<br>29 CFR 1910.1029(f)(3)(iv)(e): The existing coke oven battery was not operated in accordance with a detailed written procedure of maintenance and repair established and implemented to prevent miscellaneous fugitive topside emissions for the effective control of coke oven emissions:<br><br>a) Coke oven battery #2, where employees were exposed to coke oven emissions | 9/22/77 | $1,000 |

Stipulation

1. On 12/7/77, respondent revised its compliance program to incorporate Maintenance Procedure No. 1 which included a topside maintenance and repair procedure.

2. The abatement date in the citation is reasonable.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 13b<br>29 CFR 1910.1029(f)(3)(iv)(i)(l): Repairs, including temporary repair measures, were not instituted and completed for the prevention of miscellaneous fugitive topside emissions as soon as possible:<br><br>a) Coke oven battery #2, where employees were exposed to coke oven emissions | 11/15/77 | |

**Stipulaton**

No stipulation as to this item.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 14<br>29 CFR 1910.1029(f)(4)(i): Positive-pressure temperature controlled filtered air was not provided for the cabs of the following equipment: | 3/15/79 | $1,000 |

a) Pusher machine, coke oven battery #2

b) Larry car, coke oven battery #2

c) Push door machine, coke oven battery #2

d) Coke door machine, coke oven battery #2
Battery #2 employees were exposed to coke oven emissions

Stipulation

1. Pusher machine - battery #2.

a) At the time of the inspection, the pusher machine was not equipped with positive-pressure temperature controlled filtered air.

b) It is technically feasible to install such a system for the pusher machine cab.

c) Respondent's compliance program at the time of the inspection contained an anticipated installation date of the 2nd quarter of 1978.

2. Larry car - battery #2.

a) At the time of inspection, the #2 larry car cab was not equipped with positive-pressure temperature controlled filtered air.

b) It is technically feasible to install such a system for the larry car cab.

c) Respondent's compliance program at the time of the inspection contained an anticipated installation date of the 3rd quarter of 1978.

3. Push-side door machine - battery #2.

a) The cab of the push-side door machine for battery #2 was not equipped with positive-pressure temperature controlled filtered air at the time of the inspection.

b) It is technically feasible to install such a system for the push-side door machine cab.

c) Respondent's compliance program at the time of the inspection contained an anticipated installation date of the 1st quarter of 1979. After the inspection, Respondent revised this date to the 4th quarter of 1979.

4. Coke side door machine - battery #2.

a) The cab of the coke side door machine was not equipped with positive-pressure temperature controlled filtered air at the time of the inspection.

b) It is technically feasible to install such a

system for the coke side door machine cab.

c) Respondent's compliance program at the time of the inspection contained an anticipated installation date of the 2nd quarter of 1979. After the inspection, Respondent revised this date to the 4th quarter of 1979.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 15<br>29 CFR 1910.1029(f)(4)(ii): Stand-by pulpits equipped with positive-pressure, temperature controlled filtered air were not provided in the following location:<br><br>a) Topside of coke oven battery #2, where employees were exposed to coke oven emissions. | 3/15/78 | $1,000 |

Stipulation

1. Top-side stand-by pulpit battery #2.

a) There was no stand-by pulpit on battery #2 with positive pressure temperature controlled filtered air at the time of the inspection.

b) It is technically feasible to install such a stand-by pulpit.

c) Respondent's compliance program at the time of the inspection contained an anticipated installation date of the 4th quarter of 1977. The equipment has been ordered and Respondent anticipates installation in the 3rd quarter of 1978.

CITATION 3 - SERIOUS

| Violation | Abatement Date | Penalty |
|---|---|---|
| 1a<br>29 CFR 1910.134(f)(2)(i) as adopted by 1910.1029(g)(3): All respirators were not inspected routinely before and after each use:<br><br>a) Coke oven batteries #1 and #2 | 9/22/77 | $1,000 |

Stipulation

No stipulation as to Item 1a of Citation No. 3.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 1b<br>29 CFR 1910.134(f)(3) as adopted by 1910.1029(g)(3): Routinely used respirators were not collected, cleaned, and disinfected as frequently as necessary to insure that proper protection was provided for the wearer:<br><br>a) Coke oven batteries #1 and #2 -- no provisions were made for collection and no cleaning and disinfection agents were provided | 9/22/77 | |

Stipulation

1. Each employee was responsible for cleaning his or her individual respirator.

2. As a result, Respondent made no provision for collecting the respirators at the time of the inspection.

3. Calgon Lotion soap was available to employees.

4. The abatement date in the citation is reasonable.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 1c<br>29 CFR 1910.1029(g)(2)(i): In the vicinity of visible emissions, where respirators were required under this section, the employer did not select and assure the use of the appropriate respirator from Table 1:<br><br>a) Coke side of batteries #1 and #2 -- use by door machine operator not assured<br><br>b) Topside of Battery #1 -- use by larry car operator not assured<br><br>c) Topside of batteries #1 and #2 -- appropriate respirator for airborne concentrations of coke oven emissions greater than 1500 micrograms per cubic meter not selected for Lidman | 9/22/77 | |

Stipulation

1. The parties agree to the deletion of subsection c) of Item 1c.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 2<br>29 CFR 1910.1029(h)(2)(vi); Persons who cleaned or laundered protective clothing required by this section were not informed of the potentially harmful effects of exposure to coke oven emissions:<br><br>a) Families of employees on coke oven batteries #1 and #2<br><br>b) Employees of Arrow Uniform Services Division of Work Wear Corporation | 9/22/77 | $1,000 |

Stipulation

1. During the period from January 20, 1977 to April 2, 1977 some of the employees took their clothing home or to other locations off plant property to launder it.

2. On April 3, 1977, pursuant to contract with Respondent, Arrow Uniform Service, Division of Work-Wear Division laundered coke oven employees' "protective clothing".

3. In the purchase order attached hereto, Respondent stated the following concerning the potentially harmful effects of exposure to coke oven emissions:

STANDING ORDER

FOR LAUNDERING AND REPAIR OF SUCH QUANTITIES OF

USS SPEC FLAME RESISTANT PANTS
USS SPEC FLAME RESISTANT JACKETS

SEW ALL HOLES AND PATCH, IF NECESSARY, FROM 1-20-77 TO 2-28-78 OR UNTIL NOTIFICATION OF CANCELLATION BY UNITED STATES STEEL CORP PRIOR TO 2-28-78.

ALL PURCHASES TO BE BILLED AND ITEMIZED INCLUDING THE RELEASE NUMBERS ON THE INVOICE IN TRIPLICATE, ON THE 25TH OF EACH MONTH.

"VENDOR, AS AN INDEPENDENT CONTRACTOR, SHALL PROVIDE ALL SUPERVISION, LABOR, TOOLS, EQUIP., MATERIALS AND SUPPLIES, AND DO AND PERFORM ALL WORK AND/OR SERVICES NECESSARY FOR THE INPLANT PICKUP, HANDLING, LAUNDERING, REPAIR AND RETURN OF PROTECTIVE CLOTHING USED BY PURCHASER'S EMPLOYEES AS BELOW PROVIDED."

THIS ORDER IS NOTIFICATION TO VENDOR THAT THE PROTECTIVE CLOTHING TO BE LAUNDERED HAS BEEN USED IN REGULATED AREAS OF U.S. STEEL'S COKE OVEN OPERATIONS AND IS DESIGNATED CONTAMINATED FROM EXPOSURE TO COKE OVEN EMISSIONS AND MAY CAUSE POTENTIALLY HARMFUL EFFECTS SUCH AS DESCRIBED IN THE OSHA STANDARD COVERING COKE OVEN EMISSIONS (29 CFR #1910.1029), EFFECTIVE JANUARY 20, 1977.

EACH EMPLOYEE'S PROTECTIVE CLOTHING SHALL BE REMOVED AND CLEANED NO LESS FREQUENTLY THAN ONCE WEEKLY. USED CLOTHING FOR PICKUP AND LAUNDERING WILL BE CONTAINED IN SEPARATE CLOSED CONTAINERS SUCH AS SEALED PLASTIC BAGS. ALL PRECAUTIONARY AND IDENTIFYING MARKS AND LABELS ON SUCH CLOTHING AND CONTAINERS RESPECTING EMPLOYEE NAME, HANDLING AND EXPOSURE

OF SUCH CLOTHING TO COKE OVEN EMISSIONS SHALL BE RETAINED. VENDOR SHALL BE SOLELY RESPONSIBLE FOR THE PROPER CARE, HANDLING AND LAUNDERING OF SUCH PROTECTIVE CLOTHING AND RETURN OF THE SAME TO USS IN FULL COMPLIANCE WITH ALL CONDITIONS HEREOF AND LAWS AND REGULATIONS APPLICABLE THERETO.

VENDOR SHALL ALSO GIVE ITS EMPLOYEES NOTICE OF THE NATURE OF THE EXPOSURE OF THE CLOTHING COVERED BY THIS ORDER.

ALL PERMANENT FLAME-RESISTANT CLOTHING SHALL BE CLEANED IN A MANNER SO THAT FLAME-RESISTANT PROPERTIES ARE MAINTAINED AND NECESSARY REPAIRS MADE IN ORDER TO INSURE EFFECTIVENESS OF SUCH GARMENT. ALL PANTS AND JACKETS WILL BE IDENTIFIED WITH EMPLOYEE NAME.

| Violation | Abatement Date | Penal' 7 |
|---|---|---|
| 3<br>29 CFR 1910.1029(i)(3): Lunchroom facilities which the employer provided did not have a temperature controlled, positive pressure, filtered air supply:<br><br>a) Old "lunchroom" located at bench level between coke oven batteries #1 and #2 | 10/15/77 | $1,000 |

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3 (Abatement date modified) as amended 10/3/77 — 3/1/78

Stipulation

1. The "Old" lunchroom was located in the regulated area between batteries #1 and #2 at the bench level.

2. The New lunchroom which replaced the old lunch room on May 20, 1977 is located in the regulated area between batteries #1 and #2 at the bench level.

3. The Old lunchroom did not have postive-pressure, temperature controlled filterd air at the time of the inspection.

4. It is technically feasible to install such a system for the New lunchroom

5. Respondent's compliance program at the time of the inspection contained an anticipated installation date of the 3rd quarter of 1977. Respondent has revised its anticipated installation date to the 3rd quarter of 1978.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 4<br>29 CFR 1910.1029(i)(4)(i): Employees working in the regulated area did not wash their hands and face prior to eating:<br><br>a) Employees on coke oven batteries #1 and #2 | 9/22/77 | $1,000 |

Stipulation

1. Facilities for washing are available in the lunchroom and in two lockerooms and two lavatories.

2. Respondent's training Program dated 1/7/77, revised 1/14/77, on page 11 states the following:

Slide 38
-Wash hands & Face-

There is one further point that must be emphasized about eating or drinking anything except water. After being in a regulated area,[38] the regutions require washing hands and face before eating or drinking anything or using any tobacco product or chewing gum. Washing facilities in areas in or near lunchrooms, change rooms, shower rooms, etc. must be used to wash hands and face before eating or drinking anything except drinking water.

Another thing to remember - in order to avoid skin irritation, you should wash your face and respirator facepiece as required.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 5<br>29 CFR 1910.1029(i)(5)(i): The employer did not assure that in a regulated area food and beverages were not present or consumed or that smoking products were not present or used:<br><br>a) Old substandard "lunchroom" located at bench level between coke oven batteries #1 and #2 -- food present and consumed and smoking products present and used<br><br>b) Topside of coke oven batteries #1 and #2 -- smoking products present and used | 9/22/77 | $1,000 |

Stipulation

1. Employees were observed eating and smoking in the "old" lunchroom which is in the regulated area.

2. The "Old" lunchroom did not have positive-pressure temperature controlled filtered air.

3. Respondent's Training Program dated 1/7/77, revised 1/14/77, on page 10 states the following:

Although drinking water may be consumed in regulated areas,[36] the regulations prohibit employees from consuming any food or beverage except in a lunchroom, change room or shower room. The regulations also prohibit employees from taking any consummable item -- food or beverage -- into a

SLIDE 36
-No food, beverages, etc.

regulated area -- and this prohibition included chewing gum and tobacco products -- smoking tobacco, chewing tobacco and snuff. This may be a hard pill for long-time tobacco users to swallow, but these are government regulations and they must be enforced.

Unfortunately, the regulations also prohibit consumption of salt tablets or "pep-jels" in regulated areas. Since these items, in combination with drinking water, are very important due to exposure to heat, they will be readily available in lunchrooms and change rooms for use. To summarize,[37] the only thing that an employee is allowed to consume in a regulated area is drinking water -- nothing else. Because of this, make sure you increase your water intake while in the regulated area and be sure you get salt tablets or "pep-jels" regularly when you are in the lunchroom or change room.

SLIDE 37
-Water only-

| Violation | Abatement Date | Penalty |
|---|---|---|
| 6a<br>29 CFR 1910.1029(k)(1)(ii): The employee information and training program was not provided as of January 27, 1977 for employees who were employed in the regulated areas at the time nor at the time of initial assignment to a regulated area:<br><br>a) Employees on coke oven batteries #1 and #2 | 9/22/77 | $1,000 |

6a (Violation deleted) - as amended 10/3/77

| Violation | Abatement Date | Penalty |
|---|---|---|
| 6b<br>29 CFR 1910.1029(f)(7): Written procedures and schedules required under this paragraph (f) were not incorporated in the information and training program required under paragraph (k) of this section:<br><br>a) Coke oven batteries #1 and #2 | 9/22/77 | $1,000 |

Stipulation

1. Respondent's Training Program dated 1/7/77, revised 1/14/77, on pages 17, 18 and 19, states the following:

(52) Meetings such as this will be held annually starting in January, 1978. During 1977 there will be quarterly meetings. Training will also be provided for all new employees in the regulated areas.

Slide 52 -Information & Training-

If you desire, copies of the standard are available for your review.

(53) Now, we will talk about engineering and work practice controls.

Slide 53 -Title-Engineering Work Practice Controls-

Engineering and work practice controls required under the Standards must be instituted as soon as possible, but not later than January 20, 1980.

(54) Engineering controls to comply with the Standards at Fairless are presented on this chart.

Slide 54 -Chart-Installatior Engineering Control

(55) The Company is required to provide facilities with filtered and tempered air.

SLIDE 55
-Filtered Conditioned Requirements

(56) The filtered air installation dates for Fairless Works are shown on this chart. These dates are tentative.

SLIDE 56
-Chart-Installation for filtered air-

(57) Engineering controls for the charging procedure include:

SLIDE 57
-Engineering Controls Charging-

a. Devise for rapid and continuous flow of coal into oven (stainless steel liners).

b. Individual operated larry car drop sleeves.

c. Air seals on pusher machine leveler bars.

d. Roof carbon cutters.

(58) Engineering controls during coking cycle include:

SLIDE 58
-Engineering Controls Coking-

a. Heat shields on door machine.

(59) There are certain work practice controls to comply with in the Standards. During the charging cycle these controls include:

SLIDE 59
-Work Practice Control Charging-

a. Inspection of roof carbon prior to each charge to provide adequate gas channels to collector mains.

b. Inspection steam aspiration prior to each charge for sufficient pressure and volume to remove gases from oven collector mains.

(60) Work Practice Controls during the coking cycle include the following

Slide 60
-Work Practice Control Coking-

a. Checking oven back pressure controls to maintain uniform pressure conditions in collecting mains.

b. Cleaning of oven and chuck doors and jambs each cycle.

c. An Inspection system and corrective action program to control door emissions.

(61) Work Practice Controls for pushing cycle include:

Slide 61
-Work Practice Control Pushing-

a. Inspect standpipe caps prior to each charge and clean and wet seal.

b. Inspect each lid for carbon removal and wet seal after each charge.

(62) Maintenance Work Practice Controls will include: written procedures and inspections which will maintain equipment in proper condition and replacement will be made where necessary.

Slide 62
-Work Practice Control Maintenance-

That concludes the formal presentation. We will now answer any questions you may have.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 6c<br>29 CFR 1910.1029(k)(1)(iv)(d): The training program did not include a review of all written procedures and schedules required under paragraph (f) of this section:<br><br>a) Written inspection and cleaning procedure for each battery required by (f)(3)(i)(a)(1)-(7)<br><br>b) Written charging procedure for each battery as required by section (f)(3)(i)(b)(1)-(3)<br><br>c) Written procedure for the control of coke oven emissions during coking as required by Section (f)(3)(ii)(a)-(e)<br><br>d) Written procedure for the control of emissions during pushing as required by Section (f)(3)(iii)(b)(1)-(3)<br><br>e) Written procedure of maintenance and repair for coke oven batteries as required by section (f)(3)(iv)(a)-(i)<br><br>f) Written program and schedule to reduce exposures solely by means of engineering and work practice controls as required by section (f)(6)(i) and (ii)(a)-(e) | 9/22/77 | |

**Stipulation**

1. (Refer to training program under 6b).

CITATION 4 - Repeated

| Violation | Abatement Date | Penalty |
|---|---|---|
| 1a<br>29 CFR 1910.134(e)(4) as adopted by 1910.1029(g)(3): Frequent random inspections were not conducted by a qualified individual to assure that respirators were properly selected, used, cleaned and maintained:<br><br>a) Coke oven batteries #1 and #2<br><br>The employer was previously cited for an alleged violation of this standard in citation #2 item #4d issued 12/23/76 (See below) | 9/22/77 | $1,400 |
| 4d<br>29 CFR 1910.134(e)(4): Frequent random inspections were not conducted by a qualified individual to assure that respirators were properly selected, used, cleaned and maintained:<br><br>a) Open hearth pits -- bulldozer operators exposed to crystalline silica dust<br><br>b) Open hearth charging floor -- second floor of furnace 5 is exposed to respirable crystalline silica<br><br>c) Open hearth charging floor -- third helper of furnace 3 is exposed to respirable crystalline silica | 1/7/77 | |

Stipulation

1. Respondent was cited for a violation of 29 CFR 1910. 134(e)(4) on December 23, 1976.

2. Respondent did not contest this citation and it is a final order of the Commission.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 1b<br>29 CFR 1910.134(e)(5)(i) as adopted by 1910.1029(g)(3): Every respirator wearer did not receive fitting instructions including demonstrations and practice in how the respirator should be worn, how to adjust it, and how to determine if it fits properly:<br><br>a) Employees on coke oven batteries #1 and #2<br><br>The employer was previously cited for an alleged violation of this standard in citation #2 item 4e issued 12/23/76 (see below). | 9/22/77 | |
| 4e<br>29 CFR 1910.134(e)(5): Training did not provide the individuals with the opportunity to handle the respirator, have it fitted properly, test its face-piece-to-face seal, wear it in normal air for a long familiarity period, and finally wear it in a test atmosphere:<br><br>a) Open hearth pits -- bulldozer operators, respirators were shown not to fit properly when an irritant smoke test was performed | 1/7/77 | |

Stipulation

1. On December 23, 1976, respondent was cited for a violation of 29 CFR 1910.134(e)(5).

2. Respondent did not contest this citation and it became a final order of the Commission.

CITATION 5 - Other

| Violation | Abatement Date | Penalty |
|---|---|---|
| 1<br>29 CFR 1910.141(d)(2)(ii): Lavatories were not provided with hot and cold, or tepid running water:<br><br>a) east side of coke battery lavatory | 10/15/77 | 0 |

Stipulation

1. Respondent has a lavatory facility at the east side of the coke battery.

2. At the time of the inspection, that lavatory only had cold running water, although the lavatory had access to a hot water supply.

| Violation | Abatement Date | Penalty |
|---|---|---|
| 2<br>29 CFR 1910.141(d)(3) as adopted by 1910.1029(i)(2)(ii): Employees who use showers were not provided with individual clean towels:<br><br>a) employees working on coke oven batteries #1 and #2 using battery locker room<br><br>b) employees working on coke oven batteries #1 and #2 using women's locker room<br><br>c) employees working on coke oven batteries #1 and #2 using coke and chemical locker room<br><br>(not contested) | 9/22/77 | $100 |

| Violation | Abatement Date | Penalty |
|---|---|---|
| 3<br>29 CFR 1910.1029(h)(2)(i): Flame resistant jacket, pants, and golves not provided at least weekly in a clean condition:<br><br>a) Coke oven batteries #1 and #2<br><br>(not contested) | 9/22/77 | $100 |

| Violation | Abatement Date | Penalty |
|---|---|---|
| 4<br>29 CFR 1910.1029(m)(2)(ii)(a): A copy of the medical examination results including medical and work histories required under paragraph (j)(2) of this section was not kept by the employer or by the examining physician:<br><br>a) records maintained for employees on coke oven batteries #1 and #2 contained insufficient medical histories including smoking histories and work histories<br><br>(Not contested) | 9/22/77 | $100 |

# APPENDIX B

# 1910.1029—COKE OVEN EMISSIONS

## (a) Scope and application.

This section applies to the control of employee exposure to coke oven emissions, except that this section shall not apply to working conditions with regard to which other Federal agencies exercise statutory authority to prescribe or enforce standards affecting occupational safety and health.

## (b) Definitions

For the purpose of this section: "Authorized person" means any person specifically authorized by the employer whose duties require the person to enter a regulated area, or any person entering such an area as a designated representative of employees for the purpose of exercising the opportunity to observe monitoring and measuring procedures under paragraph (n) of this section.

"Beehive oven" means a coke oven in which the products of carbonization other than coke are not recovered, but are released into the ambient air.

"Coke oven" means a retort in which coke is produced by the destructive distillation or carbonization of coal.

"Coke oven battery" means a structure containing a number of slot-type coke ovens.

"Coke oven emissions" means the benzene-soluble fraction of total particulate matter present during the destructive distillation or carbonization of coal for the production of coke.

"Director" means the Director, National Institute for Occupational Safety and Health, U.S. Department of Health, Education, and Welfare, or his or her designee.

"Emergency" means any occurrence such as, but not limited to, equipment failure which is likely to, or does, result in any massive release of coke oven emissions.

"Existing coke oven battery" means a battery in operation or under construction on January 20, 1977, and which is not a rehabilitated coke oven battery.

"Rehabilitated coke oven battery" means a battery which is rebuilt, overhauled, renovated, or restored such as from the pad up, after January 20, 1977.

"Secretary" means the Secretary of Labor, U.S. Department of Labor, or his or her designee.

"Stage charging" means a procedure by which a predetermined volume of coal in each larry car hopper is introduced into an oven such that no more than two hoppers are discharging simultaneously.

"Sequential charging" means a procedure, usually automatically timed, by which a predetermined volume of coal in each larry car hopper is introduced into an oven such that no more than two hoppers commence or finish discharging simultaneously although, at some point, all hoppers are discharging simultaneously.

"Pipeline charging" means any apparatus used to introduce coal into an oven which uses a pipe or duct permanently mounted onto an oven and through which coal is charged.

"Green push" means coke which when removed from the oven results in emissions due to the presence of unvolatilized coal.

## (c) Permissible exposure limit.

The employer shall assure that no employee in the regulated area is exposed to coke oven emissions at concentrations greater than 150 micrograms per cubic meter of air (150 $\mu g/m^3$), averaged over any 8-hour period.

## (d) Regulated areas.

(1) The employer shall establish regulated areas and shall limit access to them to authorized persons.

(2) The employer shall establish the following as regulated areas:

(i) The coke oven battery including topside and its machinery, pushside and its machinery, coke side and its machinery, and the battery ends; the wharf; and the screening station;

(ii) The beehive oven and its machinery.

**(e) Exposure monitoring and measurement.**

**(1) Monitoring program.**

(i) Each employer who has a place of employment where coke oven emissions are present shall monitor employees employed in the regulated area to measure their exposure to coke oven emissions.

(ii) The employer shall obtain measurements which are representative of each employee's exposure to coke oven emissions over an eight-hour period. All measurements shall determine exposure without regard to the use of respiratory protection.

(iii) The employer shall collect full-shift (for at least seven continuous hours) personal samples, including at least one sample during each shift for each battery and each job classification within the regulated areas including at least the following job classifications:

(a) Lidman;

(b) Tar chaser;

(c) Larry car operator;

(d) Luterman;

(e) Machine operator, coke side;

(f) Benchman, coke side;

(g) Benchman, pusher side;

(h) Heater;

(i) Quenching car operator;

(j) Pusher machine operator;

(k) Screening station operator;

(l) Wharfman;

(m) Oven patcher;

(n) Oven repairman;

(o) Spellman; and

(p) Maintenance personnel.

(iv) The employer shall repeat the monitoring and measurements required by this paragraph (e)(1) at least every three months.

**(2) Redetermination.** Whenever there has been a production, process, or control change which may result in new or additional exposure to coke oven emissions, or whenever the employer has any other reason to suspect an increase in employee exposure, the employer shall repeat the monitoring and measurements required by paragraph (e)(1) of this section for those employees affected by such change or increase.

**(3) Employee notification.**

(i) The employer shall notify each employee in writing of the exposure measurements which represent that employee's exposure within five working days after the receipt of the results of measurements required by paragraphs (e)(1) and (e)(2) of this section.

(ii) Whenever such results indicate that the representative employee exposure exceeds the permissible exposure limit, the employer shall, in such notification, inform each employee of that fact and of the corrective action being taken to reduce exposure to or below the permissible exposure limit.

**(4) Accuracy of measurement.** The employer shall use a method of monitoring and measurement which has an accuracy (with a confidence level of 95%) of not less than plus or minus 35% for concentrations of coke oven emissions greater than or equal to 150 $\mu g/m^3$.

## (f) Methods of compliance.

The employer shall control employee exposure to coke oven emissions by the use of engineering controls, work practices and respiratory protection as follows:

### (1) Priority of compliance methods.

#### (i) Existing coke oven batteries.

(a) The employer shall institute the engineering and work practice controls listed in paragraphs (f)(2), (f)(3) and (f)(4) of this section in existing coke oven batteries at the earliest possible time, but not later than January 20, 1980, except to the extent that the employer can establish that such controls are not feasible. In determining the earliest possible time for institution of engineering and work practice controls, the requirement, effective August 27, 1971, to implement feasible administrative or engineering controls to reduce exposures to coal tar pitch volatiles, shall be considered. Wherever the engineering and work practice controls which can be instituted are not sufficient to reduce employee exposures to or below the permissible exposure limit, the employer shall nonetheless use them to reduce exposures to the lowest level achievable by these controls and shall supplement them by the use of respiratory protection which complies with the requirements of paragraph (g) of this section.

(b) The engineering and work practice controls required under paragraphs (f)(2), (f)(3) and (f)(4) of this section are minimum requirements generally applicable to all existing coke oven batteries. If, after implementing all controls required by paragraphs (f)(2), (f)(3) and (f)(4) of this section, or after January 20, 1980, whichever is sooner, employee exposures still exceed the permissible exposure limit, employers shall research, develop and implement any other engineering and work practice controls necessary to reduce exposure to or below the permissible exposure limit except to the extent that the employer can establish that such controls are not feasible. Wherever the engineering and work practice controls which can be instituted are not sufficient to reduce employee exposures to or below the permissible exposure limit, the employer shall nonetheless use them to reduce exposures to the lowest level achievable by these controls and shall supplement them by the use of respiratory protection which complies with the requirements of paragraph (g) of this section.

#### (ii) New or rehabilitated coke oven batteries.

(a) The employer shall institute the best available engineering and work practice controls on all new or rehabilitated coke oven batteries to reduce and maintain employee exposures at or below the permissible exposure limit, except to the extent that the employer can establish that such controls are not feasible. Wherever the engineering and work practice controls which can be instituted are not sufficient to reduce employee exposures to or below the permissible exposure limit, the employer shall nonetheless use them to reduce exposures to the lowest level achievable by these controls and shall supplement them by the use of respiratory protection which complies with the requirements of paragraph (g) of this section.

(b) If after implementing all the engineering and work practice controls required by paragraph (f)(1)(ii)(a) of this section, employee exposures still exceed the permissible exposure limit, the employer shall research, develop and implement any other engineering and work practice controls necessary to reduce exposure to or below the permissible exposure limit except to the extent that the employer can establish that such controls are not feasible. Wherever the engineering and work practice controls which can be instituted are not sufficient to reduce employee exposures to or below the permissible exposure limit, the employer shall nonetheless use them to reduce exposures to the lowest level achievable by these controls and shall supplement them by the use of respiratory protection which complies with the requirements of paragraph (g) of this section.

**(iii) Beehive ovens.**

(a) The employer shall institute engineering and work practice controls on all beehive ovens at the earliest possible time to reduce and maintain employee exposures at or below the permissible exposure limit, except to the extent that the employer can establish that such controls are not feasible. In determining the earliest possible time for institution of engineering and work practice controls, the requirement, effective August 27, 1971, to implement feasible administrative or engineering controls to reduce exposures to coal tar pitch volatiles, shall be considered. Wherever the engineering and work practice controls which can be instituted are not sufficient to reduce employee exposures to or below the permissible exposure limit, the employer shall nonetheless use them to reduce exposures to the lowest level achievable by these controls and shall supplement them by the use of respiratory protection which complies with the requirements of paragraph (g) of this section.

(b) If, after implementing all engineering and work practice controls required by paragraph (f) (1) (iii) (a) of this section, employee exposures still exceed the permissible exposure limit, the employer shall research, develop, and implement any other engineering and work practice controls necessary to reduce exposures to or below the permissible exposure limit except to the extent that the employer can establish that such controls are not feasible. Wherever the engineering and work practice controls which can be instituted are not sufficient to reduce employee exposures to or below the permissible exposure limit, the employer shall nonetheless use them to reduce exposures to the lowest level achievable by these controls and shall supplement them by the use of respiratory protection which complies with the requirements of paragraph (g) of this section.

**(2) Engineering controls.**

**(i) Charging.** The employer shall equip and operate existing coke oven batteries with all of the following engineering controls to control coke oven emissions during charging operations:

(a) One of the following methods of charging:

(1) Stage charging as described in paragraph (f)(3)(i)(b) of this section; or,

(2) Sequential charging as described in paragraph (f)(3)(i)(b) of this section except that paragraph (f)(3)(i)(b)(3)(iv) of this section does not apply to sequential charging; or

(3) Pipeline charging or other forms of enclosed charging in accordance with paragraph (f)(2)(i) of this section, except that paragraphs (f)(2)(i)(b), (d), (e), (f) and (h) of this section do not apply.

(b) Drafting from two or more points in the oven being charged, through the use of double collector mains, or a fixed or moveable jumper pipe system to another oven, to effectively remove the gases from the oven to the collector mains;

(c) Aspiration systems designed and operated to provide sufficient negative pressure and flow volume to effectively move the gases evolved during charging into the collector mains, including sufficient steam pressure, and steam jets of sufficient diameter;

(d) Mechanical volumetric controls on each larry car hopper to provide the proper amount of coal to be charged through each charging hole so that the tunnel head will be sufficient to permit the gases to move from the oven into the collector mains;

(e) Devices to facilitate the rapid and continuous flow of coal into the oven being charged, such as stainless steel liners, coal vibrators or pneumatic shells;

(f) Individually operated larry car drop sleeves and slide gates designed and maintained so that the gases are effectively removed from the oven into the collector mains;

(g) Mechanized gooseneck and standpipe cleaners;

(h) Air seals on the pusher machine leveler bars to control air infiltration during charging; and

(i) Roof carbon cutters or a compressed air system or both on the pusher machine rams to remove roof carbon.

**(ii) Coking.** The employer shall equip and operate existing coke oven batteries with all of the following engineering controls to control coke oven emissions during coking operations:

(a) A pressure control system on each battery to obtain uniform collector main pressure;

(b) Ready access to door repair facilities capable of prompt and efficient repair of doors, door sealing edges and all door parts;

(c) An adequate number of spare doors available for replacement purposes;

(d) Chuck door gaskets to control chuck door emissions until such door is repaired, or replaced; and

(e) Heat shields on door machines.

**(3) Work practice controls.**

**(i) Charging.** The employer shall operate existing coke oven batteries with all of the following work practices to control coke oven emissions during the charging operation:

(a) Establishment and implementation of a detailed, written inspection and cleaning procedure for each battery consisting of at least the following elements:

(1) Prompt and effective repair or replacement of all engineering controls;

(2) Inspection and cleaning of goosenecks and standpipes prior to each charge to a specified minimum diameter sufficient to effectively move the evolved gases from the oven to the collector mains;

(3) Inspection for roof carbon build-up prior to each charge and removal of roof carbon as necessary to provide an adequate gas channel so that the gases are effectively moved from the oven into the collector mains;

(4) Inspection of the steam aspiration system prior to each charge so that sufficient pressure and volume is maintained to effectively move the gases from the oven to the collector mains;

(5) Inspection of steam nozzles and liquor sprays prior to each charge and cleaning as necessary so that the steam nozzles and liquor sprays are clean;

(6) Inspection of standpipe caps prior to each charge and cleaning and luting or both as necessary so that the gases are effectively moved from the oven to the collector mains; and

(7) Inspection of charging holes and lids for cracks, warpage and other defects prior to each charge and removal of carbon to prevent emissions, and application of luting material to standpipe and charging hole lids where necessary to obtain a proper seal.

(b) Establishment and implementation of a detailed written charging procedure, designed and operated to eliminate emissions during charging for each battery, consisting of at least the following elements:

(1) Larry car hoppers filled with coal to a predetermined level in accordance with the mechanical volumetric controls required under paragraph (f)(2)(i)(d) of this section so as to maintain a sufficient gas passage in the oven to be charged;

(2) The larry car aligned over the oven to be charged, so that the drop sleeves fit tightly over the charging holes; and

(3) The oven charged in accordance with the following sequence of requirements:

(i) The aspiration system turned on;

(ii) Coal charged through the outermost hoppers, either individually or together, depending on the capacity of the aspiration system to collect the gases involved.

(iii) The charging holes used under paragraph (f)(3)(i)(b)(3)(ii) of this section relidded or otherwise sealed off to prevent leakage of coke oven emissions;

(iv) If four hoppers are used, the third hopper discharged and relidded or otherwise sealed off to prevent leakage of coke oven emissions;

(v) The final hopper discharged until the gas channel at the top of the oven is blocked and then the chuck door opened and the coal leveled;

(vi) When the coal from the final hopper is discharged and the leveling operation complete, the charging hole relidded or otherwise sealed off to prevent leakage of coke oven emissions; and

(vii) The aspiration system turned off only after the charging holes have been closed.

(c) Establishment and implementation of a detailed written charging procedure, designed and operated to eliminate emissions during charging of each pipeline or enclosed charged battery.

(ii) **Coking.** The employer shall operate existing coke oven batteries pursuant to a detailed written procedure established and implemented for the control of coke oven emissions during coking, consisting of at least the following elements:

(a) Checking oven back pressure controls to maintain uniform pressure conditions in the collecting main;

(b) Repair, replacement and adjustment of oven doors and chuck doors and replacement of door jambs so as to provide a continuous metal-to-metal fit;

(c) Cleaning of oven doors, chuck doors and door jambs each coking cycle so as to provide an effective seal;

(d) An inspection system and corrective action program to control door emissions to the maximum extent possible; and

(e) Luting of doors that are sealed by luting each coking cycle and reluting, replacing or adjusting as necessary to control leakage.

(iii) **Pushing.** The employer shall operate existing coke oven batteries with the following work practices to control coke oven emissions during pushing operations:

(a) Coke and coal spillage quenched as soon as practicable and not shoveled into a heated oven; and

(b) A detailed written procedure for each battery established and implemented for the control of emissions during pushing consisting of the following elements:

(1) Dampering off the ovens and removal of charging hole lids to effectively control coke oven emissions during the push;

(2) Heating of the coal charge uniformly for a sufficient period so as to obtain proper coking including preventing green pushes;

(3) Prevention of green pushes to the maximum extent possible;

(4) Inspection, adjustment and correction of heating flue temperatures and defective flues at least weekly and after any green push, so as to prevent green pushes;

(5) Cleaning of heating flues and related equipment to prevent green pushes, at least weekly and after any green push.

(iv) **Maintenance and repair.** The employer shall operate existing coke oven batteries pursuant to a detailed written procedure of maintenance and repair established and implemented for the effective control of coke oven emissions consisting of the following elements:

(a) Regular inspection of all controls, including goosenecks, standpipes, standpipe caps, charging hole lids and castings, jumper pipes and air seals for cracks, misalignment or other defects and prompt implementation of the necessary repairs as soon as possible;

(b) Maintaining the regulated area in a neat, orderly condition free of coal and coke spillage and debris;

(c) Regular inspection of the damper system, aspiration system and collector main for cracks or leakage, and prompt implementation of the necessary repairs;

(d) Regular inspection of the heating system and prompt implementation of the necessary repairs;

(e) Prevention of miscellaneous fugitive topside emissions;

(f) Regular inspection and patching of oven brickwork;

(g) Maintenance of battery equipment and controls in good working order;

(h) Maintenance and repair of coke oven doors, chuck doors, door jambs and seals; and

(i) Repairs instituted and completed as soon as possible, including temporary repair measures instituted and completed where necessary, including but not limited to:

(1) Prevention of miscellaneous fugitive topside emissions; and

(2) Chuck door gaskets, which shall be installed prior to the start of the next coking cycle.

(4) **Filtered air.**

(i) The employer shall provide positive-pressure, temperature controlled filtered air for larry car, pusher machine, door machine, and quench car cabs.

(ii) The employer shall provide standby pulpits on the battery topside, at the wharf, and at the screening station, equipped with positive-pressure, temperature controlled filtered air.

(5) **Emergencies.** Whenever an emergency occurs, the next coking cycle may not begin until the cause of the emergency is determined and corrected, unless the employer can establish that it is necessary to initiate the next coking cycle in order to determine the cause of the emergency.

(6) **Compliance program.**

(i) Each employer shall establish and implement a written program to reduce exposures solely by means of the engineering and work practice controls required in paragraph (f) of this section.

(ii) The written program shall include at least the following:

(a) A description of each coke oven operation by battery, including work force and operating crew, coking time, operating procedures and maintenance practices;

(b) Engineering plans and other studies used to determine the controls for the coke battery;

(c) A report of the technology considered in meeting the permissible exposure limit;

(d) Monitoring data obtained in accordance with paragraph (e) of this section;

(e) A detailed schedule for the implementation of the engineering and work practice

controls specified in paragraph (f) of this section; and

(f) Other relevant information.

(iii) If, after implementing all controls required by paragraphs (f)(2)–(f)(4) of this section, or after January 20, 1980, whichever is sooner, or after completion of a new or rehabilitated battery the permissible exposure limit is still exceeded, the employer shall develop a detailed written program and schedule for the development and implementation of any additional engineering controls and work practices necessary to reduce exposure to or below the permissible exposure limit.

(iv) Written plans for such programs shall be submitted, upon request, to the Secretary and the Director, and shall be available at the worksite for examination and copying by the Secretary, the Director, and the authorized employee representative. The plans required under paragraph (f)(6) of this section shall be revised and updated at least every six months to reflect the current status of the program.

**(7) Training in compliance procedures.** The employer shall incorporate all written procedures and schedules required under this paragraph (f) in the information and training program required under paragraph (k) of this section and, where appropriate, post in the regulated area.

**(g) Respiratory protection.**

**(1) General.**

(i) Where respiratory protection is required under this section, the employer shall provide and assure the use of respirators which comply with the requirements of this paragraph (g) Compliance with the permissible exposure limit may not be achieved by the use of respirators except:

(a) During the time period necessary to install or implement feasible engineering and work practice controls; or

(b) In work operations such as maintenance and repair activity in which engineering and work practice controls are technologically not feasible; or

(c) In work situations where feasible engineering and work practice controls are not yet sufficient to reduce exposure to or below the permissible exposure limit; or

(d) In emergencies.

(ii) Notwithstanding any other requirement of this section, until January 20, 1978, the wearing of respirators shall be at the discretion of each employee where the employee is not in the vicinity of visible emissions.

**(2) Selection.**

(i) Where respirators are required under this section, the employer shall select, provide and assure the use of the appropriate respirator or combination of respirators from Table I below.

TABLE I
RESPIRATORY PROTECTION FOR COKE OVEN EMISSIONS

| *Airborne concentration of coke oven emissions* | *Required respirator* |
|---|---|
| (a) Any concentration. | (1) A Type C supplied air respirator operated in pressure demand or other positive pressure or continuous flow mode; or<br>(2) A powered air-purifying particulate filter respirator for dust, and mist;<br>(3) A powered air-purifying particulate filter respirator or combination chemical cartridge and particulate filter respirator for coke oven emissions. |
| (b) Concentrations not greater than 1500 $\mu g/m^3$. | (1) Any particulate filter respirator for dust and mist, except single-use respirator; or<br>(2) Any particulate filter respirator or combination chemical cartridge and particulate filter respirator for coke oven emissions; or<br>(3) Any respirator listed in paragraph (g)(2)(i)(a) of this section. |

(ii) Not later than January 20, 1978, whenever respirators are required by this section for concentrations not greater than 1500 $\mu g/m^3$, the employer shall provide, at the option of each affected employee, either a particulate filter respirator as provided in paragraph (g)(2)(i)(b) of this section, or a powered air purifying respirator as provided in paragraph (g)(2)(i)(a) of this section.

(iii) The employer shall select respirators from among those approved for protection against dust and mist by the National Institute for Occupational Safety and Health (NIOSH) under the provisions of 30 CFR Part II, except that not later than January 20, 1979, the employer shall select respirators from among those approved by NIOSH for protection against coke oven emissions.

(3) **Respirator program.** The employer shall institute a respiratory protection program in accordance with §1910.134 of this part.

(4) **Respirator usage.**

(i) The employer shall assure that the respirator issued to the employee exhibits minimum facepiece leakage and that the respirator is fitted properly. The employer shall perform quantitative fit tests annually for each employee who uses a nonpowered, particulate filter respirator.

(ii) The employer shall allow each employee who uses a filter respirator to change the filter elements whenever an increase in breathing resistance is detected and shall maintain an adequate supply of filter elements for this purpose.

(iii) The employer shall allow employees who wear respirators to wash their face and respirator facepiece to prevent skin irritation associated with respirator use.

## (h) Protective clothing and equipment.

(1) **Provision and use.** The employer shall provide and assure the use of appropriate protective clothing and equipment, such as but not limited to:

(i) Flame resistant jacket and pants;

(ii) Flame resistant gloves;

(iii) Face shields or vented goggles which comply with §1910.133(a)(2) of this part;

(iv) Insulation from hot surfaces for footwear;

(v) Safety shoes which comply with §1910.136 of this part; and

(vi) Protective helmets which comply with §1910.135 of this part.

(2) **Cleaning and replacement.**

(i) The employer shall provide the protective clothing required by paragraphs (h)(1)(i) and (ii) of this section in a clean and dry condition at least weekly.

(ii) The employer shall clean, launder, or dispose of protective clothing required by paragraphs (h)(1)(i) and (ii) of this section.

(iii) The employer shall repair or replace the protective clothing and equipment as needed to maintain their effectiveness.

(iv) The employer shall assure that all protective clothing is removed at the completion of a work shift only in change rooms prescribed in paragraph (i)(1) of this section.

(v) The employer shall assure that contaminated protective clothing which is to be cleaned, laundered, or disposed of, is placed in a closable container in the change room.

(vi) The employer shall inform any person who cleans or launders protective clothing required by this section, of the potentially harmful effects of exposure to coke oven emissions.

## (i) Hygiene facilities and practices.

(1) **Change rooms.** The employer shall provide clean change rooms equipped with storage facilities for street clothes and separate storage facilities for protective clothing and

equipment whenever employees are required to wear protective clothing and equipment in accordance with paragraph (h)(1) of this section.

**(2) Showers.**

(i) The employer shall assure that employees working in the regulated area shower at the end of the work shift.

(ii) The employer shall provide shower facilities in accordance with §1910.141 (d)(3) of this Part.

**(3) Lunchrooms.** The employer shall provide lunchroom facilities which have a temperature controlled, positive pressure, filtered air supply, and which are readily accessible to employees working in the regulated area.

**(4) Lavatories.**

(i) The employer shall assure that employees working in the regulated area wash their hands and face prior to eating.

(ii) The employer shall provide lavatory facilities in accordance with §1910.141(d)(1) and (2) of this Part.

**(5) Prohibition of activities in the regulated area.**

(i) The employer shall assure that in the regulated area, food or beverages are not present or consumed, smoking products are not present or used, and cosmetics are not applied, except, that these activities may be conducted in the lunchrooms, change rooms and showers required under paragraphs (i)(1)—(i)(3) of this section.

(ii) Drinking water may be consumed in the regulated area.

## (j) Medical surveillance.

**(1) General requirements.**

(i) Each employer shall institute a medical surveillance program for all employees who are employed in a regulated area at least 30 days per year.

(ii) This program shall provide each employee covered under paragraph (j)(1)(i) of this section with an opportunity for medical examinations in accordance with this paragraph (j).

(iii) The employer shall inform any employee who refuses any required medical examination of the possible health consequences of such refusal and shall obtain a signed statement from the employee indicating that the employee understands the risk involved in the refusal to be examined.

(iv) The employer shall assure that all medical examinations and procedures are performed by or under the supervision of a licensed physician, and are provided without cost to the employee.

**(2) Initial examinations.** At the time of initial assignment to a regulated area or upon the institution of the medical surveillance program, the employer shall provide a medical examination for employees covered under paragraph (j)(1)(i) of this section including at least the following elements:

(i) A work history and medical history which shall include smoking history and the presence and degree of respiratory symptoms, such as breathlessness, cough, sputum production, and wheezing;

(ii) A 14" × 17" posterior-anterior chest x-ray and International Labour Office UICC/Cincinnati (ILO U/C) rating;

(iii) Pulmonary function tests including forced vital capacity (FVC) and forced expiratory volume at one second (FEV 1.0) with recording of type of equipment used;

(iv) Weight;

(v) A skin examination;

(vi) Urinalysis for sugar, albumin, and hematuria;

(vii) A sputum cytology examination; and

(viii) A urinary cytology examination.

**(3) Periodic examinations.**

(i) The employer shall provide the examinations specified in paragraphs (j)(2)(i)—(vi) of this section at least annually for employees covered under paragraph (j)(1)(i) of this section.

(ii) The employer shall provide the examinations specified in paragraphs (j)(2)(i)—(viii) of this section at least semi-annually for employees 45 years of age or older or with five (5) or more years employment in the regulated area.

(iii) Whenever an employee who is 45 years of age or older or with five (5) or more years employment in the regulated area transfers or is transferred from employment in a regulated area, the employer shall continue to provide the examinations specified in paragraphs (j)(2)(i)—(viii) of this section semi-annually, as long as that employee is employed by the same employer or a successor employer.

(iv) Whenever an employee has not taken the examinations specified in paragraphs (j)(3)(i)—(iii) of this section within the six (6) months preceding the termination of employment, the employer shall provide such examinations to the employee upon termination of employment.

**(4) Information provided to the physician.** The employer shall provide the following information to the examining physician:

(i) A copy of this regulation and its Appendixes;

(ii) A description of the affected employee's duties as they relate to the employee's exposure;

(iii) The employee's exposure level or estimated exposure level;

(iv) A description of any personal protective equipment used or to be used; and

(v) Information from previous medical examinations of the affected employee which is not readily available to the examining physician.

**(5) Physician's written opinion.**

(i) The employer shall obtain a written opinion from the examining physician which shall include:

(a) The results of the medical examinations;

(b) The physician's opinion as to whether the employee has any detected medical conditions which would place the employee at increased risk of material impairment of the employee's health from exposure to coke oven emissions;

(c) Any recommended limitations upon the employee's exposure to coke oven emissions or upon the use of protective clothing or equipment such as respirators; and

(d) A statement that the employee has been informed by the physician of the results of the medical examination and any medical conditions which require further explanation or treatment.

(ii) The employer shall instruct the physician not to reveal in the written opinion specific findings or diagnoses unrelated to occupational exposure.

(iii) The employer shall provide a copy of the written opinion to the affected employee.

## (k) Employee information and training.

**(1) Training program.**

(i) The employer shall institute a training program for employees who are employed in the regulated area and shall assure their participation.

(ii) The training program shall be provided as of January 27, 1977 for employees who are employed in the regulated area at that time or at the time of initial assignment to a regulated area.

(iii) The training program shall be provided at least annually for all employees who are employed in the regulated area, except that training regarding the occupational safety and health hazards associated with exposure to coke oven emissions and the purpose, proper use, and limitations of respiratory protective devices shall be provided at least quarterly until January 20, 1978.

(iv) The training program shall include informing each employee of:

(a) The information contained in the substance information sheet for coke oven emissions (Appendix A);

(b) The purpose, proper use, and limitations of respiratory protective devices required in accordance with paragraph (g) of this section;

(c) The purpose for and a description of the medical surveillance program required by paragraph (j) of this section including information on the occupational safety and health hazards associated with exposure to coke oven emissions;

(d) A review of all written procedures and schedules required under paragraph (f) of this section; and

(e) A review of this standard.

**(2) Access to training materials.**

(i) The employer shall make a copy of this standard and its appendixes readily available to all employees who are employed in the regulated area.

(ii) The employer shall provide upon request all materials relating to the employee information and training program to the Secretary and the Director.

## (l) Precautionary signs and labels.

**(1) General.**

(i) The employer may use labels or signs required by other statutes, regulations or ordinances in addition to, or in combination with signs and labels required by this paragraph.

(ii) The employer shall assure that no statement appears on or near any sign required by this paragraph which contradicts or detracts from the effects of the required sign.

(iii) The employer shall assure that signs required by this paragraph are illuminated and cleaned as necessary so that the legend is readily visible.

**(2) Signs.**

(i) The employer shall post signs in the regulated area bearing the legends:

DANGER

CANCER HAZARD

AUTHORIZED PERSONNEL ONLY

NO SMOKING OR EATING

(ii) In addition, not later than January 20, 1978, the employer shall post signs in the areas where the permissible exposure limit is exceeded bearing the legend:

DANGER

RESPIRATOR REQUIRED

**(3) Labels.** The employer shall apply precautionary labels to all containers of protective clothing contaminated with coke oven emissions bearing the legend:

CAUTION

CLOTHING CONTAMINATED WITH COKE EMISSIONS

DO NOT REMOVE DUST BY BLOWING OR SHAKING

**(m) Recordkeeping.**

**(1) Exposure measurements.** The employer shall establish and maintain an accurate record of all measurements taken to monitor employee exposure to coke oven emissions required in paragraph (e) of this section.

(i) This record shall include:

(a) Name, social security number, and job classification of the employees monitored;

(b) The date(s), number, duration and results of each of the samples taken, including a description of the sampling procedure used to determine representative employee exposure where applicable;

(c) The type of respiratory protective devices worn, if any;

(d) A description of the sampling and analytical methods used and evidence of their accuracy; and

(e) The environmental variables that could affect the measurement of employee exposure.

(ii) The employer shall maintain this record for at least 40 years or for the duration of employment plus 20 years, whichever is longer.

**(2) Medical surveillance.** The employer shall establish and maintain an accurate record for each employee subject to medical surveillance as required by paragraph (j) of this section.

(i) The record shall include:

(a) The name, social security number, and description of duties of the employee;

(b) A copy of the physician's written opinion;

(c) The signed statement of any refusal to take a medical examination under paragraph (j)(1)(ii) of this section; and

(d) Any employee medical complaints related to exposure to coke oven emissions.

(ii) The employer shall keep, or assure that the examining physician keeps, the following medical records:

(a) A copy of the medical examination results including medical and work history required under paragraph (j)(2) of this section;

(b) A description of the laboratory procedures used and a copy of any standards or guidelines used to interpret the test results;

(c) The initial x-ray;

(d) The x-rays for the most recent 5 years;

(e) Any x-ray with a demonstrated abnormality and all subsequent x-rays;

(f) The initial cytologic examination slide and written description;

(g) The cytologic examination slide and written description for the most recent 10 years; and

(h) Any cytologic examination slides with demonstrated atypia, if such atypia persists for 3 years, and all subsequent slides and written descriptions.

(iii) The employer shall maintain medical records required under paragraph (m)(2) of this section for at least 40 years, or for the duration of employment plus 20 years, whichever is longer.

**(3) Availability.**

(i) The employer shall make available upon request all records required to be maintained by paragraph (m) of this section to the Secretary and the Director for examination and copying.

(ii) The employer shall make available upon request records of employee exposure measurements required by paragraph (m)(1) of this section for inspection and copying to affected employees, and their designated representatives.

(iii) The employer shall make available upon request employee medical records required to be maintained by paragraph (m)(2) of this section to a physician designated by the affected employee or former employee.

(iv) The employer shall make available upon request records of employee exposure measurements required by paragraph (m)(1) of this section for inspection and copying to former employees and their designated representatives which indicate the former employees own exposures.

**(4) Transfer of records.**

(i) Whenever the employer ceases to do business, the successor employer shall receive and retain all records required to be maintained by paragraph (m) of this section.

(ii) Whenever the employer ceases to do business and there is no successor employer to receive and retain the records for the prescribed period, these records shall be transmitted by registered mail to the Director.

(iii) At the expiration of the retention period for the records required to be maintained under paragraphs (m)(1) and (m)(2) of this section, the employer shall transmit these records by registered mail to the Director or shall continue to retain such records.

## (n) Observation of monitoring.

**(1) Employee observation.** The employer shall provide affected employees or their representatives an opportunity to observe any measuring or monitoring of employee exposure to coke oven emissions conducted pursuant to paragraph (e) of this section.

**(2) Observation procedures.**

(i) Whenever observation of the measuring or monitoring of employee exposure to coke oven emissions requires entry into an area where the use of protective clothing or equipment is required, the employer shall provide the observer with and assure the use of such equipment and shall require the observer to comply with all other applicable safety and health procedures.

(ii) Without interfering with the measurement, observers shall be entitled to:

(a) An explanation of the measurement procedures;

(b) Observe all steps related to the measurement of coke oven emissions performed at the place of exposure; and

(c) Record the results obtained.

## (o) Effective date.

This standard shall become effective January 20, 1977.

## (p) Appendixes.

The information contained in the appendixes to this section is not intended, by itself, to create any additional obligations not otherwise imposed or to detract from any existing obligation.

### APPENDIX A—COKE OVEN EMISSIONS SUBSTANCE INFORMATION SHEET

#### I. SUBSTANCE IDENTIFICATION

A. *Substance:* Coke Oven Emissions

B. *Definition:* The Benzene-soluble fraction of total particulate matter present during the destructive distillation or carbonization of coal for the production of coke.

C. *Permissible Exposure Limit:* 150 micrograms per cubic meter of air determined as an average over 8-hour period.

D. *Regulated areas:* Only employees authorized by your employer should enter a regulated area. The employer is required to designate the following areas as regulated areas: the coke oven battery, including topside and its machinery, pushside and its machinery, cokeside and its machinery, and the battery ends: the screening station; the wharf; and the beehive ovens and their machinery.

#### II. HEALTH HAZARD DATA

Exposure to coke oven emissions is a cause of lung cancer, and kidney cancer, in humans. Although there have not been an excess number of skin cancer cases in humans, repeated skin contact with coke oven emissions should be avoided.

III. PROTECTIVE CLOTHING AND EQUIPMENT

A. *Respirators:* Respirators will be provided by your employer for routine use if your employer is in the process of implementing engineering and work practice controls or where engineering and work practice controls are not feasible or insufficient to reduce exposure to or below the PEL. You must wear respirators for non-routine activities or in emergency situations where you are likely to be exposed to levels of coke oven emissions in excess of the permissible exposure limit. Until January 20, 1978, the routine wearing of respirators is voluntary. Until that date, if you choose not to wear a respirator you do not have to do so. You must still have your respirator with you and you must still wear it if you are near visible emissions. Since how well your respirator fits your face is very important, your employer is required to conduct fit tests to make sure the respirator seals properly when you wear it. These tests are simple and rapid and will be explained to you during your training sessions.

B. *Protective clothing:* Your employer is required to provide, and you must wear, appropriate, clean, protective clothing and equipment to protect your body from repeated skin contact with coke oven emissions and from the heat generated during the coking process. This clothing should include such items as jacket and pants and flame resistant gloves. Protective equipment should include face shield or vented goggles, protective helmets and safety shoes, insulated from hot surfaces where appropriate.

IV. HYGIENE FACILITIES AND PRACTICES

You must not eat, drink, smoke, chew gum or tobacco, or apply cosmetics in the regulated area, except that drinking water is permitted. Your employer is required to provide lunchrooms and other areas for these purposes.

Your employer is required to provide showers, washing facilities, and change rooms. If you work in a regulated area, you must wash your face, and hands before eating. You must shower at the end of the work shift. Do not take used protective clothing out of the change rooms without your employer's permission. Your employer is required to provide for laundering or cleaning of your protective clothing.

V. SIGNS AND LABELS

Your employer is required to post warning signs and labels for your protection. Signs must be posted in regulated areas. The signs must warn that a cancer hazard is present, that only authorized employees may enter the area, and that no smoking or eating is allowed. In regulated areas where coke oven emissions are above the permissible exposure limit, the signs should also warn that respirators must be worn.

VI. MEDICAL EXAMINATIONS

If you work in a regulated area at least 30 days per year, your employer is required to provide you with a medical examination every year. The medical examination must include a medical history, a chest x-ray; pulmonary function test; weight comparison; skin examination; a urinalysis and a urine and sputum cytology exam for the early detection of urinary or lung cancer. The cytology exams are only included in the initial exam until you are either 45 years or older or have 5 or more years employment in the regulated areas when the medical exams including these tests are to be given every 6 months. The examining physician will provide a written opinion to your employer containing the results of the medical exams. You should also receive a copy of this opinion.

VII. OBSERVATION OF MONITORING

Your employer is required to monitor your exposure to coke oven emissions and you are entitled to observe the monitoring procedure. You are entitled to receive an explanation of the measurement procedure, observe the steps taken in the measurement procedure, and to record the results obtained. When the monitoring procedure is taking place in an area where respirators or personal protective clothing and equipment are required to be worn, you must also be provided with and must wear the protective clothing and equipment.

VIII. ACCESS TO RECORDS

You or your representative are entitled to records of your exposure to coke oven emissions upon request to your employer. Your medical examination records can be furnished to your physician upon request to your employer.

IX. TRAINING AND EDUCATION

Additional information on all of these items plus training as to hazards of coke oven emissions and the engineering and work practice controls associated with your job will also be provided by your employer.

## APPENDIX B—INDUSTRIAL HYGIENE AND MEDICAL SURVEILLANCE GUIDELINES

I. INDUSTRIAL HYGIENE GUIDELINES

A. *Sampling.* (Benzene-Soluble Fraction Total Particulate Matter).

Samples collected should be full shift (at least 7-hour) samples. Sampling should be done using a personal sampling pump with pulsation damper at a flow rate of 2 liters per minute. Samples should be collected on 0.8 micrometer pore size silver membrane filters (37 mm diameter) preceded by Gelman glass fiber type A-E filters encased in three-piece plastic (polystyrene) field monitor cassettes. The cassette face cap should be on and the plug removed. The rotameter should be checked every hour to ensure that proper flow rates are maintained.

A minimum of three full-shift samples should be collected for each job classification on each battery, at least one from each shift. If disparate results are obtained for particular job classification, sampling should be repeated. It is advis-

able to sample each shift on more than one day to account for environmental variables (wind, precipitation, etc.) which may affect sampling. Differences in exposures among different work shifts may indicate a need to improve work practices on a particular shift. Sampling results from different shifts for each job classification should not be averaged. Multiple samples from the same shift on each battery may be used to calculate an average exposure for a particular job classification.

B. *Analysis.*

1. All extraction glassware is cleaned with dichromic acid cleaning solution, rinsed with tap water, then dionized water, acetone, and allowed to dry completely. The glassware is rinsed with nanograde benzene before use. The Teflon cups are cleaned with benzene then with acetone.

2. Pre-weigh the 2 ml Teflon cups to one hundredth of a milligram (0.01 mg) on a autobalance AD 2 Tare weight of the cups is about 50 mg.

3. Place the silver membrane filter and glass fiber filter into a 15 ml test tube.

4. Extract with 5 ml of benzene for five mintues in an ultrasonic cleaner.

5. Filter the extract in 15 ml medium glass fritted funnels.

6. Rinse test tube and filters with two 1.5 ml aliquots of benzine and filter through the fritted glass funnel.

7. Collect the extract and two rinses in a 10 ml Kontes graduated evaporative concentrator.

8. Evaporate down to 1 ml while rinsing the sides with benzene.

9. Pipet 0.5 ml into the Teflon cup and evaporate to dryness in a vacuum oven at 40° C for 3 hours.

10. Weigh the Teflon cup and the weight gain is due to the benzene soluable residue in half the Sample.

II. MEDICAL SURVEILLANCE GUIDELINES

A. *General.*

The minimum requirements for the medical examination for coke oven workers are given in paragraph (j) of the standard.

The initial examination is to be provided to all coke oven workers who work at least 30 days in the regulated area. The examination includes at 14" × 17" posterior-anterior chest x-ray and a ILO/UC rating to assure some standardization of x-ray reading, pulmonary function tests (FVC and FEV 1.0), weight, urinalysis, skin examination and a sputum and urinary cytologic examination. These tests are to serve as the baseline for comparing the employee's future test results. Periodic exams include all the elements of the initial exams except that the cytologic tests need be performed only on those employees who are 45 years of age or older or who have worked for 5 or more years in the related area; periodic exams are to be performed semiannually for this group instead of annually. The examination contents are minimum requirements, additional tests such as lateral and oblique x-rays or additional pulmonary function tests may be performed if deemed necessary.

B. *Pulmonary function tests.*

Pulmonary function tests should be performed in a manner which minimizes subject and operator bias. There has been shown to be learning effects with regard to the results obtained from certain tests, such as FEV 1.0. Best results can be obtained by multiple trials for each subject. The best of three trials or the average of the last three of five trials may be used in obtaining reliable results. The type of equipment used (manufacturer, model, etc.) should be recorded with the results as reliability and accuracy varies and such information may be important in the evaluation of test results. Care should be exercised to obtain the best possible testing equipment.

C. *Sputum cytology.*

Sputum can be collected by aerosol inhalation during the medical exam or by spontaneous early morning cough at home. Sputum is induced by transoral inhalation of an aerosolized solution of eight per cent (8%) sodium chloride in water. After inhaling as few as three to five breaths the subject usually yields an adequate sputum specimen. A minimum of three samples should be collected by the subject at home. All sputum should be collected directly into sixty per cent (60%) alcohol.

Scientific evidence suggests that chest x-rays and sputum cytology should be used together as screening tests for lung cancer in high risk populations, such as coke oven workers. The tests are to be performed every six months on workers who are 45 years of age or older or have worked in the regulated area for 5 or more years. Since the tests seem to be complementary, it may be advantageous to alternate the test procedures. For instance, chest x-rays could be obtained in June and December and sputum cytologys should be obtained in March and September. Facilities for providing necessary diagnostic investigation should be readily available as well as chest physicians, surgeons, radiologists, pathologists, and immunotherapists to provide any necessary treatment services.

## TABLE OF CONTENTS


| Docket No. | Case Name | Date of Decision | Coordinates |
|---|---|---|---|
| 82-0562 | CORE OIL AND GAS CORP., RIG #11 | 11/12/82 | 65/A2 |
| 78-6055 | WHIRLPOOL CORPORATION and ALLIED INDUSTRIAL WORKERS OF AMERICA, LOCAL 370 | 11/15/82 | 65/A14 |
| | (see prior cite at 82/49/G1) | | |
| 80-7259 | D. A. & L. CARUSO, INC. | 11/17/82 | 65/B3 |
| 82-286 | KEN-MAR AUTOMOTIVE PRODUCTS CO. | 11/17/82 | 65/D10 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
|---|---|---|---|---|

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

NOTICE OF DECISION

Secretary of Labor v. Core Oil and Gas Corp., Rig #11
OSHRC Docket No. 82-0562

1. Enclosed is a copy of my decision. It will be filed with the Commission on October 13, 1982, and will become the final order of the Commission on November 12, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is November 12, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

James A. Cronin, Jr.
Judge, OSHRC

Date: September 23, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>CORE OIL AND GAS CORP.,<br>RIG #11,<br><br>Respondent. | OSHRC DOCKET NO. 82-0562 |

JUDGE'S DECISION
OCT 13 '82
RECEIVED
FINAL ORDER ON
NOV 19 '82

APPEARANCES:

Ronnie A. Howell, Esquire, of Dallas, Texas,
For the Complainant,

Robert G. Grove, Esquire of Oklahoma City, Oklahoma
For the Respondent.

DECISION AND ORDER

Cronin, Judge, OSHRC:

On March 17, 1982, a gas separator explosion killed an employee on Core Oil & Gas Corp's. Oil Rig No. 11. Following an investigation and inspection of the work site on March 18, 1982, by a compliance officer of the Occupational Safety and Health Administration (OSHA), the Secretary of Labor issued a citation to Core charging it with four "serious" violations and one "other than serious" violation of safety standards promulgated under the Occupational Safety and Health Act of 1970 (29 U.S.C. §651 et seq., hereafter called the "Act"). Citation No. 1 proposed a total penalty of $1440.00. Core contested the alleged violations and a hearing was held at Oklahoma City on July 28, 1982.

At the outset of the hearing the Secretary withdrew Citation No. 2 charging an "other than serious" violation, leaving at issue only the four alleged serious violations of Citation No. 1.

Item 1 of Citation No. 1 describes the alleged violation of 29 C.F.R. §1910.23(c)(1) as follows:

> Open sided floor(s) or platform(s) 4 feet or more above the adjacent floor or ground level were not guarded by standard railings (or the equivalent as specified in 29 CFR 1910.23(e)(3) through (v)), on all open sides:
>
> > Approximately 10 feet east of Shale Shaker, gas separator platform was not equippped with standard guard railing or the equivalent.

29 C.F.R. §1910.23(c)(1) provides:

> Guarding Floor and Wall Openings and Holes -
> (c) Protection of open-sided floors, platforms, and runways.
> (1) Every open-sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing (or the equivalent as specified in paragraph (e)(3) of this section) on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a toeboard wherever, beneath the open sides.

Item 2 of Citation No. 1 describes the alleged violation of 29 C.F.R. §1910.27(b)(1)(ii) as follows:

> The distances between rungs, cleats, or steps of fixed ladders was not uniform throughout the length of ladder:
>
> > Approximately 10 feet east of Shale Shaker on east side of gas separator tank platform, 10' in length fixed metal ladder separation, between rungs varied from six inches to four inches.

29 C.F.R. §1910.27(b)(1)(ii) provides:

> Fixed Ladders -
> (b) Specific features.
> (1) Rungs and cleats.
> (ii) The distance between rungs, cleats, and steps shall not exceed 12 inches and shall be uniform throughout the length of the ladder.

Item 3 of Citation No. 1 describes the alleged violation of 29 C.F.R. §1910.106(b)(6) as follows:

> Sources of ignition were not elimated or controlled where the presence of flammable vapors was possible:
>
> > Approximately 10 feet east of Shale Shaker, precautions were not taken to remove the source of ignition such as smoking, flare back through the air vent pipe (no flame arrester).

29 C.F.R. §1910.106(b)(6) provides:

> Flammable and combustible liquids -
> (b) Tank storage.
> (6) Sources of ignition. In locations where flammable vapors may be present, precautions shall be taken to prevent ignition by eliminating or controlling sources of ignition. Sources of ignition may include open flames, lightning, smoking, cutting and welding, hot surfaces, frictional heat, sparks (static, electrical, and mechanical), spontaneous ignition, chemical and physical-chemical reactions, and radiant heat.

Item 4 of Citation No. 1 describes the alleged violation of 29 C.F.R. §1910.106(f)(6) as follows:

> Class I flammable liquid(s) were handled, drawn, or dispensed where flammable vapor could reach a source of ignition:
>
> > Approximately 10 feet east of Shale Shaker, employee's will remove the gas separator port cover, where there is a high probability of flammable vapor present. The area is not marked by "NO SMOKING" signs.

29 C.F.R. §1910.106(f)(6) provides:

> Flammable and combustible liquids -
> (f) Bulk plants-
> (6) Sources of ignition. Class I liquids shall not be handled, drawn, or dispensed where flammable vapors may reach a source of ignition. Smoking shall be prohibited except in designated localities. "No Smoking" signs shall be conspicuously posted where hazard from flammable liquid vapors is normally present.

## Summary of Evidence

Core is a contract driller in the oil and gas exploration industry. On March 17, 1982, Core's Rig No. 11 was located on a drilling site in Wheeler County, Texas. Rig No. 11 has been at this site since just before New Year's day of 1982 (Tr. 131). About six weeks later a "gas separator" and its base platform arrived at the drill site and was connected to the rig immediately adjacent to the "shale shaker" (Tr. 104, 109). The above ground height of the adjustable gas separator platform was approximately 10 feet (Tr. 13, 18, 90). At the hearing the platform dimensions were variously estimated as "6 to 8 feet wide" and more than "35 feet" long, and "four and a half feet wide" and "approximately eight to ten feet long" (Tr. 83-84, 88, 131; Exhibits C-1, C-2).[1/]

The four sides of this platform were open and completely unguarded (Tr. 13; Exhibits C-1, C-2). On March 17, 1982, Core's Tool Pusher, Mr. Reeves, and Motor Man, Mr. Walker, worked on the platform cleaning out the gas separator (Tr. 126).

Two abutting ladders were welded to the gas separator platform and frame at its northeast corner, one ladder to the "top section," the other ladder to the "bottom section" (Tr. 27-30, 32, 90).

The telescoping design of the ladders permits the platform to be adjusted up or down without removing either of the fixed ladders (Tr. 90-91). The platform is customarily adjusted twice during the drilling stage - whenever the blowout preventers are changed (Tr. 109-111). No adjustment in the height of the platform had been made prior to March 18th, the date of the OSHA inspection (Tr. 111).

On March 18th, the rungs of the two abutting ladders (which constituted a single ladder for climbing) were not aligned and the distance between the rungs were not uniform (Tr. 27-31, 113). At one point the

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1/ There was another suggestion by respondent's counsel (probably valid) that the platform was eight feet wide and 16 feet long (Tr. 131).

rungs of the exterior and interior ladders were two and a half to three inches apart. The spacing between the remaining rungs, for approximately four feet, varied from 4 to 6 inches (Tr. 113-116).

Tool Pusher Reeves climbed the ladder on March 17, 1982, to reach the platform and admits to using the ladder "several times" (Tr. 127). He further testified that the ladders were installed to permit access to the platform (Tr. 156-157). Although Mr. Hutton, Core's Safety Director, testified that the ladder was installed to provide an exit in case of an emergency, he concedes that the ladder also would be used as an access ladder to the platform (Tr. 176, 184).

In the opinion of the Secretary's compliance officer, Mr. Vigil, a person climbing this ladder would "automatically hit the uneven rungs" which in turn could cause a fall of up to 10 feet (Tr. 32, 54-56).

On March 17, 1982, flammable vapors from the gas separator ignited and exploded killing Core's Motor Man, Mr. Walker, At the time of the explosion, Mr. Walker was attempting to re-bolt the port or valve cover of the gas separator (Tr. 34-35). A "No Smoking" sign was posted in the shale shaker area - 10 feet from the gas separator, but no similar sign was posted on the gas separator.

The compliance officer suggests two possible sources of ignition which may have caused this explosion. Mr. Walker may have been smoking, or there may have been a "flash back" in the flare pipe (Tr. 34). In his view a "No Smoking" sign should have been posted on the gas separator, the employees trained not to smoke in that area, and steps taken to ensure that all flame in the flare pipe had been extinguished before removing the port cover of the gas separator (Tr. 38-39). The compliance officer further believes that either a "wedge" or a flame arrestor should have

been installed near the end of the flare pipe in order to eliminate any chance of a flare back or "wicking" action (Tr. 39).

The relevant facts leading up to the March 17th explosion are undisputed.

There are two ways customarily employed to clean a gas separator. The valve at the bottom of the eight inch pipe sometimes is opened to drain and flush the collected solids. This valve opens at ground level (Tr. 122-124). The other way, the "right way," to clean the gas separator is to remove the port cover and then wash it out with a water hose (Tr. 124).

On March 17th, just before 6:00 a.m., the gas separator was "taken off the line" by closing the valves to prevent any more "mud" or gas going through the gas separator. The five-gallon fire bucket, which hangs on the end of the flare pipe and is used to burn the gas discharged from the 6 inch gas flow pipe, then was removed. At that time, there was no fire in the bucket and no evidence of any flame at the end of the gas flow pipe (Tr. 125-126). After waiting about an hour and 15 minutes to ensure the dissipation of any gas in the pipe or separator, Tool Pusher Reeves and Motor Man Walker removed the cover and cleaned out the inside of the gas separator with a hose (Tr. 127-128). This was the first time that the port cover had been removed since the gas separator had been installed (Tr. 131-132). According to Tool Pusher Reeves he smelled gas "faintly" when the port cover was removed (Tr. 142). Prior to going onto the gas separator platform, Tool Pusher Reeves told Mr. Walker; "Whatever you do, don't light any cigarettes because that can be dangerous if when we get the cover off there is a presence of gas" (Tr. 128).

After the cleaning, the port cover was replaced, and two bolts inserted. The time then was "right about" 8:30 in the morning. Tool Pusher Reeves then asked Mr. Walker if he could put the rest of the

bolts in and tighten them in sequence. Mr. Walker responded, "yes." Before leaving, Tool Pusher Reeves told Mr. Walker, "Don't light any cigarettes" (Tr. 129).

Shortly thereafter, Mr. Walker left the platform and went up onto the rig substructure to make a "connection" (Tr. 130). The explosion occurred at 9:10 a.m. and propelled Mr. Walker 35 feet (Tr. 145). After the explosion, Core Tool Pusher Jacobs found a package of cigarettes, one-half of a broken cigarette, and Mr. Walker's damaged cigarette lighter, 6 feet out and away from the gas separator frame (Tr. 145-146). Tool Pusher Reeves testified that he had seen Mr. Walker's lighter in an undamaged condition on March 17th prior to the explosion (Tr. 189-190).

According to Tool Pusher Reeves he had instructed Mr. Walker prior to March 17th that he could not smoke on the rig floor, the mud pits, around the shale shaker, and the diesel and propane tanks. Places where employees could smoke were not designated or marked. Mr. Reeves testified that all of the "No Smoking" areas had not been posted on March 17th, and that Core intended to put a sign up at the gas separator (Tr. 134-135).

## Discussion

Core's brief concedes the violations of §1910.23(c)(1) and §1910.27 (b)(1)(ii) but argues that the Secretary failed to prove the violations were "serious."

Core's argument with respect to the unguarded platform violation (§1910.23(c)(1)) is unpersuasive. Certainly, the compliance officer's uncontradicted testimony that an employee would probably suffer serious physical harm if he fell onto the steel pipes that ran beneath the 10-foot high platform is patently reasonable. Moreover, his testimony to the effect that the pipes extended beyond the ends of the platform is supported by Exhibit C-1, a photograph which clearly confirms the location of these pipes.

Although a serious violation of §1910.23(c)(1) will be affirmed, assessment of a substantial penalty would be inappropriate. According to the OSHA compliance officer and the evidence Core has an excellent safety program. Furthermore, there is nothing in the record reflecting adversely on Core's good faith. But more importantly, the gravity of this violation is considered relatively low due to the infrequency of employee exposure to the unguarded platform from January 1982 to March 11, 1982. A penalty of $100.00 is considered sufficient to deter Core from a similar violation in the future, and will be assessed.

The record evidence, however, requires a different result with respect to the violation of §1910.27(b)(1)(ii). This judge agrees with Core that the Secretary failed to prove by a preponderance of the evidence that the lack of uniformity between the ladder rungs constituted a serious violation. Actually, the record establishes that the violation is de minimis.

As Core points out, the ladder rung distances were not uniform for a distance of only four feet. This deviation from uniformity also occurred beneath the 10-foot level. Moreover, the variance was slight - only two inches.

This case seems indistinguishable from cases in which the Commission has concluded that rung spacing was sufficiently uniform to provide a reasonably safe and suitable means of access. See, Rodney E. Fossett, d/b/a Southern Lightweight Concrete Co., 79 OSAHRC 92/D2, 7BNA OSHC 1918, 1979 CCH OSHD ¶23,989 (No. 76-3944, 1979); Ray Boyd Plaster and Tile, Inc., 78 OSAHRC 47/D8, 6 BNA OSHC 1648, 1978 CCH OSHD ¶22,794 (No. 76-814, 1978); Rust Engineering Company, 77 OSAHRC 37/C8, 5 BNA OSHC 1183, 1977-1978 CCH OSHD ¶21,693 (No. 12200, 1977). On this record, therefore, the violation of §1910.27(b)(1)(ii) will be affirmed as de minimis with no penalty. Core, however, is urged to take steps to ensure the proper installation of its platform ladder system.

Citing Mountain States Tel. & Tel. vs. OSHRC, 623 F.2d 155 (10th Cir. 1980), Core contends in its brief that the burden of proving all the elements of a violation rests with the Secretary. An element of every violation, of course, is the applicability of a cited standard to the working conditions at issue in a particular case. And the Commission has expressly held that the Secretary has the burden of proving the applicability of a cited standard. See Howard Barthelmass Painting Company, Inc., 81 OSAHRC 84/E1, 9 BNA OSHC 2160, 1981 CCH OSHD ¶25,637 (No. 78-5450, 1981).

In this judge's view, the standards at §1910.106(b)(6) and §1910.106 (f)(6) were inapplicable to the working conditions at Rig No. 11 on March 17, 1982 and March 18, 1982.

Standard §1910.106(b)(6) relates solely to working conditions concerning "Tank storage" (See, §1910.106(b)). Plainly, the gas separator and its related piping does not involve "tank storage." A gas separator simply separates the gas from drilling mud and then exhausts it away from the rig site.

Standard §1910.106(f), on the other hand, relates solely to working conditions in "Bulk plants." Certainly, by no stretch of the imagination, can Rig No. 11's oil and gas drilling site be defined as a Bulk plant (See, §1910.106(a)(7)). Core, therefore, was not on notice of, or required to comply with, the provisions of these two cited standards.

Perhaps the Secretary has promulgated standards applicable to the working conditions under items 3 and 4 of Citation No. 1. But if he has, he neither cited them nor mentioned them at the hearing. Items 3 and 4 of Citation No. 1, therefore, must be vacated.

Core, however, should take little comfort in the vacation of these items, particularly item 4, because the record clearly establishes the need to post a "No Smoking" sign at the gas separator for the protection of Core's employees and Core's recognition of this need. Further, common sense dictates that Core should not only point out to its employees the location of all "No Smoking" areas but also clearly designate those areas in which smoking is permissible.

## Findings of Fact

All findings of facts relevant and necessary to a determination of the contested issues have been found specially and appear above (See, Rule 52(a) of the Federal Rules of Civil Procedure). Any of respondent's proposed findings of fact inconsistent with this decision are denied.

## Conclusions of Law

1. The record establishes by a preponderance of the evidence that respondent committed a serious violation of 29 C.F.R. §1910.23(c)(1) with respect to its unguarded gas separator platform.

2. A penalty of $100.00 for respondent's violation of 29 C.F.R. §1910.23(c)(1) is appropriate.

3. The record establishes by a preponderance of the evidence that respondent committed a de minimis violation of 29 C.F.R. §1910.27(b)(i)(ii) with respect to the rung spacing of its gas separator platform ladders.

4. Standards 29 C.F.R. §1910.106(b)(6) and 29 C.F.R. §1910.106(f)(6) were inapplicable to the working conditions at respondent's Rig No. 11 on March 17 and 18, 1982.

5. On March 17 and 18, 1982, respondent was not required to comply with the provisions of 29 C.F.R. §1910.106(b)(6) and 29 C.F.R. §1910.106(f)(6) with respect to the working conditions in question.

## ORDER

Based on the Findings of Fact, Conclusions of Law and the entire record, it is ORDERED:

1. Citation No. 2, issued April 28, 1982, is VACATED.

2. Item 1 of Citation No. 1, issued April 28, 1982, is AFFIRMED, and a penalty of $100.00 ASSESSED.

3. Item 2 of Citation No. 1, issued April 28, 1982, is AFFIRMED as de minimis.

4. Items 3 and 4 of Citation No. 1, issued April 28, 1982, are VACATED.

James A. Cronin, Jr.
Judge, OSHRC

Dated: October 13, 1982

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

# NOTICE OF DECISION

SECRETARY v. WHIRLPOOL CORPORATION and ALLIED INDUSTRIAL WORKERS OF AMERICA, LOCAL 370

OSHRC Docket No. 78-6055

1. Enclosed herewith is my decision in the above-entitled case. It is being filed on this date and will become the final order of the Commission pursuant to 29 U.S.C. § 661(i) on November 15, 1982, unless a Member of the Commission directs that it be reviewed.

2. Parties will not receive any further communication from the Commission on this case unless review is directed by a Member of the Commission. In that case each party will be notified and given an opportunity to submit a brief to the Commission Members prior to their final disposition of the case.

James D. Burroughs
JAMES D. BURROUGHS
Judge

Enclosure (1)

Date: October 15, 1982

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
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| SECRETARY OF LABOR, | ) | |
| Complainant, | ) | |
| v. | ) | OSHRC Docket No. 78-6055 |
| WHIRLPOOL CORPORATION, | ) | |
| Respondent, | ) | |
| and | ) | |
| ALLIED INDUSTRIAL WORKERS OF AMERICA, LOCAL 370, | ) | |
| Authorized Employee Representative. | ) | |

## ORDER APPROVING SETTLEMENT AND DISMISSING CASE

On August 31, 1982, this matter was remanded by the Commission for further proceedings consistent with the Commission's opinion in Mobil Oil Corporation, Docket No. 77-4386 (August 6, 1982). The union representative had objected to a settlement agreement executed by the employer and Secretary on September 17, 1979. The matter was certified to the Commission on interlocutory appeal by Judge Patton in order to ascertain what rights the union representative had to be heard on its objection to the settlement agreement. Subsequent to the remand, this matter was scheduled for hearing on October 19, 1982. Counsel for respondent, by letter dated September 28, 1982, to Judge Burroughs stated "that the operations which were cited have long since been discontinued and the case is therefore moot so far as alleged hazards are concerned." On October 7, 1982, a letter was directed by Judge Burroughs to the union representatives seeking their comments on the representation that the cited operations have been discontinued.

On October 15, 1982, a letter was received from Mr. Jim Gattis, President, Allied Industrial Workers of America, Local 370, stating that the union had "determined that the operation where Whirlpool was cited for over exposure (sic) is no longer in existence." Mr. Gattis concurs with counsel for Whirlpool that the question concerning a settlement is moot since the cited operation is no longer in existence. Mr. Gattis further stated that the authorized employee representative saw no need for further proceedings in this matter. Accordingly, it is

ORDERED: 1. That the terms of settlement are approved and incorporated as part of this order;

2. That the serious citation issued to respondent on November 7, 1978, is modified to affirm the violations as being other than serious and to vacate the penalty proposed for the violations;

3. That respondent's motion to withdraw its notice of contest, pursuant to the terms of the settlement agreement, is granted; and

4. That the abatement measures set forth in the settlement agreement are unnecessary if the operation covered by the citation has been discontinued.

Dated this 15th day of October, 1982.

James D. Burroughs

JAMES D. BURROUGHS
Judge

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

Secretary of Labor v. D. A. & L. CARUSO, INC.
OSHRC Docket No. 80-7259

1. Enclosed is a copy of my decision. It will be filed with the Commission on October 18, 1982, and will become the final order of the Commission on November 17, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is November 17, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

William E. Brennan
WILLIAM E. BRENNAN
Judge, OSHRC
1515 Broadway, Room 3800
New York, New York 10036

Date: September 28, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|---|
| SECRETARY OF LABOR | : | |
| Complainant | : | |
| v. | : | OSHRC DOCKET NO. 80-7259 |
| D. A. & L. CARUSO, INC. | : | |
| Respondent | : | |

APPEARANCES

FOR COMPLAINANT

Francis V. LaRuffa, Regional Solicitor
U. S. Department of Labor
1515 Broadway, Room 3555
New York, New York 10036
Attn: Jane C. Snell, Esq.

FOR RESPONDENT

Mandelbaum, Salsburg, Gold & Lazris
141 South Harrison Street
East Orange, New Jersey 07018
Attn: David J. Weston, Esq.

Brennan, W. E., A.L.J.

STATEMENT OF THE CASE

This case arises under the provisions of Section 10(c)[1/] of the Occupational Safety and Health Act of 1970 (hereinafter the Act).[2/] There is at issue a one-Itemed "Willful" Citation issued pursuant to Section 9(a) of the Act[3/] by the Secretary of Labor through the Area Director of the Occupational Safety and Health Administration (OSHA) for Hasbrouck Heights, New Jersey, (hereinafter Complainant) to D. A. L. Caruso, Incorporated, of South Plainfield, New Jersey, (hereinafter Respondent). A penalty of $8,000 was proposed by Complainant pursuant to Section 10(a) of the Act.[4/]

By Order dated February 11, 1981, this case was assigned to Judge O'Connell for determination (R.p. 9)[5/], who, after

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1/ 29 U.S.C. 659(c).

2/ 29 U.S.C. 651 et seq.

3/ 29 U.S.C. 658(a).

4/ 29 U.S.C. 659(a).

5/ References herein translate as follows:

R.p. 1 The first numbered document in the official Docket File prior to assignment to the undersigned.

R.p. J-1 The first numbered document in the official Docket File after assignment to the undersigned.

Tr. 1 Page one of the hearing transcript.
Exh. C-1 Complainant's Exhibit in evidence.
Exh. R-1 Respondent's Exhibit in evidence.

the perfection of pleadings and completion of pretrial discovery and pursuant to written notice (R.p. J-7) held a hearing in this case on May 11, 1981.

Thereafter, as a result of a major reduction in Review Commission personnel, Judge O'Connell left the Commission and on February 11, 1982, this case was reassigned to the undersigned.

After affording the parties an opportunity for a de novo hearing or to supplement the record herein with additional evidence, which was declined, the parties agreed to have this case decided on the record as it had been formulated. (See R. pp. J-13, J-14 and J-15).

The "Willful" Citation, issued to Respondent on November 20, 1980, alleges as follows:

> 29 CFR 1926.651(c): The walls or faces of excavation(s) in which employee(s) were exposed to danger from moving ground were not guarded by a shoring system, sloping of the ground, or some other equivalent means:
>
> > Manhole #71, Station 21-08-31, East and West Walls:
> > Excavation in which employee(s) were required to work was approximately 40 L X 25' W X 13' D.

This condition was to be corrected "immediately" and a $8,000 penalty was proposed.

The cited OSHA Standard provides:

> 1926.651 Specific excavation requirements.
>
> * * *
>
> (c) The walls and faces of all excavations in which employees are exposed to danger from moving ground shall be guarded by a shoring system, sloping of the ground, or some other equivalent means.

## ISSUES

1. Did the faces and walls of the excavation at issue expose Respondent's employees to the danger of moving ground, and thus, did Respondent violate Section 5(a)(2) of the Act, 29 U.S.C. 654(a)(2) by failing to comply with the OSHA Standard set forth at 29 C.F.R. 1926.651(c)?

2. If a violation is found, is it accurately denominated "Willful"?

3. If a violation is found, what, if any, penalty is appropriate under Section 17 of the Act, 29 U.S.C. 666?

Issues numbered 1 and 2 supra are answered in the affirmative and a penalty appropriate under 29 U.S.C. 666 is assessed infra.

## EVIDENCE AND OPINION

The following stipulations were agreed upon by the parties.

Respondent's full and legal name is D. A. & L. Caruso, Inc., a Corporation in the State of New Jersey with its principal place of business located at 3950 South Clinton Avenue, South Plainfield, New Jersey. Respondent concedes that at the relevant times herein, it was engaged in a business affecting commerce, having an average daily number of 45 employees, not including family employees. Respondent is a small to medium size corporation engaged in sanitary sewer installations for municipalties and other similar government bodies (Tr. 4, 5).

Complainant's Second Request for Admission of Facts, served upon Respondent on April 2, 1981, were not responded to, and thus, the facts set forth therein are deemed admitted under Federal Rule of Civil Procedure 36, made applicable to these proceedings by Commission Rule of Procedure, 2(b), 29 C.F.R. 2200.2(b). These facts essentially establish that this Respondent, on February 26, 1976, was issued a one Itemed Serious Citation for violation of the "Specific Trenching Requirements" Standard set forth at 29 C.F.R. 1926.652(a). Although initially contested by Respondent, a Stipulated Settlement of this Citation was reached between the parties, which settlement became a final order of the Review Commission prior to November 3, 1980. (See Exh. C-1 with attachments).

ISSUE NO. 1

The Complainant's evidence was presented through one witness, OSHA Compliance Officer (C.O.) Marinan. At the time of trial, Mr. Marinan had been a C.O. with OSHA for ten years and had conducted approximately 1,700 OSHA inspections, of which approximately 1,000 involved construction worksites. Prior to his OSHA experience, he had spent about four and one-half years in the maritime industry with the John W. McGrath Corporation of New York City involved in daily inspections of

ocean going vessels to determine compliance with the Longshoremens and Harbor Workers Act, making accident investigations and related work. Prior to that period, he was a U. S. Army Special Forces Medic schooled in emergency medicine. Thus, C. O. Marinan had over 15 years of experience in the safety field. His safety education included various safety and health courses while with OSHA, including soil identification, mining and tunneling, flammable materials and liquids, a one week course specifically dealing with soil mechanics and identification as well as the OSHA Standards governing trenching and excavation requirements, and various other seminars (Tr. 9, 36, 37).

The inspection from which this case arose was conducted by C. O. Marinan on November 3, 1980. At this time, Respondent was engaged, and had been since August 1980, in installing an interceptor sewer line system for the Northwest Bergen County Sewer Authority in Bergen County, New Jersey. This project called for Respondent to install approximately 29,000 feet of interceptor sewer lines, consisting of various sizes of reinforced concrete pipe, ranging from 15 to 36 inches in diameter, in trenches excavated by the Respondent to various depths up to 20 feet, in varying types of soil.

On the day of the inspection, work had progressed to a location in Mahwah, New Jersey between Halifax and Valley Brook Road which was an undeveloped area, just North of the Ramapo River.

At this location (herein the worksite), Respondent had excavated for and was in the process of installing a large, circular, precast concrete manhole identified as number 71, as part of this project. In a Northerly direction from the Ramapo River, Respondent had excavated a trench and installed sewer pipe up to the point where Manhole 71 was to be installed. At that point, the excavation for the manhole was made, which was irregularly, circular or oblong in shape.

This excavation measured approximately 35 feet across its widest point in an East-West direction, was approximately 40 feet long in a North-South direction, and varied from approximately eight feet four inches deep at the North wall to from 13 to 15 feet deep at the point where the manhole was to be installed. The South side of the excavation did not have a clearly defined boundry because it was the site of the trench excavation in which the sewer pipe leading to the manhole had been installed. This trench to some degree had been backfilled. Thus, this site, including the backfilled sewer trench and the open excavation, if viewed from above, presented a roughly defined keyhole type of shape.[6/] (Tr. 11, 20, 21, 62, 63, 64, Exhs. C-12 and R-1).

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6/ The C. O. measured the North wall of this excavation and found it to be approximately 25 feet wide (Tr. 20). Respondent's Chief Field Engineer, Mr. Pickin, measured the width of the excavation at its widest point, across the top of the manhole and found it to be 35 feet wide (Tr. 64, 65). Thus, because of the irregular shape of this excavation, these measurements do not present conflicting testimonial evidence.

On November 3, 1980, C. O. Marinan, at approximately 1:25 P.M., approached the excavation site walking from the Ramapo River in a Northly direction. He stopped momentarily and took a photograph of the scene he viewed, Exhibit C-2. This exhibit shows, in the foreground, the backfilled trench, the open excavation with one section of the precast Manhole 71 in place within the excavation, an employee of Respondent, later identified as Salvatore Trippicchio, standing between the manhole and the East wall of the excavation and part of the large, 100 ton backhoe used to dig the excavation and install the manhole, positioned on the surface of this ground above the North wall of the excavation. As he proceeded towards the excavation, he observed vertical walls of the excavation, some of which were undermined or undercut as well as a considerable amount of water at the bottom of the excavation. The C. O., after identifying himself to Respondent's foreman, Mr. Louro, and a brief opening conference, advised the foreman of the conditions he observed concerning the excavation, which in his view constituted a violation of the OSHA Excavation Standard and represented a danger of cave-in to the employee within, who should be removed until the walls of the excavation were brought into compliance with the OSHA Standard, thus making this excavation safe for employees to work within. Mr. Louro complied with the C. O.'s advise and ordered Mr. Trippicchio out of the excavation (Tr. 11, 12, 16, 17, Exhs. C-2, C-3).

The C. O. then proceeded to further inspect and photograph this excavation. Exhibit C-4 is a photograph of the West wall of the excavation looking towards the South. It depicts the vertical and undercut West wall, with the top layer of virgin, previously undisturbed soil, with a part of a fallen, buried tree projecting from its face. Exhibit C-5 is another view of the West wall, showing its vertical and undercut side. At this point, the excavation wall is approximately 13 feet high. Exhibit C-6 shows the C. O.'s tape measure, which he has put into the excavation to demonstrate the vertical nature of the North wall. (The C. O. took this photograph standing at or near the edge of the North wall, facing to the West, at a place marked by a circled X in the photo. His tape measure, running from left to right lies on top of the edge of the North wall, and then drops out of sight down the face of this wall (Tr. 17-20). At this point, the excavation was eight feet four inches deep.

Exhibit C-7 shows the East wall of the excavation with Respondent's President, Mr. Dominick Caruso, who was called to the site after the C. O.'s arrival, standing on the surface (without a hard hat), three employees and a section of the precast manhole elevated above the ground being prepared to be placed in the excavation.

Manhole 71, upon its completion, consisted of two, precast, reinforced concrete sections, each measuring seven feet high with a six and one half foot diameter, one placed atop the other, with a precast concrete cover as its top. (See Exhs. C-10, C-11).

At approximately 1:50 P.M., on November 3, 1980, Respondent's President, Mr. Dominick Caruso arrived at the scene and he contacted the C. O., asking the C. O., ". . . what the problem was." The C. O. informed him of the vertical walls of the excavation, the water present within the excavation, and the undercut or undermined walls all of which presented a risk that there might be a cave-in and thus, a danger to his employees within the excavation. Mr. Caruso replied that the excavation ". . . was wide enough." The C. O. and Mr. Caruso then proceeded to the North wall of the excavation where the C. O. demonstrated the vertical shape of that wall by using his tape measure (Exh. C-6). The C. O. further took a handful of the excavated earth and identified it as "clay", advising, in effect, that because the wall was not "solid rock and shale", (which may be vertical under the OSHA Standards), it should have been sloped back and not vertical. Mr. Caruso then, ". . . yelled something in Spanish or Portuguese to the employees and the operations commenced." The C. O. then asked Mr. Caruso if he intended to comply with the OSHA Standard,

and Mr. Caruso replied, ". . . first I finish the manhole, then I comply." The C. O. then advised that Respondent would be cited for a willful violation. Mr. Caruso "just shrugged", work recommenced and the construction of the manhole went forward to its completion. This work exposed three of Respondent's employees within the excavation to the danger of moving ground, Foreman Louro, and employees Trippiccio and Branco. After completing the errection of the manhole, the sides of the excavation were further excavated back or sloped (Tr. 26, 27).

During trial, the foregoing testimony of the C. O. was not rebutted in any way, particularly the statements and actions of Respondent's President Caruso, as Mr. Caruso was not called as a witness. Thus, this testimony is afforded full credence.

Exhibit C-8 is a photograph of the East wall of the excavation after work had been resumed upon Mr. Caruso's orders. An employee is standing in the excavation giving signals for the placement of the upper section of the manhole. Immediately to the left of this employee, is shown some type of form work supporting concrete which had been placed over the large sewer pipe previously installed which ran into the manhole. This view is looking Southward.

Exhibit C-9 depicts the same excavation looking Northward, showing the upper section of the manhole in place and two employees within the excavation. There is also visible the

tracks of the 100 ton crane used to hoist the manhole sections, pipe and to accomplish the digging, positioned on the surface level near the North wall of the excavation.

Exhibit C-11 is another view taken of the excavation looking Northward, showing the three identified employees within the excavation.

The C. O. further testified that during his inspection, he saw "blocks of soil falling into the excavation", from its Northeast and West walls, which, if an employee was at that point, could have suffocated him or "broken every bone in the employee's body", because of the large size of blocks of soil (Tr. 22, 41, 44).

This episode occurred when the 100 ton backhoe was craning a steel plate into the excavation which was then pounded by the large shovel into the excavation bottom, which was to function as a form for concrete poured over the preexisting sewer pipe. (Exh. R-2 shows such plates in place).

Additionally, the C. O. testified that during his inspection on November 3, 1980, he asked both the Respondent's President, Dominick Caruso, and Superintendent, Anthony Caruso, if they were aware of the OSHA requirements regarding the protection of excavation and trench walls from collapse by shoring or sloping back to the angle of repose, and they both indicated that they were. The C. O. then asked why they had not complied with these requirements. Respondent's president indicated that a log or

fallen tree covered by and partially protruding from the top layer of soil, could have been 60 to 70 feet long, and to slope back would have disturbed this buried log which ". . . would have been too tough to handle." This rational proved erroneous however, because when this wall was further excavated and sloped back, the protruding log proved to be about 24 inches in diameter and approximately eight (feet) long.

In reply to the C. O.'s question, Respondent's superintendent stated that he had sloped the excavation walls when initially dug, but due to ground water the base of the slopes had washed away leaving partially vertical walls. Further, he stated that the C. O. had come at the "wrong time", as they were making a turn (in the sewer pipe line, the manhole being located at this turning point). (Tr. 26).

Again, this testimony of the C. O. regarding statements made by Respondent's president and superintendent are neither rebutted nor challenged in this record, as neither individuals were called as witnesses. Thus, this testimony is given full credence.

Additionally, C. O. Marinan testified that during his inspection he was joined by Respondent's Chief Field Engineer Pickin. They discussed the excavation and its vertical walls and the C. O. stomped the top of one wall with his foot and a block of soil fell into the excavation. Mr. Pickin reportedly

agreed with the C. O. that some of the excavation walls were vertical and should have been sloped or protected (Tr. 46).

During his inspection, the C. O. observed a significant amount of water in the excavation which was being controlled by a sump pump pumping the water out of the excavation through a length of hose. (See Exh. C-10 which shows the pump and hose suspended from a cable).

The C. O. testified that the water was welling into the excavation apparently from near the North wall. Respondent, through its expert witness claims that the water was coming from the nearby Ramapo River, filtering through the crushed stone bed upon which the previously installed pipe had been placed.

Regardless of its source, there is no doubt that water was entering this excavation, as shown in Exhibits C-3 and R-4. Respondent does not challenge the C. O.'s position that this water presented an additional adverse factor to the stability of the excavation walls, in that it could further undermine the base of these walls, thus making them more subject to collapse. In fact, Respondent's superintendent reported to the C. O. that this was precisely what had happened in that the walls were initially sloped back, but that water had washed away the lower portions thereof, creating the vertical walls.

After the installation of Manhole 71 had been completed, Respondent did further excavate and slope the excavation walls. This operation took approximately 25 minutes. Exhibit C-10 shows the reexcavated East wall, completed manhole and the sump pump and hose. Exhibits R-2 thru R-5 similarly are various views of this excavation taken by Respondent's Superintendent Caruso after the reexcavation and sloping of the walls. The C. O.'s opinion that the portions of the excavation's walls which were vertical, basically the North and West walls, and part of the East wall, (he readily admitted that some parts of the walls were sloped back to some degree), were unstable was proven during this reexcavation and additional sloping process. He testified that when the large shovel (See Exh. R-5) struck the East wall (to further slope it back), ". . . the entire North wall came down with a clop, en masse." (Tr. 48). This testimony is unchallenged and unrebutted in this record and thus is entltled to full credit.

In summary, C. O. Marinan testified in effect, that based upon his observations of the excavation in question, to wit: some parts of the walls were vertical and undercut and undermined; the walls consisted of various strata, the bottom part of which was evidently a soft material as it had been washed away or undermined by the water present in the excavation; the presence of the water which increased the instability of the walls; cracks in some of the walls; seeing large chunks fall

from the face of the walls during the installation of the steel plate, concrete form; stomping on the top of a wall and thereby dislodging some soil from its face, and seeing the entire face of the North wall collapse during reexcavation procedure; he determined that the East and West walls of this excavation were not guarded by a shoring system, adequate sloping or equivalent means and thus recommended the issuance of the Willful Citation herein because not less than three of Respondent's employees were exposed to the danger of moving ground (Tr. 8-58, 122, 123).

A thorough study of the C. O.'s testimony leads to the conclusion that it is fully creditable.

Respondent defends this action by basically arguing that the excavation in question was dug in soil classified as "Cemented Sand and Gravel", and thus under Table P-1 showing "approximate Angle of Repose for Sloping of Sides of Excavations", appearing immediately after 29 C.F.R. 1926.652, the parts of the excavation walls which were vertical were not in violation of the cited OSHA Standard 29 C.F.R. 651(c).

This defense was put into the record through three witnesses.

Respondent's first witness was Mr. Pickin, its Chief Field Engineer since late in 1978. He testified that his responsibilities included overseeing Respondent's field engineers for all projects concerning the technical aspects

of the jobs, i.e., quantities [of materials] and conformance to shop drawings and the like. He stated that the Northwest Bergen County Sewer project called for the installation of approximately 29,000 feet of interceptor sewer pipe of various sizes ranging from 15 to 36 inches to be installed in "cuts", i.e., trenches and excavations varying up to 20 feet in depth in varying soil conditions. Respondent had begun this project in August of 1980, three months prior to the OSHA inspection, at which time Manhole 71 was installed as a pivot point in the turning of the sewer line, which was quite close to the Ramapo River. He voiced the opinion that "The majority of the water . . ." observed in the excavation on the day of the inspection was water from the Ramapo River which came into the excavation through the stone bedding upon which sections of the previously installed sewer pipe had been placed. This water was being pumped out of the excavation by a sump pump placed at a low section of the excavation. This testimony does not critically contridict that of C. O. Marinan, who testified that he was told by some representative of Respondent that the source of the water observed in the excavations was the river's water table and that he observed some water entering the excavation from the base of one of the excavation's walls, because, the exact source of the water observed in the excavation is not that critically important. Respondent does not contest the fact that a large enough amount of water to require

pumping out was getting into this excavation. The presence of this water in this excavation certainly did not add to the stability of its walls, rather, if anything it made these walls less stable, which was confirmed by Respondent's Superintendent, Anthony Caruso, who told the C. O. that the walls of the excavation had initially been sloped but that the water had washed away their bases, at some points, making the walls vertical. The adverse effect of water within an excavation is recognized and referred to in the OSHA Excavation Standards, such as in Table P-1, following 29 C.F.R. 1926.652, which has the following note: "The Presence of Ground Water Requires Special Treatment." See also the Specific excavation requirements relative to water in excavations set forth at 29 C.F.R. 1926.651(h), (j) and (p).

Mr. Pickin further testified to talking with C. O. Marinan on the day of the inspection at the site of the excavation, during which, "Mr. Marinan felt that the excavation was insufficiently protected. . . . due to the nature of the walls of the excavation." Mr. Pickin's response was, "I felt that although the slope was vertical in nature, for a certain section of it, that due to the width of the excavation, it was not unsafe." (Tr. 64). He testified to having measured the width of this excavation across the top of the manhole with a "grade pole" and found, "At the maximum width it was 35 foot." (Tr. 64).

He further testified on cross-examination that the manhole was "about 8 1/2 feet wide." (Tr. 70).

Thus, this excavation was in effect bisected by both the manhole structure being errected and the previously installed sewer pipe. Subtracting the 8 1/2 feet occupied by the manhole from the 35 foot maximum width, leaves a total, unoccupied width of 26 feet, 6 inches, which when divided by two, leaves a maximum distance on either side of the manhole of 13 feet, three inches, at the level at the top of the manhole. Thus, the space between the manhole structure and the walls of the excavation could not have been over approximately 13 feet at the top of the excavation and as clearly evident in the photographic exhibits, was considerably less at the bottom of this excavation. Consequently, the work area at the bottom of the excavation to the sides of the manhole were quite narrow. See Exhibits C-9 and C-11. In addition to the manhole structure within this excavation, there were also large steel plates used as concrete forms which contained concrete placed over previously laid sewer pipe. See Exhibits C-8, C-9, C-10, C-11, all of which presented formidable obstacales which would have prevented or at best seriously impeded an employees escape from a collapsing wall. Thus, Mr. Pickins opinion that the excavation was safe because of its width is worthy of little or no weight.

Mr. Pickin confirmed the C. O.'s testimony that part of one wall of this excavation did collapse when a steel plate, to be used as a concrete form, was installed next to the manhole. See Exhibit R-3, a photograph taken by Superintendent Anthony Caruso of the steel plate leaning against the West side of the manhole.[7/]

Mr. Pickin further testified that Respondent, in digging the excavation in question, used a large backhoe, which weighed approximately 100 tons. That this piece of equipment was also used to lower sections of the manhole and steel plates into the excavation and as so utilized, was positioned fairly close to the edge of the excavation, its tracks coming to within ten feet of the edge of the excavation. Additionally, that the shovel of the backhoe was used to force the steel plates into postion at the bottom of the excavation, and its operation caused "a lot of vibration." (Tr. 67, 68). See Exhibits C-2, C-7, C-8, C-9, and R-5 which depict this large backhoe and the operations described supra.

Of course the use of this 100 ton backhoe near the edge of this excavation, which caused considerable vibrations, did not add to the stability of the walls thereof. Rather, it had an adverse effect thereon by placing significant weight

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7/ Photographic Exhibits R-2 thru R-5 were taken by Superintendent Caruso on the day of the OSHA inspection at approximately 2:50 to 3:00 P.M. These photographs were taken immediately after Respondent had increased the angle of the slope of the excavation sides. (Tr. 65, 66, 122).

just behind the excavation walls and also by transmitting significant vibrations into the ground below.

Lastly, Mr. Pickin further confirmed C. O. Marinan's testimony concerning earth being displaced from one wall of the excavation when the C. O. stomped on the surface above its face (Tr. 68-69).

Respondent's second witness was its General Manager, Mr. Crandall who had occupied that position for about two and one half of his five year employment by Respondent. He was a 1969 graduate from Union College with a degree in Civil Engineering. As General Manager, he supervised all of Respondent's operations including bidding on contracts for utility projects.

He explained the preparatory work carried on to submit a bid on a project; the study of drawings and anticipated soil conditions through which the project will pass which generally involves a study of soil test borings.

In the project at issue, Mr. Crandell testified that based on the preliminary studies, ". . . we determined from it that the majority of the project could be open cut. By that I mean excavating and sloping the sides. We found that where there was'nt any water condition problem, we found we would be able to excavate without a dewatering system. Where there was a dewatering system required we would install well joints, or deep well, and proceed from that point. The whole

purpose of this is to determine the most economical way to do the jobs so that you can subsequently become the low bidder.[8/]

In many cases we had a variant salt [sic soil] condition and in some cases we could open cut as I mentioned, and in many areas of the job we have installed well point systems, deep well systems. In other areas of the job we've installed tight wood sheeting and tight steel sheeting. So it all depends on your experience and the nature of the soil that you're involved with." (Tr. 79, 80).

In relation to the excavation at issue, Mr. Crandall stated that it was determined to make an "open cut" for that as well as most of the upper end of the project. "As the determining factor in this case, was the fact that we had a wide open field or wooded area that was clear. So we did'nt have houses and other structures that we would be worried about damaging. We could slope the trench fairly wide. So our determination prior to bid was that we would do this." (Tr. 80).

Thus, in preparing its bid for this project, it was determined to use an "open cut" type of excavation where soil conditions permitted. In the words of its general manager, "open" cutting meant sloping the sides. However, as the testimony of the inspecting C. O. and the photographic exhibits definitely establish, this plan was not carried out

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8/ On cross-examination, Mr. Crandall further defined "open cut" to mean ". . . sloping the trench at whatever angle is deemed stable." This angle of repose varies, according to Mr. Crandall, "Depending" upon the conditions in the field." (Tr. 84).

for the excavation at issue as some of the walls of this excavation were vertical and undercut or undermined.

Mr. Crandall further testified to Respondent's safety program, evidently a written program compiled by Respondent's insurance company, his office, ". . . and other safety consultants." (Tr. 80). Upon being hired, employees receive a copy of this program. On Friday evenings there is a meeting ". . . with all the supervisors at the main office. And its mainly for scheduling and construction procedures but one of the topics is always safety." (Tr. 80, 81). He further stated that Respondent utilizes "trench shields" when needed which are designed by professional engineers as well as shoring systems, similarly designed. Additionally, he identified Dr. Robert Kondner of Kondner Engineering Technical Services as Respondent's "general soils consultant." (Tr. 81).

He testified that his visits to Respondent's project's varied, averaging two to three times a month. He was not at the excavation site at issue in this case on the day of the OSHA inspection nor for three days thereafter. However, sometime after the Citation herein was received, he called Dr. Kondner and requested that he do some soil sampling and some soil borings at the site of the excavation, as Respondent . . . "did'nt basically agree with the Compliance Officer. We felt that the only way to make sure that our professional analysis and gut feeling, so to speak, was correct, was to

have a professional look at the soils and to do the proper laboratory tests and either confirm that we were right or we were wrong." (Tr. 83, 75-90).

Respondent's final witness was Dr. Robert L. Kondner, who holds B.S., M.S. and Ph.D. Degrees in Civil Engineering from John Hopkins University. He has been a "professor of engineering" at the Technological Institute at Northwestern University in Evanston, Illinois, at the University of Maryland at College Park, Maryland and at Loyola College in Baltimore, Maryland, teaching both graduate and undergraduate courses in soil mechanics and foundation engineering; soil rheology (the study of stress-strain and time of materials); ground water flow; soil dynamics; mechanics; hydraulics; structured mechanics and similar courses. He has directed research programs for the National Science Foundation, U. S. Army Corps of Engineers under the Nuclear Weapons Effects Board, the National Academy of Science and National Property and Highway Research Program.

Dr. Kondner testified that at Respondent's request he visited the excavation site at issue here, on January 6, 1981, to supervise the taking of a test bore sample of the ground near the excavation (the excavation having been backfilled by this date, assumedly), by "the firm of Walsh", (Tr. 93), who had taken the pre-bidding test bore samples for Respondent. At the time of his January visit to this

site he was aware that the Citation at issue had been received by Respondent.

He testified that the test boring was taken some 18 feet to the West of Manhole 71. His analysis of this sample revealed a top soil layer of loam to a depth of two feet. Under that layer was a 12 foot deep strata of "cemented sand and gravel." (Tr. 94). Below that strata there was "cohesive sand/silt mixture" for the next six feet, as the test hole was 20 feet deep in all. After submitting this sample to the "Direct Shear Tests" (and moisture content), Dr. Kondner testified that in his opinion that, ". . . if you were to cut that slope, [in the soil of the type he found in his sample] that material very carefully, in a vertical slope, it would hold up to a depth a little over 22 feet. Now from a practical situation, with a big backhoe, and a big bucket of a backhoe going in and excavating, its not like cutting it with a teaspoon. You shake the ground, you dig the material. I would not design anything to come anywhere near that depth. However, for a depth of 13 feet, you have a factor of safety with a vertical slope, of 1.72. Now normal construction, normal good engineering practice construction, for excavations, usually uses a value for factor of safety of slope, somewhere between 1.2 to maybe 1.5." (Tr. 97-98). It was his opinion further, that based upon his boring sample and

tests thereon, that the vertical cuts [of the excavation in question] "absolutely" posed no hazard or danger to the men working in this excavation. He further testified that his test bore sample revealed "cemented sands and gravels", and thus according to Table P-1 of the OSHA Standards, vertical walls (a 90° angle of Repose) was proper (Tr. 99).

After his study of the various photographic exhibits and listening to prior testimony, (Dr. Kondner never did view the actual excavation in question), he was of the opinion that the water in the excavation migrated from the nearby Ramapo River through the crushed stone which had been placed beneath the previously installed sewer pipe and base of Manhole 71.

On the witness stand, he testified using the original, color photographic exhibits, which he had only seen zeroxed copies of previously. He identified, from these photos, the "cemented sand and gravel" he said was depicted therein, and further explained, that in some photos, this was covered as ". . . much of the top soil has been spoiled down into the excavation, and in fact covers over this hard, dense, cemented sand and gravel." (Tr. 102)[9/]

In at least two photographs, he identified the "cemented sand and gravel", in the bottom of the excavation which had fallen into the excavation by being dug by the backhoe (Tr. 102-104, Exh. C-4, C-6).

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9/ He mistakenly believed Respondent's photos, Exh. R-2 thru R-5, showed the excavation prior to the resloping of its sides (Tr. 102).

As to Exhibit C-7, Dr. Kondner's examination of this photo led him to conclude that it showed a, "slightly different deposition" of the soil strata, "at this particular area." (Tr. 104).

Finally, he testified that, "I see nothing in these photographs which indicates any form of instability or impending movement of the earth.", and "I don't think there was any danger to workmen in that excavation". (Tr. 107).

Upon cross-examination, it developed that Dr. Kondner, over the past five or six years had appeared as a witness for Respondent "Probably three times." Further, that only one test boring sample was taken "approximately 18 feet" from "approximately from the center." of Manhole 71 (Tr. 108). He was unable to detect any undercutting of the excavation wall shown in Exhibit C-5 or Exhibit C-11 (Tr. 109).10/

Finally, Dr. Kondner testified as follows on cross-examination:

> Q Assuming that at one point it was sloped, and at a later point, some of those photographs demonstrated fairly close to vertical. How did that happen if this is such a cemented sand? That it doesn't wear away or erode.
>
> A What I said was this. And I think this probably shows in these photographs. I said if you could very carefully cut this material,

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10/ He reached this conclusion by drawing a blue line supposedly parallel to the vertical Manhole 71 in Exhibit C-11. However, a careful use of a ruler establishes that this blue line is not parallel to the vertical side of Manhole 71. (Tr. 109-111).

you could have a fairly clean slope, very deep. The order of 20 to 22 feet. But in a practicality, digging with a big backhoe like this, the backhoe goes down, it rips the material, it tears it out. It's not very carefully cutting it. And that's why in some cases here, depending upon the individual material, depending upon how the individual buckets go in and rip it out, some may be sloped more than others. As a matter of fact, the bucket going in could be cutting a vertical slope and as he comes up, he loses part of that material that he gouges out, and it obviously then has the cementing action broken. Because it is not as hard as concrete. It breaks the cementing action. And then you have the individual particles. The individual gravel particles and sand particles. And they're going to lay on in there in a slope. At the approximate angle of the friction angle. Because you now have this material --- this material as I tested it, had a cohesion and internal friction. Once you break it up, you break the cementing action which is the cohesion. And then the only thing you have left is the internal friction. And that should be approximately 50 degrees. 45 to 50 degrees. Because the angle of internal friction that I got from my tests was a little over 49 degrees. And that I think is what you're seeing in these photographs when you see these sloped surfaces. It's the broken up cemented sand and gravel which the machine dug out.

Q Did you just say that once you break up the sand and gravel, there's no more cohesion?

A That's right. You break the binder.

Q Well If there's no more cohesion, Dr. Kondner, how can you say that a totally vertical angle will do?

A Certainly. Because I said this. If you'll let me give you the story here. If you go in very carefully. If I go in with a bucket, say similar to something like trying to cut this wall, if I go in with that bucket, I'm tearing the material out here. But if I very carefully avoid tearing it in here, this material still

has its cemented action, whereas the material that the bucket grabs the bucket breaks up. Now if the bucket doesn't pick every bit that it breaks up, up, it's going to fall in a pile. Along side of this wall.

Q So assuming that someone didn't go in with a spoon, and very carefully erect a straight vertical, and there would be some displacement somewhere, do you still insist that the straight vertical would be entirely safe?

A Yes it would. It depends on the excavation. And the tear of the excavation.

Q Did you happen to see the excavation here?

A Not open. But I have seen other excavations along that area. I did not see this excavation open.

Q You don't know what kind of care was taken with this excavation, do you?

A No. I don't. (Tr. 116-118).

When the entire testimony of Dr. Kondner is carefully studied, his opinion that the walls of the excavation presented no danger of moving ground to employees does not outweigh the actual on site observations of C. O. Marinan, who stomped on the surface above one wall and dislodged earth from the face below; who witnessed the entire face of the North wall of this excavation collapse when the 100 ton backhoe was re-sloping another side of the excavation, and who saw additional earth collapse when this backhoe bucket was used to pound a steel plate into position as a concrete form at the bottom of the excavation.

The substantial and creditable evidence of this record considered as a whole, fully supports the conclusion that the walls of the excavation in question did expose Respondent's employees to the dangers of moving ground as portions of these walls were neither guarded by a shoring system, nor adequately sloped nor protected by any other equivalent means. The violation as alleged is established in this record.

ISSUE NO. 2

Is the violation accurately denominated "Willful"?

The majority rule of the Circuit Courts who have spoken to the question, as well as the Commission, holds that a "Willful" violation is one involving voluntary action, done either with an intentional disregard of, or plain indifference to, the requirements of the statute. No showing of malicious intent or bad motive is necessary. A conscious, intentional, deliberate, voluntary decision is properly described as "Willful". See National Steel and Shipbuilding Co. v. OSHRC, 607 F.2d 311 (9th Cir., 1979); and Secretary of Labor v. Kus-Tum Builders, Inc., OSHRC Docket No. 76-2644, 10 OSHC BNA 1128 (1981), and cases cited therein.

The evidence of this record clearly establish the necessary elements of a "Willful" violation.

As to Respondent's knowledge of the requirements of the OSHA Excavation Standards, C. O. Marinan testified that prior

to the November 3, 1980 inspection, he was directed to conduct a general schedule inspection of Respondent's worksite. On August 26, 1980, he went to the general worksite and talked with Respondent's Superintendent, Anthony Caruso. At this time Respondent was engaged in surveying and cutting trees, the actual trenching and excavation had not yet begun. The C. O. testified to having had ". . . an extensive conversation with Superintendent, Mr. Anthony Caruso, I gave him copies of the regulation, and specifically, the OSHA booklet, 20-26, which breaks out trenching and excavation requirements". (Tr. 25).

Additionally, in February, 1976, Respondent was cited for a serious violation of the trenching standard set forth at 29 C.F.R. 1926.652(a), a violation substantially similar to the one at issue here only in a trench rather than an excavation, i.e., failure to shore, sheet, brace or properly slope the sides of the trench. Although originally contested, that case was terminated by a settlement, that Citation becoming a final Order of the Commission. The trenching and excavation requirements appear in the same section of the OSHA Standards, Subpart P - 29 C.F.R. 1926.650 through 1926.652. See Exhibit C-1.

On the day of the inspection involved here, November 3, 1980, the C. O. testified that he asked both Anthony Caruso

and Respondent's President, Dominick Caruso, if they were aware of the requirements of Subpart P. They answered that they were aware of the requirements (Tr. 25,26).

Although Respondent's Foreman Louro ordered one of Respondent's employees out of the excavation upon the C. O.'s suggestion at the beginning of the inspection on November 3, 1980, when President Caruso arrived on the scene, the C. O. discussed the hazards with him but Mr. Caruso ". . . directed everybody back in the excavation, . . ." (Tr. 23). After showing Mr. Caruso the vertical walls, overhangs and water in the excavation, the C. O. asked him if he intended to comply with the OSHA Standards. Mr. Caruso replied, ". . . first I finish the manhole, then I comply." (Tr. 26, 27). Even after being advised by the C. O. that he could be cited for a willful violation, Mr. Caruso, ". . . just shrugged and continued on with the operation and then when they did put the additional section on the manhole, then as he said prior, then he complied." (Tr. 27).

This testimony of C. O. Marinan is not contested or rebutted in any way.

The violation herein is properly characterized as "Willful".

## PENALTY

The C. O. testified to his computation of the proposed penalty of $8,000 following the standard penalty computation procedures. For a willful violation, the penalty proposed

by the C. O. is evidently reviewed by his supervisor as well as the Area Director, and only then issued in conjuction with the "Willful" citation (Tr. 34).

After an independent evaluation of the statutory penalty factors set out in Section 17(j) of the Act, 29 U.S.C. 666(j), it is concluded that this penalty should be reduced to $6,000.

Respondent is a small to medium sized utility construction company with 45 employees, exclusive of family members. Its Northwest Bergen County sewer project was a rather large one.

The hazard to which it exposed three of its employees was serious. If any employees were in this excavation when its North face did collapse, death or serious physical harm could surely have resulted. However, the duration of the exposure, as far as this record reveals, was rather brief, in the neighborhood of approximately one hour.

The walls of the excavation were ultimately sloped back to correct their vertical nature.

Respondent does have a history of one previous serious trenching violation, Exhibit C-1. Lastly, it does have a safety program, but the evidence concerning it is rather meager in this record.

It is therefore concluded that a $6,000 penalty is appropriate.

## CONCLUSION

The jurisdiction of the Review Commission in this case is not contested and is established by the pleadings and Stipulations pursuant to Sections 3(3), 3(5) and 10(c) of the Act, 29 U.S.C. 652(3), 652(5) and 659(c).

Based upon the foregoing which constitutes the findings of fact and conclusions of law herein, and pursuant to Sections 10(c) and 12(j) of the Act, 29 U.S.C. 659(c) and 661(i), it is hereby

ORDERED

1. That the one-Itemed "Willful" Citation alleging a violation of 29 U.S.C. 654(a)(2) for failure to comply with the Occupational Safety and Health Standard set forth at 29 C.F.R. 1926.651(c), issued to this Respondent on November 20, 1980, is AFFIRMED.

2. A penalty of $6,000 is ASSESSED.

William E. Brennan
WILLIAM E. BRENNAN
Judge, OSHRC

Dated: October 18, 1982
New York, New York

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

# NOTICE OF DECISION

Secretary v. KEN-MAR AUTOMOTIVE PRODUCTS CO.

OSHRC Docket No. 82-286

1. Enclosed is a copy of my decision. It will be filed with the Commission on October 18, 1982, and will become the final order of the Commission on November 17, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief, Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N. W., Suite 601
   Washington, D. C. 20006

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is November 17, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commisison.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Paul L. Brady
PAUL L. BRADY
Judge

Date: September 28, 1982

OSAHRC FORM NO. 97

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

| | | |
|---|---|---|
| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 82-286 |
| | ) | |
| KEN-MAR AUTOMOTIVE PRODUCTS CO., | ) | |
| | ) | |
| Respondent. | ) | |

APPEARANCES:

Gary A. Boncella, Esquire, Office of the Solicitor, U. S. Department of Labor, Cleveland, Ohio, on behalf of complainant

Mr. Ken Hiudt, Cincinnati, Ohio, on behalf of respondent

## DECISION AND ORDER

BRADY, Judge: This proceeding is brought pursuant to section 10 of the Occupational Safety and Health Act of 1970 ("Act") to contest a citation and proposed penalty issued by the Secretary of Labor ("Secretary") pursuant to section 9(a) of the Act.

Prior to commencement of the hearing in this cause, the parties stipulated the manner for abatement of item 4 of the citation whereupon it was agreed that respondent would withdraw its notice contesting the citation, leaving in issue only the proposed penalties.

The Commission's authority to assess penalties is derived from section 17(j) of the Act which states it is required to find and give "due consideration" to the size

of the employer's business, the gravity of the violation, the good faith of the employer, and the history of previous violations in determining the assessment of an appropriate penalty. The gravity of the offense is the principal factor to be considered. Nacirema Operating Company, Inc., 72 OSAHRC 9/A2, 1 BNA OSHC 1049, 1971-73 CCH OSHD ¶ 15,032 (No. 4, 1972). The Commission stated in Secretary v. National Realty and Construction Co., Inc., 72 OSAHRC 9/A2, 1 BNA OSHC 1049, 1971-73 CCH OSHD ¶ 15,188 (No. 85, 1971), that the elements to be considered in determining the gravity are: (1) the number of employees exposed to the risk of injury; (2) the duration of exposure; (3) the precautions taken against injury, if any; and (4) the degree of probability of occurrence of injury.

Respondent, a remanufacturer of various auto parts, including brake shoes, water pumps and clutches, employed 18 employees in its plant area. The record discloses an inspection of June 1974 found 21 nonserious violations which were not contested. Another inspection in April 1975 revealed no violations at the facility.

Items 1 and 2 of the citation pertain to an opensided, elevated platform located in the middle of the shipping department. It was approximately 16 feet by 16 feet by 8 feet in height with a concrete floor beneath (Ex. C-1, C-2, C-3, C-4).

Complainant's evidence shows that the presence of debris, and holes in the floor of the platform, increased the hazard of falling by slipping or tripping. Testimony revealed that one employee ascends a ladder to the platform to obtain packing boxes for use the following day. He was exposed to the hazard for approximately five to ten minutes each day.

Mr. Ken Hiudt, appearing for respondent, stated that the overhead storage area was not a work station but was used only to store excess packing boxes. Upon learning of the violative conditions, respondent immediately rebuilt the storage area to comply with the cited standards.

Item 3 of the citation relates to respondent's failure to have a deluge water hose and an emergency eye wash equipped with a quick, open valve at the parts cleaning tank. The tank, used on an irregular basis, contained an acidic solution heated to approximately 200 degrees for removing grease and accumulated dirt. It was indicated that one employee, operating a crane for lowering and raising a basket of parts, was exposed to a splash hazard to the skin although protected with a face shield, apron and gloves (Ex. C-5).

Mr. Hiudt stated that at no time had the State of Ohio informed the company its system was not in conformance with the appropriate standards. He advised that a combination safety shower and eye wash station has been installed.

Item 4 was violated for failure to provide foot protection for approximately seven employees working in certain areas of the plant. The employees handled parts varying in weight from approximately one to ten pounds and, when loaded into containers, weigh from 100 to 150 pounds (Ex. C-6, C-7). The hazard would be to the foot, from a falling part or the full container, of up to waist high.

Respondent states it had not been informed by the State of Ohio regarding a foot hazard, and no injuries have been sustained as a result of its operation. Employees regularly assigned to the area are now provided safety shoes by the company.

Item 5 refers to a violation for failure to provide guarding on a stripper machine (Ex. C-8). The operator was exposed to injury to hand or forearm from the nip point between the shaft and a fixed round bar at the rear of the machine. A guard was present, however, and it would be necessary for him to reach around it to gain access to the nip point. The evidence also shows the shaft rotates at a slow speed.

Respondent points out that the machine was bought in its present guarded condition which was believed to be in conformance with safety standards.

Item 6 refers to exposed horizontal belts used with pulleys which presented a hazard to the operator's fingers. Some machines were completely guarded while others had exposed areas as shown in Exhibits C-9 and C-10. It was indicated that the probability of reaching the nip point was slight.

Mr. Hiudt states that one machine was purchased new and the others were used, but each contained an enclosed flywheel which prevents contact with the outside surface of the wheel. He contends the operator would have to purposefully go inside the cover to reach the pinch points in question. All of the machines have been completely covered.

Respondent points out that, even though it is a small company, it understands its responsibility to provide a safe and healthful workplace for all employees. In fulfilling this responsibility, it is stated that the consultative services of the State of Ohio have been utilized for many years regarding safety matters. Although it is contended the state agency at no time informed it of the hazards, which gave rise to issuance of the citation, each item was immediately abated following the inspection herein.

Weighing all the factors set forth in section 17(j) in light of the circumstances, it is determined that the following penalties are deemed fair and appropriate.

| Item No. | Amount of Penalty |
|---|---|
| 1 | $ 50 |
| 2 | $200 |
| 3 | $ 25 |

| Item No. | Amount of Penalty |
|---|---|
| 4 | $ 75 |
| 5 | $ 75 |
| 6 | $ 75 |

## FINDINGS OF FACT

1. Ken-Mar Automotive Products Co., at all times hereinafter mentioned, maintained a place of business at 2926 Exon Avenue, Cincinnati, Ohio, where it remanufactured auto parts.

2. On January 1 through February 5, 1982, authorized representatives of the Secretary conducted an inspection of respondent's plant.

3. Each day an employee retrieved cardboard packing boxes from a 16-foot by 16-foot opensided platform eight feet above a concrete floor. He was required to climb a ladder to the platform, which was littered with scrap paper, and contained floor holes. His duties were performed in approximately five to ten minutes.

4. The deluge water hose and emergency eye wash in the cleaning room was not equipped with a quick opening valve.

5. Employees working in some areas of the plant were required to handle parts of 10 or 12 pounds each and containers of parts weighing up to 250 pounds. The employees were not provided with, nor did they wear appropriate, foot protection.

6. The nip point between the rotating shaft and a fixed round bar at the rear of a stripper machine was not guarded.

7. Two horizontal V-belts, operating on one-half HP motors, and pulleys in the brake lining area were unguarded.

## CONCLUSIONS OF LAW

1. Ken-Mar Automotive Products Co., at all times pertinent hereto, was an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Act, and the Commission has jurisdiction of the parties and subject matter herein pursuant to section 10(c) of the Act.

2. Respondent is, and at all times pertinent hereto, required to comply with the Act and the safety and health regulations promulgated by the Secretary pursuant to section 6(a) thereof.

3. Respondent was in violation of the standards at 29 C.F.R. § 1910.22(a)(1), § 1910.23(a)(9), § 1910.23(c)(1), § 1910.94(d)(9)(vii), § 1910.132(a), § 1910.212(a)(1) and § 1910.219(e)(1)(i), as alleged in the citation.

Upon the basis of the foregoing findings of fact and conclusions of law, and the entire record, it is ORDERED:

The citation is affirmed, and a penalty in the amount of $500.00 is hereby assessed.

Dated this 18th day of October, 1982.

Paul L. Brady

PAUL L. BRADY
Judge

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| Docket No. | Case Name | Date of Decision | Coordinates |
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| 4263 | GEARHART-OWENS INDUSTRIES, INC. | 11/22/82 | 66/A2 |
| | (Judge's decision) | | 66/B13 |
| 81-1798 | THUNDERBOLT DRILLING, INC. | 11/22/82 | 66/E14 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

November 22, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Gearhart-Owens Industries, Inc.

OSHRC DOCKET NO. 4263

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

FOR THE SECRETARY OF LABOR

OF COMMISSION DECISION

- Counsel for Regional Litigation
  Office of the Solicitor, USDOL
  200 Constitution Ave., NW. - Rm. S-4014
  Washington, D.C. 20210

To wit: See attached.

- James E. White
  Reg. Sol., USDOL
  555 Griffin Square Bldg.
  Suite 501
  Griffin and Young Sts.
  Dallas, Texas 75202

FOR EMPLOYER

- H. Dean Owen, Jr., Esq.
  Owen & Swindle
  1600 Oil & Gas Building
  Ft. Worth, Texas 76102

FOR EMPLOYEES

- James Ammerman, Esq.
  P.O. Box 1777
  Marshall, Texas 75670

  Oil, Chemical & Atomic Workers
  International Union
  1126 - 16th Street, N.W.
  Washington, D.C. 20036

- OFFICE OF THE JUDGES'
  OSHRC
  Rm. 7B11 - Federal Bldg.
  1100 Commerce Street
  Dallas, Texas 75242

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 4263 |
| GEARHART-OWEN INDUSTRIES, INC., | : | |
| Respondent. | : | |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

CLEARY, COMMISSIONER:

A decision of Administrative Law Judge Henry F. Martin is before the Commission pursuant to section 12(j), 29 U.S.C. § 661(i), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). Judge Martin vacated two citations alleging violations of section 5(a)(1) of the Act [1/] which were issued by the Secretary of Labor ("the Secretary") to Gearhart-Owen Industries, Inc., Respondent. [2/] The Secretary petitioned for review of the judge's decision and I directed review on all the issues raised by the Secretary's petition, including the following:

---

1/ Section 5(a)(1), 29 U.S.C. § 654(a)(1), provides:

> Sec. 5(a) Each employer --
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

2/ Judge Martin affirmed a third citation, which is not before the Commission on review.

> Whether the evidence establishes that Respondent violated 29 U.S.C. § 654(a)(1) by failing to provide operational shields and failing to comply with required intraline distances in storing explosives.

The Commission affirms that part of the judge's decision vacating the citation involving the alleged failure to provide operational shields. The Commission reverses that part of the judge's decision vacating the citation involving the alleged failure to comply with required intraline distances in storing explosives.

I

This case arises out of an explosion at Respondent's facility in Cleburne, Texas, where Respondent was engaged in the production of the M-213 hand grenade fuze under a contract with the U.S. Army Munitions Command. The M-213 hand grenade fuze contains a small quantity of explosive which, when detonated, in turn detonates the main powder charge in a completed hand grenade. In Respondent's production process, employees first assemble the fuze body, which consists of a striker, lever, hinge pin, spring, clip and pull ring. After the fuze body is assembled, it passes along a horizontal conveyor belt to the crimping area, where there are four crimping stations on each side of the belt, 32 to 36 inches apart. A crimping machine is located at each station. The machine consists of a cast-iron "shoe", approximately 10 to 12 inches wide and 26 to 32 inches high, which rises from the floor to just above the level of the table where the conveyor belt passes. A steel crimping head approximately one and one-half inches in diameter and 6 to 8 inches long screws into the top of the shoe. The crimping head has a 1/4-inch diameter, vertical hole in it. Each crimping machine operator is supplied with a tray of as many as 110 detonators, the parts containing the explosive material. At the crimping stage, the operator removes a fuze body from the conveyor belt, inserts the base of the fuze body into the open end of a cylindrical C-70 detonator, and then inserts the entire unit--detonator, first--into the

vertical hole in the crimping head. When the operator depresses a foot pedal, a plunger rises in the crimping head and causes a rubber washer to squeeze the open mouth of the detonator at the base of the fuze body, crimping the detonator to the fuze body like a pencil to an eraser. This completed unit, approximately 3 to 4 inches long, is then replaced on the conveyor belt and passes on successively to x-ray inspection, sealing at the crimp with glue, and packing in special trays for shipment. The trays, in turn, are placed in boxes which are then loaded onto a semi-trailer truck parked at the loading dock just outside of the work bay.

The record indicates that, after numerous repetitions of this crimping operation, the rubber washer in the crimping machine would deteriorate, either causing improper crimping or cutting the detonator and leaving part of it jammed in the crimping head. Sometimes, when part of the detonator was severed and remained lodged in the crimping head, the operator would try to remove it using a thin piece of wood like a Q-tip or toothpick. If this failed, the operator would call upon Glenn Junge, the Assembly Department Foreman, to clear the machine. Junge would unscrew the crimping head from the shoe, remove a pin which traversed the crimping head and held an inner piston in place, and remove the piston. Then, he would take out the jammed detonator, replace the rubber washer and reassemble the crimping head. One morning, Junge began to clear a jammed machine; only two were still functioning on the production line at the time. He unscrewed the crimping head, laid it across the top of the shoe, and began to tap the pin out. Suddenly, there was a green flash, followed by an explosion and a fire which engulfed the work bay. When the fire spread to the semi-trailer parked at the loading dock, perhaps three-quarters full of finished M-213 fuze units, the truck, too, exploded. Forty-nine persons were injured in the incident, four fatally.

II

In the first citation before us, we must consider whether the evidence establishes that Respondent violated section 5(a)(1) by failing to provide operational shields. 3/ The Department of Defense Contractors' Safety Manual for Ammunition, Explosives and Related Dangerous Material, DOD 4145.26M, ("DOD Safety Manual") defines "operational shield" as "[a] barrier that will protect personnel, material, or equipment from the effects of fire, fragments, or blast occurring at a particular operation."

A

Testimony at the hearing before Judge Martin established that Respondent initially submitted its contract bid to produce the M-213 hand grenade fuze through the Defense Contract Administration Services Region ("DCASR"). 4/ A DCASR safety specialist, Rodney Prows, conducted a pre-award survey of Respondent's Cleburne facility and reviewed documents submitted by Respondent in order to determine whether Respondent understood the safety requirements of the contract bid solicitation and the DOD Safety Manual. The DOD Safety Manual, which was incorporated by reference in the contract bid specifications, prescribed the use of "operational

---

3/ The citation at issue charged that Respondent:

> . . . did not furnish each of his employees employment and a place of employment which were free from recognized hazards that were causing or were likely to cause death or serious physical harm to his employees working in building no. 1, bay no. 4, the M-213 hand grenade fuze assembly line. Operational shields were not provided to reduce the exposure of employees to the effects of fire, fragments, or blasts occurring at a particular operation and to control the propagation of explosives between operations at the following locations: between employees' stations on crimping machines and between crimping operations and nearby 'unlike' operations such as x-ray inspection, packing, and crating operations.

4/ DCASR investigates companies bidding on defense contracts to assess their capability of producing in accordance with the terms of the procuring defense agency (e.g. Army, Navy, etc.). DCASR makes a recommendation to the procuring agency, but it does not enter into contracts itself.

shields." 5/ Prows' superior at DCASR, Lawrence Del Regno, later testified that, in his view, the DOD Safety Manual requires that each operation be shielded from each other and that the crimping operators be shielded from the material that they are handling. He added that such shielding can be made of any material: "It can be paper. It can be rocks. It can be--as long as the material tests out to 125 percent of the anticipated handled load--it can be of any material that will confine and restrict the blast." Prows reviewed Respondent's safety manual, its standard operating procedures manual, a plot plan of Respondent's facil-

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5/ The DOD Safety Manual, at paragraph 603(f)(1) and (2), provides:

603. Specialized Safety

* * *

f. Operational Shields.

(1) Certain operations are hazardous and operational shields must be used for the protection of employees. The requirements for shielding cannot be clearly defined because of the great variety of circumstances that surround a given operation. The safety of operations will depend on the careful scrutiny of the work planned and the farsightedness of those responsible for safety in the establishment. Dependent upon amounts of explosives, operations being performed and other factors, shields may be constructed of concrete, steel, wood, plexiglass, or other construction materials.

(2) Operational shields for the protection of personnel shall be designed taking into account thickness, size, fastening, and location in such a manner as to protect against the effects of not less than a 25 percent overload above the expected maximum charge. In the absence of reliable data proving the adequacy of these shields, the proposed design shall be tested with at least 25 percent overload before its use is permitted in operations. Operational shields for which adequate test data is available need not be retested for each specific exposure of the same magnitude.

ity and some building drawings, including one drawing titled "Proposed M-213 Hand Grenade Fuze Production Line." The drawing depicted and identified "shields (typ)" between the individual crimping stations. It also included the notation that "Crimper that crimps detonator to fuze body is properly grounded. Crimping of detonator to fuze body is shielded to protect operator and prevent propagation to other detonators."

Following the award of the contract to Respondent, Prows returned to the Cleburne plant to conduct a safety survey. He walked the length of the assembly line (which was not yet in production), including the crimping area. Prows testified that he recalled speaking with Dave Levey, Respondent's plant manager, regarding the crimping machines, the use of the crimping head as an operational shield, and the absence of barricades between the crimping stations. When he was assured by Levey that the crimping heads had been tested by detonating a 25% overload explosive charge inside the crimping head, Prows assumed that the crimping heads had withstood the test and that they constituted adequate operational shields. Approximately three months later, Prows conducted another safety survey at the plant; the line was then in production. Among other things, Prows' subsequent report on the inspection noted the presence of a trailer at the loading dock being used in lieu of a service magazine and specifically recommended that the trailer be moved to another location which complied with intraline distance requirements. The report, though, made no further mention of operational shields.

The record indicates that, in addition to Prows' periodic surveys, DCASR had two to four quality assurance inspectors (QAIs) who were present almost full-time in the plant. The primary responsibility of a QAI is to monitor the quality of the product on the assembly line. The QAI is supposed to be familiar with the DOD Safety Manual. QAIs are also given a safety procedure evaluation checklist,

keyed to the contractor's own safety program, to make sure that the contractor follows through on its safety program.

B

In his decision, Judge Martin noted that Prows never cited Respondent for inadequate shielding in the crimping area during either of his safety surveys, even though he was well aware that there were no physical barricades between crimping stations. Moreover, Prows apparently agreed, based on Levey's statement that the crimping heads had been successfully tested, that the steel crimping heads did constitute operational shields. The judge also referred to the testimony of Prows' superior, Del Regno, who expressed confidence in Prows' judgment and acquiescence in Prows' acceptance of Respondent's interpretation of "operational shield." The judge also pointed to the fact that Respondent had purchased its equipment from and modelled its layout upon a second munitions manufacturer and that its operations and procedures were similar to those employed at another, both of which produced the M-213 fuze under contracts similar to Respondent's. Finally, the judge noted that the DCASR inspectors who were present full-time at Respondent's worksite never complained about the lack of operational shields. Accordingly, Judge Martin concluded that the Secretary did not prove Respondent's failure to provide operational shields and he vacated the citation.

C

In order to establish a section 5(a)(1) violation, the Secretary must prove: (1) the employer failed to render its workplace free of a hazard, (2) the hazard was recognized either by the cited employer or generally within the employer's industry, (3) the hazard was causing or was likely to cause death or serious physical harm, and (4) there was a feasible means by which the employer could have eliminated or materially reduced the hazard. Baroid Division of NL Indus-

tries, Inc. v. OSHRC, 660 F.2d 439 (10th Cir. 1981); St. Joe Mineral Corp. v. OSHRC, 647 F.2d 840 (9th Cir. 1981); National Realty & Construction Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973); Whirlpool Corp., 79 OSAHRC 32/A14, 7 BNA OSHC 1356, 1979 CCH OSHD ¶ 23,552 (No. 9224, 1979), rev'd on other grounds, 645 F.2d 1096 (D.C. Cir. 1981); see United States Steel Corp., 82 OSAHRC 35/A2, 10 BNA OSHC 1752, 1982 CCH OSHD ¶ 26,123 (No. 77-1796, 1982). "A violation of the general duty clause cannot be sustained unless the Secretary is able (1) to establish the type of employer conduct necessary to avoid citation under similar circumstances and (b) to demonstrate the feasibility and likely utility of such conduct." Williams Enterprises, Inc., 79 OSAHRC 24/A2, 4 BNA OSHC 1663, 1666, 1976-77 CCH OSHD ¶ 21,071 at 25,361 (No. 4533, 1976). The Commission has held that "[i]t is sufficient if [a] method [of abatement] materially reduces, even though it may not eliminate, the hazard." Whirlpool Corp., supra, 7 BNA OSHC at 1360, 1979 CCH OSHD at p. 28,535.

The Secretary argues that the citation and complaint refer to the lack of operational shields both between the employee work stations and also between the crimping stage and other assembly stages along the production line; such "operational shields" clearly imply physical barriers, not the crimping heads themselves. Thus, the Secretary rejects Judge Martin's implicit finding that the crimping head constituted an operational shield. The Secretary urges that the crimping heads did not abate the hazard here, that sparks and explosions were shown to spread from and to detonators which were located outside of the crimping head, and that an explosion among the supply of detonators could spread to nearby production areas unrelated to crimping.

The Secretary also urges that he established the feasibility of barriers as an abatement method based upon: the provisions in the DOD Safety Manual; 6/ the building drawing submitted by Respondent in connection with its contract bid

depicting shields between individual crimping stations; Respondent's installation, prior to the explosion, of a 3/4-inch plywood shield, 4 feet high by 8 feet wide, between the fuze assembly area and the crimping area; and Respondent's report to the U.S. Army Munitions Command, subsequent to the explosion, that the rebuilt crimping stations were each "separated by one and one-half inch plywood."

On review, Respondent insists that it did provide operational shields in compliance with the safety requirements of the contract and the DOD Safety Manual. In Respondent's view, the record clearly shows: that the crimping took place inside the steel barrier of the crimping head; that the crimping head had satisfied the 25%-overload-of-explosives test prescribed by the DOD Safety Manual, containing the detonation and preventing fragmentation; and that the crimping head shielded the operator and prevented propagation to other detonators. Respondent charges that the Secretary did not make any showing regarding the size, height, weight or construction materials that would be necessary for effective shielding and that therefore the Secretary failed to establish the feasibility and likely utility of additonal operational shields as a means of reducing the hazard of the propagation of an explosion. Chairman Rowland and I agree with this contention. 7/

The Secretary introduced no evidence concerning the nature or design of the shielding required other than the broad generalizations contained in the DOD Safety Manual. The only evidence directly related to the feasibility of the proposed operational shields is that they "may be constructed of concrete, steel, wood, plexiglass, or other construction materials . . . [and] shall be designed taking into account thickness, size, fastening, and location in such a manner as

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6/ See note 5 supra.

7/ Chairman Rowland would also vacate the citation for the additional reasons stated in his separate opinion.

to protect against the effects of not less than 25 percent overload above the expected maximum charge." Indeed, the Secretary fails to state whether the shields must be able to withstand 25% overload above the explosive charge in one detonator (the operators crimp one detonator at a time) or 25% overload above the explosive charge in 110 detonators (the operators are each supplied with a tray containing 110 detonators). He notes that Respondent did erect a single plywood shield between the fuze assembly area and the crimping area prior to the explosion and installed plywood between crimping stations after the explosion, but a post-explosion photograph tells little about the efficacy of this shield in the event of explosion. Even if we were to agree with the Secretary that he has established that plywood partitions are technically feasible, there is no basis in this record from which we can reasonably conclude that such partitions would actually work in the event of an accident. We conclude, then, that the Secretary has failed to meet his burden of proof on the feasibility issue. Accordingly, we affirm that part of the judge's decision vacating this citation.

III

In the second citation before us we must consider whether the evidence establishes that Respondent violated section 5(a)(1) by maintaining insufficient distance between the fuze assembly line and the trailer being loaded with completed fuzes, thereby failing to eliminate or substantially reduce the hazard of propagation of explosions between the two sites. The parties agree that the DOD Safety Manual is an appropriate source of separation criteria and other precautions for deployment of explosives, but Respondent denies that the cited operation was inconsistent with the precautions described in the manual. 8/

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8/ The DOD Safety Manual, at paragraph 705(e), states:
705. Degree of Safety Provided by and Use of Quantity-Distance Tables

(continued on next page)

At the time of the explosion on the production line, a semi-trailer truck was parked at the loading dock adjoining the work bay. Referring to a photograph in evidence, Harrold Owen, Respondent's president, testified that the distance between the end of the loading dock and the work bay was 48 feet. 9/ Other witnesses estimated the distance as 10 feet and 20 feet. It is undisputed that Respondent's practice was to load boxes of completed fuzes onto the semi-trailer sporadically over the course of several days until it was fully loaded for shipment. Respondent's Assembly Department Foreman, Junge, recalled that, prior to the explosion, the semi-trailer had been parked at the loading dock for three or four days. He estimated that the semi-trailer was three-quarters loaded with fuzes. Owen stated that he did not know how long the semi-trailer had remained at the dock or how often it hauled fuzes from the plant.

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8/ (continued)

* * *

> (e) Intraline Distances are the minimum permitted between any two operating buildings and/or sites within an operating line, at least one of which contains or is designed to contain explosives, except that the distance from service magazine for the line to the nearest operating building shall not be less than the intraline separation required for the quantity of explosives contained in the service magazine.

The DOD Safety Manual also defines:

> Operating Building - Any structure, except a magazine, in which operations pertaining to manufacturing, processing, handling, loading, or assembling ammunition and explosives are performed.

and

> Service Magazine - An auxiliary building of an operating line used for the intermediate storage of explosives materials. The amount of explosives is normally limited to a minimum consistent with safe, efficient production.

9/ Owen first testified that this distance was 50 to 60 feet. However, upon examining an exhibit depicting the area in question, he stated that the distance was 48 feet.

In his decision, Judge Martin noted that the DOD Safety Manual, in Table 7-D, prescribes appropriate separation distances in relation to the net weight of the explosives involved. 10/ He concluded that in order to prove the Secretary's allegation it is necessary to know both the quantity of explosives on the semi-trailer and the distance between the semi-trailer and the production line. Judge Martin, though, could not ascertain whether the distances specified in the DOD Safety Manual were exceeded since neither the exact distance involved nor the amount of explosives on the semi-trailer could be determined with accuracy. Accordingly, the judge vacated the citation.

On review Respondent endorses the judge's disposition of this item but argues in addition that regardless of the actual quantity of explosives involved the trailer was not too close to the assembly line because the minimum safe distance in this case was 30 feet and the record establishes that the trailer was at least 48 feet from the assembly line. Alternatively, Respondent argues that separation distances are not relevant in this case because by their nature they do not apply to loading operations. In support of this argument Respondent cites to paragraph 308(g) of the Manual, which exempts automotive equipment being

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10/ Table 7-D provides as follows:

| Net Pounds of Explosives | | Distance in Feet | |
|---|---|---|---|
| Over | Not Over | Barricaded | Unbarricaded |
| (1) | (2) | (3) | (4) |
| | 50 | 30 | 60 |
| 50 | 100 | 40 | 80 |
| 100 | 200 | 50 | 100 |
| 200 | 300 | 60 | 120 |
| 300 | 400 | 65 | 130 |
| 400 | 500 | 70 | 140 |
| * | * | * | * |

loaded with explosives from the intraline distance requirements as long as the combined weight of explosives on the automotive equipment and in the building does not exceed the maximum allowed in the building. 11/ Respondent points out that at the time of the explosion Respondent's quantity-distance limit on the line was 400 pounds and there is no probative evidence that the total weight of the explosives on the semi-trailer and in the work bay exceeded 400 pounds.

We find, based on the testimony of Respondent's president, that the trailer was a maximum of 48 feet from the production building. We further find, based on Table 7-D of the Manual, that a minimum safe distance between the trailer and the building would have been 60 feet. As the judge noted, the record does not establish the quantity of explosives in the trailer or the building and therefore calculations which depend on these figures cannot be made. However, uncontradicted evidence in the form of the Manual shows that regardless of the quan-

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11/ Paragraph 308(g) of the DOD Safety Manual provides:

> 308. Siting of Ammunition and Explosives Facilities
>
> * * *
>
> g. Spotting Rail Cars and Automotive Equipment at Buildings. Rail cars and automotive equipment containing ammunition or explosives, which are nearer than intraline distances to an explosives operation or operating building shall be included in computations as part of the explosive limits of the operation or operating building. This is not intended to permit cars or trucks containing explosives and ammunition to be used as service magazines and to be placed at less than intraline distances from the explosive operation or operational building. The total quantity within the cars and building shall not exceed the maximum permitted in the building or rail cars by the quantity-distance requirements.

Quantity-distance requirements would here establish, in relation to the amount of explosives on the operating line, the necessary separation between the operating building and other inhabited buildings, passenger railroads, and public highways inside and outside of plant boundaries.

tity of explosives at either location, the minimum safe distance between explosive stores not separated by a barricade was 60 feet. 12/

We reject's Respondent's argument that the wall of the production building constitutes a barricade and therefore the 30-foot minimum separation of barricaded sites would be the appropriate standard. The Manual defines "barricade" as an "intervening approved barrier." 13/ "Intervening" implies something that lies between two entities, not something that is a constituent of one of them. Therefore, barricaded separation standards are not relevant to this case. Accordingly, we conclude that the distance separating Respondent's trailer and production building was not sufficient to eliminate or substantially reduce the hazard of explosion propagation.

Respondent argues in the alternative that no particular separation of trailer and building was necessary in this case because the trailer was being laded, and lading operations, by their nature, require proximity. Respondent points to provisions in the Manual which specifically exempt lading operations from separation requirements. It may be true that lading operations must sometimes be exempted from separation requirements. However, the cited trailer was being used for temporary storage, not for loading. The record establishes that this trailer remained at the dock even while not being filled and that it was Respondent's practice to leave trailers at the dock for several days during lading. At the time of the explosions the trailer had been at the dock for three to four days

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12/ See Table 7-D, note 10 supra.

13/ The DOD Safety Manual defines "barricade" as follows:

> An intervening approved barrier (natural or artificial), of such type, size and construction as to limit in a prescribed manner, the effect of an explosion on nearby buildings or exposures.

and nights. A plot plan of Respondent's plant indicates the trailer could have been removed to either a "Service Magazine Area for Motor Trucks" or a "Storage Magazine Area," yet Respondent offers no reason why the semi-trailer was not removed to one of these locations while not actually being loaded. We agree with the DCASR safety specialists that an intermittent loading operation which extends over several days and nights constitutes temporary storage. 14/

The Secretary originally characterized this violation as willful, but in his petition for discretionary review sought to have the violation classified as serious. We note that all the elements of a serious violation under section 17(k) of the Act, 29 U.S.C. § 666(j), are included in the elements of a section 5(a)(1) violation. Thus, although the citation did not explicitly allege that the violation was serious as well as willful, an allegation of seriousness was implicit in the section 5(a)(1) charge. Our finding that the violation was likely to cause death or serious harm is equivalent to a finding under section 17(k) that the violation gives rise to a substantial probability of death or serious harm. Accordingly, we shall affirm the citation as a serious violation. 15/

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14/ On review, Respondent also contends that both citations at issue must be vacated pursuant to section 4(b)(1) of the Act. Section 4(b)(1) provides:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

The Commission rejected this argument in an earlier decision in this case. Gearhart-Owen Industries, Inc., 2 BNA OSHC 1568, 1974-75 CCH OSHD ¶ 19,329 (No. 4263, 1975), pet. dism., No. 75-1392 (D.C. Cir. Sept. 29, 1975). That ruling became the "law of the case." The rule of the law of the case is a rule of practice based on sound policy that when an issue is once litigated and decided, that should be the end of the matter. Barret v. Baylor, 457 F.2d 119 (7th Cir. 1972). Accordingly, the Commission need not address this already-decided issue and Commissioner Cottine and I decline to do so.

15/ In cases arising under section 5(a)(2) of the Act, 29 U.S.C. § 654(a)(2), where a violation is alleged to be willful but is not proven to be so, the plead-

(continued on next page)

We have considered the factors enumerated in section 17(j) of the Act, 29 U.S.C. § 666(i) on the issue of penalty assessment. Although it is not clear how large an employer Respondent is, at least 50 people were employed on the M-213 fuze contract. The contract itself was for $1.3 million. Respondent had no previous record of violation. As to gravity, the following elements must be considered: (1) the number of employees subjected to the hazard, (2) the duration of exposure, (3) the precautions taken against injury, and (4) the degree of probability that an injury would occur. Turner Co., 76 OSAHRC 108/A2, 4 BNA OSHC 1554, 1976-77 CCH OSHD ¶ 21,023 (No. 3635, 1976), rev'd on other grounds, 561 F.2d 82 (7th Cir. 1977). In this instance, (1) some 50 employees were exposed; (2) the duration was a few days; (3) no precautions were taken; and (4) the probability of injury was relatively high. Respondent exhibited good faith in its cooperation during the investigation.

Accordingly, the judge's decision is reversed in part and the Secretary's citation alleging a failure to comply with intraline distance requirements in storing explosives is affirmed as a serious violation. A penalty of $700 is assessed.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: NOV 22 1982

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15/ (continued)

ings may be amended to allege a serious violation if the parties have expressly or impliedly consented to try whether the violation was serious. E.g., Toler Excavating Co., 75 OSAHRC 76/C8, 3 BNA OSHC 1420, 1975-76 CCH OSHD ¶ 19,875 (No. 2637, 1975). In this case, however, because an allegation of seriousness was implicit in the citation, it is not necessary to amend the pleadings to find the violation to be serious.

COTTINE, Commissioner, dissenting in part:

The Secretary has established the feasibility and likely utility of providing operational shields in the form of solid partitions to separate employees engaged in assembling hand grenade fuzes from each other and other employees working nearby. Accordingly, I dissent from the majority's decision vacating the citation relating to operational shields.

The judge observed, "it is apparent that the shielding should have been some type of a plywood shield or barrier between each operator." Nevertheless, Commissioner Cleary's lead opinion concludes that, even assuming the Secretary established the technical feasibility of plywood partitions, "there is no basis in this record from which we can reasonably conclude that such partitions would actually work in the event of an accident." As to technical feasibility the evidence is overwhelming. The Secretary relied on partitions actually depicted by the Respondent in its proposed drawings of October 13, 1972 (Exhibit C-3) and on plywood partitions actually installed after the explosion as examples of the type of protection required. The Secretary also relied on the testimony of DCASR safety specialist Prows that plexiglass partitions would be feasible. Prows stated that plexiglass partitions were already in use in a similar Defense Department facility in Kansas.

The evidence also establishes that partitions would "actually work," i.e., they would materially reduce the cited hazards. In addition, Chairman Rowland acknowledges that "[t]he Secretary presented general evidence that barriers could prevent the propagation of explosions."1/ Nonetheless, the majority finds no reasonable basis to conclude that partitions between the crimping stations would be likely to significantly

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1/ The magnitude of the explosion hazard involved in this case is evident from the four deaths and 45 other injuries that occurred following the July 10, 1973 explosion.

reduce the potential death and injury toll in the event of an explosion. However, common sense when applied to this factual record indicates the value of partitions in reducing the spread of an explosion in a munitions factory. Indeed, the Defense Department's safety manual incorporated into the Respondent's contract required that "too many consecutive operations not be permitted in the same room or building without adequate dividing walls, fire walls or operational shields . . . ."[2/] Furthermore, the Secretary presented evidence of the utility of partitions. DCASR safety specialist Prows testified without contradiction that either plexiglass or plywood of sufficient strength would be effective to stop the spread of sparks and explosions. Prows' superior, DCASR safety manager Del Regno, testified that in his opinion the absence of shields between the individual workers in the Respondent's operation is a recognized hazard and that he never would have approved the contract award to the Respondent unless shielding had been shown on its drawings.

The fact that operational shields were a requirement of the Defense Department's safety manual, which the Respondent agreed to follow, also supports the conclusion that shields would contribute to employee safety. In fact, the Respondent did not claim that partitions would be ineffective; it merely questioned the adequacy of the Secretary's proof. Its basic argument was that the crimping heads had adequately contained an explosion during testing and were sufficient operational shields under Defense Department requirements. That defense is without merit

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2/ U.S. Dep't of Defense, DOD 4145.26M, Contractors Safety Manual for Ammunition, Explosives and Related Dangerous Material § 603(b)(1) (Oct. 1968)(Joint Exhibit 1-H).

and has not been accepted by any of the Commissioners.[3/] Thus, the Respondent did not rebut the Secretary's evidence of the utility of partitions.[4/]

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3/ In support of that defense the Respondent's special products manager testified that the Respondent had tested a crimping head with an explosive charge 40% greater than the maximum expected charge and found that the head did not fragment, although it did crack. In his opinion, the crimping head controlled the explosion. However, that test was conducted with the parts assembled as they would be during normal operations. Specifically, the detonator was in position for crimping. By contrast, the catastrophe that precipitated this inspection occurred during repairs while supervisor Junge was attempting to remove a detonator from a crimping head. The Respondent's test explosion did not establish that the crimping head would contain the explosion of a detonator being removed during repairs. It also was established that sparks could be generated and cause an explosion of detonators outside the crimping heads, e.g., in the trays containing up to 110 detonators at the employees' stations awaiting crimping. Clearly, the crimping heads were not the type of operational shields that were required. The Respondent failed to rebut the Secretary's showing that solid partitions separating each operator from nearby employees were feasible and would have substantially reduced the hazards.

4/ The majority notes that the photographic evidence does not indicate that the single plywood shield in place before the explosion effectively reduced the extent of the explosion. (That shield had been between the fuze assembly area and the crimping area.) However, it cannot be concluded from this evidence that partitions separating the operators from each other and from the rest of the plant would have been ineffective. Obviously, partitions capable of arresting the initial spread of the detonation would be effective means of reducing the hazard.

ROWLAND, Chairman, concurring in part and dissenting in part:

I concur with Commissioner Cleary in affirming the judge's decision vacating the citation alleging a failure to provide operational shielding. The Secretary presented general evidence that barriers could prevent the propagation of explosions, but he did not specify the type of barriers he alleges Respondent should have used. A section 5(a)(1) violation cannot be found unless the Secretary specifies the steps the employer could have taken to avoid citation and demonstrates the feasibility and likely utility of those steps. National Realty & Construction Co. v. OSHRC, 489 F.2d 1257 (D.C. Cir. 1973). I would also vacate that citation for for the additional reasons stated infra. I dissent from the majority's decision to reverse the judge and affirm the Secretary's citation alleging a failure to comply with intraline distance requirements in "storing" explosives.

Respondent argues that both citations at issue must be vacated pursuant to section 4(b)(1) of the Act[1/] because the Department of Defense ("DOD") has regulated the cited working conditions. I agree.[2/] Section 4(b)(1) precludes the application of the Act to working conditions that are the subject of regulation by another agency. Dillingham Tug and Barge Corp., 10 BNA OSHC 1859, 1982 CCH OSHD ¶ 23,493 (No. 77-4143, 1979), appeal filed, No. 82-7552 (9th Cir. August 31, 1982). As

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1/ Section 4(b)(1), 29 U.S.C. § 653(b)(1), provides in pertinent part:

> Nothing in this Chapter shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

2/ Since § 4(b)(1) is a jurisdictional requirement rather than an affirmative defense, it may be raised and considered at any stage of proceedings. U.S. Air, Inc. v. OSHRC, No. 81-1528 (4th Cir. July 2, 1982); Columbia Gas of Pennsylvania, Inc. v. Marshall, 636 F.2d 913, 918 (3rd Cir. 1980). Since I believe that the Commission may, in the exercise of proper discretion, correct a prior erroneous ruling on a jurisdictional issue, I do not join the majority's "law of the case" discussion in footnote 15. I will consider Respondent's arguments on § 4(b)(1). See Messenger v. Anderson, 225 U.S. 436 (1912); Potomac Passengers Association v. Chesapeake & Ohio Railway Co., 520 F.2d 91, 95 n. 22 (D.C. 1975).

the lead opinion so graphically demonstrates, the Secretary's entire case was predicated on allegations that Respondent failed to comply with certain provisions of the DOD Safety Manual. But Respondent was required by DOD regulation to comply with that very manual. Gearhart-Owen Industries, 2 BNA OSHC 1568, 1569 & n.1, 1974-75 CCH OSHD ¶ 19,329 at p. 23,113 & n.1 (No. 4263, 1975). Moreover, DOD representatives constantly inspected Respondent's operation to assure that the company was in compliance with the requirements of the manual. Thus, I conclude that section 4(b)(1) deprived the Secretary of jurisdiction to issue the citations.

Moreover, the intraline distance citation should be vacated for the additional reason that the record does not support the determination of exact intraline quantity-distance requirements allegedly violated. I would further find that the Table 7-D intraline distances are not applicable in any event, because paragraph 308(g) permits spotting of trailers near operating buildings for shipping purposes so long as the maximum amount of explosives in the spotted trailer and on the production line did not exceed what would be permitted pursuant to the quantity-distance requirements--in this case, 400 pounds.

The majority reverses the judge's finding that no accurate intraline distances could be determined and resolves the unknown weight of the explosives on the semi-trailer and the production line, allegedly exceeding permissible intraline distances, by making findings which are unsupported by the record. First, the majority holds that the applicable distance requirements to protect against "the hazard of explosion propagation" are governed by the "unbarricaded distance" requirements of Table 7-D. However, it is the Secretary's burden to prove that the applicable distances were not met because there was no intervening barricade within the meaning of Table 7-D. Lacking proof in the record as to what is the applicable criteria for determining whether a barricade exists, the majority dis-

misses Respondent's arguments that the wall of the production building is an "intervening approved barricade" within the meaning of the DOD Safety Manual which permitted the trailer to be spotted as close as 30 feet to the building. The majority's justification for such a finding is simply its assertion that "'intervening' implies something that lies between two entities, not something which is a constituent part of one of them."

By concluding that the appropriate minimum distances are guided by the "unbarricaded" distance specifications, the majority adroitly skirts the problem addressed by the judge--the lack of probative evidence that intraline distances for "barricaded" situations were violated. Indeed, if the 48-foot distance found by the majority to be the length of the dock from the building is accepted as the distance of the trailer from the operating building, there is no proof that the minimum "barricaded" distance of Table 7-D was violated.

I further note that the presence of the "wall" between the operational area and the loading area apparently well-served the purposes of a "barricade" since there was no mass detonation of explosives in the trailer simultaneously with the explosion in Bay #4. In fact, the trailer exploded some 20 minutes after the initial explosion and only when a fire finally reached it.

Turning now to the alternative ground on which I would vacate--the applicability of paragraph 308(g)--the majority dismisses Respondent's argument on this point by concluding that the trailer was used for "temporary storage, not for loading," apparently, because in the opinion of the DCASR safety specialists, intermittent loading which extends over several days "constitutes temporary storage." 3/

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3/ While I agree that paragraph 308(g) does not permit motor vehicles and railcars to be used in lieu of service magazines, I further note that it was Respondent's undisputed practice that if fuses accumulated and could not proceed to shipment, then they were stored in a magazine.

I do not find the testimony of Prows and Del Regno summarily referred to by the majority to be compelling. First, neither Prows nor Del Regno testified that the cited trailer under the conditions existing at the time of citation was a service magazine. They offered only general opinion testimony to the effect that a trailer loaded with explosives and not moved for "several days" or until "ultimately loaded" would be a "service magazine". While neither Prows nor Del Regno gave further substantiation or qualification to the term "several days," I note that Prows made the contradictory statement that even "one day would be too long." Finally, Prows did not make a specific objection that the trailer was indeed in violation of the quantity-distance requirements during his prior inspection. Rather, Prows only observed that "a loaded trailer would exceed" the limits. Given the lack of evidence regarding the amount of explosives on the trailer, the length of time the trailer remained at the dock is not relevant, even under the majority's test. In sum, there is no evidence that the trailer remained at the dock without fuses being loaded onto it and without proceeding to shipment. Therefore, I conclude that the trailer was spotted at the building for loading and shipping purposes rather than for the intermediate storage of explosives.

Finally, I question the majority's unstated acceptance that the Secretary has shown how moving the trailer back and forth to a service magazine during loading would enhance worker safety and be a useful means of abatement. Had the explosives not been in the trailer during the process of loading, they could have been in the plant or loading area and Respondent would have had to comply with the explosive limits not shown to have been exceeded, 400 pounds. Paragraph 308(g) clearly contemplates that it is permissible to have a completely loaded trailer at the dock provided that the total quantity limits for the building are not exceeded. Obviously, the very hazards feared by the majority

could nevertheless occur with the accumulation of fuses in the production building or at the final loading of the trailer at the dock in the manner permitted by paragraph 308(g).

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>GEARHART-OWEN INDUSTRIES, INC.,<br><br>Respondent. | ) | Docket No. 4263 |

Appearances:

James F. Gruben, Esquire
Dallas, Texas.

For the Complainant.

H. Dean Owen, Jr., Esquire
Steven M. Carsey, Esquire
Fort Worth, Texas

For the Respondent.

James Ammerman, Esquire
Marshall, Texas

For Affected Employees.

DECISION ON REMAND

MARTIN, Judge:

On August 15, 1973, the Secretary of Labor, complainant, cited Gearhart-Owen Industries, Inc., respondent, for certain alleged violations of Section 5(a)(1) of the Occupational Safety and Health Act of 1970, hereinafter referred to as the Act. Respondent was issued two citations, one alleging a serious violation and the other alleging two willful violations. A notification of proposed penalty was also issued

on the same date wherein a civil penalty of $20,700 was proposed. The issuance of the citations followed an investigation into a fire and explosion which occurred at respondent's Cleburne, Texas, plant on July 10, 1973, in assembly bay no. 4, building no. 1, where respondent had varying numbers of employees engaged in the production of M-213 hand grenade fuzes.

Following the issuance of a complaint which was answered by respondent's counsel, Judge Risteau (now retired) issued his order of dismissal, vacating the citations on the ground that Section 4(b)(1) of the Act [1/] deprived the Review Commission of jurisdiction over the work being performed by respondent's employees. The Review Commission set aside the Judge's order and remanded the case for further proceedings. Thereupon, respondent filed a petition for review with the Court of Appeals for the District of Columbia, however, on September 29, 1975, the court dismissed the petition for review because the Commission's remand was of an interlocutory nature. The case was then assigned to the undersigned Judge who held a hearing on the merits beginning on October 27, 1976.

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1/ Section 4(b)(1) of the Act reads:

> "Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 274 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021), exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."

Respondent is a Texas corporation with its main office in Fort Worth, Texas, however, in 1969, respondent built its Cleburne explosives plant to service government contracts relating to the manufacture of explosives. The Cleburne plant has been engaged in the production, inspection, and packaging of various explosive items for the Department of Defense, one of which is the M-213 hand grenade fuze, which operation was being carried on in assembly bay no. 4 of building no. 1. Respondent submitted its bid to the U.S. Army Munitions Command, (see exhibit A to the stipulation of facts identified as joint exhibit no. 1) on August 28, 1972, and on November 15, 1972, respondent was notified that it had been awarded the contract to manufacture M-213 fuzes. (Award/contract DAAA09-73-C-0119 by the U.S. Army Munitions Command identified as exhibit D in joint exhibit no. 1.)

Pre-award and post-award surveys were conducted by representatives of the Defense Contract Administrative Services Region, Dallas (hereinafter referred to as DCASR), the last safety survey of respondent's Cleburne plant prior to the explosion and fire having been made on May 3, 1973. Exhibit H, attached to the aforementioned stipulation, is a copy of the DoD Contractor's Safety Manual for Ammunition, Explosives, and Related Dangerous Materials, dated October 1968, (DoD 4145.26M) covering safety practices to be used in industrial plants by contractors involved with contracts for explosives. The foreword of this manual reads as follows:

> "This manual is issued under the authority of and in accordance with the Department of Defense Instruction 4145.26, subject: DoD Contractors' Safety Manual for Ammunition, Explosives, and Related Dangerous Materials, dated June 21, 1968. It provides uniform safety practices to be used in industrial plants and facilities by contractors involved with contracts for ammunition, explosives and related dangerous material of the DoD, Military Departments, and Defense Agencies (hereinafter referred to collectively as 'DoD Components') or other activities as specified in the contract. This manual is a compilation of safe practices and standards used by DoD Components and other recognized national agencies. Questions on interpretation and recommendations for amendments to this manual should be submitted to the Cognizant DoD Components through the procuring contracting officer as appropriate."

Armed Services Procurement Regulation 7-104.79 (exhibit G in joint exhibit 1) requires contractors to comply with DoD manual 4145.26M in effect on the date of the solicitation of the contract as it relates to explosives.

At approximately 11:30 a.m. on July 10, 1973, an explosion and fire occurred in assembly by no. 4 of building no. 1. According to the accident report filed by respondent's plant manager (exhibit J attached to joint exhibit 1) the presumed cause of the accident was the explosion of a detonator in a crimping head caused by friction in an attempt to remove the pin from the crimper head. An employee, Mr. Junge, the bay foreman or supervisor, was called by one of the crimper operators because of a hung detonator in the crimping machine and he had removed the crimping head from the crimper and was attempting to

remove the pin to free the fuze when the detonator exploded. Following the initial explosion other detonations took place thereby resulting in a fire. A total of 41 employees were injured, including four who subsequently died. Mr. Junge, himself, lost an arm in the explosion.

CITATION FOR SERIOUS VIOLATION

Citation no. 1 alleges as follows:

> "On July 10, 1973, this employer did not furnish each of his employees employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to his employees working in building no. 1, bay no. 4, the M-213 hand grenade fuze assembly line. Repairs were being performed on a crimping machine in an explosive location in building no. 1, bay no. 4, M-213 grenade fuze assembly area, without adequate required safety precautions being taken which would reduce the possibility of the ignition of explosives accumulated in the crimping area."

Complainant's exhibit C-3 is a proposed plot plan dated October 13, 1972, showing respondent's M-213 fuze production line. According to the evidence presented there were eight crimping machines, four located on each side of a conveyor belt, however, all of the machines were not in operation at the same time because of numerous malfunctions. Mr. Junge testified that the floor was swept each day and washed down weekly, and that the machines were inspected and cleaned each day. DCASR inspectors were on the premises each day and stood in close proximity to the aforementioned crimping stations. The replacement of neoprene washers in the crimping heads was considered by Mr. Junge to be routine maintenance.

According to Mr. Junge and several of the employees under his supervision, the principal malfunction was the shearing off of the detonators which would leave a portion stuck in the crimper. This was apparently a daily or frequent occurrence and when the operator herself could not easily remove the severed portion from the machine with a wooden object, similar to a Q-tip, Mr. Junge would be summoned to correct the problem. The evidence indicated that Mr. Junge used an iron bar about five-eighths of an inch in diameter to remove the jammed detonator. One of the employees stated that she had seen Mr. Junge use a screwdriver and pliers in accomplishing this task.

Although partitions or shields were drawn on the proposed plot plan in the crimping machine area of the assembly building, none had been installed at the crimper stations or between the crimper stations and other operations as of the date of the accident.

Mr. Junge testified that he had never seen any written instructions pertaining to the removal of hung detonators; that no procedures had been posted in this connection; that he had never been instructed not to conduct this type of repair in the assembly area; that he had never received any training in this work; that he had never been instructed as to what type of tools to use in this sort of operation and further that DCASR representatives had never offered any instructions or advice regarding this matter.

On the morning in question, Mr. Junge had been called to clear a crimping machine between the conveyor belt and the back wall. After he had taken the crimper head off, he laid the head on the crimper and had started to tap out the pin. This was the last thing that Mr. Junge remembered.

Mr. Junge was the foreman over workers in the assembly bay, averaging about 40 or 45, on the date of the explosion, including up to eight at the crimper stations. Several of the crimper machine operators testified that the fuzes being assembled occasionally would come down the conveyor belt faster than they could be handled, resulting in the fuzes and detonators to be placed in their laps or put in boxes on the floor. The employees applying the sealant to the detonators stated that there was always an excess number of fuzes on the belt and that they could not always keep up with the steady flow.

Respondent has been charged with violating the provisions of the general duty clause of the Act, section 5(a)(1),[2/] because adequate safety precautions were not taken to reduce the possibility of ignition of explosives accumulated in the crimping area where the repairs were being performed.

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2/ Section 5(a)(1) of the Act reads as follows:

> "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

Mr. Prows, a compliance officer with the Occupational Safety and Health Administration, was formerly a safety specialist with DCASR, and in March and May of 1973, he made two safety surveys of respondent's Cleburne plant. Mr. Prows, prior to being employed at DCASR, was with the US Army Materiel Command where he received nine months of safety training and took a six weeks course in explosive safety. He also was employed at the Kansas Army Ammunition plant where he monitored the contractors' program dealing primarily with explosives. Mr. Prows was of the opinion that respondent's failure to remove the jammed crimper head away from the assembly line to effect the repairs necessary to return it to its proper condition constituted a recognized hazard likely to cause death or serious physical harm to the employees. He was also of the opinion that respondent's failure to instruct the operators and supervisors as to safety procedures in the event of a crimper malfunction would be a recognized hazard. He was also of the view that the failure of respondent's foreman, Mr. Junge, to remove explosives from the immediate area prior to attempting to remove the hung detonator would be a recognized hazard likely to cause death or serious physical harm to employees in the work place.

Mr. Del Regno, a safety specialist with DCASR since 1965, formerly had 28 years of experience in dealing with explosives while he was attached to the US Army Corps of Engineers. He was an instructor in explosives at Fort Belvoir for two and one-half years. Mr. Del Regno testified that in his opinion an attempt to remove a hung detonator

from a crimper head in the crimping area without clearing explosives from the area would constitute a recognized hazard likely to result in death or physical harm to the employees.

Respondent has contended that the evidence does not support the allegation that "repairs" were being performed on the crimper head. It is contended that Mr. Junge's actions were merely in the nature of routine maintenance. Respondent has also taken the position that the evidence did not reveal that there were any required safety precautions which would have reduced the possibility or probability of ignition of explosives.

After carefully considering respondent's contentions it is concluded that Mr. Junge's efforts to remove the hung detonator from the crimper head fell within the category of repairs. After reviewing Webster's definition[3/] and cases cited in Words and Phrases, Volume 36A, it can be seen that there is very little difference, if any, in the words repair and maintenance. In fact, maintenance usually includes the act of keeping something in repair. The words maintenance and repair are often used synonymously. As indicated by Webster, "to repair" means to fix

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3/ Webster's New World Dictionary, 2nd College Edition, defines repairs as "to put back in good condition after damage, decay, etc.; mend; fix; to renew; restore, revive; to amend; set right; remedy; the act, process, or work of repairing; state of being repaired, or fit for use; ....

or mend something or restore an object to its original condition. This is precisely what Mr. Junge was attempting to do when the explosion occurred. The crimper operators were only allowed to remove a cut detonator from the crimper head if it came out easily, otherwise they were under instructions to call upon their supervisor, Mr. Junge, who had to disassemble the crimper to cure the malfunction.

Respondent contended that complainant failed to show that there were adequate safety precautions which could have been taken to reduce the possibility of ignition of explosives. There is no merit to respondent's contention. The measures described by the compliance officer, Mr. Prows, and the DCASR safety specialist, Mr. Del Regno, if followed, would undoubtedly have made the work place safer in that it would have minimized the danger of an explosion resulting in physical injury to employees. In addition to the procedures described by them is the use of nonsparking tools 4/ in an effort to correct the hung detonator which

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4/ Section 603(k) entitled Safety Hand Tools in DoD Contractor's Safety Manual for Ammunition, Explosives, and Related Dangerous Material (DoD 4145.26M) further identified as exhibit H in joint exhibit 1, provides as follows:

(1) "Safety hand tools are constructed of wood or other nonsparking or spark resistant materials such as bronze, lead, beryllium alloys and "K" Monel metal. Properly maintained, nonferrous hand tools shall be used for work in locations which contain explosives or hazardous concentration of flammable dusts, gases, or vapors, subject to ignition by sparks. Hand tools or other implements used in [Footnote continued on following page]

would appear to be a matter of prime importance when working in an explosive location, much more so than the wearing of certain types of clothing which is a matter covered by respondent's operational manual (joint exhibit no. 2). On May 3, 1973, Mr. Prows made a safety survey of respondent's facilities (see exhibit I, attached to joint exhibit no. 1) and one of his recommendations was worded as follows:

> "Maintenance personnel should be provided safety hand tools constructed of nonsparking materials and all ferrous tools should be removed from the line. A tag system should be developed to certify that equipment has been decontaminated before ferrous tools are allowed to be used."

The corrective action which was taken by respondent's program manager was set out in a letter to DCASR dated May 28, 1973, and indicated that nonsparking tools had been ordered and were due to be in use by July 1, 1973. Apparently respondent's supervisor, Mr. Junge, had not

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4/ [Footnote continued from preceding page]

the vicinity of dangerous materials must be handled carefully and kept clean. All tools shall be checked in before beginning work and checked out at its completion.

(2) If the use of ferrous metal hand tools is required because of strength characteristics, the immediate area shall be free from exposed explosives and other highly combustible materials subject to ignition by spark."

been instructed with respect to the necessity for using safe hand tools along the assembly line and especially in the crimping area.

It is concluded that respondent violated the provisions of section 5(a)(1) of the Act and that the infraction was serious within the purview of section 17(k) of the Act. Accordingly, the serious citation issued on August 15, 1973, should be affirmed. After considering the size of respondent's operation, its good faith, previous history, and gravity of the violation, it is concluded that the $700 penalty, as proposed by complainant, is appropriate and will satisfy the public interest.

CITATION FOR WILLFUL VIOLATION

Citation no. 2 (page 1) alleging a willful violation reads as follows:

> "On July 10, 1973, this employer did not furnish each of his employees employment and a place of employment which were free from recognized hazards that were causing or were likely to cause death or serious physical harm to his employees working in building no. 1, bay no. 4, the M-213 hand grenade fuze assembly line. Operational shields were not provided to reduce the exposure of employees to the effects of fire, fragments, or blasts occurring at a particular operation and to control the propogation of explosives between operations at the following locations: between employee stations on crimping machines and between crimping operations and nearby 'unlike' operations such as x-ray inspection, packing, and crating operations."

It is respondent's contention that because of the size and strength of the crimping machine heads they actually served as operational shields to reduce the exposure of employees to the effects of fire, fragments, and blasts and would control the propagation of explosives in the crimping area of assembly bay no. 4.

Admittedly there were no dividing walls, barriers, partitions, or cubicles separating the crimping machine operators from each other or separating the crimping area from other sections further down the assembly line such as the inspecting, sealing and packing departments. It is noted that so called "typical" shields were drawn in the crimping area on the proposed plot plan of the M-213 fuze production line, dated October 13, 1972 (complainant's exhibit C-3). The location of the crimping machine operators as of the date of July 10, 1973, however, did not conform to the proposed layout but was moved closer to the hardware assembly area and further away from the inspection area. There was a plywood partition or shield between the crimping area and the hardware assembly area.

Mr. Wells, formerly plant superintendent, testified that the Cleburne plant manager, Mr. Levey, requested that he test the crimping heads[5/] for its effectiveness as an operational shield (see complainant's exhibit C-49). He testified that a typical crimping head was

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5/ Respondent's exhibit R-4 is one of the crimping heads taken from the production line which was in the fire and explosion at respondent's Cleburne plant on July 10, 1973, and is in fact, one of the crimping heads taken from a crimping machine which was purchased from the Penguin Industries in the fall of 1972.

tested with an E99 blasting cap, detonating a C-70 detonator, which indicated that this would simulate a 140 percent overload and that the head controlled the explosion.[6/] He stated further that while the head did have a crack in it it did not fragment.

Complainant presented two witnesses in support of his contention that there were no operational shields to reduce the exposure of the employees and to control the propagation of explosives between the various operational units. Mr. Prows, who was formerly a DCASR safety specialist, testified that he was aware of the fact that there were no plywood shields in place in the crimping area (Tr. 328). He discussed this matter with the plant manager, Mr. Levey, and was convinced by Mr. Levey that the crimper head itself had been tested and that it would serve as an operational shield (Tr. 326). Mr. Prows testified, "I assumed that it had been tested and that it was adequate" (Tr. 327). Mr. Prows stated that he had made two post-award safety surveys of respondent's Cleburne plant in March and May of 1973.[7/] In neither survey did he mention any inadequate shielding in the crimping area.

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6/ There was some question in the record as to whether an E99 blasting cap was used or a no. 8 cap.

7/ His statement as to a March inspection was probably incorrect as exhibit I in joint exhibit no. 1 shows that a survey was made by him on February 13, 1973. The May 1973, inspection date was on May 3, 1973.

Mr. Del Regno, when questioned as to whether a recognized hazard would be created by the absence of shields between the individual workers, replied: "absolutely" (Tr. 609). He quoted as his authority the green manual (DoD 4145.26M), exhibit I to the stipulation in joint exhibit 1. Section 603(f) thereof provides as follows:

> "(1) Certain operations are hazardous and operational shields must be used for the protection of employees. The requirements for shielding cannot be clearly defined because of the great variety of circumstances that surround a given operation. The safety of operations will depend on the careful scrutiny of the work planned and the forsightedness of those responsible for safety in the establishment. Dependent upon amounts of explosives, operations being performed and other factors, shields maybe constructed of concrete, steel, wood, plexiglass, or other construction materials.
>
> (2) Operational shields for the protection of personnel shall be designed taking into account thickness, size, fastening, and location in such a manner as to protect against the effects of not less than a 25 percent overload above the expected maximum charge. In the absence of reliable data proving the adequacy of these shields, the proposed design shall be tested with at least this 25 percent overload before its use in permitting operations. Operational shields for which adequate test data is available need not be retested for each specific exposure of the same magnitude."

Attention is also invited to Section C of the invitation to bid (see exhibit A in joint exhibit 1). At page 15 thereof the following appears:

> "Special requirements: Care should be taken to ground equipment and operator, and to accomplish the assembly of detonator to fuze in such a manner as to shield the operator from fragments and to prevent propagation to other detonators."

On cross examination, however, Mr. Del Regno recalled a discussion he had with Mr. Prows relative to respondent's theory of shielding which in effect meant that a crimping head of substantial size, made of steel, would constitute an operational shield pursuant to the terms of the contract. He indicated that that would be a common means of shielding (Tr. 679). After having his memory refreshed by reading portions of a deposition he gave in 1974, Mr. Del Regno testified that he was satisfied with Mr. Prows' acceptance of the conditions and that he had full confidence in Mr. Prows (Tr. 687).

Mr. Harrold D. Owen, president of respondent corporation, testified that he reviewed the fuze assembly operations at the Penguin plant in Pennsylvania prior to his purchase of their equipment. He advised that his fuze assembly operations at the Cleburne plant were substantially the same as those conducted at Penguin - - except that the Cleburne plant was a little roomier. He testified that Penguin had no physical barriers of any kind between the crimper operators or between the crimping area and other related activities such as inspection, sealing, or packing. Penguin's procedures and methods of operation were adopted at the Cleburne plant according to Mr. Owen. He also indicated that he visited the Lynx plant and found that their operations and procedures were similar to those in effect at Cleburne.

It should be noted that the citation and complaint do not charge respondent with a failure to install a dividing wall, barricade, barrier, plywood partition, or cubicle, to surround the individual crimper operators or to isolate the crimping area from the other areas such as those encompassing x-ray inspection, sealing, and the packing of fuzes.

From the gist of the testimony presented by complainant it is apparent that the shielding should have been some type of a plywood shield or barrier between each operator. The complaint, however, merely refers to an operational shield to protect employees from the effects of fire, fragments or blasts. From an examination of section 603(f) of the green manual previously referred to, it can be seen that a shield can be made of concrete, steel, wood, or plexiglass (underlining for emphasis).

DCASR inspectors were in respondent's plant on a daily basis for the purpose of determining safety items as well as the quality of fuzes being produced. Complainant's exhibit 3 which was labelled "proposed" M-213 fuze production line does show the words "shields (TYP.)" in the crimping area but whether this proposed plan, dated October 13, 1972, was ever submitted in that form by respondent to the US Army Munitions Command is not clear. The record does not reveal any instance where any DCASR representative ever complained to respondent about any lack of operational shields, nor were any mentioned in the post-award inspection reports.

On the basis of the entire record it must be concluded that complainant has not established by reliable and probative evidence that respondent failed to provide operational shields to reduce exposure to its employees in the Cleburne plant and that citation no. 2, page 1, should be vacated.

Citation no. 2 (page 2) of the alleged willful violation provides as follows:

> "On July 10, 1973, this employer did not furnish each of his employees employment and a place of employment which were free from recognized hazards that were causing or were likely to cause death or serious physical harm to his employees working in Building #1, Bay #4, the M213 hand grenade fuze assembly line. The trailer located at the loading dock of Building #1 and used as a service magazine for storage of completed M213 grenade fuzes waiting shipment was so located that a violation of the required intraline distances existed. Since the trailer was not separated from the final assembly bay, the bay quantity limit of 50 pounds of explosives was exceeded, creating a serious hazard to employees working in the bay area."

Mr. Junge, foreman in the assembly bay no. 4, testified that a semi-trailer was backed up to the loading dock where wooden crates of assembled fuzes were loaded, not continuously, but on a daily basis. He estimated that there was a three or four day accumulation of fuzes. It was also his guess that the trailer was about three-fourths full. He did not think that there was any accumulation of fuzes inside the building - no more than four or five boxes. Mr. Junge had no idea as

to the weight of the fuzes which were in the trailer. He also indicated that if there was any build up of fuzes inside the assembly area, they were moved to a magazine about a quarter of a mile away (Tr. 111).

Mr. Junge advised that there were always up to three government inspectors in the assembly bay area and that they were thorough in observing the operations going on in the crimping area and in other areas of the assembly bay. When Mr. Junge was asked whether the government inspectors discussed safety procedures with him, he replied,

> "they would mention sometimes if those crates built up in the building that I needed to move them to a magazine. If the trailer was loaded and it was waiting on another spot they would say that you need to get them out of here, they would call my attention to it, and we would move them out." (Tr. 118, 119)

When questioned about the July 10th date Mr. Junge stated:

> "I don't recall. I wouldn't think so, but like I stated earlier, the trailer was about three quarters full, so I wouldn't think there would be any reason for it to be overloaded. I really don't know. I just really don't." (Tr. 120)

Mrs. Jennie Mannan, one of the crimper operators testified that she had noticed the truck or trailer at the dock but did not know how often it was moved out. It was her opinion that not all of the boxes went straight into the truck but that some went into a storage magazine or somewhere else (Tr. 224).

Complainant's senior compliance officer, Mr. Rutherford, testified that during the investigation that followed the accident, he questioned Mr. Levey about the number of fuzes which had been assembled since the date of the last shipment. He was given the figure of 60,520 of completed units which at an amount of 31.8 grains per unit would amount to approximately 275 pounds of explosives (Tr. 459). Mr. Rutherford stated that the 60,520 fuzes had not been shipped out, according to Mr. Levey.

Relative to the distances involved, the record is anything but clear. The length of the trailer, according to Mr. Junge, was estimated to be 40 or 45 feet. The assembly bay area was 48 feet by 48 feet. The loading dock which was between the assembly bay area and the trailer was estimated to be all the way from 10 feet to 60 feet. Mr. Rutherford thought the distance was ten feet. Mr. Junge thought that it was 14 feet. Mr. Del Regno estimated the distance to be 20 feet and Mr. Owens felt that the distance was 50 or 60 feet. Obviously Mr. Owen is a very interested witness, however, he did state that the loading dock had been the subject of several alterations or modifications. Apparently no one during the investigation found it necessary to measure the size of the loading dock.

The citation and complaint herein charges respondent with a violation of the "required intraline distances" because of the position of the trailer at the loading dock and its use as a service

magazine. Intraline line distance is not defined in the green manual (DoD 4145.26M) however, the definition of intraline separation (at page 2-2) is as follows:

> "The distance to be maintained between any two operating buildings and/or sites within an operating line, at least one of which contains or is designated to contain explosives, except that the distance from service magazine for the line to the nearest operating building shall be not less than the intraline separation required for the quantity of explosives contained in the service magazine."

In order to prove this allegation it is necessary to know the distance between the explosives and the operating line as well as the quantity of the explosives. Here there is no reliable or probative evidence of either item. The distance involved is indefinite and the amount of explosives is a mere speculation. Mr. Junge thought the trailer was approximately three quarters full, however, he later stated over a three or four day period the load would build up from empty to three quarters of a load (Tr. 97).

If the figures given by Mr. Levey to Mr. Rutherford are correct and fuzes produced for the three days prior to July 10th totalled 31,500, then the amount of explosives would be about 143 pounds. If we assume that all of the 60,520 units were in the trailer on July 10th then the number of pounds of explosives would be approximately 275. If we consider that the trailer was three quarters full and apply the data taken from page 2 of the award/contract (exhibit E in joint

exhibit 1) showing that there were 360 fuzes in each of the 300 boxes (assuming there was 40 foot capacity trailer) then there would be 108,000 fuzes on board, containing approximately 490 pounds of explosives. There is, of course, no proof that all of the M-213 fuzes went into the semi-trailer.

From all the evidence at hand the weight of the explosives in the trailer or on the operating line cannot be determined with any degree of accuracy. Therefore it cannot be ascertained whether the intraline distances of table 7D in the green manual (DoD 4145.26M) were exceeded since the exact distances are not known and since the amount of explosives in the trailer could not be established.

Respondent is also charged with violating the bay quantity limit of 50 pounds of explosives because of the trailer not being separated from the assembly bay. The evidence, however, shows that there was a wall between the bay and the loading dock where the trailer was located. It was blown out however at the time of the accident. The evidence revealed that the assembly bay limit was changed from 50 pounds to 400 pounds as a result of the grant of an interim waiver (see respondent's exhibit R-2) dated July 5, 1973. The waiver was granted after discussions between respondent's officials and a DCASR representative, Mr. Del Regno. There is no credible evidence to support a finding that there was an amount of explosives on hand exceeding the assembly bay limit on the date of July 10, 1973.

It should be noted at this point that the citation alleges that respondent violated the "required intraline distances". When the DCASR

specialist, Mr. Del Regno, testified he recalled a discussion with respondent's plant manager, Mr. Levey, over which table should be applied in setting the maximum load for the building - whether it was the intraline distance table (table 7D of the green manual) or the inhabited building distance (table 7E of the green manual). Mr. Levey had been contending that the intraline distance requirement should prevail. Mr. Del Regno at that time and also as of the date of the hearing insisted that the inhabited building distance table (table 7E) was the applicable distance to be used (Tr. 692, 693; 700, 701). It should be noted, however, that the citation does not charge respondent with a violation of the inhabited building distance requirement.

Based upon all the evidence in the record it is concluded that respondent did not violate the general duty clause of the Act since the facts do not establish that the intraline distance requirement was violated and since it was not established that respondent exceeded the assembly bay limit in building no. 1 on July 10, 1973.

Citation no. 2 alleged that respondent committed two willful violations, one relating to the alleged failure to provide operational shielding and the other dealing with the alleged infraction of the intraline distance requirement and the quantity bay limit of explosives. In view of the conclusions reached herein, a finding on willfulness is not necessary. However, it is concluded that there is no basis on this record for the willful label which was placed upon the citation.

It is crystal clear that DCASR safety officials and respondent's plant management discussed the matter of operational shielding and

it was apparently agreeable with DCASR personnel for respondent to operate the crimping machines which they had purchased from Penguin with the crimping heads themselves being considered as a type of shield. Further it is also apparent that discussion was also had relative to increasing the quantity limit of explosives in the assembly bay area. This resulted in the grant of an interim waiver raising the bay limit from 50 pounds to 400 pounds. It is inconceivable to find a respondent charged with a willful violation where good faith discussions have been carried on between it and DCASR safety officials who were present in the plant on a daily basis, checking on safety items and the quality of the product being manufactured (Tr. 719, 720).

Section 17(a) of the Act imposes a severe penalty (up to $10,000) on any employer who "repeatedly or willfully" violates the Act, or any standard or rule. In order to establish a willful violation it must be shown that the employer's action was a conscious, intentional, deliberate, voluntary decision. See Intercounty Construction Company v. OSHRC, 522 F.2d 777 (4th Cir. 1975), F.X. Messina Construction Company v. OSHRC, 505 F.2d 701 (1st Cir. 1974), and the United States v. Dye Construction Company, 510 F.2d 787 (10th Cir. 1975). The evidence here falls far short of establishing "willfulness" on the part of respondent.

Respondent has renewed its motion to dismiss the complaint and vacate the citations for lack of jurisdiction under section 4(b)(1) of the Act. Respondent has called attention to the many safety procedures, practices, and rules which contractors, performing under DoD contracts,

must follow in safeguarding personnel; the periodic governmental surveys and inspections; and the training and expertise of the DCASR safety specialists in the field of explosives as compared with the lack of explosive safety training for OSHA investigators. Respondent also stresses the fact that employees in contractor owned plants are assured of a higher degree of safety when DoD contractors enforce their rules or standards than would be possible under OSHA where there are no standards covering ammunition or explosives. Although there is substantial evidence in the record to support respondent's convincing argument the undersigned Judge is obligated to follow the Review Commission's previous ruling on this question.

At the outset of the hearing respondent moved to dismiss the complaint and citations because of complainant's failure to comply with the particularity requirement set forth in section 9(a) of the Act. At no time during the pendency of this proceeding did respondent move for a more definite statement. Respondent's motion is here denied. Respondent also moved for a dismissal because of the fact that complainant's attorney acted as counsel for DCASR during the taking of certain depositions. This motion is here denied. Counsel for several of the affected employees also moved to dismiss the proceeding because of a conflict of interest. This motion was also denied.

Based upon the entire record, the following findings and conclusions are made:

## FINDINGS AND CONCLUSIONS

1. Respondent is and, at all times material hereto, was engaged in a business affecting commerce within the meaning of section 3(5) of the Act.

2. The Review Commission has jurisdiction over the parties and subject matter involved in this proceeding.

3. Respondent is a Texas corporation, having employees engaged in the business of manufacturing ammunition and explosives at its Cleburne, Texas, plant and on July 10, 1973, was engaged in manufacturing M-213 hand grenade fuzes pursuant to its contract with the US Army Munitions Command.

4. On July 10, 1973, respondent failed to furnish its employees a place of employment free from recognized hazards likely to cause death or serious physical harm to its employees in that its foreman was permitted to perform repairs on a crimping machine head in the crimping area of assembly bay no. 4 without undertaking adequate safety precautions to reduce the possibility of ignition of explosives which had accumulated in the vicinity of the crimping area, thereby violating section 5(a)(1) of the Act.

5. That the aforementioned violation constituted a serious violation with the purview of section 17(k) of the Act and a penalty of $700 is found to be appropriate and in the public interest.

6. That it has not been established by reliable and probative evidence that respondent willfully violated section 5(a)(1) of the Act

by failing to comply with required intraline distances and by failing to abide by the assembly bay explosives limit.

## ORDER

Based upon the foregoing findings and conclusions and the record as a whole, it is ORDERED that:

1. Citation no. 1, alleging a serious violation, issued on August 15, 1973, be and the same is hereby affirmed and a penalty of $700 is hereby assessed against respondent.

2. Citation no. 2, alleging willful violations, issued on August 15, 1973, be and the same is hereby vacated as well as the penalties proposed therefor.

3. This proceeding be terminated.

Henry F. Martin Jr.
HENRY F. MARTIN, JR.
JUDGE

Dated: January 10, 1978
Dallas, Texas

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 4263 |
| GEARHART-OWEN INDUSTRIES, INC., | : | |
| Respondent. | : | |

DECISION

Before MORAN, Chairman; VAN NAMEE and CLEARY, Commissioners.

CLEARY, Commissioner:

On March 15, 1974, Judge William J. Risteau issued his decision and order in this case, dismissing and vacating the three citations in issue, because under section 4(b)(1) of the Occupational Safety and Health Act of 1970 (29 U.S.C. §651 et seq., hereinafter referred to as "the Act") the Commission lacked jurisdiction over the work being performed. The citations alleged one serious and two willful violations of section 5(a)(1) of the Act.

On April 15, 1974, I directed that the decision and order be reviewed by the Commission pursuant to section 12(j) of the Act in order to determine whether the Secretary was without jurisdiction to issue the citations because of section 4(b)(1) of the Act.

The Commission has reviewed the Judge's rulings and has considered the entire record. We do not adopt the Judge's decision and order.

On November 15, 1972, respondent, a Texas corporation, was awarded a contract by the United States Army Munitions Command for the manufacture of hand grenade fuzes. During the fulfillment of this contract an explosion occurred on July 10, 1973, in respondent's Cleburne, Texas, plant. An inspection of the respondent's worksite by the authorized representatives of the Secretary ensued. As a result of this inspection, three citations were issued to respondent by the Secretary on August 15, 1973, along with a notification of proposed penalty for $20,700.

Following the timely filing of all pleadings by both parties, the respondent, on February 22, 1974, moved to dismiss all three citations on the grounds that under section 4(b)(1) of the Act it is not subject to the Act. The propriety of the granting of this motion is now before this Commission.

I.

Both the wording and the purpose of section 4(b)(1) of the Act must be examined in order to decide the issue before us. Section 4(b)(1) provides:

> Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . <u>exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health</u>. (Emphasis added).

Respondent claims exemption from the Act by virtue of the above section and the fact that respondent is a contractor with the Department of Defense [hereinafter DOD] and hence subject to safety

regulations promulgated by the DOD.[1/] The Secretary concedes that the safety regulations promulgated by the DOD cover the same working conditions for which respondent was cited. In addition, the Secretary concedes that the respondent's worksite was in fact subject to the DOD safety regulations.

The Secretary, however, maintains that the presence of DOD safety regulations does not preclude the Secretary's action in this case. We agree with the Secretary.

In support of its position, the respondent places emphasis on the language of this Commission in Mushroom Transportation Co., No. 1588 (November 7, 1973). Specifically respondent relies upon the following language in Mushroom:

> Once another Federal agency exercises its authority over specific working conditions, OSHA cannot enforce its own regulations covering the same conditions. Section 4(b)(1) does not require that another agency exercise its authority in the same manner or in an equally stringent manner.

As noted above the Secretary concedes that the DOD, in promulgating safety regulations and incorporating said regulations in its contract

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1/ The Armed Services Procurement Regulation provides in part:

> The following clause shall be inserted in all contracts which may involve the . . . manufacture . . . of ammunition and explosives.
>
> * * *
>
> The Contractor shall comply with the DOD Contractor's Safety Manual for Ammunition, Explosives and Related Dangerous Materials, (DOD Manual 4145.26 M), in effect on the date of the solicitation for this contract, as it relates to ammunition and explosives, and any other additional or more stringent requirements included in the schedule of this contract. 32 CFR §7.104-79(a).

with respondent, has exercised statutory authority.[2/] Thus, on first glance, Mushroom would appear to apply to the instant facts and thereby support respondent's assertion of exemption under section 4(b)(1) of the Act.

Closer examination of the policy and purposes behind section 4(b)(1) of the Act leads us to reject respondent's "litmus paper" application of Mushroom to the instant facts. Rather, in order for preemption under section 4(b)(1) of the Act to occur, the exercise of statutory authority by a Federal agency must be pursuant to enabling legislation the purpose of which was to affect occupational safety and health.[3/] In other words, any analysis of the applicability of section 4(b)(1) to a given situation does not terminate upon a finding that the agency in question, under color of statute, prescribes or enforces standards or regulations that affect occupational safety and health. Further examination is required. The Congressional purpose in granting

2/ See note 1, supra and the accompanying text.

3/ This "purpose test" as applied by this Commission in Fineberg Packing Co., No. 61 (March 22, 1974) seems to be a better approach than that urged by the Secretary. The Secretary would require an express grant of statutory authority to affect occupational safety and health. We believe a "purpose test" is a better approach since it speaks to the essence of preemption under §4(b)(1) of the Act as envisioned by Congress. The Secretary's argument is concerned more with the form rather than the substance of the statutory authority involved. See note 4, infra and accompanying text.

Moreover if we adopted the Secretary's position we would have to reverse our position in the Fineberg case. It is obvious that in Fineberg there was an "express" grant of authority to affect occupational safety and health. But that "express" grant was not for the purpose of protecting employees, rather its purpose was to protect consumers from the dangers of adulterated or unwholesome products by regulating working conditions in the plants where the products were produced.

an agency the power to affect occupational safety and health must be examined to determine whether this statutory purpose, supporting an agency's action, is to assure safe and healthful working conditions for the benefit of employees.

This interpretation of section 4(b)(1) of the Act finds ample support in the legislative history of the Act. In debate over the scope of exemption under section 4(b)(1) of the Act, Congress only referred to those acts the purpose of which was to assure safe and healthful working conditions for the benefit of employees.[4/]

Examination of the nature of the statutory authority under which the DOD prescribed regulations affecting occupational safety and health leads to the inescapable conclusion that the respondent's work-site was subject to the Act. The Armed Services Procurement Regulation (hereinafter ASPR) requires contractual inclusion of safety standards in all contracts with the DOD involving the manufacture of ammunition and explosives.[5/] Thus, respondent was contractually required to conform to DOD safety regulations.

The ASPR was promulgated by the DOD by virtue of the statutory authority granted it under 5 U.S.C. §301 and 10 U.S.C. §2202.[6/] 5 U.S.C. §301 provides:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the

4/ For example, only acts such as the Federal Metal and Non-Metallic Mine Safety Act were discussed. Staff of Senate Comm. on Labor & Public Welfare, 92d Cong. 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970, 1018-20, 1037 (Comm. Print 1971).

5/ See note 1, supra.

6/ DOD Directive 4105 30 (March 11, 1959).

> distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

In addition, 10 U.S.C. §2202 provides:

> Notwithstanding any other provision of law, an officer or agency of the Department of Defense may obligate funds for procuring, producing, warehousing, or distributing supplies, or for related functions of supply management, only under regulations prescribed by the Secretary of Defense. The purpose of this section is to achieve the efficient, economical, and practical operation of an integrated supply system to meet the needs of the military departments without duplicate or overlapping operations or functions (emphasis added).

Both the above sections are administrative in nature, giving the Secretary of Defense authority to promulgate rules and regulations for the purpose of insuring an operation of the DOD in furtherance of its defense mission. Admittedly, industrial accidents in plants of contractors who manufacture munitions for the DOD would likely impede the smooth operation of the DOD's procurement activities. Nevertheless, the DOD's ability to insure a continuous flow of munitions by requiring DOD contractors to conform to occupational safety and health standards does not deprive the Secretary of Labor of jurisdiction to issue citations for violations of the Act occurring at the contractor's worksite. Neither of the two sections under which the ASPR was promulgated evidences a Congressional purpose that is necessarily consonant with the purpose of the Act. Consequently,

the DOD's exercise of its contractual authority under the ASPR does not exempt respondent's worksite from the coverage under the Act.

The contract clause required under ASPR §7-104.79 7/ contains the following provision:

> Nothing contained herein shall relieve the Contractor from complying with applicable Federal, State and local laws, codes, ordinances and regulations (including the obtaining of licenses and permits) in connection with the performance of this contract (emphasis added). 8/

The presence of such a provision is an indication of the continued vitality of legislation whose specific purpose is to affect occupational safety and health.

Finally, if we adopt respondent's position that the mere promulgation of safety standards by the DOD and inclusion of such standards in defense contracts preempts the Act's coverage under section 4(b)(1), we would be tacitly declaring section 16 of the Act meaningless. Section 16 of the Act provides:

> The Secretary, on the record, after notice and opportunity for a hearing may provide such reasonable limitations and may make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any and all provisions of this Act as he may find necessary and proper to avoid serious impairment of the national defense.

The above section clearly indicates that Congress intended the Act to apply to defense contractors, such as respondent. If the Act does not apply to defense contractors, of what purpose is a grant of authority

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7/ 32 CFR §7.104-79(a).

8/ This clause recognizes implicitly and preserves any obligations that may exist under the Walsh-Healey Act, 41 U.S.C. §35-45. The OSHA standards are operative under the Walsh-Healey Act. See 41 CFR Part 50-204. By virtue of section 4(b)(2) of OSHA, the enforcement process of OSHA is added to the enforcement procedures of the Walsh-Healey Act. H. Rep. No. 91-1765, 91st Cong. 2d Sess. 33 (1970). Of course, section 4(b)(1) does not affect the jurisdiction of the Walsh-Healey Act.

to the Secretary to grant variations, tolerances, and exemptions in the interest of national defense? It is implicit in this section that the objective of national defense is not necessarily consonant with job safety or health. Thus, reading the Act as a whole, we reject respondent's claim that section 4(b)(1) renders the Act inapplicable to its worksite.

Inasmuch as the Secretary has conceded that the DOD safety regulations cover the same working conditions for which respondent was cited, it is necessary to distinguish our holding in this case from our holding in Southern Pacific Transportation Co., No. 1348 (November 15, 1974).

In Southern Pacific, we held that the Department of Transportation's (DOT) prescription and enforcement of safety standards covering some working conditions in the railroad industry did not mandate an industry-wide exemption under section 4(b)(1). Rather, we held that exemption occurs only for the specific working conditions that the DOT has undertaken to regulate pursuant to its statutory authority to regulate working conditions for the benefit of employees.

The DOD has exercised statutory authority in regulating the specific working conditions for which respondent was cited. But, as we noted above,[9/] the enabling legislation under which the DOD acted does not have a purpose that is consonant with that of the Occupational Safety and Health Act. It is this element that distinguishes this case from Southern Pacific.

The purpose behind the enabling legislation under which the DOT regulates working conditions in the railroad industry[10/] is the assurance of safe and healthful working conditions for the benefit of employees. The DOD, however, regulates the working conditions at defense contractors' worksites

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9/ See pp. 5-7, supra.
10/ Federal Railway Safety Act of 1970, 45 U.S.C. §421 et seq.

pursuant to enabling legislation that is designed to facilitate the administration of the department's defense mission. Consequently, both the Department of Labor and the Department of Defense may, under color of statute, regulate respondent's working conditions in order to achieve their respective missions.

We find no difficulty in holding that respondent was subject to both the Act and the ASPR. If application of the Act to the respondent's worksite seriously impairs the national defense, respondent may make an application to the Secretary under section 16 for relief from any or all provisions of the Act. This ability to apply for relief from the Act not only fosters the purpose of the Act itself but also fosters the purpose of the administrative sections under which the ASPR was promulgated.

II.

Respondent also urges exemption under section 4(b)(1) of the Act based upon the existence of the DOD Explosives Safety Board and DOD Instruction 5030.52 (April 28, 1972). Both the above are inapplicable to this case.

The DOD Explosives Safety Board was created on October 23, 1971, pursuant to authority vested in the Secretary of Defense by 10 U.S.C. §172.[11/] Reference to this enabling statute indicates that Congress authorized the creation of such a board in order to prevent "hazardous conditions from arising to endanger life and property inside or outside of <u>storage reservations</u>" (emphasis added).[12/] Respondent's plant was

11/ DOD Directive 5154.4 (October 23, 1971).
12/ 10 U.S.C. §172.

not a storage reservation. Moreover, respondent was a private manufacturer, in a privately owned building, merely under contract with the DOD. The DOD directive creating the Explosives Safety Board provides:

> The provisions of this Directive apply to the Military Departments and Defense Agencies, hereinafter referred to as the DOD Components, worldwide and cover facilities under United States jurisdiction located within the United States and overseas wherever ammunition and explosives are manufactured, tested, handled, developed, reworked, transported, stored or disposed of while under the custody of the DOD (emphasis added).

Since the munitions in respondent's plant were not under the custody of the DOD, the Explosives Safety Board had no jurisdiction over respondent's worksite. Consequently, we find respondent's contention that the Explosives Safety Board preempts the Secretary of Labor's jurisdiction over respondent to be without merit.

Respondent's reliance upon DOD Instruction 5030.52 is clearly misplaced. This instruction is an intradepartmental instruction to all military departments and defense agencies to comply with section 19 of the Act.[13/] Section 19 of the Act requires heads of Federal agencies to establish and maintain occupational safety and health programs consistent with the standards promulgated under section 6 of the Act. Any programs initiated in compliance with section 19 of the Act apply only to Federal employees. Any regulations promulgated under DOD Instruction 5030.52 have no application to respondent's employees and consequently will not prevent application of the Act to respondent's worksite.

13/ DOD Instruction 5030.52 (April 28, 1972).

Accordingly, it is ORDERED that the Judge's decision be set aside and this case be remanded for further proceedings consistent with this decision.

FOR THE COMMISSION

William S. McLaughlin
Executive Secretary

Dated: FEB 21 1975

MORAN, Chairman, Dissenting:

The majority has once again taken crystal ball in hand, gazed into 29 U.S.C. § 653(b)(1), and discovered language which is not there, viz., that the Occupational Safety and Health Act is subordinate to other Federal laws only where there is a policy or purpose in such other laws to include employees in the class of persons to be protected thereunder. This interpretation of § 653(b)(1) not only circumvents and expands the jurisdictional

limitation set forth therein but it transfers statutory safety responsibility from a government agency experienced in a particular safety area (in this case explosives) to an agency with no experience whatsoever in explosives. I pointed out the foolhardy nature of such a position in Secretary v. Fineberg Packing Company, Inc., 7 OSAHRC 405, 408-410 (1974).

If Congress intended that such overlapping Federal law or standard have a purpose of protecting employees, the wording of § 653(b)(1) would no doubt have stated that the Act does not apply to "Federal agencies . . . [that] exercise statutory authority to prescribe or enforce [occupational safety or health] standards . . . ."

Congress, however, inserted the terms "occupational safety or health" after the words "regulations affecting." This carefully worded phrase effectively says that the jurisdiction of this Act is preempted by any regulation statutorily promulgated by a Federal agency other than the Department of Labor which affects occupational safety or health. The statute does not say that such a regulation must have employee protection as its primary purpose. It plainly excludes the application of this Act where another Federal agency has a regulation which "affects" occupational safety or health. If a sophisticated safety program to prevent an explosives plant from blowing up doesn't affect the occupational safety and health of the employees working therein, then a roof isn't a floor,[14/] shall doesn't mean may,[15/] and Secretary doesn't mean Commission.[16/]

14/Secretary v. S.D. Mullins Co., Inc., 4 OSAHRC 1415 (1973).
15/Secretary v. Chicago Bridge & Iron Co., (Order of Remand) ____ OSAHRC ____ (Docket No. 224, December 26, 1974).
16/Secretary v. H.K. Porter Co., Inc., 11 OSAHRC 53 (1974).

The Secretary has conceded, and the majority likewise finds, that by virtue of the Armed Services Procurement Regulations and its Safety Manual for Explosives the Department of Defense has exercised its statutory authority to prescribe or enforce standards or regulations which affect occupational safety and health and that such regulations apply to the working conditions of respondent's employees. This is all that the wording of § 653(b)(1) requires for proof of exemption from applicability of the Act. Respondent has thus established all the elements necessary to bring it within the purview of the exemption, and the Judge's decision should therefore be affirmed.

In several earlier cases,[17/] I set forth in detail the policy arguments in support of a strict construction of the language of § 653(b)(1). This case well illustrates the absurdity of requiring compliance with overlapping governmental regulations. The Department of Defense safety standards by which respondent was governed are detailed precautionary measures designed to prevent the same kind of hazards which motivated the Congress to enact this law.[18/] The Department of Defense has as its background extensive experience and expertise with the manufacture of explosives. The Department of Labor, on the other hand, with no demonstrated expertise in this area, in fact provides no specific regulations for the conditions which were the

17/ Secretary v. Fineberg Packing, supra; Secretary v. George A. Hormel & Co., 11 OSAHRC 725 (1974); Secretary v. Southern Pacific Railroad, ____ OSAHRC ____ (Docket No. 1348, November 14, 1974).

18/ Indeed, § 100 of the DOD Safety Manual for Explosives declares as one of its purposes the safeguarding of personnel.

subject of the citation. It alleges only noncompliance with the general duty requirement[19/] in that respondent failed to provide a workplace free from recognized hazards.

Moreover, the majority's statement that finding respondent exempt from the Act would render § 16 of the Act, 29 U.S.C. § 665, meaningless is without merit. Obviously, explosives manufacturing does not constitute the only industry which contracts with the Department of Defense. Section 16 of the Act applies to a whole multitude of Defense contractors who manufacture such things as airplanes and tanks and uniforms, build roads and airstrips and buildings, and supply food, equipment and many other things.

19/29 U.S.C. § 654(a)(1).

(1)

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>GEARHART-OWEN INDUSTRIES, INC.,<br>Respondent. | OSHRC DOCKET NO. 4263 |

OSHRC EXECUTIVE SECRETARY
JUDGE'S DECISION REC'D MAR 15 1974
FINAL ORDER ON APR 15 1974

ORDER OF DISMISSAL

On August 15, 1973, Complainant issued three Citations to Respondent, a manufacturer of minitions, alleging violations of Section 5(a)(1) of the Occupational Safety and Health Act of 1970 (29 USC 651 et seq., hereinafter called the Act). Penalties totalling $20,700 were proposed. In due course Respondent made known its intent to contest the Citations, and a Complaint and Answer were filed.

Following a Prehearing Conference the parties entered into a limited Stipulation of Facts, and Respondent filed a Motion to Dismiss charges under the Act on the basis of Section 4(b)(1) of the Act, which provides as follows:

> "Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies..... exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."

Specifically, Respondent maintains that its workplace is operated in accordance with safety Regulations promulgated by the Department of Defense pursuant to statutory authority, thereby bringing Section 4(b)(1) into play.

5-17

Review of the Stipulation and the documents attached to it[1/] substantiates Respondent's position. It was awarded a contract to manufacture certain hand grenade fuzes for the United States Army in accordance with an Invitation to Bid which incorporated by reference (Exhibit A, page 13) portions of the Armed Services Procurement Regulations (ASPR) dealing with "Safety Precautions for Ammunition and Explosives". The ASPR is considered to be a regulation of the Secretary of Defense promulgated pursuant to applicable Statute (Exhibit K).

Section 7-104.79(b) of the ASPR requires compliance with Department of Defense Manual 4145.26M, a safety manual for DOD contractors. (Exhibit H) This is a detailed and lengthy book of instructions in safety matters, pertinent portions of which were, as appears in the Stipulation, followed by Respondent in performing the work which gave rise to the allegations contained in the Citations referred to above.

On these facts the undersigned must find that jurisdiction under the Act does not lie with respect to the work being performed in Respondent's workplace under the contract referred to in the preceeding paragraphs. It is therefore ORDERED that the Citations dated August 15, 1973, be dismissed and that the proposed penalties be vacated.

WILLIAM J. RISTEAU
JUDGE

Dated: MAR 15 1974

1/ The documents attached to the Stipulation will be referred to as "Exhibit ___".

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
Room 7B11, Federal Building
1100 Commerce Street
Dallas, Texas 75242

NOTICE OF DECISION

Secretary of Labor v. Thunderbolt Drilling, Inc.
OSHRC Docket No. 81-1798

1. Enclosed is a copy of my decision. It will be filed with the Commission on October 21, 1982, and will become the final order of the Commission on November 22, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is November 22, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Louis G. LaVecchia
Administrative Law Judge

Date: October 1, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, Complainant, | : | |
| | : | OSHRC |
| v. | : | Docket No. 81-1798 |
| | : | |
| THUNDERBOLT DRILLING, INC. Rig #52 | : | |

DECISION ON REMAND

Appearances: U.Sidney Cornelius, Jr., Esquire, for the Complainant.

George R. Carlton, Jr., Esquire, for the Respondent.

By order of the Review Commission dated September 10, 1982 this proceeding was remanded to the undersigned for further proceedings with respect to the alleged failure to post for the benefit of employees the OSHA notice required under the standard set forth at 29 CFR 1903.2(a)(1).

This was described as an "other" violation in Citation No. 2. The "serious" violations described in Citation No. 1 are no longer in issue.

The posting violation was affirmed as a de minimis delict in my decision filed with the Commission on August 11, 1982.

The Commission properly points out that noncompliance with a regulation that implements a specific statutory requirement cannot be properly characterized as de minimis, citing appropriate authorities. It also reminded that a civil penalty is mandatory for violation of any of the posting requirements.

The evidence of record respecting the alleged violation of the posting requirement is as follows: The compliance officer stated that during the opening conference and the following inspection of the work site he asked the tool pusher [foreman in charge] if he had an OSHA notice informing employees of the right to a safe and healthful work place, and "he told me he did not." He then added that he confirmed the absence of the notice during his walk-around inspection. Furthermore, he stated that no penalty was proposed for the violation. (Tr. 19,20).

The respondent's part owner and general manager, when asked to address the question of the missing OSHA notice, stated that "OSHA posters were bought at least twice for every rig that we have." His counsel began a question with respect to the notices, in the following manner: "As far as you know were they --" at which point the witness replied, "They were posted at the time." Thus, under one interpretation he was adding an addendum to the attorney's leading question, stating that as far as he knew the notice was posted. Under a stricter interpretation on his answer, he is stating that the notice was posted at the time. (Tr. 42).

Any conflict in the above statements must be resolved in favor of the government in view of the fact that the compliance officer was specifically looking for the notice and did not find it, and, of course, the tool pusher had stated that the notice was not posted. The respondent's evidence was vague in the sense that its part owner was not really sure that the notice had been posted in this particular instance. For example, viewing his statements in the most favorable light, it will be seen that he did not

say that he at any time actually saw the notice properly posted. In view of the matter at risk his testimony would also be more likely to show bias. Weighing these factors I find that the testimony of the compliance officer must be given greater weight than that of the respondent's witness. A violation of the posting regulation is specifically found.

The characterization of the violation found will be changed from de minimis, as shown in my original decision, to non-serious, in accord with the authorities cited by the Commission in its remand order, and a civil penalty of $1 will be assessed in order to comply with the mandate of the Act. Consideration of the elements shown in section 17(j) of the Act leads me to conclude that no higher penalty would be warranted.

I conclude that the respondent violated 29 CFR 1903.2(a)(1).

## Order on Remand

Item 1 of Citation No. 2 is affirmed as a non-serious violation, and a civil penalty of $1 is assessed.

Louis G. Lavecchia
Administrative Law Judge

Dated: October 21, 1982

Dallas, Texas

UNITED STA[illegible] A[illegible]

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

September 10, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Thunderbolt Drilling, Inc. Rig #52

OSHRC DOCKET NO. 81-1798

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF DIRECTION FOR REVIEW AND REMAND

To wit: See Attached.

FOR THE SECRETARY OF LABOR

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FOR EMPLOYEES

Louis G. LaVecchia
Judge, OSHRC
Rm. 7B11, Federal Building
1100 Commerce Street
Dallas, Texas 75242

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/78

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, | ) | |
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| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC DOCKET NO. 81-1798 |
| | ) | |
| THUNDERBOLT DRILLING, INC., | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

DIRECTION FOR REVIEW AND REMAND ORDER

The petition for discretionary review filed by the Secretary of Labor is GRANTED under 29 U.S.C. §661(i) and Commission Rule 92(a), 29 C.F.R. §2200.92(a).

The Secretary takes exception to the judge's action in reducing the characterization of a violation of 29 C.F.R. §1903.2(a)(1) from nonserious to de minimis. That regulation requires that employers post a notice of employee protections and obligations under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§651-678.[1/] The effect of characterizing the violation as de minimis is to preclude both an abatement requirement and a penalty assessment. Combustion Engineering, Inc., 77 OSAHRC 182/A2, 5 BNA OSHC 1943, 1977-78 CCH OSHD ¶22,241 (No. 76-2210, 1977).

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1/ 29 C.F.R. §1903.2(a)(1) states:

> Each employer shall post and keep posted a notice or notices, to be furnished by the Occupational Safety and Health Administration, U.S. Department of Labor, informing employees of the protections and obligations provided for in the Act, and that for assistance and information, including copies of the Act and of specific safety and health standards, employees should contact the employer or the nearest office of the Department of Labor. Such notice or notices shall be posted by the employer in each establishment in a conspicuous place or places where notices to employees are customarily posted. Each employer shall take steps to insure that such notices are not altered, defaced, or covered by other material.

The Secretary argues that the judge's action undermines the language of section 8(c)(1) of the Act, 29 U.S.C. §657(c)(1), which states in part:

> The Secretary shall also issue regulations requiring that employers, through posting of notices or other appropriate means, keep their employees informed of their protections and obligations under this chapter, including the provisions of applicable standards.

We agree with the Secretary. We are not free to relieve a party of a statutory obligation. Noncompliance with a regulation that implements a specific statutory requirement cannot properly be characterized as de minimis. See Lake Butler Apparel Co. v. Secretary of Labor, 519 F.2d 84 (5th Cir. 1975). Also, section 17(i) of the Act, 29 U.S.C. §666(h), states: "Any employer who violates any of the posting requirements, as prescribed under the provisions of this chapter, shall be assessed a civil penalty of up to $1,000 for each violation." (Emphasis added). Thus, a penalty is required for posting violations. See C & R Cabinet Co., 75 OSAHRC 61/D10, 3 BNA OSHC 1206, 1974-75 CCH OSHD ¶19,668 (No. 4049, 1975). Accordingly, the judge erred in affirming a violation of section 1903.2(a)(1) but characterizing it as de minimis.[2/]

We also find that the judge's decision concerning the posting citation does not contain an adequate statement of the reasons or basis for finding a violation. The judge cited testimony tending to prove the charge and testimony tending to disprove it, and did not state why he resolved the testimony

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2/ Chairman Rowland does not join in this conclusion. Because the Commission is remanding this case for the judge to further consider whether Respondent violated the posting regulation at section 1903.2(a)(1), Chairman Rowland finds it unnecessary at this time to reach the issue raised by the Secretary regarding the appropriate characterization of posting violations.

in favor of the Secretary. A judge's decision must contain a statement of the reasons or basis for the decision. E.g., Syntron, Inc., 10 BNA OSHC 1848, 1982 CCH OSHD ¶26,145 (No. 81-1491, 1982).

Accordingly, we set aside that part of the judge's decision affirming a violation of section 1903.2(a)(1) as de minimis, and remand the case for further proceedings on that citation consistent with this decision.[3/]

IT IS SO ORDERED.

BY THE COMMISSION

Ray H. Darling, Jr.

DATED: SEP 10 1982

Ray H. Darling, Jr.
Executive Secretary

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3/ No party has filed objections regarding any other aspect of the judge's decision and only the citation alleging a violation of section 1903.2(a)(1) is before the Commission on review.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|---|
| RAYMOND J. DONOVAN, SECRETARY OF LABOR, Complainant, | : | |
| v. | : | OSHRC DOCKET No. 81-1798 |
| THUNDERBOLT DRILLING, INC., Respondent, | : | |

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## SECRETARY'S PETITION FOR DISCRETIONARY REVIEW

Complainant, the Secretary of Labor, being aggrieved by the Decision and Order of the Administrative Law Judge in the above matter, hereby submits this Petition for Discretionary Review pursuant to Section 2200.91 of the Rules of the Occupational Safety and Health Review Commission.

## STATEMENT OF PORTIONS OF THE JUDGE'S DECISION AND ORDER TO WHICH EXCEPTIONS ARE TAKEN

The Secretary takes exception to Judge Louis G. LaVecchia's order reducing citation No. 2 for a non-serious violation

of 29 CFR 1903.2(a)(1) [1/] to a de minimis violation of the standard. (J.D. 8).

STATEMENT OF REASONS FOR WHICH EXCEPTIONS ARE TAKEN

Judge LaVecchia's reduction of the characterization of respondent's posting violation from nonserious to de minimis is wholly inconsistent both with Commission precedent and with the express purposes of the Act. The Commission has classified as de minimis those violations having only a neglible relationship to employee safety and health. Clifford B. Hannay and Son, Inc. , No. 15983, 6 BNA OSHC 1335 (R.C. 1978); Alfred Austin Construction Co., No. 4809, 4 BNA OSHC 1166 (R.C. 1976). Where a de minimis violation is found, there is no requirement that the cited condition be adated. National Rolling Mills Co., No. 7987, 4 BNA OSHC 1719 (R.C. 1976) But Commission case law also makes clear that violations like that involved in the present case are not to be regarded as de minimis. In General Motors Corp. (Inland Division), No. 76-5033, 8 BNA OSHC 2036 (R.C. 1980), the Commission held that a violation of the Act's reporting requirements could not be classified as a de minimis violation, stating;

1/ 29 CFR 1903.2(a)(1) states:

> (a)(1) Each employer shall post and keep posted a notice or notices, to be furnished by the Occupational Safety and Health Administration, U.S. Department of Labor, informing employees of the protections and obligations provided for in the Act, and that for assistance and information, including copies of the Act and of specific safety and health standards, employees should contact the employer or the nearest office of the Department of Labor. Such notice or notices shall be posted by the employer in each establishment in a conspicuous place or places where notices to employees are customarily posted. Each employer shall take steps to insure that such notices are not altered, defaced, or covered by other material.

> "Violations have been classified as de minimis when the Commission has found that the violations were so "trifling" that the entry of an abatement order or the assessment of a penalty was inappropriate. However, this decision demonstrates that the Commission does not consider the reporting requirements of the Act to be a trifling matter. Those requirements are the cornerstone of the Act and play a crucial role in providing the information necessary to make workplaces safer and healthier."

Similarly, the failure to post a notice informing employees of their statutory rights cannot be justifiably classified as de minimis. Judge La Vecchia's reduction of the non-serious violation totally undermines the language of Section 8(c)(1) of the Act which states in part;

> "...the Secretary shall also issue regulations requiring that employers, through the posting of notices or other appropriate means, keep their employees informed of their protections and obligations under this Act, including the provisions of applicable standards." 29 U.S.C. §657

A violation of this express statutory mandate can hardly be deemed so "trifling" as to negate the entry of an abatement order. General Motors Corp., supra. The notice informs employees that the Act exists and applies to them and their working conditions. Such dissemination of information was deemed by Congress to be essential to the effective enforcement of the Act. Lake Butler Apparel Co. v. Secretary of Labor, 519 F. 2d 84 (5th Cir. 1975); C & R Cabinet Co., Nos. 4049 and 3736, 3 BNA OSHC 1206 (R.C. 1975). The Commission itself has affirmed a citaiton for non-serious violations of 29 CFR 1903.2(a)(1) where an employer failed to display an OSHA poster. C & R Cabinet Co. supra ; See also, Cyclone Drilling and Workover, Inc., Nos. 80-1636 and 80-1721, 9 BNA OSHC 1439

(ALJ 1981); Eckel Manufacturing Co., No. 80-71405, 9 BNA 2145 (ALJ 1981); Weber Construction Co., No. 80-4107, 9 BNA OSHC 1958 (ALJ 1981).

In conclusion, although Judge La Vecchia correctly held that Respondent violated 29 CFR 1903.2(a)(1), he erred in classifying the violation as de minimis, thus not ordering abatement with the full terms of the standard. Therefore, it is respectfully requrested that the Commission direct review of the instant case.

Respectfully submitted,

T. TIMOTHY RYAN, JR.
Solicitor of Labor

FRANK A. WHITE
Associate Solicitor for
Occupational Safety and Health

HAROLD J. ENGEL
Counsel for Regional Trial
Litigation

DANIEL J. MICK
Assistant Counsel for Regional
Trial Litigation

ORLANDO PANNOCHIA
Attorney

## CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Secretary's Petition for Discretionary Review was mailed, postage prepaid, to Mr. George R. Carlton, Jr., 1200 Diamond Shamrock Tower, 717 North Harwood Street, Dallas, Texas 75201 on this 19th day of August, 1982.

ORLANDO PANNOCHIA
Attorney

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, Complainant, | : | |
| | : | |
| v. | : | OSHRC |
| | : | Docket No. 81-1798 |
| | : | |
| THUNDERBOLT DRILLING, INC., Respondent. | : | |

DECISION AND ORDER

Appearances:

U. Sidney Cornelius, Jr., Esquire,
for the Complainant.

George R. Carlton, Jr., Esquire,
for the Respondent.

This is a proceeding under section 10(c) of the Occupational Safety and Health Act of 1970.

The respondent was issued two citations for alleged violations of sections 5(a)(1) and 5(a)(2) of the Act. It contested the citations, and the matter went to hearing on January 26, 1982 at Houston, Texas. A stipulation to jurisdiction and coverage under the Act was entered on the record. (Tr. 3).

In Citation No. 1, characterized as "serious," the respondent allegedly violated section 5(a)(1) of the Act by not furnishing employment and a place of employment which were free from recognized hazards that were causing or likely to cause death or serious physical harm to employees in that:

> Item 1(a) "Employees were exposed to potential hazard of a blowout and/or related fire in that no emergency means of escape was provided from the derrick platform (monkey board). Protection could have been provided by installation of a properly rigged and equipped escape line (geronimo).
>
> Item 2(a) "Employer failed to protect his employees from being struck by rolling and/or falling heavy drill pipe and drill collars on the pipe rack. Employer could have abated this hazard by using substantial wood wedges or by tying end item on each layer.

Proposed penalties of $300 and $240 respectively were issued.

In Citation No. 2, characterized as "other," the respondent allegedly violated the safety standard set forth at 29 CFR 1903.2(a)(1) by failing to post the OSHA notice informing employees of the protections and obligations provided for in the Act. No penalty was proposed for this alleged violation.

Upon motion filed well before the hearing the complainant was permitted to amend Items 1 and 2 of Citation No. 1 to allege violations of (1) the safety standard set forth at 29 CFR 1910.36(b)(1) in that

> "Building(s) or structure(s) designed for human occupancy were not provided with exits sufficient to permit the prompt escape of occupants in case of fire or other emergency:
>
> [Describing essentially the same hazard, etc., ]

and (2) the safety standard set forth at 29 CFR 1910.176(b) in that

> "Materials stored in tiers were not stacked, blocked, interlocked or limited in height so that they were stable or secure against sliding and collapse:
>
> [Describing essentially the same hazards, etc.,]

The proposed penalties were amended to $400 for each of the two violations alleged.

## The Relevant Testimony

Mr. Roy Moore, compliance officer for the Department of Labor, conducted a general schedule inspection of a worksite at which the respondent was completing the drilling of an oil well on July 2, 1981. Six of respondent's employees were engaged in the operation at that time. (Tr. 6). During the course of his inspection he noted an employee working on the "monkey board," which in oil field parlance refers to a work platform located at some height on the derrick. He stated that the employee was working at an 85-foot height above the derrick floor. (Tr. 8). He looked for an escape device other than the ladder built into the legs of the derrick, but found none. The tool pusher, Mr. Labow, confirmed that there was no alternate escape device. (Tr. 8). A definite hazard was envisaged in the absence of the alternative escape device, in view of the possibility of a "blowout" resulting in flying debris, and the fire which often accompanies a blowout. (Tr. 9). Blowouts do not occur frequently, however. (Tr. 9). Exhibits C-1 through C-3 are photographs of the derrick, showing the absence of the "Geronimo" line. The line is normally attached to the derrick slightly above the work platform. The line extends to a point well away from the derrick structure, and

a mechanical slide device permits a man, using a brake, to descend down and away from any danger presented on the derrick. (Tr. 13,14).

Also discovered by the compliance officer was a stack of 4-1/2 inch drill pipe stored on a rack which the witness felt did not comply with the safety standard covering such stacking of pipes. He believed a hazard was presented to employees by the possibility that the pipes might roll or fall off the rack onto the employees. (Tr. 15) The type and size of the pipe used normally has a weight of 16 pounds per foot. The 30-foot sections seen by the witness weighed close to 500 pounds each. ((Tr. 15). (Exhibits C-4,5). Small stones were observed between some of the pipe sections, and pieces of wood were also used for that purpose. (Tr. 18). The respondent's safety and health program appeared to be better than average for companies engaged in similar operations. (Tr. 19). An OSHA notice was not found at the site. (Tr. 20).

The drilling operation was being done in the oil field known as the "Austin Chalk." Blowout preventers were in place on the rig, these being devices that are placed over the well bore so that it can be rammed shut in the event such action becomes desirable. (Tr. 25). The ladder climbing device contains a counterweight for balancing the weight of an employee using the ladder. (Tr. 26). If the employee should let go of the ladder he would descend to the ground, counterbalanced in a manner to prevent his striking the ground very hard. (Tr. 26). The type of drilling rig in use here can be dismantled and moved to another location as the occasion demands. (Tr. 29). It is not the outdated type of drilling rig that remains a more or less permanent structure during use. (Tr. 30).

A blowout is not considered an explosion. It is the sudden release from a well of fluids, gas, drilling mud, and possibly pieces of equipment under heavy gas pressure. (Tr. 30,31). The witness believed the potential for the need to be able to escape quickly was present at the worksite. (Tr. 31). This type of drilling rig was not of the portable types of rigs mounted on truckbeds and used in well servicing operations. (Tr. 31).

The drilling had reached the 7,950 foot depth, with about 100 feet remaining to arrive at the completion depth. The likelihood of a blowout is much greater in the producing zone than elsewhere. (Tr. 33). Both oil and gas are derived from the Austin Chalk field. Gas is the driving force behind blowouts. (Tr. 33).

Mr. Steve Richards, part owner and general manager of the respondent, testified that he has a degree in petroleum engineering and has been active in oil field work all of his working life. He has performed practically all of the jobs involved in oil field operations. (Tr. 36). He stated that the Austin Chalk field is a "fractured" formation, requiring the fracturing of the site of the oil in order to permit it to flow. He considered the field an unlikely spot for a blowout. (Tr. 37). Company sponsored safety meetings are held with employees, and a bi-monthly inspection is generally made of its rigs by its insurance company. The "Geronimo" line is one of the items inspected. So are pipe racks. (Tr. 37). He inquired about the line on the cited rig and was told by the employees that the line was up but the T-bar was not put up because the brake was not working. It is company policy to have all safety devices in place during operations. (Tr. 38).

This was Labow's first or second day on the job as tool pusher. He had been promoted to the position about 6 weeks previously, but had entered the hospital for surgery at that time. He returned to work a couple of days before the inspection. (Tr. 38,39).

The witness felt that an employee in danger could attach himself to the climbing line and lower himself to the ground, using the counterweight as a damping factor. (Tr. 39).

He stated that the company had never had any drill pipe shift and fall from a rack. He pointed out that the cited pipe (Ex. C-4) is tied on the bottom layer, and that the method of stacking the pipe makes it self-chocking. The design of the tool joints results in a V-effect that each joint makes with another, restricting the movement of the pipe. (Tr. 41). The insurance company has never complained about this manner of stacking drill pipe. (Tr. 42). OSHA posters were bought at least twice for every rig used by the company. As far as the witness knew they were posted at the time of the inspection. (Tr. 42).

## Discussion

The safety standard set forth at 29 CFR 1910.36(b)(1) provides:

> "Every building or structure, new or old, designed for human occupancy shall be provided with exits sufficient to permit the prompt escape of occupants in case of fire or other emergency. The design of exits and other safeguards shall be such that reliance for safety to life in case of fire or other emergency will not depend solely on any single safeguard; additional safeguards shall be provided for life safety in case any single safeguard is ineffective due to some human or mechanical failure."

At 29 CFR 1910.36(a) covering applicability of the standard, exits from vehicles, vessels, or other mobile structures are excluded.

The respondent, on brief, argues that (1) the cited standard does not apply to this operation because the cited drilling rig is a mobile structure, and (2) even if applicable, no violation has been proved. The Secretary argues to the contrary in his brief.

The respondent cites two cases which became final orders of the Commission because they were not directed for review. These were Parker Well Service, 5 OSHC 1847 (1977) and Fairbanks Well Service, 5 OSHC 1873 (1977). These cases held the "means of egress" sub-part of the standard inapplicable to well-servicing units (truck-mounted derricks used to drill shallow wells and service existing wells) because they were self-propelled "mobile structures," within the meaning of 36(a) above. The respondent argues that although the drilling unit here considered was not mounted on a truck it should be classified as a mobile structure because it is a movable structure (generally disassembled and reassembled at some other point).

The Secretary cites Wilson Drilling Co. v. Marshall, 8 OSHC 1921 (1980), 624 F.2d 38 (1980) in which the Fifth Circuit Court of Appeals affirmed the application of 36(b) to the type of drilling rig here under consideration. The Court noted that no escape route accessible from the monkey board would allow descent other than straight down, whereas the Geronimo line, by providing a method of egress at an angle away from the derrick, provided a safe means of escape in the event of

a fire or explosion resulting from drilling. Essentially the same situation existed in the case at bar--the only means of escape were the ladder down to the derrick floor or the counterbalanced climbing line which would also lower an employee straight down to the derrick floor. The respondent's contentions with respect to the mobility of the drill rig must be rejected. This type of drill rig is movable, but that is not enough, in my opinion, to bring it within the exclusion as a "mobile" structure. I conclude that there was a violation of the standard at 29 CFR 1910.36(b)(1). The violation being "serious," within the meaning of the Act, the question is whether the proposed penalty of $400 is appropriate. Consideration of the elements in section 17(j) of the Act leads me to conclude that a penalty of $200 should be assessed.

As to the stacking of the drill pipe, the Secretary has, in my opinion, failed to demonstrate by a preponderance of the evidence that there was a violation of the applicable standard. The respondent's chief witness demonstrated substantial knowledge of oil field operations and stated that the self-chocking action of the pipe due to the shape of the tool joints made any shifting or falling of pipe very unlikely. He had never known, in his many years of experience, drill pipes to fall from the type of rack used. I would credit this witness's experience and credibility and find no violation of the standard.

The absence of the OSHA notice will be affirmed as a de minimis violation.

## Conclusions

1. The respondent violated the safety standards at 29 CFR 1910.36(b)(1) and 29 CFR 1903.2(a)(1).

2. The respondent did not violate the standard set forth at 29 CFR 1910.176(b).

## ORDER

1. Item 1 of Citation No. 1 is affirmed as a serious violation, with a civil penalty of $200 assessed.

2. Item 2 of Citation No. 1 is vacated.

3. Item 1 of Citation No. 2 is affirmed as a de minimis violation.

Louis G. LaVecchia
Administrative Law Judge

Dated: August 11, 1982

Dallas, Texas.

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| | (see prior cite at 80/69/E3) | | 67/A2 |
| 82-37 | WILLIAMS ENTERPRISES, INC. | 11/24/82 | 67/B13 |
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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

NOTICE OF DECISION

Secretary of Labor v. TRANSCONTINENTAL DRILLING CO., INC., (CIRCLE T DIVISION) & TRANSCONTINENTAL OIL CORPORATION

OSHRC Docket Nos. 79-2667 & 80-1482 and 80-6928 & 81-0041, Consolidated

1. Enclosed is a copy of my decision. It will be filed with the Commission on October 25, 1982, and will become the final order of the Commission on November 24, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is November 24, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Quentin P. McColgin

Quentin P. McColgin
Judge, OSHRC

Date: October 5, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>TRANSCONTINENTAL DRILLING CO., INC.,<br>(CIRCLE T DIVISION)<br><br>and<br><br>TRANSCONTINENTAL OIL CORPORATION,<br><br>Respondents. | OSHRC DOCKET NOS.: | 79-2667 &<br>80-1482<br><br>80-6928 &<br>81-0041<br><br>(Consolidated) |

APPEARANCES:

Office of the Solicitor
U. S. Department of Labor
On behalf of Complainant, by
Jerry R. Atencio, Esquire
Of Denver, Colorado.

Kleh, Himelspach, Berrett, & Will
Of Denver, Colorado,
On behalf of Respondent, by
David M. Berrett, Esquire.

DECISION AND ORDER

Quentin P. McColgin, Administrative Law Judge:

This is a proceeding under §10(c) of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. §659c, involving alleged violations of §5(a)(2) of the Act, 29 U.S.C. §654(a)(2).*/ The central issue to be resolved in each of the four cases consolidated herein is whether respondents' failure to guard the kelly bushing and rotary table located on the floor of four different drilling rigs operated by respondents violated the general machine-guarding standard codified at 29 C.F.R.§1910.212(a)(1). The jurisdictional issues are admitted in the pleadings.

*/ "Each employer--shall comply with each of the occupational safety and health standards promulgated under this [Act]."

## Abbreviations

The following abbreviations shall be used in this decision:

Tr. - Transcript of March 31, 1981 hearing (Docket Nos. 79-2667 & 80-1482)

E. Tr. - Exeter Transcript (admitted as Commission Exhibits 1-3)

M. Tr. - Manning Transcript (designated as B-10 in July 2, 1981, stipulation)

A - Exhibits filed with July 10, 1981, stipulation in Docket No. 81-0041

B - Complainant's Exhibit(s) introduced at March 31, 1981, hearing in Docket Nos 79-2667 & 80-1482 (or filed afterward pursuant to stipulations entered into at such hearing.

OSHA - Occupational Safety and Health Administration

R - Respondent's Exhibit

Z - Exhibit filed with July 10, 1981, stipulation in Docket No. 80-6928

## Background

These consolidated cases involve two different respondents. One of these is Transcontinental Drilling Company, Inc., the named respondent in Docket Nos. 79-2667 and 80-1482.*/ The other is Transcontinental Oil Corporation, the named respondent in Docket Nos. 80-6928 and 81-0041. Transcontinental Drilling Company, Inc., is a subsidiary of Transcontinental Oil Corporation. (Tr. 87) The former operates five divisions, including the Circle T Division, that are engaged in drilling operations. (Tr. 87)

At the request of the parties, the cases identified as Docket Nos. 79-2667 and 80-1482 were reassigned to the undersigned. The purpose

*/ Initially, the respondent in these two cases was identified as Circle T Drilling Company, Inc. It was stipulated at the hearing that the correct name of respondent was Transcontinental Drilling Company, Inc. (Circle T Division), and the style of the case was amended to reflect respondent's correct name. (Tr. 6, 7)

of this reassignment was to facilitate the admission into evidence in these two cases, testimony heard by the undersigned in other cases involving the same issue. Thereafter, these two cases were consolidated and a hearing was held in Denver, Colorado, on March 31, 1981.

Prior to the hearing, partial settlement proposals were filed in both Docket Nos. 79-2667 and 80-1482 which disposed of all the contested issues except for the alleged violation of the machine guarding standard. In the partial settlement proposal filed in Docket No. 79-2667, complainant moves to amend Citation No. 1 by changing the characterization of the violation alleged therein from a willful violation to a serious violation and by reducing the proposed penalty to $1,000.00. Respondent, in turn, moves to withdraw its notice of contest as to Citation No. 1, thereby leaving Citation No. 2, Item No. 1, as the sole contested issue in that case. */ In the partial settlement proposal filed in Docket No. 80-1482, complainant moves to amend Citation Nos. 4 and 5 by reducing the proposed penalties in all of the items contained in such citations except Citation No. 5, Item No. 5 (the alleged machine-guarding violation). Respondent, in turn, moves to withdraw its notice of contest to all the items of Citations Nos. 4, 5 and 6 except Citation No, 5, Item No. 5.

It appears that both settlement proposals comply with the applicable procedural requirements of 29 C.F.R. §2200.100(b) and that such proposals were duly posted for the benefit of the affected employees, none of whom were represented by an authorized employee representative. Inasmuch as no comments have been received with respect to such proposals, and it

*/ Respondent indicates in its answer that it did not intend to contest the non-serious citation (Citation No. 3, containing three items). Thus, the violations alleged in Citation No. 3 are deemed to have become final Commission orders fifteen days after the issuance of such citation in accordance with the provisions of 29 U.S.C. §659(a).

further appearing that the proposals are consistent with the provisions and objectives of the Act, such proposals are hereby approved. The citations are hereby amended in accordance with the terms of the proposals and, with the exception of Citation No. 2, Item No. 1, in Docket No. 79-2667 and Citation No. 5, Item No. 5, in Docket No. 80-1482, respondent's notice of contest filed in each case is dismissed.*/

No appearance was entered at the hearing on behalf of any of the affected employees. (Tr. 2/3) At the outset of the hearing, complainant moved to amend Citation No. 2, Item No. 1, in Docket No. 79-2667, so that it is the same as is set out in Citation No. 5, Item No. 5, in Docket No. 80-1482. (Tr. 6) This unopposed motion was granted. (Tr. 6)

Additionally, certain stipulations were entered into by the parties. It was stipulated that the use of Varco kelly bushing guards on the two rigs in question would not make the operation physically impossible, and that a Varco kelly bushing guard would fit on these particular bushings. (Tr. 14) It was further stipulated that the transcripts of testimony of four witnesses who testified in Exeter Drilling Northern, Inc., Docket Nos. 80-0496 & 80-1483 (Exeter) would be admitted into evidence in this proceeding as Commission Exhibits 1-3. (Tr. 17) It was also further stipulated that the exhibits pertaining to the kelly bushing issue, which were referred to by these witnesses in their testimony in the Exeter case, would be considered as exhibits in this proceeding. (Tr. 17) It was further stipulated that the transcripts of portions of the testimony of Mr. Philip Blake, elicited at the January 11, 1980, hearing in Brinkerhoff-Signal, 80 OSAHRC 63/A2 (No. 79-2589, 1980) in which the undersigned did not preside, would be received in evidence in this

*/ The orders issued herein affirm the violations and penalties as amended.

proceeding as Exhibit B-6.*/ (Tr. 18)

Finally, it was stipulated that the transcript of Mr. Hershstead, elicited at the hearing in R. L. Manning Company, Docket No. 80-2827, pertaining to the hazards of working around kelly bushings, would be received in evidence.**/ (Tr. 21)

Before the March 31, 1981, hearing in Docket Nos. 79-2667 and 80-1482, the two other cases consolidated herein were assigned to the undersigned, and scheduled for hearing.***/ Thereafter, the parties jointly moved for the cancellation of such hearing, based upon representations that they had agreed to certain evidentiary stipulations which would obviate the need for hearings. Accordingly, the scheduled hearings were cancelled.****/

---

*/ This testimony is offered for impeachment purposes. Based upon the testimony of Mr. Blake, which is summarized at pp. 14-17 of complainant's brief, complainant contends that Mr. Blake's testimony is incredible and should be given no weight. (complainant's brief at 22)

After reviewing complainant's arguments in support of this contention, together with the testimony cited, it is found that the matters raised are insufficient to serve as a basis for a determination that Mr. Blake's testimony was incredible--particularly since Mr. Blake was not afforded an opportunity to explain or deny any apparent inconsistencies in this testimony given in the two different proceedings.

**/ This transcript, identified as Commission Exhibit B-20, together with a written stipulation dated July 2, 1981, was subsequently filed in this proceeding. The stipulation indicates the specific portions of the transcript which the parties stipulate as being in evidence in this proceeding.

***/ In its answer filed in Docket No. 80-6928, respondent indicates its willingness to have its notice of contest withdrawn as to the non-serious citation issued in that case (Citation No. 2, Items No. 1 and 2). Treating this as a motion to withdraw its notice of contest as to such citation, such motion is hereby granted.

****/ The July 10, 1982, order cancelling the hearing stated in part:

> The parties have jointly moved to cancel the hearing in this matter. The parties represent that they have entered into a stipulation as to the evidence they would offer at the hearing. Additionally, they propose to jointly move that this case

(Footnote continued on following page.)

Thereafter, the parties filed stipulations in Docket Nos. 80-6928 and 81-0041 accompanied by two motions to consolidate filed by counsel for respondent. The first motion sought to consolidate Docket No. 80-6928 with 81-0041. In the second motion to consolidate, it is requested that the two cases in which Transcontinental Oil Corporation is the respondent be consolidated with the two cases in which Transcontinental Drilling Company, Inc. (Circle T Division) is the respondent. Both motions, which were unopposed, were granted, and the records in the two cases in which Transcontinental Oil Corporation is the respondent were closed without evidentiary hearings.

Pursuant to the stipulations entered into by the parties, the following undisputed facts were made a part of the record in the two proceedings in which Transcontinental Drilling Corporation is the respondent:

> On October 28, 1980, and December 5, 1980, an authorized representative of OSHA conducted lawful inspections of respondent's drilling rigs Nos. 38 and 39, respectively.
>
> The drilling rigs were located in North Dakota.
>
> Respondent employs approximately five employees per shift, known as "tower" in the industry, three shifts per day, to operate each drill rig, including a driller, tool pusher, derrickman, and two floor hands.
>
> Each of the aforesaid drill rigs were equipped with a Varco hex drive 27 1/2" kelly bushing.

---

****/ Continued.

> be consolidated with another case that has already been heard by the undersigned. This action, unless disallowed . . . is likely to obviate the need for an evidentiary hearing.
>
> It is further ordered that any affected employee or representative thereof who wishes to participate in this proceeding file within ten days his or her notice of appearance. Consideration of a motion to consolidate shall be held in abeyance in order to give affected employees an opportunity to participate.

Respondent did not provide a kelly bushing guard for the aforesaid kelly bushings at any time material hereto.

The drilling speed of the kelly bushing and the rotating parts of the rotary table given by respondent's driller at the rig was fifty-five revolutions per minute.

The work practices of employees of respondent's rig Nos. 38 and 39 were similar to the work practices at any of the other drill rigs, including respondent's drill rigs which were the subject of litigation in OSHRC Docket Nos. 79-2667 and 80-1482 (Consolidated)

The exposure of respondent's employees working on rigs Nos. 38 and 39 to the unguarded kelly bushing and rotating parts of the rotary table is similar to respondent's other drill rigs, including those that are the subject of litigation in OSHRC Docket Nos. 79-2667 and 80-1482 (Consolidated)

Guarding the rotating kelly bushing and rotating parts of the rotary table during drilling operation is not physically impossible, and the guard manufactured by Varco is capable of guarding the aforementioned equipment.

Additionally, the following stipulations, unique to each case, were entered into:

Docket No. 80-6928:

Exhibit Z-1 fairly and accurately depicts the red Varco kelly bushing in the center of the photograph, and the conditions of the drill rig floor as they existed at the time of the investigation.

The parties stipulate that Exhibit Z-1 may be introduced into evidence in this matter.

Docket No. 81-0041:

Exhibit A-1 fairly and accurately depicts the yellow Varco kelly bushing in the center of the photograph and the conditions of the drill rig floor as they existed at the time of the investigation.

Exhibit A-2 fairly and accurately depicts the yellow Varco kelly bushing in the center of the photograph, the mousehole with drill stem to the right of the kelly bushing, and the conditions of the drill rig floor as they existed at the time of the investigation.

The parties stipulate that Exhibits A-1 and A-2 may be introduced into evidence in this matter.

At the conclusion of the March 31, 1981, hearing, the parties waived closing argument, indicating their intention to file briefs in support of their respective positions. (Tr. 133) Thereafter, both parties submitted briefs. Additionally, respondent filed proposed findings of fact, conclusions of law, and order.

Having, with one exception, heard and observed the witnesses*/ and having considered the testimony and other evidence, together with the pleadings and arguments presented in this matter, the undersigned hereby issues the findings, conclusions, and orders set forth in this decision. To the extent that proposed findings of fact or conclusions of law have not been adopted in this decision, they are rejected as being either inaccurate or unnecessary for the disposition of the issues in these consolidated cases.

## Discussion

The undersigned has previously heard and decided two cases involving the same issue as is presented here, namely whether the failure to guard a rotating kelly bushing and rotary table violates 29 C.F.R. §1910.212(a)(1), which provides:

> Types of guarding. One or more methods of machine guarding shall be provided to protect the operator and other employees in the machine area from hazards such as those created by point of operation, ingoing nip points, rotating parts, flying chips and sparks. Examples of guarding methods are--barrier guards, two-hand tripping devices, electronic safety devices, etc.

In both R. L. Manning Company, _____ OSAHRC _____, (No. 80-2827, issued May 6, 1982) and Exeter Drilling Northern, Inc., _____ OSAHRC _____, (Nos. 80-0496 & 80-1483, issued April 19, 1982) (Manning & Exeter, respectively) alleged violations of the standard were not affirmed

*/ As previously noted, the undersigned did not hear the testimony of Mr. Philip Blake, which was elicited at the hearing in the Brinkerhoff matter, which testimony was included in this record pursuant to a stipulation by the parties.

based upon findings that the standard was unconstitutionally vague as applied to the rotating parts of respondent's drilling rigs; that complainant was estopped from asserting the standard in light of previous actions by OSHA's representatives which were construed as limiting the applicability of the standard so as to exclude from its coverage rotating kelly bushings that were "smooth" as well as the exposed portions of rotating rotary tables; and that respondents established the affirmative defense of greater hazard. Essentially the same arguments are advanced in support of and in opposition to the charges in these consolidated cases as were advanced in Exeter and Manning. Furthermore, the evidence in this record which goes to respondent's vagueness and estoppel arguments is essentially the same here as was presented in the two previously decided cases. Thus, for essentially the same reasons that it was found in Exeter and Manning, that the standard could not and should not be applied, it is so found here.

Before discussing the determination that the citations cannot be affirmed, consideration to the elements of the violation which have been established and the arguments raised by respondent going to the applicability of the standard which are rejected will first be considered.*/ Preceding this is a brief description of the physical characteristics of the machinery relevant to the issues presented here.

The kelly bushing and the rotary table are two of the three principal rotating parts that are situated in the center of the floor of an oil rig. The function of these parts is to convert the power derived from the engines into a rotating force which causes the drill stem to rotate.

*/ Because of the manifest unity of interest between the two named respondents here, they will be considered a single entity in this decision.

The drill stem begins at the top with a swivel which is hooked to the lower portion of the hoisting mechanism of a rig called the traveling block. Below the swivel is the third principal rotating part, called the kelly, which is a three-, four-, or six-sided piece of pipe, usually about 40 feet long. The kelly is attached to lengths of drill pipe or drill collars, lengths of which are connected together to form the vast bulk of the drill stem. Below the lowest length of drill pipe is the drill bit, which actually operates to dig the hole in a rotating motion.

The rotary table consists of a number of different parts. The top surface of the rotary table is approximately the same level as the drill floor. Most of the rotary table is covered, however, a portion is not. The kelly bushing is located on top of and in the center of the rotary table when it is in a drilling mode. It mates with the master bushing, which is a part of the rotary table. The kelly fits into a vertical opening in the center of both the kelly bushing and the rotary table. The rotary table transforms power into a rotational force. As it rotates, the kelly bushing rotates. Since the sides of the opening in the kelly bushing are flush with the sides of the kelly, the latter rotates as well. This rotational force, coupled with the weight created by the drill stem or the traveling block, is the means by which a hole is dug into the ground.

The kelly bushings used in each of the four drill rigs involved here were 27 1/2" Varco bushings. A number of photographs taken at different angles and distances of the four kelly bushings involved here permit a more detailed description of these bushings than was permitted in the two previously decided cases.*/ In observing these photographs,

*/ These photographs are identified by rig as:
Rig (undesignated) Docket No. 79-2667): B-1, B-2, B-3, B-4 & B-5
Rig No. 16 (Docket No. 80-1482): B-8, B-9, B-10 & B-11
Rig No. 38 (Docket No. 80-6928): Z-1
Rig No. 39 (Docket No. 81-0041): A-1 & A-2

it is noted that there are no significant differences in their general appearance. The bushing rests on a square base which appears to be approximately two inches high. (e.g., B-8 & B-9) The sides of the bushing are generally rounded, with large openings above the four corners of the bushing's base. The top of the kelly bushing is generally flat, with a slightly hemispherical shape. Both the top and the sides of the bushing contain numerous indentations. In some of these indentations are nuts and bolts, which are positioned so that they do not protrude from the plane of the surface.

There appear to be two types of protruberances in the kelly bushing. The first are the four corners of the base. The second are the "S" rollers which appear in two of the four openings located on the sides of the kelly bushing.*/ While no measurements were taken as to the extent to which the "S" rollers protrude from the plane of the surface of the sides of the kelly bushing, it appears that this protrusion is not significant.**/ Except for the nuts and bolts that are located in the recessed areas, it appears that all the edges of the different parts of the kelly bushing have been rounded, to virtually eliminate the possibility of lacerations, were someone to come into contact with the bushing while it was rotating. Furthermore, the only significant protrusion on the bushing is represented by the corners of the base. Since it is adjacent to the exposed portion of the rotary table which rotates with the bushing, such protrusion does not present a significant hazard unto itself.

Measurements taken of one of the bushings indicate that it is 12 inches high and 24 inches in diameter. (B-12) Furthermore, the

*/ The two other openings contain flat rollers which do not protrude from the plane of the surface of the side of the kelly bushing.
**/ This conclusion is based upon an examination of Exhibit A-1, which best depicts the protrusion. There, it is observed that the protrusion of the "S" roller is significantly less than the height of the square base of the kelly bushing, which is estimated to be approximately two inches high.

portion of the rotary table which is exposed is shown by photographs in evidence to be sufficiently wide so that a person's foot could be placed on that portion of the rotary table which is exposed and rotating. (A-2, B-4 & B-11)

In this case, as in the two previously decided cases, three of the four elements requisite to establishing a prima facie case are not in dispute. Kelly bushing guards were not provided on any of the four rigs involved here; hence, respondent did not comply with the standard. Further, respondent's employees had access to the non-complying conditions, in that its employees routinely walked within two to four feet of the rotating kelly bushings and rotary tables. Finally, respondent's managerial personnel had actual knowledge of the non-complying conditions. Thus, the only element which is disputed is whether the standard is applicable.

Respondent offers essentially four arguments in support of its position that the standard is inapplicable. First respondent argues that the cited standard applies only to machines used in manufacturing and not to oil drilling rigs. Here, respondent argues that the scope of the standard is limited to those machines which are or can be used in the production or manufacturing process. Since respondent is engaged exclusively in extracting raw materials (oil and gas) from the ground, it is argued that it is not engaged in the processes which are within the scope of the standard.

This argument is without merit. Oil is a raw material which is refined into a number of finished products, such as gasoline, and a variety of petrochemical products. Furthermore, both oil and gas are used as an energy source to produce or manufacture an infinite variety

of other products. Thus, in the broadest sense, the raw materials extracted by respondent are used in one form or another to manufacture or produce an infinite variety of products. The fact that respondent does not itself engage in producing a finished product is of no consequence. Indeed, if actual and direct involvement in producing a finished product were determinative, it would lead to the anomaly of one driller who was vertically integrated (from extracting the raw materials to refining them) being covered, whereas another driller, who was not so integrated, would not.

Respondent's second applicability argument is that the standard, being a general standard, is unenforceably vague unless it is interpreted as requiring a showing that the required protective measures were generally recognized by the particular industry as being clearly appropriate under the circumstances. Respondent bases this argument upon the several decisions of the Circuit Courts of Appeal which have imposed such a special burden upon complainant in cases involving other general standards, such as the personal protective equipment standard.*/ Respondent then argues that complainant failed to meet this burden; hence, a violation has not been established.

Despite the general scope of the standard, it is not so broadly worded as to superimpose upon complainant the burden of making the special showing which respondent suggests is required. Here, the specific protective measures which are required are spelled out with some degree of specificity. The standard requires "one or more methods

*/ This standard, 29 C.F.R. §1926.28(a) provides:

> The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazard to the employees.

of machine-guarding." The standard further provides: "Examples of guarding methods are barrier guards, two-hand tripping devices, electronic safety devices, etc." Furthermore, the standard provides by illustration the types of hazards for which machine guarding is required. Thus, guarding is required "to protect. . . employees. . . from hazards such as those created by. . . rotating parts." Thus, the standard cannot be said to be so broadly worded as to superimpose upon complainant the burden of making the special showing of industry acceptance of specific protective measures.

Respondent's remaining challenges going to the applicability of the standard are that it is unconstitutionally vague when applied to its operations and the OSHA is estopped from applying the standard in view of OSHA's inconsistent enforcement policy vis-a-vis the guarding of kelly bushings. The record in this case establishes both defenses.

For the reasons discussed below, it is found that the standard gives insufficient warning to members of the oil drilling industry that it would be applied to require the use of kelly bushing guards. This determination is based upon the decision in Diebold, Inc. v. Marshall, 585 F.2d 1327 (6th Cir. 1978)(Diebold) wherein it was held that the point of operation guarding standard was impermissibly vague as applied to press brakes utilized by respondent there. In analyzing that decision, it appears that the court relied upon the presence of essentially three factors in its determination that the standard involved there was impermissibly vague. The first of these factors is essentially one of ambiguity created by the standard itself. The second is a demonstration of industry unawareness of the applicability of the standard and the

third is the confirmation of that practice by a pattern of administrative enforcement. Diebold, supra, 585 F.2d at 1336-37.

All three factors are present here. The ambiguity of the standard lies in its breadth and the absence of any definitional framework to guide employers as to what mechanisms are and are not subject to its coverage. In the abstract, an oil rig can be considered a "machine," with "rotating parts" (the kelly, the kelly bushing, and the rotary table). However, an oil rig is not generally considered to be a machine, and an employer within the oil drilling industry could reasonably interpret the standard as not applying to its operation.

Nothing better demonstrates this ambiguity than OSHA's initial failure to recognize the applicability of the standard to drilling operations. Thus, in the early cases wherein the failure to guard the kelly bushing and the rotary table were challenged, violations of standards other than the machine-guarding standard were alleged. DB Drilling Corporation, 78 OSAHRC 21/D2 (No. 76-4668, 1978); MND Drilling Corporation, 77 OSAHRC 183/C5 (No. 76-4149, 1977). Similarly, in the initial citation issued in one of the cases consolidated here (Docket No. 79-1667), a violation of another standard was alleged.*/

Industry unawareness of the applicability of the standard to drilling operations is manifested by the commercial practice prevalent in the industry of not guarding these rotating parts. The most quantifiable evidence on this issue (the prevalent industry practice of not guarding kelly bushings) was presented by the compliance officer in the Manning case, which evidence is stipulated as being a part of the record in this

*/ Citation No. 2, Item No. 1, issued April 24, 1979. This citation, which was amended May 1, 1979, to allege a violation of the machine-guarding standard, originally alleged a violation of 29 C.F.R. §1926.300(b)(2).

case. The compliance officer there testified that after conducting 100 inspections of oil rigs, he had never seen a kelly bushing guard in operation. (M Tr. 67) The other evidence on this point consists of the testimony of the compliance officer who inspected the rigs in Docket Nos. 79-2667 & 80-1482, and who testified that since 1976 he had seen "lots of kelly bushing guards" in use. (Tr. 69) This evidence, coupled with the dearth of reported cases wherein the failure to guard kelly bushings was successfully challenged, strongly indicates that the prevalent practice within the industry is not to guard such bushings.

Given this finding, and adopting the same rationale as was expressed in Diebold, wherein the Court rejected any inference that the absence of guarding in that industry was indicative of industry's disregard of a known legal requirement, it is concluded that the average employer within the oil drilling industry has been unaware that the regulations require the use of a kelly bushing guard.

The third and final factor present here is the pattern of administrative enforcement which operated to confirm industry practice. Through a variety of different actions by OSHA, its officials and the Commission itself, members of the oil drilling industry could reasonably infer that kelly bushing guards were not required.

Actions by OSHA and its officials which confirm such industry opinion consist of a number of inconsistent enforcement actions which, to the extent that they do not confuse the industry as to the applicability of the standard, confirm the prevalent industry practice of not guarding kelly bushings or rotary tables. The first of these actions concerns OSHA's uniform policy of not requiring the guarding of the kelly, which

is equally hazardous and accessible to oil rig workers. (E. Tr. 256) Inasmuch as the rationale for requiring the guarding of rotating parts is "anything that is rotating, a coupler or a shaft no matter how smooth it is, should be covered,"*/ OSHA's failure to require perimeter guarding around the kelly bushing and rotary table, which would also provide protection from the hazard associated with the rotating shaft of the kelly, is incomprehensible.

Additionally, OSHA has inconsistently enforced the standard in this industry. In what OSHA has designated as its Region 8, the standard is deemed to apply and is enforced. In area offices in other regions of the country, it is either not deemed to apply, or is not enforced as to "smooth" kelly bushings. (E. Tr. 481, 487, 496; Tr. 91, R-1)**/

Other evidence of OSHA's inconsistent enforcement policy is presented by the act of approving state enforcement plans which do not require kelly bushing guards. The record shows that the states of Utah, Michigan, Wyoming, California and Alaska all have approved safety programs for the drilling industry, none of which are enforced to require the guarding of kelly bushings. (E. Tr. 480) While OSHA is not directly responsible for the enforcement programs of the states, its act of approving the state plans can reasonably be interpreted as confirming the prevailing industry practice of not guarding kelly bushings and rotary tables, particularly in the instance of the regulations promulgated in the state of Wyoming, which contain express provision exempting kelly bushings from guarding requirements. (E. Tr. 480, R-1***/)

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*/ E. Tr. 215, 275

**/ "Smooth" kelly bushings are defined by the industry as those bushings without protruding J-bolts. The latter type of bushing is now obsolete and not in general use. (E. Tr. 272) The Varco bushing, which is of the type involved here, is as smooth as any bushing available in the industry. (E. Tr. 439, M. Tr. 70)

***/ This document, R-1, which contains the Wyoming regulations, was admitted into evidence in Exeter. Pursuant to the stipulation entered into by the parties here, it is considered a part of the record in this case.

The most graphic evidence of OSHA's inconsistent enforcement policy is presented in the form of a memorandum dated June 19, 1979, from the Director, Federal Compliance and State Programs, to a regional administrator of OSHA. This memorandum provides:

> Kelly Bushings on oil drilling rigs that are smooth and do not present a potential hazard to employees that come in contact with the Bushings do not require guarding. However, Kelly Bushings with projections or indentations do present a potential hazard to employees who come into contact with the Bushings and shall be guarded or employer shall be appropriately cited. (R-6)*/

The most reasonable interpretation of this statement is that kelly bushings which do not have protruding J-bolts, such as the kelly bushings involved here, need not be guarded. In fact, persons associated with the oil drilling industry have so interpreted this statement. (E. Tr. 485-87)

Finally, the decisions of Commission judges which preceded the issuance of the citations sub judice contributed to the view that "smooth" kelly bushings need not be guarded. Research discloses ten judge's decisions that were issued prior to the issuance of the citations sub judice involving the failure to guard kelly bushings. Two of these were based upon alleged violations of standards other than the machine-guarding standard. Those citations were vacated based, in whole or in part, upon the inapplicability of such other standards. DB Drilling Corporation, supra; MND Drilling Corporation, supra, (also greater hazard). One case, Signal Oilfield Services, Inc., 78 OSAHRC 39/D1 (No. 77-0026, 1978), which involved the old style kelly bushing with protruding J-bolts, held that the failure to guard that kelly bushing violated the machine-guarding standard. Of the remaining seven decisions, four vacated citations alleging violations of the machine-guarding standard based

*/ This document was admitted into evidence in the Exeter case. By virtue of the stipulation by the parties it is also included in this record.

upon findings of greater hazard. Graywolf Drilling Company, 78 OSAHRC 94/A8 (No. 77-3803, 1978); Circle Bar Drilling Company, 78 OSAHRC 82/D4 (No. 77-3581, 1978); (also lack of employee exposure); Graywolf Drilling Company, 78 OSAHRC 70/F1, 1978); Hughes Drilling Company, Inc., 79 OSAHRC 58/A2 (Nos. 76-2945 & 76-3574, 1977).

All three of the remaining judge's decisions affirm the violation of the machine-guarding standard. Only one of these, Fred Wilson Drilling Company, Inc., 78 OSAHRC 67/D2 (No. 77-3578, 1978), was issued before the issuance of all four citations involved here. Indeed, months before the issuance of citations in Docket Nos. 80-6928 and 81-0041, such decision had been reversed, based upon a finding by the Fifth Circuit Court of Appeals of greater hazard. Fred Wilson Drilling Co., Inc. v. Marshall, 624 F.2d 38 (5th Cir. 1980) Thus, as to the two earliest citations issued to respondent (in Docket Nos. 79-2667 and 80-1482), only one of the five decisions that had been issued wherein the failure to guard kelly bushings was challenged as violating the general machine-guarding standard, was the government's position sustained. Furthermore, that single decision was under review and was subsequently reversed. The next decision was issued June 19, 1980, in the case entitled Brinkerhoff-Signal, Inc., 80 OSAHRC 63/A2 (No. 79-2589, 1980. Respondent clearly had notice of this decision before the inspection and ensuing citations that were issued in Docket Nos. 80-6928 & 81-0041.*/ The final judge's decision on this issue was issued in the case entitled Bomac Drilling Company & True Drilling Company, ____ OSAHRC _____ (Nos. 79-0828 & 78-5257, November 28, 1980) a month after the inspection in Docket

*/ The inspection in Docket No. 80-6928 took place October 28, 1980, and the citation was issued November 4, 1980. The inspection in Docket No. 81-0041 took place on December 5, 1980, and the citation was issued December 15, 1980.

No. 80-6928 and a few days before the inspection in Docket No. 81-0041. Thus, at the critical times in each of the cases consolidated herein, namely, at the time of the inspection wherein the alleged violative conditions were observed, a clear majority of the Commission decisions on point had failed to affirm violations of the machine-guarding standard.

The foregoing establishes a reasonable basis for members of the oil drilling industry believing that kelly bushings need not be guarded. There is, however, evidence in this record going to the subjective state of mind of respondent's representatives vis-a-vis the applicability of the standard to respondent's operations, which should also be considered. This evidence consists of the testimony of respondent's safety director, Mr. Cornelius, who testified that prior to the inspection which gave rise to the citations involved here, he was aware that OSHA representatives were citing employers for failure to use kelly bushing guards in Montana. (Tr. 122) Mr. Cornelius further testified that respondent has five divisions that are engaged in drilling operations in various parts of the country. (Tr. 86) As the corporate safety director for respondent, Mr. Cornelius communicated with various OSHA officials concerning OSHA's enforcement policies. While it was communicated to him by the area director in Billings, Montana, that kelly bushing guards were considered "needed" (i.e., required) in that area, other OSHA area offices located in the southern regions of the country did not consider such guards to be required. (Tr. 119-20) More specifically, Mr. Cornelius testified that a citation was issued to another division of respondent's operating in east Texas, which citation was deleted after an informal conference wherein Mr. Cornelius persuaded the area director in Tyler, Texas, that kelly bushing guards were not needed. (Tr. 91-92, R-1.)

Mr. Cornelius further testified that, except for the deleted citation emanating from the area director's office in Tyler, Texas, and the four issued to it in the states of Montana and North Dakota, none of respondent's rigs had ever been cited for failure to use kelly bushing guards. (Tr. 121)

While the foregoing indicates an awareness that respondent's rigs in North Dakota and Montana would be cited for failing to use kelly bushing guards, it does not demonstrate an awareness that such failure constituted a violation of the machine-guarding standard. To the contrary, the evidence shows that respondent's safety director was actually aware of the difference of opinion among OSHA's own officials. Since such officials could not themselves agree as to whether guarding was required, it would seem unreasonable to conclude that respondent's officials were any more omniscient than complainant's.

In view of the foregoing, it is found that the standard is unconstitutionally vague as applied to rotating kelly bushings and rotary tables. It is further found that the previously quoted statement by the Director, Federal Compliance and State Programs, constitutes an express statement by a responsible official of the enforcement authority indicating a conscious decision to restrict the application of the standard to types of kelly bushings other than the "smooth" types of kelly bushings which are involved here. This alone is a sufficient basis for determining that the standard is inapplicable to the so-called "smooth" type kelly bushings, even though, in the abstract, the standard may be applicable. See Seattle Crescent Container Services, 7 BNA OSHC 1895, 1979 CCH OSHD ¶24,002 (No. 15,242, 1979).

It is noted that subsequent to the closing of the record in these consolidated cases, OSHA has announced the initiation of an experimental

variance program for the oil and gas drilling industry. This program, which was announced June 8, 1982, (47 Fed. Reg. 24,874) grants to those industry members who are participating in the program a variance from the machine-guarding standard (29 C.F.R. §1910.212(a)(1)) in order to permit them to test an alternative method of protecting workers from the hazards associated with rotating kelly bushings that are "smooth" and exposed portions of the rotary tables on drilling rigs. Key features of this alternative program are: that a qualified person shall be designated who will control activity on the rig floor while the kelly bushing is rotating; that a person capable of stopping the rotating equipment must be at the controls when employee tasks require them to handle materials that might become entangled with the rotating parts; and that equipment, such as hoses and chains, which are capable of becoming entangled with such rotating parts, are not permitted to be any closer than a specified distance from such rotating parts.

The salient feature of the announcement of this program is the implicit rescission of all previous directives and enforcement programs which conflict with the interpretation explicit in the announcement--that the machine-guarding standard applies to the rotating parts on oil rigs. Had such announcement been made before the issuance of the citations involved here, it is doubtful that respondent's vagueness argument would have prevailed. Nevertheless, the record in this case does not indicate that the previous policy statements and enforcement policies which conflicted with OSHA's current interpretation of the standard were rescinded before the issuance of the citations involved here. Thus, during the critical periods, members of the drilling industry, including respondent, were faced with the previously described circumstances, the thrust of which created genuine confusion as to what they were required to do or not do under the standard.

Respondent has also raised the affirmative defenses of impossibility of compliance and greater hazard to the machine-guarding charge. In view of the finding made here, that the standard cannot be applied retroactively to respondent, it is not necessary to address these additional defenses.

## ORDER

In view of the foregoing, IT IS HEREBY ORDERED that:

In Docket No. 79-2669:

1. Citation No. 1, Item No. 1, is AFFIRMED, as a serious violation, and a penalty of $1,000.00 is ASSESSED.
2. Citation No. 2, Item No. 1, is VACATED.

In Docket No. 80-1482:

3. Citation No. 4, Item No. 1, is AFFIRMED, and a penalty of $315.00 is ASSESSED.
4. Citation No. 5, Item No. 1, is AFFIRMED, and a penalty of $315.00 is ASSESSED.
5. Citation No. 5, Item No. 2, is AFFIRMED, and a penalty of $315.00 is ASSESSED.
6. Citation No. 5, Item No. 3, is AFFIRMED, and a penalty of $315.00 is ASSESSED.
7. Citation No. 5, Item No. 4, is AFFIRMED, and a penalty of $280.00 is ASSESSED.
8. Citation No. 5, Item No. 5, is VACATED.
9. Citation No. 6, Item Nos. 1-6, are AFFIRMED, and no penalties are assessed.

In Docket No. 80-6928:

10. Citation No. 1, Item No. 1, is VACATED.

11. Citation No. 2, Item Nos. 1 & 2, are AFFIRMED, and no penalties are assessed.

In Docket No. 81-0041:

12. Citation No. 3, Item No. 1, is VACATED.

Quentin P. McColgin
Quentin P. McColgin
Judge, OSHRC

Dated: October 25, 1982

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

Secretary of Labor v. Williams Enterprises, Inc.
OSHRC Docket No. 82-37

1. Enclosed is a copy of my decision. It will be filed with the Commission on October 25, 1982, and will become the final order of the Commission on November 24, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is November 24, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Date: October 5, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR | : | |
| Complainant | : | |
| v. | : | DOCKET NUMBER 82-37 |
| WILLIAMS ENTERPRISES, INC. | : | |
| Respondent | : | |

Appearances:

Kenneth A. Hellman, Esq. and
Orlando J. Pannochea, Esq.
U.S. Department of Labor
For the Complainant

James Brent Clarke, Jr., Esq.
For the Respondent

DECISION AND ORDER

Sommer, Judge

On November 4, 1981, Respondent was issued serious Citation No. 1 alleging violation of 29 C.F.R. 1926.302(b)(7)[1/] and a violation of 29 C.F.R. 1926.750(b)(1)(iii)[2/]. A penalty of $450 was proposed for Item No. 1 and $630 for Item No. 2 of the serious Citation No. 1.

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1/ Section 1926.302 Power-operated hand tools provides:
(b) Pneumatic power tools. (7) All hoses exceeding 1/2-inch inside diameter shall have a safety device at the source of supply or branch line to reduce pressure in case of hose failure.

2/ Section 1926.750 Flooring requirements provides:
(b) Temporary flooring - Skeleton steel construction in tiered building.
(b) (1)(iii) Floor periphery - safety railing. A safety railing of 1/2-inch wire rope or equal shall be installed, approximately 42 inches high, around the periphery of all temporary-planked or temporary metal-decked floors of the buildings and other multi-floored structures during structural steel assembly.

A hearing was held in Washington, D.C. Both parties were represented by counsel who filed briefs at the conclusion of the case.

No jurisdictional facts are in dispute, the parties having pleaded sufficient facts to establish that the Respondent is subject to the Act and the Commission has jurisdiction of the parties and of the subject matter.

The general issue to be determined is whether the Respondent violated the safety regulations as alleged in the citation and, if so, what penalty, if any, is appropriate.

## Summary of the Evidence

Respondent corporation is in the business of construction contracting with its principal place of business being located in Merrifield, Virginia. It was engaged in erecting the steel for the building at the place of the alleged violations.

### Testimony on Behalf of Complainant

The worksite was inspected by James R. Sullivan, the Secretary's compliance officer. On October 29 and 30, 1981 (T. 9), a thirteen story building was in the process of being erected at 1333 H Street, Washington, D.C. There were six trades involved in the erection and the Respondent was doing the steel erection work (T. 16). The decking had been installed to the sixth floor of the building at the time of the October 29, 1981 inspection with temporary flooring down (T. 17). The compliance officer testified that he observed an individual, who was subsequently identified to him as a foreman for the Respondent, go to the edge of the building on five occasions while working on the sixth floor deck (to call down instructions to other employees), and that there was no half inch wire rope or railing on the building periphery for

fall protection, nor was he wearing a safety belt of any kind (T. 20, 21). The decking was considered temporary inasmuch as it was not fully fastened, and it was only temporary in that eventually a deck would be put in place to fully support the particular floor site (T. 22). Mr. Sullivan viewed the scene both from an adjoining building and when he was on the 6th floor of the building being constructed (T. 20, 24). Mr. Viner the general construction superintendant told Mr. Sullivan that the 6th floor where the Respondent's employee was seen near the building precipice is approximately 68-70 feet above the ground, and Mr. Sullivan stated that if he fell there was a probability of substantial bodily injury or death (T. 27). He was of the opinion that a wire railing or cable could have been installed along the periphery of the sixth floor (T. 29-30).

Testimony on Behalf of Respondent

Mr. Joseph Henry, the superintendant on the job for Respondent at the location where the citations were issued, testified they were erecting the steel for a thirteen story building (including a roof and penthouse) (T. 87). He identified an existing building as pictured in government exhibit #1 which showed a window on the seventh floor; he noted there was a window on the ninth floor which could be opened and which he used to call out to the people working down below (T. 90). Mr. Henry stated that when he came on the job he noticed the electric compressor had no safety valves, and that he called to have said valves put on (T. 91-2). The compressor was run an hour or two a day and was on the job site about a week before the inspection. The valves were installed by the second day of Mr. Sullivan's visit. The attorney for the Respondent stipulated that the safety valve was not on the compressor when it came on the job about a week before the inspection, and that it was intermittently used during this time (T. 94).

Alexander J. Czernowski the safety director of the Respondent corporation testified that they have a ongoing safety program consisting of monthly meetings, with speakers and films. He stated the majority of superintendents have safety talks every week, and that the company has invested "quite a bit of money in the last several years in this safety program." (T. 96-7).

## Discussion

Section 5(a)(2) of the Act provides that each employer ". . . shall comply with occupational safety and health standards promulgated under this Act." In order to prove a Section 5(a)(2) violation, the Secretary must demonstrate that a particular standard applies to the facts, that the cited employer failed to comply with the standard, and that the cited employer's employees had access to the hazard. Anning-Johnson Co., 76 OSAHRC 54/A2, 1193, 1197, 1975-6 CCH OSHD ¶ 20,690 (Nos. 3694 & 4409, 1976).

### Alleged Violation of 29 C.F.R. 1926.302(b)(7) - Item No. 1, Serious Citation Number 1

The Respondent admitted and the evidence shows that he had failed to provide the compressor involved herein with a safety device to reduce pressure in case of hose failure. Thusly, his employees were exposed to a hazard in case of hose failure. This practice clearly violated the regulation and citation is affirmed.

### Alleged Violation of 29 C.F.R. 1926.750(b)(1)(iii) - Item No. 2, Serious Citation No. 1

This item alleges a serious violation in that the Respondent failed to install the wire required by Section 1926.750(b)(7)(iii) around the periphery of a building it was working on in order to protect workers who were doing work on the opensided floor. At the time of inspection the building was still

in the steel erection stage and Respondent's employees were working on the sixth floor and a crew was erecting steel for the seventh floor. The evidence is clear that permanent flooring had not been completed on the sixth floor. Absent the perimeter protection along the edge of the 6th floor a violation of Section 1926.750(b)(1)(iii) is accordingly established. The evidence further demonstrates that the Respondent's foreman was observed working exposed to the unguarded floor perimeter. Accordingly, access to the hazard has been shown. Gilles & Cotting, Inc., 76 OSAHRC 30/D9, 3 BNA OSHC 2002, 1975-76 CCH OSHD ¶ 20,448 (No. 504, 1976).

The Respondent argues that the standard does not apply to temporary flooring which admittedly existed herein. There is no merit in this argument. The standard set forth in 29 C.F.R. Section 1926.750(b)(1)(iii) applies during the steel erection stage of construction before the installation of the permanent floor. The Ashton Co., Docket No. 5111, 3 BNA OSHC 1968, CCH OSHD ¶ 20,351 (Jan. 29, 1976). This item is therefore affirmed.

In assessing penalties we must conisder the size of the business of the cited employer, the gravity of the violations, the good faith of the employer and history of previous violations. 29 U.S.C. Section 661(i). While the gravity of the violations is high, the Respondent demonstrated good faith by expeditiously providing the safety valve for the compressor (on the second day of the inspection it was installed). The evidence also demonstrates the compressor was only in use without the safety valve for approximately five days, one or two hours daily, thus further reducing the hazard of injury. The record further shows that the Respondent is safety conscious, maintains an ongoing safety program and is fully aware of its safety responsibility which it imparts to its workforce. It shows a concern for employee safety,

and there is no history of previous violations. The number of employees exposed to the violative conditions is not fully developed by the record. Having considered the factors in Section 17(5) of the Act, 29 U.S.C. § 666(i), it is concluded that a penalty of $100 for Item No. 1 and $150 for Item No. 2, or a total penalty of $250 for serious Citation No. 1, is reasonable and appropriate under all the existing facts and circumstances.[3/]

## Findings of Fact

1. Respondent corporation is in the business of construction contracting, and was engaged in steel erection and other construction work on a building situated at 1333 H Street, Washington, D.C.

2. A compressor in use at the construction site was not provided with a safety device to reduce pressure in case of hose failure thereby exposing its employees to the hazard of a serious injury.

3. The outside perimeter of the sixth floor of the building under construction, which floor was not permanent and upon which an employee of the Respondent was working on, did not have a 1/2 inch wire rope or equal approximately 42 inches high installed around it, thereby exposing its employees to the hazards of a fatal or serious injury.

## Conclusions of Law

1. The Commission has jurisdiction over the case.

2. The Respondent has violated 29 U.S.C. § 654(a)(2) by failing to comply with 29 C.F.R. § 1926.302(b)(7) and 29 C.F.R. 1926.750(b)(1)(iii), as charged.

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3/ All prepared briefs including findings and conclusions submitted by the parties have been considered, as have their contentions. To the extent such proposals and contentions are consistent with this decision, they are accepted.

3. Considering the criteria contained in 29 U.S.C. § 661(i) in conjunction with the entire record, a total penalty of $250 is considered appropriate.

## ORDER

Citation Number 1 is affirmed and a total penalty of $250 ($100 for Item No. 1, $150 for Item No. 2) is assessed.

IRVING SOMMER
Judge, OSHRC

Dated: October 25, 1982
Washington, D.C.

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

November 30, 1982

**IN REFERENCE TO SECRETARY OF LABOR v.**

John T. Brady & Co., Inc.

OSHRC DOCKET NO. 76-2894

**NOTICE IS HEREBY GIVEN TO THE FOLLOWING:**

OF COMMISSION DECISION

To wit: See attached.

**FOR THE SECRETARY OF LABOR**

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**FOR EMPLOYEES**

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Judge's Office
Occupational Safety & Health
Review Commission
1515 Broadway Room 3800
New York, New York 10036

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 76-2894 |
| JOHN T. BRADY & COMPANY, INC., | : | |
| Respondent. | : | |
| | : | |

ORDER

The United States Court of Appeals for the Second Circuit remanded this case to the Commission "with instructions to reinstate the citation." Donovan v. John T. Brady & Co., No. 82-4082 (2d Cir. Oct. 14, 1982). Accordingly, the citation alleging that Respondent violated 29 U.S.C. § 654(a)(1) is affirmed. The penalty of $200 assessed by Administrative Law Judge Seymour Fier is also affirmed.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: NOV 30 1982

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

NOV 30 1982

IN REFERENCE TO SECRETARY OF LABOR v.

State Moving-Trucking, Inc.

OSHRC DOCKET NO. 77-1971

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 77-1971 |
| STATE MOVING-TRUCKING, INC., | : | |
| Respondent. | : | |
| | : | |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners

BY THE COMMISSION:

An ironworker fell to his death when the mast of a stiffleg derrick he was dismantling collapsed. The Secretary of Labor ("Secretary") issued a citation[1/] alleging that Respondent, State Moving-Trucking, Inc. ("State"), had violated section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act").[2/] Administrative Law Judge Abraham Gold vacated the citation, concluding that State did not violate section 5(a)(1). Commissioners Cleary and Cottine directed this case for review under 29 U.S.C. § 661(i). For the reasons that follow, we reverse

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1/ The citation, among other things, alleged: "ironworker dismantling stiffleg derrick, working high above pavement, was not provided with safe working surface, or equivalent protection."

2/ Section 5(a)(1) provides:

> Sec. 5(a) Each employer -- (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees.

Judge Gold's decision and conclude that State failed to comply with section 5(a)(1). We assess a penalty of $600.

I.

After submitting a bid of $1,500, State was awarded a contract by Bird & Son ("Bird") to dismantle a stiffleg derrick on Bird's property and to clean the surrounding area.[3/] This was only State's second job.[4/] The derrick was to be removed because it had not been used for 22 years and was rusting. Prior to commencement of the job, John Pompeii, president of State, was shown blueprints of the derrick by a representative of Bird.[5/]

In order to carry out the dismantling of the derrick, State rented a 30-ton crane from Gansett Crane Service. Along with the crane, Gansett supplied a crane operator and oiler. Before the work began, Pompeii asked Peter D'Ambruoso, president of Gansett, for suggestions regarding the dismantling of the derrick. D'Ambruoso testified that his reply was, "John, I know nothing about a derrick. There's not much I can suggest to you."

Pompeii also asked D'Ambruoso if he knew anyone available for work who could climb the derrick and cut the stifflegs with a torch. D'Ambruoso informed Pompeii that David Mandeville, an unemployed ironworker, had recently inquired about work. Using D'Ambruoso as an intermediary, State engaged Mandeville to cut the stifflegs for a fee of $75.

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3/ A stiffleg derrick is a fixed derrick whose mast is capable of being rotated and is supported or held in place by two or more rigid members, called stifflegs. The term "stiffleg derrick" is defined in the standard at 29 C.F.R. § 1910.181(a)(9). See also American National Standard Institute (ANSI), Safety Code for Cranes, Derricks, Hoists, Jacks, and Slings, B30.6-1969, §§ 6-0.2.1.9 and 6-1.2.3a (1969).

4/ State had been incorporated approximately one and one-half months before the incident. The four officers of State, who were its only full-time employees, previously had worked in the rigging and moving business.

5/ These blueprints are not part of the record, nor was any evidence presented concerning the content of the blueprints.

After arriving at the Bird facility with Mandeville, Ralph Imperatore, the Gansett crane operator, went to Pompeii to find out what he wanted done. Pompeii indicated that the boom of the derrick was to be taken down first, and then the other sections were to be removed. The boom swung from a vertical member, called a mast, which was held in place by two stifflegs attached to the top of the mast. Pompeii also told Imperatore to support both stifflegs with the crane, but Imperatore replied that he would not use the crane to support two loads because of the danger of the crane tipping. Instead, he told Pompeii that he "would take [the derrick] down the way that [he] felt was best. . . ."

After the crane's guy wires were hooked to one stiffleg, Mandeville ascended to the top of the mast of the derrick, climbing the first 40 feet on a ladder and the remaining 22 feet on the mast webbing. According to Imperatore, Mandeville was supposed to stand near the top of the mast and cut part way through the stiffleg that was hooked to the crane. Mandeville then was to move onto that stiffleg in order to get into a better position to complete the cut.[6/]

Imperatore testified that it took Mandeville "quite a while" to cut the stiffleg. Pompeii testified that when Mandeville shouted that he had an inch to go, he (Pompeii) hollered "no, no." At that point the unsupported stiffleg and mast wobbled and then fell to the ground. Mandeville unsuccessfully tried to move over to the supported stiffleg, was jarred loose from the mast, and fell to the ground. At the time of the incident, Pompeii and the other three officers of State, who were assisting in the operation, were standing in the

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6/ Pompeii testified that he did not realize that Mandeville had climbed the mast to cut the stiffleg, since Imperatore had instructed Mandeville to attach guy wires before cutting the stiffleg. Pompeii's testimony was unclear with respect to the purpose of the guy wires and where they were to be attached. Further, Imperatore stated that he did not instruct anyone to place guy wires.

vicinity of the derrick.[7/]

The mast of the derrick was connected to the ground by only a ball joint and, therefore, was without sufficient support when the stiffleg that was attached to the crane was cut away from the mast. According to Imperatore, neither Pompeii nor any other person associated with the job knew that the mast was not bolted or cemented in a fixed position at the base.[8/]

Martin Byrne, business agent for Local 237, Ironworkers' Union, testified that the method used to dismantle the stiffleg derrick was improper.[9/] According to Byrne, the correct method of dismantling a stiffleg derrick is to first place temporary guy wires on the mast to hold the mast in place, and then to remove the stiffleg.[10/]

II.

Judge Gold determined that Mandeville was not an employee but rather was an "independent contractor unprotected by section 5(a)(1) of the Act." However, the judge found that the four officers of state were State's employees for purposes of the Act and that the officers were exposed to the

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7/ Pompeii was standing behind the crane. McWeeney, the treasurer, was at the foot block of the mast when it started to fall. Another officer was near the paper shed acting as a fire watch. The falling mast struck the roof of the paper shed. The fourth officer was working on a rig at the time of the incident.

8/ OSHA compliance officer John Koska testified that Pompeii told him that he (Pompeii) thought that the mast was bolted at the bottom and therefore would remain vertical after one stiffleg was cut away.

9/ The parties stipulated to Byrne's expertise and knowledge with respect to the ironworking industry. Also, State's counsel stated that Byrne was "eminently qualified" concerning setting up and dismantling cranes.

10/ Byrne also stated that, as a less preferable alternative, a crane with a jib attachment could be used to support the mast and one stiffleg while the derrick was being dismantled. John Koska, a compliance officer, agreed with the use of guy wires, but also suggested that, as an alternative, two cranes could be used to support the mast and a stiffleg.

hazard of the derrick collapsing on them. The judge also found that this hazard was recognized by the ironworking industry. Nevertheless, the judge concluded that State should not be found in violation of section 5(a)(1). The judge determined that State's four officers were riggers, were not members of the ironworking industry, and relied upon the crane crew and upon Mandeville to perform their part of the operation. The judge also noted that no one participating in the dismantling operation knew that the vertical mast was not bolted or cemented at the base. The judge further pointed out that Mandeville understood that he was to cut the stiffleg only part way, then move from the mast to the stiffleg, and that Mandeville cut too far. The judge therefore concluded that State had a right to rely upon the expertise of Mandeville, whose mental lapse it could not have foreseen or prevented.

III.

On review, the Secretary maintains that State violated section 5(a)(1) by neglecting to ascertain that the mast of the derrick was connected to the ground by only a ball joint. The Secretary contends that, contrary to the judge's conclusion, State either knew, or should have known, that the unsupported mast of the derrick was potentially unstable. In the Secretary's view, Mandeville was exposed to the hazard of falling from the derrick, and State's officers were exposed to the hazard of the derrick falling on them.[11/] The Secretary further maintains that State could have prevented the collapse of the mast by

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11/ The Secretary takes exception to the judge's conclusion that Mandeville was an independent contractor, and the Secretary argues that Mandeville should be found to be an employee of State for purposes of the Act. However, we do not find it necessary to determine whether Mandeville was an employee since we agree with the judge that State's officers were exposed to the hazard of the derrick falling on them. Neither party took exception to the judge's holding that State's officers were employees for purposes of the Act.

securing the mast with guy wires or other effective means.[12/]

To establish a section 5(a)(1) violation, the Secretary must show that an employer failed to render its workplace free from a hazard that is recognized and likely to cause death or serious physical harm to its employees. See Little Beaver Creek Ranches, Inc., 82 OSAHRC _____, 10 BNA OSHC 1806, 1982 CCH OSHD ¶ 26,125 (No. 77-2096, 1982). The Secretary must also demonstrate that there were feasible means available to abate the hazard. Id; National Realty & Construction Co. v. OSHRC, 489 F.2d 1257, 1268 (D.C. Cir. 1973).

A recognized hazard is a condition or practice in the workplace that is known to be hazardous either by the industry in general or by the employer in particular. Beaird-Poulan, a Division of Emerson Electric Co., 79 OSAHRC 21/D11, 7 BNA OSHC 1225, 1979 CCH OSHD ¶ 23,493 (No. 12600, 1979); see Continental Oil Co. v. OSHRC, 630 F.2d 446, 448 (6th Cir. 1980), cert. denied, 101 S.Ct. 1481 (1981). The hazard in this case was the possibility of the mast and adjacent portions of the stiffleg derrick collapsing while it was being dismantled. Byrne, a business agent for the ironworkers' union, gave unrebutted testimony that the derrick was not properly dismantled and that the correct method of dismantling the derrick was to support the mast of the derrick with guy wires or a crane before a stiffleg was detached from the mast. The parties stipulated to Byrne's expertise with respect to the ironworking industry, and State's counsel stated that Byrne was "eminently qualified" concerning setting up and dismantling cranes. Therefore, we conclude that an employer engaged in the business of dismantling derricks should have known that the method used here to dismantle the derrick was improper and that the mast of the derrick should have been secured. Accordingly, we find that the hazard at issue in this case was recognized by the derrick-dismantling industry.

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12/ State did not file a brief on review.

State's officers previously had worked as riggers and movers, and the contract with Bird was only State's second job. However, an employer who undertakes a project outside of its normal area of work cannot, on the grounds of its ignorance of the new area, be excused from obligations that apply to employers who normally work in that field. In this case, State sought the contract for dismantling the derrick and State undertook the project. Consequently, State should be held responsible for recognizing hazards inherent in dismantling derricks.

The judge concluded that State should not be found in violation of section 5(a)(1) since State had a right to rely upon the expertise of Mandeville, an ironworker. However, State, rather than Mandeville or the crane company, was responsible for the overall management of the dismantling operation. State obtained the contract for the project, undertook the work, and State's four officers were taking part in the project at the time of the incident. Moreover, Mandeville had no expertise in dismantling derricks, and State did not ask whether he was knowledgeable about derricks when it engaged him to cut the stifflegs. Additionally, before the project began, Pompeii was told by the crane company's president that he knew nothing about dismantling derricks. Therefore, State could not have relied on the derrick-dismantling expertise of Mandeville or the crane company. Thus, under the circumstances of this case, State must be held responsible for assuring that the derrick was dismantled safely. If State lacked the expertise to accomplish the work safely, as appears to have been the case, then it should have hired others with sufficient expertise to plan and supervise the project, which it also failed to do.

Pompeii, State's president, testified that he did not realize until just before the collapse of the derrick that Mandeville was cutting the stiffleg.

Pompeii stated that he thought that Mandeville was in the process of attaching guy wires. This testimony was not discussed by the judge and conflicts with testimony given by the crane operator, Imperatore. However, even assuming that Pompeii did not realize that Mandeville was cutting the stiffleg until shortly before the derrick collapsed, this does not relieve State of responsibility for the alleged violation. As general contractor, State was responsible for assuring that the work was accomplished according to a safe work plan.[13/] See, e.g., National Industrial Constructors, Inc., 81 OSAHRC _____, 10 BNA OSHC 1081, 1981 CCH OSHD ¶ 25,743 (No. 76-4507, 1981). Crane operator Imperatore, however, had rejected Pompeii's instructions to have the crane support both stifflegs while the derrick was being dismantled. Rather, Imperatore had stated that he would take the derrick down the way that he felt was best, and Pompeii, apparently acquiescing in this, let the work proceed. Thus, Pompeii did not assure that a safe procedure would be used to dismantle the derrick, but rather relinquished selection of a dismantling method to the crane operator. Since State's president neglected to ascertain whether a proper method was to be used to dismantle the derrick, his asserted failure to realize until the last moment that Mandeville was cutting the stiffleg does not relieve State of responsibility for the improper manner in which the derrick was being dismantled.

The judge noted that Mandeville cut the stiffleg "too far" before he attempted to move from the mast to the supported stiffleg. The judge therefore concluded that State could not have foreseen or prevented Mandeville's "mental lapse." However, Byrne testified that Mandeville's cut of the stiffleg from the unsupported mast was an improper method of dismantling the stiffleg, and

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13/ Chairman Rowland would not rely on State's status as a general contractor as a basis for finding that it committed a violation but instead would rely upon State's role, as detailed above, in undertaking and carrying out the dismantling of the derrick.

that the mast and stifflegs of the derrick needed to be supported during the dismantling operation. Therefore, whether Mandeville cut too far is irrelevant, since a proper method for dismantling the derrick would have required that the derrick be adequately supported during the dismantling operation.

The record indicates that the likely result of an employee being struck by the falling 62-foot high mast and stiffleg would be death or serious injury. Moreover, the feasibility of abatement in this case is clear. The evidence establishes that the collapse of the derrick could have been prevented by securing the mast with guy wires or by securing it with another crane.

For the reasons discussed above, the criteria for a section 5(a)(1) violation have been met. Considering the gravity of the violation and State's size, good faith, and prior history, we conclude that a penalty of $600 is appropriate. Based upon both the extreme danger posed by the collapse of the derrick and the unsafe method used by State to dismantle it, we find the gravity of the violation to be high. While State's efforts at protecting its employees' safety were inadequate, we do not find such lack of protection to be the result of a lack of good faith. We also note that State is a small employer with no history of previous violations.

V.

For the foregoing reasons, we reverse Judge Gold's decision with respect to the section 5(a)(1) citation and we find State in violation of section 5(a)(1). We assess a penalty of $600.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: NOV 30 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant<br>v.<br>STATE MOVING-TRUCKING, INC.,<br>Respondent | OSHRC DOCKET NO. 77-1971 |

APPEARANCES:

Complainant: Merle Hyman, Attorney

Respondent: Robert F. Arrigan, Esq.

DECISION AND ORDER

On May 17, 1977 an ironworker fell 62 feet to his death while taking part in the dismantling of a stiffleg derrick.[1/] The deceased, sitting high on the mast, had cut through a stiffleg with an oxyacetylene torch, when the mast fell.

As a consequence, Respondent was issued a serious citation alleging two violations. A single penalty of $600 was recommended by Complainant.

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1/ A stiffleg derrick is a fixed derrick whose mast, capable of being rotated, is supported or held in place in a vertical position by two or more stifflegs (rigid members) one end of each being connected to the top of the mast, and the other end securely anchored. 29 CFR 1910.181(a)(9). ANSI B30.6-1969, Secs. 6-0.2.1.9 and 6-1.2.3a.

Respondent contested both charges. Trial was held on December 19, 1977 at Providence, Rhode Island, pursuant to Section 10(c) of the Occupational Safety and Health Act.

Respondent corporation, located at Providence, Rhode Island, admittedly is engaged in interstate commerce (Tr. 4). I find that the Commission has jurisdiction over the parties and the subject matter.

Item 1a of the citation charges a violation of Section 5(a)(1) of the Act in that an "ironworker dismantling stiffleg derrick, working high above pavement, was not provided with a safe working surface, or equivalent protection."

John Pompeii, President of Respondent, has been a rigger and mover for 38 years (Tr. 138). He and three others, being out of work, formed their own corporation on April 5, 1977 (Tr. 139, 160). On April 27 the corporation submitted a bid to Bird & Son (Tr. 15), and was awarded a contract to dismantle a stiffleg derrick and clean the area for $1,500 (Tr. 15-16). This was only its second job (Tr. 158).

Bird had decided to remove the derrick because it had not been used for 22 years and was rusting (Tr. 14).

In order to carry out the dismantling of the derrick Respondent hired a 30-ton crane from Gansett Crane Service for $365 (Tr. 29, 140-141, 172, 174). Along with the crane Gansett supplied a crane operator and oiler (Tr. 42). Since Respondent also decided that it needed someone to climb and cut the stifflegs with a torch, Pompeii

asked Peter D'Ambruoso, President of Gansett, during a telephone call on May 15 if he knew anyone out of work (Tr. 19-20). D'Ambruoso replied that he had just heard from a journeyman, and at Pompeii's suggestion D'Ambruoso called David Mandeville and eventually arranged that the latter do the job for $75 (Tr. 20-21).[2/]

According to D'Ambruoso, Mandeville did not know how to reach the Bird location, so Mandeville was told to come to Gansett on the morning of May 17 and ride with the crane to the worksite (Tr. 22). Mandeville drove a Gansett auxiliary truck to the worksite, accompanying the crane (Tr. 44-45).

The Gansett crane crew and Mandeville arrived at the Bird yard at about 7:30 a.m. on May 17 (Tr. 33). The crane operator had hooked up the crane boom with guy wires to one stiffleg so as to hold it up while Mandeville was cutting that stiffleg (Exh. C-20, Tr. 48-50). Mandeville climbed the derrick mast, the first 40 feet on a ladder and the rest of the way on the mast webbing until he reached the top (Tr. 63); he cut through the stiffleg held up by the crane and

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2/ D'Ambruoso testified that Mandeville had contacted him on May 15, and asked if D'Ambruoso had work for him or knew of any available job (Tr. 18-19). Mandeville, an ironworker for 8-10 years, had worked for him during most of 1976 and for 5-7 weeks in 1977, the last time during the week of March 9, 1977 (Tr. 18, 23-24). Mandeville had worked for General Gansett Corporation, which erects steel structures, and employs ironworkers (Tr. 172). The Gansett corporation involved in the instant case is Gansett Crane Service which is engaged solely in the rental of cranes, and in that connection never employs ironworkers (Tr. 172).

tried to climb onto it, but the mast and the other stiffleg fell before Mandeville could make the move (Tr. 37-38). Mandeville was to have cut part way, move onto the leg supported by the crane, and then complete the cut (Tr. 63). Pompeii declared that when Mandeville shouted that he had an inch to go, he (Pompeii) hollered, "No, no," but it was too late (Tr. 147-148). The tragedy occurred at about 10:30 a.m. (Exh. C-36). The reason for the collapse of the mast was that the mast, at the bottom, had nothing more than a ball joint, and was held in place only by the stifflegs (Tr. 70, 87). The mast was without support when the attached stiffleg was cut away from the mast (Tr. 70).

Respondent contends that Mandeville was not its employee, but was an independent contractor, and therefore the Section 5(a)(1) charge cannot lie. Additionally, Respondent argues that even if it is found that Mandeville was in its employ, Complainant has not established the existence of a recognized hazard and has failed to demonstrate the manner in which Respondent's conduct fell short.

Section 5(a)(1), 29 U.S.C. §654(a)(1), the so-called general duty clause, requires that each employer

> "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."

The expression "recognized hazard" means (1) generally recognized as a hazard by the employer's industry or (2) actually recognized as a hazard by the employer. Secretary of Labor v. OSHRC and Vy Lactos, 494 F.2d 460, 464 (8th Cir. 1974).

The Act furnishes little assistance as to the meaning of "employer" or "employee". Under Section 3(5) "employer" means "a person engaged in a business affecting commerce who has employees, but does not include the United States of any State or political subdivision of a State." The term "employee" is defined in Section 3(6) as "an employee of an employer who is employed in a business of his employer which affects commerce."

Pompeii asserted that he did not regard Mandeville as his employee (Tr. 143); that he thought that Mandeville came with the crane (Tr. 154). The $75 charge for Mandeville's services were to be added to the Gansett bill to be paid by Respondent (Tr. 141-142, 154). The $75 was never paid by Respondent or Gansett (Tr. 31, 157), and Gansett billed Respondent for only $300 for the crane (Tr. 30-31, 157).

As far as Gansett was concerned, D'Ambruoso declared that Mandeville was not working for him (Tr. 31).

Complainant presented Ralph Imperatore, the Gansett crane operator, who testified that he asked Mandeville for whom he was working and who was paying him; and that Mandeville replied, "They are." Imperatore claimed that he then asked, "Who is they?" and that Mandeville said, "The guy I'm going to work for." (Tr. 42). This was offered by Complainant in an effort to show that the deceased regarded himself as an employee of Respondent. However, that conversation was less than clear.

The crucial test in determining whether Mandeville was an independent contractor is whether he was engaged to do a certain piece

of work according to his own judgment and methods without being subject to the control of Respondent except as to the result of the work. Linstead v. Chesapeake & Ohio R. Co., 276 U.S. 28 (1928). Standard Oil Co. v. Anderson, 212 U.S. 215 (1909).

As an ironworker Mandeville possessed and exercised a certain expertise. D'Ambruoso acted as a go-between in arranging for Mandeville to do one specific job for Respondent, that of dismembering a derrick. The work was to last one day, perhaps two. Mandeville was to be paid a fixed sum by Respondent, regardless of the time involved. Mandeville operated on his own (Tr. 50, 55, 56). On the basis of this record I find that Respondent did not retain the right of control or supervision over Mandeville as to details, and that for the purposes of the Occupational Safety and Health Act Mandeville was not an employee, but was an independent contractor unprotected by Section 5(a)(1) of the Act.

However, there were employees of Respondent at the site, and they were exposed to danger at a place of employment which was not free from a hazard so recognized in the ironworking industry.

Except for one part-time summer employee, Respondent corporation consisted of its four officers, experienced riggers (Tr. 83-84, 156, 160-161, 164). All four were at work at the site when the mast collapsed (Tr. 77).

Holding stock in a corporation is not necessarily inconsistent with being an employee of the corporation. In United States v. Bernstein, 179 F.2d 105, 114 (4th Cir. 1949) the Court held that

an officer of a corporation may or may not be its employee, dependent upon the facts and circumstances of his particular relationship to the corporation. In the case at hand, the officers contributed substantial services on a regular basis. Bearing in mind that the Congress intended that the term "employee" be given the broadest possible interpretation, it is found that the four corporate officers were employees of Respondent corporation, and as such are under the protective cover of the Act.

This leads to the question whether Respondent corporation was in violation of Section 5(a)(1) of the Act with respect to its four officer-employees at the site. Martin Byrne, business agent for Local 237, Ironworkers Union, testified that he was an ironworker for 20 years (Tr. 86); that he was at the site a half hour after the death (Tr. 88); that no employees of Respondent belong to the ironworkers union (Tr. 99); that the correct method of dismantling a stiffleg derrick is to first place temporary guy wires on the mast to hold it in place (Tr. 87, 101-102).

Unfortunately, Pompeii, D'Ambruoso, and the crane operator did not know that the vertical mast was not bolted or cemented into a fixed position at the base (Tr. 25, 56, 70). No one participating in the dismantling operation seemed to know this fact (Tr. 56).

Section 2(b) of the Act declares that its purpose is "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions." The record firmly demonstrates that the workplace was not free of a hazard. However, the Congress

did not mean to impose strict liability upon employers, as evidenced by the language of Section 2(b) of the Act. Respondent's four officers were riggers. They relied upon the crane crew to perform its function, and depended upon Mandeville to perform his part of the operation. Respondent was not a part of the ironworking industry. Mandeville understood that he was to cut the stiffleg only part way, then move from the mast to the stiffleg supported by the crane. He cut too far. In these circumstances, I find that Respondent had a right to rely on the expertise of the deceased, whose mental lapse Respondent could not have foreseen or prevented. The charge in item 1a will be ordered vacated.

Item 1b alleges a violation of Section 5(a)(2) of the Act, 29 U.S.C. §654(a)(2), for failure to comply with the safety standard at 29 CFR 1926.850(a), which reads:

> Subpart T - Demolition
>
> §1926.850 Preparatory operations.
>
> (a) Prior to permitting employees to start demolition operations, an engineering survey shall be made, by a competent person, of the structure to determine the condition of the framing, floors, and walls....

I find that item 1b has not been sustained both from a factual standpoint and as a matter of law.

The OSHA compliance officer who visited the site after the accident testified that he asked Pompeii whether an engineering survey had been conducted, and that Pompeii replied that he had thought that the vertical mast was bolted in at the bottom and

would remain vertical after one stiffleg was cut away (Tr. 70). This evidence does not suffice as proof that there was no survey. Pompeii testified at the trial, but was never questioned on this point.

In any event, it is my view that the standard does not apply to the facts herein. Section 1926.850(a) is limited to demolition operations. However, the derrick was not being demolished, -- it was being dismantled. By citing this standard the Secretary has gone outside the bounds of the normal meanings of words. In normal usage, to "demolish" an object means to destroy it, whereas to "dismantle" something is to separate it into its constituent parts in a non-destructive manner. The specific forms of demolition referred to in Subpart T are mechanical demolition by clamming or balling (§1926.859) and demolition by explosives (§1926.860). The derrick in the instant case was being dismembered, not destroyed. Since it was not being demolished, the operation was not within the purview of the cited standard.

Moreover, the standard applies only to the demolition of buildings. It demands a survey "to determine the condition of the framing, floors, and walls." A stiffleg derrick has no framing, floors, and walls. Subpart T refers, time and again, to floors, walls, and buildings. In the eleven subsections of 1926.850 the word "wall(s)" appears in four, "floor(s)" in five, "building" in two. Gas, electric, and other utilities are also discussed in two. The language throughout 1926.850 makes it plain that it is intended to protect against hazards encountered in connection with the destruction of buildings, and has no application

to the dismantling of a stiffleg derrick.

In light of the foregoing, it will be ordered that item 1b be vacated.

## CONCLUSIONS OF LAW

1. Respondent engages in a business affecting commerce, and the Occupational Safety and Health Review Commission has jurisdiction over the parties and the subject matter within the contemplation of 29 U.S.C. §§652 and 653(a).

2. On May 17, 1977 Respondent did not violate 29 U.S.C. §654(a)(1).

3. On May 17, 1977 Respondent did not violate 29 U.S.C. §654(a)(2) for noncompliance with the standard at 29 CFR 1926.850(a).

## ORDER

It is ordered that items 1a and 1b of the serious citation of May 27, 1977 be vacated.

Abraham Gold
ABRAHAM GOLD
Judge, OSHRC

Dated: May 1, 1978
Boston, Massachusetts

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

NOV 30 1982

**IN REFERENCE TO SECRETARY OF LABOR v.**

Republic Steel Corp.

OSHRC DOCKET NO. 81-656

**NOTICE IS HEREBY GIVEN TO THE FOLLOWING:**

**FOR THE SECRETARY OF LABOR**

OF COMMISSION DECISION (REMAND)

To wit: See attached.

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Judge James D. Burroughs
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FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>REPUBLIC STEEL CORPORATION,<br><br>Respondent.<br><br>UNITED STEELWORKERS OF AMERICA, DISTRICT 27, AND LOCAL UNION 1200,<br><br>Authorized Employee Representative. | OSHRC Docket No. 81-656 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

This case is before the Commission on interlocutory appeal[1] of an order entered by Administrative Law Judge James D. Burroughs denying a motion by the Secretary of Labor ("the Secretary") to withdraw a citation previously issued to and contested by Respondent, Republic Steel Corporation ("Republic"). The Secretary had based his motion on the ground that there was insufficient evidence to establish a violation of the cited standard at the time and place alleged in the citation. However, the United Steelworkers of America, Local Union 1200 ("the Union"), an authorized employee representative, had objected to the Secretary's motion on the ground that withdrawal of the citation would leave

[1]See Commission Rule 75, 29 C.F.R. §2200.75.

the hazardous conditions described in the citation uncorrected. The judge denied the Secretary's motion because (1) the Union had objected and (2) it had asserted that it was prepared to offer evidence to establish the alleged violation.

The judge implicitly rejected the arguments raised by the Secretary and Republic in opposition to the Union's right to object. We affirm his disposition of these issues. The interests of an authorized employee representative that has elected party status in a timely manner are not restricted, as Republic argues, to the reasonableness of the abatement period. Mobil Oil Corp., 82 OSAHRC _____, 10 BNA OSHC 1905, 1982 CCH OSHD ¶ 26,187 (No. 77-4386, 1982). The Union, as a party in this case, may object to the Secretary's motion to withdraw the citation. Cuyahoga Valley Railway Co., Docket No. 76-1188 (October 29, 1982).

Nevertheless, we conclude that the judge erred in denying the Secretary's motion to withdraw. The judge should have deferred ruling on the Secretary's motion until a hearing could be held on the Union's objections and a determination could be made as to whether the Secretary's motion is consistent with the provisions and objectives of the Act.[2] See Cuyahoga Valley Railway Co., supra.

After the judge had certified this case for interlocutory appeal, the Union filed a motion to immediately enforce the citation in full. In response, we entered an order in which we reserved a ruling on that motion pending a decision on the merits of this interlocutory appeal. Because Republic has not withdrawn its notice of contest of the citation and no hearing has been held on the merits of the alleged violation, we cannot enter an order affirming the citation at this time. For this reason, the Union's motion is denied.

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[2] If the judge again denies the Secretary's motion after a hearing on the Union's objections, he must then schedule the case for a hearing on the merits. If the Secretary declines to prosecute the case on the merits, Commissioner Cleary would permit the Union to prosecute. Mobil Oil Corp., supra (concurring opinion). Commissioner Cottine presumes that the Secretary will proceed appropriately on the merits if the Union's objections are found to be meritorious and the withdrawal motion is denied. See Dunlop v. Bachowski, 421 U.S. 560, 574-76 (1975).

Accordingly, we set aside the judge's order and remand the case[3] to Judge Burroughs to consider the Union's objections to the withdrawal of the citation.[4]

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: NOV 30 1982

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[3]We note that Commission Rule 61, 29 C.F.R. § 2200.61, places strict limitations on the postponement of a hearing by a judge.

[4]Chairman Rowland adheres to his position in Mobil Oil Corp., supra (dissenting opinion) and in Cuyahoga Valley Ry. Co., supra, slip op. at p. 6 n.6. The Chairman believes that the decision to withdraw a citation is within the prosecutorial discretion of the Secretary. For this reason, he would reverse Judge Burroughs' order and grant the Secretary's motion to withdraw the citation.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>REPUBLIC STEEL CORPORATION,<br><br>Respondent,<br><br>and<br><br>UNITED STEELWORKERS OF AMERICA, DISTRICT #27, and ALL NATIONS LOCAL UNION NO. 1200,<br><br>Authorized Employee Representative. | OSHRC Docket No. 81-656 |

## ORDER GRANTING COMPLAINANT'S AND RESPONDENT'S MOTIONS FOR CERTIFICATION OF INTERLOCUTORY APPEAL

On September 22, 1981, a motion for certification of interlocutory appeal was received from counsel for respondent. On September 23, 1981, a similar motion was received from counsel for complainant. The motions having been read and considered, it is

ORDERED: That the motions are granted pursuant to Commission Rule 75(b).

Dated this 24th day of September, 1981.

James D. Burroughs
JAMES D. BURROUGHS
Judge

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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(A) - Notes a case presently under appeal to a U.S. Circuit Court of Appeals.
(D) - Notes a case in which a decision has been issued by a U.S. Circuit Court of Appeals.

* Citations for OSAHRC Reports are listed according to microfiche cites. When applicable citations for the printed volumes of OSAHRC Reports are listed in parentheses.

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

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UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
John W. McCormack Post Office and Courthouse, Room 420
Boston, Massachusetts 02109

## NOTICE OF DECISION

Secretary of Labor v. United States Steel Corporation, American Bridge Division
OSHRC Docket No. 82-168

1. Enclosed is a copy of my decision. It will be filed with the Commission on November 1, 1982, and will become the final order of the Commission on December 1, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is December 1, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Foster Furcolo

FOSTER FURCOLO
JUDGE, OSHRC

Date: October 12, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant<br>v.<br>UNITED STATES STEEL CORPORATION,<br>AMERICAN BRIDGE DIVISION,<br>Respondent | OSHRC DOCKET NO. 82-168 |

JUDGE'S DECISION
NOV 1 '82
RECEIVED
FINAL ORDER ON
DEC 1 '82

APPEARANCES:

Ronald Glover, Esq., for Complainant

James T. Carney, Esq., for Respondent

DECISION AND ORDER

This case arose under 29 USC, sec. 651 et seq. of the Occupational Safety and Health Act of 1970 (the Act). As a result of an inspection by the Occupational Safety and Health Administration (OSHA) of the Respondent's premises on or about January 27, 1982, Citation #1 was issued on or about February 4, 1982, charging in Item #2 that the Respondent violated sec. 5(a)(2) of the Act by the serious violation of the standard at 29 CFR 1926.28(a) in that welders were not required to wear personal protective equipment to protect against thermal burns while performing electric arc welding and gouging.

Citation #1 also charged in Item #1 that the Respondent violated sec. 5(a)(1) in that there were slippery floor conditions.

On or about February 9, 1982, the Respondent filed Notice of Contest to Items 1 and 2 of Citation #1 and the penalties proposed therefor, but the Respondent withdrew its Notice of Contest to Item 1.

The pertinent sections of the Act and the standard in question are appended to this decision under appropriate titles.

## ISSUES

Although there was considerable testimony concerning a dispute between the employees and the Respondent as to who should provide personal protective equipment, and whether employees should have been discharged for insubordination, we should not lose sight of the fact that neither of those issues was the gravamen of the citation. Regardless of who had the obligation of providing personal protective equipment, the questions to be decided are:

1. Was the equipment that was worn by employees on or shortly before January 27, 1982, appropriate for the conditions of employment?
2. Did the Respondent take every reasonable step to require the employees to wear appropriate personal protective equipment?

## PRELIMINARY

The employees affected by the alleged hazardous conditions were welders who were working on various floors of a multi-story building being erected by the Respondent. The kinds of welding being done included processes designated by the witnesses as arc gouging, air arcing, stick, inner shield, automatic, semi-automatic, etc.

In stick welding, a rod or electrode is put in a holder, electric current is generated, and two pieces of metal are joined when the rod or electrode is consumed into the weld. Inner shield welding is basically the same process except that a coil of wire is used instead of the rod, resulting in much hotter temperatures. In arc gouging [or air arcing] a copper coated carbon rod

is used. After the metal is heated into a molten state, compressed air blows away the excess.

The point of welding was in various places and, depending on its location, the welder might be below it, above it, beside it, facing it, etc.

The working position of the welder also varied, as he might have to stand on a deck, straddle a beam, sit on a scaffold, balance himself on a "float", etc. [A "float is a 4 x 6 foot platform suspended alongside a building by ropes.]

The degree of hazard to the welder differed with the location and kind of weld. For example, there is obviously a greater hazard of sparks falling on the welder from an overhead weld than from one below the waist; and an insecure position on a "float" or in a confined space permits less mobility and agility in combatting flames than one on a solid floor.

## APPROPRIATE PROTECTIVE EQUIPMENT

All the witnesses testified that sparks or flames from at least some of the welding operations could fall upon the wearing apparel of the welders. For that reason, one issue is whether the protective equipment worn by the employees was appropriate. That equipment varied from ordinary clothing to "leathers", which might include a leather jacket, leather sleeves, leather pants or leggings, etc. Since the welding involved temperatures as high as 1500 - 2000 degrees (depending on the weather and the type of welding) it is obvious that there was a hazard from "a shower of sparks" or molten metal or flames caused by the welding process. The evidence clearly indicated that ordinary clothing was more likely to catch fire than "leathers". Moreover, some types of apparel (e.g. leather jacket) gave more protection to the wearer than ordinary clothing because leather is not only more flame-resistant but

its composition is such that sparks tend to "bounce" off it rather than to become imbedded in it. It is clear that, for at least some of the welding conditions that existed at the worksite, ordinary clothing was not "appropriate personal protective equipment" and that some sort of leather covering would have reduced the hazard to employees.

## REQUIRE THE WEARING

The evidence is overwhelming that the Respondent did not "require" the wearing of personal protective apparel of any kind, whether it be even just ordinary clothing. The Respondent's position was that the welders themselves were responsible for deciding what they wanted to wear. That was not only the testimony of the employees and the Respondent's Superintendent [Gibson] but it was also so stipulated by the Respondent...Tr. 92.

The Respondent's policy on this point is emphasized by its very strict rule concerning hard hats and safety belts: the employee wore them or was not permitted to work. There was no comparable policy for personal protective equipment for welders; on the contrary, it was customary [on the date of the inspection and for the months before it] for welders to work in any kind of clothing and with or without personal protective clothing of any sort.

The Respondent eventually did take stern disciplinary action against employees but, even if such action be interpreted as enforcement of a rule requiring employees to wear adequate personal protective equipment, such action came long after the inspection. While it may have some bearing on the penalty to be imposed, it does not excuse the violation.

## KNOWLEDGE

Supervisory personnel knew of all the conditions at the jobsite; and also knew that employees often did various kinds of welding while not wearing anything more than ordinary clothing...Tr. 49, 103, 104, 115, 145, 151, 174, 175, 273, 300, 311, 379.

## SERIOUS

Although the evidence did not show a particularly large number of cases of serious injury to welders, there was ample evidence of incidents from which the conclusion could be drawn that there was a substantial probability that serious physical harm could result from the welding operation. I draw that conclusion.

Several of the witnesses had either themselves had their clothing catch fire or had seen others put in similar jeopardy. Moreover, a description of the welding process as performed, for example, in a confined space or on a "float" would itself lead to the same conclusion...Tr. 97, 114-116, 143, 146, 170, 172, 212, 300, 307, 349, and Exh. C-1, 2, 3, 6, 9-14, 19.

## FINDINGS OF FACT

Having heard the testimony, observed the witnesses, and examined the exhibits, the following Findings of Fact are made:

1. At all times concerned, the Respondent regularly received, handled or worked with goods which had moved across state lines.

2. As concerns Item #2 of Citation #1, the Respondent did not require the wearing of appropriate personal protective equipment where it was needed to reduce the hazards to employees who were welding.

3. Some of the Respondent's welders wore ordinary clothing that could be ignited by sparks or flames caused by the welding operation.

4. The Respondent had no rules or procedures or customs or discipline or other practices that would require the employees to wear appropriate personal protective equipment to avoid or lessen hazards.

5. The conditions described in Item #2 of Citation #1 exposed the Respondent's employees to sustaining serious harm because of the hazard of burns from sparks or flames caused by the welding operation.

6. One or more officers or supervisory personnel of the Respondent knew of the hazardous conditions described herein and knew that employees were exposed to such hazard.

## CONCLUSIONS OF LAW

1. At all times concerned, the Respondent was an employer engaged in a business affecting commerce within the meaning of the Act; and the Occupational Safety and Health Review Commission has jurisdiction over the subject matter and the parties.

2. At all times concerned, the Respondent knew, or with the exercise of due diligence should have known, of the alleged violation.

3. On the date in question, the Respondent was not in compliance with the standard at 29 CFR 1926.28(a); and the Complainant has sustained the burden of proving the Respondent violated sec. 5(a)(2) of the Act (sec. 654).

4. The Respondent having withdrawn its Notice of Contest, the Complainant has sustained the burden of proving the Respondent violated sec. 5(a)(1) of the Act.

## ORDER

The whole record having been considered, and due consideration having been given to 29 U.S.C. sec. 666(j), it is ordered:

1. Item #1 of Citation #1 is affirmed and a penalty of $100 assessed therefor.

2. Item #2 of Citation #1 is affirmed and a penalty of $100 assessed therefor.

SO ORDERED.

Foster Furcolo

FOSTER FURCOLO
JUDGE, OSHRC

Dated: November 1, 1982
Boston, Massachusetts

## APPENDIX

## THE ACT

Section 654 [section 5(a)(1)] Employer "...shall furnish...a place of employment...free from recognized hazards...likely to cause death or serious physical harm to his employees; ..."

Section 654 [section 5(a)(2)] Employer "...shall comply with occupational safety and health standards..."

Section 666 [section 17(b)] "...employer who has received a citation for a serious violation...of this Act...shall be assessed a civil penalty of up to $1,000 for each such violation."

Section 666 [section 17(j)] "...assess all civil penalties...giving due consideration to...the size of the business...gravity of the violation, the good faith of the employer, and the history of previous violations."

Section 666 [section 17(k)] "...a serious violation shall be deemed to exist...if there is a substantial probability that death or serious physical harm could result...unless the employer did not, and could not...know of the presence of the violation."

## THE STANDARD

29 CFR 1926.28(a): "The employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions or where this part indicates the need for using such equipment to reduce the hazards to the employees."

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

Secretary of Labor v. Howard Electric Company
OSHRC Docket No. 80-2111

1. Enclosed is a copy of my decision. It will be filed with the Commission on November 4, 1982, and will become the final order of the Commission on December 6, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is December 6, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

James A. Cronin, Jr.
Judge, OSHRC

Date: October 15, 1982

OSHRC FORM 97

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>HOWARD ELECTRIC COMPANY,<br>Respondent. | OSHRC DOCKET NO.80-2111 |
| IBEW - LOCAL UNION NO. 68,<br>Authorized Employee Representative. | |

Appearances:

Robert S. Milgrim, Esquire, of Kansas City, Missouri
For the Complainant

Albert S. Wolf, Esquire, of Denver, Colorado
For the Respondent

DECISION AND ORDER

James A. Cronin, Jr., Judge, OSHRC:

On October 11, 1979, an abrasive wheel or blade on an abrasive cutting-off machine shattered, killing an employee of Howard Electric Company (Howard). Following a fatality investigation by compliance officers of the Occupational Safety and Health Administration (OSHA), the Secretary of Labor issued two citations to Howard charging it with a "serious" violation of Section 5(a)(1) of the Occupational Safety and Health Act of 1970 (29 U.S.C. §651 et seq.; hereafter called the "Act"), and a "willful" violation of 29 C.F.R. §1926.303(b) for failure to comply with "Sections 3.2 and 4.1, American National Standards Institute (ANSI) B7.1-1970, Safety Code for the Use, Care, and Protection of Abrasive Wheels . . .".

The Secretary proposed a $1,000.00 penalty for the alleged violation of section 5(a)(1) of the Act and $8,000.00 for the alleged violation of 29 C.F.R. §1926.303(b). Howard contested the alleged serious and willful violations and penalties, and a hearing was held at Denver, Colorado, on August 4, 1982.

Citation No. 1 describes the alleged violation of section 5(a)(1) as follows:

> 1
> Section 5(a)(1) of the Occupational Safety and Health Act of 1970: The employer did not furnish employment and a place of employment which were free from recognized hazards that were causing or were likely to cause death or serious physical harm to employees, in that:
>
> At the Eisenhower Tunnel, second floor of fan deck, the AEG Model WSD 2300S "Cut-Elec" portable abrasive cut-off machine was used with an un-marked, oversized, metal cutting blade to cut a camera opening in the concrete west wall.

Section 5(a)(1), 29 U.S.C. §654(a)(1), provides:

> Each employer--shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

Citation No. 2 describes the alleged violation of 29 C.F.R. §1926.303(b) as follows:

> 1
> 29 CFR 1926.303(b): Sections 3.2 and 4.1 American National Standards Institute B7.1-1970, Safety Code for the Use, Care, and Protection of Abrasive Wheels, as adopted by 29 CFR 1926.303(b):
>
> At the Eisenhower Tunnel, the AEG Model WSD 2300S "Cut-Elec" portable abrasive cut-off machine being used to cut a camera opening in the concrete west wall, second floor of fan deck, was being operated without a safety guard.

Section §1926.303(b) provides:

> §1926.303 Abrasive wheels and tools.
>
> * * *
>
> (b) Guarding. Grinding machines shall be equipped with safety guards in conformance with the requirements of

American National Standards Institute, B7.1-1970. Safety Code for the Use, Care and Protection of Abrasive Wheels, and paragraph (d) of this section.

Section 3.2 of ANSI Standard B7.1-1970 provides:

3.2 Safety Guards

Grinding machines shall be equipped with safety guards in conformance with the requirements covered in section 4 page 27.

Section 4.1 of ANSI Standard B7.1-1970 provides:

4.1 General Requirements

All abrasive wheels shall be used only on machines provided with Safety Guards as defined in the following paragraphs of this section.

Exceptions: This requirement shall not apply to the following classes of wheels and conditions.

(1) Wheels used for internal work while within the work being ground.

(2) Mounted wheels used in portable operations (see definition Sec. 1.4.18 page 15) 2 inches and smaller in diameter.

(3) Types 16, 17, 18, 18R and 19 cones and plugs and threaded hole pot balls where the work offers protection.

## Issues

Among other defenses, Howard's answer contends that the Commission lacks subject matter jurisdiction over this proceeding and personal jurisdiction over Howard. At the outset of the hearing, Howard's counsel filed a Statement of Position with respect to its asserted defenses of lack of jurisdiction. He also orally moved to dismiss the citation and to dismiss the complaint on the same grounds as stated in the Statement of

Position (Tr. 9, 22-23). Essentially, Howard argues that the Commission lacks jurisdiction because of the failure of the Secretary of Labor to file his complaint within the time permitted by applicable Commission rule, as extended by a Commission order.

Howard's post-hearing brief reiterates its jurisdiction defense and also maintains that the Secretary's evidence failed to substantiate the violations charged. In addition to its brief, Howard also filed a post-hearing motion to strike certain evidentiary exhibits and the testimony of a compliance officer relating to and concerning these exhibits. Each of Howard's contentions will be addressed.

## Jurisdiction

The facts relevant to this issue are as follows:

Howard's notice of contest to citations Nos. 1 and 2 was filed on April 14, 1980, and received by the Secretary of Labor on April 16, 1980. On April 30, 1980, the Secretary filed a Motion to Stay Proceedings Pending Consideration of Criminal Prosecution. This motion specifically requested that the Commission stay the requirement that the Secretary file his complaint, which the motion represented was due on May 6, 1980.

By order issued May 21, 1980, the Commission stayed the proceedings pending consideration of criminal prosecution "including the filing of a complaint," for 60 days. The stay expired on July 23, 1980 (allowing 3 days' additional time because of service by mail under Commission Rule 4(b)). No complaint was filed, and the Secretary did not request a further extension of time to file his complaint, on or prior to July 23, 1980.

On March 5, 1981, some 225 days after the stay had expired, the Secretary moved the Commission to extend the stay ordered on May 21, 1980,

for an indefinite period pending consideration by the Department of Justice of criminal prosecution. Although no complaint had been filed, no request was made in the motion to specifically stay the requirement of filing a complaint. The Commission granted the Secretary's motion on May 7, 1981. In granting this motion, the Commission made no reference concerning the filing of a complaint.

On February 1, 1982, the Commission ordered the Secretary to notify the Commission of the current status of the criminal prosecution and the expected date when a final decision "will be made" on whether criminal proceedings will be initiated under section 17(e) of the Act. The Commission also ordered the Secretary's counsel to request a continuance or lifting of the stay order within 20 days of February 1, 1982.

On March 11, 1982, in response to the Commission Order of February 1, 1982, the Secretary moved to vacate the May 7, 1981 stay order. No reference was made in the motion to filing a complaint, but accompanying this motion was the Secretary's complaint. Attached to the motion was a certificate of service representing that the motion and complaint had been served on the respondent Howard.

On March 25, 1982, before the Commission ruled on the Secretary's motion to vacate the stay, Howard filed with the Commission its answer to the complaint. By order dated March 31, 1982, the Commission granted the Secretary's motion to vacate the stay order. The March 31st order contained no reference to the filing of the complaint.[1/]

1/ The case file, however, reflects that one Commissioner voted to "grant the Secretary's motion to vacate," and "accept for filing the Secretary's attached complaint." (See section 12(g) of the Act which requires: "every official act of the Commission shall be entered of record, and its hearings and records shall be open to the public.")

This record clearly establishes that this Commission has both subject matter jurisdiction over the proceeding and personal jurisdiction over the respondent Howard. Respondent's jurisdictional defenses, therefore are rejected.

This Commission's jurisdiction and powers to adjudicate proceedings initiated under the Occupational Safety and Health Act of 1970 derive solely from the provisions of that Act.

Section 10(c) of the Act specifically authorizes, and grants jurisdiction to, the Commission to adjudicate proceedings initiated under the Act whenever (as was done here) an employer timely contests a citation issued by the Secretary of Labor.[2/] Section 12(i) of the Act also makes section 11 of the National Labor Relations Act (29 U.S.C. 161) applicable to the jurisdiction and powers of the Commission. The Act further authorizes the Commission to "make such rules as are necessary for the orderly transaction of its proceedings." (See section 12(g) of the Act).

A complaint is a creature of the Commission's Rules of Procedure and a mandatory pleading requirement of the Commission, not the Act. See Asarco Inc., 80 OSHARC 99 A/3, 8 BNA OSHC 2156, 1980 CCH OSHD ¶24,838 (No. 79-6850, 1980; Commission Rule 33(a)). The Act neither mentions the need for a complaint nor imposes any jurisdictional time limits on the filing of a complaint.

Rule 33 (a)(1) mandates that the Secretary file a complaint within twenty (20) days after the Secretary has received a notice contesting

2/ Commission and Court precedent also hold that the Commission retains jurisdiction to grant appropriate relief under Rule 60(b) of the Federal Rules of Civil Procedure even when the notice of contest was untimely. See Banciforte Builders, 81 OSAHRC 80/A5, 9 BNA OSHC 2113, 1981 CCH OSHD ¶25,076, 25,591 (No. 80-1920, 1981); J. J. Haas Co., Inc., 648 F.2d 190 (3rd Cir. (1981).

his citation. Commission Rule 5 further provides that requests for extension of time for the filing of "any pleading" must be received in advance of the date on which the pleading is due to be filed.

As correctly pointed out by the Secretary in his brief, however, these rules, as well as all other Commission Rules of Procedure, are simply that, procedural rules. They do not impose jurisdictional limitations on the authority of the Commission to adjudicate proceedings initiated by the filing of a notice of contest; and the Secretary's failure to comply with their provisions does not deprive the Commission of its jurisdiction to adjudicate. Neither the Commission Rules of Procedure nor the Federal Rules of Civil Procedure were designed to affect jurisdiction.

Commission Rule 38 does provide that the failure to file any pleading "pursuant to these rules when due, may, in the discretion of the Commission or the Judge, constitute a waiver of the right to further participation in the proceedings." But this rule is plainly discretionary and does not mandate dismissal in the event the Secretary fails to file a timely complaint.

Personal and subject matter jurisdiction in this proceeding were established the moment Howard filed its notice of contest to the citation and its answer to the complaint. The complaint's allegations properly invoked the Commission's jurisdiction, and Howard admitted that it was an employer with employees and was engaged in a business affecting commerce.

Howard's Statement of Position indicates that Howard has confused the defenses of lack of jurisdiction with a defense grounded on the filing of an untimely and unauthorized complaint. Despite this misdesignation of defenses by Howard, however, the answer and motion

to dismiss will be treated as raising the issue of whether vacation of the Secretary's complaint under Commission Rule 38 is required or warranted.

Determination of this issue requires review and analysis of relevant Commission case law which has imposed limitations on a Judge's discretion to vacate citations for failure of the Secretary to comply with the Commission's Rules of Procedure.

Following its decision in Asarco, supra, which held that Rule 33(a)(1) was a mandatory pleading requirement, the Commission issued a series of decisions concerned with defining the scope of a Judge's discretion in vacating a citation or notice of contest for failure of a party to comply with the Commission's Rules of Procedure.

In The Boardman Company, 80 OSAHRC 122/C11, 9 BNA OSHC 1163, 1981 CCH OSHD ¶25,017 (No. 80-75, 1980), the Commission held that a citation should not be dismissed for failure of the Secretary to file a timely complaint unless the Secretary's noncompliance with Rule 33(a)(1) results from his contumacious conduct or results in prejudice to the respondent. This holding was reaffirmed in Refractory Construction Inc., 80 OSAHRC 128/D7, 9 BNA OSHC 1192, 1981 CCH OSHD ¶25,088 (No. 80-1416, 1980) and Henry C. Beck Co., 80 OSAHRC 128/E1, 9 BNA OSHC 1191, 1981 CCH OSHD ¶25,087 (No. 80-1612, 1981).

Howard cites this Judge's decision in TRG Drilling Corporation, 81 OSAHRC 108/D10, 10 BNA OSHC 1268, 1981 CCH OSHD ¶25,837 (80-6008, 1981) in support of its motion to vacate. There, this Judge held that the filing of an untimely complaint has no force and effect without authorization by the Commission, and the complaint must be stricken or

dismissed on motion. In that case it was further held that the Secretary's unexplained failure to file a timely complaint was deemed a waiver under Rule 38 of the Secretary's right to further participation in the proceeding and ground for vacation of the citation. In affirming this Judge's action in vacating the citation, the Commission did not discuss or allude to his holding that an unauthorized, untimely complaint must be stricken on motion. Instead, the Commission simply equated the Secretary's unexplained failure to comply with Rule 33(a)(1) with contumacious conduct and held that vacation of the citation was not an abuse of the Judge's discretion.

This Commission holding, of course, is clearly consistent with the Commission's prior decision in Rollins Outdoor Advertising, 77 OSAHRC 24/C1, 5 BNA OSHC 1041, 1042, n. 3, 1977-78 CCH OSHD ¶21,551 (No. 12528, 1977). Although the Judge in that case was reversed, the Commission held that the Judge's action in vacating an unexplained failure to file a timely complaint was not an abuse of discretion. In that case the Judge was reversed because the Secretary satisfactorily explained on appeal his failure to timely request an extension of time to file his complaint and his failure to file a timely complaint, and because the respondent employer had suffered no prejudice. Unlike in Rollins, however, the Secretary in TRG failed to offer a satisfactory explanation on appeal.[3/]

Applying the above Commission precedent to this case, Howard's motion to dismiss is denied. Contrary to the Secretary's contention, the complaint here was not filed either in accordance with the twenty-day provision of

3/ This Judge suggests that, absent exceptional circumstances, the Secretary's explanation for filing an untimely complaint should not be considered on appeal unless made before the Judge.

Rule 33(a)(1) or in compliance with the Commission order of May 28, 1980, which granted the Secretary an additional 60 days within which to file his complaint. But in this Judge's view, the late filing, although unexplained, was authorized by the Commission when it granted the Secretary's motions to extend the stay and to vacate the stay. The complaint was attached to the motion to vacate, and it is reasonable to assume that all three Commissioners were aware of the untimely complaint. Moreover, the Secretary's brief makes clear why no explanation for the untimely filing was ever offered on March 11, 1982, or subsequently. The Secretary contends the filing of the complaint was timely because he considers the second stay of May 7, 1981, by the Commission as a waiver of the May 28 60-day requirement. Although one may disagree with the Secretary's reasoning, his actions do not approach the level of contumacious conduct which would require vacation of the citation.

Howard also has not demonstrated in its oral argument or in its Statement of Position that any prejudice resulted from the Secretary's noncompliance with any of the Commission's Rules of Procedure. Howard never opposed the Secretary's motions to stay or his motion to vacate the stay. Instead, Howard waited until the day of the hearing to clarify his contentions concerning the untimely complaint. But more importantly, Howard has never claimed or demonstrated that the untimely complaint adversely affected its ability to defend against the charges of the citation.

Unable to find contumacious conduct on the part of the Secretary or prejudice to Howard, this Judge must deny Howard's motion to dismiss.

## Motion to Strike

After the hearing, Howard moved to strike the Secretary's photographic exhibits C-3, C-4, C-5, C-6, C-7, and C-8, together with all of the testimony of the Secretary's witness, Ivan Blood, relating to or concerning the objects shown in those exhibits.

These exhibits were received in evidence over the objections of Howard's counsel. The objections to each were similar, "irrelevancy and immateriality" (Tr. 44, 52, 54, 55, 57, 63-64, & 71). Also, Howard objected to Mr. Blood's testimony with respect to the alleged hazard depicted in Exhibit C-7 on the grounds of incompetency, irrelevance and immateriality (Tr. 57-59, 63-64, 72).

In overruling Howard's objections, this Judge admitted all of these exhibits "subject to connection," or proof that the objects shown in the photographs C-3 through C-7, and the manufacturer's catalogue, C-8, were involved in the incident at issue. This Judge indicated that if the Secretary failed "to connect" the photographed objects with this case, he would entertain a motion to strike "at the end of the case" (Tr. 45, 52, 54, 55, 59, 63-64, 71, 72).

The Secretary expressly offered exhibits C-3 through C-7 through Mr. Blood as photographs of objects having a direct part in the incident resulting in issuance of the citations and the hearing. Such objects are commonly called "real" or "original" evidence and are to be distinguished from evidence not playing a direct role but offered for illustrative or other purposes. When real evidence (or a photograph thereof) is offered, an adequate foundation for admission requires testimony that the object offered is the object which was involved in the incident and

that the condition of the object is substantially unchanged. Unquestionably, Mr. Blood was competent to testify that Exhibits C-3 through C-7 were accurate representations of the cut-off saw, guard and shattered abrasive wheel observed by him. However, he lacked personal knowledge of the objects in question or their prior condition, and, therefore, was incompetent to testify that the objects were directly involved in the October 11th incident. See Rule 602 of the Federal Rules of Evidence This is also true with respect to Exhibit C-8, the manufacturer's catalogue. The catalogue was relevant only if the model WSD 2300S shown on page 31 was the same model saw observed and photographed by Mr. Blood and shown in Exhibit C-3. Mr. Blood admittedly did not have personal knowledge of the model number of the saw in C-3 and, therefore, was incompetent to testify that the saw in C-3 was AEG model WSD 2300S. Of course, even if Mr. Blood had been able to testify of his own knowledge that the saw shown in C-3 was the same as WSD 2300S, the relevancy of Exhibit C-8 also would rest on establishing that the saw in C-3 was involved in the October 11th incident.

Exhibits C-3 through C-7 were admitted subject to the introduction of additional evidence sufficient to support a finding that the saw, guard and abrasive wheel pictured were involved in the October 11th incident. See Rule 104(b) of the Federal Rules of Evidence. In this Judge's view, the Secretary introduced sufficient evidence to fulfill this condition. Mr. Petsche, who was intimately familiar with the saw used on October 11th, testified that the saw shown in C-3, the guard in C-4, and blade in C-5 "looks like" those used on October 11th (Tr. 117). Also, Mr. Clark, who had observed the saw and blade used on

October 11th, testified that the saw in C-3 "looks identical" to the saw used on October 11th, and that the blade in C-5 "looks like the same blade". He also testified that the saw blade was in fragments after the October 11th accident (Tr. 140-141). Based on this testimony, and absent any contradictory evidence, the relevancy of Exhibits C-3 through C-7 was satisfactorily established, and Howard's motion to strike these exhibits is denied. Even if "looks identical" and "looks like the same" were deemed insufficent to establish that the saw, guard and blade shown in C-3 through C-7 were involved in the October 11th accident, the exhibits still would be admissible as illustrative of Mr. Petsche's and Mr. Clark's testimony.

A different ruling, however, is required for Exhibit C-8. As previously noted, the relevancy of Exhibit C-8 rested in the first instance on whether the saw in C-3 was AEG model WSD 2300S. The Secretary laid an appropriate preliminary foundation by establishing that the witness Blood through personal observation had personal knowledge that the saw in C-3 was the same as WSD 2300S (Tr. 71). On questioning by the Judge and cross-examination by Howard's counsel, however, it was brought out that no model number was distinguishable on the saw shown in C-3, that Mr. Blood's knowledge of the model number was obtained solely from what he was told by the owner of the saw, and that Mr. Blood did not personally know whether the saw in C-3 was a 1978 model (Tr. 73, 77). Due to Mr. Blood's proven lack of knowledge, his testimony that the saw in C-3 is the same model as shown in Exhibit C-8 must be stricken. Without any other evidence to establish this fact, Exhibit C-8 and any testimony of witness Blood concerning Exhibit C-8 also must be stricken for the Secretary's failure to establish Exhibit C-8's relevance.

## The Alleged Violations

### A. Citation No. 1 - Section 5(a)(1)

To establish that an employer has violated Section 5(a)(1), the Secretary must prove by a preponderance of the evidence: (1) that a hazard likely to cause death or serious bodily harm existed at the employer's workplace; (2) that the hazard was recognized as such either by that employer or generally within the industry, and (3) that there was a feasible method by which the employer could have abated the "recognized hazard." National Realty and Construction Company, Inc. v. O.S.H.R.C., 489 F.2d 1257 (D. C. Cir. 1973); Usery v. Marquette Cement Manufacturing Co., 568 F.2d 902 (2d Cir. 1977); Baroid Division of NL Industries, Inc., 660 F.2d 439 (10th Cir. 1981).

Asked at the hearing to state the Secretary's theory of liability the Secretary's counsel indicated that the alleged recognized hazard was that an ". . . oversize blade was being used on a saw for which it was too large to be used" (Tr. 89).

Having identified the alleged recognized hazard, the burden was on the Secretary to prove by a preponderance of evidence that the use of the abrasive wheel installed by Howard on the borrowed AEG cut-off machine was hazardous due to the size of the blade.

Many of the relevant facts surrounding the fatal accident of October 11, 1979, are undisputed.

Approximately a week or 4 days before October 11, 1979, Howard's project manager and superintendent at the Eisenhower Tunnel work site, Mr. Stan Plucheck, instructed Mr. Herb Petsche, a Howard foreman, to proceed with the drilling of an opening in a concrete wall in the west ventilation

building into which a camera housing was to be installed by Howard. Previously, in August, Mr. Petsche, on instructions of Mr. Plucheck, had drilled through the wall and had determined it to be five inches thick (Tr. 98).

Mr. Plucheck provided Mr. Petsche with an AEG abrasive cut-off machine with a blade already installed. Mr. Petsche, in turn, gave the cut-off machine to Mr. John Riggs and told him to cut an opening in the wall. A short time later, Mr. Riggs returned and told Mr. Petsche that the blade was unable to "score" the concrete and showed him that the blade had worn down "to hardly anything" (Tr. 102).

Mr. Petsche then called Mr. Plucheck on the phone and advised him that the blade". . . wouldn't even touch the concrete and we just wore the blade down."

On October 10, Mr. Plucheck called Mr. Petsche and asked him, ". . .[W]hat's the maximum size we can put in that machine?" Mr. Petsche, in response, told Mr. Plucheck that the maximum size was 14 inches (Tr. 103). When Mr. Petsche arrived at work the next day there was a "new metal blade" on the machine. It was 14 inches in diameter (Tr. 118). Mr. Plucheck said, "Let's go ahead and cut that thing, we can still make money if we get it cut tonight" (Tr. 103). During the evening of Wednesday, October 10, John Riggs and Steve Romer, on the instructions of Mr. Petsche and with the cut-off machine and blade provided by Mr. Plucheck, started cutting the opening. They could only cut into the wall four and a half inches deep. They needed to cut five inches deep (Tr. 104).

Mr. Petsche believed that the opening could be completed by cutting the remainder of the opening from the outside of the wall (Tr. 104-105).

Mr. Petsche made preliminary arrangements to hire Weaver Construction's manlift at $55.00 an hour. This manlift would enable Howard employees to cut the opening from the outside (Tr. 105).

Early on the morning of Thursday, October 11, Mr. Petsche arrived at the work site. He told Mr. Plucheck that Weaver had a manlift that would permit them to cut the opening from the outside.

Mr. Plucheck, complaining about the level of the cut, said he wanted to go look at the cut again and left the trailer to go to the ventilation room. Later he met Mr. Petsche and told him that the opening was "out of square" and "you ought to get on them guys" (Tr. 108).

Back at the trailer, Mr. Plucheck told Mr. Petsche, "We don't need it (manlift) . . . Use that blade over there" (Tr. 112, 126-127). Because Mr. Petsche was under the mistaken impression the new blade was the same size, he attempted to explain to Mr. Plucheck that it was the flanges holding the blade that were preventing a deeper cut, not the size of the blade (Tr. 112). Mr. Plucheck responded, "Just take off the guard, it's a bigger blade, and it will cut that half-inch" (Tr. 113).

Mr. Plucheck helped Mr. Petsche remove the blade guard (Tr. 115-116). After Mr. Petsche put on the new blade, he left the Howard trailer to find someone to finish cutting the opening. He found Steve Romer. Mr. Petsche and Mr. Romer then went to the ventilation room. Mr. Romer plugged in the cut-off machine and turned it on (Tr. 120). When he touched the blade to the concrete, the blade shattered, cutting Mr. Romer fatally[4/] (Tr. 120, 129).

4/ Mr. Clark's description of Mr. Romer's injuries (Tr. 139-140) and the characterization, "fatality investigation" support the conclusion that Mr. Romer died.

To prove his theory that the use of the particular blade was hazardous due to its size and so recognized as hazardous by the construction industry, the Secretary relied on the manufacturer's specifications for an AEG abrasive cut-off machine, model No. WSD 2300S (Exhibit C-8), Mr. Blood's opinion that use of the 16-inch abrasive blade on the AEG cut-off machine on October 11 was hazardous (Tr. 62-69, 72), and Mr. Blood's testimony that industry recognizes that the blade shown in Exhibit C-7 (and used on October 11) was "too large to use on that particular saw (Tr. 72-73).

Although Mr. Blood's referenced opinions were admitted into evidence over Howard's objection of "competency" (Tr. 63-64, 72-73), they will not be credited or given any weight. Mr. Blood acknowledged he was not an expert on abrasive blades generally, nor an expert on the blade involved in the October 11 accident in particular. (Tr. 56, 58, 77-78). Further, his opinion in regard to the alleged size hazard is not based on personal perception or experience. Rather, his opinion in this regard is based solely on the manufacturer's specification in Exhibit C-8 that the "Max. Wheel Diameter" of AEG's 1978 model WSD 2300S cut-off machine is 14 inches, what he was told by an unidentified spokesman of the manufacturer, and the ANSI standard, B7.1-1970.

Exhibit C-8, of course, has been stricken for failure of the Secretary to establish its relevancy to this proceeding. As previously pointed out, Mr. Blood, the only foundation witness for Exhibit C-8, lacked personal knowledge that the AEG cut-off machine shown in Exhibit C-3 was a 1978 model WSD 2300S. But even if Exhibit C-8 is relevant and, therefore, admissible, it falls short of proving what the Secretary claims it does. The manufacturer's catalogue fails to explain what happens if an abrasive wheel or blade larger than 14 inches is used. And on this record, it is

just as reasonable to conclude that a maximum wheel diameter of 14 inches has been prescribed by the manufacturer because the cut-off machine's designed guard cannot accommodate a larger diameter wheel. Whether use of an unguarded abrasive blade on a cutting-off machine is a violation of the Act, of course, is the central issue of Citation No. 2, not Citation No. 1.

With respect to Mr. Blood's reliance on provisions of ANSI standard B7.1-1970, he never identified the provisions which supported his opinions, thereby making it impossible to evaluate their worth. Even the Secretary's counsel was unable to assist in this regard, and conceded he was not relying on an ANSI standard to support his theory of liability (Tr. 68).

The statements of the manufacturer's unidentified spokesman to Mr. Blood are hearsay. But more importantly, these statements are relevant only if the evidence establishes that a 1978 model WSD 2300S was the cut-off machine used in the October 11 cutting. For the same reasons that Exhibit C-8 was struck, any statements made by the manufacturer with respect to that model also must be disregarded. Moreover, even if a sufficient foundation had been laid to establish the relevance of the statements, this Judge would give them no weight because they are uncorroborated hearsay on a critical issue.

For the above reasons, the Secretary has failed to prove by a preponderance of evidence that the use of the 16-inch diameter blade on October 11 was hazardous due to the blade's size, or that either the construction industry or Howard recognizes such a use as hazardous. Absent this proof, Citation No. 1 must be vacated.

B. Citation No. 2 - 29 C.F.R. §1926.303(b)

Howard first argues that the standard at issue in Citation No. 2 is inapplicable because the cut-off machine used by Howard on October 11 is not a "grinding machine." This Judge disagrees and finds the standard applicable to the facts of this case.

Standard 29 C.F.R. §1926.303 is entitled, "Abrasive Wheels and Tools". All of the specific provisions of this section relate and refer to machines used for grinding or abrasive wheels or blades used to grind.

Section 1926.303(b) requires that grinding machines shall be equipped with safety guards in conformance with ANSI standard B7.1-1970, Safety Code for the Use, Care and Protection of Abrasive Wheels. As pointed out by the Secretary in his brief, the "scope" section of this ANSI standard (§1.1) provides that "[t]his code sets forth the rules and requirements for safety on the use of abrasive wheels. . ." and Section 1.2.2 of this same standard defines an abrasive wheel as a "cutting tool. . .".

Because the ANSI standard covers and relates to "grinding" machines which use abrasive ("cutting") wheels, as well as to "cutting-off" machines which use abrasive ("grinding") wheels (See §4.3.3), it seems obvious that the ANSI standard's provisions are intended to apply regardless of whether the abrasive wheel is used to "grind" or "cut." Clearly, the adjectives "cutting" and "grinding" are used interchangeably and are equivalent in meaning wherever found in the ANSI standard.

By referencing in §1926.303(b), §1926.303(d), which requires that all abrasive wheels and tools meet "other applicable" requirements of

ANSI standard B7.1-1970, the Secretary plainly indicated his intent to incorporate into §1926.303(b) all of the applicable guarding requirements of B.71-1970. Because B7.1-1970 specifically requires a cutting-off machine to be guarded, so does §1926.303(b). To read and interpret §1926.303(b) as not requiring guarding on abrasive wheel, cutting-off machines would fly in the face of reason and ignore the plain intent of the Secretary.

The evidence establishing a violation of §1926.303(b) is overwhelming. Section 3.2 of ANSI standard B7.1-1970 requires that grinding machines (also cutting-off machines) "shall" be equipped with safety guards in conformance with section 4. Section 4.1 provides that all abrasive wheels (with some designated exceptions, not applicable in this case) shall be used only on machines provided with safety guards. The following paragraphs of section 4 then describe the type of guards that must be used on particular wheels and machines. Section 4.3.3 prescribes the maximum angular exposure of the "grinding wheel" periphery and sides for the safety guards used on "cutting-off" machines.

The AEG abrasive cutting-off machine used by a Howard employee on October 17, 1979, was equipped with a safety guard. Howard's superintendent, however, ordered the guard removed and assisted in the guard's removal. He also provided and ordered the Howard foreman to install on the AEG cutting-off machine an abrasive wheel measuring approximately 16 inches in diameter. He knew the guard could not be reinstalled due to the wheel's size and knew this abrasive wheel was marked with the instruction "USE GUARD" (Tr. 56, Ex. C-5). Howard's superintendent then assigned Howard's foreman, Mr. Petsche, the task of completing the

cut in the concrete wall and instructed him how the cut should be made. The foreman asked Steve Romer, the Howard employee who had previously assisted in cutting the opening, to finish the cut.

The instant the abrasive wheel contacted the concrete it shattered, striking and fatally injuring Mr. Romer. The moment Mr. Romer attempted to cut the opening with a cutting-off machine unequipped with a safety guard, he committed a violation of §1926.303(b). The violation obviously was the direct result of Mr. Plucheck's orders. He removed the guard and gave the instructions to use the unguarded cutting-off machine.

Howard argues that, even assuming a violation, Howard cannot be held responsible or liable because there is no evidence that Howard knew of any dangerous condition or that it could have foreseen or prevented the same. Howard's contention is totally without merit. Contrary to Howard's view of the facts, the violation by Mr. Romer in this case was not an isolated incident of unforeseeable or idiosyncratic employee behavior. As previously pointed out, it was the direct result of the actions and orders of Howard's superintendent. Mr. Plucheck not only knew that the unguarded cutting machine was going to be used, he ordered its use.

Howard cites Mountain States Tel. & Tel. Co. v. Occupational Safety and Health Review Com., 623 F.2d 155 (10th Cir. 1980) in support of its claim that knowledge of any violation of §1926.303(b) "cannot be imputed" to the respondent. Howard's reliance on Mountain States Tel. & Tel. Co., however, is misplaced. Actually, the court's holding there supports the opposite conclusion. In that case, the court stated:

> "When a corporate employer entrusts to a supervisory employee its duty to assure employee compliance with safety standards, it is reasonable to charge the employer with the supervisor's knowledge--actual or constructive--of noncomplying conduct of a subordinate. Upon a showing of the supervisor's knowledge, it is not unreasonable to require the employer to defend by showing the failure to prevent violations by subordinates was unforeseeable."

Here, Howard's highest ranking supervisor at the work site knew that an employee was going to use an unguarded cutting-off machine. Not only did he fail to take steps to prevent the machine's use, he ordered it used in an unguarded condition. On these facts, the holding in Mountain States Tel. & Tel. Co. requires imputation of the supervisor's knowledge to Howard.

For similar reasons, the violation of §1926.303(b) is found to be "willful."

The Commission has found a violation to be willful when it is marked by careless disregard of a standard or of employee safety. According to the Commission, once careless disregard of employee safety has been established, the Secretary need not prove additionally that an employer knew that it was violating the Act. See John W. Eshelman and Sons Steel Erectors, Inc., 81 OSAHRC 18/D2, 9 BNA OSHC 1396, 1981 CCH OSHD ¶22,264, 25,231 (No. 76-5039, 1981).

Applying this test, Howard's violation obviously was willful. Howard's superintendent deliberately removed the guard despite the instruction on the abrasive wheel to "USE GUARD" and the urging of Foreman Petsche not to remove the guard (Tr. 138). Certainly, the superintendent's actions in this case demonstrate a blatant indifference to employee safety and, therefore, constitute "willful" conduct.

The proposed penalty of $8,000.00 also will be assessed. Based upon the criteria enumerated in section 17(j) of the Act, a substantial penalty is warranted. Howard employs 600 persons and cannot be classified as a small employer. Howard also has a past history of violations under the Act and apparently maintained no safety program at the Eisenhower Tunnel work site (Tr. 122, 141). Further, the violation was of the highest gravity. Finally, the deliberate exposure of an employee to a life-threatening hazard precludes any credit for good faith. On these facts, and in order to encourage Howard to imbue safety consciousness in its supervisors, the proposed penalty of $8,000 will be assessed.

## Findings of Fact

All findings of fact relevant and necessary to a determination of the contested issues have been found specifically and appear above. (See, Rule 52(a) of Federal Rules of Civil Procedure.) Proposed findings of fact inconsistent with this decision are denied.

## Conclusions of Law

1. The record establishes by a preponderance of the evidence that respondent committed a "willful" violation of 29 C.F.R. §1926.303(b), on October 11, 1979, with respect to its use of an unguarded abrasive AEG cutting-off machine.

2. A penalty of $8,000.00 for respondent's violation of 29 C.F.R. §1926.303(b) is appropriate.

3. Complainant has not shown by a preponderance of the evidence that use of an abrasive wheel measuring approximately 16 inches in diameter on October 11, 1979, was hazardous due to its size; or that the use of a wheel of that size constitutes a "recognized hazard", as those terms are used in

29 U.S.C. §654(a)(11). Therefore, complainant has not proven that respondent violated 29 U.S.C. 654(a)(1) as alleged in Citation No. 1, issued April 1, 1980.

## ORDER

Based upon the Findings of Fact, Conclusions of Law, and the entire record, it is ORDERED:

1. Citation No. 1, issued April 1, 1980, is VACATED.

2. Citation No. 2, issued April 1, 1980, is AFFIRMED, and a penalty of $8,000.00 ASSESSED.

James A. Cronin, Jr.
Judge, OSHRC

Dated: November 4, 1982

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

December 7, 1982

**IN REFERENCE TO SECRETARY OF LABOR v.**

BASF Wyandotte Corporation

**OSHRC DOCKET NO.** 79-0987

**NOTICE IS HEREBY GIVEN TO THE FOLLOWING:**

**OF** COMMISSION DECISION AND REMAND

**To wit:** See attached.

**FOR THE SECRETARY OF LABOR**

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Joe D. Sparks
Judge, OSHRC
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**FOR THE COMMISSION**

Ray H. Darling, Jr.

**RAY H. DARLING, JR.**
**EXECUTIVE SECRETARY**

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant | : | |
| v. | : | OSHRC Docket No. 79-987 |
| BASF WYANDOTTE CORPORATION, | : | |
| Respondent, | : | |
| OIL, CHEMICAL, & ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO-CLC LOCAL 4-620, | : | |
| Authorized Employee Respresentative. | : | |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE Commissioners.

BY THE COMMISSION:

This case is before the Commission on interlocutory appeal[1/] of Administrative Law Judge Joe D. Sparks' order disapproving a settlement between the Secretary of Labor and Respondent, BASF Wyandotte Corporation ("BASF"). The Oil, Chemical and Atomic Workers International Union, Local 4-620 ("the Union"), an authorized employee representative, objected to the settlement, claiming that the settlement would not abate the principal hazard in this case. Judge Sparks held that the settlement agreement could not be approved because it allowed an item of the citation to be withdrawn without affording the Union an opportunity to be heard on the merits. We reverse Judge Sparks' deci-

1/ See Commission Rule 75, 29 C.F.R. § 2200.75.

sion and remand for specific findings on whether the settlement is consistent with the provisions and objectives of the Act.

I

At BASF's chemical production plant, chlorine gas is produced by an electrolytic process in devices referred to as chlorine cells. The chlorine cells, which are approximately five feet high, three feet wide and about ten feet long, are set in long rows with catwalks running between the rows to provide workers access to the cells. The cells, which contain exposed, energized electrical parts, are located in two huge rooms with each room containing 156 cells. While in the cell room, the employees are protected against electric shock by rubber gloves and boots. Warning signs are posted on the doors of the cell rooms and the rooms are restricted to authorized personnel.

On September 18, 1978 John Courtney, a BASF employee, was accidentally electrocuted. There were no eyewitnesses to the incident, but apparently Courtney stepped into a 4-1/4 inch by 16-1/2 inch floor hole beside the step leading to an elevated catwalk in the chlorine cell room, lost his balance, tumbled from the narrow elevated catwalk and came in contact with the live portion of a chlorine cell. Shortly after the incident, BASF repaired the floor hole. The decedent was a qualified cell room operator.

The Secretary issued a single citation alleging willful violations of 29 C.F.R. § 1910.23(a)(8) (a floor hole standard) and 29 C.F.R. § 1910.309(a), incorporating section 110-17(a) of the National Electric Code (the guarding of live electrical parts).

Shortly after the citation was issued, the Secretary and BASF engaged in settlement talks. The Secretary kept the Union up to date

with the settlement negotiations and the Union suggested employees the Secretary might depose for the case. The Union and BASF also engaged in unsuccessful settlement negotiations of their own. Eventually, BASF and the Secretary entered into a settlement agreement. BASF agreed to accept a serious violation of the floor hole standard and the Secretary agreed to withdraw the part of the citation concerned with BASF's alleged failure to guard live electrical parts.[2/] The Union objected to this settlement and a hearing was held on whether the settlement should be approved. In disapproving the agreement, Judge Sparks did not rely on any evidence presented at the hearing but held, as a matter of law, that a settlement agreement which withdraws an item of a citation cannot be approved over the objection of an employee party.

II

Recently, the Commission held that an employee party is entitled to be heard on any objection it has to a settlement agreement between the Secretary and the employer. Mobil Oil Corp., 82 OSAHRC , 10 BNA OSHC 1905, 1982 CCH OSHD ¶ 26,187 (No. 77-4386, 1982). The Commis-

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2/ The Secretary offered to withdraw the second citation because the facts seemed to indicate that BASF was in compliance with the NEC. The pertinent portions of the NEC provide:

> 110-17. Guarding of Live Parts. (Not more than 600 Volts)
>
> (a) Except as elsewhere required or permitted by this Code, live parts of electrical equipment operating at 50 volts or more shall be guarded against accidental contact by approved cabinets or other forms of approved enclosures, or any of the following means:
>
> (1) By location in a room, vault, or similar enclosure which is accessible only to qualified persons.

The cell rooms had warning signs and were restricted to authorized personnel.

sion stated that the judge must hear the objections of an employee party in order to determine if the settlement agreement is consistent with the provisions and objectives of the Act. See Mobil Oil, supra, and Commission Rule of Procedure 100, 29 C.F.R. § 2200.100.

The overriding purpose of the Act is the elimination of conditions hazardous to employees. In general, a settlement agreement that leaves a serious hazard uncorrected will not be consistent with this objective and should not be approved. Mobil Oil Corp., supra. In this case, the crux of the Union's objection is that the settlement agreement, by deleting the item involving unguarded electrical parts, leaves uncorrected the electrocution hazard that has already proven fatal to one employee.

If the judge determines that the Union's objections have merit, and the settlement agreement is inconsistent with the purpose of the Act, then the judge should disapprove the settlement. Since Judge Sparks made no specific findings concerning the merits of the Union's objections, the case must be remanded for such findings.[3/] If the judge

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3/ In determining whether the Union's objection has merit, the judge must consider several factors. He must first decide whether the conditions at BASF's workplace, which will remain unabated if the settlement agreement is approved, are in fact hazardous to employees. If so, he must inquire into whether there exists a statutory basis for requiring the abatement of the hazard. In this case, the Union does not contend that BASF violated the electrical standard cited by the Secretary, but argues that BASF violated section 5(a)(1) of the Act. In determining whether the case should proceed on the merits, the judge must determine whether amendment to a section 5(a)(1) charge is appropriate.

Section 5(a)(1), 29 U.S.C. § 654(a)(1), provides:

> Sec. 5.(a) Each employer —
>
> (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

disapproves the agreement, the case should proceed on the merits.[4/]

The case is remanded to Judge Sparks for specific findings on the Union's objections and for further proceedings as necessary.[5/] SO ORDERED.[6/]

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: DEC 7 1982

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4/ Commissioner Cleary would have the judge approve the settlement only if he concludes that the Union's objections are without merit as a matter of law. If the judge finds merit in the objections, he should deny the Secretary's motion and schedule the case for a hearing. If the Secretary does not appear at the hearing to prosecute the citation, the judge should permit the Union to prosecute if it chooses to do so. Cuyahoga Valley Railway Co., 82 OSHARC , 10 BNA OSHC 2156, 1982 CCH OSHD ¶ 26,296, (No. 76-1188, 1982) (concurring opinion). Commissioner Cottine presumes that the Secretary will proceed appropriately on the merits if the settlement agreement is disapproved. Mobil Oil Corp., 10 BNA OSHC at 1916 n. 30, 1982 CCH OSHD at p. 33,030 n. 30; see Dunlop v. Bachowski, 421 U.S. 560, 574-6 (1975).

5/ Since Judge Sparks has already held a hearing concerning whether the settlement agreement should be approved, it may not be necessary to request any further evidence. Should Judge Sparks determine that more evidence is needed, the Commission would encourage the use of less formal means of fact finding such as depositions and affidavits.

6/ Chairman Rowland adheres to his position in Mobil Oil Corp., supra (dissenting opinion), and in Cuyahoga Valley Railway Co., supra note 4, 10 BNA OSHC at 2158 n. 5, 1982 CCH OSHD at p. 33,229 n. 5. The Chairman believes that except where the abatement date is an issue, the terms of a settlement agreement lie within the prosecutorial discretion of the Secretary. Hence, the withdrawal of a citation in a settlement by the Secretary is not subject to review by the Commission. Chairman Rowland notes further that in this case remand to the judge is particularly inappropriate since the judge concluded that but for the objection of the union, the agreement would have been approved as consistent with the objectives of the Act.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 400

ATLANTA, GEORGIA 30309

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>BASF WYANDOTTE CORPORATION,<br><br>Respondent,<br><br>OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, LOCAL NO. 4-620,<br><br>Authorized Employee Representative. | ) | OSHRC Docket No. 79-987 |

## ORDER CERTIFYING INTERLOCULATORY APPEAL

A Settlement Agreement, executed by the complainant and respondent, was received September 28, 1979 (J-26). On October 2, 1979, Mr. Steven Wodka, International Representative of the captioned union, formally stated its objections to the settlement agreement (J-30).

A hearing was held in Baton Rouge, Louisiana, on October 23, 1979, to hear testimony and argument on the issue of whether the settlement agreement should be approved.

An Order entered December 5, 1979, ruled that the settlement agreement could not be approved since it provided for the withdrawal of one alleged violation over the objections of the union. It thereby denied the union an opportunity to be heard on the merits and was held to conflict with the rationale of IMC Chemical Group, Inc., 78 OSHRC 95/C14, 6 BNA OSHC 2075, 1978 CCH OSHD ¶23,149 (Docket No. 76-4761). Except for the objections by the union, the settlement agreement would have been approved as consistent with the objectives of the Act

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and in conformity with Dawson Brothers Mechanical Contrators, 72 OSHRC 5/B8(1/386), 1 BNA OSHC 1024, 1971-73 CCH OSHD ¶15,039 (Docket No. 12, 1972).

Complainant and respondent moved for an order certifying the ruling for an interlocutory appeal.

Pursuant to Commission Rule 75 I find and certify that:

(1) the ruling involves an important question of law concerning which there is substantial ground for difference of opinion; and

(2) an immediate appeal from the ruling will materially expediate the proceedings.

Accordingly, the motion is granted and the Interlocutory Appeal is hereby certified.

Dated this 19th day of December 1979.

Joe D. Sparks

JOE D. SPARKS
Judge

Copies sent by first class mail to:

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Local 4-620 OCAWIU
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Prairieville, Louisiana 70769

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FOR

PROPER PAGINATION

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FOR

PROPER PAGINATION

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

Secretary of Labor v. WAUPACA FOUNDRY, INC.
OSHRC Docket No. 81-1543, 81-1749 & 81-1750

1. Enclosed is a copy of my decision. It will be filed with the Commission on November 15, 1982, and will become the final order of the Commission on December 15, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is December 15, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

Richard J. Murphy
Judge, OSHRC

Date: October 26, 1982

OSHRC FORM 97

11-15 / 12-15/82

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v | : | OSHRC Docket Nos. 81-1543 |
| | | 81-1749 |
| WAUPACA FOUNDRY, INC., | : | 81-1750 |
| Respondent. | : | |

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For Respondent.

## DECISION AND ORDER

Murphy, Judge

Respondent, Waupaca Foundry, Inc., (Waupaca) operates grey iron foundries at Marinette and Waupaca, Wisconsin. On April 28, 1981, a compliance officer of the Occupational Safety and Health Administration (OSHA) made an inspection of the Marinette plant and on May 13, 1981, inspected Respondent's Plants 1, 2 and 3 in Waupaca.

As a result of these inspections Respondent was issued citations which became the subjects of the complaints in this proceeding. Docket No. 81-1543 is the complaint concerning the Marinette plant. Docket No. 81-1749 concerns Plants 2 and 3 at Waupaca, and Docket No. 81-1750 concerns Plant 1 at Waupaca. Each complaint alleges numerous violations of the Occupational Safety and Health Act of 1970 (29 U.S.C.651 et seq) (Act) as described in several multi-item citations. The parties have settled most of the issues raised by the complaints[1/] and have filed a partial settlement agreement in each case. Those agreements, dated August 16, 1982, have been posted as required by Rules 7 and 100 of the Commission's Rules of Procedure, 29 CFR 2200. No objections to those settlement agreements has been made by or on behalf of Respondent's employees. Those agreements are approved.

As a result of the amendments to the pleadings made by the partial settlement agreements the only contested issues presented for disposition are whether Respondent violated Section 5(a)(2) of the Act by failing to guard portable hand held grinders used in its Marinette and Waupaca foundries[2/] as required by 29 CFR 1910.243(c)(1). That safety standard, with limited exceptions, provides that portable abrasive wheels shall be used for exterior grinding only on machines provided with safety guards.

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1/ Respondent admitted that had employees at workplaces at its Marinette and Waupaca foundries and that it was engaged in a business affecting commerce within the meaning of Section 3(5) of the Act. It is found and concluded that this Commission has jurisdiction in this case under Section 10(a) of the Act.

2/ Item 4 of Citation 1 in Docket No. 81-1543(Marinette Plant); Item 7 of Citation 1 in Docket No. 81-1749 (Waupaca Plants 2 and 3); and Item 4 of Citation 1 in Docket No. 81-1750 (Waupaca Plant 1) contain the only disputed allegations of unlawfulness.

## COMPLAINANT'S CASE

The inspections that resulted in the instant complaints were made by Gordon C. Krohn, an OSHA compliance officer. Mr. Krohn testified that during the course of those inspections he observed grinding performed on external surfaces of castings by hand held grinders which did not have guards on the abrasive wheels. Complainant's Exhibits 2 (Marinette Plant); 4 (Waupaca Plant 1); and 5, 6, 7, and 9 (Waupaca Plants 2 and 3) are photographs taken by Mr. Krohn during the course of his inspections which show employees operating unguarded hand held grinders on external surfaces. Complainant's Exhibits 3 (Waupaca Plant 1) and 8 (Waupaca Plants 2 and 3) are photographs also taken by Mr. Krohn which show unguarded portable grinders available for use at locations other than those depicted in Complainant's Exhibits 2, 4, 5, 6, 7 and 9.

The unguarded grinding wheel depicted in Complainant's Exhibit 8 bears the warning that it should not be used without a guard. Also Complainant's Exhibits 11 and 12 which are reproductions of portions of catalogues of Chicago Pneumatic and Ingersoll-Rand, two major manufacturers of portable hand operated grinders, stress the importance of guarding. The Ingersoll-Rand grinder features an integrated guard which prevents tool operation when the guard is removed. The Chicago Pneumatic catalogue refers to the American National Standard Institute safety code which specifies the guarding requirement.

In the opinion of Mr. Krohn the hazard to the employee operating an unguarded grinder or to other employees in the area is the hazard of deep puncture wounds, potential amputation, loss of sight and possibly death if a wheel fragment should puncture a vital organ. The injuries would be caused by shattering of an abrasive wheel or by accidental contact with a wheel. Mr. Krohn had personal knowledge of a severe leg injury and loss of an eye as a result of grinding wheel explosions.

The fact that hand held portable grinders without guards were used for grinding external surfaces is established by testimony of Mr. Krohn and the photographs he took during the inspections. Employee access to the hazard is proven by those pictures which show employees holding the grinders during the grinding process. The seriousness of the injuries that could occur from fracture or explosion of an unguarded grinding wheel is established by witness Krohn's testimony. Respondent had actual knowledge of the fact that its grinders were operated without a guard.

In Hermitage Concrete Pipe Co., 10 OSHC 1517 (1982), the Commission stated the requirements of Section 17(k) as follows:

> ". . . In order to establish a serious violation of the Act, the Secretary must establish that (1) death or serious physical harm could result if the standard is violated, and (2) that the employer has actual or constructive knowledge of the violative condition.(1518)."

I find that in each case here Complainant has made a prima facie showing that Respondent failed to comply with 29 CFR 1910.243(c)(1). That failure is a serious violation of the Act under the criteria of the Hermitage case and as defined in Section 17(k) of the Act.

## Respondent's Defense

At the hearing Respondent did not contest the fact that its portable hand held grinders were unguarded and neither at the hearing nor on brief did Respondent contend that the unguarded grinders specified in the complainants are in compliance with 29 CFR 1910.243(c)(1). Rather Waupaca's defense is based on two independent theories. First, Respondent argues that its violation, if any, is de minimus for the reason that because of the safety measures in effect at Waupaca's foundries the failure to guard the portable grinders has only a negligible relationship to employee safety. Second, Respondent advances the affirmative defense of impossibility of compliance arguing that due to the nature of the castings being ground it is impossible to guard the portable grinders and still perform the necessary work.

## The De Minimus Defense

Respondents cites the well established principle that where a violation has only a negligible or trifling relationship to employee safety the Commission may classify the violation as de minimus and neither assess a penalty nor order abatement [3/] and refers to cases in which the Commission

3/ Continental Oil Company, 7 OSHC 1432, 1433(1979); Alton Box Board Company, 9 OSHC 1846, 1847(1981); General Motors Corporation, 9 OSHC 1575, 1577(1981); Clifford B. Hannay & Son, Inc., 6 OSHC 1335, 1337(1978); National Rolling Mills Company. 4 OSHC 1719, 1720(1976).

regarded practices in employer's plants sufficient to eliminate hazard and therefore justify a de minimus holding.[4/]

In its necessary effort to show that the failure to guard its portable hand held grinding wheels had no appreciable effect on employee safety Respondent relies on its safety record and on its safety practices.

Respondent presented Greg Marvelas, its safety director, who testified that Respondent has a relatively low injury rate, being fifty or sixty percent of the grey iron foundry industry average, and that its injury experience is reflected in favorable workmans compensation insurance rates. Waupaca maintains a log of injuries. That log does not list any injuries caused by a shattering grinding wheel since 1971 when the record was initiated.

Mr. Marvelas also described Waupaca's practices in handling the grinding wheels. Mr. Marvelas recognizes that a grinding wheel could shatter in use if it were flawed, damaged in handling or in use, improperly mounted on the grinder, or mounted on a grinder with a faster RPM than that for which the abrasive stone was designed. Mr. Marvelas described the inspection, handling, storage and testing procedures employed by Respondent to prevent use of defective abrasive wheels which would be likely to explode. Ronald L. Pagel, Production Foreman of Respondent's Plant 2 Mill Room, described the safety training and safety practices in his department.

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4/ National Rolling Mills Company, supra N3; Ray Boyd Plaster & Tile, Inc., 6 OSHC 1648, 1653, (1978); Southwestern Electric Power Company, 8 OSHC 1974, (1980).

While it appears from the testimony of Respondent's witnesses Marvelas and Pagel in regard to Respondent's work practices and from Respondent's safety record that Respondent is concerned about safety and sincerely works to provide a safe workplace, the record does not show that the failure to comply with the guarding requirement of 29 CFR 1910.243(c)(1), has an insignificant or de minimus effect on employee safety.

The absence of serious accidents caused by unguarded portable grinders, while perhaps a sine qua non for a de minimus finding (see Continental Oil Company, supra), does not establish the absense of the hazard. A. E. Burgess Leather Company, Inc. 5 OSHC 1096(1977), sustained 576 F 2d 948 (1st Cir. 1978). A hazard requiring abatement may exist in the absense of recorded injuries, Arkansas-Best Freight Systems, Inc., 529 F2d 649 (8th Cir. 1976). One of the purposes of the Act is to prevent the first accident.

Also Respondent's procedure for handling and testing grinding wheels before using them is the type of practice required by 29 CFR 1910.243(c)(5) which sets forth the safety standard for mounting and inspection of abrasive wheels. The standards require that abrasive grinding wheels be inspected and be installed properly on portable hand held grinders to minimize the possibility of wheel explosion or shattering while in operation; and as a further safety measure require that the grinding wheels be guarded to protect employees in the event that in spite of inspection and proper installation a wheel should shatter or explode. In view of the seriousness

of the injury that could result from such an incident and the possibility of an accident in spite of the care exercised by Respondent[5/] I find that the presence of guards on the portable grinders in Respondent's foundries would have more than a trifling, unsubstantial or de minimus effect on employee safety.

For these reasons I hold that this is not a case in which the failure to comply with the standard can be characterized as a de minimus omission.

## The Impossibility Defense

Respondent's evidence in support of its affirmative defense of impossibility of compliance is submitted through the testimony of Mr. Marvelas, and Mr. Pagel. Mr. Pagel's testimony relates exclusively to the grinding operations in his department and Mr. Marvelas, while specific in respect to Plant 2 Mill Room, only described in most general terms the grinding operations in other plants. The Exhibits introduced by Respondent on the impossibility issue (Respondent's Exhibits 1 through 14) are of castings, a grinder, and operations in the Plant 2 Mill Room. On brief respondent states that the grinding practices at each plant differ according to the type of castings produced in each plant (P3). In view of that statement the evidence submitted in support of its impossibility of compliance defense for Plant 2 Mill Room can not be considered as applicable to other operations. Therefore, I find that Respondent has not met its burden of proof on this affirmative deference

5/ Grinding wheels have shattered at Waupaca Plants in the past (Tr 109A).

in respect to the Marinette Plant (Docket No. 81-1543); Waupaca Plant 1 (Docket No. 81-1750); and Waupaca Plant 3 (one of the Plants in Docket No. 81-1749).[6/]

The remaining issue on this defense is whether the evidence submitted by respondent validates its impossibility of compliance defense for Plant 2 Mill Room. In order to establish the defense, an employer must show that (1) compliance with the standard, i.e., in this case guarding of portable grinders, would preclude performance of required work and (2) that the employer used reasonable alternative means to protect its employees. M. J. Lee Construction Co., 7 OSHC 1140, 1144-46 (1979).

Plant 2 produces castings which range from 60 pounds to 300 pounds with the most typical size being from 100 to 200 pounds. (Tr. 91) Virtually all casting grinding in Plant 2 Mill Room is performed by portable cup grinders. ( Tr. 117) These grinders are used to grind the internal cavity of the casting and also to grind the outside of the castings. 98 percent of the grinding at Plant 2 is done with portable cup grinders of which 45 to 50 percent is external (Tr. 117) Portable cup grinders are the type of grinder which the standard, 29 CFR 1910.243(c)(1), requires be guarded if used for external grinding.

The two castings shown in Respondent's Exhibits 1 and 2 are produced in Plant 2. They weigh 121 and 118 pounds respectively. (Tr. 121). The casting shown in Respondent's Exhibit 1 is the casting shown in

6/ On reply brief (Fn P 6) Respondent limited its reliance on the impossibility defense to production operations in the Mill Rooms of its plants 1, 2 and 3 at Waupaca.

Respondent's Exhibits 3 through 10. The casting shown in Respondent's Exhibits 12, 13 and 14 is the same type as the casting shown in Exhibits 3 through 10.

Mr. Marvelas testified that unguarded cup grinders are used on the outside of castings for the reason that the entire periphery of the casting can be ground in one motion as compared to several if a guard is used (Tr 94) Respondent's Exhibits 3 through 8 show the continuous motion of grinding the periphery of the casting with an unguarded tool. Respondent's Exhibits 9 and 10 show internal grinding being done with the same tool. Mr. Marvelas discussed Respondent's Exhibits 12 and 13 and stated that they depict the same employee attempting to grind the outside periphery of the casting with a guarded portable cup grinder and that No. 14 depicts the employee attempting internal grinding of the casting with the same guarded tool. Mr. Pagel also reviewed these exhibits and expressed the opinion that employees in his department could not grind the castings with guards on the portable grinders.

The weakness of Respondent's evidence on this defense is that at best it shows that Respondent may have to change its grinding procedures on one type of casting.[7/] The regulation does not require respondent to guard portable grinders used for internal grinding. Respondent may be required to supply two grinders for its employees, one for internal and one for external grinding, as guards are not required on grinders used for internal grinding.

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7/ Respondent did not submit evidence to show that external grinding could not be done with guarded grinders on the type of casting shown in Complainant's Exhibit 6 which was produced in the Plant 2 Mill Room (Tr. 44).

In summary, Respondent limited its evidence on its impossibility of compliance defense to one of the four foundries involved here and submitted evidence as to the impossibility of using a guarded grinder for grinding external surfaces of only one of the types of castings produced at that plant. I find that Respondent has demonstrated that for one of the types of castings ground in the Plant 2 Mill Room compliance with the 29 CFR 1910.243(c)(1) requirement that grinding wheels be guarded when used on external surfaces may require Respondent to change its operations somewhat and therefore may inconvenience Respondent. However that showing of inconvenience is not tantamount to showing that guarding would preclude the performance of the required grinding of exterior surfaces of that type of casting. For these reasons I find that Respondent has failed to satisfy its burden of proof on its impossibility of compliance defense.

## Penalties

Complainant proposes penalties of $540.00 in Docket No. 81-1543; $730.00 in Docket No. 81-1749; and $630.00 in Docket No. 81-1750 for the violations of 29 CFR 1910.243(c)(1) discussed heretofore. Giving consideration to Respondent's safety practices and its good safety record along with the other criteria set forth in Section 17(j) of the Act, I find that the penalty should be reduced to $350.00 in each case.

## ORDER

The settlement agreements dated August 16, 1982, in Dockets Nos. 81-1543, 81-1749 and 81-1750 are approved; the request of the parties that the pleadings be amended to conform to those settlement agreements is granted; and the civil penalties to which the parties have agreed are imposed.

Item 4 of serious citation 1 in Docket No. 81-1543 is affirmed and a civil penalty of $350.00 is imposed.

Item 7 of serious citation 1 in Docket No. 81-1749 is affirmed and a civil penalty of $350.00 is imposed.

Item 4 of serious citation 1 in Docket No. 81-1750 is affirmed and a civil penalty of $350.00 is imposed.

Richard J. Murphy
Judge, OSHRC

Dated: November 15, 1982

Chicago, Illinois

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| | (Judge's decision) | | 69/D1 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

December 17, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Sun Ship, Inc.

OSHRC DOCKET NO. 16118

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION And REMAND

To wit: See attached.

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-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 16118 |
| SUN SHIP, INC., | : | |
| Respondent. | : | |
| | : | |

DECISION

Before ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

The occupational noise standard at 29 C.F.R. § 1910.95(b)(1)[1/] requires that "feasible" administrative or engineering controls be implemented to reduce excessive noise levels. This case involves the meaning of the word "feasible" as it is used in the standard. In Continental Can Co., 76 OSAHRC 109/A2, 4 BNA OSHC 1541, 1976-77 CCH OSHD ¶ 21,009 (No.

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1/ 29 C.F.R. § 1910.95(b)(1) provides:

§ 1910.95 Occupational noise exposure.

* * *

(b)(1) When employees are subjected to sound exceeding those listed in Table G-16, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table.

* * *

(continued on next page)

3973, 1976), appeal withdrawn, No. 76-3229 (9th Cir. Apr. 26, 1977) ("Continental Can"), the Commission first interpreted "feasible" in the noise standard. A divided Commission held that the word must be interpreted "to effectuate the Congressional purposes underlying the Act,"[2/] 4 BNA OSHC at 1546, 1976-77 CCH OSHD at p. 25,255, and reasoned that this means a cost-benefit analysis is required. The Commission stated: "In determining whether controls are economically feasible, all relevant cost and benefit factors must be weighed." 4 BNA OSHC at 1547, 1976-77 CCH OSHD at p. 25,256.

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1/ (continued)

TABLE G-16—PERMISSIBLE NOISE EXPOSURES[1]

| Duration per day, hours | Sound level dBA slow response |
|---|---|
| 8 | 90 |
| 6 | 92 |
| 4 | 95 |
| 3 | 97 |
| 2 | 100 |
| 1-1/2 | 102 |
| 1 | 105 |
| 1/2 | 110 |
| 1/4 or less | 115 |

[1] When the daily noise exposure is composed of two or more periods of noise exposure of different levels, their combined effect should be considered, rather than the individual effect of each. If the sum of the following fractions: $C_1/T_1 + C_2/T_2$ $C_n/T_n$ exceeds unity, then, the mixed exposure should be considered to exceed the limit value. $C_n$ indicates the total time of exposure at a specified noise level, and $T_n$ indicates the total time of exposure permitted at that level.

Exposure to impulsive or impact noise should not exceed 140 dBA peak sound pressure level.

2/ The Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act" or "the OSH Act").

This holding of Continental Can has remained Commission precedent. Samson Paper Bag Co., 80 OSAHRC 60/A2, 8 BNA OSHC 1515, 1980 CCH OSHD ¶ 24,555 (No. 76-222, 1980). However, the Supreme Court has since interpreted the word "feasible" in section 6(b)(5)[3/] of the Act and held that "feasible" does not require, and indeed precludes, a weighing of costs and benefits. American Textile Manufacturers Institute, Inc. v. Donovan, 101 S.Ct. 2478 (1981) ("ATMI"). The Court held that "feasible" means "capable of being done" or "achievable" and that Congress intended employee health to outweigh "all other considerations save those making the attainment of this 'benefit' unachievable." 101 S.Ct. at 2490.

In this case, we consider the impact of the Supreme Court's decision in ATMI on the Commission's interpretation of the noise standard in Continental Can. For the following reasons, we hold that the interpretation in Continental Can was erroneous.

I

Sun Ship, Inc. operates a shipyard in Chester, Pennsylvania. In September, 1975, a United States Department of Labor compliance officer inspected the plant and measured the noise to which one blacksmith was exposed during his work shift. Because the compliance officer found excessive noise exposure, Sun Ship received a citation alleging noncompliance with the noise standard, section 1910.95(b)(1).

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3/ Section 6(b)(5), 29 U.S.C. § 655(b)(5), of the Act provides in pertinent part:

> The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity. . . .

At the hearing, the Secretary proposed engineering controls to reduce the excessive noise. An expert, a consulting engineer with experience in noise control, testified about the controls and the costs involved in implementing them. He gave a figure representing the cost of fabricating the controls but he did not quantify any indirect costs, such as any loss of productivity, incidental to using the controls.

At the close of the Secretary's case, Sun Ship moved to dismiss the charges on the basis that the Secretary's case was insufficient. Sun Ship argued that the Secretary failed to meet his burden of proof under Continental Can, supra, because he failed to demonstrate indirect costs. Administrative Law Judge William E. Brennan, before whom the case was tried, granted Sun Ship's motion to dismiss. He concluded that the Secretary failed to meet the burden of proof imposed by Continental Can since he did not establish the indirect costs of the engineering controls.

The Secretary filed a petition for discretionary review which Commissioner Cleary granted.[4/] The Commission subsequently issued the following briefing order:

> (1) What impact, if any, does the United States Supreme Court decision in American Textile Manufacturers Institute, Inc. v. Donovan . . . have on the Commission interpretation of 29 C.F.R. § 1910.95 (b)(1) set forth in . . . Continental Can Co. . . .
>
> (2) What impact, if any, does the decision in Carnation Co. v. Secretary of Labor, 641 F.2d 801 (9th

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4/ The case is before the Commission pursuant to § 12(j) of the Act, 29 U.S.C. § 661(i). Prior to the Supreme Court's decision in ATMI, the parties filed briefs with the Commission. The Secretary contended that Continental Can was wrongly decided and that, under a proper burden of proof, his case was sufficient. Sun Ship contended that the Secretary's case was insufficient under Continental Can and therefore was properly dismissed.

Cir. 1981), have on whether the Secretary established a prima facie case that Respondent violated 29 C.F.R. § 1910.95(b)(1)?5/

Sun Ship argues that ATMI does not affect Continental Can because ATMI involved a section 6(b)(5)6/ rather than a section 6(a)7/ standard, ATMI involved a life-threatening hazard, and under ATMI cost-benefit may be used to determine the feasible abatement to reach a given exposure level. The Secretary argues that ATMI requires Continental Can to be overruled. In the Secretary's view, "feasible" must be given the same meaning in the noise standard as in section 6(b)(5). Also, the

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5/ Sun Ship argued to the judge and on review that the Secretary was required, as a part of his prima facie case, to establish the feasibility of the proposed engineering controls for all other, similar operations performed in Sun Ship's facility, not just the feasibility of controls for the one cited operation. A similar claim was made in Carnation Co. v. Secretary of Labor. The Court of Appeals for the Ninth Circuit held that the employer must be given the opportunity to show "that a piecemeal approach differs significantly from a plant-wide approach," 641 F.2d at 805, and that, if the employer shows there would be significantly different results, then the Secretary must show that his controls are feasible for the entire plant.

6/ Section 6(b) authorizes the Secretary to adopt safety and health standards after notice and an opportunity to comment. See §§ 6(b)(2)-(4). Section 6(b)(5) contains specific requirements imposed on "[t]he Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection. . . ." In ATMI the Supreme Court reviewed a standard regulating exposure to cotton dust which was adopted pursuant to § 6(b)(5).

7/ Section 6(a) authorized the Secretary to adopt safety and health standards without regard to other requirements for notice and comment rulemaking proceedings in the Administrative Procedure Act, 5 U.S.C. §§ 551-706, and in this Act. The authority was limited to the two years following the effective date of the Act and concerned adoption of national consensus standards, see 29 U.S.C. § 652(9), and established federal standards, see 29 U.S.C. § 652(10). See generally S.Rep. No. 1282, 91st Cong., 2d Sess., at 5-6, reprinted in Legislative History of the Occupational Safety and Health Act of 1970, at 145-46 (1971). The noise standard, § 1910.95, was an established federal standard adopted as an occupational safety and health standard pursuant to § 6(a). The standard was originally promulgated by the Secretary under the Walsh-Healey Act, 41 U.S.C. §§ 35-45.

Act does not require a cost-benefit analysis for a standard adopted under section 6(a).

II

In ATMI the Supreme Court interpreted the language of section 6(b)(5) which states:

> The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity. . . .

The Court was confronted with an industry challenge to a standard regulating employee exposure to cotton dust. The standard was adopted by the Secretary under section 6(b)(5) and the industry parties contended that the Act requires the Secretary to balance costs and benefits when promulgating a standard under this section.

Focusing on the phrase "to the extent feasible," the Court held that "feasible" means "capable of being done" or "achievable." 101 S.Ct. at 2490, 2494. The Court looked to the "plain meaning" of the word — the common definition. The Court also examined other statutes and found that "[w]hen Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute." 101 S.Ct. at 2491. From this, the Court concluded that, in view of the common definition of "feasible," the word as used by Congress in section 6(b)(5) cannot be understood to impose a requirement for cost-benefit analysis. In addition, the Court reviewed the legislative history of the Act and concluded:

> The legislative history of the Act, while concededly not crystal clear, provides general support for . . . [the conclusion that 'feasible' does not require

> cost-benefit analysis]. The congressional reports and debates certainly confirm that Congress meant 'feasible' and nothing else in using that term. Congress was concerned that the Act might be thought to require achievement of absolute safety, an impossible standard, and therefore insisted that health and safety goals be capable of economic and technological accomplishment. Perhaps most telling is the absence of any indication whatsoever that Congress intended OSHA to conduct its own cost-benefit analysis before promulgating a toxic material or harmful physical agent standard. The legislative history demonstrates conclusively that Congress was fully aware that the Act would impose real and substantial costs of compliance on industry, and believed that such costs were part of the cost of doing business.

101 S.Ct. at 2493. The Court specifically concluded from its examination of the congressional discussions of general costs and general employee benefits:

> Nowhere is there any indication that Congress contemplated a different balancing by OSHA of the benefits of worker health and safety against the costs of achieving them. Indeed Congress thought that the <u>financial costs</u> of health and safety problems in the workplace were as large or larger than the <u>financial costs</u> of eliminating these problems. In its statement of findings and declaration of purpose encompassed in the Act itself, Congress announced that 'personal injuries and illnesses arising out of work situations impose a substantial burden upon, and are a hinderance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.' 29 U.S.C. § 651(a).

101 S.Ct. at 2496-2497 (emphasis by the Court).

In sum, in <u>ATMI</u> the Supreme Court held that, because neither the Act nor its legislative history reveals that Congress intended to require a cost-benefit analysis as a part of rulemaking under section 6(b)(5), the word "feasible" in that section must be given its ordinary meaning -- that which is "achievable." Significantly, the Court determined that Congress, in enacting the Act, believed that the costs of employee injuries and illnesses were at least as great as, and likely greater than, the costs of

eliminating injuries and illnesses and that, therefore, the benefits of reduced injuries and illnesses generally justified the costs that would be incurred in doing so.

The Court's interpretation of "feasible" is limited, Sun Ship argues in this case, to standards promulgated under section 6(b)(5). Because the noise standard was promulgated under section 6(a) of the Act, see note 7 supra, and neither Congress nor the Secretary ever considered the balance of costs against benefits for this standard, Sun Ship argues that cost-benefit analysis should be required to enforce the standard. Accordingly, Sun Ship urges that the Commission adhere to Continental Can.

We find these arguments unpersuasive in light of the Court's decision. Clearly, the Supreme Court decided only the meaning of section 6(b)(5) and not whether cost-benefit analysis might be required for standards promulgated under other sections. See 101 S.Ct. at 2490 n. 29 and 2493 n. 32. However, the Supreme Court held that, because of the absence of any strong indication that Congress intended "feasible" to have a special meaning, "feasible" as used by Congress must be given its ordinary meaning. The Court further held that, under its ordinary meaning of "achievable," "feasible" cannot require cost-benefit analysis. See 101 S.Ct. at 2490, 2492. The Court thus decided that Congress did not intend to require cost-benefit analysis by using the word "feasible." The identical question of legislative intent is presented in interpreting the noise standard.

The pertinent language of the noise standard is: "When employees are subjected to sound exceeding those listed . . . , feasible administrative or engineering controls shall be utilized." The Secretary adopted this language in the noise standard because Congress directed that the Walsh-Healey standards, one of which was the noise standard,

be adopted as occupational safety and health standards under section 6(a). See note 7 supra. Accordingly, the Commission in Continental Can examined the Walsh-Healey Act and its history as well as the history of the noise standard to determine whether "feasible" had any special meaning. However, there was no indication that the word was intended to have any meaning other than the common definition. In these circumstances, the Commission concluded, "The standard must be interpreted to effectuate the Congressional purposes underlying the Act." 4 BNA OSHC at 1546, 1976-77 CCH OSHD at p. 25,255.

Because "feasible" had no special meaning under the Walsh-Healey Act, it is appropriate to interpret it in accordance with the Congressional purpose underlying the OSH Act. But, as held by the Supreme Court in ATMI, "feasible" under the OSH Act means "achievable" and does not require cost-benefit analysis. Regulations are to be construed consistent with the statutes under which they are promulgated. United States v. American Trucking Ass'ns, 310 U.S. 534, 542 (1940). Furthermore, unless a different intent is clearly evident the same statutory terms are to be given the same meaning. Chugach Natives, Inc. v. Dayon Ltd., 588 F.2d 723 (9th Cir. 1979) and cases cited. Accordingly, regulatory language should be given the same meaning as the same language appearing in the statute. See Baroid Div. of N.L. Industries, Inc. v. OSHRC, 660 F.2d 439, 447 (10th Cir. 1981), and RMI Co. v. Secretary of Labor, 594 F.2d 566 (6th Cir. 1979), where the statutory and regulatory uses of "feasible" are viewed as synonymous.[8/] Accordingly, we overrule

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8/ Our dissenting colleague claims that the Commission errs in applying the Court's ATMI interpretation of the statutory term "feasible"

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Continental Can to the extent that it ho'ds that "feasible" in the noise standard requires cost-benefit analysis.[9/]

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8/ (continued)

to the interpretation of the same term in a section 6(a) standard. This new interpretation conforms the Commission's interpretation of "feasibility" to the language and intent of the Act as interpreted by the Supreme Court. Moreover, reappraisal of precedent is permissible in the administrative process though the reversal of precedent must be guided by caution. See NLRB v. J. Weingarten, Inc., 420 U.S. 251, 265-6 (1975); Atchison, Topeka & Santa Fe R.R. Co. v. Wichita Board of Trade, 412 U.S. 800 (1973); NLRB v. Wentworth Inst., 515 F.2d 550, 555 (1st Cir. 1975). Accordingly, we reject our dissenting colleague's suggestion that the Commission's overruling of its precedent of 6 years and its substitution of a new interpretation of the term "feasible" supports his contention that the standard is unenforceably vague.

9/ The United States Court of Appeals for the Ninth Circuit recently issued its decision in Donovan v. Castle & Cooke Foods, A Div. of Castle & Cooke, Inc., No. 77-2565 (9th Cir. Nov. 19, 1982), affirming a 1977 Commission decision that applied the Continental Can cost-benefit test. The court concluded that the Commission's interpretation was "neither unreasonable, arbitrary, nor an extension of the authority granted the Commission by the Act," slip. op. at 13, under the applicable standard for judicial review of agency decisions, slip. op. at 6. The court deferred to the Commission's expertise in interpreting the standard. This case involves a necessary reevaluation of Continental Can and a reinterpretation of the noise standard in light of the Supreme Court's decision in ATMI.

The Ninth Circuit considered the Supreme Court's interpretation of the term "feasible" in section 6(b)(5) of the Act to be inapplicable to section 6(a) standards. However, we treat as identical the term "feasible" in the statute and the noise standard. When Congress authorized the Secretary to adopt established federal standards and national consensus standards as occupational safety and health standards, it understood that the Walsh-Healey standards would be the primary source of established federal standards for covered workplace hazards. General Motors Corp., GM Parts Div., 81 OSAHRC 13/C10, 9 BNA OSHC 1331, 1336-37, 1981 CCH OSHD ¶ 25,202 at pp. 31,122-24 (No. 79-4478, 1981), appeal dismissed, No. 81-3194 (6th Cir. Sept. 16, 1981). Several of these standards, like the noise standard, regulated exposure to "toxic materials" and "harmful physical agents" and contained feasibility requirements. At the same time that Congress authorized the adoption of section 6(a) standards, it authorized the promulgation of standards dealing with toxic materials or harmful physical agents under section 6(b)(5). Section 6(b)(5) also contains a feasibility requirement. There is no

(continued on next page)

The Supreme Court did not, however, reject the idea that "feasible" includes economic considerations. All parties in ATMI agreed that a standard would not be feasible if its costs would be so high as to threaten the economic viability of an industry.[10/] The Court did not disagree, expressing the view that inclusion of economic considerations "is certainly consistent with the plain meaning of the word 'feasible.'" 101 S.Ct. at 2501 n. 55. In promulgating the standard in ATMI, the Secretary had estimated the costs of compliance for the different sectors of the cotton industry affected by the standard and evaluated their

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9/ (continued)

indication that Congress intended the feasibility requirement of existing standards that the Secretary was authorized to implement immediately to be measured by a different criterion than feasibility under section 6(b)(5).

Accordingly, we respectfully decline to acquiesce in the Ninth Circuit's divergent interpretation of the term "feasible." Rather, we view the ATMI interpretation to be applicable to the regulation in question. Cf. Baroid Div. of N.L. Industries, Inc. v. OSHRC, 660 F.2d 439, 447 (10th Cir. 1981) (definition of "feasible" as economically and technologically capable of being done applied to a section 5(a)(1) violation based on Supreme Court's definition in ATMI).

10/ In an early case involving a challenge by a union to the promulgation of a § 6(b)(5) standard, the Court of Appeals for the District of Columbia Circuit held that the Secretary could properly consider the economic impact on an industry in determining whether a standard is feasible. Industrial Union Department, AFL-CIO v. Hodgson, 499 F.2d 467 (D.C. Cir. 1974). That holding has been followed in other decisions involving challenges to 6(b)(5) standards. United Steelworkers of America, AFL-CIO-CLC v. Marshall, 647 F.2d 1139, 1265 (D.C. Cir. 1980), cert. denied, 101 S.Ct. 3148 (1981); American Iron & Steel Institute v. OSHA, 577 F.2d 825 (3d Cir. 1978), cert. dismissed, 448 U.S. 917 (1980). Thus, by the time ATMI was decided by the Supreme Court, there was no longer any real dispute that the Secretary could, and indeed must, consider the economic impact on an industry in determining feasibility. Indeed, in the industry challenge to the cotton dust standard that led to the Supreme Court's decision in ATMI, the D.C. Circuit held that the Secretary had not established the economic feasibility of the standard for the cottonseed oil industry. AFL-CIO v. Marshall, 617 F.2d 825 (D.C. Cir. 1979). That holding was not in issue before the Supreme Court.

ability to absorb the costs. Because he concluded that compliance with the standard would not threaten the "long-term profitability and competitiveness" of the various industrial sectors, the Secretary concluded that the standard was feasible. Id.

Thus, "feasibility" under section 6(b)(5) includes consideration of whether the cost of compliance with a standard will be so great as to threaten an industry's long-term profitability and competitiveness. By analogy, considerations of cost must also enter into whether administrative or engineering controls are "feasible" under section 1910.95(b)(1).[11/] Generally, administrative or engineering controls would be economically infeasible if their cost would seriously jeopardize the cited employer's long-term financial profitability and competitiveness.[12/] There may

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11/ The initial inquiry into feasibility of administrative or engineering controls involves whether such controls are technologically feasible. The Commission has held that, because the standard expressly requires that administrative or engineering controls be used in preference to personal protective equipment, controls which achieve a significant reduction in noise exposure will be deemed technologically feasible even if they do not result in absolute compliance with Table G-16 levels. Continental Can Co., 4 BNA OSHC at 1545-46, 1976-77 CCH OSHD at pp. 25,254-55; see also Samson Paper Bag Co., supra; Turner Co., 76 OSAHRC 108/A2, 4 BNA OSHC 1554, 1976-77 CCH OHSD ¶ 21,023 (No. 3635, 1976), rev'd on other grounds, 561 F.2d 82 (7th Cir. 1977). This test for technological feasibility is consistent with the ordinary meaning of "feasible" as set forth by the Supreme Court in ATMI.

12/ In most cases arising under the noise standard, there will not be a serious question of the employer's ability to afford the cost of technologically feasible controls; economic feasibility will be clear. See, e.g., Continental Can Co., 4 BNA OSHC at 1542 n.4, 1976-77 CCH OSHD at p. 25,251 n.4. It has been our experience that the controls suggested by the Secretary in cases arising under section 1910.95(b)(1) are not generally so expensive as to give rise to substantial question of their economic feasibility. Moreover, in most cases it will be possible to alleviate the employer's financial difficulty by extending the time required for the installation of controls. See Samson Paper Bag Co., supra (lead and separate opinions). Thus, in cases where financial hardship is asserted, the Commission will consider whether this hardship can be adequately cured through an extended abatement date before concluding that the controls are infeasible.

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also, as the Secretary points out, be situations in which a particular employer is lagging so far behind its industry in protecting the health and safety of its employees that it cannot afford to implement controls that are generally feasible throughout the industry. See Industrial Union Department, AFL-CIO v. Hodgson, 499 F.2d 467, 478 (D.C. Cir. 1974). In these situations, controls may be feasible even though they are beyond the financial capability of the cited employer. Thus, as part of his proof of feasibility, the Secretary must show either that the cost of engineering and administrative controls will not threaten the cited employer's long-term profitability and competitiveness or that the employer's inability to afford the cost of controls results from the employer lagging behind its industry in providing safety and health protection for employees.[13/]

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12/ (continued)

Commissioner Cleary notes that, when there is a question whether controls will be so costly as to threaten an employer's ability to remain in business, a range of economic factors may merit consideration. These factors could include the competitive structure of the industry involved, the competition that the industry faces from other industries or from other countries, inflation, the ability of the company to raise capital, its ability to alter employees' work schedules and assignments, its other capital investment requirements, energy costs, and the like. See ATMI; Samson Paper Bag, supra (Cleary, concurring).

13/ In Commissioner Cleary's view, the Secretary may make out a prima facie showing of economic feasibility by showing that the estimated costs of the controls are small compared with other figures that represent the company's financial ability. For example, if implementation of the controls would require an initial capital investment, the Secretary could show that the company regularly makes capital investments that are substantially larger than implementation of the controls would require. If the controls would involve annual costs, the Secretary could show that the company's annual cash flow or profits, over a representative period of time, are substantially larger than the annual cost the controls would impose. Such information is readily available to the Secretary either through public reports that corporations must file or through discovery.

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III

In this case, the Secretary's charges under the noise standard were dismissed at the close of the Secretary's evidence. The question is whether the Secretary made a prima facie case of violation under our interpretation of the noise standard. The evidence presented during the Secretary's case-in-chief is as follows.

On September 30, 1975, a blacksmith was performing grinding and blacksmith work for shipfitting and fabrication in a building in Sun Ship's shipyard. Using a dosimeter and a sound level meter, the compliance officer measured the noise to which the blacksmith was exposed during his shift.

During the morning half of his shift, the blacksmith worked in the shipfitting end of the building grinding steel hatch opening rings. He used a Stanley V-50 pneumatic hand-held grinder which was not equipped with a muffler. A metal workbench was used to hold each ring as it was ground. The ring was not clamped to the workbench. Also, there were eight or nine other employees performing welding, grinding, and shipfitting work in the vicinity of the blacksmith.

With the sound level meter, the compliance officer measured the noise levels. She found that they ranged from 101 to 108 dBA while the

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13/ (continued)

The employer may then rebut the Secretary's case by showing that the cost figures are incorrect or that additional, indirect, costs will be incurred, or that any of the factors listed above, such as the competitive structure of the industry, make controls infeasible. The employer may also rebut the Secretary's case by showing that while controls for the cited locations are economically feasible, the cost of plant-wide controls would exceed the bounds of economic feasibility. Carnation Co. v. Secretary of Labor, 641 F.2d 801 (9th Cir. 1981).

blacksmith was using the grinder in contact with a hatch opening ring and the other employees were working in the background. When there was no background noise but the blacksmith was using the grinder on a ring, the noise levels were 102 to 103 dBA. The background noise alone was 90 to 92 dBA. The noise levels were below 90 dBA when no employees were working.

The compliance officer timed the blacksmith's grinding activities. She watched the employee grinding several of the rings and, using a stop watch, she timed the intervals during which he held the grinder in contact with the ring. She found that the intervals added up to about five minutes per ring, on the average. Since eleven rings were ground that morning, the compliance officer attributed one hour of the morning portion of the shift to grinder-to-metal work.

Between the intervals of grinder-to-metal work, the blacksmith was doing such things as adjusting the ring on the workbench or adjusting the grinder. During these times, he was exposed only to background noise and/or noise from his grinder which may have been switched on. He was not holding the grinder in contact with anything, however. Because the blacksmith spent a total of about three hours working on grinding the eleven hatch opening rings but one of those hours could be attributed to grinder-to-metal work, the compliance officer attributed the remaining two hours to pre-grinding work involving exposure mainly to background noise. There remained approximately one hour during which the blacksmith was performing some unidentified activities not involving exposure to any of this noise. The compliance officer concluded that during this hour the blacksmith's noise exposure was below 90 dBA.

During the afternoon half of his shift, the blacksmith performed blacksmith work in the fabrication end of the same building. With the sound level meter, the compliance officer found that the noise level was generally 92 dBA. She also found that the blacksmith was exposed to this noise level for about 3.25 hours.

With the information compiled about the various sound levels and time intervals, the compliance officer was able to compute the blacksmith's total noise exposure. The compliance officer's data indicated that the blacksmith was exposed to the following minimum noise levels for the following times:

| | |
|---|---|
| 102 dBA | - 1 hour (grinder-to-metal work — no background noise) |
| 90 dBA | - 2 hours (background noise only) |
| less than 90 dBA | - 1 hour (unidentified work) |
| 92 dBA | - 3.25 hours (blacksmith work) |

Table G-16, note 1 supra, gives the permissible exposure time for each of these noise levels. The footnote to the table states that the combined effect of exposure to two or more periods of noise exposure at different levels may be determined by computing the sum of fractions $C_n/T_n$ where $C_n$ is the total actual exposure time and $T_n$ is the permissible exposure time for the particular noise level. In this case, the fractions added up to 1.46.[14/] Because the sum exceeded unity (one),

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14/ The following fractions were added:

1/1.5 + 2/8 + 1/infinity (zero) + 3.25/6

(The permissible time for exposure to 102 dBA is 1.5 hours, for 90 dBA is 8 hours, for less than 90 dBA is unlimited, and for 92 dBA is 6 hours).

the compliance officer concluded that the blacksmith was exposed to excessive noise.

The compliance officer also used a dosimeter to judge the blacksmith's noise exposure. The blacksmith wore the dosimeter while he was engaged in performing the grinding and blacksmith work. The total readout was 168 percent of permissible noise exposure which showed exposure to excessive noise. Because both the dosimeter readout and the computation based on the sound level meter measurements revealed excessive noise exposure, the Secretary issued the citation alleging noncompliance with the noise standard with respect to the blacksmith.

At the hearing, the Secretary presented expert testimony proposing engineering controls for the hatch opening ring grinding operation. The expert visited Sun Ship's facility and tested the noise levels generated by a Stanley V-50 pneumatic grinder which was being used to grind the metal substructure of a ship. He found that the levels were generally 92 dBA when the grinder was in contact with the metal. When the grinder was not in contact, the levels were about 90 dBA. Any higher noise levels detected during grinder-to-metal work are generally attributable almost entirely to vibration of the work piece. Also, large metal objects such as this metal ship substructure produce little significant vibration noise while being ground. The expert concluded from his tests that the noise level produced by the grinder alone was about 92 dBA. He testified that the 102 dBA noise levels detected by the compliance officer while the blacksmith was grinding hatch opening rings but there was no background noise were attributable to two sources, the grinder itself and the hatch opening rings vibrating on the workbench. Therefore, the expert recommended muffling the grinder and using a sound-dampening workbench.

The expert testified that the primary source of the noise generated by the grinder is the exhaust air port, where the pressurized air exhausts after turning the turbine of the grinder. Accordingly, the expert proposed enclosing the exhaust air port and attaching a muffler. The expert testified that from Stanley, the manufacturer of the grinder, he learned that a muffled version of the grinder can be purchased. He also learned that, although Stanley does not produce a retrofit kit to muffle the older V-50 grinder, for $200 an employer can purchase the muffling parts of the newer grinder and apply them to the older tool. However, because Stanley does not produce the parts specifically adapted to retrofit the older V-50, the Secretary's expert designed a muffler for the grinder. His design consisted of a housing enclosing the exhaust air port and a hose leading to a muffler. The expert estimated that the design cost would be $1500 and the fabrication cost would be $320, a total of $1820.[15/] He also estimated, based on his experience in muffling grinding tools, that a 3 dBA reduction would result and as much as a 6 dBA reduction could be possible.

The expert also recommended that the metal workbench be replaced with a wooden one and that the workbench be equipped with clamps to

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15/ The expert estimated that the muffler could be designed in one day for about $400. In two days, a draftsman could produce detailed engineering design drawings and investigate the availability of materials. The cost for the draftsman's work would be about $800. The expert estimated that additional expenses could bring the design cost to about $1500.

The expert further estimated that labor for making the housing would be about $120 (for 6 hours at $20 per hour). Labor at the same wage rate for the muffler would be about $80 (4 hours) and about $80 (4 hours) to apply the parts to the tool. The expert estimated the cost of materials at about $40, for a total fabrication cost of approximately $320.

hold the hatch opening rings securely to the workbench during grinding. The expert estimated that the cost of materials and labor for this workbench would be about $460.

IV

The Secretary's evidence shows employee exposure to excessive noise. The principal question is whether the evidence shows there are feasible engineering controls for the excessive noise. According to the expert's testimony, the muffler would result in a 3 dBA reduction in the noise produced by the grinder alone, which the expert determined was approximately 92 dBA. Further, the elevation in noise levels during grinder-to-metal work results from vibration noise. Accordingly, vibration noise accounts for approximately 10 dBA of the 102 dBA noise levels detected by the compliance officer while the blacksmith was using the grinder in contact with the hatch opening rings.[16/] With a 3 dBA reduction in grinder noise and most of the vibration noise eliminated,[17/] the Secretary's evidence shows that the blacksmith's exposure will be within permissible limits.[18/]

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16/ Because the compliance officer detected noise levels of 102 dBA when there was no background noise (from other employees working near the blacksmith), we do not ascribe any part of the elevated noise levels to background noise.

17/ The Secretary's expert did not specify what dBA reduction he would expect from the sound-dampening workbench, but he testified that it should be made of wood which he stated has "significant" sound-dampening properties. He also specified that the workbench should have clamps to hold the workpiece in place firmly against the wood. Thus, most if not all vibration noise can be eliminated using the wooden workbench with clamps.

18/ On the basis of the expert's testimony, see note 17 supra, most of the vibration noise can be eliminated. Because the noise level was 102 dBA when the blacksmith was exposed only to the noise generated by grind-

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The Secretary's evidence also establishes that the cost of implementing the controls will be about $2,500. See note 15 supra and accompanying text. The judge dismissed the Secretary's charges because the Secretary did not show the indirect costs, such as inefficiency or loss of productivity, that might result from implementation of the controls. We can infer, however, that such indirect costs would be negligible. Substitution of a wooden workbench for a metal one should present no impediment to Sun Ship's grinding process. Moreover, the fact that muffled grinders are available commercially suggests that grinders can be successfully muffled without a significant adverse effect on performance.

The Secretary's evidence also establishes that Sun Ship has annual sales in excess of $100 million. In light of this, we infer that the $2,500 cost of the controls will not adversely affect Sun Ship's long-

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18/ (continued)

ing metal and about 10 dBA of this noise level was vibration noise, we find that using the proposed workbench can be expected to reduce the vibration noise by approximately 7-8 dBA. Adding to this the 3 dBA reduction in grinder noise, the 102 dBA noise level can be reduced by about 10-11 dBA. The computation based on Table G-16 and the footnote to it, see note 1 supra, will be:

1/6 + 2/8 + 1/infinity (zero) + 3.25/6

(The permissible time for exposure to 92 dBA is 6 hours.)

The compliance officer's computation was:

1/1.5 + 2/8 + 1/infinity (zero) + 3.25/6

The sum will be .96 rather than 1.46. See note 14 supra and accompanying text. The total reduction may be even greater. The expert stated that a 6 dBA reduction in grinder noise from the muffler could be possible.

term profitability and competitiveness. We therefore conclude that the Secretary has established a prima facie case. In making this conclusion, we have not taken into account whether abatement on a plant-wide basis will threaten Sun Ship's long-term profitability and competitiveness. See note 5 supra and accompanying text. However, we conclude that, to make a prima facie case, the Secretary is not required to show more than that the controls are economically feasible for the cited operation or location. As the Court of Appeals for the Ninth Circuit stated in Carnation Co. v. Secretary of Labor, supra, in rejecting the employer's argument that the Secretary was required to inspect the entire plant for noise violations and issue a comprehensive citation:

> It would be a waste of government money and energy to compel the Secretary to prove the economic feasibility of plant-wide controls where there is no suggestion by the violator that such controls would be economically infeasible. . . . The matter would be entirely different if a violator were able to show that the controls installed at discrete locations, while economically feasible, would not be economically feasible were they installed throughout the plant. The latter case would be impermissible because the Secretary could carry his burden and prove economic feasibility under 29 C.F.R. § 1910.95 by piecemeal proof in situations where he would not be able to prove economic feasibility had he required the violator at the outset to remedy all the violations in the plant.

641 F.2d at 803.

Accordingly, we conclude that the Secretary has established a prima facie case of violation of the noise standard.[19/] The judge's decision

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19/ The cases relied on by our dissenting colleague in support of his conclusion that the noise standard is unenforceable because it is "so uncertain of meaning as to result in arbitrary and discriminatory treatment" are inapposite to these proceedings because they involve either

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granting Sun Ship's motion to dismiss is therefore set aside and the case

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19/ (continued)

criminal or First Amendment issues. The standard for review of the constitutional sufficiency of a regulatory warning is not the "reasonably explicit" test taken from Grayned v. City of Rockford, 408 U.S. 104 (1972). As the omitted footnote citations to Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972), reveal, the test of Grayned is subject to the qualification that administrative regulations are governed by a less stringent standard. 408 U.S. at 108-09 nn. 3 & 4; see Diebold, Inc. v. OSHRC, 585 F.2d 1327, 1337 (6th Cir. 1978).

> When considering remedial legislation such as the OSH Act and its implementing regulations, the purported vagueness of a standard is judged not on its face but rather in the light of its application to the facts of the case. PBR, Inc. v. Secretary of Labor, 643 F.2d 890, 897 (1st Cir. 1981); McLean Trucking Co. v. OSHRC, 503 F.2d 8, 10-11 (4th Cir. 1974). Moreover, the regulations will pass constitutional muster even though they are not drafted with the utmost precision; all that due process requires is a fair and reasonable warning. Allis-Chalmers Corp. v. OSHRC, 542 F.2d 27, 30 (7th Cir. 1976).

Faultless Div., Bliss & Laughlin Indus., Inc. v. Secretary of Labor & OSHRC, 674 F.2d 1177, 1185 (7th Cir. 1982). See Diebold, Inc. v. OSHRC, supra, citing, Boyce Motor Lines v. United States, 342 U.S. 337, 340 (1952). A standard is not unconstitutionally vague simply because judgment must be exercised in determining its application. See Bethlehem Steel Corp., 82 OSAHRC , 10 BNA OSHC 1673, 1677 n.8, 1982 CCH OSHD ¶ 26,093 at p. 32,832 n.8 (No 77-1807, 1982). See Turner Co., supra note 11. A standard must be read in light of the conduct to which it is addressed. United States v. National Dairy Products, Inc., 372 U.S. 29, 36 (1963); Bethlehem Steel Corp., supra.

Additionally, while we do not agree with the dissenting Member that the standard in question is constitutionally infirm, we note that

> [I]t is axiomatic that defects in the constitutional sufficiency of a regulatory warning may be cured by authoritative judicial or administrative interpretations which clarify obscurities or resolve ambiguities.

Diebold, Inc. v. OSHRC, 585 F.2d at 1338 (footnote omitted), citing, Rose v. Locke, 423 U.S. 48, 52 (1975); Parker v. Levy, 417 U.S. 733,

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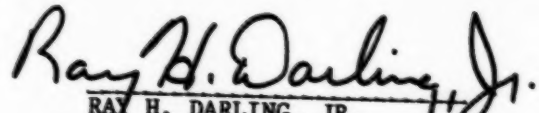
is remanded for further proceedings.[20/] SO ORDERED.

FOR THE COMMISSION



RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: DEC 17 1982

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19/ (continued)

752-54 (1974); Smith v. Gougen, 415 U.S. 566, 575 (1974); Wainwright v. Stone, 414 U.S. 21, 22-23 (1973); Jackson v. Dorrier, 424 F.2d 213, 217-18 (6th Cir.), cert. denied, 400 U.S. 850 (1970). See S & H Riggers & Erectors, Inc., 79 OSAHRC 23/A2, 7 BNA OSHC 1260, 1264 & n.14, 1978 CCH OSHD ¶ 23,490 at p. 28,437 & n.14 (No. 15855, 1979), rev'd on other grounds, 659 F.2d 1273 (5th Cir. 1981).

The Commission has consistently and repeatedly held that the noise standard is not unenforceably vague. E.g., Turner Co., supra, cited in Wheeling-Pittsburgh Steel Corp., 79 OSAHRC 66/A2, 7 BNA OSHC 1581, 1979 CCH OSHD ¶ 23,784 (No. 14702, 1979); Wheeling Corrugating Co., A Div. of Wheeling-Pittsburgh Steel Corp., 77 OSAHRC 204/E9, 6 BNA OSHC 1661, 1977-78 CCH OSHD ¶ 22,350 (No. 13286, 1977), petition denied, No. 77-1030 (3d Cir. Nov. 20, 1978); Castle & Cooke Foods, A Div. of Castle & Cooke, Inc., 77 OSAHRC 87/A2, 5 BNA OSHC 1435, 1977-78 CCH OSHD ¶ 21,954 (No. 10925, 1977), aff'd, No. 77-2565 (9th Cir. Nov. 19, 1982); accord Plum Creek Lumber Co. v. Hutton, 608 F.2d 1283 (9th Cir. 1979); cf. Turner Co. v. Secretary of Labor, 561 F.2d 82, 84 (7th Cir. 1977) (consideration of relevant economic considerations under Continental Can will "obviate any due process challenge"). The term "feasible" is not so devoid of meaning that a fair determination of the required conduct cannot be made. See Boyce Motor Lines v. United States, supra. Furthermore, one of the cases relied on by our colleague indicates that perceived ambiguities can be cured by interpretation -- a course that is preferable to invalidation. See International Society for Krishna Consciousness of Atlanta v. Eaves, 601 F.2d 809, 822 (5th Cir. 1979).

In ATMI v. Donovan, the Court determined that the term "feasibility" had an ascertainable meaning based on the statute. 101 S.Ct. at 2490. The definition set forth by the Court is applicable to the regulation at issue. We reject our colleague's suggestion that the term is devoid of meaning.

20/ Commissioner Cottine further notes that the dissent's conclusion that the noise standard represents an impermissible delegation depends

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20/ (continued)

on the erroneous premise that the noise standard is vague. The dissent characterizes the noise standard as an impermissible delegation to the Commission of the Secretary's authority to promulgate standards and establish enforcement criteria under the Act. This broad characterization ignores the fact that the noise standard establishes a definite criteria for occupational noise exposure -- an 8-hour time weighted average of 90 dBA. § 1910.95(a). This required performance is to be achieved by "feasible" administrative or engineering controls. § 1910.95(b). As previously noted, the term "feasible" permits a fair determination of the required conduct and is capable of application to the factual controversies presented to this adjudicatory forum. See Boyce Motor Lines v. United States, supra note 19. Like any factual inquiry "feasibility" is determined by the unique characteristics of an employer's economic conditions and the technological attributes of the abatement methodology. The "feasibility" criterion is ascertainable and the possibility of more than one interpretation does not justify invalidation under the delegation doctrine. ATMI v. Donovan, 101 S.Ct. at 2506 n.75. The mere fact that a term requires a factual analysis does not invalidate the standard. Factual determinations are both the heart of adjudication and the focus of delegation. See Atlas Roofing Co., Inc. v. OSHRC, 430 U.S. 442, 449-60 (1977). See generally L. Jaffe, Judicial Control of Administrative Action ch. 3 (1965). Moreover, a feasibility determination is the type of complex fact-finding regularly committed to an administrative agency for specialized adjudication in the context of the forum's experience and expertise. See, e.g., Crowell v. Benson, 285 U.S. 22, 46-47 (1932); Reconstruction Finance Corp. v. Bankers Trust Co., 318 U.S. 163, 170 (1943). Accordingly, Commissioner Cottine rejects the dissent's conclusion that the noise standard is unenforceable because the regulatory use of the term "feasible" results in an impermissible delegation.

In addition, Commissioner Cottine notes that the Commission's adjudicatory responsibility does not permit it to question a standard's stringency or appropriateness. W.J. Lazynski, Inc., 79 OSAHRC 108/B6, 7 BNA OSHC 2064, 2072, 1980 CCH OSHD ¶ 24,145 at p. 29,336 (No. 13864, 1979); Austin Bridge Co., 79 OSAHRC 81/A2, 7 BNA OSHC 1761, 1764, 1979 CCH OSHD ¶ 23,934 at p. 29,021 (No. 76-93, 1979); Fleming Foods of Nebraska, Inc., 77 OSAHRC 196/C12, 6 BNA OSHC 1233, 1978 CCH OSHD ¶ 22,889 (No. 14484, 1977). However, the Commission's independent adjudicatory responsibility necessarily includes the interpretation of the statute and its implementing regulations. Donovan v. Castle & Cooke Foods Div., Castle & Cooke, Inc., No. 77-2565, slip op. at 7 (9th Cir. Nov. 19, 1982) and cases cited; Brennan v. OSHRC & Ron M. Fiegen, Inc., 513 F.2d 713 (8th Cir. 1975). In interpreting the term "feasibility," it is irrelevant that the Secretary has under consideration revisions to the present standard, see, Modern Drop Forge Co. v. Secretary of Labor, 683 F.2d 1105, 1111 (7th Cir. 1982); Koppers Co., Inc., 77 OSAHRC 44/A2,

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2 BNA OSHC 1354, 1974-75 CCH OSHD ¶ 19,063 (No. 3449, 1974); United States Steel Corp., 77 OSAHRC 12/C3, 2 BNA OSHC 1343, 1974-75 CCH OSHD ¶ 19,047 (Nos. 2975 & 4349, 1974) (alternate holding), appeal dismissed, 517 F.2d 1400 (3d Cir. 1975), or that individual members of the Commission have expressed differing personal views on the proper interpretation of this term, see Public Service Commission of the State of New York v. Federal Power Commission, 543 F.2d 757, 777-78 (D.C. Cir. 1974). It is the Commission's institutional responsibility as an adjudicatory body, 29 U.S.C. § 651(b)(3), to apply precedent unless overruled or distinguished, see Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade, 412 U.S. 800, 808 (1973); Secretary of Agriculture v. United States, 347 U.S. 645 (1954); Local 777, Democratic Union Organizing Committee Seafarers Int'l Union of North America v. NLRB, 603 F.2d 862, 894 (D.C. Cir. 1978), and to interpret the applicable legal requirements in the context of factual controversies.

Sun Ship #16118

ROWLAND, Chairman, dissenting:

During the more than ten years that the noise standard has been in effect, this Commission has been unable to interpret and apply it in a consistent, reasonable manner. This decision, which represents the Commission's latest attempt to define the meaning of the term "feasible," is no exception. Relying on a Supreme Court decision[1/] that is not dispositive of the issue at hand, the majority concludes that "feasible" has the "plain meaning" of "achievable," and that the noise standard therefore requires employers to spend large sums of money to reduce noise levels regardless of whether such expenditures produce any commensurate benefits in employee safety or health. Moreover, the majority's interpretation preempts a rulemaking decision that the Secretary of Labor is statutorily empowered to make, and indeed is in the process of making. In my opinion, the inability of the Commission to arrive at a consistent interpretation of the standard, coupled with the absence of any legislative history concerning the meaning "feasible" was intended to have in the standard, demonstrates that the standard lacks ascertainable criteria for its enforcement and impermissibly delegates to the Commission the authority to decide what the standard should mean. I therefore conclude that the standard is unenforceable to the extent it seeks to require "feasible administrative or engineering controls" and would vacate the citation issued to Sun Ship in this case on this basis.

I

It is a fundamental principle that a statute or regulation is unenforceable if its terms are so uncertain of meaning as to result in arbi-

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1/ American Textile Manufacturers Institute v. Donovan, 101 S.Ct. 2478 (1978) ("ATMI").

trary and discriminatory enforcement. Grayned v. City of Rockford, 408 U.S. 104 (1972); Giaccio v. State of Pennsylvania, 382 U.S. 399 (1966); International Society for Krishna Consciousness of Atlanta v. Eaves, 601 F.2d 809 (5th Cir. 1979). As the Supreme Court said in Grayned v. City of Rockford, supra:

> [I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

408 U.S. 108-09 (footnotes omitted). Examining the nexus between unenforceably vague statutory terms and the non-delegation doctrine, Justice Rehnquist observed in his concurring opinion in Industrial Union Department, AFL-CIO v. American Petroleum Institute, 448 U.S. 607, 100 S.Ct. 2844 (1980) ("IUD v. API"):

> As formulated and enforced by this Court, the non-delegation doctrine serves three important functions. First, and most abstractly, it ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our government most responsive to the popular will. See Arizona v. California, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting in part); United States v. Robel, 389 U.S. 258, 276 (1967) (Brennan, J., concurring in the result). Second, the doctrine guarantees that, to the extent Congress finds it necessary to delegate authority, it provides the recipient of that authority with an "intelligible principle" to guide the exercise of the delegated discretion. See Hampton & Co. v. United States, 276 U.S. 394, 409 (1928); Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935). Third, and derivative of the second, the doctrine ensures that courts charged with reviewing the exercise of delegated legislative discretion will be able to test that exercise against ascertainable standards. See Arizona v. California, supra, at 626 (Harlan, J., dissenting in part); American Power & Light Co. v. SEC, 329 U.S. 90, 106 (1946).

100 S.Ct. at 2885-86. Justice Rehnquist's observation that Congress "must provide sufficient principles to guide an agency as to the limits of its delegated discretion," is equally applicable to agency promulgation of standards. Accordingly, where an agency exercises Congressionally-delegated authority to promulgate standards, the agency must write the standards in reasonably explicit terms so that the adjudicators under those standards have principles to guide their findings and conclusions.

In attempting to interpret the noise standard, individual Commission members have held greatly divergent views about the meaning of "feasible" and ultimately the Commission has not been able to adhere to an interpretation. Instead, each time the Commission has examined the issue, its members came to different conclusions. In Continental Can Co.,[2/] a Commission majority agreed that "[i]n determining whether controls are economically feasible, all relevant cost and benefit factors must be weighed." 4 BNA OSHC at 1547, 1976-77 CCH OSHD at p. 25,256. The majority noted that the Secretary would only allow consideration of economic factors if the cost of implementing controls would seriously jeopardize the financial health of a company[3/] and stated that this ap-

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2/ 76 OSAHRC 109/A2, 4 BNA OSHC 1541, 1976-77 CCH OSHD ¶ 21,009 (No. 3973, 1976), appeal withdrawn, No. 76-3229 (9th Cir. Apr. 26, 1977) ("Continental Can").

3/ Engineering controls to reduce noise levels can be very expensive. A study prepared for OSHA in the early 1970's projected that the cost of achieving the 90 dBA 8-hour time weighted average limit of the noise standard using engineering controls would be about $13.5 billion. 1973-74 CCH Developments ¶ 9126. And, since that time, inflation has undoubtedly increased the cost considerably. In contrast, according to OSHA's preamble to the new hearing conservation standard, 46 Fed. Reg. 4078, 4117-18 (1981),

(continued on next page)

proach is unreasonable because it compels employers to expend considerable sums of money for protection against a hazard that is not life threatening:

> Clearly, employers have finite resources available for use to abate health hazards. And just as clearly if they are to be made to spend without limit for abatement of this hazard their financial ability to abate other hazards, including life threatening hazards, is reduced. We can conceive that in some if not many cases it will be reduced to the point that they will be put in financial jeopardy when faced with the problem of abating a life threatening hazard.

4 BNA OSHC 1547, 1976-77 CCH OSHD at p. 25,256. Thus, the Continental Can majority saw that it is entirely unreasonable to hold that "feasible" means simply "achievable" or "capable of being done." The courts that reviewed decisions concerning alleged violations of the noise standard accepted the Continental Can majority's interpretation. Donovan v. Castle & Cooke Foods, No. 77-2565 (9th Cir. Nov. 19, 1982); RMI Co. v. Secretary, 594 F.2d 566 (6th Cir. 1979); Turner Co. v. Secretary, 561 F.2d 82 (7th Cir. 1977). See also Diversified Industries Division, Independent Stave Co. v. OSHRC, 618 F.2d 30 (8th Cir. 1980); Marshall v. West Point Pepperell, 588 F.2d 979, 981 n.3 (5th Cir. 1979).

The Commission has never until now overruled the Continental Can interpretation, but the two Commission members who form the majority in this case certainly wanted to, and were only prevented from doing so

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3/ (continued)

the cost of a hearing protection program meeting the requirements of the new standard is expected to be, at most, $270 million.

The cost of engineering controls obviously will fall unevenly on different industries and different employers within an industry. Thus, there is a very real possibility that the costs associated with engineering controls will jeopardize the financial health of particular employers or even of entire industries.

through their inability to agree on a new interpretation. Commissioner Cleary first described his views in his dissenting opinion in Continental Can. There he said, "Economic considerations are not implicit in the term 'feasible' as it appears in section 1910.95(b)(1)" (emphasis in the original) and "Cost considerations are relevant only in determining the pace at which an abatement program should proceed." 4 BNA OSHC at 1550, 1976-77 CCH OSHD at p. 25,259. Thus, Commissioner Cleary took the view that "feasible" means technologically achievable and nothing more. As technology develops, employers must implement it, without regard to costs and benefits. Commissioner Cottine later agreed with this position in Samson Paper Bag Co., 80 OSAHRC 60/A2, 8 BNA OSHC 1515, 1980 CCH OSHD ¶ 24,555 (No. 76-222, 1980) (concurring opinion), but Commissioner Cleary then decided, having given the matter further thought, that economics plays some role in determining whether controls are feasible. According to Commissioner Cleary, the standard "should not force an employer into an abatement situation that, from an economic standpoint, is patently unreasonable." 8 BNA OSHC at 1525, 1980 CCH OSHD at p. 30,048. However, he rejected weighing the costs against the benefits as the test of economic feasibility, saying that the OSH Act does not require a reasonable balance of costs and benefits.

Thus, over about four years there were three widely diverging and strongly held views expressed by Commission members about the meaning of "feasible": one requiring cost-benefit analysis, another prohibiting any consideration of economic factors, and a third permitting consideration of economic factors under a vaguely defined "reasonableness" test.

The current Commission majority adopts a fourth view. As part of the Secretary's proof of feasibility, the Secretary must show "either that the cost of engineering and administrative controls will not threaten the cited employer's long-term profitability and competitiveness or that the employer's inability to afford the cost of controls results from the employer lagging behind its industry in providing safety and health protection for employees."[4/]

II

Accepting the Secretary's arguments, the majority bases its interpretation of the noise standard on ATMI, in which the Supreme Court decided that "feasible" means simply "capable of being done" or "achievable."[5/] However, in ATMI the Supreme Court was faced only with the narrow question of interpreting section 6(b)(5) of the OSH Act, which deals with the promulgation of standards for toxic substances and harmful physical agents. See notes 3 and 6 of the majority opinion. See also 101 S.Ct. at 2489. The

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4/ Although they agree on this broad, general test, it appears that Commissioners Cleary and Cottine do not agree on how the test is to be applied. Commissioner Cleary specifies numerous factors that may be considered in such inquiry, and it is not clear whether Commissioner Cottine considers those factors relevant. See notes 12 and 13 of the lead opinion. Moreover, the wide range of factors Commissioner Cleary would consider provide a further demonstration that "feasible" can mean whatever a person wants it to mean. As Justice Rehnquist stated, "feasible" is a "legislative mirage . . . assuming any form desired by the beholder." IUD v. API, 100 S.Ct. at 2883 (concurring opinion).

5/ In this case, the Secretary argues that the Court's interpretation of "feasible" as it appears in § 6(b)(5) rulemaking should be applied to the judicial interpretation of the noise standard, promulgated under § 6(a). However, in another case, the Secretary has argued to the Commission that the "significant risk" test for § 6(b)(5) standards established by the Supreme Court in IUD v. API should not be applied to the interpretation and application of standards because that decision of the Court applies only to rulemaking, and not adjudication. See Pratt & Whitney Aircraft, 10 BNA OSHC 2011, 1982 CCH OSHD ¶ 26,257 (No. 13591, 1982), appeal filed, No. 82-4180 (2d Cir. Nov. 16, 1982).

Court unequivocally stated in ATMI that it did not decide whether costs and benefits can be weighed in promulgating standards under other provisions of the OSH Act or to establish priorities among possible standards for rulemaking proceedings. 101 S.Ct. at 2490 n. 29 and 2493 n. 32. See Donovan v. Castle & Cooke Foods, slip op. at 12. Thus, ATMI does not answer what role costs and benefits can play in a standard adopted under section 6(a).

Additionally, the Court's "plain meaning" definition of "feasible" cannot be uncritically applied wherever the term is found. The Court closely examined the legislative history of section 6(b)(5) to assure that the Congressional intent in inserting "feasible" into the section corresponded with what the Court said was the "plain meaning" of the term. See 101 S.Ct. at 2490-94. Accordingly, although the meaning of section 6(b)(5) of the OSH Act is now clear from ATMI, the meaning of the noise standard remains an unanswered question.

Interpreting the noise standard presents different and special problems. Because the noise standard was adopted under section 6(a) of the OSH Act as an established federal standard in effect under the Walsh-Healey Act,[6/] the standard must be given the same meaning under the OSH Act that it had under the Walsh-Healey Act, for the Secretary was generally not empowered to effect any substantive change in adopting standards under section 6(a) of the OSH Act. American Can Co., 82 OSAHRC 5/A2, 10 BNA OSHC 1305, 1982 CCH OSHD ¶ 25,899 (No. 76-5162, 1982); George C. Christopher & Sons, Inc., 82 OSAHRC , 10 BNA OSHC 1436,

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6/ See note 7 of the majority opinion.

1982 CCH OSHD ¶ 25,956 (No. 76-647, 1982), citing Diebold, Inc. v. OSHRC, 585 F.2d 1327, 1332 (6th Cir. 1978); cf. Noblecraft Industries, Inc. v. Secretary, 614 F.2d 199 (9th Cir. 1980). But nowhere in the Walsh-Healey Act, its legislative history, or the standards adopted under the statute is there any indication what "feasible" meant under Walsh-Healey. Accordingly, unlike section 6(b)(5) of the OSH Act, for the Walsh-Healey noise standard there is no legislative support for interpreting "feasible" as simply "achievable."

In the absence of any ascertainable criteria to guide the enforcement of a standard, any interpretation given by the Commission is derived, not from the standard, but from the Commission majority's own views of what the standard should say.[7/] Such an interpretation is impermissible for any standard, but particularly for one that, like the noise standard, may impose enormous costs on industry to protect against a hazard that is not life-threatening.[8/] The policy decisions that must be made in such a

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7/ See Continental Can Co., 4 BNA OSHC at 1546-47 and n. 14, 1976-77 CCH OSHD at p. 25,255 and n. 14. Having recognized that the legislative history of the standard provided no guidance as to the role economic considerations were to play, the majority in Continental Can proceeded to hold that the standard required a balancing of costs and benefits. Although I believe such an interpretation is "reasonable," the Commission cannot create an interpretation of a standard that has no basis in the language and intent of the standard. As I have noted, it is the duty of the congressionally delegated authority, in this case the Secretary, to provide ascertainable criteria by which standards can be interpreted and applied. To hold otherwise would mean that the Commission, not the Secretary, is setting the standard, and would constitute an impermissible delegation of the Secretary's rulemaking authority. Thus, although I believe that the Continental Can interpretation was reasonable, I also believe that the majority's analysis in Continental Can supports the conclusion that the standard is unenforceable.

8/ The abatement of many life-threatening hazards involves costs far less than those at stake in implementing engineering controls for noise. For

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situation should be made in rulemaking, in which all persons affected by the standard have an opportunity to be heard. Indeed, the Secretary is currently engaged in a rulemaking proceeding aimed at determining the degree to which administrative or engineering controls must be used to protect against excessive noise.[9/] It is incongruous for the Commission to

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8/ (continued)

example, OSHA estimated the cost of engineering controls for cotton dust at $543 million. ATMI, 101 S.Ct. at 2498. OSHA believed that the cost of such controls for benzene would be $266 million. IUD v. API, 100 S.Ct. at 2857. The cost of engineering controls for lead, to be implemented by primary and secondary smelters, battery manufacturers, and the paints and coatings industry, OSHA projected to be between approximately $337 and 395 million. United Steelworkers of America, AFL-CIO-CLC v. Marshall, 647 F.2d 1189, 1278-1303 (D.C. Cir. 1980), cert. denied, 101 S.Ct. 3148 (1981). And OSHA estimated that the costs for compliance with the coke oven emissions standard would be between $240 and 1,280 million. American Iron & Steel Institute v. OSHA, 577 F.2d 825, 836 (3d Cir. 1978), cert. dismissed, 448 U.S. 917 (1980).

The costs associated with abating these life-threatening hazards have been subjected to intense scrutiny in administrative rulemaking and in judicial review of the rulemaking actions. In contrast, the potentially much greater costs associated with engineering controls for noise, see note 3 supra, were apparently not considered before section 1910.95(b)(1) was promulgated under the Walsh-Healey Act and the policy decisions that Congress intended should be made before such costs are imposed on industry have not been made or scrutinized in any forum.

9/ In 1972, pursuant to authority granted by 29 U.S.C. §§ 669(a) and 671(d), the National Institute for Occupational Safety and Health ("NIOSH") developed a criteria document on noise exposure recommending that the Secretary study the feasibility of reducing the permissible time weighted exposure level to 85 dBA. In 1973, pursuant to authority granted by 29 U.S.C. § 656(b), the Assistant Secretary of Labor for Occupational Safety and Health appointed an Advisory Committee on Noise to receive and evaluate the views of labor, management, government, and independent experts in noise problems and make recommendations to OSHA for a revised noise standard. In late 1973, the Advisory Committee transmitted its report to OSHA and, during the first nine or ten months of 1974, OSHA considered the information and recommendations contained in the NIOSH criteria document and the Advisory Committee's recommendations, as well as other available information. 46 Fed. Reg. 4102-4103. Then, on October 24, 1974, OSHA proposed a revision to the

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apply the Supreme Court's section 6(b)(5) definition of "feasible" to the current standard's requirement for administrative and engineering controls when the Secretary is considering in rulemaking the circumstances under which such controls are "feasible" within the meaning of section 6(b)(5).

The extent of this incongruity is demonstrated by examining the nature of the policy decisions the Secretary must make in determining whether administrative and engineering controls are feasible within the meaning of section 6(b)(5). As noted above, note 3 supra, one report prepared for the Secretary calculated that the cost of achieving 90 dBA in all workplaces would approximate $13.5 billion, unadjusted for the inflation that has occurred in the past several years. The report also states that the cost of achieving the 85 dBA limit of the hearing conservation standard through engineering controls would approximate $31.6 billion, also unadjusted for inflation. The Secretary must consider the impact these costs will have on each industry affected by the standard, taking into account all the complex and critical factors listed by Commissioner Cleary in his separate remarks in this case. He must determine whether different requirements should be imposed on different industries either because the nature of the

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9/ (continued)

noise standard and solicited comments and objections. 39 Fed. Reg. 37773-37778. Subsequently, the comment period was extended several times because of the complexity of the issues and over the next several years, two informal hearings were held. See 46 Fed. Reg. 4103-04 (summarization of notices and proceedings). These proceedings resulted in the hearing conservation amendment to the noise standard and OSHA's solicitation of further information about revision of the noise standard's current requirement for the use of "feasible" engineering and administrative controls. See 46 Fed. Reg. 4105.

hazard differs between industries or because certain industries cannot afford to achieve noise levels that other industries can, and perhaps already have, obtained. See AFL-CIO v. Marshall, 617 F.2d 825 (D.C. Cir. 1979); see also 39 Fed. Reg. 43802 (Environmental Protection Agency's comments in the Secretary's rulemaking proceeding). He must consider whether a requirement for administrative or engineering controls should be phased in over a period of time, or whether different industries should be given different periods for compliance. The difficulty of making these determinations is illustrated by the fact that the Secretary has been unable to adopt a final standard in the approximately ten years he has had the issue under consideration.[10/]

None of the factors bearing on economic feasibility under section 6(b)(5) were considered when the Secretary promulgated the present standard under the Walsh-Healey Act, and were also not considered when the Secretary followed the summary procedure for adopting that standard under the OSH Act. See Continental Can Co., 4 BNA OSHC at 1547, 1976-77 CCH OSHD at p. 25,256. The Secretary simply required that engineer-

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10/ In this case, the Secretary contends that Sun Ship violated section 1910.95(b)(1) by exposing a single employee to excessive noise and by failing to implement engineering controls for the equipment that employee was using. However, the interpretation established in this case will control the disposition of more than twenty other cases now before the Commission. Many of those cases will have implications for the types of noise controls required in entire industries. E.g., Cox Enterprises, Docket No. 12074 (newspaper industry); Pabst Brewing Co., Docket No. 13068 and 77-1895 (beverage packaging); Plum Creek Lumber Co., Docket No. 78-1753 (sawmill operations); Deering-Milliken, Inc., Docket Nos. 12598 and 13037 (textile manufacturing); Southwest Forest Industries, Docket No. 78-3976 (corrugated paperboard manufacturing); Sherwin Williams, Inc., Docket No. 14131 (can manufacturing). Therefore, although this case has relatively simplistic facts, its decision will have a broad impact on numerous industries, and it is necessary to consider that impact in deciding this case.

ing or administrative controls be implemented if "feasible," without providing ascertainable criteria by which the meaning of "feasible" could be determined. Indeed, the Secretary's very purpose in using the word "feasible" was probably to avoid establishing ascertainable criteria and to leave the interpretation of the word for a later day.

I recognize that, to this time, no court which has considered the noise standard has decided that it impermissibly delegates to the Commission the unbounded authority to establish criteria for its enforcement. Donovan v. Castle & Cooke Foods, supra; RMI Co. v. Secretary, supra; Turner Co. v. Secretary, supra; see also Diversified Industries Division, Independent Stave Co. v. OSHRC, supra. But the interpretation before these courts for their consideration was that set forth by the Commission in Continental Can, which represented a good faith attempt to give genuine significance to costs of compliance with the noise standard.[11/] The Commission had not yet issued the decisions in Samson Paper Bag Co., supra, or this case, which so graphically illustrate that the word "feasible" can mean whatever an individual adjudicator wants it to mean. Because the Commission majority has now retreated from Continental Can at the urging of the Secretary, and has substituted

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11/ In Donovan v. Castle & Cooke Foods, the Ninth Circuit concluded that the Supreme Court's decision in ATMI did not preclude a weighing of costs and benefits in the enforcement of a § 6(a) standard. The Ninth Circuit therefore accepted the Commission's interpretation of § 1910.95(b)(1) because that interpretation was not unreasonable, arbitrary, or inconsistent with the Act. Slip op. at 13. I agree with the Ninth Circuit that ATMI does not preclude a weighing of costs and benefits in interpreting a § 6(a) standard. However, as I have explained above, the enforcement of any standard must be consistent with the regulatory intent underlying the standard. The Commission is not free to fill a regulatory void by supplying its own interpretation of a standard lacking in regulatory intent, no matter how reasonable that interpretation may be.

an unworkable test consisting of elements which the majority itself cannot clearly define, I conclude that the requirement of section 1910.95(b)(1) to abate by use of "feasible" controls must be considered unenforceable.

III

Nobody can deny that protection against excessive noise is necessary. However, it is not necessary to enforce the requirement for "feasible administrative or engineering controls" in section 1910.95(b)(1) to provide employees with such protection. The requirement of the Secretary's new hearing conservation standard that employees be protected against excessive noise levels by personal protective equipment remains in force.[12/] Indeed, in this case the employee allegedly exposed to

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12/ The hearing conservation standard requires employers to ensure that all employees exposed to noise levels in excess of those listed in Table G-16 wear personal hearing protectors. In addition, employers must make hearing protectors available to employees exposed to time weighted average noise levels greater than 85 dBA, and must ensure that employees exposed to such noise levels who have experienced a permanent significant threshold shift in their hearing ability wear such protectors. 29 C.F.R. § 1910.95(1).

Properly used, personal protective equipment is capable of as much as a 20 to 30 dB attenuation in existing noise levels, see 46 Fed. Reg. at 4111 (1981), and can reasonably be expected to produce a 10 to 15 dB attenuation, see 46 Fed. Reg. 4113-14. Of course, the effectiveness of personal protective equipment depends on its correct use and, therefore, personal protective equipment is generally regarded as inferior to engineering controls. See Continental Can Co., supra; Turner Co., 76 OSAHRC 108/A2, 4 BNA OSHC 1554, 1976-77 CCH OSHD ¶ 21,023 (No. 3635, 1976), remanded, 561 F.2d 82 (7th Cir. 1977); see generally 46 Fed. Reg. at 4078, 4113, 4114. However, in the hearing conservation amendment to the noise standard, OSHA prescribes a program for effective use of personal protective equipment. The employer is required to make available a variety of suitable protective devices, to insure their proper fit, and to train and supervise employees in the proper use and care of hearing protectors. Detailed instructions

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excessive noise was wearing swedish wool earplugs, and there is no allegation that this equipment was being improperly used.

The Secretary has been considering, in rulemaking, the circumstances in which engineering or administrative controls shall be required to supplement the protection afforded by the hearing conservation standard. The question requires the Secretary to consider a number of complex issues, including the significance of the risk to employees despite the provisions of the hearing conservation standard and the economic feasibility of controls for all industries and industry segments affected by the standard. By their decision in this case, however, the majority short-circuits the statutory rulemaking process and decides that engineering or administrative controls must be implemented regardless of the efficacy or use of personal protective equipment. The majority further holds that the numerous and complex factors affecting the ability of employers to afford the cost of controls, factors that are peculiarly suited to consideration in rulemaking, must be addressed on a case-by-case basis in adjudication.

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12/ (continued)

are also prescribed for evaluating the degree of noise attenuation which will be achieved by protective equipment. Presumably, the program can be successfully implemented. Moreover, engineering controls can also be used ineffectively and can become progressively less effective from wear and abuse. For example, removable barriers or enclosures can be circumvented, left out of place, or damaged by employees. See Ormet Corp., 81 OSAHRC 35/C3, 9 BNA OSHC 1828, 1981 CCH OSHD ¶ 25,322 (No. 76-4398, 1981) (employees deliberately damaged a locking clasp on a main electrical disconnect switch so that they could use it as an on-off switch); MRS Printing, Inc., 78 OSAHRC 84/B10, 6 BNA OSHC 2025, 1978 CCH OSHD ¶ 23,102 (No. 76-3113, 1978)) (employee circumvented dual controls activating a guillotine cutter by tripping the left hand lever with his left knee, leaving his left hand free while the blade was activated by his right hand). Thus, engineering controls, too, involve human elements that can undermine the protection.

Thus, instead of the Commission applying ascertainable criteria established when the standard was promulgated, each Commission proceeding on a noise citation will become a mini-rulemaking proceeding. But because the record made in a proceeding before the Commission cannot possibly permit an intelligent evaluation of the factors the Secretary must consider in rulemaking, such Commission proceedings will inevitably result in arbitrary and unequal enforcement of the standard. Given the absence of any legislative history of the standard establishing ascertainable criteria for its enforcement, I would hold that the requirement for feasible engineering and administrative controls is unenforceable. I would leave the issue of when such controls should be required for the Secretary to resolve in rulemaking, the forum in which Congress intended such questions to be resolved.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|---|
| SECRETARY OF LABOR | : | |
| Complainant | : | |
| v. | : | DECISION AND ORDER |
| SUN SHIPBUILDING & DRYDOCK CO. | : | OSHRC Docket No. 16118 |
| Respondent | : | |

APPEARANCES

FOR THE SECRETARY OF LABOR

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FOR THE RESPONDENT

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Brennan, W. E.; A.L.J.

This action arises under the provisions of Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 659(c) (hereinafter the Act), to review a Citation for nonserious violations of Section 5(a)(2) of the Act, 29 U.S.C. 654(a)(2) and penalties proposed thereon issued pursuant to Sections 9(a) and 10(a) of the Act, 29 U.S.C. 658(a) and 659(a) by the Secretary of Labor through the Area Director of the Occupational Safety and Health Administration for Philadelphia, Pennsylvania (hereinafter Complainant), to Sun Shipbuilding and Drydock Company (hereinafter Respondent), following an inspection of Respondent's shipyard located at the foot of Morton Avenue, Chester, Pennsylvania (hereinafter work site).

Between July 31, 1975, and September 30, 1975, three Industrial Hygienists - Compliance Officers (Clark, Dubin and Crenshaw), made an industrial hygiene inspection of Respondent's work site. As a result of that inspection, Respondent, on November 26, 1975, was issued a Citation alleging nonserious violations of Section 5(a)(2) of the Act, 29 U.S.C. 654(a)(2) for failure to comply with the Occupational Safety and Health Standards (hereinafter Standards) codified at 29 C.F.R. 1910.95, (Item No. 1) and 29 C.F.R. 1910.1000 (Item No. 2), as well as a Notification proposing a total penalty of $60 based upon Item No. 2[1/] (R.pp. 1, 2).

[1/] During the trial herein, without objection, the Notification of Proposed Penalty was amended, to reflect Complainant's true intention, to wit, to propose the $60 penalty for the alleged noise violation, Item No. 1, and no penalty for Item No. 2 (Tr. Vol. IV, p. 20).

A timely notice of contest to both Items of the Citation was filed by Respondent, through its counsel, pursuant to Section 10(c) of the Act, 29 U.S.C. 659(c) (R.p. 3).

After the filing of a Complaint (R.p. 6) and Answer (R.p. 8), this case was originally set down for trial for March 24, 1976 (R.p. J-1).

Item No. 1 of the instant Citation involved the so called "noise" Standard, 29 C.F.R. 1910.95, and Item No. 2, the Air Contaminant Standard, 29 C.F.R. 1910.1000, and there ensued rather protracted pretrial procedures involving a reinspection of Respondent's work site and discovery procedures (R.pp. J-2 through J-25).

On August 24, 1976, the Review Commission issued its Decision in the case of Sec. of Labor v. Continental Can Company, Inc., OSHRC Docket No. 3973, et al., which involved the noise Standard (29 C.F.R. 1910.95), and significantly altered the burden of proof of the parties to such a type of case. A further delay in this trial was occasioned awaiting the Complainant's decision on whether to appeal the Continental Can case to an appropriate U. S. Court of Appeals (R.pp. J-26 through J-32). It was finally decided that any further delay of this trial pending the appeal in the Continental Can case was not warranted, and the trial was finally convened pursuant to written notice on January 12, 1977, concluding on the fifth day, with an intermittent recess, on March 10, 1977 (R.pp. J-32 through J-35). Both parties were represented by counsel. No affected employees or representatives thereof desired party status (Tr. Vol. I, p. 6). Post-trial briefs were finally received from both parties on May 23, 1977 (R.pp. J-50, J-51).

Having considered the entire record herein, the testimony and demeanor of the witnesses, the exhibits, stipulations, representations, admissions and arguments of the parties, it is concluded that the substantial, reliable and probative evidence of this record considered as a whole supports the following findings of fact and conclusions of law.

The citation as issued herein, set forth the following information:

Item No. 1

Description of Alleged Violation

> 29 C.F.R. 1910.95 - Employees, in the following locations, were subjected to sound levels which exceeded the permissible exposures listed in Table G-16 of this section, and their exposures were not limited in accordance with the requirements of 29 CFR 1910.95(b)(1). The sound levels were obtained at the hearing zone of the employees:
>
> a) Shot Blast Building — shot blast operator
>
> b) Building No. 42, Blacksmith Shop -- blacksmith (grinding hatch opening rings and blacksmithing)
>
> Employees at the preceding locations, 'a' and 'b', were subjected to sound levels for which the exposure fraction Cn/Tn (see Table G-16, Note #1) exceeded 1.0.
>
> c) Building No. 30, Boiler Shop -- arcair operator
>
> Employee at the preceding location, 'c', was subjected to sound levels in excess of 115 dBA.

Abatement was ordered in accordance with a specific timetable set forth in the Citation, and a total penalty of $60, not allocated to any of the three specified locations, was intended to be proposed (see fn. 1/, supra).

Item No. 2

Description of Alleged Violation

> 29 C.F.R. 1910.1000 - Employees, in the following locations, were exposed to material listed in Table Z-1 of this section,

and their exposures were not limited in accordance with the requirements of 29 CFR 1910.1000 (a)(2), (d)(1) and (e). Samples were obtained at the breathing zone of the employees:

a) Building No. 30, Boiler Shop -- arcair operator

Employees at the preceding location, 'a', were exposed to iron oxide fume concentrations in excess of 10 $mg/M^3$ (eight-hour time-weighted average).

Abatement was ordered in the same fashion as under Item No. 1, and no penalty was intended to be proposed (R.pp. 1, 2).

The cited Standards provide:

Item No. 1

29 C.F.R. 1910.95

Occupational Noise Exposure

(a) Protection against the effects of noise exposure shall be provided when the sound levels exceed those shown in Table G-16 when measured on the A scale of a standard sound level meter at slow response. When noise levels are determined by octave band analysis, the equivalent A-weighted sound level may be determined as follows:

(b)

(1) When employees are subjected to sound exceeding those listed in Table G-16, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table.

Table G-16 - Permissible Noise Exposures[1/]

| Duration per day, hours | Sound level dBA slow response |
|---|---|
| 8 | 90 |
| 6 | 92 |
| 4 | 95 |
| 3 | 97 |
| 2 | 100 |
| 1-1/2 | 102 |
| 1 | 105 |
| 1/2 | 110 |
| 1/4 or less | 115 |

(Footnote 1 omitted)

Exposure to impulsive or impact noise should not exceed 140 dB peak sound pressure level.

(2) If the variations in noise level involved maxima at intervals of 1 second or less, it is to be considered continuous.

(3) In all cases where the sound levels exceed the values shown herein, a continuing, effective hearing conservation program shall be administered.

Item No. 2

29 C.F.R. 1910.1000

Air Contaminants

An employee's exposure to any material listed in table Z-1, Z-2, or Z-3 of this section shall be limited in accordance with the requirements of the following paragraphs of this section.

(a) Table Z-1: * * *

(2) Other materials--8-hour time weighted averages. An employee's exposure to any material in table Z-1, the name of which is not preceded by 'c', in any 8-hour work shift of a 40-hour work week, shall not exceed the 8-hour time weighted average given for that material in the table.

Table Z-1

| Substance | p.p.m. | mg./$M^3$ |
|---|---|---|
| * * * | | |
| Iron Oxide Fume | --- | 10 |
| * * * | | |

(e) To achieve compliance with paragraph (a) through (d) of this section, administrative or engineering controls must first be determined and implemented whenever feasible. When such controls are not feasible to achieve full compliance, protective equipment or any other protective measures shall be used to keep the exposure of employees to air contaminants within the limits prescribed in this section. Any equipment and/or technical measures used for this purpose must be approved for each particular use by a competent industrial hygienist or other technically qualified person. Whenever respirators are used, their use shall comply with § 1910.134.

The following matters were stipulated to by the parties at the outset of trial.

Exhibit C-1 was admitted into evidence (Tr. Vol. I, p. 7). Samples of the iron oxide contaminant obtained during the inspection of Respondent's work site were sent to the National Institute's Occupational Safety and Health analytical laboratory at Salt Lake City, Utah, where they were analyzed by Chemist Edward F. Zimowski. Exhibit C-1 sets forth the substance of this chemist's testimony if he were produced as a witness, i.e., the receipt of the samples, the method used to analyze them, and the results of this analysis. These samples were found to contain iron oxide in excess of the 10 $mg/M^3$[2/] limit set forth in the Standard, to wit; 23.4, 20.3, 27.2 and 19.9 $mg/M^3$ (see Exhibit C-1, p. 3). This exhibit obviated the need to call this chemist and relates to Item No. 2 of the Citation.

Exhibit C-2, as amended by counsel at trial, was also admitted into evidence (Tr. Vol. I, pp. 7-12).

This exhibit involves Item 1(a) of the Citation, wherein, it is alleged that the shotblast operator, working in a shotblast building at the work site, was exposed to sound levels which exceeded the allowable levels set forth in the cited Standard, 29 C.F.R. 1910.95, supra.

At the close of the Complainant's case, Respondent moved for the dismissal of the Citation. During argument on that motion, Item 1(a) of the Citation was found to have been established by the stipulation, Exhibit C-2. Because Respondent had implemented two of the three

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[2/] 10 $mg/M^3$ translates to 10 milligrams (of iron oxide) per cubic meter of air.

engineering controls suggested by Complainant in his reinspection of the work site thereby evidencing its good faith, it was concluded that no penalty (or portion of the $60 penalty proposed for all the alleged noise violations, Items 1(a), 1(b) and 1(c)), should be assessed (Tr. Vol. V, pp. 38-62). That ruling is hereby confirmed.

Further, at the beginning of trial, Complainant moved to vacate Item 1(c) of the Citation, on the ground that there exists no known engineering technology to reduce employee exposure who are arcairing[3/] to permissible levels as set forth in Table G-16 of the noise Standard. This motion was granted, which ruling is hereby confirmed (Tr. Vol. I, pp. 12, 13).

Thus, at the outset of trial, there remained for resolution the one remaining alleged noise violation, Item No. 1(b), involving an employee located in Building No. 42 engaged in grinding hatch opening rings, with a hand held, pneumatic grinder, and Item No. 2, involving an employee in Building No. 30, the Boiler Shop, engaged in an arcairing operation and exposed to iron oxide fumes in excess of the limit permissible under the cited Standard.

It was additionally stipulated that Respondent is a Pennsylvania corporation with its principal office located at its shipyard in Chester, Pennsylvania. It purchases goods in excess of one million dollars a

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[3/] Arcairing is a process of burning away unwanted metal. It is the opposite of welding. The arcair tool is hand held. It is fitted with various diameter carbon rods, which are electrically arced producing intense heat which melts the unwanted metal to a molten state. An air stream at high velocity (80 to 100 p.s.i.) moves through the tool and blows the molten metal away at appoximately 100 to 125 feet per second. The process is used to gouge out defective welds or to burn and blow away other types of unwanted metal from surfaces. The molten metal generates the iron oxide fumes at issue herein (Tr. Vol. III, pp. 90, 91; Vol. pp. 224-226).

year from sources without the State of Pennsylvania. No injuries are connected with this case. It is a large employer in its geographic area, with an average daily number of 4000 employees. Its gross annual sales exceed 100 million dollars (Tr. Vol. I, pp. 17-21, Vol. II, p. 97).

Based upon the foregoing, it is concluded that Respondent is an employer engaged in a business affecting commerce who has employees within the meaning of Sections 3(5) and (6) of the Act, 29 U.S.C. 652(5) and (6). Upon the filing of the Notice of Contest herein, the Review Commission has jurisdiction in this matter pursuant to Section 10(c) of the Act, 29 U.S.C. 659(c).

The first issue to be decided is Respondent's contention that it was improperly cited, in Item No. 2, for an alleged violation of the General Industry Standard codified at 29 C.F.R. 1910.1000 because the arcairing operation in process, which forms the factual basis of the allegation, involved shipbuilding and thus, a Maritime-Shipbuilding Standard, specifically 29 C.F.R. 1916.82(d)(1) should have been cited (see Respondent's Brief, pp. 3, 4, 13-15; R.p. J-50).

The General Industry Standard codified at 29 C.F.R. 1910.5, in pertinent part, provides as follows:

Applicability of Standards

* * *

(c)

(1) If a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable to the same condition, practice, means, method, operation, or process. For example, § 1501.23(c)(3) of this title prescribes personal protective equipment for certain ship repairmen working in specified areas. Such a

standard shall apply, and shall not be deemed modified nor superseded by any different general standard whose provisions might otherwise be applicable, to the ship repairmen working in the areas specified in § 1915.23(c)(3).

(2) On the other hand, any standard shall apply according to its terms to any employment and place of employment in any industry, even though particular standards are also prescribed for the industry, as in Subpart B or Subpart R of this part, to the extent that none of such particular standards applies. To illustrate, the general standard regarding noise exposure in § 1910.95 applies to employments and places of employment in pulp, paper, and paperboard mills covered in § 1910.261.

Respondent argues that the Shipbuilding Standard codified at 29 C.F.R. 1916.82(d)(1),[4/] covers the activity here in question because the coverage of the Longshoremen and Harbor Workers Act (under which the Shipbuilding Standards were initially promulgated) has been judicially broadened under the recent case of Dravo Corp. v. Maxin, 545 F2d 374 (CA 3, 1976). Thus, the employee who was arcairing in Respondent's shipyard, although geographically removed from the "navigable waters of the U. S.," would be covered under the Dravo case, supra, and also thereby covered under the Shipbuilding Standard.

The solution to this issue, however, in my view, rests in determining the meaning of the above quoted "applicability" provisions of the General Industry Standards, 29 C.F.R. 1910.5(c)(1) and (2).

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[4/] This Standard provides:

(d) Protection against particulate contaminants not immediately dangerous to life.

(1) When employees are exposed to unsafe concentrations of particulate contaminants, such as dusts and fumes, mists and fogs or combinations of solids and liquids, they shall be protected by either air line or filter respirators, except as otherwise provided in the regulations of this part.

Although the quoted provisions are far from a model of clarity, they appear to intend to make applicable to any given condition, the most specific Standard existent, whether a General Industry or particular industry standard regardless of where the alleged violative condition exists. Here, the General Industry Standard cited and relied upon by Complainant, 29 C.F.R. 1910.1000 is much more specific than the Shipbuilding Standard Respondent argues should apply. 1910.1000 makes reference to the specific offending air contaminant herein, iron oxide fume by name, and sets a specific employee exposure limit, 10 $mg/M^3$, whereas the Shipbuilding Standard is more general in its terms.

It is therefore concluded that the appropriate and more specific General Industry Standard is properly cited and relied upon herein and Respondent's argument is rejected.

The next issue raised is whether the remaining noise violation, Item 1(b), involving the grinding of hatch rings at Respondent's work site, is established by the evidence of record.

In order to determine this question, reference must be made to the decision of the Commission in its precedent case, Sec. of Labor v. Continental Can Company, Inc., OSHRC Docket No. 3973 et al. (August 24, 1976).

Chairman Barnako, speaking for the majority, in part,[5/] held that the Noise Standard, 29 C.F.R. 1910.95, "... requires only the implementation of those engineering controls which are economically, as well as

[5/] See "concurring" opinion of Commissioner Moran, p. 23, Slip opinion.

technically feasible." (p. 3, Slip opinion). In short, the Chairman defined the word "feasible" as it appears in the Noise Standard, to mean both "economically" and "technically" - feasible.

Further, the Chairman stated:

> "In determining whether controls are economically feasible, all the relevant cost and benefit factors must be weighed. ... any significant reduction in ambient noise levels which are above G-16 limits will tend to provide some protection to the hearing of employees. But we cannot overlook the fact that protection against most of the detrimental effects of excessive noise can be achieved through the use of a relatively reliable and convenient type of personal protective equipment. Additionally, the effects of exposure to continuous noise levels as high as 115 dBA is permitted by the standard itself.
>
> Other factors to be considered in the benefits which noise reduction will achieve include the number of employees exposed to excessive noise, and the net reduction in their exposure which engineering or administrative controls can reasonably be expected to produce. As to the last noted factor we would emphasize that the benefits to be obtained will vary according to the magnitude of the noise levels existing prior to the imposition of controls. Cost factors which must be considered include both the direct costs of installing and maintaining controls, and indirect costs due to any loss of productivity or efficiency resulting from their implementation. This list is not meant to be all-inclusive. We cannot here establish specific guidelines which will be applicable to all cases. The ultimate determination in each individual case must be made by weighing all the relevant factors in light of the objectives of the Act.
>
> The burden of proving that engineering or administrative controls are feasible lies with Labor. Love Box Co., OSHRC Docket No. 6286, BNA 4 OSHC 1138, CCH OSHD para. 20,588 (April 7, 1976); Reynolds Metals Co., OSHRC Docket No. 1551, BNA 3 OSHC 2051, CCH OSHD para. 20,447 (February 25, 1976).16/
>
> fn 16/ In Atlantic & Gulf Stevedores, Inc. v. OSHRC, [534 F2d 541 (3rd Cir., March 26, 1976)], the Court indicated that an employer could generally defend against an alleged violation of a standard by proving that the standard was not economically feasible as to him. The standard here at issue, unlike the one before the Court, explicitly requires only those engineering

and administrative controls which are feasible. Accordingly, proof of feasibility is an element of the charge, and must be borne by Labor. In Love Box Co. and Reynolds Metals Co., supra, Labor conceded that it had the burden of proving the feasibility of engineering or administrative controls."
(Slip opinion, pp. 18-20).

As of this writing, the Continental Can case has not been reviewed, reversed or modified by any U. S. Circuit Court of Appeals. It therefore constitutes Review Commission precedent which binds the undersigned and controls the determination of the issue stated, supra. Gindy Manufacturing Company v. Secretary of Labor, 10 OSAHRC 367, (May 7, 1974).

As Commissioner Cleary pointed out in his dissenting opinion in Continental Can, supra:

> "Perhaps the most disturbing aspect of the Chairman's holding is his placing of the burden of proving the economic feasibility of engineering controls upon the Secretary. This imposition is contrary to settled principles of law. More importantly, however, it places upon the Secretary a burden that is so onerous that it may be impossible to satisfy. As a necessary consequence, therefore, it will be virtually impossible for the Secretary to enforce the noise standard so as to assure the continuing development and implementation of technologically feasible engineering controls."[6/]
> (Slip opinion, pp. 35-36).

As to the case herein, and the issue stated, supra, the evidence of this record does not establish the alleged noise violation set forth in Item 1(b). Under the Continental case burden of proof, Complainant failed to introduce any evidence whatever concerning the "... indirect costs

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[6/] I find myself in agreement with the compelling logic of Commissioner Cleary's well reasoned dissent in the Continental Can case, Slip opinion, pp. 24-37. Regretably, I am not free to follow it however.

due to any loss of productivity or efficiency resulting from...", the implementation of "technically" feasible engineering controls (i.e., a muffled air driven grinder and a wooden workbench), which the evidence does establish were available to this Respondent (see Tr. Vol. I, pp. 34-104, Exhs. R-1, R-2; pp. 113-202, Exhs. C-3, C-4, C-5, C-6).[7/] At the close of the Complainant's case, Respondent's motion to dismiss Item 1(b) was granted for the foregoing reasons (Tr. Vol. V, pp. 3-89). This ruling is hereby confirmed.[8/]

There remains for determination Item No. 2 of the nonserious Citation herein, which alleges that an arcair operator in Respondent's Boiler Shop, was exposed to iron oxide fumes in excess of the 10 $mg/M^3$ level set forth in the Air Contaminant Standard, 29 C.F.R. 1910.1000, and Respondent failed to determine and implement feasible engineering controls to reduce his exposure.

Paragraph (e) of the cited Standard provides:

> To achieve compliance with paragraph (a) through (d) of this section, administrative or engineering controls must first be determined and implemented whenever feasible. When such controls are not feasible to achieve full compliance, protective

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[7/] This failure of evidence is quite understandable. I fail to understand how Complainant can produce such evidence absent a thorough and extensive cost analysis of all of Respondent's relevant financial, as well as production records, coupled with a thorough time and motion study of the noise operation both before and after the "technically" feasible engineering or administrative control. (Complainant might well have to resort to Section 8(b) of the Act, 29 U.S.C. 657(b) to accomplish this.) Even this type of evidence might well prove to be insufficient under Continental Can because the Chairman advises that the indicated "indirect costs," "... is not meant to be all-inclusive."

[8/] This determination is one example of what I conceive to be the accuracy and wisdom of Commissioner Cleary's cavaet in his dissenting opinion in the Continental Can case, quoted, supra.

equipment or any other protective measures shall be used to keep the exposure of employees to air contaminants within the limits prescribed in this section.

* * *

29 C.F.R. 1910.1000(e)

During trial, Respondent's counsel argued that the term "feasible" as it appears in the Air Contaminant Standard should be construed to mean what Chairman Barnako said "feasible" means in the Noise Standard (29 C.F.R. 1910.95) in the Continental Can case. (Tr. Vol. V, pp. 90-126).

This argument is rejected. In my view, the term "feasible" appearing in the Air Contaminant Standard means "practically possible of accomplishment under all of the circumstances of the case."[9/] (Tr. Vol. V, pp. 107, 127). "Feasible" is defined in Webster's New World Dictionary (The World Publishing Co., Second College Ed., 1974), as follows:

> 1. Capable of being done or carried out; practicable; possible. 2. Within reason, likely, probable. 3. Capable of being used or dealt with successfully; suitable.

Inherent in the foregoing definitions are concepts of both "technical" and "economic" feasibility. In my view, "economic" feasibility, i.e., the financial capacity of an employer to implement engineering or administrative controls, otherwise "technically feasible," is properly a matter of an affirmative defense to be borne by employers, who are best situated to know their own financial status and the financial impact, both as to "direct" and "indirect" costs, implementation of "technically" feasible controls will have.

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[9/] The term "feasible" is not defined in the Act or the Air Contaminant Standard.

The definition "announced" (as Respondent puts it), at trial, in the absence of authority to the contrary, is therefore used herein to determine the alleged iron oxide violation.

Industrial Hygienist Martin Dubin, on September 30, 1975, very professionally, carefully and competently obtained air samples from the breathing zone of the arcairing employee, Mr. Wilson.[10/] These samples, properly handled throughout, were ultimately analyzed at the Salt Lake City laboratory of NIOSH. This analysis revealed concentrations of iron oxide, in these samples to be as follows: 23.4 $mg/M^3$; 20.3 $mg/M^3$; 27.2 $mg/M^3$; 19.9 $mg/M^3$. From these results, the eight hour time weighted exposure of Mr. Wilson to the iron oxide fumes, was properly calculated to have been 13.986 $mg/M^3$, thus exceeding the 10 $mg/M^3$ Standard limit. (Tr. Vol. II, pp. 5-94).

The evidence of record clearly establishes Mr. Wilson's exposure to a level of iron oxide fumes in excess of the limit set forth in the Standard. It further establishes, however, without contradiction, that throughout this arcairing operation, Mr. Wilson wore a respirator. It was Respondent's practice, to issue a respirator, either air line or canister type depending on the type of arcairing to be performed, to any employee who is to do arcairing, with the arcairing tool and equipment from the tool room, prior to each arcairing operation. (Tr. Vol. II, pp. 98-109). Instructions on how to use these respirators are given employees and Respondent's safety personnel regularly inspect and enforce the use of this respiratory equipment. (Tr. Vol. II, p. 113; Vol. V, p. 150).

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[10/] All sampling done by the inspecting Industrial Hygienists were professionally and competently carried out.

Thus, the question presented by this case is whether there existed "feasible" administrative or engineering controls to achieve compliance with the cited Standard, 29 C.F.R. 1910.1000(e). If so, a violation has been established. If not, Respondent was justified in resorting to "protective equipment," i.e., respirators, as spelled out in paragraph (e) of 1910.1000 for the arcairing operation in question; and no violation existed.

The evidence reveals that Respondent's Boiler Shop, within which the arcairing operation in question took place, is approximately 500 feet long and 120 feet wide. This building is divided into two open areas, the low bay and high bay. The low bay is about 45 feet high, the high bay 70 to 75 feet high. In the low bay, two 25-ton overhead cranes operate at about 25 feet from the floor. In the high bay, one 100-ton and three 35-ton overhead cranes also operate. This Boiler Shop, like Respondent's other operations, is essentially a job shop, that is, there exists no production line type of operation. Many varied and individualized parts for ships are fabricated therein, such as bulbous bows, rudders, propellers, boilers, smoke stacks and the like. Many of these ship components are of gigantic size and weight, are fabricated at varying locations within the Boiler Shop on a space available basis. Thus, the physical layout of this shop varies from day to day. (Tr. Vol. V, pp. 177-180, 221-245).

The arcairing type of operation is used extensively throughout Respondent's shipyard and as many as 50 such operations may be in progress on any given day. Within the Boiler Shop, as many as seven or eight arcairing operations are frequently in progress. Large ventilating blowers or fans, capable of moving 186,000 cubic feet of air per minute are located

in the roof of the Boiler Shop. Individual local ventilation equipment is provided to all welders and for employees working in enclosed spaces on ships. Respondent employs ventilation control experts to assure adequate ventilation in enclosed spaces which abound at this shipyard. (Tr. Vol. II, pp. 100, 112; Vol. V, pp. 205-210).

On the day of the inspection, Mr. Wilson was working in the low bay of the Boiler Shop about 50 feet in from the river end of this building. He was engaged in arcairing a large cone and a cylinder. The cylinder was a portion of an inner smoke stack and was about 5 feet in diameter and 30 feet long, and was laying on its side, on a platen (platform), thus resembling a large pipe. Respondent's quality assurance inspectors had marked various welds and other areas on the surface of the cylinder which required arcairing. To accomplish the arcairing, staging had been erected alongside of this cylinder, and Mr. Wilson was observed to arcair from the staging, 5 to 6 feet off the floor, as well as on the bottom portion of the cylinder, about 2 feet from the floor. Upon completion of the arcairing operation, inspectors would reinspect the areas. Other work was performed on this cylinder during the total arcairing process, such as rewelding joints and further inspections. This cylinder was in the Boiler Shop for approximately 45 days and arcairing took place inside as well as outside of the cylinder. (Tr. Vol. V, pp. 177-189, 191, 230). There is no evidence in this record concerning the specifics of the large cone Mr. Wilson was arcairing on the day of the inspection.

As noted earlier, the arcairing process involves melting unwanted metal, such as a defective weld, to a molten state and blowing this molten metal away from the surface by a jet of high velocity air, emitted from

the arcairing tool at from 80 to 100 psi (pounds per square inch). The molten metal, which generates the iron oxide fumes, is thus blown away at about 100 to 125 feet per second (Tr. Vol. III, pp. 90-91). There is thus produced a large, defused shower of sparks and molten metal propelled in a direction away from the operator. If the arcairing operation is a shallow cut, the fume cloud is closer to the operator than if a deep cut is being made. In the latter case, a tunnel like effect is produced and the fume cloud is propelled as far as 25 feet from the operator (Tr. Vol. V, pp. 230, 231). The trajectory of the shower of sparks and molten metal, as well as the iron oxide fume cloud, will also vary depending upon the geometry or shape of the surface being arcaired.

Respondent produced a representative from the Arc Air Company, the manufacturer of the arcair tool used by Mr. Wilson. Although this company, through its Research and Development Department, is currently working in both the noise and fume control area, having spent about $100,000 for various consultants, it as yet has not been successful in devising any system to effectively vent arcairing fumes under the conditions existent at Respondent's work site. Further, he was unaware of any commercially available equipment for dealing with this problem (Tr. Vol. III, pp. 86-142).

Respondent has also performed several experiments attempting to collect and vent away arcairing fumes which were not successful. In 1970, Respondent found that its experimental collector was not successful because the molten metal damaged the impellers in the ventilating blowers and clogged the filters (Tr. Vol. V, pp. 225-227).

Complainant's primary witness concerning the arcairing operation, Mr. Gronka, an Industrial Hygiene Engineer with a private consultant firm,

testified at considerable length to three proposed engineering methods to ventilate the iron oxide fumes away from Mr. Wilson while working on the cylinder. (Mr. Gronka made a post-inspection visit to Respondent's Boiler Shop on May 7, 1976. The cylinder in question was no longer there. He reviewed Industrial Hygienists Dubin's notes to visulize the arcairing operation in question.)

He first suggested the most simple devise, a pedestal fan to blow the iron oxide fume cloud away from Mr. Wilson (Tr. Vol. II, pp. 182-188). He next recommended a "lamb" air mover, which is nothing more than a relatively high velocity, directional fan, to blow the fumes away from Mr. Wilson.

Neither of these suggestions, however, are practical, as pointed out by Respondent's Safety Director, Mr. Walton. Either system merely moves the iron oxide fume cloud from one location to another, which, because of the job shop nature of Respondent's work site, in all probability, would result in blowing the fumes onto nearby workers. Additionally, the high velocity fan (variously denominated a "lamb" air mover, squirrel cage or copas blower), would subject an arcair operator to a significant draft and thus a possible health hazard. Further, any high velocity air mover would also blow dust particles about, with a significant chance of causing such particles to be blown into the eyes of nearby workers, compounding an already common employee complaint of foreign matter in their eyes. Furthermore, because arcairing operations involve the frequent movement of the operator from one location to another upon the huge structures involved, any fan type of ventilation would require the repositioning of any type of fan being used. This would have to be done by ventilation employees, not the arcair operator, or a jurisdictional labor dispute might well ensue (Tr. Vol. V, pp. 211, 216-236).

Mr. Gronka's next suggestion was a system of fume collection and exhaustion away from the operator outside of the building. These systems were to employ various types of collection hoods, connected by duct work to exhaust fans and by additional duct work to outside of the building. Exhibits C-7(a), (b), (c) and C-8 are copies of diagrams depicting these suggested engineering controls. Such exhausting suggestions also involved the use of a platen or platform with motorized rollers, onto which the stack in question would be placed, and rotated so that the arcairing operation could be done at a constant, fixed level off the floor.

These systems all have significant difficulties which make them impracticable. As pointed out by Respondent's Safety Director, if Respondent's work site involved the same operation on a day-to-day basis, perhaps such systems might be made to work effectively. However, Respondent's work is just the contrary, with a constantly changing work environment, with differently shaped, large components of ships being fabricated at ever changing locations within the Boiler Shop. The collection hoods also present a significant problem. The molten metal and sparks created by the arcairing process, being jetted away at high speed from the point of burning, would strike the collection hood and bounce back at the operator, thus subjecting him to the danger of burns. These hoods, to be effective in any way, would have to be positioned at a very precise distance and angle to the point of burning, which would require the constant adjustment of them from one spot to another as the various locations on the stack would be arcaired. Because of the mechanically limited range and configuration which the hooded ducts are capable of, such a system would not be possible of use inside of large ship parts, such as the bulbous

bows or rudders, the interior of which are webbed with reinforcing steel supports. Additionally, the duct work to carry off the fumes would significantly interfere with the movement of the overhead cranes in this Boiler Shop.

The very large, skid mounted exhaust fan also suggested is likewise not practical (See Exhibit C-9). Its implementation would require frequent repositioning within the Boiler Shop, which would require the use of overhead cranes as well as flexible duct work running on the Shop floor to the fan. This ducting on the Shop floor of course would create a tripping hazard.

The use of the platen equippped with motorized rollers, to position the cylinder at issue at a constant fixed level (a necessary part of the fume collection, hood suggestion), is also impractical, because of the necessity for other employees to work upon and within the cylinder during arcairing operations (Tr. Vol. II, pp. 124-214, 215-233; Vol. III, pp. 5-85; Vol. IV, pp. 9-28, 29-103; Vol. V, pp. 133-258).

Although the evidence of record is rather meager as to the toxicity of iron oxide fumes, both parties appear to agree that these fumes present the lowest form of toxicity and constitute no risk of permanent physical injury or disability to employees. It is compared to nuisance dust (Tr. Vol. IV, pp. 17-21; Exh. C-10).

Thus, when dealing with a substance of such admittedly low toxicity, if toxic at all on this record, the Complainant's burden of proving the feasibility, i.e., practicality of suggested engineering or administrative controls, is higher than if a more toxic air contaminant were involved.

Similarly, Respondent's burden of showing infeasibility, i.e., impracticality is proportionatly reduced.

The evidence is also clear and unrebutted that Respondent's employees, including Mr. Wilson, who carry out arcairing operation at this work site, are adequetly protected from iron oxide fumes by well maintained respirators, the use of which is closely monitored and enforced by Respondent's Safety Division.

Upon the evidence of record herein, it is therefore concluded that there existed no feasible engineering or administrative controls available to Respondent for the arcairing operation in question on the day of the inspection. Respondent's utilization of personal protective equipment, i.e., a respirator for the employee engaged in this operation, conformed to the requirements of the Air Contaminant Standard, 29 C.F.R. 1910.1000, and thus, no violation of this Standard has been established.

Based upon the foregoing findings and conclusions, and pursuant to the provisions of Sections 10(c) and 12(j) of the Act, 29 U.S.C. 659(c) and 661(i), it is hereby,

ORDERED:

1. That Item No. 1(a) of the Nonserious Citation herein, alleging a violation of Section 5(a)(2) of the Act, 29 U.S.C. 654(a)(2), for failure to comply with the Noise Standard set forth at 29 C.F.R. 1910.95, is AFFIRMED. No penalty is ASSESSED.
2. Items No. 1(b) and 1(c) of said Citation are VACATED.

3. Item No. 2 of said Citaiton, alleging a violation of Section 5(a)(2) of the Act, 29 U.S.C. 654(a)(2) for failure to comply with the Air Contaminant Standard set forth at 29 C.F.R. 1910.1000 is VACATED.

William E. Brennan
WILLIAM E. BRENNAN
Adm. Law Judge, OSHRC

Dated: August 10, 1977
Hyattsville, Maryland

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| 76-2769 | KIN-BUC, INC. | 12/17/82 | 70/D11 |
| | [Remand] | | |
| | (Judge's decision) | | 70/E1 |
| 82-0136-S | ROBERT P. LOVELAND, d/b/a SECURITY WELDING | 12/20/82 | 70/G1 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

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UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

December 17, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Cyprus Mines Corporation d/b/a Cyprus Wire & Cable Co.

OSHRC DOCKET NO. 76-616

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION (REMAND)

To wit: See attached.

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-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

- Judge's Office
  Occupational Safety & Health
  Review Commission
  1515 Broadway Room 3800
  New York, New York 10036

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>CYPRUS MINES CORPORATION, d/b/a CYPRUS WIRE AND CABLE COMPANY,<br><br>Respondent. | OSHRC Docket No. 76-616 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

Cyprus Mines Corporation operates a wire and cable plant in Rome, N.Y. After a compliance safety and health officer inspected Cyprus' plant on October 31, November 3 and November 4, 1975, the Secretary of Labor issued a citation alleging that Cyprus had violated 29 U.S.C. § 654(a)(2), section 5(a)(2) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"), by failing to comply with the occupational noise standard at 29 C.F.R. § 1910.95(b)(1). 1/

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1/ This standard provides in part:

> § 1910.95 Occupational noise exposure.
>
> * * *
>
> (b)(1) When employees are subjected to sound exceeding those listed in Table G-16, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal

(cont'd)

The citation, as clarified in the complaint, alleged that on November 4, 1975, Cyprus employees in two buildings at the plant had been exposed to sound levels in excess of those permitted by the standard and that feasible administrative or engineering controls had not been used. No penalty was proposed.

Administrative Law Judge Alfieri held a hearing and found that Cyprus was not in violation in the Watson stranding machine area in Building 19 of its plant. He found that Cyprus was in violation in two areas of Building 16 but was not in violation in a third area of that building. The Secretary petitioned for review of that portion of the judge's decision finding no violation in the Watson stranding machine area in Building 19, and Cyprus petitioned for review of that portion of the decision finding a violation in the Vaughn Fine Wire area of Building 16. Commissioner Cleary granted both petitions. 2/

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(Footnote 1 cont'd)

protective equipment shall be provided and used to reduce sound levels within the levels of the table.

* * *

Table G-16--PERMISSIBLE NOISE EXPOSURES

| Duration per day, hours | Sound level dBA slow response |
|---|---|
| 8 | 90 |
| 6 | 92 |
| 4 | 95 |
| 3 | 97 |
| 2 | 100 |
| 1 1/2 | 102 |
| 1 | 105 |
| 1/2 | 110 |
| 1/4 or less | 115 |

(Footnote omitted).

2/ Former Commissioner Moran also directed review "for error." Neither party has challenged the judge's disposition of the citation with respect to the Bartell-Watson area or the Cook-Butt area of Building 16. Mr. Moran's general direction for review did not specify any issues, and the parties have not raised issues other than those specified by Commissioner Cleary. Inasmuch as we find no compelling public interest that would warrant review

(cont'd)

## I. BUILDING 19 - WATSON STRANDERS

### A

Two stranding machines manufactured by the Watson Machine Company were in Building 19. One was a seven-strand machine; the other was a twelve-strand machine. The machines were separated by an aisle about fifteen feet wide. On November 3, 1975, there was one employee working in the area, the machine operator. The compliance officer took noise level readings with two different instruments. He used a sound level meter to take readings in different locations around the work area once during each hour of the eight-hour workshift. The readings ranged from 101 to 103 dBA. The compliance officer also fastened a noise dosimeter near the ear of the machine operator to determine the amount of noise to which the operator was exposed during his entire shift. The dosimeter readings showed that the operator, who was not using any protective equipment, was exposed to noise levels equal to 459% of the permissible levels. 3/

After Cyprus contested the citation, the compliance officer returned to the plant with Norman L. Meyerson, an acoustical engineering expert, to determine what feasible engineering or administrative controls could be implemented to reduce the noise in the cited areas. In the time between the inspection by the compliance officer and the visit by Mr. Meyerson, Cyprus had had the seven-strand

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(Footnote 2 cont'd)

of issues not raised by the parties, such issues will not be considered on review. See Water Works Installation Corp., 76 OSAHRC 61/B8, 4 BNA OSHC 1339, 1976-77 CCH OSHD ¶ 20,780 (No. 4136, 1976); Abbott-Sommer, Inc., 76 OSAHRC 21/A2, 3 BNA OSHC 2032, 1975-76 CCH OSHD ¶ 20,428 (No. 9507, 1976). The unreviewed portions of the decision are accorded the significance of an unreviewed judge's decision. See Leone Constr. Co., 76 OSAHRC 12/E6, 3 BNA OSHC 1979, 1975-76 CCH OSHD ¶ 20,387 (No. 4090, 1976), appeal withdrawn, No. 76-4070 (2d Cir. May 17, 1976).

3/ Cyprus has not argued that employees were not shown to have been exposed to excessive noise.

machine fixed because it was badly in need of repair and was ready to break down. 4/ The repairs cost approximately $32,000 and would have been necessary whether there had been a citation or not. As a result of the repairs, the noise produced by the seven-strand machine was reduced so that sound level readings taken with the twelve-strand machine off ranged from 80 to 87 dBA. With both machines running, the noise levels ranged from 85.5 dBA to 94 dBA.

The Secretary's expert testified that similar repairs to the twelve-strand machine would bring noise in the area down to Table G-16 levels. Cyprus presented testimony that the cost of repairing the twelve-strand machine would be at least $50,000 to $60,000. If the gearbox needed repair, the added cost would be $10,000 to $20,000; the total cost of the repairs might therefore range from $50,000 to $80,000. Cyprus argued to the judge that the reduction in noise levels resulting from the repairs meant that the violation had been cured and no violation should be found in Building 19.

B

In his decision, Judge Alfieri found that the operator was exposed to noise levels of 101-103 dBA at the time of the original inspection but that, at the second inspection, the noise made by the repaired seven-strand machine was below the level permitted by the standard for an eight-hour exposure. Judge Alfieri found that because the repairs to the seven-strand machine lowered the noise

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4/ Mr. Meyerson's written report recited that a Cyprus safety administrator had stated that the repairs had been made to reduce noise levels. At the hearing, however, the vice president and general manager of Cyprus Wire testified that the repairs were made because the machine was ready to break down. We find the testimony of the Cyprus official more reliable than the hearsay in Mr. Meyerson's report. We therefore find that the machine repairs were necessary regardless of the noise it produced.

emanating from it alone to below 90 dBA over 8 hours, "[i]t follows therefrom that there are feasible engineering controls available for the Watson strander machines in building #19." In considering the costs of the repairs, the judge merely noted the estimated cost of repairing the twelve-strand machine and that Cyprus does $450,000,000 volume of business annually. He concluded that the cost "does not render the proven controls economically infeasible."

The judge then focussed on the question of whether the violative condition continued to exist after the repairs. Relying on the readings taken during the second visit and on evidence that one machine was often shut down while the operator performed his duties and that the operator is away from the machines for part of his shift, the judge concluded that the Secretary had not proved that the machine operator was then being exposed to an excessive level of noise in this area. He therefore vacated the citation insofar as it pertained to this area.

C

In his petition for review, the Secretary argued that the evidence clearly established the existence of a violation on the day of the compliance officer's first inspection of Building 19 and that it was error for the judge to vacate the citation on the ground that a violation did not continue to exist. The Secretary contends that the evidence as to the reduction in noise resulting from the repairs is proof only that feasible engineering controls exist to reduce noise in the cited area. He argues that it is inconsistent with the purposes of the Act to permit corrective measures taken after the inspection to negate the existence of the violation alleged in the citation. The Secretary urges that the evidence clearly establishes that the employee was exposed to excessive levels of noise on the date of the initial inspection and that the Secretary is not required to show that this overexposure continued to exist.

Cyprus, on the other hand, argues that the judge's finding was correct and should be affirmed. Cyprus argues that evidence as to the feasibility of an engineering control must relate to the character and intensity of the noise found by the expert during his later visit to the plant.

D

We agree with the Secretary that the judge erred in vacating the citation on the ground that the violation did not continue. The question is whether the cited condition existed on the date the violation is alleged to have occurred. Abatement of a violative condition after a citation has been issued does not negate or excuse an employer's prior failure to comply with the requirements of the Act. Gannett Rochester Newspaper Corp., 81 OSAHRC 35/A2, 9 BNA OSHC 1590, 1981 CCH OSHD ¶ 25,323 (No. 6352, 1981), and cases cited. Although the Secretary himself introduced the evidence of later reductions in noise levels, that evidence was introduced for the purpose of establishing the existence of feasible engineering controls. There is no basis for concluding that the parties impliedly consented under Fed. R. Civ. P. 15(b) to try whether a violation existed only on the date of the second visit.

Inasmuch as it is uncontested that the operator was exposed to excessive noise levels on the date that the violation is alleged to have occurred, the remaining question is whether the proposed engineering controls, repairs to the machines, were feasible within the meaning of section 1910.95(b)(1). We find that the repairs to the seven-strand machine are feasible engineering controls, both technologically and economically.

The Commission has recently considered the meaning of the term "feasible" in light of American Textile Manufacturers Institute, Inc. v. Donovan, 452 U.S. 490 (1981), in which the Supreme Court held that "feasible" means "achievable" or "capable of being done." In Sun Ship, Inc., OSHRC No. 16118, issued this day, the Commission held that where technologically feasible controls will significantly

reduce noise levels, the Secretary may show economic feasibility by showing either that the cost of engineering and administrative controls will not threaten the cited employer's long-term profitability and competitiveness, or that the employer's inability to afford the cost of controls results from the employer's lagging behind its industry in providing safety and health protection for employees. Sun Ship overruled Continental Can Co., 76 OSAHRC 109/A2, 4 BNA OSHC 1541, 1976-77 CCH OSHD ¶ 21,009 (No. 3973, 1976), appeal withdrawn, No. 76-3229 (9th Cir. April 26, 1977) ("Continental Can"), to the extent that Continental Can had required that costs of controls be weighed against their benefits.

The analysis of the feasibility of engineering controls applied by the judge in this case is inconsistent with the current Commission precedent. We have therefore reviewed the evidence and find [5/] that, as to the seven-strand machine that was repaired, the engineering controls suggested by the Secretary, repairs to the machine, were feasible steps. The repairs were obviously achievable. The reduction of noise levels--by at least 7 dBA--was significant. Inasmuch as the repairs to the seven-strand machine did not add any cost that Cyprus otherwise would not have incurred, the added costs for noise abatement were zero. Accordingly, we find that with respect to the seven-strand machine, there were feasible engineering controls that could have been used and there was a violation in the Watson Strander area of Building 19 at the time alleged in the citation and complaint.

It is unnecessary here to determine whether repairs to the twelve-strand machine are required. The repairs to the seven-strander reduced noise levels in

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5/ The Commission has the authority to make findings of fact itself, independent of the administrative law judge. Butler Lime & Cement Co., 79 OSAHRC 103/D12, 7 BNA OSHC 1973, 1979 CCH OSHD ¶ 24,091 (No. 855, 1979), rev'd on another ground, 658 F.2d 544 (7th Cir. 1981).

the area to 85.5 to 94 dBA when both machines were operating. Inasmuch as the employee working in the area moved around during the day, it is uncertain whether any further measures would be necessary to reduce his noise exposure. We also note that the citation and complaint alleged that there was excessive noise in the Watson Strander area and that Cyprus had not instituted feasible engineering or administrative controls in that area. The citation and complaint did not purport to require abatement of any particular sort or require that abatement measures be instituted on both machines. Although at the hearing the Secretary focussed on repairing the seven- and twelve-stranders because he was required to establish that there were feasible engineering controls available, Cyprus is not required to adopt the abatement method suggested by the Secretary, even one found feasible by the Commission; it may satisfy its duty to comply with the standard by using any feasible method that is appropriate to abate the violation. Cf. General Electric Co., OSHRC No. 79-504, slip op. at 16, n.6 (Sept. 30, 1982) (section 5(a)(1) case requires use of any feasible means or a combination of feasible means); Kelly Springfield Tire Co., 82 OSAHRC _____ , 10 BNA OSHC 1970, 1975 n.5, 1982 CCH OSHD ¶ 26,223, p. 33,114 n.5 (No. 78-4555, 1982)(same); Ted Wilkerson, Inc., 81 OSAHRC 70/D8, 9 BNA OSHC 2012, 1981 CCH OSHD ¶ 25,551 (No. 13390, 1981) (section 5(a)(1) case requires proof of feasible abatement; employer allowed to show it used other abatement method); Brown & Root, Inc., 80 OSAHRC 97/A2, 8 BNA OSHC 2140, 1980 CCH OSHD ¶ 24,853 (No. 76-1296, 1980)(same). For these reasons, it is unnecessary in this particular case to go beyond our finding that the repairs to the seven-strander were feasible and significantly reduced the noise.

## II. BUILDING 16--VAUGHN FINE WIRE AREA

### A

Cyprus does not deny that there was excessive noise in the Vaughn Fine Wire area but contends that the Secretary has not proved that the engineering con-

trols proposed are feasible. The Vaughn Fine Wire area occupies about 3,000 square feet on the second floor of Building 16 and contains twenty Vaughn machines in four rows containing five machines each. There are two aisles with five machines on each side of the aisle, so that ten machines face each aisle. The machines in the two inner rows are back to back very close to each other, and the aisles from which employees work are between the outer rows and the inner rows. Two machine operators work in this area, one operator for each aisle. In addition, there are oilers and maintenance workers who also work in this area.

The machines pull wire from large supply spools through dies and feed the wire onto smaller reels or spools. Sometimes all ten machines on an aisle will be in operation at one time, but often only seven or eight will be operating. The operators must replace the empty large supply reels and remove and replace the full take-up reels. The supply reels weigh approximately 500 pounds and the finished reels are 30 to 40 pounds. The operators must check the take-up reels to see that they are winding properly and must make adjustments to the dies and the machines. Cyprus' vice president of manufacturing estimated that one operator would need to have access to the machines about 500 times in an eight-hour shift.

The compliance officer testified that during the inspection he recorded readings of 96 and 97 dBA once each hour throughout the 8-hour shift and that the dosimeter readings indicated that the employees were exposed to 283% of the permissible noise levels. The Secretary's expert witness, Mr. Meyerson, stated that he measured noise levels of 98 dBA while he was standing in the aisle among four of the machines. Only three of the machines were operating at the time he took that measurement.

Mr. Meyerson stated that one way to decrease the noise levels would be to spread out the machines so that the noise was not concentrated in a small area. Because of space limitations, however, he said this solution was not possible.

He therefore suggested that the machines be enclosed with sound-absorptive materials. In each row, the machines are separated into a group of two and a group of three. Because the middle rows are so close, they constitute one group of four machines and another group of six. Mr. Meyerson recommended that each group in the outer aisles be enclosed and that each group in the middle be enclosed, with a double sided sound-absorptive wall between the backs of the machines in the two middle rows. In order to permit access to the machines, he recommended that at the front of each machine the enclosures have doors that would slide either horizontally or vertically. He recommended windows in the doors to allow visual checking of the machines. Because the machines produce heat, Mr. Meyerson suggested that there not be tops on the enclosures. He testified that the enclosures could be made of readily-available panels at nominal cost, and that they would reduce the noise by at least 15 decibels. He testified that enclosures of this type are used in textile plants.

Mr. Barrett, Cyprus' vice president of manufacturing, testified on behalf of Cyprus. Mr. Barrett holds a bachelor's degree in chemical engineering and a bachelor's degree in business administration. He testified that the machines in the center groups were too close together to permit the wall in the middle of the proposed enclosures, and he expressed the opinion that the wall would make necessary maintenance impossible. Mr. Barrett stated that he believed the proposed enclosures were not feasible because they would limit access to the machines and slow down or inconvenience the operators and employees performing maintenance on the machines. He testified that the enclosures would require the machines to be shut down for some operations, thereby reducing productivity. Mr. Meyerson testified in rebuttal that the wall need not be permanent or solid but could be made of removable modular panels with some space beneath and between them, so they need not interfere with maintenance or repairs.

Mr. Barrett stated that he believed that the enclosures would not really reduce employee exposure to noise because the employees would constantly have to

open the doors to work on the machines and would then be exposed to the full force of the noise. On rebuttal, Mr. Meyerson testified that the absorptive enclosures would reduce the amount of noise the employee would be exposed to even if the employee had to open the door to perform his duties and that the noise from machines in other enclosures would be reduced. His written report stated that, even with the door open, employees "will be exposed to only a fraction of the noise now impacting [them]."

The Secretary's evidence was that the cost of the enclosures would be "nominal" and that the enclosures could be installed on weekends or other times when the machines would be off. The Secretary offered no estimated cost of enclosing the Vaughn machines, and Cyprus presented no monetary figures for the costs of constructing the enclosures or estimates as to how much its production might be reduced if the enclosures were installed. Cyprus also presented testimony that doors opening into the aisle might pose new dangers and obstruct both access to adjacent machines and the aisles.

B

In his decision, Judge Alfieri noted that although Cyprus did not deny that its employees were exposed to noise levels above those specified in Table G-16, Cyprus asserted that the Secretary had not proved the feasibility of the controls because he had not shown that the controls would bring the noise within permissible limits. The judge rejected Cyprus' argument, stating that the engineering controls need not reduce the noise to the levels permitted by the standard in order to be considered feasible. He found that the enclosures were a feasible engineering control because they could be fabricated "from readily available materials at economical cost," and would reduce the noise by 10 to 15 dBA. He stated that "it is not shown that the anticipated construction problems are insurmountable." The judge mentioned an engineering report prepared for Cyprus

that was introduced into evidence by the Secretary over Cyprus' objection. That report concluded that partial enclosure would bring the operator' exposure to noise within permissible levels. Addressing the adverse effect of the enclosures on Cyprus' production, the judge found that there was not sufficient evidence to find that the engineering controls were "infeasible." He found that Cyprus' argument that the enclosures might themselves cause a hazard was not substantiated. The judge found a violation in this location but assessed no penalty. He found also that, because experimentation with the proposed controls was necessary, an abatement period of 2 years, six months was reasonable, instead of the one year period provided in the citation.

C

Cyprus petitioned for review of this portion of the judge's decision, maintaining that the evidence establishes that the engineering controls are not feasible. Cyprus argued that its evidence that the enclosures would create operational and maintenance problems outweighed the Secretary's evidence. On review, Cyprus argues that the Secretary's proposal for enclosures represents "the completely theoretical nature of his approach." Cyprus argues that, because the operators would have to open the doors to work on the machines approximately 500 times a shift, they would be exposed to excessive noise levels anyway. Therefore, reasons Cyprus, when the duties of the employee are taken into consideration, the Secretary has not proved that the enclosures would make a significant reduction in the level of the employee's exposure. Cyprus also contends that the enclosures are not feasible because they would cause a reduction in productivity and would interfere with maintenance on the machines.

D

We do not agree with Cyprus' argument that, because doors would often be open, the Secretary failed to show that the enclosures were feasible. Cyprus

argues that the operators would therefore be exposed to excessive noise even with the enclosures. The enclosures would be made of noise absorbent materials, and the Secretary's expert testified that the noise levels would be reduced even with the door open. As the Secretary also points out, the other enclosures would absorb the noise from the other machines even while the door to one booth was open. Even if the noise level would be above the level permitted, the enclosures need not reduce noise to permissible levels in order to be feasible; they need only make a significant reduction in the existing noise levels. Sun Ship, slip op. at 11 n.10, and cases cited.

We agree with the judge's finding that the noise-absorbent enclosures were a technologically feasible engineering control. Cyprus argues, and Mr. Barrett testified, that the motors of the machines in the center rows are too close together for the center wall to fit. Mr. Meyerson testified, however, that, because the purpose of the enclosures is to absorb the noise rather than to wholly contain it, the walls need not be solid, and that there could therefore be openings in the wall to accommodate the motors. We also reject Cyprus' argument that the enclosures would make it impossible to do repairs or servicing on the Vaughn machines; Cyprus points, for example, to Mr. Meyerson's testimony that, with one door open, access to the adjacent machine might be obstructed. Mr. Meyerson testified, however, that because the enclosures could be constructed of removable panels, one could gain access to perform maintenance. Finally, Cyprus argues that a door could be accidentally closed on an employee, causing him to be injured. Judge Alfieri correctly found that the evidence on this issue was highly speculative and gave it little weight. 6/

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6/ We acknowledge that the use of enclosures with doors would not be entirely free of difficulty. For example, overhead garage-type doors could not be used in part of the area because several machines have overhead mezzanine

(cont'd)

Cyprus argues that the enclosures were not proved to be feasible because they would slow maintenance work on the machines, cause loss of time, and reduce production. These factors may be considered in determining whether the proposed noise controls are economically feasible. See Sun Ship, slip op. at 19.

When this case was tried, the Commission had not yet held, first in Continental Can and recently in Sun Ship, that the cost of engineering controls is relevant to their feasibility. The parties here did not litigate the economic aspects of feasibility under the approach of Sun Ship. The evidence on the point is sparse. The Secretary's expert testified that the noise-absorbent panels were commercially available at "nominal" cost, but he gave no estimate of the cost of the materials or of the cost of erecting the six enclosures required. Although Cyprus presented testimony that the enclosures would present a "nightmare" for the operators and for employees performing maintenance on the machines, this testimony does not enable us to determine how much time would be lost or how much production would be reduced. There is no evidence in the record as to Cyprus' ability to absorb the direct or indirect costs of the engineering controls. We therefore remand this case for the parties to present further evidence as to the anticipated costs, both direct and indirect, of the proposed noise abatement controls and for the application of our decision in Sun Ship.

III.

One last issue remains. At the hearing, the Secretary introduced into evidence portions of a report of a noise study of Cyprus' plant done in 1974 by

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(Footnote 6 cont'd)

grills that would obstruct the doors. The sliding doors would obstruct aisle traffic when they were open. Despite these difficulties, we are convinced that, on the whole, the booths are feasible.

an engineering firm hired by Cyprus. The report recommended that the operator desk in the Vaughn Fine Wire area be enclosed or that the machines be partially enclosed. Cyprus objected to the admission of the report on the ground that the study was not performed by Cyprus and there was no evidence that the report had ever been adopted or acted on by Cyprus. The judge admitted it into evidence and considered it in determining the technological feasibility of controls. On review Cyprus has renewed its objection to the report, relying on a ruling of an administrative law judge in an earlier case in which Cyprus was a party involving a different area of the same plant. In the earlier case, the judge sustained Cyprus' objection to the report.

Cyprus' argument that the report was not written or adopted by Cyprus raises a hearsay objection. See Fed. R. Evid. 801(d)(2)(A) and (B)(statements of or adopted by a party). Hearsay is admissible in administrative proceedings. Hurlock Roofing Co., 79 OSAHRC 93/A2, 7 BNA OSHC 1867, 1979 CCH OSHD ¶ 24,006 (No. 14907, 1979). We therefore conclude that Judge Alfieri properly admitted the engineering report.

Accordingly, that portion of the judge's decision dealing with the Watson Stranders in Building 19 is reversed, and the portion of the citation alleging a violation in that area is affirmed. We assess no penalty. With respect to the Vaughn Fine Wire Area in Building 16, this case is remanded for further proceedings consistent with this decision.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: DEC 17 1982

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

December 23, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Cyprus Mines Corp. d/b/a Cyprus Wire and Cable Corp.

OSHRC DOCKET NO. 76-616

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF CORRECTIVE ORDER

FOR THE SECRETARY OF LABOR

Counsel for Regional Litigation
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Francis V. LaRuffa,
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To wit: Delete the sentence in Chairman Rowland's dissent beginning "I would therefore vacate" and substitute the following: "I would vacate the citation as to Building 19. As to the Vaughn Fine Wire Area in Building 16, I would vacate the citation insofar as it alleges a failur to implement feasible engineering controls."

FOR EMPLOYER

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FOR EMPLOYEES

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

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Rev. 10/1/76

ROWLAND, Chairman, dissenting:

I respectfully dissent. For the reasons stated in my dissenting opinion in Sun Ship, Inc., No. 16118, issued this day, the requirement in section 1910.95 (b)(1) that feasible administrative or engineering controls be utilized is invalid. I would therefore vacate the citation.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>CYPRUS MINES CORPORATION d/b/a<br>CYPRUS WIRE & CABLE CO.,<br>Respondent. | OSHRC DOCKET<br>NO. 76-616 |

Appearances:

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Attorney for respondent
by William L. Broad, Esq.

## DECISION AND ORDER

Alfieri, Judge.

## STATEMENT OF THE CASE

This is a proceeding under section 10 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.)

contesting an other than serious citation issued on January 9, 1976 by the complainant against the respondent under the authority vested in the complainant by section 9(a) of the Act (29 U.S.C. 658(a)).

The citation alleges that a November 4, 1975 inspection made of respondent's workplace, a wire and cable plant, described as a complex of one and two-story buildings, located at Rome, New York, showed the respondent violated section 5(a)(2) of the Act (29 U.S.C. 654(a)) because it failed to comply with occupational safety and health standard 29 CFR 1910.95(b)(1), relating to occupational noise exposure, promulgated by the Secretary under section 6 of the Act (29 U.S.C. 655). The citation requires a one year multi-step abatement. No penalty is proposed.

In accordance with section 10(c) of the Act (29 U.S.C. 659(a)) respondent by a letter dated January 30, 1976, timely contested the citation and the time and method of the abatement.

The standard 29 CFR 1910.95(b)(1) provides:

> (1) When employees are subjected to sound exceeding those listed in Table G-16, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table.

TABLE G-16-PERMISSIBLE NOISE EXPOSURES[1]

| Duration per day, hours | Sound level dBA slow response |
|---|---|
| 8 | 90 |
| 6 | 92 |
| 4 | 95 |
| 3 | 97 |
| 2 | 100 |
| 1-1/2 | 102 |
| 1 | 105 |
| 1/2 | 110 |
| 1/4 or less | 115 |

[1] When the daily noise exposure is composed of two or more periods of noise exposure of different levels, their combined effect should be considered, rather than the individual effect of each. If the sum of the following fractions: C1/T1+C2/T2...Cn/Tn exceeds unity, then, the mixed exposure should be considered to exceed the limit value. Cn indicates the total time of exposure at a specified noise level, and Tn indicates the total time of exposure permitted at that level.

Exposure to impulsive or impact noise should not exceed 140dB peak sound pressure level.

The description of the alleged violation reads:

> The Stranders and Wire Machines in the Bare Wire Area, Building #16, 2nd floor and the Stranders in Building #19, generate sound levels that exceed unity when calculated on an 8 hour time weighted average and exposes the employees in these areas to excessive sound levels.

## MULTI-STEP ABATEMENT

I. Immediate Temporary Controls:

(a). Provide employees working on the Stranders and Wire Machines in the Bare Wire Area (Building 16, 1st and 2nd floor) and the Stranders in (Building #19) with (1) hearing protection or (2) reduce employee exposure to excessive noise levels by administrative controls (for example, temporary assignment of employee to a low noise area).

II. Permanent Engineering Controls:

(1) By April 8, 1975 submit to OSHA* a reasonable sequence of dates showing the following minimal information:

(a) An engineering study to determine whether it is feasible to reduce the noise within the above mentioned areas by an engineering method,

(b) A date when OSHA* will be notified of the employer's decision whether the noise will be reduced by an engineering method,

(c) A sequence of dates showing a schedule for the implementation of engineering controls if deemed feasible,

(d) A final date showing a date for completion,

(e) Continue immediate temporary controls until completion of permanent engineering controls,

(f) You may provide OSHA* with a monthly progress report until the completion of permanent engineering controls.

(2) By January 9, 1977 complete the engineering controls needed to reduce noise levels to acceptable levels.

*MR. CHESTER C. WHITESIDE
AREA DIRECTOR
U. S. DEPARTMENT OF LABOR
OCCUPATIONAL SAFETY & HEALTH ADM.
700 E. WATER STREET
203 MIDTOWN PLAZA
SYRACUSE, NEW YORK 13210

Respondent moved to have stricken from the record any reference to the first floor of Building #16 on the ground that it was not part of the citation and complaint. Complainant acknowledged that the area was included in his investigator's reports but not included in the citation and complaint. The motion was granted.

The four areas of the plant that are the subject of this proceeding and respondent's position concerning each of these areas[1/] are as follows:

Building 19. If the complainant has proved a violation, respondent has either cured it or the complainant is estopped to deny that respondent has cured it.

Building 16.

Bartell-Watson Area. Respondent does not deny that there is a noise violation nor that there are effective engineering controls. The basic question here is a reasonable time for abatement.

Cook and Butt Area. Respondent submits that the complainant has not proved a noise violation in this area.

Vaughn Fine Wire Area. Respondent does not contest the existence of a violation, but asserts that the complainant has not proved there are feasible administrative or engineering controls to bring noise levels within the permissible limits of Table G-16.

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1/ Respondent's post-hearing brief, p. 2.

## I S S U E S

1. Whether or not in Building #19 the respondent violated the standard 29 CFR 1910.95(b)(1).

2. Whether or not the time within which the violation in the Bartell-Watson area is reasonable.

3. Whether or not in the Cook and Butt area the respondent violated 29 CFR 1910.95(b)(1).

4. Whether or not complainant has established that there are are feasible administrative or engineering controls to reduce the sound levels in the Vaughn Fine Wire area.

## SUMMARY OF EVIDENCE

The complainant produced two witnesses, Ruben Isaacson, an industrial hygienist and Norman Meyerson, an expert in acoustic engineering controls.[2/]

Mr. Isaacson testified that he held an opening conference with officers of the respondent on October 31, 1975. Following that he proceeded to conduct the walk-around inspection of Buildings numbered 19 and 16, accompanied by Mr. Jaynes, respondent's safety director and a union representative. On November 3, 1975, he returned to respondent's

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2/ Respondent stipulated that Mr. Meyerson is an acoustical expert. His resume appears as Exh. C-7.

complex bringing with him sound level testing equipment that he had calibrated the night before (Tr. 15). The equipment has a margin of error of 2% plus or minus (Tr. 52).

Building #19

Isaacson, accompanied by respondent's safety director Jaynes (Exh. C-3(a)), commenced the survey in building #19 which he described as a one-story masonry structure with a wood ceiling. It has a twelve-foot high wall on one side and a four-foot high wall on the other side leading to another building (Tr. 16). For the survey, Isaacson selected the operator of the Watson stranding machines numbered 217-06 and 216-05. These machines, shown on Exhibit C-1 and depicted in photographs marked Exhibits C-4(a) through (h) are separated by a fifteen-foot wide aisle (Tr. 21). During the course of the day, the machine operator's duties are to change spools and check the machines which are on both sides of the operator's log desk. A star and circle on Exhibit C-1 indicates the desk location (Tr. 26).

A Dupont Noise Dosimeter placed on Mr. Szmurlo, the machine operator, and a hand held General Radio Sound Level Meter were used to take readings every hour (Tr. 18) for a full eight hour shift (Tr. 26).

The completed survey showed that in Szmurlo's work area, the hand held sound level meter readings ranged from 101 dba to 103 dba. The dosimeter readout exposure was 459% (Exh. C-2(a)). Isaacson explained that readout exposure is the percent of allowable exposure[3/] as read on the readout unit for the dosimeter (Tr. 25). Szmurlo, was the only employee in the area and he was not wearing ear protection. He was observed working from one to six feet from the noise source (Exh. C-2(b)). However on cross-examination, Isaacson said the distance could be seven and one-half feet (Tr. 22).

Complainant's second witness was Norman L. Meyerson[4/] an acoustical expert with Ostergaard Associates, the company retained to do an evaluation of feasible engineering and administrative controls of respondent's plant.[5/]

For the express purpose of carrying out the above objectives, the Cyprus Wire and Cable Company was visited by Meyerson on May 24, 1976, in the company of Rubin Isaacson.

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3/ The noise levels shown in Table G-16 which appears at page 3.

4/ Resume appears as Exhibit C-7.

5/ Mr. Meyerson's report dated June 15, 1976, appears as Exhibit C-8(a). Addenda to the report appears as Exhibits C-8(a)(b)(c) and (d).

At Cyprus, Mr. Carter H. Strickland of the law firm representing Cyprus Wire; and Mr. Richard F. Compo, Cyprus safety administrator, accompanied Messrs. Meyerson and Isaacson during the visitation to buildings numbered 19 and 16.

Meyerson learned from the respondent's representatives that subsequent to Isaacson's inspection repairs were made on the Watson strander machine, number 216-05[6/] specifically to reduce the noise level emiting from it (Exh. C-8(a) p. 3). This was borne out by the readings taken by Meyerson between machines 217-06 and 216-05 (Exh. C-8(a) p. 4). With 217-06 shut down the noise level from 216-05 ranged from 80 dba to 87 dba (Exh. C-8(b)). With both machines operating, the noise level tested in the middle of the floor (Tr. 60) ranged from 85.5 dba to 94 dba (Exh. C-8(b)). Meyerson did not take any noise level readings at the log station where the machine operator normally is when both of the machines are operating (Tr. 68, 98; Exh. C-8(a) p. 13).

Directing his testimony to his findings of feasible engineering and administrator controls for this building (Exh. C-8(a) pp. 12, 13), Meyerson expressed the view that if machine number 217-06 were to undergo repairs like those

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6/ Throughout the Meyerson report, Exh. C-8(a) and testimony, the machine is erroneously identified as 215-06.

done to 216-05 "[T]he exposure in the area will become very close to the statutes (sic) if not below" (Tr. 66). In his report, Meyerson makes the observation that "the gear box at the puller capstan location" is excessively noisy and recommends replacement (Exh. C-8(a) p. 13). If that proved unsuccessful then, according to Meyerson, an enclosure like the one shown as figure 7 at page 16 of his report (Exh. C-8(a)) could be used (Tr. 77). An alternative measure would be to use personnel enclosures. These are shown on p. 17 of Exh. C-8(a).

Administratively, respondent could have the operator's log desk moved to an area between the machines "... which brings him into an area even now, that is in the order of 86 decibels. Away from being between the two machines where gear boxes and the pulleys and cones are located" (Tr. 68). Such a move would reduce the employee noise exposure to an acceptable level (Exh. C-8(a) p. 13).

Photographs of the machines (Exhs. 9(a) through (d)) were placed into evidence through this witness.

Cross-examination elicited from Meyerson that at the start of the survey he had trouble with the mast extension of the General Radio sound level meter. After curing the problem he did not recalibrate the meter (Tr. 95-96). He further acknowledged that at page 13 of his report (Exh. C-8(a)), the reading 86 dba was in error (Tr. 98). On redirect examination, he said it should have read 94 dba (Tr. 110).

Charles R. Kunkle, Sr.,[7/] respondent's vice-president and general manager, testified that the repairs for machine 216-05 cost $32,000 (Tr. 128). He estimated it would cost from $50,000 to $60,000 to repair machine number 217-06 and an additional $10,000 to $20,000 if the gear box needed to be replaced (Tr. 128-129).

According to Kunkle, the machine's operator spends one and one-half hours per shift setting up the machine (Tr. 127) during which time the machine is not operating (Tr. 128) and the same time walking between the machines and the remainder at the log desk (Tr. 128).

Building #16 - Second floor

Bartell-Watson Area

On November 4, 1975, Isaacson, using sound test equipment calibrated the night before (Tr. 26, 27), inspected the second floor of building #16. Commencing at 7:30 A.M. and ending 3 P.M. sound level readings were taken in the areas where the respondent's employees Smith, Kelly and Demuth were working. These areas appear on Exh. C-3(g) marked as 3[8/], 4 and 5 respectively (Tr. 30, 31) and pictured in Exhibits C-5(a) through (j). None of the employees were wearing ear protection equipment (Exhs. C-3(b)(c) and (d).

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7/ Mr. Kunkle holds a B.S. degree in engineering and a M.A. degree in business administration.

8/ The witness corrected the location of Mr. Smith to show as 3 in ink. The location marked 3 in red was in error (Tr. 31).

The completed survey (Exh. C-3(a)) shows that in Smith's area the sound meter readings ranged from 96 to 97 decibels. At Kelly's work station, the sound meter showed a decibel span of 93 to 94. The readings at Demuth's location showed a range of 96 to 98 decibels. The dosimeter readouts for Smith, Kelly and Demuth showed 283%, 185% and 314% respectively (Exh. C-3(a)).

Meyerson testified (Tr. 70) that the readings taken by him on May 24, 1975 at the locations marked M, N, O and P on the floor plan (Exh. 8(a) p. 8 fig. 4), showed sound levels in excess of 95 dba; at point "Q" on the plan, the reading was 93 dba. The machines are shown in Exh. 10(a) through (e) (Tr. 71, 72).

Directing his testimony specifically to twenty-four[8a/] machines in the area, Meyerson said that not all needed to be enclosed to bring the noise level within acceptable range (Tr. 74), (Exh. C-8(a) p. 15) and that feasible engineering controls in the form of enclosures were available from the Bartell machine manufacturer (Tr. 75). (Exh. C-8(a) p. 14). He also stated that a reasonably simple construction of existing materials can be fashioned to form an enclosure for the Watson machine. It is shown as figure 7 of his report (Exh. C-8(a)) (Tr. 77). An alternative control measure would be enclosures for the machine operators (Tr. 78) (Exh. C-8(a) fig. 7 p. 16).

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8a/ 21 Bartell and 3 Watson machines.

Respondent's vice-president, Charles R. Kunkle, Sr., acknowledged that in the Bartell-Watson area there is a noise problem (Tr. 131) for which there are feasible engineering controls (Tr. 135). However, an independent noise testing done by respondent with six machines operating and eighteen shut down, showed an excess of 90 dba. From this, Kunkle concluded that eighteen of the machines, if not the entire twenty-four, would have to be enclosed to bring the noise level to 90 dba (Tr. 131).

In his opinion, it would take about six months of experimenting to make a suitable enclosure (Tr. 132, 139).

In his further opinion, after making certain that there will be a minimum inconvenience to plant operation (Tr. 141), and taking into consideration customer service demands, interdependency of departments, economics and that there are three or four different types of machines involved, it would take a minimum of three years to abate the violation (Tr. 133, 134). His estimate of the cost of each enclosure is $4,000 (Tr. 132, 147) or $100,000 for the twenty-four machines (Tr. 132).

When cross-examined, Kunkle disclosed that there are twenty-one Bartell machines and three Watson machines in the area. They are operated on three shifts five or six days per week (Tr. 137). At one time, eighteen to twenty

of the machines are operating but not necessarily the same machines every day (Tr. 138).

The Cook and Butt Area

Relative to this area, Meyerson testified that the sound level readings were marginal. One machine that was vibrating had a sound level of 91-1/2 dba and the sound levels at the other machines never exceeded 92 dba (Tr. 78). These levels are not considered a definite employee hazard and could be further reduced if the Bartell-Watson machines in the area were engineered to reduce their noise levels (Exh. C-8(a) p. 19). Meyerson, referring to his report, stated:

> "I have, in the report, indicated that I felt that this area of the Cook and Butt machines, that requires nothing to bring it in to compliance. Since I could not verify the fact that we were materially over 90 dba.
>
> We have to remember, when dealing with various frequencies, we're dealing with a tolerance, with a sound level meter, of plus or minus 1 db."

Complainant's exhibits C-6(g) and (h), photographs of Cook and Butt machines, were previously introduced into evidence through Isaacson who keyed the photographs to the plant floor blueprint, exhibit C-3(g) (Tr. 46).

The Vaughn Fine Wire Area

Meyerson described the area as a very compact, highly congested machine complex (Tr. 84), of twenty Vaughn machines in an estimated area of about 3,000 square feet[9/] (Tr. 83). Exhibits C-12(a) through (i) are photographs introduced to show the alleged congestion (Tr. 84).

When the Vaughn machines numbered 11, 16 and 17 (shown on diagram at p. 22 of Exh. C-8(a)) were sound tested, the readings were 98 dba (Tr. 84).

Focusing his testimony on the methods of abatement, Meyerson said one approach is by means of absorptive enclosures to set off groups of Vaughn machines as illustrated at p. 22 of Exh. C-8(a) into separate rooms (Tr. 89) and a single enclosure for the Bartells (Tr. 92). The rooms can be constructed of commercially available modular panels that are nominal in cost (Tr. 90). The panels are bi-fold or sliding units which would permit the operator to have access to the machines (Tr. 89, 91).[10/] They are guaranteed to reduce the noise level by 15 decibels (Tr. 91) and are a conventional method for all forms of textile and wire machinery (Tr. 90).

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9/ At p. 20 of his report (Exh. C-8(a) Meyerson shows 1200 sq. ft.

10/ A superimposed graphic presentation of the suggested enclosure around Vaughn machines appears at p. 24 of exhibit C-8(a).

In his report (Exh. C-8(a) pp. 20-23), Meyerson fully describes the suggested enclosure of the source of materials for its construction.

The second method of abatement is to separate the machines at great distances. This would consume tremendous space in the work area (Tr. 91).

Meyerson reported that the source of noise cannot be effectively treated (Exh. C-8(a) p. 20).

Meyerson expressed the opinion that a conservative estimate of the time needed for respondent to effect any of the suggested controls is one and one-half years (Tr. 92); two weeks of which would be shut-down time (Tr. 92).

In response to questions on cross-examination, Meyerson said that in concluding that engineering controls were feasible he gave consideration to machine operation and maintenance (Tr. 103); that he has no idea how many times a day the machine operator would have to open and close the doors of the suggested enclosures (Tr. 104); that the machines would be accessible for changing spools (Tr. 104); and that relative to machine maintenance access to the machines would be rapidly had whether the enclosures were made of bi-fold or sliding doors (Tr. 105).

Respondent's vice-president for manufacturing, Stewart W. Barrett[11] has been employed by the company for 19 years.

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11/ Mr. Barrett is a chemical engineer, and holds degrees in chemical engineering and science.

Twelve of those years were devoted to research and development. In his opinion,[12/] the engineering controls (enclosures) outlined by Meyerson were not feasible from a maintenance point of view (Tr. 150).[13/]

According to Barrett, the operator assigned to the Vaughn machine area generally is responsible for an aisle which has five machines on each side (Tr. 158). Generally, seven to ten machines are in operation (Tr. 159). From the operational viewpoint, the suggested enclosures are not feasible based on the operator's duties. These duties are summarized (Tr. 161) as follows: The operator who must work from the aisle (Tr. 160), has to change 180 finished spools, an average figure (Tr. 171), in an eight-hour shift; check each spool approximately twice or 360 times during the shift and change 15 supply reels. From these duties, Barrett reasoned that the operator would have to open and

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12/ This witness' testimony was augmented by reference to a blueprint of part of the Vaughn machine area (Exh. R-3) and nine photographs (Exh. R-4(a) to (i)) keyed to the machines depicted on the blueprint.

13/ Although witness limited his answer to maintenance, all of his testimony beginning at Tr. 157 and ending at Tr. 161 relates to operational feasibility.

close the bi-fold doors of the suggested enclosures 500 times before starting production work (Tr. 161). Barrett concluded that this means a door will be open six hours of the eight hour shift (Tr. 165) with the operator in front of it (Tr. 197) not taking into account the time another enclosure door would have to be open for maintenance work (Tr. 166).

Barrett explained that while a machine in an enclosure would be shut down for maintenance, others in the enclosure would be running (Tr. 205).

On cross-examination, Barrett stated that he feared the operator would be exposed to excessive sound because of the open doors (Tr. 198).

Relative to the maintenance of the Vaughn machines, Barrett characterized the suggested enclosures as a "virtual nightmare" (Tr. 162) and questioned how a four inch wide vertical panel, as suggested by Meyerson, could be installed between the drive motors in the back to back area since the available space is one and one-half inches to three inches (Tr. 162). He foresaw other problems (Tr. 162) ranging from general maintenance to changing motors. Also a hazardous condition if any employee is within an enclosure and the bi-fold door is accidently closed (Tr. 168).

Concerning the use of a folding vertical door in lieu of the bi-fold type, Barrett did not believe such a unit could be used. He explained that there was no way to support the sides for such a door and further the area over many of the machines was a mezzanine and pipes (Tr. 203).

Cross-examination elicited from Barrett that his major concerns were the lack of available space and that the enclosures would slow production (Tr. 204).

On redirect examination, Meyerson stated a sliding door could also be used for the enclosure (Tr. 211). However, on cross-examination, he said it would block access to the next door machine (Tr. 213).

Meyerson never saw any of the various doors he suggested used for wire manufacturing (Tr. 214).

## DISCUSSION

The respondent timely filed its answer denying various paragraphs of the complaint. Paragraphs I, II and III which relate to the respondent's engaging in interstate commerce and the Commission's jurisdiction are not denied.[14/] Accordingly, I find the respondent is engaged in commerce and the Commission has jurisdiction.

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14/ Under 33(b) of the Commission's Rules of Producure, allegations in the complaint not answered are deemed admitted.

Building #19

The first issue for decision is whether the complainant has shouldered his burden of proof that respondent's employee assigned to the Watson stranding machines 217-06 and 216-05 is exposed to excessive noise levels during the eight-hour work shift. Secretary v. Love Box Co., Docket No. 6286 (4/17/76); Secretary v. Reynolds Co., Docket No. 1551 (2/25/76). Thus it must be shown that (a) the noise was greater than the permissible levels set forth in Table G-16 of the standard and (b) that respondent failed to utilize feasible administrative or engineering controls to reduce the noise levels to which the employee is exposed.

The complainant's evidence shows that when the initial inspection was made on October 31, 1975, the operator of Watson machines 217-06 and 216-05 was exposed to a noise level range of 101 to 103 dba - far in excess of the allowable 90 dba. Thereafter and before the second inspection, repairs were made to 216-05 lowering its noise level to below the allowable 90 dba.

It follows therefrom that there are feasible engineering controls available for the Watson strander machines in building #19. Respondent's contention that it would cost from $50,000 to $80,000 to repair machine 217-06 does not

render the proven controls economically infeasible. Respondent does a $450,000,000 volume of business annually.[15/]

The more troublesome question is whether or not a violative condition continues to exist where, as a result of the repairs to 216-05, the noise level when both machines are operating is lowered to a range of 85.5 dba to 94 dba. The answer requires an analysis of the evidence of the noise levels to which the machine operator is exposed while he is carrying out his various duties. During the eight-hour shift, he spends 1-1/2 hours attending one of the machines which is shut down. Regardless of which machine is not running, the operator is not exposed to excessive noise. This is so because the operator is not adversely affected by the noise from 216-05 (Exh. 8(a) p. 13) and of course when 217-06, the unrepaired machine is down, no noise is generated from it. For another 1-1/2 hours of the shift, the operator walks the aisle between the machines and when both were in operation, he is exposed to a noise level that ranges from 85.5 dba to 94 dba.

However, the record contains neither noise test readings taken at the log desk where the operator spends

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15/ Kunkle at Tr. 144.

the remaining five hours of the eight-hour shift nor any probative evidence from which it can be gleaned what is the noise level at that location.

Exhibit C-8(a), figure #1, shows the log desk is located to the left of points ABC where readings were taken of the unrepaired machine 217-06. They showed 87, 89.5 and 93 dba respectively (Exh. C-8(b). However, the log desk is located in the middle of the 15-foot wide aisle - seven and one-half feet removed from the sources of the recorded noise. Under those circumstances, it cannot be reasonably found that the same levels of noise exist at the log desk. They are unknown quantities. Nor is the conclusion in the Galson Report[16/] (Exh. C-14, p. 56) that the operator of the machines would be overexposed even if he stayed at the log desk all day any help. It was prepared at a time prior to when the repairs were made to machine 215-06. The conditions under which the report was made no longer exist.

In summary, the record shows that during an eight-hour shift, the machine operator is not exposed to excessive noise for 1-1/2 hours, for another 1-1/2 hours he is overexposed only part time (the range is 85 to 94 dbs) and for the major part of his shift, five hours, the noise level to which he is exposed is not established.

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16/ Noise Survey and Recommendations prepared August 1974 for respondent by Galson Technical Services, Inc.

A showing of excessive noise can be made by the use of spot readings if other evidence shows that exposure of employees to the noise levels so measured existed for a period of time in excess of that permitted by the standard 29 CFR 1910.95(b)(1). Sun Shipbuilding and Drydock Co., 11 OSAHRC 171 (1974). Complainant's case lacks the "other" evidence.

On this record, I cannot conclude that the complainant has proven by a preponderance of evidence that the respondent's employee while operating the Watson stranders in building #19 is exposed to a noise level in excess of the allowable 90 dba. The preponderance of evidence rule is applicable. Olin Construction Co. v. OSAHRC, 525 F2d 464 (2nd Cir., 1975); Secretary v. Armor Elevator Co., 5 OSAHRC 260 (1973).

In order to dispose of all the issues and to assist both parties, we indulge in an assumption. Assume that testing in the log desk area was done and showed an excessive noise level. Then and in that event, the respondent could come into compliance by administrative controls. This is clearly established by the complainant's evidence that all is required administratively, is to move the log desk to a place in the aisle where the dba is 86 (Tr. 68).

Respondent's contention that it was prejudiced by the introduction of complainant's exhibit 8(b) is totally without merit. Respondent was afforded full and adequate opportunity to examine the exhibit and stated for the record that it had no objection to it. Equally lacking in merit is the argument that the government is estopped from relying on the information in exhibit 8(b).

Building #16

Bartell-Watson Area

Respondent concedes that complainant has established that there is, in this area, a noise level in excess of the allowable 90 dba and that there are effective engineering controls.

It challenges the reasonableness of the one year allowed within which it must abate and seeks three years. Respondent argues that many more machines will have to be enclosed to reduce the noise level than complainant suggests and that it will be more costly (Respondent's brief p. 7, 8).

Respondent's plea for an extension of abatement time is supported by complainant's expert. In Meyerson's expert opinion, respondent should be given at least one and one-half years and not one year within which to abate. The question then is how much more time, if any, does the evidence support.

We are, in this area, concerned with 24 machines. Twenty-one are manufactured by Bartell and three by Watson.

Respondent makes much of the need for experimentation to fabricate an enclosure for the machines. It apparently has overlooked the uncontroverted fact that for the Bartell machine manufacturer offers commercial enclosures for the stranders respondent is using (Exh. 8(a) p. 14). It may

well be that respondent, if it wishes to avail itself of these enclosures, can more quickly abate as to these machines.

For the remaining three machines, the Watsons, respondent will have to fabricate enclosures since none are commercially available (Exh. 8(a) p. 14).

Considering all of the factors and arguments of both parties, I conclude that a reasonable abatement period is two years from the date this order becomes final.

Cook and Butt Area

The complainant's evidence fails to establish that in this area the respondent's employees are exposed to a noise level in excess of the allowable 90 dba. The violation of 29 CFR 1910.95(b)(1) is not shown.

Vaughn Fine Wire Area

Respondent concedes that the noise level in this section of its plant exceeds the level prescribed in Table G-16. It argues that notwithstanding complainant has not proved there are feasible engineering or administrative controls to bring the noise levels with the limits of Table G-16. (Brief p. 2) (emphasis added)

The Commission has consistently rejected this interpretation of 29 CFR 1910.95(b)(1). Secretary v. Continental

Can Co., no. 3973, et al (8/24/76); Secretary v. Turner Co., No. 3635 (8/24/76); Secretary v. Anheuser-Busch, Inc., No. 10609 (1/13/77). In Continental, the Commission said:

> "The standard requires the implementation of feasible engineering or administrative controls, and then goes on to provide for the use of personal protective equipment 'if such controls fail to reduce sound levels within the levels of Table G-16'. The standard thus contemplates that there will be some situations where engineering or administrative controls are to be considered feasible even though they fail to reduce the noise below G-16 limits."

Considered within the context of these rulings, respondent's argument lacks merit.

Respondent argues further that the suggested engineering controls are impractical and therefore not feasible, citing Secretary v. Anchor Hocking Co., 3 OSAHRC 1389 (1975).[17/]

Complainant's acoustical expert offered two methods to reduce the noise level of the machines in this area. His suggestion that the machines be separated at great distances is quickly disposed of. Respondent does not have the space required to adopt this approach to abatement. The recommended method of abatement is unrelated to the realities of the respondent's physical plant. It is rejected as infeasible.

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17/ The members of the Commission are equally divided on this case. It has no precedented value. Secretary v. Garcia Concrete Co., 18 OSAHRC 184 (1975).

We examine the feasibility of full enclosures for groups of the Vaughn machines - the second method.

The evidence shows that an enclosure of the type Meyerson described can be fabricated from readily available materials and at economical cost. Unquestionably, some problems will be encountered in their construction, as contended by respondent. However, it is not shown that the anticipated construction problems are insurmountable.

The evidence further demonstrates that the use of enclosures with doors closed will effectively reduce the noise level emitting from the machines. Complainant's evidence that a 10 to 15 dba reduction would result from their use is unrebutted.

From this it can be fairly concluded that the use of enclosures would provide some protection from the high levels of noise in the Vaughn machine area.

I concluded that the use of enclosures is a "feasible" engineering control of the type contemplated by 29 CFR 1910.95(b)(1).

In reaching this conclusion, I do not overlook the respondent's argument that considering the employee duties and machine maintenance requirements, the installation of enclosures would be a useless act. Respondent mistakenly relies upon the Anchor-Hocking case (supra)

which is neither persuasive nor has precedential value.[18/] It seeks to buttress its position with the erroneous interpretation that the controls are per se not feasible unless they would reduce the noise levels to within G-16 limits (Continental Can and Turner Co. cases, supra, at pp. 25-26).

Indeed it does not improve respondent's position that the survey which it commissioned concluded that a partial enclosure of the Vaughn machines would bring the operator's exposure to within the allowable limits (Exh. C-14, p. 107).

Respondent further defends on the ground that the use of an enclosure would create a hazardous condition by reason of a door being accidently closed with the employee within. The defense is properly raised. Secretary v. Steel Erectors, Inc., 6 OSAHRC 154, 156, but lacks substance. It is highly speculative.

Economic considerations cannot be disregarded in determining feasibility. Secretary v. Republic Granite Co., Docket No. 7359 (9/30/76). Respondent's contention that to enclose the machines would adversely effect production by slowing it down is not supported by that quality or

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18/ See FN 17.

quantity of evidence which would warrant a finding that the engineering controls would be infeasible.

Respondent's challenge to the validity and accuracy of the readings taken by Meyerson is rejected. It is concluded the readings were both accurate and reliable.

Unlike the Bartell-Watson area, the respondent does not have the advantage of an enclosure made by the machine manufacturer (Exh. 8(a) p. 20). Although panels from which enclosures can be made are available to respondent there are problems to overcome . Thence, time to experiment is needed before the 20 machines can be enclosed. As stated elsewhere, in this opinion, complainant's expert rejected the one year abatement period provided for in the citation. I conclude from all of the available evidence that a reasonable abatement period is two years and six months from the date this order becomes final.

Complainant does not seek any penalty. Its position is supported by the record. It is reasonable and proper.

Having heard the testimony and observed the demeanor of the witnesses, and having considered the same, together with the citations, notification of proposed penalty, notice of contest, pleadings, representations, stipulations and admissions of the parties, it is concluded that the preponderance of evidence, on the entire record, supports the following:

Building #19

1. That feasible engineering and administrative controls can be utilized to reduce the noise level of the Watson strander machines in building #19.

2. That the cost of such engineering and administrative controls for the Watson stranders do not make them infeasible.

3. That during one and one-half hours of the eight-hour shift, the Watson machine's operator is not exposed to excessive noise levels and for one and one-half hours he is only partially exposed.

4. That there is no evidence from which it can be determined whether or not the Watson machine's operator is exposed to noise in excess of 90 dba for the eight-hour shift because there are no readings of the noise to which he is exposed to for the five hours he spends at the log desk.

Building #16

5. That feasible engineering controls necessary to reduce the noise level emitting from the machines in the Bartell-Watson area can be reasonably accompolished within two years.

6. The evidence does not establish that the employees in the Cook-Butt area of building #16 are exposed to noise in excess of the allowable 90 dba.

7. That feasible engineering controls can be utilized to reduce the noise level of the Vaughn machinery in building #16.

8. That there are no administrative controls that can be utilized to reduce the noise level of the Vaughn machinery in building #16.

9. That the feasible engineering controls necessary to reduce the noise level of the Vaughn machinery can be reasonably accomplished within two years and six months.

10. The test equipment used by Mr. Meyerson and the readings they produced were reliable and accurate.

## CONCLUSIONS OF LAW

1. The respondent is, and at all times material hereto, was engaged in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970.

2. The respondent is, and at all times material hereto, was subject to the requirements of the Occupational

Safety and Health Act and the standards promulgated thereunder and the Commission has jurisdiction of the parties and of the subject matter herein.

3. That the respondent was not, with respect to the Watson stranders in building #19, in violation of section 5(a)(2) of the Act, 29 U.S.C. 654(a)(2) or 29 CFR 1910.95(b)(1).

4. That with respect to the Bartell-Watson area in building #16, respondent violated section 5(a)(2) of the Act, 29 U.S.C. 654(a)(2) by failing to comply with 29 CFR 1910.95(b)(1).

5. That the respondent, in the Cook-Butt area of building #16 was not in violation of section 5(a)(2) of the Act, 29 U.S.C. 654(a)(2) or 29 CFR 1910.95(b)(1).

6. That in the Vaughn Fine Wire area of building #16, the respondent violated section 5(a)(2) of the Act, 29 U.S.C. 654(a)(2) by failing to comply with 29 CFR 1910.95(b)(1).

## O R D E R

Those parts of the citation which charge respondent with failure to comply with 29 CFR 1910.95(b)(1) in the Watson area of building #19 and in the Cook-Butt area of building #16 are vacated. Those parts of the citation which refer to a violation of said standard in the Bartell-Watson and Vaughn Fine Wire areas of building #16 are affirmed.

The multi-step abatement period of the violation is modified to the extent of advancing the period from one year to two years in the Bartell-Watson area and to two years and six months in the Vaughn area from the date this order becomes final.

No penalty is assessed.

Edward V. Alfieri

EDWARD V. ALFIERI
JUDGE, OSHRC

Dated: April 4, 1977
New York, New York

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

December 17, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Kin-Buc, Inc.

OSHRC DOCKET NO. 76-2769

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION (REMAND)

To wit: See attached.

FOR THE SECRETARY OF LABOR

Counsel for Regional Litigation
Office of the Solicitor, USDOL
200 Constitution Ave., NW. - Rm. S-4014
Washington, D.C. 20210

Francis V. LaRuffa, Regional Solicitor
U. S. Department of Labor
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FOR EMPLOYER

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141 South Harrison Street
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FOR EMPLOYEES

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Richard DeBenedetto, Judge
Occupational Safety & Health
Review Commission
John W. McCormack Post Office
& Courthouse, Room 420
Boston, Massachusetts 02109

Rev. 10/1/76

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

January 4, 1983

CORRECTED COPY

IN REFERENCE TO SECRETARY OF LABOR v.

Kin-Buc, Inc.

OSHRC DOCKET NO. 76-2769

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF CORRECTIVE ORDER

FOR THE SECRETARY OF LABOR

Counsel for Regional Litigation
Office of the Solicitor, USDOL
200 Constitution Ave., NW. - Rm. S-4014
Washington, D.C. 20210

Francis V. LaRuffa, Regional Solicitor
U. S. Department of Labor
1515 Broadway Room 3555
New York, New York 10036

To wit: Footnote 1 of the decision in Kin-Buc, Inc., OSHRC Docket No. 76-2769 (Dec. 17, 1982), is withdrawn. The following footnote is substituted therefore:

"Chairman Rowland dissents. He would not remand the case for further proceedings. Consistent with his dissenting opinion in Sun Ship, he concludes that the requirement in section 1910.95(b)(1) that feasible administrative or engineering controls be utilized is invalid."

FOR EMPLOYER

Kent A. F. Weisert, Esq.
Schwartz, Steinberg, Tobia & Stanziale
141 South Harrison Street
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FOR EMPLOYEES

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Richard DeBenedetto, Judge
Occupational Safety & Health Review Commission
John W. McCormack Post Office & Courthouse, Room 420
Boston, Massachusetts 02109

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>KIN-BUC, INCORPORATED,<br>Respondent. | OSHRC Docket No. 76-2769 |

ORDER OF REMAND

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

On December 17, 1982, the Commission issued its decision in Sun Ship, Inc., OSHRC Docket No. 16118. In accordance with the decision of the U.S. Supreme Court in American Textile Manufacturers Institute, Inc. v. Donovan, 101 S.Ct. 2478 (1981)("ATMI"), the Commission held that "feasible" under the occupational noise standard means achievable. The Commission overruled the cost-benefit test of feasibility previously set forth in Continental Can Co., 76 OSAHRC 109/A2, 4 BNA OSHC 1541, 1976-77 CCH OSHD ¶ 21,009 (No. 3973, 1976), appeal withdrawn, No. 76-3229 (9th Cir. Apr. 26, 1977), and substituted a test consistent with ATMI.

In view of this intervening change in law, the judge's decision with respect to item 3 of citation 1 is vacated. The case is remanded for further proceedings, including evidentiary submissions, so that the interrelated issues of technological

and economic feasibility can be reconsidered in light of the test of feasibility established by Sun Ship, Inc. 1/

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.
Executive Secretary

DATED: DEC 17 1982

1/ Chairman Rowland dissents. He would vacate item 3 because the requirement in section 1910.95(b)(1) that feasible administrative or engineering controls be utilized is invalid. See his dissenting opinion in Sun Ship.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>KIN-BUC, INC.,<br><br>Respondent. | OSHRC DOCKET<br><br>NO. 76-2769 |

Appearances:

Francis V. LaRuffa, Regional Solicitor
United States Department of Labor
1515 Broadway, Room 3555
New York, New York 10036
Attorney for complainant
by James A. Magenheimer, Esq., of counsel

Schwartz, Steinberg, Tobia & Stanziale, Esqs.
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Attorney for respondent
by Kent A. F. Weisert, Esq., of counsel

DECISION AND ORDER

DeBenedetto, Judge.

This is a proceeding pursuant to section 10 of the Occupational Safety and Health Act of 1970 (29 U.S.C. et seq.,

hereinafter called the Act) stemming from three citations issued by complainant against respondent under authority provided by section 9(a) of the Act.

The citations and notification of proposed penalty, issued on June 11, 1976, are based on an inspection made during the period from March 13 to June 4, 1976, of a "chemical and solid waste landfill" in Edison, New Jersey. Citation number 1 alleged nonserious violations of various general industry safety standards* designated in the citation as items 1 through 18; item 3 involved the occupational noise standard 29 CFR § 1910.95(b)(1). The penalties proposed for citation number 1 totaled $2,635.00, including $290.00 proposed for item 3. Citation number 2 alleged serious violation of 29 CFR § 1910.106(e)(6)(i) for which a $750.00 penalty was proposed. Citation number 3 alleged serious violations of 29 CFR §§ 1910.1017(c)(2), (f)(1), (f)(2) and (f)(3), for which a $750.00 penalty was proposed. Respondent contested the three citations as well as the proposed penalties.

## STIPULATED SETTLEMENT

The parties entered into a Stipulated Settlement (J-15) regarding the three citations and proposed penalties excepting

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*Section 5(a)(2) of the Act, 29 U.S.C. § 654(a)(2), requires each employer affecting commerce to "comply with occupational safety and health standards promulgated under this Act".

only said item 3 and the proposed penalty of $290.00. Pursuant to the agreement, complainant moved to amend the notification of proposed penalty and complaint to reflect a reduction in the proposed assessment of penalties for the three citations from a total of $3,845.00 to $1,845.00. In consideration thereof, respondent has moved to withdraw its notice of contest and answer to the citations, notification of proposed penalty and complaint as modified, except as to item 3 of citation number 1.

The record reflects (1) abatement of the violations has been accomplished according to an affidavit incorporated into the Stipulated Settlement; (2) assurance of continuing compliance by respondent; (3) agreement to pay the amended proposed penalties; and (4) adequate notice to affected employees.

The Stipulated Settlement being in accord with the purposes and objectives of the Occupational Safety and Health Act of 1970, it is hereby approved and the motions contained therein are granted.

The only issues remaining are whether respondent violated 29 CFR § 1910.95(b)(1), as alleged in item 3 of citation number 1, and if so, what is the appropriate penalty. These matters were heard on May 19 and May 20, 1977, in Newark, New Jersey.

## OCCUPATIONAL NOISE STANDARD IN ISSUE

§ 1910.95(b)(1) provides:

> "When employees are subjected to sound exceeding those listed in Table G-16,[1] feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table."[2]

## ADMISSION

Respondent admitted that the Commission has jurisdiction of the matter in issue pursuant to section 10(c), 29 U.S.C. § 659(c) [Tr. 4].

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1/ Table G-16 - Permissible Noise Exposures

| Duration per day, hours | Sound Level dBA slow response |
|---|---|
| 8 | 90 |
| 6 | 92 |
| 4 | 95 |
| 3 | 97 |
| 2 | 100 |
| 1-1/2 | 102 |
| 1 | 105 |
| 1/2 | 110 |
| 1/4 or less | 115 |

2/ The citation alleges that four out of five "heavy equipment operators" exposed to excessive sound levels were not wearing protective equipment; and that "[f]easible engineering and/or administrative controls were not determined or implemented". Correction of the condition by means of personal protective equipment (as "interim protection") was to be accomplished "immediately." July 10, 1976, was specified as the date "by which alleged violation must be corrected," presumably by "feasible engineering and/or administrative controls."

By post-hearing motion, complainant moved "to amend the final abatement date for the alleged violation of the noise standard 29 CFR 1910.95(b)(1) from July 10, 1976, to July 1, 1978." The unopposed motion is hereby granted.

**TESTIMONY OF MICHAEL McGUINNESS**
**OSHA'S INDUSTRIAL HYGIENIST**

Mr. McGuinness inspected respondent's worksite in Edison, New Jersey, during the period from March 13 to June 4, 1976. The operations involved primarily solid waste landfill which was described as mixing solid waste with dirt, "a method of recycling garbage" (Tr. 14). In May 1976, he tested six units of respondent's earthmoving equipment for sound levels including bulldozers and "pans" (Tr. 16-17, 19). Five of the 6 pieces of equipment were in violation of the standard of permissible sound levels. The bulldozers were smaller than the "pans" and one of the bulldozers, which had a "soundproof cab," was in compliance with the noise standard (Tr. 17-19, 22). Bulldozer "No. four" produced sound levels ranging from 90 dBA "when it was idle" to 102 dBA during reverse and forward movements, and up to 105 dBA when moving earth (Tr. 20). Bulldozer "No. three" produced the following sound levels: 92 dBA while "idling," from 103 to 107 dBA during reverse and forward movements, and 103-105 dBA when moving earth (Tr. 21). The "D-5" bulldozer produced the following sound levels: 90 dBA while "idling," 100-102 dBA during reverse and forward movements, 100-102 dBA while moving earth (Tr. 21-22). The sound levels produced by one "pan" ranged from 92-95 dBA while "idling" to 104-106 dBA during "an empty run." The second "pan"

that was tested measured 92-95 dBA while "idling," 100-105 dBA during "an empty run," and 104-106 during a "full run" (Tr. 21). Measurements of "the dozer with the soundproof cab on it" disclosed the following results (Tr. 22): "Moving forward it was 85 to 90 [dBA]. Pushing the pans with the windows closed was 90. Pushing pans with the windows open it was 92. Idling with the windows closed was 85 and backing up with the windows closed was 93 to 95." When asked to describe how the other machines "differed from this particular bulldozer" the following colloquy ensued (Tr. 23-25):

"A. From what I could notice, they did not have insulating materials and the windows were open. Most of the time the doors were wide open. So you really didn't have much of a barrier there at all.

Q. Did the other bulldozers have a cab structure?

A. Yes.

Q. How about the pans? Did they have cab structures also?

A. Well, a shell, a basic shell type of cab, yes.

* * *

THE COURT: Mr. McGuinness, please clarify your description of the equipment that you say the doors were open. Did they have doors?

A. Yes.

THE COURT: You mean the operator just happened to leave the door open?

A. No. You could tie it back. On a hot day it gives you more air because it's pretty hard to sit in the cab and not have any air movement and do the job when it's pretty hot out on the lift. The lift being the dump.

THE COURT: Well, supposing the pieces of equipment that had the windows open and doors open, supposing the doors and windows were closed. Would that have rendered the equipment in compliance with the noise standard?

A. Well, I'd only be giving you my opinion because I really couldn't say.

THE COURT: You couldn't say?

A. No.

THE COURT: Well, I'm just wondering if we have a problem here of easy compliance simply by rolling up the windows and closing the doors.

Is that the kind of a situation that we have? . . .

A. Well, I don't think simply by closing the doors and windows that it would reduce the noise fully because you don't have any insulating material or absorbing material. It would definitely lower the levels. How much, I don't know."

Of the six employees operating the equipment, "five were not wearing their hearing protection" (Tr. 27) although [a]ll of them had hearing protection in the cab" (Tr. 32).* When the witness discussed during the inspection the need for exerting more control over the employees "to insure that they wear the

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*A discrepancy exists as to whether four or five employees were allegedly not using personal protective equipment. The citation specifies that four out of five equipment operators were not using personal protection. McGuinness's testimony reflects that one of the six machines tested had a "soundproof" cab, therefore, only five operators would require personal protective equipment.

personal protective equipment," respondent's employee "in charge" replied that "he thought it would be a good idea and he would take care of it" (Tr. 29). No administrative controls were utilized to reduce the noise exposure; the employees operated the equipment "about five to six hours minimum" (Tr. 31-32). The witness felt that respondent's equipment should be retrofitted with sound suppressed cabs that "are available to owners of this heavy equipment . . .," a feasible engineering noise control accomplished by either "[m]odifying the existing cab with sound absorbing material or getting an entire new cab already fitted with the sound absorbing material" (Tr. 32-33). Two sources of such devices are Tube-Lok Products and Caterpillar, the latter being the manufacturer of respondent's equipment (Tr. 35-36, Exhs. C-2, C-3). He did not know "the specifics" of respondent's equipment (Tr. 35), however, "[s]peaking with the people from Tube-Lok, they couldn't give me any specific information unless they knew the exact serial number, model number, year of manufacture for the pieces of equipment; but in general, I got a quote from them, somewhere, you know, depending on what you would want, anywhere between $3,000 and $6,000 per cab for everything you'd want" (Tr. 37). Those prices did not include an air conditioner which "more than likely" would be needed (Tr. 69). In assessing the amount of the proposed penalty for violating the noise standard, he gave a 10 percent credit for "good faith," 5 percent was

allowed for "size" based on the fact that respondent employed 23 persons, and 10 percent was given for "history," the respondent having been previously cited for other violations (Tr. 42-43).

On cross-examination the witness testified that at the time of his inspection, the weather was "warm." He did not know whether the machines were equipped with air conditioners and he did not inquire as to whether respondent's equipment had air conditioning (Tr. 57). He acknowledged that his knowledge of retrofitting respondent's equipment was limited to Tube-Lok's sales literature (Tr. 64), and he did not know whether or not Tube-Lok's noise control kits were available for the specific pieces of equipment owned by respondent (Tr. 67).

## TESTIMONY OF ROBERT MEAGHER
## RESPONDENT'S PRESIDENT AND TREASURER

Respondent is a public utility of the State of New Jersey and as such is required to file a Certificate of Public Convenience. Since July 1976 respondent has ceased dealing in chemical waste as a result of an agreement with the New Jersey Department of Environmental Protection. Substantially all the equipment owned or operated by respondent was manufactured by the Caterpillar Company and it consists of bulldozers, front

end loader, earthmoving pan and a garbage compactor (Tr. 82). The pan or "Wheel Tractor-Scraper" shown in the brochure, Exhibit R-1, offers a sound suppression cab which is a feature offered only relatively recently (Tr. 84). The bulldozer or "Track-type Tractor" shown in the brochure, Exhibit R-2, is a current model which also offers a sound suppression cab. Respondent's bulldozers were older models except one which was the new model with sound suppression cab purchased by respondent in 1976 (Tr. 98) and which was found to be in compliance with the noise standard during the OSHA inspection (Tr. 85). The cost of the cab was approximately $6,000.00 (Tr. 99). The front end loader or "Track-type Loader" depicted in the brochure, Exhibit R-3, is the current model; respondent owns the older model (Tr. 86). He stated (Tr. 87): "We continually replace equipment in the landfill business. It's a reasonably tough service and the earlier pieces were acquired in 1973. Some were acquired in 1974. Two pieces in '75, two items in '76 and one in '77." Respondent has "[a]pproximately ten" pieces of heavy equipment (Tr. 97). Respondent has been operating at a loss since 1975 (Tr. 88-89, 104). The rates that respondent may charge its customers are regulated by the Public Utility Commission of New Jersey. Rates are based on fixed assets and "working capital" (Tr. 90-92). Any addition or renovation done to equipment that did not add materially to the useful life of

the equipment such as making cab alterations, would not be included in the "rate base" (Tr. 92-93). All of respondent's equipment have enclosed cabs, most of which were installed by respondent's own maintenance shop, therefore, they were not of "standard issue" or size (Tr. 93-95). He prefers to have equipment with sound suppression cabs, and respondent has "always followed the program of continually renewing the fleet . . . by adding one or two pieces a year rather than . . . have it all fall apart at [the same time] . . ." but it was questionable whether respondent would be able to afford it (Tr. 101-102). Sometime after the OSHA inspection, respondent established a set of safety rules the violations of which are subject to disciplinary action. The rules include requiring the wearing of protective devices such as ear muffs or plugs (Tr. 206-209, Exh. R-7). He stated that "[s]ubject to our economic feasibility, it would be our intention to purchase new sound suppressed equipment. We already purchased one. We're reasonably pleased with the results of it . . .[during] the ten year operating history of Kin-Buc, we started out by buying basically machines that had 10,000 hours on them and investing a certain amount to get them updated; primarily because we're operating on a garbage dump and we didn't think we needed a new D-8 [bulldozer] on a garbage dump, but over the

period of years we have . . . reached the conclusion that if you can, it's more desirable to use new equipment even on a garbage dump . . . [because of] down time and the cost to repair and maintain" (Tr. 211-212).

## TESTIMONY OF BERNARD RABINOWITZ RESPONDENT'S CONTROLLER

In 1975 respondent had an annual loss of $50,200.00 after income taxes, and $138,800.00 before income taxes. In 1976 the pre-tax loss was $486,800.00 and $383,300.00 after taxes. During the first quarter of 1977 there was a loss of $175,000.00. Respondent has been operating at a loss ever since its operations had been restricted (Tr. 125-126). The depreciable life of respondent's heavy equipment has varied from three to seven years, depending on whether it was purchased used or new. It is common accounting practice to "expense out" any equipment expenditures that did not extend the life of the equipment (Tr. 127-128). If capitalized, the equipment betterment item is included in the rate base, but if the item is "expensed out" it is not included in the rate base (Tr. 129). At the present time respondent is insolvent and its financial condition would not improve under "present levels of operation" due to "a restraining order that limits the amount of waste that we can receive . . ." (Tr. 130-131).

TESTIMONY OF CURTIS STOKES
VICE PRESIDENT, FOLEY MACHINERY COMPANY

Mr. Stokes heads the parts and service departments and is familiar with various types of equipment including Caterpillar where he was formerly employed in sales (Tr. 141-142). Foley Machinery is one of the two Caterpillar dealerships existing in the State of New Jersey with Foley handling the northern area of the State (Tr. 143). Although machines have been retrofitted for rollover protection, Foley has not retrofitted any Caterpillar machine for sound suppression (Tr. 153-154). In order to be effective, a sound suppression cab requires an air conditioner (Tr. 157). In order to retrofit respondent's present equipment for sound suppression it would be necessary to proceed in stages depending upon the results achieved (Exh. R-6). The estimated cost of the initial stage including the air conditioner is $7,500.00. If the first stage did not reduce the sound levels to permissible limits, then the second-stage modifications would be installed also at an estimated cost of $7,500.00. If the third-stage modifications are instituted in order to achieve permissible sound levels, the cost is estimated to be an additional $23,000.00 (Tr. 166-175). Caterpillar also has available for certain bulldozers a sound suppression cab unit that "could be adopted with possibly very

expensive modifications to fit the D-8 machines that Kin-Buc currently owns" (Tr. 175). Such a unit including air conditioner would cost about $15,000.00-$16,000.00 plus the cost of making modifications that would be likely necessary (Tr. 177-178). Installing or retrofitting sound suppression devices does not prolong the useful life of the machine (Tr. 180). The prices for the purchase of new equipment with sound suppression cab and air conditioner are as follows: about $150,000.00 for a Track-type Tractor (or bulldozer); approximately $100,000.00 for a Track-type Loader; and $250,000.00 for a Wheel Tractor-Scraper [or pan] (Tr. 178). A new bulldozer may be purchased with just a simple canopy and the price for the canopy is $4,000.00; the price for an enclosed cab with sound suppression and air conditioner is about $11,000.00. The prices for such optional factory installed equipment are "somewhat less" for the loader and scraper (Tr. 192-193). The operational life of a machine depends on its use and maintenance. Generally, a machine has a life of about 10,000 hours of operation and the average rate of operation is approximately 1,500 hours per year (Tr. 179). The sound suppression cab does not reduce the amount of noise created by the machine during its operation it merely deflects the noise from the operator (Tr. 182). The cost of leasing a bulldozer would be at least about $6,000.00 per month, and $10,000.00-$12,000.00 per month for a scraper [or pan] (Tr. 185-186).

DISCUSSION

Respondent Kin-Buc, Inc., a public utility company, is engaged in the operation of a landfill site in Edison, New Jersey, for the purpose of collecting and disposing of commercial and industrial waste products. In the course of its operations it utilizes heavy earthmoving equipment, including bulldozers, scraper (or "pan") and loader manufactured by Caterpillar Tractor Co.

McGuinness, an industrial hygienist, conducted a survey of sound levels emanating from six pieces of respondent's earthmoving equipment, five of which were found to have noise levels in excess of those listed in Table G-16 of 29 CFR § 1910.95, the equipment being operated by respondent's employees a minimum of "about five to six hours" per day. During the inspection, McGuinness observed that although personal hearing protective devices (in the form of ear muffs or ear plugs) were present in all equipment cabs tested, only one operator was actually wearing such protection while operating the equipment.

Although all six machines were equipped with cabs,[3/] only one had a sound suppression cab and met the permissible sound levels of § 1910.95(b)(1). Tests of noise levels of the five other

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3/ The equipment manufacturers' brochures introduced into evidence by both parties (Exhs. C-2, C-3, R-1, R-2, R-3 and R-5) indicate that the primary purpose of the equipment cab is to afford the operator a rollover protective structure ("ROPS"), and that the cab is available with sound suppression.

units were made by McGuinness while the windows and doors of the cabs were open. This was apparently due to the absence of air conditioners and the resultant operator's discomfort without the flow of air through the opened windows and doors.4/

As a result of the inspection and noise survey conducted by McGuinness, respondent was cited for nonserious violation of § 1910.95(b)(1) because (a) of the five employees exposed to excessive sound levels, only one was wearing personal protective equipment, and (b) "[f]easible engineering and/or administrative controls were not determined or implemented".

In its brief respondent argues that the citation should be vacated because: (1) "the Secretary has failed to establish the technical feasibility of engineering or administrative controls;" (2) "the engineering and administrative controls required are economically infeasible;" and (3) "the Secretary has not met [his] burden of proof in showing that Respondent did not have an effective policy to insure the wearing of the personal protective equipment provided its employees". The last of these arguments will be considered first.

It is settled law that the Secretary has the burden of proving all elements of an alleged violation. Secretary v. Raymond Hendrix d/b/a Alsea Lumber Company, 511 F.2d 1139, 1142-1143 (9th Cir. 1975); 29 CFR § 2200.73(a). The standard

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4/ The evidence clearly indicates that in order to effectively control the operator's noise exposure, a cab must be equipped not only with sound suppression materials but an air conditioner is also required for warm weather operation (Tr. 157, Exh. R-6).

29 CFR § 1910.95(b)(1) requires the use of feasible administrative or engineering controls whenever employees are exposed to sound levels exceeding those permitted by Table G-16. The use of personal protective equipment is required only if engineering or administrative controls are not feasible or cannot reduce noise exposure to within permissible levels. If engineering or administrative controls are not sufficient to reduce noise exposure to within permissible levels, such controls must be used to reduce exposure to the greatest extent feasible and must be supplemented by personal protective equipment to reduce sound within the prescribed limits. Secretary v. Turner Company, Division of Olin Corp., No. 3635 (August 24, 1976). Thus, while engineering and administrative devices constitute the primary means of controlling noise exposure, an employer may be issued a citation and held liable for penalties under the Act for violating the occupational noise standard when personal protective equipment has not been used to achieve compliance with the standard in the absence of feasible engineering or administrative controls.5/

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5/ In its brief, (p. 13), respondent rather tenuously argues that "the issue as to whether or not employees were in fact wearing the protective devices may be irrelevant when considering whether or not the citation issued by the Secretary should be vacated". The cases cited by respondent (Secretary v. Weyerhaeuser Company, No. 11869 September 14, 1976), Secretary v. Peterson Manufacturing Co., Inc., No. 76-1314 (April 21, 1977), and Secretary v. Wheeling-Pittsburgh Steel Corp., No. 13949 (May 13, 1977)) do not support such a contention.

While the evidence clearly establishes that respondent provided ear protective equipment to its employees, it is equally plain that respondent did not undertake to seriously enforce the use of such equipment by its employees until sometime after the compliance officer made his inspection.[6/] The lead opinion of Commissioner Cleary in Secretary v. B-G Maintenance Management, Inc., No. 4713 (June 1, 1976) spoke specifically on this issue:

> "We are not unmindful that under the Act an employer is not to be held strictly liable for all violations. We do not hold here that the employer must provide constant over-the-shoulder supervision for each of his employees, but we do hold that in order to fulfill its statutory obligation the employer must do more than issue adequate safety instructions, or

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6/ Respondent apparently misconceives the personal protection requirements of the standard as evidenced by the following remarks made in its brief (p. 15):

> "Since . . . Mr. McGuinness testified that he did not conduct a systematic observation of the heavy equipment operators as to whether they were wearing the protective devices . . . it is entirely possible that the men sometimes wore the devices and sometimes did not, depending upon the weather and other operating conditions at the job site. Therefore . . . the Secretary has failed to meet his burden of proof in showing that an effective program of hearing conservation through the use of personal protective equipment was not employed by Respondent . . . ."

I should think it eminently clear that the standard's requirement of personal protective equipment is not conditioned upon the individual employee's comfort or discretion.

> hold safety meetings. J. A. McCarthy & Co., supra, note 2: The Leone Construction Co., No. 4090 (February 10, 1976). On the adequacy of safety instruction, see Ames Crane & Rental Service, Inc., v. Dunlop, No. 75-1591 (8th Cir., April 1, 1976). What is basically lacking here is an effective safety enforcement program reflecting a diligent effort to discourage, by discipline if necessary, violations of safety rules by employees. Warnel Corporation, No. 4537 (March 31, 1976). Section 5(a)(2) requires no less than this. See generally, Atlantic & Gulf Stevedores, Inc., No. 2818 etc., (April 11, 1975) (lead opinion), aff'd, No. 75-1584 (3rd Cir., March 26, 1976). To hold differently would mean that once an employer provides and instructs employees in the use of safety equipment, and issues orders regarding its use, employees are at liberty to disregard such orders. We believe that the adoption of such a position would fall short of the Congressional purpose." (Footnote omitted.)

The second ground relied upon by the Secretary in citing respondent for violation of the occupational noise standard, is the charge that respondent failed to utilize feasible engineering controls to reduce excessive sound levels.7/ Respondent contends that complainant has failed to establish that engineering controls are a feasible means of abatement. I agree.

McGuinness, the Secretary's only witness, testified as to the availability of engineering controls. He recommended that respondent's equipment be retrofitted with sound suppression cabs by either installing sound absorptive material in the existing cabs or replacing the equipment cabs with new sound suppression cabs. The estimated cost was "anywhere between

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7/ The Secretary has not presented any evidence showing that feasible administrative controls are available to reduce noise exposure.

$3,000.00 and $6,000.00 per cab" without air conditioner. These recommendations were based primarily upon the sales literature supplied by Tube-Lok, a manufacturer of retrofit noise control systems for equipment cabs. McGuinness acknowledged that he did not know whether or not Tube-Lok's retrofit noise control systems were available for the specific pieces of equipment owned by respondent.

Stokes, Vice-President of Foley Machinery Company, testified that, although Foley is one of the two Caterpillar dealerships existing in New Jersey, no retrofitting of Caterpillar equipment with sound suppression had been done by Foley. His testimony also indicates that because of many uncertainties involved, retrofitting respondent's equipment would require step-by-step modifications depending on the sound levels achieved. The first phase involves installation of sound suppression material inside the cab and air conditioner at a cost of $7,500.00. In the event that the first phase failed to produce permissible sound levels, the second phase would be implemented by installing rubber mounts between the equipment cab and the main frame, and by installing special muffler group at an additional cost of $7,500.00. If a third phase were required to further reduce the level of sound, the additional cost would be $23,000.00. There was no assurance as to the extent of the sound reduction resulting from such modifications.

The second method of reducing the sound levels of respondent's bulldozers described by Stokes consists of replacing the existing cabs with sound suppression cabs at a basic cost of about $15,000.00 - $16.000.00 per unit plus the cost of making necessary modifications. The only other alternative is to purchase completely new machines[8/] with sound suppression cabs and air conditioners, sold by Caterpillar at the approximate price of $100,000.00 for a loader, $150,000.00 for a bulldozer and $250,000.00 for a scraper (or pan).[9/] The record indicates that permissible sound levels would be attained by either one of these two methods.

"Feasible engineering controls", as the term is defined by the Commission, means engineering controls which are both economically and technologically feasible. Engineering controls are technologically feasible if they will result in a significant reduction in ambient noise levels. In determining whether controls are economically feasible, all relevant cost and benefit factors must be weighed. Secretary v. Great Falls Tribune Company, No. 6632 (May 19, 1977); Secretary v. West Point Pepperell, Inc.,

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8/ Another choice available to respondent is leasing. However, except for approximate monthly rental charges (which are substantial and appear to offer no cost advantage to respondent on a long-term lease basis), neither party presented any evidence on which to base a valid evaluation of the effects of equipment leasing as compared to outright purchase.

9/ The bulldozer's $150,000.00 price tag includes $11,000.00 for an enclosed cab with sound suppression and air conditioner; the price of a "simple canopy" type cab is $4,000.00. According to Stokes's testimony, the prices for such optional factory-installed equipment are "somewhat less" for the loader and scraper.

No. 8255 (April 18, 1977); Secretary v. Continental Can Company, Inc., No. 3973 (August 24, 1976).

Except for his reference to one of the tested machines having sound suppression cab, McGuinness's testimony concerning engineering controls was limited essentially to retrofitting devices manufactured by Tube-Lok, and here there is a complete absence of probative facts to establish the feasibility of Tube-Lok's noise control system. The Secretary's burden of proof is not satisfied simply by a showing that noise controls exist; the occupational noise standard is violated only if an employer fails to utilize those controls which are feasible in its operations. Secretary v. Great Falls Tribune Company, supra.

The undisputed testimony of Stokes indicates that retrofitting respondent's present machines by either (a) modifying the existing equipment cabs or (b) replacing existing cab units with sound suppression cabs, involves: In the first instance, costs ranging from $7,500.00 to $38,000.00 with no proof as to the extent of resultant noise-level reduction and no assurance of achieving a significant reduction in sound levels; and in the second instance, costs of $15,000.00 - $16,000.00 plus "expensive modifications" that may be likely to reach permissible sound levels.

It is significant to note that the average operational life of a machine is about seven years, and respondent's machines have had a "depreciable life" of three to seven years, depending on whether the equipment was purchased used or new. There is no evidence to indicate the operating condition or the expected

operational-life span of respondent's equipment. The evidence is clear that retrofitting with a noise control system will not prolong the machines' service life.[10/] Complainant would require respondent to expend substantial sums of money within a limited period of time to retrofit its present equipment regardless of its residual useful life.

It is clear from the record that the earthmoving machines under discussion are an essential part of respondent's waste products operations, and that the machines must be replaced at some time due to wear and tear inherent to such type of work. Caterpillar offers for sale new machines with optional equipment including air conditioner and a sound suppression cab which reduces sound levels to 90 dBA. The price of this optional equipment is approximately $7,000.00,[11/] almost equal to Foley's "phase I" estimated cost of retrofitting respondent's machines.

Is respondent required to retrofit its present machines to reduce sound levels? This procedure, which is advanced by the Secretary, is encumbered with technological as well as economic uncertainties. Is respondent required to purchase

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10/ The evidence establishes that expenditures incurred by respondent for such modifications are not taken into account in ascertaining its public utility rate base.

11/ The amount of $7,000.00 represents the difference between the price of a rollover protective structure ("ROPS") cab ($4,000.00), which is required in certain cases by other safety standards, and the price of the sound-suppressed "ROPS" canopy with air conditioner ($11,000.00).

new machines equipped with sound-suppressed cabs and air conditioners in order to comply with the standard? It would appear that the Secretary has serious doubts concerning the feasibility of this latter course in view of his failure to present any evidence on this issue in support of his case.

Chairman Barnako summarized the concept underlying his lead opinion in Secretary v. Castle & Cooke Foods, Inc., No. 10925 (May 19, 1977):

> ". . . [the Secretary] approaches this case as if noise hazards and the abatement thereof should receive an employers' highest priority for allocation of its resources to the exclusion of all other health and safety hazards that may exist in the workplace. We note that the hazard involved herein was alleged to be nonserious, and the Secretary declined to propose a penalty. Excessive noise, however, is only one of numerous safety and health hazards the Act seeks to eliminate from workplaces, and other hazards pose serious debilitating threats and yet others are life threatening. Such serious hazards will also require resources for abatement, and obviously the benefits to be achieved will be great. We therefore cannot conclude that noise reduction should be assigned the priority suggested by the Secretary. Furthermore, we do not think that a specific employer's economic situation is particularly relevant in determining the feasibility of noise controls. If the question is whether an employer can 'afford' the controls, then employee health would depend on the financial condition of their employer. Instead, we think that in determining whether controls are feasible, we must realistically consider the hazard presented by excessive noise and determine whether the health benefits to employees from noise reduction justify the cost to the employer.

> "This approach is consistent with the purposes of the Act. The Act recognizes that perfect safety and health cannot be achieved, and that a balancing of costs and benefits must be made . . . ." [Footnote omitted.]

In applying the economic feasibility test in Castle & Cooke, it was concluded that controls capable of attaining a reduction from 98-100 to 90 dBA in the can plant, and from 95-96 to 90 dBA in the cannery for an 8-hour day were not economically feasible when, for each employee benefited, such controls would cost: in the can plant, $3,100.00 to install and $1,100.00 in increased annual costs due to production losses and maintenance; and in the cannery, $3,400.00 to install and $111.00 in annual production losses and maintenance.

The Castle and Cooke case is controlling here and leads to the conclusion that retrofitting respondent's earthmoving machines (either by making modifications to existing cabs or by replacing existing cab units with sound-suppressed cabs) or purchasing new machines with sound-suppressed cabs and air conditioners, is not economically feasible.[12/] It is also concluded that complainant has failed to establish that retrofitting respondent's machines by making modifications to existing cabs constitutes a technologically feasible control.

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12/ The conclusion reached herein should not be interpreted by respcndent as a discordant note in its determination to "purchase new sound suppressed equipment", as expressed by Meagher. Any decision in that regard will, of course, depend on respondent's business judgment and not because of any requirement of 29 CFR § 1910.95(b)(1).

As previously discussed, respondent's failure to diligently enforce employee use of personal protective equipment to reduce noise exposure warrants affirmation of the citation.[13/] Under the penalty-assessment criteria of 29 U.S.C. § 666(j),[14/] it is believed that a penalty of $100.00 is appropriate.

## FINDINGS OF FACT

1. At the time the survey of sound levels was made in May 1976, five earthmoving machines, manufactured by Caterpillar Tractor Co., and operated by five employees of respondent during a minimum period of five to six hours per day, generated sound levels ranging from 90 dBA to 95 dBA while "idling", and from 100 dBA to 107 dBA during reverse and forward movements or while moving earth.

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13/ In its answer to the complaint, respondent presented the argument that the citation does not meet the "particularity" requirement of 29 U.S.C. § 658(a). This contention lacks merit as to the personal protection requirement of the standard in view of the employees specified in the citation who were allegedly not using personal protective equipment. Disposition of the matter makes unnecessary any discussion as to substance of the particularity argument regarding the issue of feasible engineering controls. For a pertinent and informative discussion of the particularity issue, see Secretary v. Gannett Corporation, No. 6352 (May 3, 1976).

14/ Section 17(j) (29 U.S.C. § 666(j)) reads:

> "The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations."

2. The noise produced by the five machines exceeded permissible sound levels.

3. Although respondent provided its employees personal protective equipment, only one of the five operators was actually using such equipment while the machines were being operated.

4. Respondent did not adequately enforce the use of personal protective equipment by its employees.

5. Engineering controls by means of retrofitting existing cabs with sound suppression material and air conditioner are neither technologically nor economically feasible.

6. Retrofitting respondent's machines by replacing existing cabs with sound-suppressed and air-conditioned cabs is technologically feasible but not economically feasible.

7. The purchase of new earthmoving machines with sound-suppressed and air-conditioned cabs, as a means of reducing sound levels generated by the machines, is technologically feasible but not economically feasible.

8. There is no evidence to establish the feasibility of administrative controls.

## CONCLUSIONS OF LAW

1. At all times relevant herein, respondent has been engaged in a business affecting commerce within the meaning of section 3 of the Act.

2. Respondent violated 29 U.S.C. § 654(a)(2) by failing to comply with the safety standard 29 CFR § 1910.95(b)(1) because its employees did not use personal protective equipment to reduce noise exposure.

3. The charge of noncompliance with 29 CFR § 1910.95(b)(1) based on failure to use feasible engineering or administrative controls is not warranted.

## O R D E R

It is hereby ORDERED that:

1. The agreement to settle the issues involving the three citations of June 11, 1976, and proposed penalties (excepting only item 3 of citation number 1 and the penalty proposed for that item) is approved; respondent's notice of contest to the citations and the proposed assessment of penalties, as amended, is dismissed (except as to said item 3); citations number 1 (excluding said item 3), 2, and 3 are affirmed, and a total penalty of $1,845.00 is assessed therefor.

2. Item 3 of citation number 1, issued on June 11, 1976, involving 29 CFR § 1910.95(b)(1) is affirmed to the extent indicated, the penalty proposed is vacated, and a penalty of $100.00 is assessed in lieu thereof.

Richard DeBenedetto
RICHARD DeBENEDETTO
JUDGE, OSHRC

Dated: August 18, 1977
New York, New York

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

## NOTICE OF DECISION

Secretary of Labor v. ROBERT P. LOVELAND, d/b/a SECURITY WELDING
OSHRC Docket No. 82-0136-S

1. Enclosed is a copy of my decision. It will be filed with the Commission on November 18, 1982, and will become the final order of the Commission on December 20, 1982, unless a Member of the Commission directs that it be reviewed.

2. You may petition for discretionary review of this decision by the Commission. A petition may be filed directly with me within twenty (20) days from the mailing of my decision. Thereafter, a petition should be mailed to the Executive Secretary, Attention:

   Chief Review Counsel
   Occupational Safety and Health Review Commission
   1825 K Street, N.W., Suite 601
   Washington, D.C. 20006.

   Any petition filed directly with the Commission will be considered to the extent that time and resources permit. The last day the Commission may consider your petition is December 20, 1982. This final order date is fixed by law and cannot be extended under any circumstances.

3. If review is ordered by a Member of the Commission, each party to this case will be notified. In addition, each party will be given an opportunity to submit a brief to the Commission.

4. Please complete the enclosed postcard indicating whether you presently intend to seek review of this decision and mail the completed card promptly. Your response does not bind you in any way, but it assists the Commission in processing your petition when it is filed.

5. For any further details on the review process, see Commission Rules 90, 91, 92, and 93.

James A. Cronin, Jr.
Judge, OSHRC

Date: October 29, 1982

OSHRC FORM 97

11/18/12/20/82

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>ROBERT P. LOVELAND, d/b/a<br>SECURITY WELDING,<br><br>Respondent. | OSHRC DOCKET NO. 82-0136-S |

ORDER

On May 5, 1982, a Notice of Conference/Hearing was issued scheduling a conference/hearing in the captioned case for June 3, 1982.

On June 2, 1982, the June 3rd hearing was cancelled upon the representation of complainant that a settlement had been reached. The June 2nd order further instructed the parties to file a settlement agreement within twenty days of June 2, 1982.

On August 18, 1982, the parties were ordered to advise within five days when a settlement agreement would be filed.

Subsequently, complainant's counsel advised that respondent had failed to return a settlement agreement which had been submitted by complainant to respondent for his consideration and execution. No response was received from respondent.

On September 1, 1982, a Notice of Hearing was sent to the parties. This notice advised that the hearing would be held in Colorado Springs,

Colorado on October 29, 1982, at 9:00 a.m. The Notice further advised that the parties would be notified at a later date as to the exact location of the hearing.

On October 20, 1982, a notice was sent to the parties that the hearing scheduled for October 29, 1982, would be held at the following location:

New Judicial Building
20 East Vermijo
Colorado Springs, Colorado.

The parties also were instructed to check with Mrs. Florence Bryant, Receptionist New Judicial Building, for exact room designation.

On October 25, 1982, the envelope and notice mailed to respondent on October 20, 1982, was returned to the Denver office of the Commission marked, "Box Closed - No order."

Rule 6 of the Commission Rules of Procedure requires that the initial pleading filed by any person shall contain his name, address, and telephone number, and that any change in such information must be communicated promptly in writing to the Judge or Commission and to all other parties. Rule 6 further provides that a party who fails to furnish such information shall be deemed to have waived his right to notice and service under these rules.

Respondent's failure to comply with Commission Rule 6 is deemed a waiver of his right to further participation in this proceeding and constitutes a default.

Accordingly, it is ORDERED:

1. Citation No. 1, issued January 20, 1982, is AFFIRMED, and a penalty of $80.00 ASSESSED.

James A. Cronin, Jr.
Judge, OSHRC

Dated: November 18, 1982

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

December 22, 1982

**IN REFERENCE TO SECRETARY OF LABOR v.**

VANCO CONSTRUCTION, INC.

**OSHRC DOCKET NO.** 79-4945

**NOTICE IS HEREBY GIVEN TO THE FOLLOWING:**

**OF** COMMISSION DECISION

**To wit:** See attached.

**FOR THE SECRETARY OF LABOR**

- **Counsel for Regional Litigation**
  **Office of the Solicitor, USDOL**
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**FOR EMPLOYER**

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  Dallas, Texas 75240

**FOR EMPLOYEES**

-

**FOR THE COMMISSION**

Ray H. Darling, Jr.

**RAY H. DARLING, JR.**
**EXECUTIVE SECRETARY**

Louis G. LaVecchia
Judge, OSHRC
Federal Building, Room 7B11
1100 Commerce Street
Dallas, Texas 75242

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>VANCO CONSTRUCTION COMPANY,<br>Respondent. | OSHRC Docket No. 79-4945 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

The Secretary of Labor issued a citation item alleging that Vanco Construction, Inc. ("Vanco"), violated 29 C.F.R. § 1926.102(a)(1). The standard requires that employees "be provided with eye and face protection equipment when machines or operations present potential eye or face injury from physical, chemical, or radiation agents." Administrative Law Judge LaVecchia vacated the citation item because he found the evidence of a "potential eye or face injury" insufficient. We reverse the judge and affirm the citation item.

I.

A compliance officer observed two employees without eye or face protection chipping hardened mounds of concrete at a construction site. The employees were using a sledgehammer and a Hilti electric hammer to break down the excess concrete. The operation produced chips and dust particles which the compliance officer observed flying out a distance of four feet. The two workers were continually struck in the face by these particles. The largest chips were approximately the size of a matchhead. The workers were about five feet tall, and crouched as they worked. The compliance officer observed the workers squinting or flinching from the impact of the chips, and occasionally brushing

their faces to remove accumulations of dust and particles. The compliance officer testified that the chips were "definitely" flying out with "great force," and that serious injury would be substantially probable if a chip were to strike an employee in the eye. No form of eye or face protection was available at the worksite.

Douglas Fisher, the area sales manager for the Hilti hammer, testified that he had received no reports of serious eye injuries associated with the use of the hammer in the seven years it had been manufactured (about 200,000 were in use at the time of the hearing). Fisher also stated that the hammer's chisel would absorb about 95 percent of the energy produced by its "striking pistol."

Roy Neel, Vanco's assistant superintendent at the worksite, testified that the sledgehammer was "primarily" used to drive wooden stakes rather than to chip concrete. Neel also claimed that the Hilti hammer did not throw chips into the workers' faces, but only propelled chips about 24 inches. He conceded, however, that he "wasn't observing [the employees] that close."

The senior job superintendent, Ralph Pruett, did not observe the workers at the time of the inspection. He testified that on many previous jobs he observed the Hilti hammer and that it did not spray particles into the face of its operator. He also stated that a sledgehammer striking concrete will produce flying chips.

The judge found that chips of concrete were spraying out from the Hilti hammer up to a distance of four feet, and that the chips would "probably" fly back toward the employees' faces. He also found that the employees were occasionally required to brush the dust and chips from their faces. However, the judge vacated the citation on the ground that the Secretary failed to establish the velocity of the chipped particles and, specifically, because there was no evidence that the chips were travelling fast enough to penetrate the eyes or flesh of the workers. The judge credited Fisher's testimony that no serious eye injuries had been reported in the seven years since the Hilti hammer was first

marketed, and construed his statement about the hammer's design to mean that the velocity of any flying chips would tend to be reduced. The judge did not find a violation with respect to the use of the sledgehammer apparently because there was no evidence as to the velocity at which chips might fly from concrete struck by a sledgehammer. 1/ However, the judge did state that chips flying from a sledgehammer would present more of a hazard, in his opinion, than chips flying from a Hilti hammer.

The Secretary petitioned for discretionary review, and review was directed by former Commissioner Barnako on whether the judge erred in vacating the citation.

On review, the Secretary argues that his burden of proof under the cited standard does not require him to prove the velocity of flying chips and dust particles. He contends that the standard "does not limit the hazard to flying particles of a specified minimum velocity." The Secretary also argues that the standard "recognize[s] that eye contact with flying particles is inherently hazardous regardless of velocity."

Vanco cites the lack of recorded injuries and disputes the Secretary's claim that the electric hammer had enough force to cause injury. The employer claims that the Secretary's position, if adopted, would require the wearing of safety glasses at all construction sites, and that the violation, if any, was de minimis. Vanco also argues that the standard is vague, that it had no knowledge of the violation, that the citation was not issued with reasonable promptness, that the violation at most should be deemed non-serious, and that the penalty is excessive.

II.

We have previously cautioned that "the eye is an especially delicate organ and . . . any foreign material in the eye presents the potential for injury."

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1/ The judge also stated that there was a conflict in the evidence with respect to the use of the sledgehammer. We disagree with this statement. See discussion below.

Stearns-Roger, Inc., 79 OSAHRC 94/A2, 7 BNA OSHC 1919, 1921, 1979 CCH OSHD ¶ 24,008, p. 29,156 (No. 76-2326, 1979). In Stearns-Roger the Commission held that an employee wearing ordinary eyeglasses and cutting lumber with a portable power saw was engaged in an operation which posed a potential for eye injury under section 1926.102(a)(1). The hazard in that case was flying sawdust and, if the saw blade should shatter or strike a hidden nail, flying metal particles. We did not require the Secretary to prove the velocity of the flying particles as part of his prima facie case.

The facts of this case are no less compelling. Concrete chips were actually propelled with force up to four feet through the air by the hammers. Because the employees were about five feet tall, and crouched as they worked, their faces were within striking distance of the chips. The workers were observed squinting or flinching from the impact of the chips and occasionally were required to brush their faces to remove accumulations of concrete dust. We discount the testimony of assistant superintendent Neel that he did not observe chips striking employees in the face because, as he said, he "probably wasn't observing them that close." We also discount the judge's statement that the evidence as to the use of the sledgehammer is in conflict. No witness at the hearing denied that the sledgehammer was used to chip concrete, and Vanco does not now deny that the sledgehammer was in fact so used.

The judge's finding that any chips thrown through the air would be slow-moving because of the Hilti hammer's design is also not supported by the record. When asked if he knew the striking force of the Hilti hammer, Fisher responded that "there is actually a striking element inside the hammer that is propelled by compressed air, but the chisel or bit would actually absorb ninety-five percent of the energy transmitted from the striking pistol." Fisher's testimony thus concerns the force transmitted within the Hilti hammer's mechanism, rather than the force transmitted by the hammer on impact with the surface being worked.

Even if Fisher had addressed the issue of the force transmitted to the concrete, the fact remains that chips of concrete were flying directly into the workers' faces. 2/

These facts establish a potential for eye injury, given the considerable vulnerability of the eye. The judge's view that the Secretary must prove that the chips were propelled with enough force to penetrate the eye does not comport with the standard's purpose or language and is inconsistent with our precedent. 3/

We also reject Vanco's argument that the standard is vague or that it fails to afford adequate notice to employers. It is well-settled that a standard should not be evaluated for vagueness solely on its face, but should instead be considered on the facts of each case. See Gold Kist, Inc., 79 OSAHRC 93/C8, 7 BNA OSHC 1855, 1859, 1980 CCH OSHD ¶ 24,205, p. 29,445 (No. 76-2049, 1979); accord, Santa Fe Trail Transport Co., 505 F.2d 869 (10th Cir. 1974)(standard must be considered

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2/ Fisher's additional testimony that he had not received any reports of serious eye injuries attributable to the hammer is of little value. The record does not reflect the conditions under which the hammer is usually operated. It may well be that eye injuries were rare because eye protection is commonly used or because chips are usually not propelled into employees' faces. The record also does not indicate whether Fisher would have received reports of injuries had any occurred.

3/ Vanco refers us to the argument in its post-hearing brief that it lacked knowledge of the violation. This point requires little discussion. The Commission has held that the record must show that the employer knew or with the exercise of reasonable diligence could have known of the violative conditions. Prestressed Systems, Inc., 81 OSAHRC 43/D5, 9 BNA OSHC 1864, 1868, 1981 CCH OSHD ¶ 25,358, p. 31,500 (No. 16147, 1981). Vanco argues that it could not have known that the chipping operation presented a potential for eye injury. Vanco's argument lacks merit. First, the knowledge element of a serious violation refers to the physical conditions that constitute a violation. See Southwestern Acoustics & Specialty, Inc., 77 OSAHRC 25/E7, 5 BNA OSHC 1091, 1092, 1977-78 CCH OSHD ¶ 21,582, p. 25,896 (No. 12174, 1977). That Vanco did not draw the conclusion that there was a potential for eye injury is therefore not the point. Vanco's employees assigned to perform the chipping operation were not provided with eye protection and none was available on the site. It is therefore enough that with reasonable diligence, Vanco could have known that chips were flying into the faces of the employees. See Automatic Sprinkler Corp. of America, 80 OSAHRC 47/E4, 8 BNA OSHC 1385, 1387, 1980 CCH OSHD ¶ 24,495, p. 29,926 (No. 76-5089, 1980).

"in the light of conduct to which it is applied"), citing United States v. National Dairy Corp., 372 U.S. 29, 36 (1963). We stated in Brown & Root, Inc., 81 OSAHRC 44/A2, 9 BNA OSHC 1833, 1840, 1981 CCH OSHD ¶ 25,366, p. 31,563 (No. 76-190, 1981), that:

> [t]he test for determining the vagueness of a standard is the "external and objective test" of whether "a reasonable person responsible for the safety of employees, after considering the standard . . . and the factual situation, would be able to apply the language of the standard to the situation in order to identify the hazard and eliminate it." [Quoting Pratt & Whitney Aircraft, 75 OSAHRC 42/A2, 2 BNA OSHC 1713, 1715, 1974-75 CCH OSHD ¶ 19,443, p. 23,216 (No. 510, 1975).]

The issue is therefore whether a reasonable person could ascertain that the use of the hammers to chip concrete presented a potential for eye or face injury from flying chips and dust. That test has certainly been met. Any reasonable person familiar with the facts would have realized the potential for eye injury. We also note that 29 C.F.R. § 1926.102(a)(5) refers the employer to Table E-1 for use "as a guide in the selection of eye and face protection for the hazards and operations noted." Chipping and flying particles are listed in the table among the operations and hazards for which protection is required. The table, when read in conjunction with section 1926.102(a)(1), thus serves to additionally inform the employer of the appropriate protection for a given operation. See Gold Kist, 7 BNA at 1859, 1980 CCH OSHD at p. 29,443 ("broad terms in standards can acquire meaning when read together with other standards . . ."), quoting Modern Automotive Service, Inc., 74 OSAHRC 9/A11, 1 BNA OSHC 1544, 1973-74 CCH OSHD ¶ 17,369 (No. 1541, 1974); see also Daniel Construction Co., 82 OSAHRC _____, 10 BNA OSHC 1549, 1554, 1982 CCH OSHD ¶ 26,027, p. 32,674 (No. 16265, 1982).

Vanco argues that the citations were not issued with reasonable promptness as required under section 9(a) of the Act, 29 U.S.C. § 658(a). The inspection was conducted on July 25, 1979. The citation was issued 15 days later. In order

to vacate a citation for lack of reasonable promptness, the Commission has held that an employer must establish prejudice in the preparation of its defense. See Stripe-A-Zone, 82 OSAHRC ____, 10 BNA OSHC 1694, 1695, 1982 CCH OSHD ¶ 20,069, p. 32,781 (No. 79-2380, 1982). Although Vanco alleges prejudice in the preparation of its case, it was informed at the closing conference on the day of the inspection that its failure to provide eye protection constituted a safety hazard. In addition there is no showing that the timing of the citation delayed Vanco from immediately conducting its own investigation or that the presentation of its case was hampered due to the alleged delay. See National Industrial Constructors, Inc., 81 OSAHRC 94/A2, 10 BNA OSHC 1081, 1084, 1981 CCH OSHD ¶ 25,743, p. 32,126 (No. 76-4507, 1981). We therefore reject its claim.

III.

The citation alleges that the violation was "serious." The compliance officer testified that if a concrete chip were to strike an employee in the eye, major damage, including the possibility of blindness, could result. Vanco argues on review that "no serious damage could be done even if a chip had struck an employee in the eye . . . ."

In determining the seriousness of a violation, the correct inquiry is not the likelihood of an accident but whether, in the event of an accident, there is substantial probability that it would result in death or serious physical harm. See, e.g., Frank Swidzinski Co., 81 OSAHRC 4/E14, 9 BNA OSHC 1230, 1232-3, 1981 CCH OSHD ¶ 25,129, p. 31,032 (No. 76-4627, 1981). We find that given the delicateness of the eye, serious physical harm would be substantially probable if an employee were struck in the eye by a particle or chip of concrete from one of the hammers. We note that the compliance officer testified that the chips were the size of a matchhead and flew out with sufficient force to cause the employees

to squint or flinch from the impact. We therefore find that the violation is serious under section 17(k) of the Act, 29 U.S.C. § 666(j). 4/

The Secretary proposed that a penalty of $280 be assessed. 5/ As to size, Vanco had over 100 employees. As to good faith, Vanco immediately stopped the chipping and sought to obtain eye protection. The gravity of the violation was moderate. Although only two employees were exposed, particles were indeed flying into the employees faces. As to history of previous violations, we note that although citations had been issued to Vanco, they were not shown to have become final orders. Until a citation becomes a final order, it may not be considered as evidence of a history of previous violations for the purpose of penalty assessment. See General Steel Fabricators, Inc., 77 OSAHRC 173/F2, 5 BNA OSHC 1837, 1838, 1977-78 CCH OSHD ¶ 22,190, p. 26,704 (No. 76-710, 1977). We there-

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4/ That section provides:

> For the purposes of this section, a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation.

Vanco argues that the violation at most should be affirmed as de minimis. We disagree. Inasmuch as the failure to provide eye protection could have resulted in severe and permanent injury, the violation was not too trifling to warrant the imposition of an abatement requirement or the assessment of a penalty. See Southwestern Electric Power Co., 80 OSAHRC 81/C7, 8 BNA OSHC 1974, 1975, 1980 CCH OSHD ¶ 24,732, p. 30,445 (Nos. 77-3890 & 77-3391, 1980).

5/ Section 17(j), 29 U.S.C. § 666(i), provides:

> The Commission shall have authority to assess all civil penalties provided in this section, giving due consideration to the appropriateness of the penalty with respect to the size of the business of the employer being charged, the gravity of the violation, the good faith of the employer, and the history of previous violations.

fore do not rely on the fact that there were outstanding citations issued against Vanco. We find a penalty of $280 to be appropriate. 6/

IV

Accordingly, the judge's decision is reversed. The citation item is affirmed; a penalty of $280 is assessed.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: DEC 22 1982

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6/ Vanco challenges the manner in which the penalty was calculated by OSHA; it argues that because it did not have a history of previous violations, a lower penalty should have been proposed under the guidelines set forth in the OSHA Field Operations Manual. We have previously held that the guidelines provided by the manual do not bind us, do not have the force and effect of law, and do not accord important procedural or substantive rights to individuals. See FMC Corp., 77 OSAHRC 153/D4, 5 BNA OSHC 1707, 1710, 1977-78 CCH OSHD ¶ 22,060, p. 26,573 (No. 13155, 1977). Also, because the Commission assesses penalties de novo, the proposed penalty has no force once it is contested. J.L. Foti Construction Co., 80 OSAHRC 36/C10, 8 BNA OSHC 1281, 1285, 1980 CCH OSHD ¶ 24,421, p. 29,784 (Nos. 76-4429 & 76-5049, 1980).

ROWLAND, Chairman, dissenting:

The standard cited in this case, 29 C.F.R. § 1926.102(a)(1), requires employers performing construction work to provide eye and face protection equipment "when machines or operations present potential eye or face injury from physical, chemical, or radiation agents." Vanco argues that section 1926.102(a)(1) is unenforceable because it does not give fair warning of the conduct it prohibits or requires. Because I am unaware of anything in the standard or its regulatory history that would guide the Commission in its proper application, I would vacate the citation item. I therefore dissent.

The plain meaning of the word "potential" is "possible." 7/ Inasmuch as nearly all construction work poses the possibility of eye injury, a literal reading of the standard would require that eye or face protection be provided in nearly all construction operations. The majority correctly recognizes that this standard could not possibly have been intended to be literally applied. Yet, there is nothing that indicates how it does apply. The standard does not specify which construction operations present a "potential" for eye injury. The other standards in Part 1926 provide the Commission with no guidance to determine the standard's reach. Section 1926.102(a)(5) and Table E-1, which the majority uses as an interpretive aid, are unhelpful. Section 1926.102(a)(5) refers employers to Table E-1 only as a "guide." 8/ Table E-1 does not provide useful information on the requirements of section 1926.102(a)(1) because it does not indicate that eye protection is required in all chipping operations nor does it indicate which chipping operations necessitate eye protection. At best, the table merely guides employers in the selection of eye protection after it is

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7/ Webster's Third New International Dictionary (1971).

8/ Daniel Constr. Co., 82 OSAHRC 23/A2, 10 BNA OSHC 1549, 1554 n. 6, 1982 CCH OSHD ¶ 26,027, p. 32,674 n.6 (No. 16265, 1982)(dissenting view).

known that such protection is required. Finally, I am not aware of any regulatory history of section 1926.102(a)(1) that would shed light on its proper application.

It is the duty of the congressionally delegated authority, the Secretary of Labor, to provide ascertainable criteria by which standards can be interpreted and applied. To hold otherwise would mean that the Commission, not the Secretary, is setting the standard, and would conflict with the separation of powers established by Congress under the Act. See Sun Ship, Inc., No. 16118 (December 17, 1982) (dissenting opinion). In the absence of meaningful criteria to guide the interpretation or application of a standard, the Commission's decision is derived, not from the standard, but from the majority's own view of what the standard should say. I recognize, of course, that no standard can be written so as to be entirely free from ambiguity. There are limits to the precision of language. 9/ However, a standard may not be so broadly written that it delegates basic policy matters to the Commission for resolution on an ad hoc and subjective basis.

While I recognize that standards can be construed so as to avoid questions of their validity, 10/ this doctrine applies only where to do so does not overstep the bounds of the judicial function. 11/ For the reasons I have indicated, such a course is not possible in this case. I would therefore affirm the judge's decision and vacate the citation.

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9/ See Southern Pacific Co. v. Jensen, 244 U.S. 205, 221 (1916)(Holmes, J., dissenting)("I recognize without hesitation that judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.")

10/ See Rockwell International Corp., 81 OSAHRC 118/A2, 9 BNA OSHC 1092, 1097, 1980 CCH OSHD ¶ 24,979, p. 30,845 (No. 12470, 1980); Northern National Gas Co. v. O'Malley, 277 F.2d 128, 134 (8th Cir. 1960)(regulation); cf. Crowell v. Benson, 285 U.S. 22, 62 (1932)(statute).

11/ See Yu Cong Eng v. Trinidad, 271 U.S. 500, 518 (1926); see also N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490, 509-511 (1979)(dissenting opinion) (collecting cases).

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, Complainant, | : | |
| | : | OSHRC Docket No. 79-4945 |
| v. | : | |
| | : | |
| VANCO CONSTRUCTION, INC., Respondent. | : | |

Appearances:

E. Justin Pennington, Esquire,
for the Complainant.

Robert C. Elder, Jr., Esquire,
for the Respondent.

DECISION AND ORDER

LaVecchia, J.

STATEMENT OF THE CASE

This is a proceeding under section 10(c) of the Occupational Safety and Health Act of 1970 (29 USC 651 et seq.). Respondent seeks review of a citation issued against it by the Occupational Safety and Health Administration.

Based on an inspection conducted on July 25, 1979 respondent was cited for a serious violation of the safety standard set forth at

29 CFR 1926.102(a)(1), which states that:

> Employees shall be provided with eye and face protection equipment when machines or operations present potential eye or face injury from physical, chemical, or radiation agents.

A hearing was held on December 5, 1979, at Dallas, Texas. The compliance officer conducted a consent inspection of respondent's worksite in Arlington, Texas on the date indicated. He went through the usual preliminary matters with management and then made a walk-around inspection of the site. He observed two of respondent's employees chipping concrete with a "chipper" and a sledgehammer. Chips of concrete were seen flying through the air. (Tr. 17). The men were not using any protection against the flying chips. (Tr. 17). The chipping hammer was in almost constant use, while the sledgehammer was used intermittently. The employee using the sledgehammer was within striking range of the chips flying from the chipping hammer. Neither employee was using any type of face or eye protection from the flying chips. (Tr. 19). The assistant job superintendent, Mr. Neel, told the witness that the two employees were chipping the concrete to form a lower level for the pouring of more concrete. (Tr. 20). The concrete chips flew from 23 to 48 inches after being chipped. The chips ranged in size from tiny specks to larger chips. (Tr. 21). The two employees were short men, and worked in a crouched position. Their eyes and faces would have been much less than 48 inches from the chipping points. (Tr. 22). No protective equipment was available at the worksite. (Tr. 22). The men had been working from four to eight hours on the day of the inspection. (Tr. 24).

The compliance officer was of the opinion that the employees were exposed to dangers to the face and eyes, ranging from minor damage to the skin to many levels of eye injury, including possible blindness. (Tr. 24). The employees were using an electric chipping hammer. (Tr. 27). The employee using the sledgehammer was breaking up larger chunks of concrete. (Tr. 29, 30). (Exs. C-1 through C-4). If the employees had been wearing face shields or eye protection the witness would not have considered respondent to be in violation of the standard. (Tr. 35). Such protective equipment is available on short notice to suppliers. (Tr. 36). Mr. Neel ordered the employees to quit work upon being apprised of the alleged violation by the compliance officer. (Tr. 38). The witness saw the employees' faces being struck by chips while they were working. They flinched when struck. (Tr. 43). The witness did not observe either employee indicating that he had been struck in the eyes by the chips. (Tr. 44). They were under observation about 20 minutes. (Tr. 44). When struck in the face by the flying chips no cuts were sustained. (Tr. 44). The employees ignored the striking chips. (Tr. 44). The chips fly in all directions. (Tr. 49). The employees appeared to be annoyed by the chips, squinting their eyes, and brushing their faces in between work activity. (Tr. 53). Dust particles emanated from the concrete being chipped. These could irritate the employees' eyes, perhaps causing cuts. (Tr. 60). The witness saw the employees brushing the concrete dust from their faces. (Tr. 61). The witness could not interrogate the employees because they were unable to speak English. (Tr. 63).

The area sales manager for the Hilti Fastening Systems, with 12 years in that capacity, testified that the chipping tool used was an electromatic rotary hammer drill, weighing approximately 17 pounds. It is used for drilling concrete for the setting of anchors, and for demolition work, such as the chipping operation here under consideration. The particular model in use at the time of the inspection was a Hilti TE-60 hammer. In excess of 200,000 of these are in use in the United States at the present time, and the model has been produced for the past 7 years. (Tr. 64-65). The witness knew of no reports of serious eye injuries through the use of the Hilti hammer. (Tr. 65). He felt that it would be highly improbable that a chip of concrete would fly into the eye of a workman using the chipper. (Tr. 66). But he did feel that the wearing of safety glasses would add another safety factor. (Tr. 67). There is a striking element inside the hammer that is propelled by compressed air, but the chisel or bit absorbs about 95% of the energy transmitted from the striking pistol. (Tr. 67). He expressed the opinion that more force is exerted by an air hammer than an electric hammer. (Tr. 67). He also asserted that there is more danger of chips flying from an air hammer than an electric hammer, because of the greater impact exerted by the air hammer, and the chips would fly at greater velocity from an air hammer. (Tr. 68).

Roy Neel, assistant superintendent for respondent at the time of the inspection, testified that he was present at the worksite at the time of the compliance officer's visit, and that he accompanied the

inspector on a walk-around tour of the job site. (Tr. 69). Two of respondent's employees were performing concrete chipping operations at that time. (Tr. 69). They were using a Hilti drill and a sledgehammer. The sledgehammer was used primarily to drive stakes into the ground. (Tr. 70). While in the company of the inspector he did not witness any concrete chips or fragments being thrown up into the faces of the employees engaged in the chipping. (Tr. 70). To his knowledge, the Hilti drill does not have enough force to cause chips to fly very far in any direction. (Tr. 70). They would fly perhaps 18 to 24 inches, in his opinion, and would not be traveling with any great force. (Tr. 71). He does not instruct employees under his supervision to wear goggles at all times when working. There are occasions, however, when employees are subject to particles being thrown into their faces by windy conditions.(Tr. 71). The wind was blowing hard at the time of the chipping operation. The employees were engaged in skimming small layers of concrete off a concrete mass, with a view to removing about two inches. (Tr. 71-72). He saw no particles being thrown into the faces of the employees, and did not note any attempts on their part to turn their faces or heads in order to avoid being struck by chips or dust from the concrete. (Tr. 72).

George Parks, safety director for respondent, testified that it has an active safety program. (Tr. 73). He pointed to a favorable workmens compensation experience undergone by respondent, and suggested that its operations were 31 percent better than the average risk. Refunds have been received from the workmens compensation insurance carrier. (Tr. 74).

Ralph Pruett, job superintendent for respondent, testified that Mr. Neel was his assistant on the considered project. He did not observe the employees in the concrete chipping operation. (Tr. 75-76). He is familiar with the type of electric drill (chipper) used by the employees, and has observed chipping operations on many occasions. He stated that he had never seen chips or particles fly into the faces of the men using the chippers. (Tr. 77). He expressed the opinion that the chips do not leave the concrete mass with enough force to go very far. (Tr. 77). He has observed individuals striking concrete with sledgehammers, and has used them himself. Chips of concrete fly from the mass when struck by sledgehammers. (Tr. 78).

## Discussion and Conclusions

On the basis of the evidence before me the citation should be vacated. The critical point of failure in the government's case, it seems to me, is the lack of evidence to show the actual striking force of the flying chips of concrete. There is no evidence to show that the chips are propelled at such force so as to be able to penetrate the eye or the flesh of employees using the electric chippers or employees within range of the flying chips. Although not conclusive on the point, it is significant that the manufacturer's representative stated that more than 200,000 of these tools had been in use throughout the country for the past seven years, with no serious eye injuries reported. The chisel or bit of the tool absorbs about 95 percent of the energy transmitted from the striking pistol. This would obviously reduce the speed at which chips

would be thrown through the air. Chips flying from the chipper travel 18 to 48 inches, if credence is given to all of the testimony. That being the case, it does not appear likely that the velocity of the chips would be much after the first 18 inches. It would also appear that the chips would fly primarily away from the employee using the chipper, although in some instances they would probably fly back toward the face of the employee. Employees were seen wiping the chips, or concrete dust from their faces, but this would appear to be more of a nuisance than a hazard covered by the standard. Chips flying from a sledgehammer would present more of a hazard, in my opinion, than chips from a chipper. The evidence is in conflict with respect to the use of the sledgehammer. The compliance officer stated that he saw the sledgehammer being used to chip concrete, whereas company officials stated that sledgehammers are used primarily for driving stakes into the ground, and secondarily for chipping concrete. The record does not suggest the velocity at which the chips might fly from concrete struck by sledgehammers.

I conclude that the evidence fails to show a violation of the cited safety standard.

ORDER

Based on the foregoing, it is ORDERED that:

Citation No. 1 is VACATED.

Louis G. LaVecchia
Judge, OSHRC

Dated: March 31, 1980
Dallas, Texas.

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

December 23, 1982

**IN REFERENCE TO SECRETARY OF LABOR v.**

Deering Milliken, Inc.

OSHRC DOCKET NO. 13037 & 12598

**NOTICE IS HEREBY GIVEN TO THE FOLLOWING:**

OF COMMISSION DECISION (REMAND)

To wit: See attached.

**FOR THE SECRETARY OF LABOR**

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**FOR EMPLOYEES**

-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Paul L. Brady, Judge
Occupational Safety & Health
Review Commission
1365 Peachtree Street, N. E.
Room 240
Atlanta, GA. 30309

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>DEERING-MILLIKEN, INC.<br>Respondent. | OSHRC Docket Nos. 12598 & 13037 |

ORDER OF REMAND

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

On December 17, 1982, the Commission issued its decision in Sun Ship, Inc., OSHRC Docket No. 16118. In accordance with the decision of the U.S. Supreme Court in American Textile Manufacturers Institute, Inc. v. Donovan, 101 S.Ct. 2478 (1981) ("ATMI"), the Commission held that "feasible" under the occupational noise standard means achievable. The Commission overruled the cost-benefit test of feasibility previously set forth in Continental Can Co., 76 OSAHRC 109/A2, 4 BNA OSHC 1541, 1976-77 CCH OSHD ¶ 21,009 (No. 3973, 1976), appeal withdrawn, No. 76-3229 (9th Cir. Apr. 26, 1977), and substituted a test consistent with ATMI.

In view of this intervening change in law, the judge's decision with respect to the alleged violations of section 1910.95(b)(1) is vacated. The case is remanded for further proceedings, including evidentiary submissions, so that the interrelated issues of technological and economic feasibility can be reconsidered in light of the test of feasibility established by Sun Ship, Inc.[1/]

SO ORDERED

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: DEC 23 1982

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1/ Chairman Rowland dissents. He would not remand the case for further proceedings. Consistent with his dissenting opinion in Sun Ship, he concludes that the requirement in section 1910.95(b)(1) that feasible administrative or engineering controls be utilized is invalid.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 400

ATLANTA, GEORGIA 30309

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| SECRETARY OF LABOR, | ) | |
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| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket Nos. 12,598 and 13,037 (Consolidated) |
| | ) | |
| DEERING MILLIKIN, INC., | ) | |
| | ) | |
| Respondent. | ) | |

DECISION

APPEARANCES: Ms. Bobbye D. Spears, Regional Solicitor
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on behalf of the complainant

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on behalf of the respondent

Gregory B. Tobin, Esquire
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Atlanta, Georgia 30303
on behalf of the respondent

BRADY, Judge: This is a consolidated proceeding brought pursuant to section 10 of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq. (hereinafter referred to as the Act) to contest two citations issued by the Secretary of Labor (hereinafter referred to as the Secretary) pursuant to section

9(a). The citations which were issued April 14, 1975 and April 28, 1975, respectively, alleged that as the result of certain inspections at two of the respondent's workplaces, it violated section 5(a)(2) of the Act by failing to comply specific Occupational Safety and Health standards promulgated by the Secretary pursuant to section 6 thereof. A notice of proposed penalty was issued with one citation.

The Secretary alleges that on February 24, 1975 respondent, a textile manufacturer, violated four Occupational Safety and Health standards at its Kex plant located in LaGrange, Georgia. It is also alleged that on April 3, 1975, the respondent violated five Occupational Safety and Health standards at its New Holland Plant located in Gainesville, Georgia.

The only matter remaining in issue at the time of the hearing as a result of various stipulations was whether respondent violated the standard at 29 C.F.R. § 1910.95 at both work sites. The standard provides as follows:

29 C.F.R. §1910.95 Occupational Noise Exposure

> "(b)(1) When employees are subject to sound exceeding those listed in Table G-16, Feasible Administrative or engineering controls shall be utilized. If such controls fails to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to produce sound levels within the levels of the Table."

TABLE G-16 Permissible Noise Exposures

| Duration per day, hours | Sound level dBA slow response |
|---|---|
| 8 | 90 |
| 6 | 92 |
| 4 | 95 |
| 3 | 97 |
| 2 | 100 |
| 1-1/2 | 102 |
| 1 | 105 |
| 1/2 | 110 |
| 1/4 or less | 115 |

It was stipulated that the noise levels in the weave rooms involved remained constant during a work shift (Joint Exhibit 1). Also, it is uncontroverted that weavers and other employees were subject to sound levels in excess of the permissible limits provided in Table G-16. The sound levels in the weave room of the Kex Plant ranged from 94.5 dBA to 97 dBA (Tr. 32, Exh. C-1). In the weave room of the New Holland Plant the sound levels ranged from 103 to 105 dBA (Tr. 63, 66).

Respondent first contends that as a matter of proof complainant has the burden to prove there were feasible controls which would have reduced the noise levels to within the limits prescribed in Table G-16, and not just reduce the noise levels.

This contention is without merit as the standard clearly sets forth that if the limits of Table G-16 are not met "feasible engineering or administrative controls shall be utilized", without any exception. The standard does not state

that such controls are to be utilized only if they reduce the noise levels to within the limits set forth in Table G-16. The burden imposed upon the complainant by this part of the standard is to establish that there are feasible administrative or engineering controls which will reduce the decibel (dBA) level and that such controls were available at the time of the inspections.

The central issue, therefore, is whether the complainant has shown by the evidence of record that there are feasible controls which could reduce the decibel level. 1/

The Secretary relied on the testimony of Dr. Robert Crawford to meet his burden of proof as required by the standard. Dr. Crawford has a Ph.D. from the Institute of Noise and Vibration at the University of Southampton in England. His doctoral dissertation dealt with noise reduction in various textile machines and was entitled, "Textile Machine Noise." At the time of his graduation, this was the only institute in the western world offering a Ph.D. in noise and vibration engineering. Since his graduation he has performed consulting services in noise reduction for numerous industries including the design and manufacture of replacement parts for the purposes of reducing noise levels. Dr. Crawford has also been called upon to deal with the reduction of noise associated with looms in weave rooms (Tr. 105-109, Exh. C-13).

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1/ As used herein, the term "feasible" means that which is "practicable or useful under the circumstances", as defined by Commissioner Cleary in Secretary v. Anchor Hocking Corp., 19 OSAHRC 308 (1975).

## SUMMARY OF EVIDENCE

### KEX PLANT

Mr. Charles Burnham, Vice President of Engineering for Rockwell International's Draper Division, manufacturer of the Draper shuttleless loom (DSL), explained briefly the operational aspects of the loom which was in operation in respondent's Kex Plant. He explained the shuttleless weaving process of the loom and pointed out that the DSL has two filling carriers mounted on flexible steel tapes which advance across the loom through the shed of warp yarn from both sides of the loom, feed in the middle, transfer the strand of filling yarn from the right carrier to the left, and return to the sides of the loom. The steel tapes wind and unwind from reciprocating tape wheels to which they are bolted. The power from the tape motion is supplied from the drive mechanism through its motor pinion gear to the transmitter drive gear (Tr. 97-101, Exhibits C-3, C-6).

Dr. Crawford, qualifying as an expert in the identification and evaluation of noise sources, and engineering control of noise specifically referenced to industrial facilities, testified that he visited the Kex Plant on August 18, 1975. He determined that the noise sources in the weave room were associated with the Draper shuttleless looms. The noise specifically radiates from the tape covers, the yard guard shields, the heddles and frames, and from the drive mechanism ( Tr. 118-119).

Dr. Crawford explained that the types of sound in the plant consist of direct sounds from the machines, and the reverberant sound field. The sound from the machines is direct to the operator while the reverberant sound field is caused by the multiple reflections of noise from various surfaces such as ceilings, walls, and other objects. The sound field as heard by the operator is a combination of the direct sound field from the machines, plus reverberant sound field from within the area. He stated that the noise levels in the weave room could be reduced by certain modifications to the looms and through the use of sound absorptive room surface treatment (Tr. 124-126).

Dr. Crawford further explained that through the loom modifications in the Kex Plant, the reduction at the weaver's alley could be 3 to 5 decibels. The modifications in combination with absorptive ceiling treatment could result in a total reduction of 6 to 8 decibels (Tr. 239).

Dr. Crawford stated that the loom modifications could be divided into two classes. The first would involve dealing with the noise at each source and secondly the enclosure of two ends of the loom (Tr. 127).

He recommended use of Aquaplas, which is a trade name for a viscoelastic damping compound that could be painted on the surface of the tape wheel covers with a brush to reduce the

vibration levels and thus the amount of radiated noise from the covers. The noise being generated within the tape wheel cover can also be reduced by sound absorption material. In addition, vibration in the cover could be controlled with the use of rubber grommets or washers (Tr. 127-128, 155-156).

Dr. Crawford pointed out that the problem associated with the yard guards is due to the large surfaces in comparison to the general structure of the machine which therefore, vibrates causing a radiation of noise. Again, the application of a damping compound would reduce the vibration levels and thus reduce the radiated noise. The application of sound absorptive material on the other side of the covers could prevent reflections from the yard shield itself (Tr. 129). The foregoing enclosures of the ends of the loom would be provided with proper access for maintenance (Tr. 133). Such enclosures were observed on a Draper loom at an exhibition which was of the same basic design as the DSL (Tr. 185).

The third noise source associated with the DSL involves the heddles including frames. The frames are those devices which shed the warp threads and move up and down after each pass of the shuttle. The heddles are metal eyelets attached to frames through which the warp threads pass. They are small in size and are made of hard material which tends to radiate high frequency noise as opposed to low frequency noise when the movement takes place in the frames (Tr. 129-130).

Dr. Crawford's view was that the heddles should be replaced with quiet heddles of a type which is commercially available from Egelhaaf, a German firm. He explained that they are presently made of a sandwich material on the frames consisting of a combination of metal, plastic material and metal (Tr. 160). A change to the sandwich heddles would result in a 2.5 decibel reduction (Tr. 169). He indicated that he had not run any test of his own with reference to the heddles as well as the tape wheel cover and the arm-filling shield guards (Tr. 161).

The noise produced by the drive train is the result of metal to metal contact with the operating gear. The metal pinion should be replaced with an engineered plastic gear (Tr. 161). Dr. Crawford was aware that Draper Division of North American Rockwell Company attempted use of a plastic gear to no avail and although he did not know the details of the testing by the company he believed forged nylon material would be suitable as he has seen such gears used in other wood looms (Tr. 163). He estimated a noise reduction of 3 to 4 decibels as the result of the pinion gear replacement (Tr. 169).

It is Dr. Crawford's view that all four controls should be implemented as each contributes to the overall noise level

of the machine. He therefore believed the noise reduction to the operator would be on the order of 3 to 5 decibels. Enclosure of the tape wheel covers alone would conservatively amount to a 5 decibel reduction. In combination with the sound absorptive treatment, the reduction would be approximately 6 to 8 decibels and with implementation of all the recommended controls the reduction would be 8 to 10 decibels (Tr. 131-135).

The respondent presented testimony by Mr. Charles Burnham to refute the feasibility of reducing the noise levels associated with the DSL modifications. Mr. Burnham qualified as an expert on noise control for the testile industry both in DSL and fly shuttle (X-3) weaving based on his 30-year career with Draper (Tr. 413). He testified that by the use of noise testing equipment the primary noise source of the DSL was the mesh point between the motor pinion gear and the transmitter drive gear. The next significant noise source was from the harness motion of the harness frames.

The third significant source is the tape motion involving the tape and tape wheel gear.

Mr. Burnham testified that the manufacturer experimented with a DSL retro-fit kit designed to reduce DSL noise by 7.5 decibels, which included a plastic motor pinion gear. He indicated that upon testing the retro-fit kit including the plastic motor pinion gear, they were rejected and never placed on the market (Tr. 422-426). Mr. Burnham acknowledged that a

portion of the DSL's sound power radiated from the filling shield and agreed that a dampening material placed on the yarn shield covers would reduce the radiated sound. Also, he agreed that loom modifications with available hardware could achieve a 2 decibel reduction and if the drive noise could be successfully suppressed, an additional reduction of 5 to 5 1/2 decibels could be realized.

Mr. George Ridenhour, Manager of respondent's Service Corporation's Machine Maintenance Department, testified that he was responsible for Deering Milliken's textile machinery maintenance (Tr. 276-277). He explained that in May 1975 nylon motor pinion gears were tried on the DSL's at the Kex Plant but the tests were discontinued when the gears failed under physical strain (Tr. 303-304).

Respondent next attacks the replacement of the metal heddles with quiet heddles which Dr. Crawford had indicated were available at the Engelhaaf Company. Mr. L. K. Fitzgerald, retired Vice President of Deering Millikin Corporation, testified that he had never heard of "quiet or sandwich" heddles (Tr. 395). He also learned that Engelhaaf was not presently marketing such heddles and did not know of such a type (Tr. 398, Exhibit R-14).

It is not disputed that the noise from the tape wheel covers and filling shield guards could be reduced a minimal amount with the application of dampening material. It is argued, however, that reduction of DSL noise by 3 to 5 decibels can not feasibly be accomplished.

Also, it is argued that Dr. Crawford has not seen the type of loom enclosures that he recommends, and his recommendations for the DSL's were made without the performance of any tests.

Mr. Burnham pointed out that the loom enclosures observed on the Draper Apollo loom in Milan, Italy, was a prototype with enclosures primarily for appearance and styling with a secondary purpose for sound reduction (Tr. 495). He stated that enclosures were not commercially available (Tr. 437).

## NEW HOLLAND PLANT

Dr. Crawford testified with reference to his inspection of the Draper X-3 fly shuttle looms at the New Holland Plant on January 20, 1976. He stated that noise sources in the weave room were associated with impacts of the various parts of the loom. In his opinion the noise levels in the New Holland Plant weave room could be reduced by the same independent methods recommended for the Kex Plant (Tr. 140). This would include the installation of sound absorption material in the ceiling with a sound absorptive co-efficient in the range of .8 to .95 operative over a frequency range of 500 Hertz to 4 kilohertz (4,000 Hertz) which could reduce the noise 3 to 5 decibels (Tr. 140-142).

The implementation of loom modifications in addition to the acoustical treatment would achieve a reduction of about 5 to 8 decibels (Tr. 145).

Mr. Burnham explained the operation of the X-3 fly shuttle loom which consists of a shuttle containing a supply of filling which is propelled back and forth through the warp shed. Each passage of the shuttle is a "pick" which causes numerous impacts (Tr. 88-94).

Dr. Crawford determined that one source of noise was the impact of the picker stick on the side loom check (Tr. 136-137). This condition could be corrected with use of a more resilient material than the hard leather check. Polyurethane or rubber impregnated felt coult be used as well as installation of a pneumatic air spring damper system. Polyurethane picker sticks were indicated as being commercially available through the British Picker Company (Tr. 224). The dampening device could be inserted between the picker stick and the frame of the loom to slow the picker stick, thereby reducing the impact on the picker stick bumper (Tr. 142-143).

The impact of the picker on the shuttle was another noise source. This could be controlled by replacing the existing hard fiber picker with a polyurethane picker including a polyurethane insert. The insert would take the brunt of the impact.

There is also a source of noise from the impact of the shuttle on the shuttle arresting mechanism as it enters the box on the binders. The hard leather side checks could be replaced on the binders and box plate with hard polyurethane

liners which would reduce the force of the impact (Tr. 143-144).

The picker stick also impacts on the lug strap which is a source of noise. This could be corrected by reducing the amount of play between the lug strap and the picker stick, and also replacing the metal power block with a polyurethane power block (Tr. 144).

Another source of noise is the impact of the cam on the pick ball. The noise from this could be reduced by replacing the metal pick ball with plastic or polyuethylene to eliminate the metal to metal impact (Tr. 144).

Dr. Crawford also found noise eminating from the frames and heddles and the gear drive mechanism (Tr. 136-140). The noise from the heddles and frames should be controlled in the same manner as the DSL loom by replacing the heddles with quiet heddles as previously described. Also, noise from the gear drive mechanism could be reduced by eliminating the metal to metal contact and replacing the motor pinion with an engineered plastic gear. This noise was of a continuous nature with fluctuations and not an impact source (Tr. 144-145).

In Mr. Burnham's opinion the number of picks per minute would have to be reduced in order for plastic motor pinions to succeed as recommended by Dr. Crawford (Tr. 442).

He also pointed out that a pick ball of a resilient plastic material was not commercially available. Mr. Burnham also testified that Draper's experience with plastic pick balls prior to April 1975 had shown "a very rapid failure of the pick ball . . . by shelling out the surface or scalloping of the surface" when in contact with the metal pick cam toe (Tr. 439). Dr. Crawford deemed the noise source controllable by replacing the hard resin fiber picker with a polyethylene picker with polyurethane insert. Respondent indicates that at the time of the inspection Dayco rubber impregnated pickers were being used in the New Holland plant and not hard resin bonded fiber pickers (Tr. 306). It is conceded, however, that there would be an improvement in the sound level if polyurethane pickers were used (Tr. 438-439).

In response to Dr. Crawford's proposal to reduce noise from the picker stick impacting on the bumper, respondent showed that Draper's experience with softer picker stick bumpers such as leather covered foam resulted in failure within a week at the most. Also, use of pneumatic dash pots resulted in increased noise levels (Tr. 437, 438).

The other recommendation by Dr. Crawford was replacement of the hard leather binders with polyurethane. It was shown that pre-1975 experiments by Draper with hard polyurethane binders resulted in melting at the point of contact with the incoming shuttle (Tr. 439).

In spite of the respondent's attack on the techniques advanced by Dr. Crawford, modification of the X-3 looms to reduce the noise level by 3 decibels was a prevailing view of the parties as Mr. Burnham agreed that there was hardwear available which could reduce the noise levels produced by the X-3 looms by 3 decibels in the weave room of the New Holland Plant (Tr. 442).

## Sound Absorptive Room Surface Treatment

Dr. Crawford described the weave room at the Kex Plant as a large main area and a smaller adjacent area known as the kitchen (Tr. 125; Joint Exhibit 2). In the large area Dr. Crawford stated that the reverberant noise could be reduced 3 to 4 decibels at the operator's station in the weaver's alley upon installation of an acoustical ceiling made up of .95 over the range of 500 to 4,000 hertz, hung from the ceiling in a rectangular array resembling a honeycomb (Tr. 125, 201, 245, 462-464; Exhibit C-14). The batts would be mineral wool encased in polythene (Tr. 192, 466). The

smaller kitchen area would have the walls treated in addition to the aforementioned ceiling treatment in order to achieve the 3 to 4 decibel reduction (Tr. 125).

Dr. Crawford believed that if the acoustical room surface treatment was used in conjunction with loom modifications to the sources of noise on the DSL's a noise reduction of 6 to 8 decibels could be achieved at the operator's atation in the weaver's alley (Tr. 133, 239). The use of acoustical room surface treatment in conjunction with an acoustical enclosure of the noise sources on the ends of the DSL's would achieve a noise reduction of 8 to 10 decibels at the weaver's station. These recommended controls were available as of February 24, 1975 (Tr. 134, 240).

Dr. Crawford recommended the same type absorptive room surface treatment for the ceiling in the weave room at the New Holland Plant as proposed for the Kex Plant (Tr. 216). This would result in the reduction of reverberant sound created by the wood and concrete floors, brick walls and wood ceiling by 3 to 5 decibels at the operator's station (Tr. 141, 142, 240).

If the sound absorptive room surface treatment was utilized in conjunction with the loom modifications to the X-3 looms, a noise reduction of 5 to 8 decibels would be achieved at the operator's station (Tr. 145).

Respondent rejects the proposed recommendations for reducing the reverberant sound in the weave rooms of both plants with the use of sound absorptive material. Also, the initial reference to "ceiling treatment" by complainant's acoustical expert, and his subsequent recommendation of "acoustical batts" is objectionable to respondent. It must necessarily be held, however, that use of sound absorptive surface room treatment as described by Dr. Crawford includes, interchangeably, installation of an acoustical ceiling and overhead acoustical batts.

Respondent offered testimony to refute the feasibility of acoustical treatment to the ceilings of the weave rooms. The testimony dealt with the problems that would be encountered with making modifications to the overhead sprinkler system, air-conditioning ducts, crane rail, electrical and atomizer systems (Tr. 314-325).

Dr. Crawford believed these problems could be remedied by decreasing the size of the batts in various areas from 2 feet vertically by 4 feet horizontally to 1 foot vertically by 2 feet horizontally and proper spacing of the batts (Tr. 464, 494). The batts could be reduced in size without losing any effectiveness provided the total surface area of acoustic treatment is maintained by increasing the number of panels. Therefore, if the batts were reduced in size by one-half, the number of

panels would have to be doubled, thus the bottom side of the batts would be one foot above the ducts, sprinklers, etc. (Tr. 330, 345, 356, 392, 465).

## DISCUSSION

It is established without dispute in this case that respondent's employees were exposed to noise levels for a period in excess of those permitted by the standard. Upon full consideration of the record, it must be held that complainant has established a violation of the standard as alleged.

The Secretary, through an eminently qualified expert, clearly identified sources of noise from the looms and recommended specific engineering controls for its reduction. Two independent methods of engineering controls were proposed consisting of sound absorptive room surface treatment and loom modifications.

The sources of noise were determined by the parties to be essentially the same. However, respondent rejects the various modifications of the looms recommended by Dr. Crawford primarily on the basis that the manufacturer did not have commercially available engineering controls for them.

Respondent's expert witness did admit that there is hardware available which could reduce the decibel level in the Kex Plant by 2 decibels and that if a plastic motor pinion gear could be developed, a reduction of another 5 to 5 1/2 decibels could be achieved. Although respondent showed that

nylon pinion gears were tried on the DSL's without success, Dr. Crawford has seen engineered plastic gears in operation and maintained such gears could be successfully utilized on the DSL.

Complainant's expert testified that certain loom modifications to the X-3 looms could result in a 3 to 4 decibel reduction.

Respondent's witnesses testified against the techniques advanced by Dr. Crawford but it's expert witness, Mr. Burnham, admitted that there was hardware available which could reduce the noise level produced by the X-3 fly shuttle loom by 3 decibels in the weave room of the New Holland Plant. The witness also explained the significance of a 3 decibel reduction in that it represented a substantial reduction in sound power.

The 3 to 4 decibel reduction through acoustical room surface treatment at the Kex Plant was not refuted by respondent. Also, the 3 to 5 decibel reduction at the New Holland Plant was likewise unchallenged.

The issue, as viewed by the respondent, is not whether the evidence establishes that acoustical batts can reduce reverberant sound levels in a hard surface room, but whether there is evidence in the record to establish to perponderance that it would be feasible to install acoustical batts in the weave rooms of the plants involved.

The testimony on behalf of respondent therefore dealt with the problems associated with installation of acoustical batts in the facilities involved. It was acknowledged that such problems are of an engineering nature and that various modifications to air conditioning systems, electrical systems, crane rails, etc., are ordinarily required when the type facilities herein are purchased.

The evidence of record shows that the application of sound absorptive material is a method of reducing sound levels. The recommendations of Dr. Crawford for room surface treatment and the manner of installation outlined sufficiently establishes a feasible engineering control which was available to respondent. Respondent apparently recognizes the beneficial results of room surface treatment as acoustical ceilings are installed in its new plants. However, no attempt has been made to implement acoustical ceiling treatment in the Kex or New Holland Plants.

The record is clear that at the time of the inspection respondent was engaged in no efforts to develop and apply techniques to control sound in either of the weave rooms despite the fact that evidence offered by both parties shows that such techniques were known, and application thereof would result in significant reduction of noise levels to employees. Furthermore, respondent raised no objection to the possible cost of the Draper retro-fit kit which incorporated

certain loom modifications. Likewise, installation of acoustical ceilings in new plants has not been shown to be economically infeasible, and costs have been incurred for other purposes when older plants have been purchased.

The Act places the primary responsibility for the safety and health of employees upon employers. This responsibility includes an affirmative duty to take all steps possible to protect employees from hazards in the workplace. While the respondent asserts that personal protective equipment was being used in the weave rooms, such equipment according to the standard, is to be used only during the period when engineering or administrative controls, which have been implemented, can not by themselves produce sound levels to within the sound levels of Table G-16. Accordingly, the standard requires a duty to develop and implement engineering controls after a showing that such measures are technologically feasible. The standard does not provide or allow for the employer to limit his responsibility to implement various controls already fully developed.

It is, therefore, incumbent upon the respondent to provide an ongoing noise control program that will reduce sound levels to meet the requirements of the plain wording of the standard. Therefore, it is held respondent violated the standard at the Kex and New Holland Plants as alleged.

## FINDINGS OF FACT

1. Deering Milliken, Inc., is a corporation having a place of business and doing business, among other places, at Spring Street, Gainesville, Georgia, and Leeman Street, LaGrange, Georgia.

2. On February 24, 1975 and April 3, 1975 respondent was engaged in the business of textile manufacturing.

3. On February 24, 1975 and April 3, 1975, authorized representatives of the Secretary conducted inspections of respondent's aforementioned worksites. As a result of such inspections, on February 28, 1975 and on April 14, 1975 citations were issued respondent alleging violation of the standard at 29 C.F.R. 1910.95.

4. At the time of the inspections respondent's employees were exposed to noise which exceeded the sound levels set forth in Table G-16 of the standard.

5. The Secretary established two methods of feasible engineering controls to reduce the noise in the Kex and New Holland Plants.

6. Respondent failed to utilize feasible engineering controls to reduce the aforementioned sound levels.

## CONCLUSIONS OF LAW

1. Deering Milliken, Inc., at all times pertinent hereto, was an employer engaged in a business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970, and the Commission has jurisdiction of the parties and subject matter herein, pursuant to section 10(c) of the Act.

2. Respondent is, and at all times pertinent hereto, required to comply with safety and health regulations promulgated by the Secretary pursuant to section 6(a) of the Act.

3. Respondent was in violation of the standard at 29 C.F.R. 1910.95 on February 24, 1975 and April 3, 1975 as charged in the citations.

Upon the basis of the foregoing findings of fact and conclusions of law, and the entire record, it is

ORDERED

That the citations issued February 28, 1975 and April 14, 1975 charging violation of the standard at 29 C.F.R. 1910.95 are hereby affirmed.

Dated this 27th day of May 1977.

Paul L. Brady

PAUL L. BRADY
Judge

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

December 23, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Pabst Brewing Company

OSHRC DOCKET NO. 13068

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION (REMAND)

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Judge's Office
Occupational Safety & Health
Review Commission
1365 Peachtree Street -Rm. 240
Atlanta, GA. 30309

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>PABST BREWING COMPANY,<br>Respondent. | OSHRC Docket No. 13068 |

ORDER OF REMAND

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

On December 17, 1982, the Commission issued its decision in Sun Ship, Inc., OSHRC Docket No. 16118. In accordance with the decision of the U.S. Supreme Court in American Textile Manufacturing Institute, Inc. v. Donovan, 101 S.Ct. 2478 (1981) ("ATMI"), the Commission held that "feasible" under the occupational noise standard means achievable. The Commission overruled the cost-benefit test of feasibility previously set forth in Continental Can Co., 76 OSAHRC 109/A2, 4 BNA OSHC 1541, 1976-77 CCH OSHD ¶ 21,009 (No. 3973, 1976), appeal withdrawn, No. 76-3229 (9th Cir. Apr. 26, 1977), and substituted a test consistent with ATMI.

In view of this intervening change in law, the judge's decision with respect to the alleged violation of section 1910.95(b)(1) is vacated. The case is remanded for further proceedings, including evidentiary submissions, so that the interrelated issues of technological and economic feasibility can be reconsidered in light of the test of feasibility established by Sun Ship, Inc.[1/]

SO ORDERED

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: DEC 23 1982

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1/ Chairman Rowland dissents. He would not remand the case for further proceedings. Consistent with his dissenting opinion in Sun Ship, he concludes that the requirement in section 1910.95(b)(1) that feasible administrative or engineering controls be utilized is invalid.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1365 PEACHTREE STREET, N.E., SUITE 400

ATLANTA, GEORGIA 30309

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| SECRETARY OF LABOR, | ) | |
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| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 13068 |
| | ) | |
| PABST BREWING COMPANY, | ) | |
| | ) | |
| Respondent. | ) | |

## DECISION AND ORDER ON REMAND

APPEARANCES:

Stephen J. Simko, Jr., Esquire, Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia, on behalf of complainant.

Mr. J. D. Fleming, Jr., Esquire, Sutherland, Asbill and Brennan, Atlanta, Georgia, on behalf of respondent.

## STATEMENT OF CASE

LARKIN, JUDGE

This case is on remand from the Occupational Safety and Health Review Commission (Commission). Respondent (Pabst) operates a brewery at Perry, Georgia. On April 7, 1975, Pabst was cited[1/] for a non-serious

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1/ The citation described the violation of 29 C.F.R. § 1910.95(b)(1) as follows:

> "Failure to use feasible engineering or administrative controls to protect employees from exposure to hazardous noise levels exceeding those specified in 1910.95 Table G-16. Violations occurred in the Filling Room # III - West, Filling Room No. III, East, No. 2 Filling Room, No. 1 Filling Room, Machine Operators in Can Packaging Area, Uncaser and Rinser Operator, Label Machine Operators, H & K Packer Machine Operator, SK Glue Machine Operator, 3 West Uncaser & Rinser Operator and Bottle Pasteurizer Operator.
>
> "Long Range Abatement: April 9, 1976
>
> "An Abatement Plan shall be submitted by: July 5, 1975"

violation of section 5(a)(2) of the Occupational Safety and Health Act of 1970 (Act) for failure to conform with 29 C.F.R. § 1910.95(b)(1).[2/]

The areas left in issue are Filling Rooms I, 2, III East and III West.

In Filling Room I, cans are filled with beer in two 100-spout fillers, operating at a rate of approximately 90,000 cans per hour each, for a total filling rate of approxiately 180,000 cans per hour. Two employees operate these fillers. In Filling Room 2, cans are filled with beer in two 88-spout fillers, each of which processes approximately 72,000 cans per hour, for a total filling rate of approximately 144,000 cans per hour. Two employees operate these fillers. After being filled, the cans from Filling Rooms I and 2 move to a pasteurizer outside of the filling rooms. Twelve-ounce non-returnable bottles pass from a bottle sterilizer into Filling Room III East, where they are filled in a 72-spout filler at a rate of approximately 42,000

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2/ The standard at 29 C.F.R. § 1910.95(b)(1) provides:

> "When employees are subjected to sound exceeding those listed in Table G-16, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table.

Table G-16—Permissible Noise Exposure

| Duration per day, hours | Sound level dBA slow response |
|---|---|
| 8 | 90 |
| 6 | 92 |
| 4 | 95 |
| 3 | 97 |
| 2 | 100 |
| 1-1/2 | 102 |
| 1 | 105 |
| 1/2 | 110 |
| 1/4 | 115" |

bottles per hour. One employee operates this filler. Returnable and non-returnable bottles, primarily 12-ounce returnable bottles, pass from the bottle sterilizer into Filling Room III West, where they are filled in a 100-spout filler at a rate of approximately 36,000 bottles per hour. Two employees, one to operate the filler and one to operate a soaker-discharger, work in Filling Room III West. After being filled, bottles pass from Filling Rooms III East and III West into a pasteurizer.

Filling Rooms I and 2 are approximately 40 feet by 70 feet. Filling Rooms III East and III West are approximately 40 feet by 60 feet. The rooms have concrete block walls with plaster ceilings.

The Packaging Center normally operates on three daily eight-hour shifts. All of the fillers are operated about 70% of the time during the day shift. As few as two fillers may be operated on a shift and it is rare that all of the fillers are run except on the day shift. The operators normally spend between 6.5 and seven hours per shift in the filling rooms. Other personnel come into the filling rooms, including maintenance, utility, clean-up, and supervisors but their exposure time is not in issue.

In Filling Rooms III East and III West, the operators monitor the filling operation. They correct bottle jams and feed crowns at the crowner chute. The operators move along a platform 12 to 14 feet long. If problems occur they spend 70% to 80% of their time at the crowner, two to four feet away from the filler. Otherwise, they spend approximately 50% of their time at the crowner.

In Filling Rooms I and 2, the operators feed lids to the canning machine and monitor along an 18-foot platform. Approximately 60% of the

time is spent feeding lids to the seamer and 40% is spent at other locations. The operators feel the cans to detect indentations and remove foreign material in the seamer causing the problem. The operator must clear jams, sometime to the extent of using crowbars. The can lines run approximately 70% to 75% of the time.

The noise measurements on March 12, 1975, and June 23, 1977, in the four filling rooms were as follows:

**Room III West**

| Noise Levels | Location |
|---|---|
| 98 - 105 | platform |
| 98 | platform - cap machine |
| 102 | platform - filler area |
| 98 - 101 | platform - soaker discharge |
| 98 - 100 | floor - between conveyor and soaker discharge |

**Room III East**

| | |
|---|---|
| 103 | platform - filler |
| 98 - 102 | platform |
| 101.5 | platform - machine running and not filling |

**Room 2**

| | |
|---|---|
| 91 - 92 | platform - machine running and not filling |
| 97 - 98 | platform - machine filling |

| | |
|---|---|
| 97.5 | east machine - cap filling location |
| 97 - 98 | filler area |
| 97 | between filling machines |
| 98 | behind machine |

Room I

| | |
|---|---|
| 102 - 103 | west machine - filling platform |
| 102 | between machines |
| 101 - 103 | east machine - platform |
| 101 | east doorway |
| 102 | conveyor line - between machines |

In areas of possible excessive noise, signs requiring hearing protection are posted and Pabst employees are required to use personal hearing protectors.

The workers in Filling Rooms I, 2, III East and III West wear muffs. These muffs will lower noise at the eardrum by at least 30 dBA or to a level between 68 and 72 dBA.

On June 23 and 24, 1977, Dr. Thomas H. Melling, Hampshire, England, agreed upon by the parties as an expert in acoustical engineering and noise control in breweries, inspected Pabst's facility to determine the feasibility of engineering controls to reduce the noise levels. Dr. Melling's report was received into evidence by agreement of the parties.

Two components make up the noise level in a room with machinery running. The first is the direct noise from the machines. The second is the reverberant level produced by all of the noise sources in the room. The

direct noise level at the operator's ear decreases as he moves away from the machine. If the machine is compact, such as a motor or a pump, the direct noise level decreases by approximately six dBA with each doubling of the distance from the center of the machine. For example, if the direct noise level is 102 dBA when the operator is two feet from a pump, it falls to 96 dBA when he moves to four feet from the pump. If the machine is elongated rather than compact, such as in the case of a conveyor line, the direct noise level decreases by approximtely three dBA for each doubling of the distance of the operator from the center of the machine. For example, if the direct noise level is 102 dBA when the operator is two feet from a conveyor, it falls to 99 dBA when he moves to a distance of four feet. The reverberant sound level is constant throughout the room and does not depend on the location of the operator.

Noise levels in dBA cannot be added directly. Instead, the total sound power must be determined by adding the power from each source. The total noise level can then be calculated from the equation

$$L = 10 \log (P/C)$$

where L is the sound level in dBA, P is the sound power, and C is a constant. As an approximation, a doubling of the sound power will increase the total noise level by approximately three dBA. If a room contains two machines, each of which produces a sound level at a given position of 90 dBA, the total resulting sound level will be 93 dBA. Similarly, if the direct sound level at an operation's position is 95 dBA and the reverberant sound level is 95 dBA, the total sound level at that position will be approximately 98 dBA.

The foregoing considerations indicate that the sound level at the operator's position in a room containing machinery will be made up of the reverberant sound level and the direct sound level produced by the machines. If either noise component greatly exceeds the other, that component will be the major contributor to the total sound level and efforts to reduce the total sound level will depend on taking steps to reduce the predominating component. If both components are of comparable magnitude, reduction of the overall noise will require reduction of both components.

The direct noise level may be reduced by a properly designed shield or enclosure which separates the operator from the sound source. In some cases, it may also be possible to redesign or modify the equipment in order to decrease the direct sound power which is emitted. The reverberant level may be decreased by installing sound absorbing materials in the room in order to absorb a portion of the reverberant sound energy.

Dr. Melling concluded:

The filling rooms would require treatment to reduce both the reverberant noise level and the direct noise level. For each filling room, absorptive treatment is necessary to reduce the reverberant noise level. The absorbent material specified was a textured vinyl coated tile manufactured by Owens Corning, Inc., having an absorption coefficient of 0.6. For the bottle filling rooms, Filling Rooms III East and III West, the direct noise level could be reduced by enclosing the bottle conveyors with "Clear & Quiet" panels produced by Body Guard, Inc. The Body Guard panels are made of corrugated clear plastic, with wedges of plastic-capped foam in the corrugations. The direct noise from the crowner could be decreased by

installing a shield made of plastic material similar to that used in the Body Guard screens and the Holstein and Kappert crowner could be modified to reduce the direct noise level by rebuilding the crown injection system. For the can filling rooms, Filling Rooms I and II, the direct noise level from the seamer could be decreased by covering the seamer opening with a plastic material similar to that used in the Body Guard shields. Also, the direct noise level could be reduced by enclosing in metal enclosures hydraulic power packs, used to operate the fillers.

The engineering controls were itemized and the cost estimated by Dr. Melling as follows:

| AREA | RECOMMENDED TREATMENT | COST ESTIMATE |
|---|---|---|
| Filler Room I | 1130 $ft^2$ absorptive treatment to walls/ceilings | $ 720 |
| | Screens over seamer open areas | $ 800 |
| | Enclosures for hydraulic power packs | $2,000 |
| Filler Room 2 | 1130 $ft^2$ absorptive treatment to walls/ceilings | $ 750 |
| | Screens over seamer open areas | $ 800 |
| | Enclosures for hydraulic power packs | $2,000 |
| Filler Room III East | 2200 $ft^2$ absorptive treatment to walls/ceilings | $1,500 |
| | Bottle conveyor covers | $1,200 |
| | Conveyor screens at filler/crowner | $1,000 |

| | | |
|---|---|---|
| Filler Room III West | 2600 $ft^2$ absorptive treatment to walls/ceilings | $1,500 |
| | Modifications to H & K crowner | $3,000 |
| | Conveyor screens at filler/crowner | $1,000 |
| | TOTAL | $16,270 |

The cost estimate was obtained by Dr. Melling by talking with proposed suppliers by phone.

As an experiment to test Dr. Melling's proposals, Pabst installed the above recommended applications for Filler Room III East adding an additional 100 square feet of absorptive tile. The installation cost Pabst $9,815. Based upon the difference between Dr. Melling's cost estimate and Pabst's actual cost experience, the total cost of application of the four rooms would be $43,160 in lieu of Dr. Melling's estimate of $16,270. This would indicate a cost of the controls per employee of $1,570 per employee for Filling Room I; $1,556 per employee for Filling Room 2; $3,272 per employee for Filling Room III East; and $2,432 per employee per employee for Filling Room III West.

During the period from 1974 through October, 1977, Pabst spent a total of $6,100.90 to provide 266 employees with personal hearing protectors at an average annual cost per employee of $6.12.

Engineering predictions are made by either theoretical predictions, empirical predictions or a combination of both. A theoretical prediction is based on a fundamental analysis of physical phenomena. An example of a theoretical prediction is the knowledge that the amount of force necessary

to accelerate a mass at a given rate is equal to the product of mass and acceleration. Because theoretical predictions are based on physical phenomena fully explained, they tend to be very accurate. In many practical situations, the controlling factors are too complex to permit theoretical analysis. In such a case, it is necessary to make an empirical prediction based on experimental data correlated in an orderly fashion. With empirical predictions, it is not unusual to find errors of 20%. If theoretical predictions are used without all of the conditions known accurately or if empirical predictions are used, an error must be anticipated in the prediction. The techniques which Dr. Melling used in his study were based on theoretical equations interpreted and applied by using empirical predictions. This prediction makes heavy use of experience and calls for the application of judgment. Because judgment is involved, predictions would vary some between consultants. Dr. Melling anticipated his predictions could error as much as 2 dBA in sould level and 60% in sound power.

Dr. Melling predicted that the engineering controls which he specified could reduce the noise level in all four filling rooms to 91.5 dBA. With Dr. Melling's estimate of as much as 2 dBA error in his predictions, the actual noise level resulting from implementation of the controls could be as high as 93.5 dBA.

If the noise level in the filling rooms could be reduced to 91.5 dBA by implementing the controls specified by Dr. Melling, the allowable exposure time without personal hearing protectors would be 6.5 hours. Theoretically, a worker exposed to 91.5 dBA for 6.5 hours would not need to wear personal hearing protectors. The normal work day at Pabst consists of eight hours

with a lunch break of 30 minutes and two 15-minute coffee breaks. On days with no equipment malfunctions, the workers are exposed for seven hours. Because of the possibility of error in Dr. Melling's calculations and an exposure on some days of seven hours instead of 6.5 hours used by Dr. Melling, the filling room employees would need to continue wearing personal hearing protectors.

In assessing the effect of a change in sound level, the term "doubling rate" is used to indicate the sound level decrease, in dBA, which decreases the effect by one half. A doubling rate of three dBA is internationally recognized as the proper doubling rate to be used in assessing the effects of a change in sound level on hearing damage. Under this criterion, hearing damage is a direct function of the sound power level or the sound energy level.

Using a doubling rate of three dBA, the percent change in sound power or sound energy which results from a change in sound level from $L_1$ dBA to $L_2$ dBA is given by

$$\text{Delta P} = 100\left(\frac{10^{.1L_2}}{10^{.1L_1}} - 1\right)$$

To evaluate the effectiveness of a particular noise control, a cost-benefit ratio, in dollars per percent of sound energy reduction, may be calculated by dividing the cost of the control for each protected worker by the percent of sound energy reduction. A high ratio indicates that the control is costly compared with its benefits.

Pabst administers pre-employment audiometric tests to all new employees and annual audiometric examinations to employees who are

employed in high noise areas. If any hearing problems are detected, the company refers the employees to the company physician. Pabst has invested over $5,000 in equipment used in the hearing conservation program and spends over $3,000 annually on audiometric tests. The annual cost of the audiometric examination program is $7.58 per employee tested.

Pabst has experienced no difficulty in insuring that its employees use personal hearing protectors. No workmen's compensation claims for hearing impairment have been made.

The Secretary has never adopted any regulations, rules, interpretations, guidelines or standards to define the meaning of the term "feasible" administrative or engineering controls.

It is the Secretary's practice not to give employers any guidelines or information which identify feasible controls when a citation is issued. That practice was followed in this case.

Neither the citation nor the complaint specified the noise levels alleged to exist at the cited locations, the amount of reduction in noise levels which complainant expected Pabst to accomplish, nor any method of noise control which Pabst could implement in order to abate the alleged violations.

An abatement period cannot be specified until a specific control is identified, a supplier is located, and the delivery and installation times have been determined. The one-year abatement period proposed in this case was not based on any analysis of these factors.

The abatement period of one year in this case was selected because it was customary to set a one-year period since such a period did not require the approval of the OSHA regional office.

## ECONOMIC FEASIBILITY

The ultimate decision in the case rests upon whether the government has carried its burden of proving that the proposed engineering controls are "economically and technologically feasible." It is concluded that the Secretary has not carried that burden.

Although bound by Commission precedent[3/] it is difficult to ignore without comment the validity of respondent's argument that the term "economic feasibility" is so vague that it violates the due process clause of the Fifth Amendment. Respondent argues:

> "In order for the Commission to hold that the term 'feasible' is sufficiently definite, the meaning of the included term 'economic feasibility' must be sufficiently clear that it need not be defined by statute or regulation in order to inform an employer what he must do to avoid a violation.
>
> "The relevant criteria were stated by the Tenth Circuit, in the specific context of OSHA standards, in Brennan v. Occupational Safety and Health Review Commission, 505 F.2d 869 (10th Cir. 1974). The basis rule is:
>
>> 'A statute which is so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process. This rule applies to regulations.' 505 F.2d at 872 (citations omitted).

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3/ Continental Can Co., Inc., 76 OSAHRC 109/A2, 4 BNA OSHC 1541, 76-77 CCH OSHD ¶ 21,009 (Docket No. 3973, August 24, 1976), pet. for rev. withdrawn; Turner Co., 76 OSAHRC 108/A2, 4 BNA OSHC 1554, 76-77 CCH OSHD ¶ 21,023 (Docket No. 3635, August 24, 1976) rev. CA 7; Castle & Cooke Foods, A Division of Castle & Cooke, Inc., 77 OSAHRC 87/A2, 5 BNA OSHC 1435, 77-78 CCH OSHD ¶ 21,854 (Docket No. 10925, May 19, 1977); Union Camp Corp., 74 COSHRC 25/C5 (8/31), 1 BNA OSHC 3385, 73-74 CCH OSHD ¶ 17,576 (Docket No. 3905, May 1, 1974); Great Falls Tribune Co., 77 OSAHRC 86/B7, 5 BNA OSHC 1443, 1977-78 CCH OSHD ¶ 21,844 (Docket No. 6632, May 19, 1977).

The decision as to whether or not a standard meets this test is 'governed by the 'reasonable man' concept.' Id at 873. The noise standard is not impermissibly vague if a reasonable person could decide whether or not a noise control measure is 'economically feasible.' Respondent respectfully submits that neither complainant, respondent nor even the Commission can reasonably make that decision.

"... it should be noted that complainant has never promulgated any regulation, rule, interpretation, guideline, or standard in order to advise the public what 'feasible' means. . . .

"Respondent respectfully submits that the noise standard does not 'delineate its reach in words of common understanding.' Brennan v. Occupational Safety and Health Review Commission, 505 F.2d 869, 872 (10th Cir. 1974). When a panel of experts selected by complainant cannot agree on what 'feasible' means, and when complainant's own industrial hygienist states that 'it's a vague term' which he cannot evaluate, it would be ludicrous to hold that 'feasible' is a word of common understanding. No reasonable man, no employer, and not even a reasonable expert can be held at his peril to know what he is commanded to do by a standard which directs him to employ 'feasible' noise controls."

The Commission has stated its position in Turner Co., supra, by quoting the following except from the case of Union Camp Corporation, supra:

"Any standard given the necessary specificity, as respondent suggests, to meet the objection of one employer would by necessity contain variable factors which would call for different conclusions by different employers under different or even the same circumstances. It is manifest that engineering or administrative controls can not be specified to meet the varying noise levels of every employer. Yet all must be subject to regulation if the objective of the Act is to be achieved. How does one accomplish this objective? Requiring specifications as to how to reduce noise levels for every known sound in excess of the permissible limits would be an insurmountable obstacle to the enforcement of the Act. The objective of the Act would be totally frustrated insofar as noise exposure is concerned. Thus the standard must necessarily be expressed in general terms and depend for its application upon the circumstances of each case. The employer is required to think and use his expertise gained in the operation of his business in order to comply with the standard. This is not grounds for declaring a standard vague and unenforceable. Due process does not require that an employer be informed as to every course of action he is to take."

It is difficult to understand how the compounding of mass confusion furthers the purposes of the Act. Failure to force the government to establish guidelines in the noise field will result in many years of useless litigation with the ultimate cost passed on to the American consumers and especially the American worker already being destroyed in an economy out of control.

Respondent correctly points out that what is meant by the term "economic feasibility" will be as varied as the number of people questioned. To compound such mass confusion by failing to force the government to set forth guidelines in the noise field is especially devastating to the small employer fighting for survival in an attempt to comply with the regulations of a myriad of government agencies.[4/]

How is the small employer to handle the situtation? How is the small employer going to know how to proceed as to his noise problem? To be exact, to find out what is required under the present regulation and Commission position, ultimately requires litigation because each employer, of necessity, cannot know what "economic feasibility" means as to his individual operation. His first recourse must be an appeal to the Commission. There as is obvious in the Turner case, supra, his problem is only compounded. The Secretary contends that "economic feasibility" is limited to whether the costs of the controls would result in putting the

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4/ Respondent points to the requirements of the Food and Drug Administration and Internal Revenue Service as two of the agencies directly involved in this case in addition to OSHA. Very little imagination is required to recognize the many other agencies with voluminous regulations affecting respondent's operation.

employer out of business. See Castle & Cooke Foods, A Division of Castle & Cooke, Inc., supra. Each Commissioner has his own ideas. Then, as in Turner, the case is reversed by the Court for the Commission to define the term "economic feasibility" as to the specific facts in issue and the whirlwind begins again. By then the complexity of the Commission has changed with a new member who probably has his own concept of what is meant by "economic feasibility." In the interim litigation costs mount and emphasize to an attorney properly representing large or small employer that his client may never know what the term "economic feasibility" means as applicable to his business because he does not have the financial resources to find out—and this is due process under the Constitution . . . to put the situation in the vernacular "Thomas Jefferson would turn over in his grave."

Again, it is mere folly to say that the government cannot tell its citizenry what is expected of them in the noise field. The Secretary in this case has brought an internationally recognized expert in the noise field from England at a probable fantastic cost to defend against the vagueness of the regulation. This witness has joined the horde of other persons in expressing his understanding of what is meant by the term "economic feasibility." If this witness can establish criteria in this case, then the government could use him to establish published regulations applicable to the industry. Rather than expend vast sums of money in expert witness fees and litigation costs, wouldn't the purposes of the Act be far greater served by recognizing that the regulation ". . . is so vague that men of common intelligence must necessarily guess at its meaning" and violates due process?

Guidelines must be established. If not done on an administrative level, it will have to be done by the Courts. The Commission rather than fulfilling its statutory role as a quasi-judicial body has attempted to establish guidelines as the alter ego of the Secretary. This function instead was placed by Congress with the Secretary who has statutory authority to make law by issuing regulations that must muster due process.

The ultimate effect of the regulation is that government is saying to its citizenry "you tell government what is meant" rather than the government telling its citizenry. For the citizenry to find out what "economic feasibility" means legally it must litigate. This is not government by and for the people, this is people subservient to and for government.

The Commission attempts to soften the impact of its position by stating to the employer, you spend what may amount to thousands of dollars to apply controls and if your efforts are unacceptable to a government inspector, your good faith attempt will be rewarded by the Commission as the proposed penalty which can not exceed $1,000 under section 17(c) of the Act will be adjusted. See footnote 12 of the Commission's decision in Turner Co., supra.

Due process ultimately means fairness. There is no way that fairness can be found regarding this regulation whether applicable to the Secretary, the Commission, the worker or the employer. Instead, ridiculous position after ridiculous position will be justified on the grounds it is a public act involving safety and health. Does such purpose justify that the basic concepts of a democracy as protected by the Constitution should be ignored? The purposes of the Act can not be furthered by attempting to uphold such a vague and indefinite regulation.

However, being bound by Commission precedent, an attempt will be made to determine whether the proposed controls in this case are "economically feasible." The Commission has expressed "economic feasibility" in terms of a "cost benefit" concept. More specifically the Commission stated in Continental Can Co., Inc., supra:

> ". . . any significant reduction in ambient noise levels which are above G-16 limits will tend to provide some protection to the hearing of employees. But we cannot overlook the fact that protection against most of the detrimental effects of excessive noise can be achieved through the use of a relatively reliable and convenient type of personal protective equipment. Additionally, the effects of excessive noise are gradual rather than sudden, and a certain amount of exposure to continuous noise levels as high as 115 dBA is permitted by the standard itself.
>
> "Other factors to be considered in the benefits which noise reduction will achieve include the number of employees exposed to excessive noise, and the net reduction in their exposure which engineering or administrative controls can reasonably be expected to produce. As to the last noted factor we would emphasize that the benefits to be obtained will vary according to the magnitude of the noise levels existing prior to the imposition of controls. Cost factors which must be considered include both the direct costs of installing and maintaining controls, and indirect costs due to any loss of productivity or efficiency resulting from their implementation. This list is not meant to be all-inclusive. We cannot here establish specific guidelines which will be applicable to all cases. The ultimate determination in each individual case must be made by weighing all the relevant factors in light of the objectives of the Act."

As to the merits, the Secretary contends:

1. Pabst exposed its employees to noise levels in excess of those listed in Table G-16.

2. Pabst failed to utilize feasible administrative or engineering controls to reduce noise levels and 21 employees were exposed to levels two to four times those listed in Table G-16.

3. The government does not have to prove that administrative or engineering controls are economically or technologically feasible, but even assuming that it does, it has carried that burden, and

4. The controls recommended by the government's expert were available at the time of the initial inspection.

In response to the Secretary's first and second arguments, Pabst concedes that the noise levels in the areas in issue exceed the levels listed in Table G-16. Instead, Pabst points to the protection afforded by personal hearing protectors and the fact such protectors lower the sound levels at least 22 dBAs below the engineering controls proposed by the expert.[5/]

The parties are in substantial disagreement as to the Secretary's third argument and it will be considered in conjunction with Pabst's contentions.

Pabst does not pursue the argument on brief that the proposed controls were not available at the time of the inspection. With exception of the H & K crowner, Dr. Melling testified that similar materials were being used in Europe prior to the inspection date.

There are other areas of controversy as to the facts that must be reconciled. Most crucial to the case is whether the proposed controls will eliminate the need for personal hearing protectors. The Secretary assumes this fact on brief and it is concluded it is not supported by the weight of the facts of record. Pabst contends that even accepting the expert's findings,

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5/ Although the Secretary refers to administrative controls in his brief, no facts were offered that administrative controls were applicable or feasible and it has not been considered as an issue.

personal protectors must still be worn. Pabst's position is supported by admissions of Dr. Melling and testimony of Pabst's safety director. The expert's findings were based upon a 6.5 hour day and a conclusion that the controls would lower the sound levels to 91.5 dBA. The 91.5-dBA level is the maximum permissible exposure time for 6.5 hours under Table G-16. The expert admitted a margin of error and obviously there would have to be some margin of error in speculating as to the ultimate sound reduction of untested controls. This possible error was estimated by Dr. Melling at 1% to 2% in sound level or 60% in sound power (Tr. 211). Also, on some days the employees are exposed for at least seven hours. For these reasons the expert conceded:

> "Q So if in fact your prediction is off as much as 2 DB's and this is what is found when the controls are tested, then this is the allowable time. This is the average time, so that on the average they're overexposed one and a half hours, and on maximum days they're overexposed for two hours?
>
> "A Yes.
>
> "Q Now, based on all of that, if you're responsible for the safety program at this plant, surely you're not going to let the employees discontinue the use of hearing protectors? That's fair to say, isn't it?
>
> "A That's fair to say.
>
> "Q And in fact, unless you could have a very convincing safety factor in here you probably would not want [to] risk the health of your employees enough to discontinue the use of hearing protectors, is that right?
>
> "A That's right." (Tr. 219)

The parties are in disagreement as to the estimated costs of the proposed controls. Dr. Melling obtained his estimated costs by telephoning proposed suppliers. Pabst installed the proposed controls in Filling Room III

East. The actual experience of Pabst would be entitled to greater weight than cost estimates obtained by phone due to the possibility of misunderstandings and misconceptions that are likely to occur during phone conversations.[6/] Pabst's actual cost for Filling Room III East are more reliable to use as a basis for arriving at ultimate estimated costs.

In support of his contention that the proposed controls are "economically feasible," the Secretary relies heavily upon the maintenance cost of $5,000,000 expended by Pabst annually and the original equipment costs of approximately $1,800,000 to $2,000,000. The Secretary argues that one percent of capital costs of the equipment is convincing that the costs of proposed controls are "economically feasible."

Pabst argues that the "cost-benefit" concept should be applied by comparing the cost per dBA reduction per employee provided by personal hearing protectors against the cost per dBA reduction per employee provided by the proposed controls. Pabst points out that the "cost-benefit" concept must be considered in the light of whether the proposed controls will eliminate the wearing of the personal hearing protectors. Pabst emphasizes that personal hearing protectors reduce the sound levels 22 dBA below the threshold limits at a cost of $6.12 per employee, while even the Secretary's most optimistic cost figures show $592 per employee and will not eliminate the wearing of the personal hearing protectors.

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6/ The witness recognized he was working under a time limitation and the difficulty dealing with suppliers (Tr. 198, 203). Also, the rising costs of materials due to inflation are a matter of common knowledge.

The Secretary's argument that the costs of the controls are reasonable when considered in the light of Pabst's annual maintenance costs and the capital costs of the equipment adds little to a "cost-benefit" concept. Sizeable capital and maintenance costs are at most indicative that an employer can afford the controls. Pabst does not challenge this fact and the Commission majority has rejected the Secretary's argument that "economic feasibility" is limited solely to ability to afford the controls. See Continental Can Co., Inc., supra.

Pabst's approach does add significance to a "cost-benefit" concept. If cost per dBA of reduction is considered in the light of benefit to each employee, some guideline is established that could be applicable to all employers irrespective of the size of the employer or the number of employees involved. Actually, the benefits to the individual employee in the light of the cost to the employer of the control for each employee is the crux of what a cost-benefit concept should be all about. There is no better way to ultimately determine cost-benefit than by weighing the cost of the control by the amount of sound reduction measured in terms of dBA. This approach relates directly to Table G-16 and the reality of whether the control eliminates the wearing of personal hearing protectors. Although the Commission has held that controls may be required to reduce noise levels even though the levels specified in Table G-16 are not reached, the fact that personal hearing protectors are not eliminated is a very important fact to consider as to the benefit of the control to the employee. Actually from a "cost-benefit" concept the fact that the personal hearing protectors are not eliminated should be one of the more important considerations. If personal

protectors are not eliminated, the benefit of the proposed control to the employee is at best minimal. This fact was recognized by the Commission in the following quote from Continental Can Co., Inc., supra, that ". . . we cannot overlook the fact that protection against most of the detrimental effects of excessive noise can be achieved through the use of a relatively reliable and convenient type of personal protective equipment."

As stated, unless the cost-benefit concept is applied on the basis of cost per dBA of reduction in the light of benefit to each employee, the concept can not be made consistently applicable to all employers. By this approach, a definite guideline is established and there is better possibility of equal and fair application of the regulation to all employers, irrespective of size or the number of employees affected.

The higher the ratio between the costs of the proposed controls and the costs of personal hearing protectors in situations where the protectors are not eliminated, the greater the indication that the costs are excessive and the benefit minimal. The facts in the instant case emphasize the importance of the recognition of inexpensive personal hearing protectors especially where the controls fail to eliminate their use. The facts of record show that the personal hearing protectors cost $6.12 per employee. The Secretary's most optimistic cost shows $592 per employee. The personal hearing protector will reduce the noise conservatively to 68 dBA or 23.5 dBA lower than the Secretary's most optimistic assumed results. Pabst breaks down its comparative cost-benefit argument even further by comparing costs on the basis of percentage of sound removed by hearing protectors as against the proposed controls. This comparison indicates a cost-benefit

ratio for hearing protectors of six cents versus $6.50 to $13.89 depending on the filling room involved. The results become of even greater magnitude when the reduction of percentage of sound between the protectors and proposed controls are compared.

The expert testified:

> "Q Looking at it strictly from the standpoint of economic feasibility, though, if I can get down to 68 dBA at a cost of $6.12, you agree with me that purely on an economic basis, given the choice of these two, the economic choice, of course, must be hearing protectors?
>
> "A Yes.
>
> "Q And I think you said earlier that really, hearing protectors, anytime this is an allowable choice, is bound to be the better economic choice?
>
> "A Yes.
>
> "Q On an economic basis, there's no question in your mind that hearing protectors are economically the preferable choice?
>
> "A In this instance, yes." (Tr. 301).

The facts indicate in the instant case an extremely high costs ratio and the protectors must still be worn. When these facts are weighed in the light of the admissions of the government's expert witness as to cost-benefit concepts, the only logical legal conclusion remaining is that the Secretary has failed to carry his burden of proving that the proposed engineering controls are "economically feasible."

## ENGINEERING FEASIBILITY

Pabst questions whether the acoustical tile and the Body Guard shield can be used in its plant because of sanitation problems. It relies upon Great Falls Tribune, supra, holding that the Secretary's burden includes proof that

the proposed controls can be used in the employer's workplace.

Dr. Melling testified that the Body Guard could be designed without the acoustical material. Although this testimony is an ultimate conclusion of fact, in view of his expertise, the statement is accepted as sufficient to carry the Secretary's burden.

However, a different conclusion must be drawn regarding the acoustical tile.

Dr. Melling did not determine the working environment in the filling rooms. He did not determine the hazard involved from movement of cartons, ladders or other devices that might damage the tile. Although he testified the tile was intended to be placed higher than the workmen, this does not assure that cartons and the necessity to use ladders would not damage the tile. Obviously, a vinyl coating no thicker than one thousandth of an inch would be very susceptible to sharp edges or an object exerting even slight pressure. Dr. Melling's statement that the tile had been used in breweries in Europe or on offshore platforms is not sufficient to shift the burden back to Pabst to go forward with the evidence, much less sufficient to carry the Secretary's burden of persuasion. The reason, of course, is that the Secretary failed to lay foundation that Dr. Melling knew the working conditions at Pabst or that the breweries in Europe were the same in design as Pabst's facility and, of course, there was no foundation laid that the operation at Pabst has any bearing to offshore platforms. To emphasize the problem with the Secretary's failure of proof, Dr. Melling's pertinent testimony was as follows:

"Q All right. Now, again, in answer to my question, just so we'll have it on the record, you don't know of any breweries using the H & K Crowner in America - - - I'm sorry, modification of the H & K Crowner?

"A No I don't.

Q How many breweries, what fraction of breweries in America use the acoustical tile that you suggest of your own knowledge?

"A I don't know.

"Q How many breweries in America have enclosed hydraulic power packs to your knowledge, what fraction of them?

"A I don't know.

"Q Now, I'm leaving something out, Dr. Melling, what is it? Oh, Body Guard, how many breweries in America to your knowledge are using Body Guard on the conveyors?

"A I don't know.

"Q Do you know how many breweries in America have shielded, covered the bottom of the seamer in America?

"A No.

"Q So that with regard to Pabst, in terms of these specific modifications, you're not able to evaluate how widely any of these are used in America in breweries?

"A Given time I could find out, yes.

"Q Right, but I mean here today?

"A Here today, no." (Tr. 229, 230)

"Q If the - - - let's be sure the Court understands what we're talking about with the tile now. Acoustical tile normally is very porous and very absorbant, right?

"A Yes.

"Q As it needs to be to be a good sound absorber?

"A Right.

"Q So that this material up here, if I put it in a bucket of paint would soak that paint up rapidly, right?

"A Yes.

"Q It would be kind of like the television commercial that one of the flouride (sic) toothpastes puts on where they take a piece of chalk and they put it in a dye and very, very quickly you get a colored ring, right?

"A Yes.

"Q Now, the only way that you can put this tile in the Pabst Brewery is by preventing that kind of thing, right?

"A Yes.

"Q Because if material starts sopping up in there you'd have a terrible sanitation problem, right?

"A Yes.

"Q And the FDA would be on your neck, true?

"A I believe so.

"Q So what's been done here it to coat this tile with an impervious vinyl film, correct?

"A Yes.

"Q How thick is that film?

"A It's of the order of thousands of an inch.

"Q A couple of mils, maybe?

"A Umh.

"Q Two thousandths of an inch thick?

"A Yes.

"Q And if you make it a thick film, of course, then the tile would no longer function as an acoustical absorbant?

"A Correct.

"Q So we have here a vinyl film maybe .001 to .002 inches thich (sic)?

"A Yes.

* * *

"Q Now, I can take my thumb nail and scrape it across this film and destroy it very easily?

"A Yes.

"Q So that if someone comes into the bottling plant with a stack of beer bottles and happens to rub across the surface of that film it would damage it, wouldn't it?

"A It would indeed, but let's get this into perspective. That treatment is quite high up, it deliberately placed above head height, etcetera so it will be reasonably free from damage.

"Q And how many times do people bring ladders, big stacks of cartons in there that would go up above the level of the tile?

"A In the case of Pabst, I have no idea.

"Q But you wouldn't be surprised it does occur from time to time?

"A I wouldn't be surprised.

* * *

"Q But from what you know of this material, you wouldn't disagree with me that it may or may not prove structurally satisfactory at the Pabst plant? You know it will absorb noise, but you don't know whether it's going to prove that it's too easily damaged to stay up, isn't that true, Dr. Melling?

"A I would agree with you, yes." (Tr. 231-234)

* * *

"Q No, how long would you expect the material to last in place?

"A Well, again I can call on my experience back in the United Kingdon (sic) where we have used similar materials not only in breweries, but offshore platforms, which I'm sure you will accept as being a more rugged environment than a brewery. It's been very satisfactory and very little damage." (Tr. 314).

On the basis of the overall record, it must be concluded that the Secretary has failed to carry his burden of persuasion that the acoustical tile is a feasible engineering control adaptable to Pabst's operation.

## ULTIMATE CONCLUSIONS OF FACT, LAW, DECISION AND ORDER

1. Respondent is engaged in a business affecting commerce within the meaning of section 3(5) of the Act.

2. The Commission has jurisdiction over the parties and the proceeding.

3. On March 12, 1975, the noise levels in Filling Rooms I, 2, III East and III West of respondent's packaging center exceeded the limits of Table G-16 of 29 C.F.R. § 1910.95(b)(1).

4. The employees exposed to the noise levels in Filling Rooms I, 2, III East and III West were protected by personal protective equipment.

5. Due to the high cost ratio between the engineering controls proposed by the Secretary and the personal hearing protectors where the controls will not eliminate the wearing of the protectors, the Secretary has failed to prove that the costs of the proposed controls are feasible when weighed in the light of the benefits to the employee.

6. The Secretary has failed to prove that on March 12, 1975, and January 10, 1978, that economically feasible engineering controls existed for use in Filling Rooms I, 2, III East and III West of respondent's packaging center at Perry, Georgia.

7. The Secretary has failed to prove that acoustical tile was technologically feasible for installation on March 10, 1975, and January 10,

1978, in Filling Rooms I, 2, III East and III West of respondent's packaging center at Perry, Georgia.

8. The respondent was not in violation of section 5(a)(2) of the Act for failure to conform with 29 C.F.R. § 1910.95(b)(1).

## DECISION AND ORDER

Wherefore it is ORDERED:

The citation issued on April 7, 1975, is vacated and no penalty is assessed.

Dated this 25th day of July, 1978.

JOHN J. LARKIN
Judge

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

December 23, 1982

**IN REFERENCE TO SECRETARY OF LABOR v.**

Stone Container Corporation

OSHRC DOCKET NO. 15116

**NOTICE IS HEREBY GIVEN TO THE FOLLOWING:**

**FOR THE SECRETARY OF LABOR**

OF COMMISSION DECISION (REMAND)

To wit: See attached.

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  360 North Michigan Avenue
  Chicago, IL. 60601

**FOR EMPLOYEES**

- Local No. 703
  United Paperworkers International Union
  4190 Farm Lane
  Smyrna, GA. 30080

James D. Burroughs, Judge
Occupational Safety & Health Review Commission
1365 Peachtree Street Rm. 240
Atlanta, GA. 30309

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>STONE CONTAINER CORPORATION,<br>Respondent. | OSHRC Docket No. 15116 |

ORDER OF REMAND

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

On December 17, 1982, the Commission issued its decision in Sun Ship, Inc., OSHRC Docket No. 16118. In accordance with the decision of the U.S. Supreme Court in American Textile Manufacturers Institute, Inc. v. Donovan, 101 S.Ct. 2478 (1981)("ATMI"), the Commission held that "feasible" under the occupational noise standard means achievable. The Commission overruled the cost-benefit test of feasibility previously set forth in Continental Can Co., 76 OSAHRC 109/A2, 4 BNA OSHC 1541, 1976-77 CCH OSHD ¶ 21,009 (No. 3973, 1976), appeal withdrawn, No. 76-3229 (9th Cir. Apr. 26, 1977), and substituted a test consistent with ATMI.

In view of this intervening change in law, the judge's decision with respect to the single-facer and double-backer operators is vacated. The case is remanded for further proceedings, including evidentiary submissions, so that the interre-

lated issues of technological and economic feasibility can be reconsidered in light of the test of feasibility established by Sun Ship, Inc. 1/

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: DEC 23 1982

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1/ Chairman Rowland dissents. He would not remand the case for further proceedings. Consistent with his dissenting opinion in Sun Ship, he concludes that the requirement in section 1910.95(b)(1) that feasible administrative or engineering controls be utilized is invalid.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

(404) 881-4197
FTS: 257-4197

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| SECRETARY OF LABOR, | ) | |
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| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 15116 |
| | ) | |
| STONE CONTAINER CORPORATION, | ) | |
| | ) | |
| Respondent. | ) | |

APPEARANCES:

Daniel A. Caldwell, Esquire, Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia, on behalf of complainant

Robert L. Greenwald, Esquire, Chicago, Illinois, on behalf of respondent

## DECISION ON REMAND

BURROUGHS, Judge: The Commission, by order dated April 27, 1981, remanded this case for consideration of the issue of whether respondent filed a timely Notice of Contest to a citation issued to it on August 28, 1975, for allegedly violating provisions of the noise standard, 29 C.F.R. § 1910.95(b), during operations at its Lithonia, Georgia, plant. At the nearing held on March 1 and 2, 1976, complainant's Motion to Dismiss the Notice of Contest was denied and a hearing on the merits proceeded. The Judge's Decision and Order issued on November 3, 1976, affirmed a violation of 29 C.F.R. § 1910.95(b).

Subsequent to the remand, the parties decided to have the issue resolved without the necessity of a trial. On June 24, 1981, an executed Stipulation of Facts was received from the parties. In support of its position, respondent attached to

the Stipulation of Facts the affidavits of Robert L. Greenwald, respondent's counsel; Laurence J. Smith, the personnel manager of the Lithonia plant; and J. Lester Ross, respondent's manager of loss control at the time the citation was issued. In support of his position, complainant attached a copy of an October 22, 1975, letter from respondent's counsel to the Commission and a copy of respondent's Response in Opposition to Motion to Dismiss Notice of Contest and for Extension of Time in Which to File a Complaint.

Section 10(a) of the Act, 29 U.S.C. § 659(a),[1/] sets a firm time limit for contesting a citation issued pursuant to the Act. The employer must notify the Secretary within fifteen working days from receipt of the citation. The failure to file a Notice of Contest within fifteen working days divests the Commission of jurisdiction to hear merits of the citation, which becomes final by operation of law pursuant to section 10(a). Capital City Excavating Co., 80 OSAHRC 83/A10, 8 BNA OSHC 2009, 1980 CCH OSHD ¶ 24,734 (No. 78-4725, 1980); Kerr-McGee Chemical Corp., 76 OSAHRC 129/C14, 4 BNA OSHC 1739, 1976-77 CCH OSHD ¶ 21,161 (No. 9890, 1976).

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1/ Section 10(a) of the Act provides:

> If, after an inspection or investigation, the Secretary issues a citation under section 9(a), he shall, within a reasonable time after the termination of such inspection or investigation, notify the employer by certified mail of the penalty, if any, proposed to be assessed under section 17 and that the employer has fifteen working days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty. If, within fifteen working days from the receipt of the notice issued by the Secretary the employer fails to notify the Secretary that he intends to contest the citation or proposed assessment of penalty, and no notice is filed by any employee or representative of employees under subsection (c) within such time, the citation and the assessment, as proposed, shall be deemed a final order of the Commission and not subject to review by any court or agency.

A nonserious citation was issued to respondent on August 28, 1975. The citation was received by respondent on September 2, 1975, at its Lithonia, Georgia, plant. An undated Notice of Contest, contained in an envelope having a postmark date of September 24, 1975, was received by OSHA's area office in Tucker, Georgia, on September 25, 1975. Both parties agree that a timely Notice of Contest was required to be mailed by respondent on or before September 23, 1975. These facts establish a prima facie case by complainant that the Notice of Contest was untimely. Kerr-McGee Chemical Corp., supra. "While the postmark represents 'prima facie' evidence of untimeliness, an employer can rebut this evidence by demonstrating that the notice of contest was mailed on a date other than that contained in the postmark." Newport News Shipbuilding & Drydock Company, 80 OSAHRC 119/A2, 9 BNA OSHC 1085 at 1088, 1980 CCH OSHD ¶ 25,003 (No. 76-171, 1980).

The Commission has held that it is the date of mailing, not the actual postmark, that is the decisive factor. Newport News Shipbuilding & Drydock Company, supra; J. D. Blum Construction Co., 76 OSAHRC 58/D14, 4 BNA OSHC 1255, 1976-77 CCH OSHD ¶ 20,735 (No. 3543, 1976). Respondent submits that while the letter was postmarked on September 24, 1975, it was actually mailed between the hours of 5:00 p.m. and 6:00 p.m. on September 23, 1975, which made the Notice of Contest timely. In support of the September 23, 1975, mailing date, respondent submitted the affidavit of Laurence J. Smith, the personnel manager of the Lithonia, Georgia, plant. Smith states in his affidavit that he had the responsibility for mailing the Notice of Contest. His affidavit, in pertinent part, states as follows:

> 3. On September 23, 1975, I therefore deposited at the U. S. Post Office located at 3035 Mountain Street, Lithonia, Georgia 30058, Stone Container Corporation's said Notice of Contest, a copy of which is attached hereto.

4. Said Notice of Contest was signed by Mr. J. Don Cason, the Plant Manager, and was not dated. I then proceeded to run the envelope containing the Notice of Contest through the Company's post office meter, which had already been advanced to the date of September 24, 1975, as was often done, since it was late in the afternoon on the 23rd of September, 1975.

5. After having the envelope stamped with the proper postage, I personally deposited it in the mail box outside the Lithonia, Georgia Post Office located at 3035 Stone Mountain Street, Lithonia, Georgia 30058 sometime between the hours of 5:00 and 6:00 P.M. on September 23, 1975.

The affidavit of J. Lester Ross supports the affidavit of Smith. Ross had the responsibility of determining the proper response to the citation. According to his affidavit, he delayed filing a Notice of Contest so that he might have an opportunity to discuss a possible resolution of the citation with the Atlanta area director for OSHA. Ross further states that on September 22, 1975, he instructed Smith to prepare a Notice of Contest and that on September 23, 1975, he called Smith to instruct him to deposit the Notice of Contest in the mail on that date. On September 25, 1975, Ross called Smith and was advised by Smith that he deposited the Notice of Contest in the mailbox outside the Lithonia, Georgia, post office on September 23, 1975.

The postmark date of September 24, 1975, was stamped by a Pitney-Bowes postage meter which was under the exclusive control of respondent. The postage meter was designed to let respondent change the postmark date to be stamped. Complainant argues that the affidavits of Smith and Ross are insufficient to rebut the presumption that the Notice of Contest was mailed on September 24, 1975, since the postmark date was within the control of respondent and not the post office. Complainant seeks to distinguish the rationale of the Commission in Newport News Shipbuilding & Drydock Company, supra, on the basis that the postmark date in that case was made by the U. S. Postal Service. This fallacious

reasoning overlooks the main import of the Newport News decision; namely, the date of mailing is controlling. There is no credible evidence to rebut Smith's representation that he deposited the letter in the mailbox outside the Lithonia, Georgia, post office sometime between the hours of 5:00 p.m. and 6:00 p.m. on September 23, 1975.

Complainant further points to the fact that respondent, at the time the Notice of Contest envelope was postmarked, had no standard practice regarding whether the postmark date on its Pitney-Bowes meter was changed at the end of the business day or at the beginning of the next business day. Respondent currently changes the postmark date on its postage meter at the commencement of the business day corresponding to the postmark date. These facts are not in conflict with Smith's affidavit and form no basis on which to conclude that he was mistaken in saying that he mailed the letter on September 23, 1975.

Complainant's last argument is premised on certain statements made by respondent's counsel in his document entitled "Response In Opposition To Dismiss Notice Of Contest And For Extension Of Time Within Which To File A Complaint" and the letter dated October 22, 1975, forwarding the document. The letter of October 22, 1975, states that "the Notice of Contest was placed in the hands of the Lithonia Post Office on September 23, 1975," and that "the Post Office failed to postmark the Notice of Contest until the following day." The Response In Opposition To Dismiss Notice of Contest states that the Notice of Contest was hand delivered to the Lithonia Post Office in Lithonia, Georgia, at 4:00 p.m. on September 23, 1975. It is obvious that counsel was not as well versed with the facts as he should have been prior to making his representations, but his lack of preparedness does not negate the representation of Smith.

There is no evidence to conclude that counsel was informed that the envelope bearing the Notice of Contest was postmarked by a postage meter owned by respondent. Once Smith represented to respondent's counsel that he had mailed the letter on September 23, 1975, counsel probably assumed the postmark was made by the postal service.

The affidavit of Laurence Smith is a sufficient basis to conclude that respondent timely contested the citation within the fifteen working day period of section 10(a) of the Act. The Motion to Dismiss the Notice of Contest as untimely is again dismissed.

## FINDINGS OF FACT

The following findings of fact are based on the Stipulation of Facts filed by the parties on June 24, 1981:

1. Respondent was issued a nonserious citation on August 28, 1975, that was received by it at its Lithonia, Georgia, plant on September 2, 1975.

2. Respondent's undated Notice of Contest was received by the OSHA area office in Tucker, Georgia, on September 25, 1975.

3. The envelope containing the Notice of Contest bore a postmark date of September 24, 1975. The postmark date was made by a Pitney-Bowes postage meter under the exclusive control of respondent.

4. The envelope was run through the postage meter at the close of business on September 23, 1975, after the meter had been advanced forward for the next business day, September 24, 1975.

5. The personnel manager of the Lithonia, Georgia, plant deposited the envelope containing the undated Notice of Contest in the mailbox outside the

Lithonia, Georgia, post office sometime between the hours of 5:00 p.m. and 6:00 p.m. on September 23, 1975.

## CONCLUSIONS OF LAW

1. Respondent, at all times material hereto, was engaged in a business affecting commerce within the meaning of section 3(5) of the Act.

2. Respondent, at all times material hereto, was subject to the requirements of the Act and the standards promulgated thereunder. The Commission has jurisdiction of the parties and of the subject matter herein.

3. Respondent's Notice of Contest was mailed on September 23, 1975, and was timely within the requirements of section 10(a) of the Act.

## ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, it is

ORDERED: That respondent's Notice of Contest was timely filed and the Motion to Dismiss is denied.

Dated this 25th day of August, 1981.

James D. Burroughs

JAMES D. BURROUGHS
Judge

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| | [Remand] | | |
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| 76-3460 | THE DOLESE COMPANY | 12/23/82 | 72/B5 |
| | [Remand] | | |
| | (Judge's decision) | | 72/B8 |
| 78-1638 | CARPENTER TECHNOLOGY CORP. (Order) | 12/23/82 | 72/C10 |
| | (Judge's decision) | | 72/C12 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
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UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

December 23, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Russell, Burdsall & Ward, Inc.

OSHRC DOCKET NO. 76-2958

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION AND REMAND

To wit: See attached.

FOR THE SECRETARY OF LABOR

- Counsel for Regional Litigation
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FOR THE COMMISSION

Ray H. Darling, Jr.

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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>RUSSELL, BURDSALL & WARD, INCORPORATED,<br><br>Respondent. | OSHRC Docket No. 76-2958 |

ORDER OF REMAND

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

On December 17, 1982, the Commission issued its decision in Sun Ship, Inc., OSHRC Docket No. 16118. In accordance with the decision of the U.S. Supreme Court in American Textile Manufacturers Institute, Inc. v. Donovan, 101 S.Ct. 2478 (1981)("ATMI"), the Commission held that "feasible" under the occupational noise standard means achievable. The Commission overruled the cost-benefit test of feasibility previously set forth in Continental Can Co., 76 OSAHRC 109/A2, 4 BNA OSHC 1541, 1976-77 CCH OSHD ¶ 21,009 (No. 3973, 1976), appeal withdrawn, No. 76-3229 (9th Cir. Apr. 26, 1977), and substituted a test consistent with ATMI.

In view of this intervening change in law, the judge's decision is vacated with respect to the allegation concerning engineering controls. The case is remanded for further proceedings, including evidentiary submissions, so that the

interrelated issues of technological and economic feasibility can be reconsidered in light of the test of feasibility established by Sun Ship, Inc. 1/

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: DEC 23 1982

---

1/ Chairman Rowland dissents. He would not remand the case for further proceedings. Consistent with his dissenting opinion in Sun Ship, he concludes that the requirement in section 1910.95(b)(1) that feasible administrative or engineering controls be utilized is invalid.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>RUSSELL, BURDSALL & WARD, INC.,<br>Respondent. | OSHRC<br>Docket Nos. 76-2957<br>and 76-2958<br><br>DECISION AND ORDER |

Appearances:

Gregory B. Taylor, Esquire, for Complainant

Francis Carling, Esquire, for Respondent

Edward F. Fitz, President, U.A.W. Local 843,
Authorized Employee Representative

STATEMENT OF THE CASE

Rubin, Judge

Respondent corporation manufactures industrial fasteners in Mentor, Ohio. On April 14 and 15, 1976, a Department of Labor compliance officer inspected respondent's plant and issued a citation alleging two non-serious violations (Docket No. 76-2957), and a notification of failure to correct alleged violation (Docket No. 76-2958).

Docket No. 76-2957 was settled by agreement of the parties. Respondent represents that the alleged violations have been abated (T 8-9). The agreement is incorporated in this order.

Docket No. 76-2958 charges respondent with failure to correct a violation of 29 CFR 1910.95(b)(1) and (3) as alleged in amended citation dated February 20, 1974 (Ex. C-1).[1/] A penalty of $1,350 was proposed.

## STANDARD AND CITATION

29 CFR 1910.95 pertains to occupational noise exposure.

> "(a) Protection against the effects of noise exposure shall be provided when the sound levels exceed those shown in Table G-16 when measured on the A scale of a standard sound level meter at slow response. . .
>
> (b)(1) When employees are subjected to sound exceeding those listed in Table G-16, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table.
>
> (2) If the variations in noise level involve maxima at intervals of 1 second or less, it is to be considered continuous.
>
> (3) In all cases where the sound levels exceed the values shown herein, a continuing, effective hearing conservation program shall be administered.

---

1/ The complaint refers to failure to correct a violation cited on January 31, 1974. This citation was superseded by amended citation dated February 20, 1974. Complainant's motion to amend the complaint was granted (T 9-10).

Table G-16--Permissible Noise Exposures[1]

| Duration per day, hours | Sound level dBA slow response |
|---|---|
| 8 | 90 |
| 6 | 92 |
| 4 | 95 |
| 3 | 97 |
| 2 | 100 |
| 1-1/2 | 102 |
| 1 | 105 |
| 1/2 | 110 |
| 1/4 or less | 115 |

[1]When the daily noise exposure is composed of two or more periods of noise exposure of different levels, their combined effect should be considered, rather than the individual effect of each. If the sum of the following fractions: C1/T1+C2/T2. . . Cn/Tn exceeds unity, then, the mixed exposure should be considered to exceed the limit value. Cn indicates the total time of exposure at a specified noise level, and Tn indicates the total time of exposure permitted at that level.

Exposure to impulsive or impact noise should not exceed 140 dB peak sound pressure level."

The amended citation, dated February 20, 1974, alleges that respondent:

> Failed to use feasible administrative or engineering controls to reduce the sound levels within the permissible limits.
>
> Locations.
>
> Department 66 (Extrusion)
> Machine Nos. 536-538
>
> Department 55 (Roll Thread Sems)
> Machine Nos. 776-772-774

Department 51 (Bolt Maker)
Column J-36

Department 51 (Header Operator)
Machine Nos. 213-210

Also, the employer failed to require the proper use of personal hearing protection equipment to reduce the sound levels within the permissible limits. (29 CFR 1910.95(b)(1) and (3)).

EVIDENCE AND DISCUSSION

The parties have stipulated that the citation dated February 20, 1974 became a final order of the Review Commission; that the machines cited in this present proceeding are the same machines cited on February 20, 1974; that the sound levels produced by the cited machines exceeded the permissible limits in the standard at the time of the original inspection and upon reinspection; that the sound levels were 94 and 95 dBA on April 14 and 15, 1976; that administrative controls are not feasible;[2/] that engineering controls are theoretically feasible; and that the machine operators were wearing ear plugs on April 14 and 15, 1976. The machine originally identified as Bolt Maker, Column J-36, Department 51, was relocated and in Department 50 at the time of the reinspection (T 10-11, 14-15, 40-43, Ex. C-2).

2/ Transcript p. 14, line 12, is corrected to add "not" between "are" and "feasible". The record is further corrected to show errata listed in complainant's letter dated April 19, 1977.

Norman L. Meyerson, Senior Engineer and Vice President of Ostergaard Associates, Consultants in Acoustics, testified as complainant's sole witness. Meyerson surveyed respondent's plant on November 30, 1976 for the purpose of investigating the feasibility of engineering controls. His report includes a summary of noise measurements, general observations, analysis, and evaluation of engineering solutions (Ex. C-3). Meyerson was of the opinion that a significant noise reduction of 15 dBA or more can be achieved by the installation of sound enclosures on each of the eight machines cited. The noise levels at each machine would thereby be reduced to 90 dBA or below. However, the operators of these machines will continue to be exposed to excessive noise levels from the adjacent machines. To reduce exposure of these employees to within the standard limits, it is necessary to enclose two machines on each side of each cited machine. Respondent's study indicates that the problem is plant-wide with 228 machines producing noise in excess of the standard levels (T 162-163). Complainant would limit the issue to the technological feasibility of abatement for the eight machines cited. Respondent insists that the 228 machines must be considered and that engineering controls, while theoretically feasible, are not economically feasible.

Savina Home Industries, Inc., OSHRC Docket No. 12298 (RC January 1977) sets forth the proof needed to establish a failure to abate where the original citation was not timely contested. Complainant's prima facie case is made upon a showing that: "(1) the original citation has become a final order of the Commission, and (2) the condition or hazard found upon reinspection is the identical one for which respondent was originally cited. An employer may rebut this prima facie case by showing that the condition has in fact been corrected or, if not corrected, that the employer has prevented the exposure of his employees to the violative condition. Secretary v. York Metal Finishing Company, 7 OSAHRC 845 (1974). The prima facie case may also be rebutted by a showing that the condition for which the employer was cited was in fact not violative of the Act either at the time of the original inspection or at the time of reinspection. Secretary v. Franklin Lumber Co., Inc., 9 OSAHRC 922 (1974)."

A divided Review Commission has held that the economic as well as technological feasibility of noise reduction controls must be considered. Continental Can Company, 76 OSHRC 109/A2, 4 BNA OSHC 1541, 1976-77 CCH OSHD para. 21,009 (No. 3973, etal, 1976), pet. for review withdrawn, No. 76-3229, 9th Cir., April 26, 1977;

Castle & Cooke Foods, Inc., 77 OSHRC 87/A2, 5 BNA OSHC 1435, 1977-78, CCH OSHD para. 21,854 (No. 10925, May 19, 1977), pet. for review filed, No. 77-2565, 9ty Cir., July 14, 1977. The Commission's interpretation of the term "feasibility" was approved in Turner Company v. Secretary of Labor and OSHRC, 561 F.2d 82 (7th Cir., 1977), and is applied here.

The eight machines cited appear to have been selected at random. Complainant has offered no explanation for the selection of these particular machines and for the omission of over 200 similar noise-producing machines found throughout respondent's plant. A rational basis for this piecemeal approach is not evident. The approach is rejected as economically wasteful and tending to vitiate the decisions of the Review Commission with respect to the economic factor. Accordingly, economic feasibility will be considered as it pertains to the entire plant.

Meyerson estimated the cost of eight enclosures as $20,800 to $35,250, depending upon which of his proposed alternatives are adopted. Using Meyerson's estimates, we find that enclsing 228 machines will cost from approximately $600,000 to $1,000,000. Respondent has challenged the effectiveness of the enclosures recommended by Meyerson and asserts that more expensive,

custom-designed enclosures are necessary. Respondent also includes additional expenses for machinery relocation, installation, etc. It is not necessary to resolve these differences to reach a decision on economic feasibility since substantially greater expenses on a continuing basis are anticipated due to increased maintenance costs and decreased productivity.

Meyerson estimated increased maintenance costs of 3% annually and decreased annual productivity of 5% (T 55-56). Using the 3% estimate, respondent computed increased maintenance costs in the bolt maker department at $7,000 annually (T 172-173). The computation is not refuted. The bolt maker department has 22 machines. Assuming that maintenance costs are comparable for the remaining 206 machines, the annual increased maintenance cost is $70,000. Respondent has computed the loss of sales capacity due to reduced productivity in the bolt maker department and extrapolates therefrom a total loss of $6,000,000 annually for all machines. This figure is deemed excessive in view of the total net sales reported in fiscal 1975, 1976 and the first half of 1977 (Ex. R-3). While a precise figure cannot be determined, the loss in sales capacity due to a 5% decrease in productivity is estimated at $1,250,000 annually on the basis of the total net sales reported.

The record further shows that respondent instituted a mandatory program of wearing hearing protectors in designated areas of the plant. Company regulations have been issued providing for disciplinary action and penalties for failure to wear the hearing protectors. Sueprvisors make two inspections per shift to see that the men are wearing the ear protectors, and a number of warnings were issued for failure to do so (T 105, 108; Ex. R-5 Compliance Program, Attachments A through F). Three different sizes of ear plugs are provided, and the plugs are fitted by a nurse (T 114). Audiometric tests commenced in December 1973 and this program has since been augmented. Respondent has contracted with an outside hearing consultant firm to evaluate the audiograms on a yearly basis (T 108-109).

In 1974, respondent instigated a joint effort by the fastener industry to develop a technology for noise control. The fastener industry noise control research program (FINCRP) retained consultants to study the noise problems presented by the standard machines in industry-wide use (T 118-124). Meyerson expressed the opinion that the study report was "a more thorough study than all surveys that I ever saw in the fastening industry done before" (T 60). The first phase has been completed, and the program has entered

a phase of prototype design, fabrication, installation and evaluation. Experimental noise treatment will be applied to 22 machines in industry-wide use under actual operating conditions (T 124-126). It is estimated that phase two will be completed by March 1979 (T 124-129). Respondent could not assure that the study will be implemented. This would depend on the technical performance and economic costs of the controls recommended (T 133).

Respondent's ability to absorb the costs of abatement must be examined against a background of reduced employment and operating losses. On June 26, 1976, the U. S. Department of Labor issued a certificate of eligibility to apply for adjustment assistance under the Trade Act of 1974. Petition for such relief was filed by the United Auto Workers for worker adjustment assistance for employees and former employees of the Mentor plant. The Department of Labor round a significant number of total or partial separations of production and salaried workers in 1975 and 1976; sales or production, or both, decreased absolutely in 1975 and 1976; imports increased absolutely and relatively in 1974 and 1975 (Ex. R-2). Respondent began production in the Mentor plant in March 1973. At first, the plant operated at a loss, showed a profit in 1974, again suffered a loss

in fiscal 1976 and a greater loss proportionately in the first half of fiscal 1977 (Ex. R-3). The corporation had a net profit nationwide in fiscal 1976 (Ex. C-9).

In Castle & Cooke Foods, Inc., supra, the Review Commission held that the benefits do not justify the cost of controls where the implementation cost was $3,100-$3,400 per employee and the annual cost impact was $111-$1,100 per employee. In that case, the noise levels ranged from 95-101 dBA. Here, the number of employees exposed to excessive noise levels is somewhat less than 234.[3/] Using the 234 figure and Meyerson's estimates for installation projected for 228 enclosures, and the annual expenses for maintenance and reduced productivity - the cost of engineering controls per employee is as follows: implementation cost - $2,500 to $4,250; annual cost impact - $5,600. The parties have stipulated that the inspection on April 14 and 15, 1976, which gave rise to the citation, recorded noise levels in the 94-95 dBA range.

The cost-benefit factors considered in Castle & Cooke Foods, Inc. apply a fortiori here where the costs are greater and benefits less. Accordingly, it is held that engineering controls are not economically feasible.

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3/ Exhibit R-5, Attachment A, shows that upon completion of the personal hearing protection equipment program on February 19, 1974, 234 employees had received earplugs. Exhibit R-3, p. 2, shows a 30.4% decrease in employment of production workers in 1975 from 1974 and further reduction in 1976.

Respondent argues that the FINCRP study is a viable alternative with distinct economic advantages over complainant's approach. This is a collateral argument which bears primarily on the question of a variance, a matter which is solely under the jurisdiction of the Secretary of Labor. Since the study has not been completed, its application herein cannot be evaluated in terms of economic feasibility.

## FINDINGS OF FACT

1. Respondent is a corporation which manufactures industrial fasteners in Mentor, Ohio.

2. Products bought and sold by respondent are shipped in interstate commerce.

3. An amended citation dated February 20, 1974, which charged a violation of 29 CFR 1910.95(b)(1) and (3) was not contested by respondent and became a final order of the Review Commission.

4. Reinspection of respondent's plant on April 14 and 15, 1976 disclosed that the machines previously cited continued to produce noise levels in excess of the permissible noise levels listed in Table G-16 of the standard.

5. Respondent's employees were exposed to excessive noise levels in Department 66 at Machine Nos. 536-538, Department 55 at Machine Nos. 776-772-774,

Department 51 Bolt Maker at Column J-36, Department 51 at Machine Nos. 213-210 at the time of the initial inspection and upon reinspection.

6. At the time of reinspection, respondent was administering a continuing, effective hearing conservation program.

7. Administrative controls are not feasible.

8. Machine enclosures will reduce noise levels to 90 dBA or below.

9. Engineering controls are technologically but not economically feasible.

## CONCLUSIONS OF LAW

1. Respondent is and, at all times relevant herein, was an employer engaged in a business affecting commerce within the meaning of Section 3(5) of the Act.

2. The Occupational Safety and Health Review Commission has jurisdiction of the parties and subject matter pursuant to Section 10(c) of the Act.

3. Feasible administrative or engineering controls are not available for utilization within the meaning of 29 CFR 1910.95(b)(1).

4. Respondent was not in violation of 29 CFR 1910.95(b)(3) at the time of reinspection.

## ORDER

OSHRC Docket No. 76-2957

1. Items 1 and 2 of citation 1 are affirmed.

2. A penalty in the amount of $200.00 is assessed.

3. Respondent's Motion to Withdraw its notice of contest is granted.

OSHRC Docket No. 76-2958

1. Notification of Failure to Correct Alleged Violation and of Proposed Additional Penalty is vacated.

Louis J. Rubin
Judge, OSHRC

Dated: March 14, 1978

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

December 23, 1982

**IN REFERENCE TO SECRETARY OF LABOR v.**

THE DOLESE COMPANY

OSHRC DOCKET NO. 76-3460

**NOTICE IS HEREBY GIVEN TO THE FOLLOWING:**

**FOR THE SECRETARY OF LABOR**

- **Counsel for Regional Litigation**
  **Office of the Solicitor, USDOL**
  **200 Constitution Ave., NW. - Rm. S-4014**
  **Washington, D.C. 20210**

- James E. White
  Reg. Sol., USDOL
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  Room 501
  Griffin and Young Sts.
  Dallas, Texas 75202

**FOR EMPLOYER**

- Peter T. Van Dyke, Esq.
  Lytle Soule & Emery
  2210 First National Center
  Oklahoma City, Oklahoma 73102

**FOR EMPLOYEES**

-

OF COMMISSION DECISION
REMAND

To wit: See attached.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Office of the Judges
Federal Building, Room 7B11
1100 Commerce Street
Dallas, Texas 75242

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 76-3460 |
| DOLESE COMPANY, | : | |
| Respondent. | : | |
| | : | |

ORDER OF REMAND

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

On December 17, 1982, the Commission issued its decision in Sun Ship, Inc., OSHRC Docket No. 16118. In accordance with the decision of the U.S. Supreme Court in American Textile Manufacturing Institute, Inc. v. Donovan, 101 S.Ct. 2478 (1981) ("ATMI"), the Commission held that "feasible" under the occupational noise standard means achievable. The Commission overruled the cost-benefit test of feasibility previously set forth in Continental Can Co., 76 OSAHRC 109/A2, 4 BNA OSHC 1541, 1976-77 CCH OSHD ¶ 21,009 (No. 3973, 1976), appeal withdrawn, No. 76-3229 (9th Cir. Apr. 26, 1977), and substituted a test consistent with ATMI.

In view of this intervening change in law, the judge's decision with respect to the alleged violation of section 1910.95(b)(1) is vacated. The case is remanded for further proceedings, including evidentiary submissions, so that the interrelated issues of technological and economic

feasibility can be reconsidered in light of the test of feasibility established by Sun Ship, Inc.[1/]

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: DEC 23 1982

---

1/ Chairman Rowland dissents. He would not remand the case for further proceedings. Consistent with his dissenting opinion in Sun Ship, he concludes that the requirement in section 1910.95(b)(1) that feasible administrative or engineering controls be utilized is invalid.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, Complainant, | ) | |
| v. | ) | Docket No. 76-3460 |
| THE DOLESE COMPANY, Respondent. | ) | |

Appearances:

Robert F. Maris, Esquire
Dallas, Texas

Attorney for the Complainant.

Peter T. Van Dyke, Esquire
Oklahoma City, Oklahoma

Attorney for the Respondent.

DECISION AND ORDER

MARTIN, Judge:

This matter arises under Section 10(c) of the Occupational Safety and Health Act of 1970, (29 USC §651 et seq.), hereinafter referred to as the Act, and involves the application of regulations adopted thereunder relating to noise exposure. In this proceeding the Secretary of Labor (complainant) seeks to affirm two items of a nonserious citation and a notification of proposed penalty, both of

which were issued on July 26, 1976, against the Dolese Company, (respondent) for its alleged failure to comply with the two regulations. The citation followed an inspection of respondent's work place located at 104 West Main in Edmond, Oklahoma, where respondent had two employees working at its batch plant, and charged that respondent failed to comply with the provisions of sections 29 CFR 1910.95(a) and 29 CFR 1910.95(b)(1).

The citation at item 1(a), charging respondent with violating Section 29 CFR 1910.95(a), reads as follows:

> "Protection against the effects of noise was not provided for employees exposed to sound levels which exceeded those listed in the Table G-16 of Subpart G of 29 CFR Part 1910: i.e., the employee that operated the crane, east of the batch plant, unloading and distributing rock and sand."

Item 1(b) of the citation, alleging that respondent violated Section 29 CFR 1910.95(b)(1), reads as follows:

> "Employee was subjected to sound levels exceeding those listed in Table G-16 of Subpart G of Section 29 CFR Part 1910, and feasible administrative or engineering controls were not utilized to reduce sound levels within those of the table; i.e., the employee that operated the crane, east of the batch plant, unloading and distributing rock and sand . . . "

The aforementioned standards are set forth in Title 29 of the Code of Federal Regulations as follows:

> "Section 1910.95, entitled Occupational Noise Exposure, reads in part as follows:
>
> (a) Protection against the effects of noise exposure shall be provided when the sound levels exceed those shown in Table G-16 when measured on the A scale of a standard sound level meter at slow response . . . .

(b)(1) "When employees are subjected to sound exceeding those listed in Table G-16, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table."

* * * *

TABLE G-16 PERMISSIBLE NOISE EXPOSURES

| Duration per day, hours | Sound level dBA slow response |
|---|---|
| 8 | 90 |
| 6 | 92 |
| 4 | 95 |
| 3 | 97 |
| 2 | 100 |
| 1 1/2 | 102 |
| 1 | 105 |
| 1/2 | 110 |
| 1/4 or less | 115 |

After respondent submitted a timely notice of contest a complaint and answer were filed with the Review Commission and a hearing was held pursuant to notice in Oklahoma City, Oklahoma, on January 20, 1977, and April 29, 1977. Briefs have been submitted by both parties.

Subsequent to the hearings complainant moved to withdraw the $120 penalty proposed in connection with item 1(a) of the citation. The motion is hereby granted.

There are no jurisdictional matters in dispute inasmuch as the pleadings established that respondent is subject to the Act and that the Commission has jurisdiction over the parties and subject matter

herein. The issues to be determined are whether respondent violated occupational safety regulation 29 CFR 1910.95, as alleged in the citation and complaint, by failing to provide employees protection from the effects of noise levels in excess of those listed in Table G-16 and by failing to utilize feasible administrative or engineering controls to reduce the sound levels within the purview of Table G-16.

Complainant presented the testimony of two industrial hygienists, Mr. Wingo, and Dr. Anderson, who visited respondent's batch plant at Edmond, Oklahoma, on July 9th and 12th, 1976. A preliminary walk around was conducted on the 9th of July and a spot check was made of the noise levels in the cab of respondent's Manitowoc Crane, which indicated a possible exposure problem. On July 12th readings were taken by means of a Dupont audio dosimeter for a period of some seven and one-half hours, the measurement being taken near the ear of the crane operator. The instrument indicated an average of 100 decibels on an A weighted scale, with the readings ranging from 98 to 105 decibels. The only noise source was the crane operation, that is, the engine, gears, and winch mechanism. The operator was on duty for ten or more hours per day. He was positioned in the forward part of the crane and on the right side and was not wearing ear protective devices.

Mr. Henshaw, the crane operator, testified that he worked at the ready mix plant, charging the bins, picking up sand, unloading rock, and so forth. He testified that he could have asked for ear

plugs, stating that they were available at the Oklahoma City office of the company. Following the inspection he has worn ear plugs to protect against the excessive noise.

Dr. Anderson expressed the opinion that the Manitowoc Crane could have been maintained in a better fashion because he noticed several rattles and squeaks, as well as noisy gear levers. He felt that mechanical adjustments and the installation of isolators, foam installation and plywood interliners, could reduce the noise about five or ten decibels. He was unable to say how much better the maintenance or mechanical adjustments might reduce the noise levels.

Dr. Nelson, an engineer and consultant in the environmental field, including industrial hygiene, and an associate professor at the University of Oklahoma, testified that he was called by respondent to remedy the noise problem at the Edmond plant. He was at the Edmond site on January 26, 1977, and took some sound measurements for approximately one and a half or two hours, with a B and K sound level meter with an octave band analyzer. He observed the crane during various operations such as while the engine was idling, moving sand and gravel, lifting, turning and so forth. His readings were basically consistent with the OSHA measurements, ranging from 92 decibels while the engine was idling, up to 104 decibels during the lifting operations. The readings were taken with the door open between the engine and the cab and also while it was

closed. The average decibel level was found to be between 95 and 96. 1/ From his testing he concluded that the crane operator was exposed to noise levels greatly in excess of the standard in question.

Dr. Nelson testified that his investigation failed to reveal any type of retrofit package which could be utilized in connection with the 1951 Manitowoc Crane. It was his professional opinion that a minimum expenditure of $5800 would be required to provide the necessary reduction in the sound levels to meet the noise standard and then only if the crane cab remains closed at all times. He did not believe that any type of plywood interliners and a foam insulation in the cab would solve the problem, only a completely isolated cab would be feasible to insulate the cab from the engine noise and mechanical operation of the gears and levers. The $5800 figure included the complete removal of the cab and reconstruction of it with a metal enclosure, foam insulation, plywood lining, hydraulic controls, all of which would have to be used in connection with air conditioning and heating units. Considering the nominal costs of ear plugs, it was his opinion that all of the alterations necessary would be too expensive for the type of results which could be expected.

---

1/ When Dr. Nelson was at the site some plywood and rubberized material had been installed in the cab.

The ear plugs now worn by the crane operator (Willson Sound Ban) are, in Dr. Nelson's view an effective protective device and would lower the noise level well below 90 decibels. A sales manager of the Midwestern Engine and Equipment Company, Mr. Mowrey, testified that he was not aware of any type of sound proofing which could be purchased for this old model crane. Mr. Henry, also a sales representative with the Midwestern firm, testified that the market value of the 1951 Manitowoc Crane was about $1,000 to $1,500. It was his view, that the gears on the crane which cost between $650 and $750 each should be replaced because that would help reduce the noise. However, Mr. Mowrey advised that Manitowoc does not have any replacement gears for this particular model of crane.

Mr. Basolo, respondent's assistant director of safety, testified that he was not aware of any employee who had suffered any hearing loss, that is, none which had been documented by medical evidence. He advised that employees are told at their safety meetings that if they feel they need ear protection they can requisition the devices and that ear protection was offered to all employees. Mr. Basolo stated that American Optical muffs were formerly used but that the Willson Sound Ban[2/] type of plugs were now being used by their employees. He indicated that there has been no reluctance on the part of respondent's employees to wear the Willson plugs.

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2/ The Willson ear plugs were purchased for $2.85 per unit according to Mr. Basolo.

Mr. Basolo further testified that a new crane would cost in the neighborhood of $150,000 to $200,000 and would of course be equipped with hydraulic controls and the cab would be completely sound proofed and air conditioned. He advised that at the Edmond plant it would not be administratively feasible to switch the two employees around because of the different skills involved and further because the batch man could not be used in the crane on account of back trouble which would prevent his pushing and pulling of the control levers in the crane.

Mr. Rutledge, a heavy equipment foreman for respondent, testified as to the action taken after the inspection was conducted in July, 1976. Ear plugs were distributed to the crane operators and they were given instructions as to greasing their equipment at the start of each work shift. Materials were purchased to install paneling and to insulate the cab.

After carefully considering all of the evidence in the record it is concluded that respondent violated the provision of Section 29 CFR 1910. 95(a) since it was established that the crane operator, Mr. Henshaw, was not wearing ear protection on the dates of the inspection. He was exposed to the noise generated by the crane engine and draw works which, according to measurements taken by the industrial hygienists, were considerably in excess of the 90 decibels figure permitted in Table G-16 for an eight hour day. The readings were not disputed.

Respondent's principal argument was that it did provide its employees with ear protection. This argument cannot be accepted. There were no ear plugs, muffs, or other protective devices available or provided at the batch plant in Edmond. Respondent has presented evidence, however, that ear protective devices were available at its general office in Oklahoma City to any employee upon request. Also, the availability of such devices was apparently made known to employees at their safety briefings. It should be pointed out, however, that the aforementioned Act, and regulations issued thereunder, require employers to furnish each of their employees a safe work place and that this responsibility cannot be left to the discretion of the workers. In view of the fact that the crane operator was subjected to excessive noise levels (98 to 105 decibels) for a period of approximately ten hours it must be found that respondent was in violation of Section 5(a)(2) of the Act by failing to comply with Section 29 CFR 1910.95(a).

The resolution of the remaining issue is more complex. Section 29 CFR 1910.95(b)(1) provides that where employees are subjected to noise in excess of the levels specified in Table G-16, the employer shall utilize feasible engineering or administrative controls. The burden of proving that engineering or administrative controls are feasible lies with complainant. It should be noted, however, that Congress did not provide any guidance as to what feasible means. The standard does not define it. The usually accepted meaning of feasible is practicable, suitable, or reasonable (see the New World Dictionary, Second College Edition).

The evidence in this case reveals that it is technically possible to lower the excessive noise in the cab of the crane to a level which would comply with Table G-16. By the expenditure of a minimum of $5800 the cab of the Manitowoc Crane could probably be removed, rebuilt, insulated, heated and air conditioned so that the operator would be protected against excessive noise. Respondent could also correct the situation by buying a new air conditioned crane by spending a sum of money ranging from $150,000 to $200,000 which would isolate the operator from the harmful noise. However, the question remains as to whether this would be economically feasible when the hearing of only one person is involved and where the use of inexpensive ear plugs would effectively protect him.

In the case of the Secretary v. Continental Can Company, OSAHRC 76/109/A2 (1976-1977) OSHD ¶21,009, the Commission in considering the matter of economic feasibility framed the issue as follows:

> "The basic controversy between the parties concerns whether the word 'feasible' as used in the standard should be interpreted to mean only 'technically possible' as labor contends, or whether it includes a component of economic feasibility as claimed by Continental."

The Commission ruled that the mere proof of the existence of technology capable of achieving a significant reduction in the noise levels is not sufficient to establish a violation of Section 29 CFR 1910.95(b)(1). Rather, to determine whether administrative controls are feasible, the

cost of such controls must be considered and weighed against the benefits which can be achieved. In Continental the Commission agreed that "feasible" as used in the noise regulation incorporated economic as well as technical factors and that the burden of establishing feasibility remained with the Secretary.

Also in Turner Co. v. Secretary of Labor, 561 F2d 82 (7th Cir. 1977), the Court adopted the logic in Continental Can stating:

> "We conclude that the standards should be interpreted to require those engineering and administrative controls which are economically as well as technically feasible. Controls may be economically feasible even though they are expensive and increase production costs . . . . But they will not be required without regard to the costs which must be incurred and the benefits they will achieve. In determining whether controls are economically feasible, all the relevant cost and benefit factors must be weighed."(Tr. 85)

In remanding the proceeding to the Commission the Court stated that the Commission must realistically consider the hazards presented by the excessive noise in Turner's work place and determine whether the health benefits to the employees who were equipped with personal protective equipment justify the cost of the engineering controls.

Here the Secretary argued that his burden should not go beyond a demonstration that technical measures exist whereby respondent can significantly lower the decibel level of the noise in the Manitowoc Crane and that respondent can afford the cost of implementing the controls.[3/]

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3/ By stipulation it was admitted that the expenditure of $5800 would not work an economic hardship on respondent.

It was contended that the $5800 cost figure arrived at by Dr. Nelson is economically feasible and further that the cost might be much less by the use of a more efficient maintenance program, coupled with the installation of a plywood interliner and the foam insulation as suggested by Dr. Anderson. Complainant also argued that according to Dr. Anderson, who is not a professional engineer, the installation of plywood and foam insulation, in addition to the elimination of the rattles and squeaks could be effective in dealing with the noise problem (emphasis added).[4/]

Complainant has also contended that the batch man and the crane operator could switch job positions during the day, thereby reducing the exposure of the crane operator to the excessive noise.

The principal thrust of respondent's argument is that complainant has failed to show that administrative or engineering controls are feasible. Dr. Nelson testified in his opinion that anything less than the five measures set forth in his report (see respondent's exhibit R-4) and costing $5800 or more would not accomplish the necessary noise reduction. Respondent also questioned the conclusions reached by the OSHA industrial hygienist, Dr. Anderson, who felt that the noise

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4/ In view of the greater experience and expertise in the noise abatement field, Dr. Nelson's opinion is considered to be more reliable. It is of interest to note that Dr. Anderson was a student of Dr. Nelson while studying at the University of Oklahoma.

could be controlled by the use of the plywood interliner and foam insulation.[5/] Respondent further contends that it would not be feasible to resort to controls costing four to five times the value of the crane itself. Respondent also points out that the expenditure of $5800, as recommended by Dr. Nelson to isolate the cab of the crane, valued at $1000 to $1500, must be weighed against the fact that only one employee will be exposed on that job site and when adequate protection can be achieved by inexpensive and comfortable ear plugs.

After carefully considering all of the testimony herein it is found that complainant has failed to establish the feasibility of engineering or administrative controls which might be instituted to comply with Section 29 CFR 1910.95(b)(1). Technologically the problem might be solved by all of the measures suggested by Dr. Nelson which would isolate the operator of the crane from the noise sources, or a new crane could be purchased for the sum of $150,000 to $200,000; however, it is concluded that the cost of isolating the cab would not be economically feasible when compared with the benefits to be achieved, to wit, the protection of one employee against a possible loss of hearing at some future date.

---

5/ These items alone would not work because the operator could not work with the doors closed because of the extreme heat in the summer months and the cold during the winter months. Dr. Nelson's testimony was convincing when he stated the noise in the cab could not be eliminated unless the cab was completely isolated from the engine, gears, draw works, and so forth.

It is also concluded that the complainant has not established that the use of feasible administrative controls would be effective. Dr. Nelson testified that dividing the work between the batch man and the crane operator would not be a practicable solution because of the difference in skills of the two employees. The same view was expressed by Mr. Basolo. He pointed out that the batch man was on light duty work because of a back problem and that he would be unable to pull the levers and controls in the crane.

Complainant has not presented any evidence as to the cost of implementing administrative controls such as would be required in the hiring and training of additional crane operators or other persons in order to split the hours in the noisy environment. Therefore, there would be no way to compare the costs of additional personnel or training with the benefits to be achieved. It is the present policy of respondent to hire fully experienced crane operators. It is here determined that economic feasibility is equally as important as engineering technology in considering the cost of the corrective measures against the health benefits to the affected employees.[6/] Accordingly, it is concluded that respondent did not fail to comply with Section 29 CFR 1910.95(b)(1).

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6/ In weighing the relative costs against the benefits it should be noted that the Act is designed to protect employees from safety hazards in the work place. On the Edmond job site there is no evidence of any loss of hearing to date. The crane operator now wears ear plugs. It is concluded that a loss of hearing is not a serious safety hazard and that a hearing loss, if any, occurs gradually and over an extended period of exposure. It is dubious whether the expenditure of funds for engineering controls is warranted prior to the institution of a hearing conservation program to ascertain if any employees' hearing has been affected.

## FINDINGS AND CONCLUSIONS

Having considered the entire record it is concluded that a preponderance of the reliable, probative and credible evidence supports the following findings and conclusions:

1. At all times mentioned herein respondent, the Dolese Company, was and now is an employer within the meaning of Section 3(5) of the Act and the Commission has jurisdiction over the parties and subject matter herein.

2. Respondent, a corporation doing business in the State of Oklahoma, had two employees working at its batch plant in Edmond on the dates of the inspection, July 9th and 12th, 1976.

3. On the aforementioned dates respondent's crane operator, who was not wearing ear plugs, was exposed to noise levels in excess of the permissible decibel limits as set forth in Table G-16 and as a result thereof respondent failed to comply with Section 29 CFR 1910. 95(a).

4. The implementation of various engineering techniques costing $5800, or more, could result in a significant reduction in the noise levels in the cab of the Manitowoc Crane. However, the evidence failed to establish that engineering technology would be feasible, weighing the costs against the benefits to be achieved.

5. The evidence of record failed to establish the existence of feasible administrative controls which would reduce the noise levels to permissible limits as set forth in Table G-16.

6. Accordingly, it is concluded that respondent was not in violation of Section 29 CFR 1910.95(b)(1) on the dates of the inspection.

ORDER

Based upon the foregoing findings and conclusions and upon the entire record it is hereby ORDERED that:

1. Item 1(a) of citation 1, alleging a violation of Section 29 CFR 1910.95(a) be and the same is hereby affirmed and no penalty is assessed.

2. Item 1(b) of citation 1, alleging a violation of Section 29 CFR 1910.95(b)(1) be and the same is hereby vacated.

3. This proceeding be terminated.

Henry F. Martin Jr

HENRY F. MARTIN, JR.
JUDGE

Dated: April 3, 1978
Dallas, Texas

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

December 23, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Carpenter Technology Corp.

OSHRC DOCKET NO. 78-1638

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF ORDER

To wit: See attached.

FOR THE SECRETARY OF LABOR

- Counsel for Regional Litigation
  Office of the Solicitor, USDOL
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FOR EMPLOYER

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FOR EMPLOYEES

- Francis E. Reh, Jr., President
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  1365 Sylvan Ave.
  Trumbull, CT 06611

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Office of the Judges
OSHRC
- John W. McCormack Post Office
  & Courthouse
  Room 420
  Boston, Mass 02109

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
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| SECRETARY OF LABOR, | ) | |
| | ) | |
| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 78-1638 |
| | ) | |
| Carpenter Technology Corp. | ) | |
| | ) | |
| Respondent. | ) | |

ORDER

The Commission grants the Secretary's motion to withdraw Petition for Discretionary Review and Citation.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

Dated: DEC 23 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

* * * * * * * * * * * * * * * * * * *

SECRETARY OF LABOR, *

COMPLAINANT *

v. * No. 78-1638

CARPENTER TECHNOLOGY CORPORATION, *

RESPONDENT *

* * * * * * * * * * * * * * * * * * *

LOCAL 2215, UNITED STEELWORKERS OF AMERICA, *

Authorized Employee Representative *

* * * * * * * * * * * * * * * * * * *

ON FINAL HEARING

---

Robert A. Yetman for complainant

Robert J. Cooney for respondent

Local 2215, USWA, by Francis E. Reh, President

---

WEIL, J.:

This is an enforcement proceeding by the Secretary of Labor under the Occupational Safety and Health Act, 29 USC §§ 651-678. The Commission has jurisdiction because respondent is engaged in interstate commerce.[1]

I

BACKGROUND.

Carpenter is a manufacturer of specialty steels with plants in Reading, Pennsylvania, and Bridgeport, Connecticut, and other locations. Within each of the two plants mentioned, it uses straddle carriers to transport cargoes from location to location. At about 1:45 p.m. on March 9, 1978, in the Bridgepo c plant, Thomas Forgette, a crane repairman, was walking east inside Building 63, toward a large, open, vehicle door. His course was roughly parallel with the easterly wall of the building. At the same time "Hyster No. 5", carrying a cargo, was approaching the door on a course which would converge with Forgette's at an angle of about 30 degrees, at a point about 20 feet west of the door. (Exh. R. 44) The carrier driver's position was offset to a point in the left rear quadrant of its deck (Exh. R 42), so that in the right front quadrant the driver could not see the top of the head of a man 5 feet 8 inches tall (Forgette was 5 feet 6 (1104)) less than 7 feet 9 inches ahead of the vehicle. (Ex. R 38).

Caporaso, the driver, approaching the door and keeping a sharp lookout, could see Quinones, driving the "bobcat", a small front-end loader which cleaned up scrap, outside the door, preparing to enter. Caporaso stopped the carrier and waived Quinones in; whereupon Quinones passed, heading west, the right of the bobcat adjacent to the right of the carrier heading east. At this time Forgette,

walking east toward the door, was somewhere between the course of the carrier and the course of the bobcat, which had moved to a point west of where the carrier was stopped; it now pulled over close to the south wall of Building 63; and the bobcat also stopped. Caporaso, never seeing Forgette, started toward the door at a crawl. Quinones, who saw Forgette and saw the carrier starting to overtake him, sensed that an accident was imminent. He jumped on the bobcat, waved his arms and shouted "back." When Caporaso had moved about three feet he somehow sensed Quinones' warning. He stopped the carrier, backed up, climbed down from the cab on the left, saw a crowd at the right front quadrant of the carrier and finally learned what had happened. (236-243; Ex. R 33, 357-368; Ex. R. 36, Quinones' Statement to Compliance Officer 3/10/78; cf. Ex. R 35, Quinones' Statement to Carpenter Safety Engineer, 3/9/78.) The next day Forgette died in the hospital as the result of his injuries.

Neither side offered evidence or argument to show that the accident was the result of lack of skill or due care on the part of Caporaso; and there is no basis for such a finding.

## II

## THE INSPECTION, THE CITATION THE NOTICE OF CONTEST, AND THE PROCEEDING BEFORE THE COMMISSION.

Following the accident Carpenter's plant was inspected by the Secretary, who issued to Carpenter a citation charging Carpenter

with violating the General Duty Clause of the Act, 29 U.S.C. §654(a)(1), in that Carpenter had failed to furnish to its employees a place of employment "free from recognized hazards that are causing or are likely to cause death or serious physical harm to [its] employees...." As set forth in the amended complaint, the gravamen of the alleged violation was that Carpenter regularly operated through plant areas to which many employees had access in the course of their duties and in walking to and from their duty stations large, straddle-type cargo carriers which were so configured that the driver could not see an average-sized pedestrian who was less than about eight feet from the right front wheel, with other lesser blind spots in the other quadrants; that the drivers were not guided by walking flagmen; and that no automatic alarm warned pedestrians of the carriers' forward motion. Carpenter duly contested the citation, whereupon this enforcement proceeding resulted.

## III

## THE REQUIREMENTS FOR A *PRIMA FACIE* CASE UNDER THE GENERAL DUTY CLAUSE

A *prima facie* case for complaint under the General Duty Clause comprises the following elements: (1) that a hazard existed which could cause serious physical harm to employees; (2) that the hazard was "preventable", i.e., could be abated by specific feasible measures as proved by the Secretary; and (3) that it was "recognized", either by the industry of which the employer was a member or by the

employer itself. National Realty & Const. Co., Inc. v. Brennan, 489 F.2d 1257, 1265-1268 (CA DC c 1973); Vy Lactos Laboratories, Inc. v. Brennan, 494 F.2d 460 (CA 8 1974); Usery v. Marginette Cement Mfg. Co., 568 F.2d 902, 909-910 (CA 2 1977).

IV

THE CONTENTIONS OF THE PARTIES

The Secretary's claim may be summarized as follows. Operating Hyster No. 5 and similar carriers in areas of Carpenter's plants to which many employees had access and in which they had occasion to walk in the course of their work days constituted a serious hazard. Carpenter had express notice of the hazard from in-plant accidents in 1966 (Bridgeport) and 1975 (Reading). The hazard was preventable by a variety of feasible measures, i.e. adding mirrors to improve the driver's forward vision and an automatic alarm to warn pedestrians of the carrier's forward motion; and using a walking flag man to direct the driver. Secretary's brief, p. 7.

Carpenter's position may be summarized as follows. (a) The Secretary failed to prove a prima facie case. (i) The Secretary failed to prove that the alleged hazard was recognized by that sector of heavy industry which, like Carpenter, uses straddle couriers for in-plant cargo transport. (ii) The Secretary failed to prove that Carpenter itself had notice of the alleged hazard. (A) The Secretary has not shown that the prior accidents were substantially similar to the instant accident. (B) At the time of the 1966 accident the plant was being operated by a different corporation; and the Secretary has shown no facts which would make

reasonable to attribute to Carpenter notice of the acts or omissions of the other corporation. (C) The 1966 accident provided no notice of a General Duty Clause violation since that clause introduced in 1970 a statutory liability theretofore nonexistent. (iii) The Secretary has not proved feasible means of abatement. Front mirrors are ineffective; a sound device to warn of forward motion would give no more notice than the noise of the machine itself; and the flag man system is not feasible, since it is not economic to operate a 30-ton straddle carrier at walking speed and technological problems would interfere with receipt by the carrier driver of signals directed to him from the ground. (b) By way of affirmative defense, Carpenter pleads that the hazard was not caused by any breach of duty by Carpenter, but by an unpredictable and therefore unpreventable failure by an employee to comply with Carpenter's safety rules: the employee danger which here resulted in Forgette's death was caused not by Carpenter's operation of the carrier in the plant environment as it did, i.e., with blind spots, without a flag man and without an automatic forward motion alarm, but by the circumstance that Forgette was four feet outside of the pedestrian walkway, thus giving rise to "the defense of unpreventable misconduct by an employee" (Carpenter's brief, pp. 9, 2, 7).

V

THE ENVIRONMENTAL FACTOR OF THE HAZARD. THE BACKGROUND. THE AREA WHICH PRODUCED THE TRAFFIC PATTERN OF WHICH THE SECRETARY COMPLAINS.

Carpenter's Bridgeport facility is a large plant which worked 840 people in three shifts. To deliver supplies to the production

machines and carry away product Carpenter, on March 9, 1978, when the violation is alleged to have occurred, operated a fleet of seven straddle carriers, three on the morning shift, three on the afternoon shift and two on the night shift, with aggregagate travel at an annual rate of about 64,000 miles. Since 1970, when the Occupational Safety and Health Act became a law, carriers in the Bridgeport plant were involved in near misses but no pedestrian accident until Forgette was run down. Hyster No. 5, the carrier involved, was one of the seven referred to above. The area which produced the traffic pattern of which the Secretary complains lies between two doors in the extreme southeast corner of Building 63, leading to the plant gates, and a locker room about 110 feet to the west, containing 153 lockers and sanitary facilities. Of the two doors, one is a vehicle door 13 feet 11 inches wide, and the other, immediately adjacent to it, is an ordinary pedestrian door. The Forgette accident occurred at a point about 20 feet west of the doors and about 10 feet north of the south wall of Building 63. (Ex. R 44). Building 63 is about 180 feet north and south by about 56 feet east and west, housing 16 "abrasive cut-off machines." Immediately to the west is Building 10, which has a north wall which is an almost smooth projection of the north wall of Building 63. Building 10 is divided from Building 63 by a wall which runs about 160 feet south from this north wall, leaving an open passageway, about 20 feet wide, to Building 63. But Building 10 runs about 50 feet east and west by at least 250 feet north and south. Hence along its east wall it projects at least 70 feet beyond the passageway.

Its north wall is described above; and its west wall, roughly parallel with its east, runs north and south at least 250 feet. It contains at least seven "gantry grinders." Adjoining Building 10 to the west is an area bounded on the north by a further projection of the north wall of Buildings 63 and 10, with an east wall and a west wall each roughly 250 feet long, and with a north wall and a south wall roughly 26 feet long. The northerly portion, about 190 feet wide, is called Building 50 and contains the so-called "combination mill" and various electrical installations; while the southerly portion, called Building 9, contains the 153 lockers and the sanitary equipment.[2] (Ex. R 4)

Some of the shifts turned at 6:30 a.m., 2:30 p.m. and 10:30 p.m. and some later; and at about 1:45 p.m. on March 9, 1978, when Forgette was run down, he was the only one walking through Building 63. (1114) But that circumstance is far from decisive. If the environment between the locker room and the doors was such that the operation of Hyster No. 5 was dangerous to pedestrians, there was a hazard whether or not anyone was actually hit. National Realty, Supra, at p. 1267. During the three shift breaks, 150 to 170 people a day went to the locker room, including many from outside Buildings 63 and 10 (1105-1106; 1112; 298); and in the area between the locker room and the doors there was "a lot of pedestrian traffic." (304)

## VI

## THE HAZARDOUS INSTRUMENT. DIMENSIONS OF THE CARRIER AND ITS BUILT-IN BLIND SPOT. ROUTINE, INTENDED OPERATION OF THE CARRIER WITHIN THE PLANT ENVIRONMENT CONSTITUTED HAZARD.

The Secretary's effort to prove the hazardous nature of the instrumentality -- the carrier's built-in blind spot which largely

hid walking workmen from the view of the driver of Hyster No. 5 in forward motion (see Caporeso's testimony discussed above) met with very serious difficulties. (415-466)

Proof of the operation of one dangerous carrier would suffice to prove hazard; the Secretary had proved danger due to the blind spot only in respect of Hyster No. 5; from the time of the pretrial conference, two months before the trial, the catalogue dimensions of the 1972 30,000 pound capacity Hyster carrier were in evidence (Ex. R 6) -- and that was the model year of Hyster No. 5 -- and so the Secretary gave Lyons, his expert, "the assignment to draw diagrams based upon the 1972 Hyster." (434) "Unfortunately" counsel "did not then go back to Mr. Lyons to see if he had the 1972 data." In fact, Lyons did not have the 1972 data; and unfortunately Lyons thought that the 1972 dimensions so far as significant were the same as those of the 1975 model year, which Lyons had obtained through his own efforts. But the Secretary remained steadfast to his theory of the hazard -- that it must be based on the blind area of Hyster No. 5. And so, when it first appeared that Lyons' diagrams, then Exs. C 37A id. and C 37B id., were based on the dimensions of the 1975 catalogue, and Lyons was giving assurances that there were no significant differences, counsel for the Secretary wished only for the chance to show that this was so, and gratefully accepted the opportunity to offer what he hoped would be the necessary proof.[3] Accordingly I gave the Secretary an adjournment of the trial to enable Lyons to study the two sets of dimensions.

After comparison Lyons conceded that there was a significant difference: that the assumed driver's height of eye was six inches lower on the 1975 model than on the 1972, making the blind spot dimensions in his diagrams larger than they should have been. But Lyons was now sure that he had the data from which he could correct the diagrams to show the blind spots on Hyster No. 5; and over Carpenter's objection I gave the Secretary a second adjournment to enable Lyons to make the computations.

Carpenter then objected that there was a further error due to the circumstance that Lyons' diagrams, especially what was then Ex. 37B id., showed the engine enclosure on the center line of the carrier with the driver's position slightly offset to the left whereas a photograph of Hyster No. 5 clearly showed that the engine was well offset to the left, with the driver's position even further offset in that direction. (Ex. R10) Despite the Secretary's concession that Lyons' location of the cab constituted "poetic liscence" (438) I refused to strike Lyons' testimony at that point, reserving to Carpenter, however, leave to move to strike after the cross-examination of Lyons. But this was not the end. After correcting the blind spot dimensions for the height-of-eye error, counsel for the Secretary asked whether "there is anything other than the position of the operator which would vary the dimensions which you have just given on these diagrams?" Whereupon Lyons answered

> There is a difference between the purchase order and the company material furnished. Some of the dimensions were different. (454)

At pages 455-456 the following ensued:

> The Court: Well, you have a purchase order issued by Carpenter Technology?
>
> The Witness: That is correct.
>
> The Court: And you have a catalogue dimension?
>
> The Witness: Right.
>
> The Court: By the vendor. Now what are the dimensions of the vehicle as it existed on March 9, 1978?
>
> The Witness: I can't answer that.
>
> The Court: Which of those two sets of dimensions?
>
> The Witness: I can't answer that. I never measured that.

At that point I reversed my ruling which had permitted Lyons to correct his dimensions based on calculations taking into consideration the difference between the assumed height of eye of the operator in the 1972 specifications as opposed to those for 1975; again over objection, I persuaded Carpenter to arrange to make Hyster No. 5 available for measurements by Lyons; and I granted a third adjournment to the Secretary to enable this to be done. (415-466)

The next day, based on this preparation, Lyons was able to give the following dimensions. Hyster No. 5 is 15 feet 11 inches long by 7 feet 9 inches wide. (Ex. R42). It has a deck 6 feet 9 inches high (486) and a driver's height of eye measured at 11 feet. (477; 487) Resting on the deck is an engine enclosure, and the cab (Exs. R8; R9; R38) which are well offset to the left (Exs. R42; R10).

The aggregate of these factors created two right triangles of driver non-vision ahead. In each triangle, the hypotenuse

would be a projection of the driver's line of sight. In the right front quadrant the line of sight would touch the front of the engine enclosure and run to the nearest visible point in the ground ahead. Measuring back from that point to the right angle, where a perpendicular touching the right front tire would have its base on the ground, the longer of the two sides adjacent to the right angle would have a length of 28 feet. The shorter side adjacent to the right angle -- the perpendicular -- would have an upper limit at the point where it intersects the line of sight, which projects on to become the hypotenuse. Moving a man 5 feet 8 inches tall forward within the triangle until the top of his head intersects the hypotenuse and begins to become visible to the driver, he would be 7 feet 9 inches forward of the right front wheel. In the left front quadrant the line of sight would run to the left of the engine enclosure touching the front of the deck and run to the nearest visible point in the ground ahead. Measuring back from that nearest point to the right angle, where a perpendicular touching the left front tire would have its base on the ground, the longer of the two sides adjacent to the right angle would have a length of 13 feet 11 inches. The shorter side adjacent to the right angle -- the perpendicular -- would have an upper limit at the point where it intersects the line of sight, which projects on to become the hypotenuse. Moving a man 5 feet 8 inches tall forward within the triangle until the top of his head intersects the hypotenuse and begins to become visible to the driver, he would be 2 feet 2 inches forward to the

left front wheel. In the other directions, the dimensions of the blind spots measured along the ground were as follows: with the operator looking out at an angle of 90 degrees from the fore-and-aft axis of the carrier, on the right, 6 feet 9 inches and on the left 2 feet; and looking aft, 5 feet 7 inches. (479; 480; 483; 490; Exs. R38; R42).

To be sure, Hyster No. 5 made a loud noise from its diesel engine and its massive chain drive; and to emphasize its visibility it was painted a bright yellow and on top of the cab it had a rotating red strobe light. But the near misses and the fatal accident occurred although Carpenter's well-trained drivers kept carrier speeds to five miles an hour or less in the buildings (299-303). Clearly, the operation of Hyster No. 5 in the plant on March 9, 1978, exposed employees to the hazard of serious physical injury or death.

## VII

## THE AFFIRMATIVE DEFENSE OF ISOLATED, UNPREDICTABLE OCCURRENCE DUE TO EMPLOYEE RULE VIOLATION WAS NOT MADE OUT.

Carpenter puts misplaced reliance on its affirmative defense to the effect that the cause of the accident was Forgette's isolated, unpredictable and therefore unpreventable failure to comply with a rule which required him, in walking toward the doors, to keep within the pedestrian walkway. The rule on which Carpenter relies, Ex. R3, contains no such requirement. The rule reminds employees of the longstanding requirement that in general they wear hard hats, safety glasses and safety shoes throughout the plant and warns that

this will be strictly enforced. In pertinent part the rule then provides:

> In order to better protect employees walking between the guardhouse and the locker rooms, white safety lanes have been painted showing the approved routes to the melt shop, anneal, billet prep, combination mill and blooming mill locker rooms. Employees walking in these safety lanes at change of shifts will not be required to wear safety equipment. Employees using other routes and not wearing safety protection will be subject to safety violations. (Emphasis added. For the full text of the quoted rule, see Footnote 4.)

Forgette was not on his way from the gate to his locker to pick up his safety equipment, nor was he homeward bound to the gate after putting aside his safety equipment. On the contrary, he had carried a small motor to the combination mill in Building 50 and was on his way back to his duty station. (1112-1113; 1241-1242). To show that the rule required Forgette to walk within the lane, the burden was on Carpenter to prove by way of affirmative defense that Forgette was moving to or from his locker, without his safety equipment. PBR, Inc. v. Secretary of Labor, ___F.2d___ (CA1 March 11, 1981, No. 80-1376, slip opinion, p. 8); Secretary v. B-G Management, Inc., 4 BNA 1282 (1976) and cases collected at page 1283; Secretary v. Jensen Const. Co., 6 BNA 1070, 1071 (1977). That burden Carpenter made no effort to meet. See 1659-1660 and Carpenter's proposed finding No. 317.

## VIII

## THE MEANS OF PREVENTION PROPOSED BY THE SECRETARY WERE NOT PROVED TO BE EFFECTIVE.

As indicated above, the Secretary sought to prove that the hazard of the carrier's forward motion was preventable by three separate measures: a front-vision mirror showing an area in the otherwise blind right front quadrant of Hyster No. 5 nearer to the carrier than the place where a man 5 feet 8 inches tall would come within the operator's unaided line of sight; a walking flag man to guide the driver; and a continuous alarm sounding automatically when the carrier moved ahead. None of these measures was shown to be feasible.

### A

There were vague statements by Lyons about the effects of forward vision mirrors on miscellaneous carriers, none of which was shown to be a 1972 model Hyster of 30,000 pounds capacity.[5] These were of little value since there was no proof as to the dimensions of the various carriers: no proof as to the respective blind spots without mirrors, and no proof as to the mirrors' effects, if any; indeed, no facts from which could be derived a method for relating those statements to the issue as to whether mirrors would render preventable the blind spot in the right front quadrant of Hyster No. 5. There was however a notable exception. As the result of driver pressure immediately following the Forgette incident Carpenter had installed a convex mirror over the right front corner of Hyster No. 5 (Exs. C4; R12); and with that fact as a basis Lyons was asked to give evidence about what the mirror showed the driver, which evidence, in its setting, was as follows.

Lyons had given the results of his actual measurements as to where the line of sight of the driver of Hyster No. 5 touched the ground (1) over the right front quadrant, (2) projected out to the right of the driver's position at 90 degrees from the fore-and-aft axis of the carrier, (3) to the rear, (4) projected to the left of the driver's position at 90 degrees, and (5) over the left front quadrant. Also, he had measured forward from the carrier to the nearest point on the ground where a man 5 feet 8 inches tall could be standing with the top of his head just breaking the driver's line of sight in the right front quadrant and then in the left front quadrant. Referring to Lyons' testimony as to the nearest points out at 90 degrees at which the driver's line of sight would touch the ground, Lyons was questioned as follows:

> The Court: These are ground dimensions?
>
> The Witness: Yes, sir.
>
> The Court: Did you make any measurements to show at what point a man would become visible?
>
> The Witness: No, sir. Mainly, -- may I answer?
>
> The Court: Well, you say no. This is your answer.
>
> [By Mr. Yetman]
>
> Q. Mr. Lyons, may I ask why?
>
> A. Mainly because I thought my assignment was restricted to what was shown on the diagram, and [on] the diagram I only show the person forward of the vehicle.
>
> (483-484)

* * *

The Court: When the driver is looking down into the mirror from the normal driving position, what does the mirror show him, if you know? (492)

* * *

A [Lyons]: Yes, sir. On the vehicle from the driver's position it gave a view of the right front wheel going vertically down from the mirror itself, limited in scope approximately about a foot and a half to a two foot view at the ground.

The Court: When you say, a foot and a half view at the ground, do you mean to convey by that a foot forward of the forward edge of the wheel?

The Witness: Yes, sir. (493-494)

Somewhat later, on cross-examination Lyons testified further on the point as follows:

Q. Now, the mirror that you talked about being installed on the right front corner of the Hyster vehicle, if it was properly aligned it would show the driver an area from one to two feet in front of the right front tire, is that correct?

A. That was a dimension that I mentioned, sir.

Q. Well, is that correct?

A. Yes.

Q. Is that right?

A. It can be adjusted that way.

Q. Is that the maximum distance that the mirror can be adjusted for a driver to see the area, the right front area of the right front wheel?

A. No. It could be adjusted, the mirror that I saw in that vehicle yesterday could have been adjusted to give a greater field of vision to the driver in the front of the vehicle.

Q. Could you tell me based upon your examination of the vehicle what the dimensions would be?

A. Sir, that wasn't included, as I didn't want to veer from our instructions from the Court which was only to take measurements of the truck.

Q. Your answer is that you can't tell me, then, is that correct?

A. Sir, I think you are being unfair.

The Court: Just a minute, gentlemen. I don't want you to get into a debate. Now, is there a question before the witness?

(The reporter read the previous question.)

The Court: Next question.

Mr. Cooney: Your Honor, Mr. Lyons was permitted on direct examination to testify at some length about the mirrors and what they would show and what they wouldn't show, the front view mirror and the mirror that he saw on the vehicle and the other mirror that he described. I am asking him whether he could tell me what the maximum distance or range would be for that mirror on that vehicle.

The Court: Well --

Mr. Cooney: I am entitled to have an answer to it.

The Court: Did you tell us a moment ago, Mr. Lyons, that you did not investigate this question when you went to the plant yesterday because you understood that you were under instructions from me to simply take measurements in order to correct a situation which I mentioned during the trial?

The Witness: Yes, sir. (568-570)

A little later in the cross-examination counsel referred back to Lyons' opinion that the mirror on Hyster No. 5 could be adjusted to give greater forward vision than the one and a half to two feet which Lyons had estimated from the position in which he had seen the mirror. Mr. Cooney's question was "what the slightly increased range of visibility would be for that mirror if it was aligned in the way you indicated", to which Lyons answered:

> "Conservatively I think you could possibly get in front of the wheel a horizontal distance of about four or five feet." (572-573)

But what was to come out before the cross-examination was over showed that Lyons' most important testimony, admittedly incorrect, was of little help in determining the issue as to the value of the mirror in establishing that the hazard was preventable. Lyons had not refrained from measuring the area shown by the mirror: on the contrary, he admitted that he measured and found its depth to be only 6 inches from the front of the right front tire. (626-627; Ex. 38) And as to his attempted explanation that he had refrained from making the measurement because of his understanding of my instructions, his admission was as follows:

By Mr. Cooney

> ...when I asked you earlier on cross-examination you told me that you did not take measurements concerning the distances in relation to the mirror and yourself and the driver because that was beyond the scope of his Honor's instructions, is that correct?

A. That is correct.

Q. So when you said that, your answer was not correct?

A. Well, I agree with you, sir.

With respect to Lyons' testimony several considerations seem clear. Although I gave no such instructions (see 466-472), I see no reason to disbelieve him when he first said that he thought that they limited him in the measurements he might make. He had made no claim that side view mirrors would show the Hyster No. 5 hazard to be preventable, hence no side measurement would endanger his theory; and there is no evidence that he actually made side measurements to show where the hypothetical man would come into view. But the effect on forward vision was the crux of his position on mirrors.

His measurement would destroy his theory and he wanted to keep it out of the record: instead, he wanted the evidence as to the mirror's effect to be limited to his approximations, i.e., the one given to me that as it was angled on December 4, 1978, the mirror would project the driver's vision out up to two feet from the right front wheel, and the one given to Mr. Cooney, that as the mirror could be adjusted for optimum effect, the projection would be up to five feet. In order to bring that about he made two untrue statements: that according to his knowledge the mirror gave a view forward of the right front wheel extending about a foot and a half to two feet (492-493); and that he made no measurement of the area of view afforded of the mirror. Indeed, the last mentioned misstatement was made twice: the first time at 569 when, as quoted above, he explained that he couldn't give the distance revealed by the mirror because "that wasn't included and I didn't want to veer from our instructions of the Court which was only to take measurements of the truck", and the second time at 569-570 when Mr. Cooney was demanding a further answer to the question whether Lyons could tell him what the distance asked was that was revealed

by the mirror -- "I am asking him whether he could tell me what the maximum distance or range would be for that mirror on that vehicle." At that point, again as quoted above, my question and Lyons' answer were as follows:

> The Court: Did you tell us a moment ago, Mr. Lyons, that you did not investigate this question when you went to the plant yesterday because you understood you were under instructions from me simply to make measurements in order to correct a situation which I had mentioned at the trial?
>
> The Witness: Yes, sir.

In cases heard by a trial judge in which the evidence of an expert witness runs into difficulty in gaining acceptance it is often because he has failed to demonstrate that his opinion is the one which is entitled to be projected from a hypothetical question based on the facts of record or directly from the facts themselves. Rules of Evidence, 702. But the expert may also give his opinion without disclosure of his facts or data prior to cross-examination, id., 705. Here the opinion is challenged on cross-examination by an attack on the veracity of the expert in reporting the factual data; and upon that attack it seems clear that the problems arise not from momentary confusion, which a witness may spontaneously recognize, and explain, but from a repeated attempt to shore up unprepared testimony at the expense of the facts.

Finally, in the earlier portion of his evidence Lyons' claim that a front view mirror would prevent the exposure of Carpenter employees to the hazard of operating Hyster No. 5 in the plant is solidly refuted by the testimony of Caporaso, who was driving

the carrier when it struck Forgette and who was familiar with the front view mirror installed, and of Compliance Officer Foley, who, the day after the accident, climbed into the seat in the cab of Hyster No. 5 to determine what the driver could see in the mirror. Thus Caporaso testified as follows.

> The Court: Tell us what the mirror shows.
>
> The Witness: The immediate area in front of the carrier. The right front tire and part of the load is visible, depending on the way, you know, the individual driver will angle the mirror.
>
> The Court: Well, with the mirror in place, would it be possible actually to see the surface of the tire itself?
>
> The Witness: Yes, sir.
>
> * * *
>
> [By Mr. Cooney]
>
> Based upon my conversation at the Carpenter Technology plant about this accident, didn't you tell me that the mirror located where it was located on Hyster No. 5 on March 10, I guess, or after the accident, would not in your view have prevented this accident?
>
> A: In my view it wouldn't have.
>
> (278-279)

In more general terms, Caporaso testified as follows when I recalled him as a witness at the close of the trial.

> Mr. Caporaso, you were a regular Straddle Truck Driver on March 9, 1978?
>
> The Witness: Yes, I am.
>
> The Court: Okay. Have you been a regular Straddle Truck Driver ever since?

The Witness: Yes, sir.

The Court: I see. Now, immediately after the accident, was a mirror placed on each of the Staaddle Carriers?

The Witness: Yes, there was.

The Court: Okay. Are they on there now?

The Witness: Yes.

The Court: Okay. Now, I want you to compare the operation of a Straddle Carrier prior to the installation of the mirrors, with the operation of a Straddle Carrier after the installation of a mirror, and tell us the difference?

Mr. Cooney: For the record, your Honor, I'm going to object to the Court asking this witness questions for the reasons I stated earlier.

The Court: Yes. Your objection is noted and overruled.

Mr. Cooney: Thank you.

The Witness: Well, the operation, to my estimate is basically, the same with them on or with them off. Primarily, the mirror, to the way the drivers and myself feel, it gives us a better visibility of the right front, but it seems to be, primarily in that area for the lesser wear and tear on the equipment itself, as we are negotiating a turn over the load we can judge or help to aid us, it can judge or help aid us in negotiating better our lefthand turns and cutting down the effect of the tire hitting a load and ripping the tire. Now as far as the visibility effect on the front, directly down, there is visibility there now that we never had before as to the immediate area in front of the tire on that right fron[t] side.

The Court: And just expound, if you will, on the effect of the mirror or the changes created by the mirror with respect to a pedestrian in front of the righthand corner of the vehicle?

The Witness: Depending upon the way the mirror is angled by each individual driver, and depending upon how much an area is visible, either directly in front of the right tire, in front of the right center of the Carrier -- excuse me, the left center of the Carrier and also the right corner of the tire -- In other words, you can have a larger area, depending upon the way you angle the mirrors as to the area you have in front of the machine itself, and it is also, basically, individual preference. Some of the drivers have asked to have the poles, the extent as to which the mirrors are attached, bend further forward to give a different depth to the individual driver and the other drivers don't want them moved and have them back in just about a 90 degree position.

The Court: Well, I don't think you have quite answered my question. Now, I would like to have you comment, if you will, as to any difference which you have observed with respect to the visibility of the driver of the pedestrian in the righthand forward quadrant of the vehicle when it is proceeding forward?

The Witness: I don't think it does aid you, does help you in that area.

(1661-1663)

Referring to Schuler, Carpenter's Safety Manager, who assisted Foley in seeking to determine the effect of the mirror, Foley testified as follows:

The Court: Before we leave this subject of the mirror, may I just interrupt for a few moments. I want to ask one or two questions. You got up into the driver's seat of this vehicle?

The Witness: Yes, your Honor.

The Court: Did you look in that mirror?

The Witness: Yes, your Honor.

The Court: All right. Now, do you recall what you saw in that mirror?

The Witness: I could see Mr. Schuler because he was in front of it for me. I asked him to stand in front of the wheel for me.

The Court: Do you know how far in front of the wheel he was when you could see him?

The Witness: He was right next to the wheel, your Honor.

The Court: He was right next to it?

The Witness: Right. Right next to the wheel.

[By Mr. Cooney]

Q: Is it true, Mr. Foley, except for showing the area directly in front of the right front wheel it does not show any area in front of the straddle carrier?

A: Correct, the way the mirror was positioned. That is correct.

(162-163)

Upon all of the proof I cannot find that the Secretary proved that the hazard of operating Hyster No. 5 in the Carpenter plant on March 9, 1978, was preventable. I turn, then, to the Secretary's claims that it was preventable by the use of a flag man, or through the operation of an automatic alarm.

B

The Secretary's case that the hazard was preventable through the use of a flag man and an automatic forward motion alarm was put in through Lyons.

As to the flag man his proposal was in two parts. According to Lyons, at the points where a carrier delivers stock and/or picks up product, the driver acts under the direction of a "stocker". These are the points of pedestrian traffic concentration and hence of carrier hazard. On reaching these areas the carrier driver can put himself under the control of the stocker, who, via two-way radio, would talk him in and talk him out. (537) Elsewhere the driver could be guided by a walking flag man either via two-way radio or through hand signals or by flashlight. The flag man could be stationed to one side of the carrier, about four to six feet ahead of the point where the head of a man 5 feet 8 inches tall would break the line of sight of the driver. (538; 610-611) As examples of the flag-man operation, Lyons cited the man who had to walk with a lantern ahead of the early automobile to avoid the horses being scared by its approach, the "crane follower", and the "placer" who would guide the driver backing up to unload at a construction site. (537-538)

With respect to a forward motion alarm Lyons likewise had two suggestions. The first was a device attached to one of the carrier's wheel hubs, arranged so that notches in a ring attached to the hub would cause a hammer to strike a gong, with a centrifugal governor which would hold the hammer away from the gong as long as a selected rate of speed was maintained. Under Lyons' second suggestion, the

hammer would be driven by an electric motor, with optional wiring which would prevent the carrier from moving forward until the gong circuit was closed, and which could provide an override by which the driver might turn off the alarm (538-541).

There was little attempt by Lyons to relate these suggestions to the actual conditions which resulted from the operation of Hyster No. 5 in the Building 63 -- Building 10 -- Building 9 -- Building 50 area between the doors and the locker room. There was no report by Lyons on the size, shape, contents, personnel and traffic patterns within the buildings and no studies as to what kind of flag man system and what kind of forward motion alarm were needed and would bring about what results -- nothing to indicate whether and to what extent Lyons had informed himself on these points as a basis for his opinions. He was never commissioned to do these studies; he never got inside the plant; he was never given the catalogue dimensions of the 1972 30,000 pound carrier or any other pertinent information. (610; 623-625; 657-658) He never measured or photographed the six carriers which he studied in preparation for his testimony, material which could be highly relevant to his opinion as to the need for and the feasibility of a flag man system. He never showed whether within the Carpenter plant there was any such person as a "stocker", with functions such as Lyons attributed to him. He never showed where a flag man could be stationed so that, despite the mammoth blind areas of Hyster No. 5 he could simultaneously see pedestrians in time to give effective warning to the driver and be able to

make flashlight or hand signals which the driver could see and read. He never reported on any facility where a flag man system was in operation except for several small boatyards which used carriers on "a back and forth operation on a track or runway" (561) which boatyards, as above shown, almost certainly used Travelifts, which have an entirely different design and are completely dissimilar in the features which limit the operator's ability to see pedestrians and to see signals from a flag man, which yards worked four or five men each, as contrasted with the group of 150 to 170 workers which daily traversed the Carpenter area here under consideration.

The problem of relating Lyons' general suggestion with respect to the audible forward motion alarm to actual conditions in the Carpenter plant was at least equally difficult and as completely unsolved. The engine sounds of Hyster No. 5 seemed not to warn Forgette, a few feet away, as it went through its most noisy phase -- picking up cargo (239-242; 263; 1580); and when the loading operation was completed and the carrier was moving forward at a crawl, Caporaso could not hear Quinones shouting to him at the top of his lungs. On the other hand Lyons recognized that it was important not to make the alarm so loud that it would distract the driver. (540) But he made no tests to measure the ambient noise over which an effective horn or gong would have to be heard, or the intensity and pitch of a signal which would warn pedestrians but leave the driver able to operate safely.

Lyons' position was directly disputed by Carpenter's witnesses, Houser and Dunham. (1581-1582; 1501; 1503-1506) Houser is a Lehigh B.S. in Mechanical Engineering, a safety engineer licensed by the State of California, and a past Chairman of the General Safety Committee of the American Iron & Steel Institute. He is coordinator of safety at all Carpenter plants; he visits the Bridgeport facility at least once a month; and he personally took part in the investigation of the Forgette accident. (1566-1581) Dunham has been an engineer licensed by the State of Pennsylvania since 1948. He is a certified safety professional and an independent safety consultant who spends about 25 percent of his time on problems related to material handling. (1477-1484) Engaged by Carpenter to testify in this case, he studied the area of the accident and Hyster No. 5. (1485-1491; 1495; 1500-1501) Based on their better opportunity for studying the facts, I could refuse to find that the Secretary has proved by a fair preponderance of the evidence that the hazard was preventable, despite the circumstance that I rejected their view that the operation of Hyster No. 5 on March 9, 1978, created no hazard. But the real issue here is different. The threshold question is whether Lyons' evidence met the Secretary's burden to prove "the feasibility and likely utility of particular measures" -- "to specify the particular steps a cited employer should have taken to avoid citation, and to demonstrate the feasibility and likely utility of these measures." National Realty, supra, 489 F.2d pp. 1267, 1268. To meet that requirement something more was required than

putting Lyons on the stand and having him testify that in general, safety conditions attendant upon operating a carrier in a steel mill would be improved if a flag man system was implemented and an automatic forward motion alarm were added.[6] Since the Secretary failed to fulfill the requirement that he prove the particular steps pertaining to driver guidance by a flag man or "stocker" and pertaining to an automatic forward motion alarm, which Carpenter could have taken to avoid citation, I find against the Secretary on those points.

IX

Since I do not find the hazard preventable, I do not reach the issue as to whether the hazard was recognized, the point found dispositive by Judge Carlson in Secretary of Labor v. Lytton Systems, Inc., No. 76-900 (April 4, 1977; review directed May 4, 1977).

Accordingly the citation is vacated and the amended complaint is dismissed with prejudice.

Robert P. Weil
ROBERT P. WEIL
Judge, OSHRC

Dated: April 23, 1981
Boston, Massachuetts

## NOTES

1. See pretrial order, November 17, 1978, ¶ 1.3.

2. Thus Buildings 9 and 50, like Buildings 10 and 63, are roughly rectangular.

3. The following occurred at 415-416:

> Mr. Cooney: Well you Honor, I am going to object unless he is using that data sheet. I think a proper foundation has to be laid to show that the data sheet is the same as the 1972 Hyster model that is involved in this incident.
>
> The Court: I think you are absolutely correct.
>
> Mr. Yetman: If only I had a chance to do that.
>
> Mr. Cooney: I think he would like a chance to do that.
>
> The Court: I think now is your chance.
>
> Mr. Cooney: Thank you. Now is your chance.
>
> Mr. Yetman: Thank you, Mr. Cooney.

4. The full text of the rule is as follows.

> The Carpenter Steel Division has long since adopted a safety program whereby all employees shall wear safety glasses, hard hats and safety shoes. Over the past several months many employees have neglected to wear the mandatory personnel safety equipment. Effective July 15, 1974, all employees are hereby given notice that the safety program will be strictly enforced. Violators will be subject to the normal disciplinary procedure.
>
> In order to better protect employees walking between the guardhouse and the locker rooms, white safety lanes have been painted showing the approved routes to the melt shop, anneal, billet prep, combination mill and blooming mill locker rooms. Employees walking in these safety lanes at change of shifts will not be required to wear safety equipment. Employees using other routes and not wearing safety protection will be subject to safety violations.

> As you know, the company is required by the Occupational Safety and Health Act to enforce a safety program including safety glasses, hard hats and safety shoes.
>
> We ask your cooperation in this program to reduce serious injuries.

5. Lyons "was educated as a textile chemist in colors and dies [sic] at Lowell Textile Institute"; and in addition he took miscellaneous engineering and safety courses; but he holds no degree from any recognized college and no engineering or design degree. (407-408; 546) At the time of the trial he was Manager of the Safety Engineering Department of Gillette, which operated no straddle carriers (398; 546) Lyons' employment in a steel mill which operated straddle carriers was at Youngstown Sheet & Tube, 1952-1958. He described his work at Youngstown as "supervisor of methods in the handling of straddle carriers and the design and development and use of various types of carriers..." (502); but this broad spectrum of responsibilities lasted less than a year. To be sure, Youngstown brought in three 10,000-pound capacity Clark carriers which were modified with mirrors and two-way radios to meet unstated conditions, with unstated results. But after a trial period of eight or nine months the carriers were discarded in favor of trailers. (405; 547) Since Lyons' connection with Youngstown he has never seen a Clark carrier with a front view mirror. (549-550)

After the completion of his work for Youngstown on carriers (503), while Youngstown was on strike in 1953, Lyons worked on carrier safety for Timkin Roller Bearing, which operated five or six carriers which were accidentally hitting stationary objects. Lyons' group studied "the use of lights, mirrors, audible devices, and shields, and the general plant layout and the area of travel of these vehicles", seeking to "develop corrective action that could be used in the operation of vehicles to eliminate incidents of damage to the property of others and to vehicles, to pedestrians, and to other motor vehicles." But Lyons did not remember the make or makes of the Timkin carriers and he did not specify the dimensions of any blind spots or the characteristics of the environment. (502-505; 554-555)

Lyons testified to three random incidents from which he claimed to have gleaned information relevant herein. Despite his evidence that Youngstown's carrier equipment was made by Clark, Lyons testified that in 1953 he saw at the Youngstown plant a Hyster equipped with three front view mirrors. (640-641) While on a fishing trip to Maine during the period 1970-1975, Lyons saw a lumber company carrier equipped with two-way radio. And in 1976, near Mason, Ohio, he saw a carrier equipped with two or three front view mirrors and with a radio which might have been two way. At first he testified that the latter two carriers were Hysters; but upon being pressed he could not be sure. (642-646)

(5 continued)

To prepare himself to testify in this case Lyons looked at six carriers but he was not really sure that any were Hysters. At first he identified as Hysters one with no mirrors and no radio in a small North Shore boatyard (550-551) and two, inert, in the junk pile of a Maine lumber camp. But he admitted that he wasn't really sure about the make of the two in the junk pile (621-623); and he gave testimony which at three points was inconsistent with the North Shore boatyard carrier being a Hyster. After identifying carriers which he looked at in a boatyard in Plymouth and in two boatyards in Duxbury as Travelifts (553; 556; 559), he testified that prior to measuring Hyster No. 5, the only carriers which he looked at were four Travelifts (564); that prior to Hyster No. 5 the only Hysters he saw during such preparation were the two in the junk pile (621-622); and that for the purposes of his preparation he couldn't locate a single operational Hyster. (623) The layout of a Travelift is entirely different from that of Hyster No. 5, giving rise to completely dissimilar problems of operator vision which Lyons made no attempt to reconcile. (560-562; 564-568; 584-604. Note Ex. R37A, at page 2 of Ex. R37 id., marked as part of Carpenter's offer of proof, 602-604)

6. "Opinion evidence without any support in the demonstration and physical facts, is not substantial evidence. Opinion evidence is only as good as the facts upon which it is based." State of Washington v. United States, 214 F.2d 33, 43 (CA 9 1954)

Even where such opinions are entitled to some weight, they have "no such conclusive force that there is error of law in refusing to follow them." Sartor v. Arkansas Gas Corp., 321 U.S. 620, 627 (1944). The Court continued:

> "* * This is true of opinion evidence generally, whether addressed to a jury or to a judge or to a statutory board." Dayton Power & Light Co. v. Public Utilities Commission, 292 U.S. 290, 299. Cf. Halliday v. United States, 315 U.S. 94, 97; Forsyth v. Doolittle, 120 U.S. 73, 77; McGowan v. American Pressed Tan Bark Co., 121 U.S. 575, 609; Quock Ting v. United States, 140 U.S. 417, 420; Head v. Hargrave, 105 U.S. 45, 50; Union Insurance Co. v. Smith, 124 U.S. 405, 423. The rule has been stated "that if the court admits the testimony, then it is for the jury to decide whether any, and if any what, weight is to be given to the testimony." Spring Co. v. Edgar, 99 U.S. 645, 658. "...the jury, even if such testimony be uncontradicted, may exercise their independent judgment." The Conqueror, 166 U.S. 110, 131. (id., 627-628)

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

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UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

December 23, 1982

**IN REFERENCE TO SECRETARY OF LABOR v.**

SOUTHWEST FOREST INDUSTRIES

**OSHRC DOCKET NO.** 78-3976

**NOTICE IS HEREBY GIVEN TO THE FOLLOWING:**

**OF** COMMISSION DECISION AND REMAND

**To wit:** See attached.

**FOR THE SECRETARY OF LABOR**

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-

**FOR THE COMMISSION**

Ray H. Darling, Jr.

**RAY H. DARLING, JR.**
**EXECUTIVE SECRETARY**

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Judge, OSHRC
Federal Building, Room 7B11
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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>SOUTHWEST FOREST INDUSTRIES INC.,<br><br>Respondent. | OSHRC Docket No. 78-3976 |

ORDER OF REMAND

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

On December 17, 1982, the Commission issued its decision in Sun Ship, Inc., OSHRC Docket No. 16118. In accordance with the decision of the U.S. Supreme Court in American Textile Manufacturing Institute, Inc. v. Donovan, 101 S.Ct. 2478 (1981) ("ATMI"), the Commission held that "feasible" under the occupational noise standard means achievable. The Commission overruled the cost-benefit test of feasibility previously set forth in Continental Can Co., 76 OSAHRC 109/A2, 4 BNA OSHC 1541, 1976-77 CCH OSHD ¶ 21,009 (No. 3973, 1976), appeal withdrawn, No. 76-3229 (9th Cir. Apr. 26, 1977), and substituted a test consistent with ATMI.

In view of this intervening change in law, the judge's decision with respect to the alleged violation of section 1910.95(b)(1) is vacated. The case is remanded for further proceedings, including evidentiary submissions, so that the interrelated issues of technological and economic feasibility can be reconsidered in light of the test of feasibility established by Sun Ship, Inc.[1/]

SO ORDERED

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: DEC 23 1982

---

1/ Chairman Rowland dissents. He would not remand the case for further proceedings. Consistent with his dissenting opinion in Sun Ship, he concludes that the requirement in section 1910.95(b)(1) that feasible administrative or engineering controls be utilized is invalid.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>SOUTHWEST FOREST INDUSTRIES, INC.,<br>Respondent. | OSHRC DOCKET NO. 78-3976 |

## DECISION AND ORDER

Appearances:

Allen L. Prince, Douglas N. White, and Gail M. Dickenson, Esquires, of Dallas, Texas, for the complainant.

Douglas B. M. Ehlke, Esq., of Federal Way, Washington, for the respondent.

## STATEMENT OF THE CASE

BLYTHE, Judge:

This is a noise exposure case in which the Secretary of Labor ("the Secretary") alleges that the respondent, Southwest Forest Industries, Inc. ("Southwest") violated §5(a)(2)[1] of the Act and health standards codified at 29

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[1] The Occupational Safety and Health Act of 1970, 29 U.S.C. §651, et seq.

CFR 1910.95(a) and (b)(1)[2] by exposing employees to sound levels exceeding permissible limits and failing to use feasible administrative or engineering controls to reduce exposure of employees to excessive sound levels.

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[2] The cited standards provide:

29 CFR 1910.95(a):

Protection against the effects of noise exposure shall be provided when the sound levels exceed those shown in Table G-16 when measured on the A scale of a standard sound level meter at slow response. When noise levels are determined by octave band analysis, the equivalent A-weighted sound level may be determined as follows: [Graph, Fig. G-9, not reproduced.]

Table G-16—Permissible Noise Exposures[1]

| Duration per day, hours | Sound level dBA slow response |
|---|---|
| 8 | 90 |
| 6 | 92 |
| 4 | 95 |
| 3 | 97 |
| 2 | 100 |
| 1 1/2 | 102 |
| 1 | 105 |
| 1/2 | 110 |
| 1/4 or less | 115 |

[1] When the daily noise exposure is composed of two or more periods of noise exposure of different levels, their combined effect should be considered, rather than the individual effect of each. If the sum of the following fractions: $C_1/T_1 + C_2/T_2 \ldots C_n/T_n$ exceeds unity, then, the mixed exposure should be considered to exceed the limit value. $C_n$ indicates the total time of exposure at a specified noise level, and $T_n$ indicates the total time of exposure permitted at that level.

29 CFR 1910.95(b)(1):

When employees are subjected to sound exceeding those listed in Table G-16, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table. Exposure to impulsive or impact noise should not exceed 140 dB peak sound pressure level.

One "serious" citation was issued to Southwest August 11, 1978, as the result of an inspection July 13-27, 1978, of its corrugated box factory at El Paso, Texas, by an industrial hygienist of the Occupational Safety and Health Administration (OSHA). Southwest gave timely notice of contest on August 25, 1978, and thereafter a complaint and answer were filed with the Occupational Safety and Health Review Commission ("the Commission") pursuant to §10 of the Act.

After six days of hearings at El Paso May 1-4, 1979, and May 24 and 25, 1979, the parties submitted post-hearing briefs[2a]. Southwest also submitted proposed findings of fact and conclusions of law. No affected employee or authorized employee representative participated in this proceeding.

Southwest's 10-page answer denied all allegations of the complaint except those alleging that it is engaged in a business affecting commerce and has employees within the meaning of §3(5) of the Act. It also raised numerous defenses, including: (1) The Act unconstitutionally delegates

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[2a] By motion dated October 15, 1979, Southwest requested leave to file a reply brief, which was submitted with the motion. The grounds of the motion are alleged "misstatements of fact and omissions of material fact" in the Secretary's post-hearing brief. The Commission's rules do not provide for reply briefs. In this case the parties were informed by letter dated July 11, 1979, that "[r]eply briefs are not favored, but, if one side briefs a point not covered in the other's brief, the latter may petition to file a reply brief, stating the reasons for not covering the point in the original brief." The original time for filing briefs was extended to August 25, 1979. If Southwest's motion were to be granted, the Secretary in all fairness should be given an opportunity for replication. This would unduly delay the issuance of the decision. Also, Southwest has given no compelling reason for filing its reply brief, which in any event is largely a repetition of its post-hearing brief. Therefore, leave to file the reply brief is denied.

legislative and judicial powers to the Secretary, OSHA and the Commission to promulgate, publish and enforce standards of criminal and other conduct contrary to Articles I and III of the Constitution; (2) the Act is unconstitutional in that it discriminates against employers by subjecting them, but not their employees, to penalties and the expenses associated with enforcement proceedings; (3) the Act, as it is enforced, is unconstitutional, offending in particular Articles I and III and amendments 5, 6 and 14 thereof; (4) the Secretary acted arbitrarily, without reasonable basis, without authority and contrary to §6 of the Act, and without proper notice in the promulgation of the noise standards here involved; (5) the noise standards are unconstitutionally vague, ambiguous, unreasonable, arbitrary and capricious, and their enforcement would deprive Southwest of property without due process of law; (6) the noise standards are unequally enforced, depriving Southwest of the equal protection of the law; (7) the noise standards are neither national consensus nor established federal standards under §3(10) of the Act and were promulgated contrary to the §6(b) of the Act and the Administrative Procedures Act, 5 U.S.C. Ch. 5; (8) the inspection here involved was invalid (a) under the Act, (b) as a denial of due process, and (c) as an unreasonable search and seizure; (9) the complaint is inconsistent with and illegally amends the citation and is without statutory basis or authority; (10) the citation should be vacated for lack of particularity under §9(a) of the Act; and (11) the Secretary has not provided respondent with a resonable, tested, proper, practical or economically feasible solution or means to correct the alleged violative condition.

Southwest's brief concedes that the Commission cannot decide the issues pertaining to the constitutionality of the Act.[3] Many of the other defenses raised by the answer are not argued in Southwest's brief, but it requests rulings on "all litigated issues."[4] Not only would this make for an inordinately long decision, but it is unnecessary in view of the disposition to be made in this case. See Weyerhaeuser Co., 77 OSAHRC 44/D6, 5 BNA OSHC 1275, 1977-78 CCH OSHD ¶21,716 (No. 11869, 1977), where the attorney here representing Southwest made a similar request, with the same result.

The basic issues to be decided are whether Southwest violated §5(a)(2) of the Act and the standards codified at 29 CFR 1910 §§95(a) and 95(b)(1). In the process, it will be necessary to touch on some of the issues raised by Southwest.

## DISCUSSION AND OPINION

### Background

The existence of a noise problem in the corrugated box manufacturing industry is rather well known[5], though only three such cases, two involving

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[3] Sugar Cane Growers Cooperative of Florida, 76 OSAHRC 162/E4, 4 BNA OSHC 1320, 1976-77 CCH OSHD ¶20,795 (No. 7673, 1976).

[4] Southwest was allowed to make a full record on all issues, even though some of them have been decided by the Commission in other cases; it has the right to attempt to convince the Commission to reverse itself, or, failing that, to appeal to the courts.

[5] See p. 1 of Exhibit R-39, a report on a study commissioned by the Fibre Box Association and manufacturers of corrugator machinery.

Weyerhaeuser Co.[6] and one involving Love Box Co.[7], have resulted in Commission decisions. None of these cases, which will be discussed later, resulted in the affirmance of a noise citation.

Corrugators have several components in linear arrangement which corrugate paperboard and adhere to it on both sides sheets of paper to form corrugated cardboard from which shipping containers are made. Auxiliary machines cut, fold and imprint the procduct in a variety of sizes and shapes to meet customers' specifications, as well as salvaging waste materials. All of this is an integrated and complex operation. The plant here involved is typical except that the machines are old, were made by several manufacturers, and require more manual adjustments than their more modern counterparts.

The corrugator has a "wet" end, in which steam, starch and glue are used, and a "dry" end in which conveyors carry the product over hotplates for drying and past trimmers and knives which cut it to desired dimensions..

The "wet" end starts with two machines called single-facers which corrugate the paperboard and use starch to affix a facing on one side. Then comes a double-backer which sticks paper to the other side. These machines

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6 Weyerhaeuser Co. (Westbrook, Maine), 74 OSAHRC 57/F4, 2 BNA OSHC 1152, 1974-75 CCH OSHD ¶18,468 (Nos. 2116 and 2250, 1974); Weyerhaeuser Co. (Honolulu), 77 OSAHRC 44/D6, 5 BNA OSHC 1275, 1977-78 CCH OSHD ¶21,716 (No. 11869, 1977).

7 Love Box Co., 76 OSAHRC 45/D5, 4 BNA OSHC 1138, 1975-76 CCH OSHD ¶20,588 (No. 6286, 1975).

are connected overhead by a "bridge" on which product may accumulate to facilitate coordination of the various components.

The corrugating mechanism in the single-facers are "flutes", which are counter-rotating fluted rolls with a pressure roll to keep the desired tension on the product. These flutes and pressure rolls are the major sources of noise in the plant.

Southwest's El Paso plant was installed in a building constructed as a warehouse, with the corrugator machines arranged parallel to and about 6 feet from an exterior wall. These machines are operated, or controlled, from the other side, which has a passageway about 15 feet wide bounded by concrete block rooms for steam generation, glue and starch preparation, and salvage machines known as a "hogger" and a baler. At the time of the inspection, however, the hogger and baler were not in a separate room but were near the dry end of the corrugator.

Southwest is an integrated forest products company with approximately 6,500 employees and 1978 gross sales of approximately $600 million (Tr. 4). It has other corrugated box plants, but its relative size in the industry was not established.[8]

The validity of the noise standards.

Southwest has attacked the validity of the noise standards on several grounds, listed above. These contentions all are answered by Commission

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[8] Weyerhaeuser, with 31 corrugated box plants, is the industry's largest (Tr. 753).

decisions which are binding precedent as far as the Commission's judges are concerned. Grossman Steel and Aluminum Corp., 76 OSAHRC 54/D9, 4 BNA OSHC 1185, 1975-76 CCH OSHD ¶20,691 (No. 12775, 1975).

The noise standard was held not to be unenforceably vague in Turner Co., Div. of Olin Corp., 76 OSAHRC 108/A2, 4 BNA OSHC 1554, 1976-77 CCH OSHD ¶21,023 (No. 3635, 1976), rev'd on other grounds, 561 F.2d 82 (7th Cir., 1977); Castle & Cooke Foods, a Div. of Castle & Cooke, Inc., 77 OSAHRC 87/A2, 5 BNA OSHC 1435, 1977-78 CCH OSHD ¶21,854 (No. 10925, 1977); Weyerhaeuser Co. (Honolulu), supra, 1976-77 CCH OSHD ¶12,080.

Turner Co. also answered Southwest's contentions that the noise standards are invalid because they were improperly promulgated under §6(b) of the Act and are not "established Federal standards" which §3(10) of the Act permitted to be adopted without the full rulemaking procedure. (Their origin was the Walsh-Healy Act, so they are not "national consensus standards").

Southwest's contention that the noise standards are arbitrary and capricious, and therefore invalid, refers to the requirement of §95(b)(1) that feasible administrative or engineering controls be utilized to prevent excessive exposure to noise when personal protective devices (ear plugs or muffs) are effective and much less expensive. This matter will be discussed later, in connection with the issue of economic feasibility of engineering controls.

The citation and complaint.

Southwest attacks the citation for lack of particularity and the complaint for supplying by amendment the information lacking in the citation.

It is well settled that the particularity required by §9(a) of the Act may be supplied by the complaint or by the discovery procedures (which were amply utilized in this case), or at the hearing. In a very recent noise case, Meadows Industries, Inc., 79 OSAHRC _____, 7 BNA OSHC 1718, 1979 CCH OSHD ¶23,847 (No. 76-1463, 1979), the Commission held that a citation which "failed to state with particularity the noise levels found at the plant or the exact locations where they were found" still gave the employer "fair notice of the general locations of excessive noise levels" and was sufficient. Here the citation, while it did not name the employees involved or specify the noise levels to which they were exposed, gave the areas and machines involved and identified the employees as the operators of those machines. This was at least as much, and apparently more, "particularity" than found in the Meadows citation.

The complaint listed four employees by name and for each gave the work area (machine), the sound levels to which he was exposed, and the percent of unity (permissible levels of exposure). It also specified the date of the exposures as "on or about July 25, 1978," whereas the citation had shown the inspection dates as July 13-27, 1978. This was more than sufficient "particularity" under Meadows.

The inspection.

Southwest has not briefed the defense, raised in its answer, that the inspection was invalid (a) under the Act, (b) as a denial of due process, and (c) as an unreasonable search and seizure. Therefore, it may be deemed abandoned. Anyway, I find nothing in the record to substantiate this defense.

It is possible that Southwest had in mind the noise testing procedures used by OSHA's industrial hygienist, that is, the use of audio dosimeters to measure the noise levels to which employees were exposed. This matter will be discussed in some detail next.

The use of dosimeters

OSHA's industrial hygienist, Steven Brisbin, used General Radio audio dosimeters, backed up with occasional readings with a sound level meter (SLM), in measuring the noise levels to which Southwest's employees were exposed. Southwest contends that use of dosimeters is not authorized by 29 CFR 1910.95(a), that dosimeters are inherently inaccurate, and that the most accurate methodology is a combination of frequent SLM readings and a time-and-motion study to determine what proportion of his time each employee spends at the locations chosen for testing.

Both methods have been approved by the Commission. Love Box Co., supra, specifically approved the use of dosimeters as the primary instrument, backed up, as here, by SLM readings, and in the recent case of Wheeling-Pittsburgh Steel Corp., 79 OSAHRC _____, 7 BNA OSHC 1581, 1979 CCH OSHD ¶23,784 (No. 14702, 1979), it affirmed a citation based primarily on SLM readings which were confirmed by dosimeter measurements. On the other hand, it has approved the taking of "spot" or "grab" samples with an SLM "if it is reasonable to infer that the measured sound levels are representative of sound levels for the pertinent duration of time. . ." Weyerhaeuser Co. (sawmill - plywood mill case), 77 OSAHRC 9/A2, 4 BNA OSHC 1972, 1976-77 CCH OSHD ¶21,465 (Nos. 1231 and 1758, 1977).

Actually, as pointed out in Love Box, an audio dosimeter is basically a compact SLM with a memory cell which, when placed into a read-out instrument, displays the noise level as a percentage of the permissible level (100% or less indicating compliance). It is small enough to be placed in an employee's shirt pocket, with the microphone at or near his ear. It is used to measure the noise level experienced during an entire work shift, obviating the problem of whether a test sample is "representative," a problem which is acute in the present case.

Southwest maintains that there is no such thing as a typical day in its box plant—that it processes orders of varying sizes calling for different weights and widths of paper, which factors in turn dictate lengths and speed of runs and amount of downtime. All of these factors combine complexly to affect noise levels. They also add to the difficulty of devising an accurate time-and-motion study and relating it to noise measurements.

OSHA's Industrial Hygiene Field Operations Manual ("FOM")[9] says at part III(A) of Ch. VI that the audio dosimeter "serves to give maximum possible personal noise sampling of an exposed subject and is used as the primary basis for issuing a citation."[10] (Emphasis supplied.)

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[9] Ch. XI of the FOM was introduced into evidence as Exh. R-3. Official notice is taken of the remainder.

[10] The audio dosimeter also is authorized for use in underground coal mines by 30 CFR 70.505 and 506, but this is not relied upon here.

However, in recognition of human and equipment errors, as well as "legal considerations," FOM Ch. IX, ¶16 forbids the issuance of a citation unless permissible noise levels measured by a dosimeter are exceeded by a factor of 1.30. This is crucial here because one of the measurements relied upon by the Secretary was only 131.1% of the permissible level.

A Type 2 dosimeter, such as was used here, is designed to be accurate to ± 2 dBA. Thus a reading of 90 dBA (equivalent to 100%) could actually mean anything from 88dBA (75%) to 92 dBA (130%). The wide variation in the percentage of permissible noise is due to the fact that the decibel scale is "logarithmic rather than arithmetical," so that an increase of 3 dBA represents a doubling of the air pressure at the listener's ear. Continental Can Co., Inc., 76 OSAHRC 109/A2, 4 BNA OSHC 1341, 1976-77 CCH OSHD ¶21,009, f.n. 8 (Nos. 3973, et al., 1976).

The SLM used by Southwest's noise expert, William Halvorsen, also was a type 2 (Tr. 1024), which means that its rated accuracy likewise is ± 2 dBA. However, there are type 1 SLMs, and their accuracy ratings are ± 1 dBA.

Southwest introduced expert testimony regarding factors which affect dosimeter accuracy, especially calibration. Brisbin was cross-examined about these matters, but it was not demonstrated that he departed significantly from the instructions in FOM Ch. VI for the calibration and use of dosimeters. Part E(1) of Ch. VI says that dosimeters should be calibrated "before and after using." Brisbin calibrated his dosiemter the afternoon or evening before their use (Tr. 56; Exh. C-1). In view of the time required to calibrate the 11 dosimeters he used, he could hardly be expected to do it at Southwest's plant.

In the absence of any evidence showing that their accurary was affected by the calibration the day before use, I find that this is insufficient to justify discarding the results of the inspection.

Also, in view of the Commission's approval of the noise measuring methods used by both parties, and in the absence of a showing that Brisbin failed to follow the procedures prescribed by the FOM or that his measurements were in fact so inaccurate as to affect the result, I find that the use of audio dosimeters was proper.

The alleged violation of 29 CFR 1910.95(a).

The 131.1% measurement referred to above was made on Joe Carrillo, operator of a labeling machine called a Staley, which is not a part of the corrugator. Corrillo was not wearing ear plugs or other personal protective device (Tr. 103). Item 1A alleged a serious violation of 29 CFR 1910.95(a) because protection was not provided against the effects of noise exposure in excess of Table G-16 levels.[11]

At the time of the inspection, the Staley machine was near the "hogger," which shreds scrap cardboard, and the baler, which bales it for shipment. The hogger was a major source of the noise in the area of the Staley machine.

Subsequent to the inspection, the hogger and baler were moved into a separate concrete block room, and measurements made thereafter by experts

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[11] See footnote 2.

employed by both parties indicated that there no longer was a noise problem at the Staley machine. Therefore, no administrative or engineering controls were proposed at the hearing for the Staley (which was also included in the §95(b)(1) citation). Thus the question is whether the noise exposure and lack of hearing protection for Carrillo on the inspection date is a violation of §95(a). I find that it is, for it is the condition that existed on the inspection date that counts. This is true even though Southwest at that time had plans to move the hogger and baler and so informed the inspector.

During the dosimeter test on July 25, 1979, 16 measurements were made with an SLM in the Staley area, 8 while the machine was running and 8 while it was not (Exhibit C-2). With the Staley not operating, the noise levels ranged from 83 to 88 dBA, and while it was operating the noise levels varied from 89 to 94 dBA. Brisbin testified in general that the SLM readings confirmed the dosimeter readings (Tr. 85, 185). Southwest's proposed finding of fact No. 37 (and several statements in its brief) takes out of context a statement by Brisbin, "There is a definite inconsistency if you're trying to compare my readings I took with a Sound Level Meter with the results of a Dosimeter" (Tr. 175). The question and answer, on redirect examination, were as follows:

> Q. You were asked on cross-examination about the readings found at the hogger and at the staley and the ranges that you found. Did you see any inconsistency in those readings?
>
> A. There is a definite inconsistency if you're trying to compare my readings I took with a Sound Level Meter with the results of a Dosimeter. Understand that a Sound Level Meter reading is taken, ten during a day, where a Dosimeter is integrating an entire full shift exposure. So, my hand-held

reading does not take into account the fact that, say, we used an example of a hogger operator at 108. There's nothing in my Sound Level Meter results stating that right after that reading that employee could have been in a 50 db exposure. So I wouldn't expect, just because I measured 108 with a Sound Level Meter that I'm going to get 108 Dosimeter read-out. Do you follow me?

Read as a whole, Brisbin's answer seems to be to the effect that an SLM reading cannot be expected to conform exactly to a dosimeter readout, because the sound level meter does not reflect what happens between readings.

The SLM readings in the Staley area, with their corresponding percent of unity, were as follows:

| Staley Not Operating | | Staley Operating | |
|---|---|---|---|
| SLM Reading | % Unity | SLM Reading | % Unity |
| 88 dBA | 80 | 91 dBA | 114 |
| 88 dBA | 80 | 92 dBA | 130 |
| 84 dBA | 45 | 91 dBA | 114 |
| 83 dBA | 40 | 94 dBA | 175 |
| 83 dBA | 40 | 92 dBA | 130 |
| 88 dBA | 80 | 89 dBA | 87 |
| 84 dBA | 45 | 89 dBA | 87 |
| 83 dBA | 40 | 92 dBA | 130 |

As previously mentioned, Brisbin testified generally to the effect that the SLM readings backed up the dosimeter readouts. This appears to be true with regard to the Staley area.

Carrillo's failure to wear ear plugs or other personal protective device was a prima facie violation. Southwest has not affirmatively pleaded or argued the defense of unpreventable employee misconduct, though it introduced evidence that it had a work rule requiring the wearing of ear plugs or ear muffs "in any area identified as having excess noise levels" (Exh. R-48, p. 7). There was no showing that the Staley area had been so designated.

Carrillo did not testify.

I find that §95(a) was violated.

This item, in combination with item 1B, is alleged to be a "serious" violation under §17(k) of the Act, which defines a "serious" violation as one in which "there is a substantial probability that death or serious physical harm could result" therefrom. The tenor of the expert testimony in this case was that overexposures to noise in the range here present (slightly over 92 dBA) would take long periods of time to substantially affect human hearing, though this varies individually. There was no evidence that Carrillo had suffered any hearing loss as a result of this exposure.

Research has disclosed no case in which a noise violation has been held to be "serious." In fact, the secretary has made a practice (at least until recently) of citing such violations as other than serious.

Undoubtedly loss of hearing can be a severe handicap. However, it seems to me that the Act contemplates a more immediate onset of disability than is likely in such a case as this §95(a) violation. Therefore, I find that this violation, standing alone, is nonserious and that no penalty should be assessed.

The alleged serious violation of 29 CFR 1910.95(b)(1).

Item 1B, as amended by the complaint, alleges a serious violation of 29 CFR 1910.95(b)(1)[12] in that feasible engineering contracts were not utilized to protect 4 employees against the effects of noise exposure.

The employees involved, their work areas and exposures were listed as follows:

| Employee | Work Area | Sound Level* (DbA) | Percent of Unity** |
|---|---|---|---|
| Jose Vega | Corrugator | 89 to 99 | 293.7% |
| Jessie Jean | Corrugator | 79 to 104 | 289.7% |
| Angel Holguin | Knife Operation | 81 to 97 | 176.8% |
| Joe Carrillo | Staley | 75 to 94 | 131.1% |

* The sound levels noted show the minimum and maximum levels measured on the A scale of a standard sound level meter at slow responses, with at least 10 separate readings having been taken at each location.

** When the daily noise exposure was composed of two or more periods of noise exposure at different levels, the percentage of unity indicates the sum of the variables $\frac{C_1}{T_1} + \frac{C_2}{T_2} + \ldots \frac{C_n}{T_N}$ (where $C_n$ is the total time of exposure at a specified noise level and $T_n$ is the total time of exposure permitted at that level). Permissible levels of exposure and corresponding time periods are found in Table G-16 of 29 CFR 1910.95.

As previously mentioned, no engineering controls were proposed for the Staley area at the hearing, so it will not be considered. The same is true of the knife operation, which is on the dry end of the corrugator near the Staley.

[12] See footnote 2.

Therefore, only the corrugator operator positions need be considered. Thus the central issue is whether the proposed engineering controls are technologically and economically feasible, which the Secretary has the burden of proving. Continental Can Co., supra. The technological feasibility issue will be considered first.

Industrial Hygienist Brisbin testified to noise exposures as alleged in the complaint regarding the July 25, 1978, inspection (Tr. 81, Exh. C-1). It is difficult to compare the results of Halvorsen's study made January 4, 1979, with Brisbin's because Halvorsen's SLM readings were not presented in a readily usable form. His notes (Exh. R-9) show readings of 100 to 102 dBA at the B-flute single facer, 94 dBA at the C-flute single, 98 dBA at both single facers, 83 to 92 dBA at the double backer, and 90 to 92 dBA at the knife area. These readings are fairly consistent with Brisbin's, and in any event they show noise levels in excess of Table G-16.

The Secretary's noise expert, Dr. Calvin C. Oliver, an acoustic consultant and mechanical engineer, made a survey of Southwest's plant January 4 and 5, 1979, using an SLM with octave band filter attached. He determined the major sources of noise to be the two single facers and the double backer, for which he proposed engineering controls consisting of a 10-foot long barrier on the operator's side of each of these machines, with a curtain of vertical, overlapping transparent plastic strips extending from each end of each single-facer barrier to the wall on the opposite side and from the bridge to the floor. He also proposed that a metal hood be suspended from the ceiling, extending down to the barriers over the three machines.

After analyzing the spectra, or frequencies, of the noise generated by these machines, Dr. Oliver recommended that 6 inches of sound-absorbent material be placed on the inside (machine side) of each barrier. He also recommended that a 2' X 4' window be placed in each barrier. Stop and speed controls would be moved outside the barrier (Tr. 639-645; Exh. C-24). The hood, while serving to attenuate sound, would also vent steam and heat from the wet end of the corrugator. Dr. Oliver opined that these controls would reduce the noise exposure, expressed as a percentage of permissible levels, by half, e.g., from 300% to 150% (Tr. 722). He did not express this in terms of decibels, but it would be 5 decibels in that illustration. Mr. Halvorsen, on the other hand, estimated that the reduction in noise levels for the operators of these machines would be 1 1/2 dBA, that is, from 98 to 96.5 dBA (Tr. 1032, 1057). This would be a reduction from 300% to 250% of permissible exposure.

Southwest made numerous objections to the technological feasibility of the proposed controls, including the slight attenuation that might be expected, interference with operation of the corrugator, creation of heat, dust and fire hazard problems, and inability of the plant's ceiling to support the ventilating hood.

The barriers proposed by Dr. Oliver are not novel in design. In fact, similar installations exist in at least 4 other corrugated box plants, but the witnesses were at odds on their effectiveness. Dr. Oliver based his opinion on similar barriers he had seen in use at the Inland Container Co. plants at Hattiesburg, Mississippi ("Inland - Hattiesburg") (Tr. 615, 636, 638, 717, 741, 1288; Exh. C-24, fig. 3) and Macon, Georgia ("Inland - Macon") (Tr. 677-687).

He had made SLM measurements of noise levels at Inland - Hattiesburg and found them to be as high as 101 dBA inside the barrier and 89 dBA outside it.

Don Harvey, a supervisor of OSHA industrial hygienists, inspected Inland - Hattiesburg August 7, 1975, when no barriers were present, and December 27, 1976, after barriers were installed (Tr. 1203-1205). He testified that in 1975 SLM readings showed an "average" employee exposure of 95 dBA (200% of permissible) and that in 1976, when dosimeters and an SLM were used, the single facer operator was exposed to 103% and the double backer operator to 90% of permissible levels.

Halvorsen made dosimeter measurements at Inland - Hattiesburg two days in 1977 (after the barriers were installed) and found operating personnel had a noise exposure equivalent to 90 dBA (or 100%) on the first day and an unquantified "over exposure" on the second day (Tr. 1033). Halvorsen pointed out, however, that Inland - Hattiesburg had roll-out roll stands, which require the operators to work less under the machine than the stationary roll stands at Southwest - El Paso, thus reducing their noise exposure (Tr. 1038).

On the whole, it appears from the testimony of Dr. Oliver, Harvey and Halvorsen that sound barriers and hoods of the type proposed here have been successful to some degree in reducing noise exposure at Inland - Hattiesburg but that Table G-16 levels may be exceeded at times.

Dr. Oliver made two visits to Inland - Macon in December 1977 and December 1978. The first visit was made because Inland - Macon had reported to OSHA that it could control the noise level on one but not two single facers with barriers. However, in 1977 the barriers were not coated

with absorbent material, and Dr. Oliver recommended they do this and make other (unspecified) changes. When he returned a year later the absorbent material had been installed on the barriers, but the plant was practically shut down due to labor negotiations so Dr. Oliver made no noise measurements. Thus the effectiveness of such controls at Inland - Macon was not established.

Weyerhaeuser Co. has at least two plants which have sound barriers somewhat similar to Dr. Oliver's proposals, one at Tampa, Florida ("Weyerhaeuser - Tampa") and one at Jackson, Mississippi ("Weyerhaeuser - Jackson"), and its manager of manufacturing services in its shipping container division, Walter G. Paulson, testified for respondent (Tr. 752-813). Both were new, post-OSHA plants incorporating the latest in noise controls, the Tampa plant having been built in 1972 or 1973 and the Jackosn plant in 1974 (Tr. 761, 782). They had much longer barriers than here proposed, and in addition they had numerous baffles (but no hoods) suspended from the ceiling. They also had acoustic block walls. Despite these controls, noise measurements were 96 to 98 dBA, so that employees still have to wear ear plugs and ear muffs, Paulson testified (Tr. 812). He also said that the barriers interfered with production and had to be shortened to 20 feet, and that the 3' x 3' window in one of the barriers was removed because employees complained of the heat (Tr. 791).

Paulson admitted that Weyerhaeuser is interested in the outcome of Southwest's case (Tr. 802). Whether the engineering controls used at Tampa and Jackson reduced employee exposure to noise was not established, since the plants were new and afforded no "before-and-after" comparison.

However, Paulson's dislike of such controls was apparent. He testified that they caused a fire hazard due to dust deposits (Tr. 779), caused heat problems which affected the bonding of materials (Tr. 773), caused more frequent "wrap-ups" of paper (Tr. 774), and increased noise exposure of operators (Tr. 770). He predicted similar or worse results at Southwest - El Paso (Tr. 771).

Cecil S. Fleming, a loss control consultant who was Southwest's loss control director from April, 1976, to April 20, 1979, testified that the roof structure at Southwest - El Paso was not strong enough to support the partitions[13] and hood (Tr. 1154); that such overloading of the roof structure might be a violation of 29 CFR 1910.22[14] (Tr. 1156); that the machines cannot be used as supports because they must be realigned occasionally (Tr. 1155); that collisions of forklifts (actually "clamp" trucks) and paper rolls with the barrier would be inevitable because the aisle on that side already is too narrow for the forklift to turn around (Tr. 1158, 1159); that the sprinkler system would have to be modified at a cost of $83,000 (Tr. 1159); that the heating requirements would be greater in winter due to the barriers and hoods (Tr. 1164); that the conveyor might have to be lengthened in the dry end of the

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[13] Fleming apparently thought the barriers as well as the hood would be supported by the roof structure.

[14] §1910.22(d)(2) provides:

> It shall be unlawful to place, or cause, or permit to be placed, on any floor or roof of a building or other structure a load greater than that for which such floor or roof is approved by the building official.

corrugator to dry out the product due to confinement of steam (Tr. 1165); and that finely divided residue from the operation would settle on the barriers and curtains and be a fire hazard (Tr. 1187, 1188).

Fleming also testified that the barriers would block egress of employees on the wall side of the corrugators and violate 29 CFR 1910.37 unless an exit door was cut in the load-bearing wall at a cost of $5,000 (Tr. 1161, 1162), but he apparently did not realize that the curtains enclosing the ends of the single facers would be transparent plastic strips rather than solid structures.

Of the two corrugator operators named in the complaint (Jose Vega and Jessie Jean), only one (Vega) testified. However, Angel Holguin, named in the complaint as a knife operator, and now a corrugator or single facer operator, testified, as also did Jose Rocha and Eddie Fattorini, double backer operators who assist the corrugator operators.

Vega testified that frequent adjustments have to be made to the machines (Tr. 238); that he has to touch the paper to test the pressure; that it takes about 3 minutes to push a fresh roll into the machne (Tr. 239); that he can start, stop and govern the speed of the machine from the controls (Tr. 244, 245); that the brake is manually operated (Tr. 257); that there are adjustments on the roll stands (Tr. 257); that when the paper breaks he must stop the machine in 30 seconds (Tr. 261); and that a noise barrier should have a big window in it (Tr. 253).

Holguin testified that the machine has 10 rolls (Tr. 286); that the brakes must be loosened as the rolls get smaller (Tr. 280); but that if all goes well the machine requires few adjustments (Tr. 281).

Rocha said he helps with roll changes, splices, paper breaks, glue and starch (Tr. 362, 371); that he doesn't adjust the machine (Tr. 367); and that he stands in the hallway near the machine while watching it (Tr. 366).

Fattorini testified it is necessary to go under the bridge to change rolls (Tr. 438); that he is not supposed to slow the machine to put a roll in (Tr. 440); that a full roll lasts 45 minutes to an hour (Tr. 444); that there are separate controls for the single facers and double backer (Tr. 440); that the double backer can be controlled from the single facers but not vice versa (Tr. 447); that he can get as much as 50 feet away from the controls when he is acting as operator (Tr. 443); that he spends about 40 minutes of each hour watching the machine (principally the bridge) (Tr. 458); that most of the adjustments are made when the machine is started in the morning (Tr. 451); that he would have problems if he couldn't hear the machines, at least the breaking of the paper (Tr. 456); and that breakdowns occur from twice a week to once a month (Tr. 460).

Gabriel Pena, a knife man, testified that the corrugator, if enclosed, would "be like a sauna bath" (Tr. 320).

In Love Box Co., supra, the Commission held an "acoustical booth" for a corrugator operator technologically infeasible because his duties were not stationary but required him to return "every minute or so" to the face of the machine. It mentioned the experiments of the Fibre Box Association (a trade association of corrugated box manufacturers) with a "tight-end" enclosure for the single facer. This type of enclosure has since been abandoned by the association (Exh. R-39). The question is whether the state of the art of

engineering noise controls for corrugators, as reflected by the record in this case, has advanced sufficiently since Love Box to make them technologically feasible.

From what has been said about the Inland - Hattiesburg, Weyerhaeuser - Tampa, and Weyerhaeuser - Jackson plants, it is apparent that controls such as here proposed have been marginally successful in new plants and with newer, more automatic machines than Southwest's. It may seem anomalous that a large employer like Southwest can get by with obsolescent machines in a building not designed for or well suited to the purpose, but the alternatives would be harsh indeed.[15]

Due in large measure to the antiquity of its machines, it is necessary for the operators to make frequent manual adjustments to and maintain visual and aural contact with, the single facers and double backer. This would limit the time they could remain behind the barrier, and when in front of the barrier their noise exposure would be considerably greater than if it did not exist.

The plant itself, including the weakness of the roof structure and the narrowness of the aisle on the operator's side, also tends to make the proposed controls infeasible. These matters might be corrected, but at great cost which was not considered by the Secretary's expert. Heat problems affecting the product and a fire hazard affecting the safety of personnel and

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[15] Robert White, general manager of Southwest's El Paso plant, testified that a new corrugator would cost $1 million (Tr. 469), and Paulson testified tht the costs associated with noise control at Weyerhaeuser - Tampa totalled $271,785 (Tr. 769). Economic feasibility is discussed more fully at pp. 26-28.

the plant would also be created. The cumulative effect of these and other objections raised by Southwest is the conclusion that the imposition of such controls would have significantly adverse effects on the whole operation.

Even if these effects could be tolerated, or to some extent overcome, there is a serious question concerning the attenuation of noise levels that might reasonably be expected to result from these controls as previously mentioned. Dr. Oliver opined that the noise levels for the corrugator operators would be reduced from about 300% of the permissible level to 150%. Mr. Halvorsen calculated the reduction at 1 1/2 dBA, that is from 98 to 96.5 dBA, which would be equivalent to a reduction from 300% to 250% of the permissible. The truth may lie somewhere between these estimates, but Halvorsen's estimate seems the more accurate.

Both estimates are above Table G-16 levels. This means that employees still would have to wear ear plugs or muffs, but the Commission has held that controls may be required in such a situation if they will significantly reduce the exposure even though not to Table G-16 levels. RMI Co., 78 OSAHRC 31/C8, 6 BNA OSHC 1523, 1978 CCH OSHD ¶22,674 (No. 13773, 1978).

The expected results, however, must be measured in terms of cost, which makes the issue of economic feasibility inseparable from technological feasibility.

Dr. Oliver, who had no expertise in construction costs and did not give the source of his cost estimates, testified that his proposed engineering controls would cost $35,000 (Tr. 660). He did not consider that there would be any effect on product quality or plant productivity (Tr. 674).

Fleming, while not providing an overall cost figure, testified on the basis of his experience as an engineer and contractors' estimates that it would cost $27,850 to relocate the electrical switching gear (Tr. 1150), as compared to Dr. Oliver's estimate of $4,000 to $8,000; that the sprinkler system would have to be modified at a cost of $3,000; and that an egress door in the load-bearing wall would cost $5,000. No estimate was made concerning the cost of strengthening the roof to support the hood or of moving the interior room walls on the barrier side of the machines to provide more room for clamp trucks. Neither did Southwest establish the cost of personal ear protection for a comparison such as was made in Weyerhaeuser Co. (Honolulu), supra.

The presently effective economic feasibility guidelines in noise cases were laid down in Continental Can Co., 76 OSAHRC 109/A2, 4 BNA OSHC 1541, 1976-77 CCH OSHD ¶21,009 (No. 3973, 1976), where controls costing $494,000 would have reduced noise to Table G-16 levels for 125 employees (and a lesser amount for an unspecified number of others), and the Commission held there was insufficient proof of economic feasibility though it held that a reduction of 3 decibels would be "clearly significant."

In Weyerhaeuser Co. (Honolulu), supra, Judge Burchmore's decision on remand (which was affirmed without review by the Commission; 1977-78 CCH OSHD ¶21,716) held economically infeasible barriers at the single facer costing $20,000 which would reduce exposure of 4 employees 2 decibels, as compared to the $5 cost of ear protectors for each employee.

In Castle & Cooke Foods, supra, where the expected reduction was to Table G-16 levels from a range of 95 to 101 dBA, implementation costs per empoyee of $3,100 and $3,400 in two different plants (plus annual costs of $1,100 and $111, respectively) were held to be infeasible economically.

And in Great Falls Tribune 77 OSAHRC 86/B7, 5 BNA OSHC 1443, 1977-78 CCH OSHC ¶21,844 (No. 6632, 1977), where the expected reduction was from 100 to 93.5 dBA at a cost of $12,500 per employee, the proposed controls again were held not economically feasible.

Here the cost of controls, using the Secretary's figures, would be $35,000 for 3 employees, or $11,666 per employee for installation, with no figure for annual cost impact. The attenuation that might be expected (1 1/2 dBA according to Southwest and 5 dBA according to the Secretary) would still leave the exposure above Table G-16 levels. Under the guidelines of the Commission decisions, economic feasibility has not been proved.

The costs issue.

Lastly, Southwest requests that it be awarded attorney fees and costs incurred because the Secretary allegedly concealed exculpatory information and refused in pretrial discovery to admit certain facts as requested by Southwest.

Commission precedent clearly holds that, absent statutory authority, it has no power to award attorney fees or costs against any party, hence it is unnecessary to inquire into the merits of the matter. General Electric Co., 75 OSAHRC 50/A2, 3 BNA OSHC 1031, 1974-75 CCH OSHD ¶19,567 (No. 2739,

1975); John W. McGowan, 77 OSAHRC 189/E10, 5 BNA OSHC 2029, 1977-78 CCH OSHD ¶22,268 (No. 76-1308, 1977).

## FINDINGS OF FACT

1. The respondent is an employer engaged in commerce who has employees within the meaning of 53(5) of the Act. It operates a corrugated box factory at El Paso, Texas, which was inspected by an OSHA industrial hygienist on July 13-27, 1978.

2. On July 25, 1978, Joe Carrillo, a Staley machine operator, was exposed to a noise level equivalent to 131.1% of the permissible level for an 8-hour shift, and at that time he was not protected by personal hearing protection device or otherwise from the excessive noise. There was no substantial probability that the violative condition could cause death or serious physical harm. No penalty should be assessed.

3. On said date two corrugator operators, Jose Vega and Jessie Jean, were exposed to noise levels of 293.7% and 289.7%, respectively, of the permissible noise level for an 8-hour shift, and no engineering controls were utilzied by Southwest to protect these employees from the excessive noise exposure.

4. Engineering controls in the form of barriers and hoods proposed for the single facers and double backers would reduce the noise levels for operators of those machines approximately 1 1/2 dBA.

5. The noise levels after implementation of the proposed controls would be in excess of those permitted by Table G-16 of 29 CFR 1910.95, and it would

still be necessary for affected employees to use personal hearing protective devices.

6. The cost of implementing the proposed controls would be at least $35,000, and no figures were supplied for annual cost impact.

7. Three employees would be benefitted by the propsoed controls, the single facer operators and the double backer operator.

8. Respondent's corrugator machines are obsolescent, requiring more manual adjustments than modern machines, and they are installed in a warehouse building not designed for or well suited to the purpose. The roof is not strong enough to support the proposed hood, and there would be insufficient room in the aisle where the barriers would be installed to allow maneuvering of clamp trucks carrying paper rolls to the machines. The barriers would cause heat problems affecting the product and a fire hazard due to dust accumulations.

9. The proposed controls are neither technologically nor economically feasible.

## CONCLUSIONS OF LAW

1. The Commission has jurisdiction of the parties and of the subject matter of this proceeding.

2. On July 25, 1979, respondent was in violation of §5(a)(2) of the Act and 29 CFR 1910.95(a), but the violation was nonserious and no penalty should be assessed.

3. On said date respondent was not in violation of 29 CFR 1910.95(b)(1).

## ORDER

On the basis of the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Item 1A, for serious violation of 29 CFR 1910.95(a), is amended to allege a nonserious violation, and, as so amended, it is AFFIRMED. No penalty is assessed.

2. Item 1B, for serious violation of 29 CFR 1910.95(b)(1), is VACATED.

3. Respondent's requested findings of fact and conclusions of law, to the extent that they are inconsistent with this decision, are denied.

DEE C. BLYTHE
Administrative Law Judge

Dated: November 15, 1979

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

December 23, 1982

**IN REFERENCE TO SECRETARY OF LABOR v.**

OLIN CORP.

**OSHRC DOCKET NO.** 78-5919

**NOTICE IS HEREBY GIVEN TO THE FOLLOWING:**

**OF** COMMISSION DECISION AND REMAND

**To wit:** See attached.

**FOR THE SECRETARY OF LABOR**

- **Counsel for Regional Litigation**
  **Office of the Solicitor, USDOL**
  **200 Constitution Ave., NW. - Rm. S-4014**
  **Washington, D.C. 20210**

- Albert Ross
  Reg. Sol., USDOL
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**FOR EMPLOYER**

- Ian P. Spier, Esq.
  Assistant Labor Counsel
  Olin Corporation
  120 Long Ridge Road
  Stamford, CT 06904

**FOR EMPLOYEES**

-

**FOR THE COMMISSION**

Ray H. Darling, Jr.

**RAY H. DARLING, JR.**
**EXECUTIVE SECRETARY**

Office of the Judges
OSHRC
John W. McCormack Post Office
and Courthouse, Room 420
Boston, MA 02109

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 78-5919 |
| OLIN CORPORATION, | : | |
| Respondent. | : | |
| | : | |

ORDER OF REMAND

Before: CLEARY and COTTINE, Commissioners.*/

BY THE COMMISSION:

On December 17, 1982, the Commission issued its decision in Sun Ship, Inc., OSHRC Docket No. 16118. In accordance with the decision of the U.S. Supreme Court in American Textile Manufacturing Institute, Inc. v. Donovan, 101 S.Ct. 2478 (1981) ("ATMI"), the Commission held that "feasible" under the occupational noise standard means achievable. The Commission overruled the cost-benefit test of feasibility previously set forth in Continental Can Co., 76 OSAHRC 109/A2, 4 BNA OSHC 1541, 1976-77 CCH OSHD ¶ 21,009 (No. 3973, 1976), appeal withdrawn, No. 76-3229 (9th Cir. Apr. 26, 1977), and substituted a test consistent with ATMI.

In view of this intervening change in law, the judge's decision with respect to the alleged violation of section 1910.95(b)(1) is vacated. The case is remanded for further proceedings, including evidentiary

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*/ Chairman Rowland took no part in the consideration or decision of this case.

submissions, so that the interrelated issues of technological and economic feasibility can be reconsidered in light of the test of feasibility established by Sun Ship, Inc.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: DEC 23 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, | : | |
| Complainant | : | |
| v. | : | OSHRC DOCKET NO. 78-5919 |
| OLIN CORPORATION, | : | |
| Respondent | : | |

APPEARANCES:

Paul Katz, Esq.,
For Complainant

Ian Spier, Esq.,
For Respondent

DECISION AND ORDER

This case arose under Section 10(c) of the Occupational Safety and Health Act, 29 U.S.C. §659(c), and was heard June 12 to 14, 1979, at Hartford, Connecticut.

On November 16, 1978, Respondent was issued a 2-item serious citation and a nonserious citation listing one item. All charges were contested. Serious Item 1 is resolved by a settlement agreement, which I hereby approve, wherein Complainant reduces the proposed penalty from $480 to $320, and Respondent withdraws its contest of this item (Ans. IX). The other serious item was reduced to a nonserious charge by Complainant's amended citation dated December 8, 1978, and became Item 2 of the nonserious citation.

Olin Corporation manufactures firearms at a plant at New Haven, Connecticut, where its employees work with goods and materials moving across state lines in interstate commerce; hence, Respondent is an employer engaged in a business affecting commerce within the meaning of §3(5) of the Act (Ans. II). In light of the foregoing, it is determined that the Commission has jurisdiction over the parties and the subject matter.

Nonserious Item 1 alleges a violation of the standard at 29 CFR 1910.95(b)(1) in that employees were subjected to sound levels in excess of those listed in Table G-16 of Subpart G, and feasible administrative or engineering controls were not utilized to reduce the sound.

The standard at 29 C.F.R. 1910.95(b)(1) provides:

> When employees are subjected to sound exceeding those listed in Table G-16, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table.

Table G-16 - Permissible Noise Exposure

| Duration per day, hours | Sound level dBA[1/] slow response |
|---|---|
| 8 | 90 |
| 6 | 92 |
| 4 | 95 |
| 3 | 97 |

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1/ The abbreviation dB stands for decibels, the unit of measurement of sound. On the A scale the measuring instrument reacts to sound in a manner similar to the human ear. For "slow" response the instrument is set so as to average out high level noises of brief duration. See U.S. Department of Labor, Guidelines to the Department of Labor's Occupational and Noise Standards, 1971, p. 3.

Table G-16 (continued)

| Duration per day, hours | Sound level dBA slow response |
|---|---|
| 2 | 100 |
| 1-1/2 | 102 |
| 1 | 105 |
| 1/2 | 110 |
| 1/4 | 115 |

When the daily noise exposure is composed of two or more periods of noise exposure of different levels, their combined effect should be considered, rather than the individual effect of each....

Exposure to impulsive or impact noise should not exceed 140 dB peak sound pressure level.

On October 4 and 10, 1978, Respondent's New Haven facility was inspected by James Stewart, who was at the time employed as an industrial hygienist by the Occupational Safety and Health Administration (OSHA). (Tr. 4-6, 10).

On October 10, 1978, Stewart conducted noise tests at this plant by attaching dosimeters to Respondent's employees resulting in these readings (Tr. 29, 30-31, 39, 42-43, 53-54, 56-57, 68):

| Name of Employee | Location | Work Performed | Time Tested | Reading |
|---|---|---|---|---|
| Abenante | 26A3 | routers | 7 hrs,27 min. | 169.4%[2/] |
| Funderburg | 8A3 | vacuum cleaner; materials handled | 7 hrs,16 min. | 133.2% |
| Joshua | 7A3 | Rye set machine operation | 7 hrs,20 min. | 205.6% |

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2/ The dosimeter readings are in percentages, convertible to dBA. Decibels are measured on a logarithmic rather than linear scale. Shown below are examples of percentage readings converted to dBA.

In addition, Stewart made spot checks at each area at intervals during the day, using a General Radio Type II Sound Level Meter (Tr. 44, 54, 68).

Stewart testified that the dosimeter has an error factor of 30% in either direction, and that this amounts to 2 dB (Tr. 91). (30% does not necessarily equal 2 dB. See note 2.) A reading of 133.2% for location 8A3 could thus mean an actual noise level of 103.2%, or 90.2 dBA, and perhaps even less. Stewart conceded that this was "possibly" a borderline case (Tr. 91). In my view this reading is insufficient to establish exposure to sound in excess of the levels listed in Table G-16, and the charge will be ordered vacated with respect to the 8A3 vacuum cleaner and materials handling location.

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2/ (continued)

| % noise exposure time (dosimeter data) | equivalent sound pressure level (dBA) | % noise exposure time | dBA |
|---|---|---|---|
| 100 | 90.0 | 119 | 91.3 |
| 101 | 90.1 | 120 | 91.3 |
| 102 | 90.1 | 125 | 91.6 |
| 103 | 90.2 | 130 | 91.9 |
| 104 | 90.3 | 135 | 92.2 |
| 105 | 90.4 | 140 | 92.4 |
| 106 | 90.4 | 145 | 92.7 |
| 107 | 90.5 | 150 | 92.9 |
| 108 | 90.6 | 155 | 93.2 |
| 109 | 90.6 | 160 | 93.4 |
| 110 | 90.7 | 165 | 93.6 |
| 111 | 90.8 | 170 | 93.8 |
| 112 | 90.8 | 175 | 94.0 |
| 113 | 90.9 | 180 | 94.2 |
| 114 | 90.9 | 185 | 94.4 |
| 115 | 91.0 | 190 | 94.6 |
| 116 | 91.1 | 195 | 94.8 |
| 117 | 91.1 | 200 | 95.0 |
| 118 | 91.2 | 210 | 95.4 |

As to location 26A3 the reading of 169.4% could mean 139.4%, or 92.4 dBA, taking into account the 30% error factor. Applying the error factor to the 7A3 location, it is possible that the actual noise level was 175.6%, or 94 dBA.

The sound levels registered by the dosimeters after the all-day studies on October 10, 1978, at locations 26A3 and 7A3 were higher than the levels allowed by the cited standard, and it is so found. However, merely establishing that Respondent's employees were exposed to excessive noise on October 10, 1978, is not enough to prove a violation of 29 CFR 1910.95(b)(1); Complainant is also required in the instant case to show that Respondent failed to utilize engineering or administrative controls which were technically and economically feasible. RMI Co. v. Secretary of Labor, 594 F.2d 566, 571-572 (6th Cir. 1979). Turner Co. v. Secretary of Labor and OSHRC, 561 F.2d 82, 83-84 (7th Cir. 1977). Secretary of Labor v. Continental Can Co., 1976-1977 OSHD para. 21,009 at p. 25,256; BNA 4 OSHC 1541, 1546; 76-3229 (9th Cir., filed October 19, 1976), pet'n for review withdrawn by Secretary of Labor.

According to Stewart, two routers were operating on October 10, 1978, and there was a third router not operating that day (Tr. 33, 52). Routing machines shape the wooden stocks of guns by drilling with a high speed bit (Tr. 31-32, Exh. C-2). He observed one Rye set machine operator at location 7A3 (Tr. 56-57). The employee actually runs wood stock through a series of four machines, each of which performs a separate operation (Tr. 57-60, 64-66, Exh. C-5). The Rye set machines included two routers (Tr. 525).

Stewart said that these four machines were "pretty much" in continuous motion (Tr. 67), and that three of the machines could be operating at the same time (Tr. 67-68).

To reduce the noise level to which Respondent's employees at location 26A3 were exposed Stewart recommended the installation of partial enclosures for the routing machines (Tr. 48-49). For the Rye set machines, he advocated enclosing portions of three of the four machines with sound-absorbing material (Tr. 73).

Stewart was employed for about one year at OSHA (Tr. 7), before leaving for employment in the private sector in January, 1979 (Tr. 77). He is not a member of the American Industrial Hygienist Association, and has no certification in industrial hygiene (Tr. 75). He had never seen routers or Rye set machines with the partial enclosures he recommended (Tr. 101, 104).

Ronald Morin, Supervisor of Industrial Hygienists at the Hartford OSHA office (Tr. 197), suggested partial enclosures for both the routers and the Rye set machines (Tr. 216, 228). Morin offered an alternative control for the Rye set machines: a transparent sound-reducing plastic curtain placed between the machine and the operator (Tr. 218-219, 223, Exh. C-12). The operator could move through the curtain by parting the overlapping sections (Tr. 223). Morin said that he spent a total of only about 40 minutes in examining these machines at Respondent's facility (Tr. 257-258). He is not board-certified in the field of noise (Tr. 249).

Morin estimated the total cost of the proposed enclosures for the three Rye set machines at $2,000 to $3,000, including labor and materials (Tr. 295),

and predicted a sound level reduction of at least 10 decibels (Tr. 216). For the alternative use of curtains, he estimated the cost at about $200 for the curtain material, plus $2.50 each for hanging fixtures (Tr. 225), and felt that this method would result in a reduction of "a good 12 decibels" (Tr. 222). He set the cost of a partial enclosure for the routers at $500 for a 10 decibel reduction (Tr. 232), and asserted that if he were the designer of the enclosure he would "realistically" expect a 25 decibel reduction (Tr. 232).

Respondent presented Dr. Paul Ostergaard, an acoustical engineer for the past 25 years (Tr. 323), who specializes in noise and noise control (Tr. 321). He spent four days at Respondent's plant studying the noise situation (Tr. 364), two days of which were devoted to the three locations listed in the citation (Tr. 365). In the 26A3 location he observed three routers in operation, with one operator running the three machines sequentially (Tr. 326). The machines were about five feet from each other (Tr. 327). He stated that he also observed the Rye set operation (Tr. 327-328), with one person operating the machines (Tr. 356). Dr. Ostergaard, who qualifies as an expert in acoustical engineering, opined that the most efficient engineering control for the Rye set machine is a full, rather than partial, enclosure (Tr. 330); that partial enclosures are impractical from a production standpoint because the machines are used for different operations, which require changes in machine configuration, and because partial enclosures must be sealed since even a small opening can reduce the effectiveness by 15 decibels (Tr. 334-335). He felt that the curtain method would not work (Tr. 336-337),

for the reason that the curtain material is not clear, and presents a distorted view to the employee (Tr. 337). This witness also recommended full enclosures for the routers for the same reasons he gave for selecting that type of engineering control for the Rye set machines (Tr. 351-352).

Dr. Ostergaard testified that based on estimates obtained from manufacturers and his own estimate of the cost of installing and maintaining the equipment (Tr. 353), he placed the cost of each full enclosure for a router at $8,615 (Exhs. R-5, R-11), and each full enclosure for a Rye machine at $7,255 (Exh. R-5). In his opinion a full enclosure would reduce the sound level by 20 to 25 decibels (Tr. 357).

On cross-examination Dr. Ostergaard conceded that the enclosures he recommended were "over-designed" for OSHA purposes (Tr. 389); that the cost of an enclosure could be reduced below the figures he had given (Tr. 382); and that he would be able to locate mufflers to be placed on the air nozzles on the routers so that the air noise (but not the woodcutting noise) could probably be reduced by 10 decibels, and that similar mufflers on the Rye set would reduce the air noise there (Tr. 389-390) by 10 decibels (Tr. 384-386), at a cost of about $100 for each muffler, including installation (Tr. 385-386).

One reason given by Dr. Ostergaard for his claim that a partial enclosure would be impractical for routers was that the machines require changes when used for different operations. However, that reason dissolves in the light of Respondent's foreman's testimony that such changes never require moving the "former box" on the machine more than one inch laterally (Tr. 530-531).

The admission by Dr. Ostergaard that his original estimated cost for full enclosures was excessive was followed by his concession that a combination of a partial enclosure and curtain in the back would suffice (Tr. 395-396), and that this measure would cost about $2,000 (Tr. 398) if installed by Respondent's employees (Tr. 397).

Stewart and Morin believed that partial enclosures for the machines would reduce the noise level within the limits set by the cited standard. Neither one qualifies as an expert in the field of noise control, whereas Dr. Ostergaard does. However, the latter's opinion that a partial enclosure would be impractical was based on an incorrect assumption that the routing machines underwent substantial modifications when switched from one operation to another. Also, Dr. Ostergaard expressed the view that the effectiveness of a partial enclosure can be reduced by as much as 15 decibels if not sealed properly; however, there is no reason to assume that the enclosures would be installed improperly. Upon consideration of the record in its entirety, I find that the weight of the evidence establishes that a partial sound-reducing enclosure constitutes a technologically feasible engineering control for the machines at locations 26A3 and 7A3.

As far as economic feasibility is concerned, the record offers estimates based on calculations made by Morin and Dr. Ostergaard. Morin estimated the necessary labor and materials for the partial enclosures for any of the machines at about $500 each (Tr. 232). Dr. Ostergaard originally placed the cost at about $7,200 to $8,600 for a full enclosure for each machine (Exhs. R-5, R-11), before dropping his estimate to about $2,000 for a partial

enclosure (Tr. 398). I find the estimate of about $2,000 per machine to be the most reliable in this record.

Stanley Sandquist, Respondent's Safety Engineer (Tr. 165) since September 1976 (Tr. 167), and an employee of Olin since 1940 (Tr. 504), testified that there are 26 routers and 26 Rye set machines in the Wood Shop at the New Haven plant (Tr. 505); that testing has disclosed that all the machines "are very close in noise reading" (Tr. 505-506); that the other routers are similar in operation to those cited and that the operations of the other Rye machines are similar to the cited Rye machines (Tr. 505).

Sandquist further testified that the cited routers are operated only about one week per month, or 25% of the time; that the rest of the time the employee "might be working on any of the other machine operations in that department" (Tr. 508); that the employee might be working on "another router" (Tr. 508-509). Sandquist's testimony was uncontroverted. Morin testified that he was told that the Rye set machines were used only three or four months out of the year (Tr. 300). Thus, in order to comply with the cited standard Respondent would have to install partial enclosures for 52 machines, at a total cost of about $100,000. In addition, there would be maintenance costs.

It was conceded by Stewart that personal protective equipment was worn by Respondent's employees on December 10 (Tr. 96). He claimed that on December 4, one employee, Abenante, was not wearing personal protective equipment (Tr. 46); and that he was told that Abenante did not normally work in that department (Tr. 83). However, Stewart's own notes covering that inspection

state that Stewart was told that Abenante was going to be there for only a few minutes (Tr. 83). I consider his notes on that point to be entitled to more weight than his testimony. It is clear that the OSHA officer did not ascertain that some employees worked at different machines, and was under the impression that Abenante always operated those machines at which he worked on December 10, at location 26A3.

Safety Engineer Sandquist asserted that the failure to wear ear protection results in disciplinary action at the plant, with a written warning for the first offense, suspension possibly for the second offense or even for a first offense if it was a serious infraction, and discharge the next time (Tr. 518-519).

Dr. Sorenson, Respondent's Medical Director, said that Respondent provides its employees with three types of ear plugs and an earmuff (Tr. 433); that employees are fitted for the device they are to wear (Tr. 438-439); that the employee is required to wear the protection if he is in a "hearing protection area" and annual audiograms are done on such employees (Tr. 431, 441); and that he has recommended that an employee no longer work in a high noise area when he had a hearing loss (Tr. 432). He further stated that he analyzed the audiograms of the employees working in the Wood Shop and found no evidence of harm resulting from their working there (Tr. 445).

The projected total expense of the hearing protections program for 1979 was about $14,000 (Exh. R-14). This included physician and nursing costs for audiograms, earplug costs, maintenance of equipment and other labor costs.

Dr. Ostergaard stated that the personal protective devices for the ear

reduce noise from 10 to 40 decibels, depending on the type; that one type of ear plug provided by Respondent reduces sound 20 to 25 decibels (Tr. 412-413).

I find that this record shows that Respondent has a good hearing protection program, which is mandatory and enforced by Respondent. Complainant contends that Stewart saw 15 to 20 persons working in the areas cited (brief, p. 19), but Stewart qualified this by saying that "there were some people working there that could be called borderline areas where the sound levels were lower" (Tr. 96). When Stewart spoke of the "area" he was so imprecise that it cannot be said with any degree of certainty how many, or if any, employees other than Abenante and Joshua were exposed to excessive sound levels. As far as this record is concerned, the expenditure of about $100,000 for partial enclosures would protect only those two named employees.

In light of all of the foregoing, I find that spending about $100,000 for partial enclosures for the machines is not warranted when the wearing of personal protection for the ears reduces the sound levels by 20 to 25 decibels.

It is found that Complainant has failed to show economically feasible engineering or administrative controls capable of substantially reducing the excessive sound levels at locations 26A3 and 7A3 at Respondent's New Haven facility. It is therefore concluded that on December 10, 1978, Respondent did not violate §5(a)(2) of the Act, 29 U.S.C. §654(a)(2), for noncompliance with the standard at 29 CFR 1910.95(b)(1). Nonserious Item 1 will be ordered vacated.

Item 2 of the nonserious citation, as amended, charges a violation of 29 CFR 1910.151(c) in that adequate eyewash facilities were not available to its employees.

The standard reads:

> Subpart K--Medical and First Aid
>
> §1910.151 Medical services and first aid.
>
> * * *
>
> (c) Where the eyes or body of any person may be exposed to injurious corrosive materials, suitable facilities for quick drenching or flushing of the eyes and body shall be provided within the work area for immediate emergency use.

On October 4, 1978, Stewart observed the strip room and the paint spray booth area (Tr. 12-13). In the spray booth area employees were exposed to the possibility of injurious chemicals splashing into their eyes (Tr. 13-14). At the time of the inspection Respondent had provided at each of the four spray booths a one-pint squeeze bottle containing an eyewash solution for emergency use (Tr. 14). Complainant contends that this did not meet the standard's requirement of "suitable facilities" because the manufacturers of chemicals used in the spray area advise in their literature to flush with copious quantities of water for 15 minutes if their products come in contact with an eye (Tr. 17, 478-479). Complainant is of the view that Respondent was required to provide a 15-minute supply of water, which could have been accomplished either by installing a connection to the city water line for running water, with one connection at each spray booth, or by placing in the area a number of portable containers filled with sufficient water (Tr. 27-28). The OSHA inspecting officer estimated that the one-pint bottles of eyewash provided at the time of the inspection could flush the eye for only five minutes (Tr. 15) instead of the 15 minutes recommended by the manufacturer.

Stewart conceded that city water can contain sediment (Tr. 81).

Supervisor Morin testified that an immediate eye flush for a minimum of 15 minutes was necessary, based on material data safety sheets put out by manufacturers of chemicals, the National Safety Council, the Red Cross, multi-media training courses, and "many, many doctors" he had encountered (Tr. 241-242). Later, Morin stated that an even better method of treatment would be to have a doctor treat the patient after a 10-minute flush (Tr. 244).

Dr. Sorenson did his residency for two years in the combined fields of neurology and ophthalmology at the Medical University of South Carolina (Tr. 418). He testified that the polyethylene bottles containing eyewash were preferable to a water installation or station for several reasons. One, making the bottles available takes less time than installing plumbing; two, the bottles are placed closer to the operator; three, the eyewash solution is guaranteed sterile, it is a balanced salt solution, and it contains substances which neutralize an alkali or caustic. He asserted that plain water was not as effective as the eyewash solution (Tr. 423-424), and that the solution was sufficient to protect the employees from the substances used in the spray area (Tr. 477).

According to Dr. Sorenson, when the spray booth is in operation he, or a nurse trained in the treatment of eye injuries, is always available at the plant to treat such injuries (Tr. 424-426); there is nursing coverage daily from 6:30 a.m., to midnight (Tr. 425). He said that he has four part-time doctors and a doctor associate on his staff (Tr. 473).

This witness also noted that when one places the eye in an eyewash

fountain and sprays water at it the reflex action is to close the eyelids, but the eyewash bottle has a flange on its mouth that assists in holding the eyelids in a retracted position (Tr. 426-427). In addition, the bottle is designed to let out a soft, broad spray rather than a narrow, projected one (Tr. 426-427).

Dr. Sorenson further testified that the plant Medical Department is about 120 yards from the cited area; that the liquid in the eyewash bottle would flush until the injured employee could be assisted to the Medical Department; that the employee would be transported to the medical area; that it takes only 30 seconds for an ambulance to respond to a call; that the ambulance is in a garage immediately behind the Medical Department, and a driver is always right there (Tr. 476-477, 484).

After the inspection and prior to trial Respondent installed water stations (eyewash fountains) in the cited area (Tr. 480-481).

As relevant here, 29 CFR 1910.151(c) mandates "suitable facilities" within the work area for quick flushing of the eyes in the event of an emergency. Complainant claims that Respondent failed to comply because it provided only a 5-minute flush whereas the record shows that doctors, authorities on first aid, and manufacturers of chemicals which can be injurious to the eyes recommend a 15-minute flush with water. However, such recommendation does not necessarily mean that this is the only or the best practice to follow in every situation. Respondent's squeeze bottles filled with an eyewash solution may have permitted only a 5-minute flush, but this record shows that four bottles were available in the work area, the solution

was sterile but the local water was not, the solution was better suited than water to protect the employees because only the solution contained substances needed to neutralize the injurious chemicals used in the area, and in addition, an injured employee could be reached by ambulance within 30 seconds, brought to the Medical Department only 120 yards away, and treated by a doctor or nurse. Based on these facts, I find that Respondent provided better protection than a 15-minute water flush, and did in fact provide its employees with suitable facilities within the contemplation of the cited standard. The charge has not been established, and this item will be ordered vacated.

Accordingly, it is ordered that serious Item 1 be affirmed and a penalty of $320 assessed, and that Items 1 and 2 of the amended nonserious citation be vacated.

Abraham Gold

ABRAHAM GOLD
Judge, OSHRC

Dated: January 22, 1980
Boston, Massachusetts

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

December 23, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

J. T. C. Construction Company

OSHRC DOCKET NO. 79-2455

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

FOR THE SECRETARY OF LABOR

OF ORDER

- Counsel for Regional Litigation
  Office of the Solicitor, USDOL
  200 Constitution Ave., NW. - Rm. S-4014
  Washington, D.C. 20210

To wit: See attached.

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  John F. Kennedy Federal Bldg.
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FOR EMPLOYER

- Carmine W. DiAdamo
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  Lawrence, MA 01840

FOR EMPLOYEES

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Judge's Office
OSHRC
John W. McCormack Post Office
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Boston, Mass 02109

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FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR, | ) | |
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| Complainant, | ) | |
| | ) | |
| v. | ) | OSHRC Docket No. 79-2455 |
| | ) | |
| J.T.C. CONSTRUCTION CO., INC. | ) | |
| | ) | |
| Respondent. | ) | |

ORDER

The Parties' Stipulation and Settlement Agreement is Approved.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

Dated: DEC 23 1982

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant<br>v.<br>J.T.C. CONSTRUCTION CO., INC.,<br>Respondent | OSHRC DOCKET NO. 79-2455 |

APPEARANCES:

David Baskin, Esq.,
For Complainant

Carmine DiAdamo, Atty.,
For Respondent

DECISION

WORCESTER, Judge:

On April 20, 1979, the Secretary of Labor's Occupational Safety and Health Administration (OSHA) office in Waltham, Massachusetts, was informed that there had been a fatal accident at the site of a sewer construction project in Peabody, Massachusetts. Two compliance officers and a civil engineer were sent to the site and, after their inspection was completed, two citations were issued alleging that the Respondent, J.T.C. Construction Co., Inc. (JTC), had violated regulations promulgated by the Secretary pursuant to the authority granted him by the Occupational Safety and Health Act of 1970 (29 U.S.C.A.

§651 et seq., hereinafter called the Act). The Secretary recommended that a total penalty of $5,280 be assessed.

The jurisdiction of this Commission and of JTC as an employer subject to the provisions of the Act and the regulations promulgated by the Secretary is established.

The evidence revealed that two laborers and a foreman, O'Maley, were at the worksite. They were preparing to install sewer pipe in a trench which was more than 86 feet long, more than five feet wide and 7 1/2 to 8 feet deep (Tr. 33, 41). One of the laborers, Mark Stamitas, testified at the hearing. The other laborer, Albert Smart, was killed in the collapse of the wall of the trench. O'Maley, because he is now employed by another contractor, was temporarily absent from the vicinity on the trial date (Tr. 90), but there is no evidence showing that his testimony could not have been offered.

Stamitas, the surviving laborer, said that when the backhoe struck a rock ledge at the bottom of the trench that he and Smart went into the trench to clear it off so it could be blasted (Tr. 9, 10). JTC's general manager, Cristaldi, said that he had visited the jobsite about an hour before the cave-in. He discussed the situation with O'Maley and it was decided to just prepare for blasting. He said that the two laborers would not have been required to enter the trench in order to do that (Tr. 91-95).

The evidence is clear, unambiguous, and in most instances, not in dispute. In Citation No. 1 JTC is alleged to have failed to give its employees safety training in violation of 29 CFR §1926.21(b)(2). The Secretary, who has the burden of proof, neglected to introduce any evidence showing what training

should have been given. A common laborer is an unskilled worker who needs close supervision and direction as he works. There is no basis upon which it could be concluded that the fatal accident was due to lack of training. The Secretary concedes this when he says that the sole cause of the tragedy was the act of the foreman who "oblivious to the hazards..." (Brief p. 5) ordered the two laborers to enter the unshored trench. Assuming without deciding that this was the case, it is plain to be seen that inadequate training had nothing to do with the two employees being in a place of danger. For that reason Citation No. 1 and the $480 proposed penalty must be vacated.

In Citation No. 2 JTC is alleged to have violated 1926.652(b) by failing to shore sheet, brace or slope the sides of a trench. A penalty of $4,800 was recommended on the ground that this was a willful violation. The weight of authority is that a willful violation is one in which the conduct of the employer amounts to a "...conscious, intentional, deliberate, voluntary..." act. Kent Knowlin Construction Co. v. Secretary, 593 F.2d 368 (10th Cir. 1979); F.X. Messina Construction Corp. v. Secretary, 505 F.2d 701 (1st Cir. 1974).

JTC's superintendent who had viewed the site shortly before the accident said that the entrance of the laborers into the trench was neither required nor in accordance with his instructions (Tr. 91). The laborer said that O'Maley did not "...come right out and tell anybody specifically (to enter the trench)..." (Tr. 9). The Secretary has failed to sustain the burden of proof of willful violation.

## CONCLUSIONS OF LAW

1. In the absence of affirmative proof by the moving party, the Secretary, that a construction laborer working in a trench in the presence of a civil engineer supervisor needed special training and instruction, Citation No. 1 alleging violation of 29 CFR §1926.21(b)(2) must be vacated.

2. The undisputed evidence shows that the hole in the ground was a trench as defined by the regulations and that its vertical walls were composed of unstable soil. The fact that there was a cave-in shows conclusively that, in the terminology of tort law, it was a res ipsa loquitur case of instability. However, it does not follow that there was a violation of 29 CFR §1926.652(b), willful or serious. Ocean Electric Corporation v. Secretary, 594 F.2d 396 (4th Cir. 1979); Floyd S. Pike Electrical Contractor, Inc. v. Secretary, 557 F.2d 1045 (4th Cir. 1977); Horne Plumbing & Heating Company v. Secretary, 528 F.2d 564 (5th Cir. 1976); and National Realty Company, Inc. v. Secretary, 489 F.2d 1257 (DC Cir. 1973).

3. Although I have previously taken the position that an employer should be held accountable for the consequences of the acts of supervisory personnel the same as under the doctrine of respondent superior in tort law, see Secretary v. Ocean Electric Corp., OSHRC No. 5811, para. 22466 CCH OSHD (Aug. 9, 1974), the courts have rejected this view, see Ocean Electric Corporation v. Secretary, (and other citations supra). Unlike Ocean Electric where it was stipulated that a foreman had ordered an apprentice into a place of danger where he was electrocuted, JTC disputes the allegation that employees were ordered into a hazardous area by a supervisor. In the

absence of a stipulation as in Ocean Electric and upon consideration of Cristaldi's unrebutted testimony that the two men were in the trench contrary to his specific instructions, it must be concluded as a matter of law that the incident was unforeseeable and that there was no violation of §652(b).

ORDER

It is therefore hereby ordered that Citations 1 and 2 and the proposed penalties be vacated and that this proceeding be dismissed.

Ben D. Worcester

BEN D. WORCESTER
Judge, OSHRC

Dated: February 4, 1980
Boston, Massachusetts

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

---

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

Complainant,

v.

OSHRC DOCKET
No. 79-2455

J.T.C. CONSTRUCTION COMPANY, INC.,

Respondent.

---

STIPULATION AND SETTLEMENT AGREEMENT

I.

The parties hereby enter into this stipulation and settlement agreement as full and complete settlement of the instant case which is presently pending before the Occupational Safety and Health Review Commission (hereinafter "the Commission").

II.

The parties stipulate as follows:

(A) The Commission has jurisdiction of this matter purusant to section 10(c) of the Occupational Safety and Health Act of 1970 (84 Stat. 1590, 29 U.S.C. §651 et. seq.) (hereinafter "the Act").

(B) Respondent, J.T.C. Construction Company, Inc., is a corporation with an office and place of business located in North Andover, Massachusetts, and is engaged in the operation of a construction business. During the course of its business, Respondent uses equipment and material from places

located outside the State of Massachusetts. Respondent was and is an employer engaged in a business affecting interstate commerce within the meaning of sections 3(3) and 3(5) of the Act and employed employees within the meaning of section 3(6) of the Act.

(C) As a result of an inspection conducted on April 20-24, 1979, at respondent's worksite located at Centennial Industrial Park, Fourth Street, Peabody, Massachusetts, two citations and notifications of proposed penalty were issued to respondent on April 27, 1979, by certified mail, return receipt requested, pursuant to Sections 9(a) and 10(a) of the Act, to wit:

> (1) Citation No. 1 alleging one item of serious violation of the standard set forth at 29 CFR 1926.21(b)(2) and proposing a penalty of $480; and
>
> (2) Citation No. 2 alleging one item of willful violation of the standard set forth at 29 CFR 1926.652(b) and proposing a penalty of $4800.

(D) By letter dated May 4, 1979, respondent timely contested the citations and proposed penalties. The notice of contest was duly transmitted to the Commission.

(E) Following the timely filing of a complaint and answer, this matter came to hearing on November 20, 1979, before an administrative law of the Commission.

(F) On February 4, 1980, the administrative law judge issued his decision and order in which he vacated the citations and the penalties proposed therefore.

(G) On February 28, 1980, the Secretary filed a petition for discretionary review. On March 5, 1980, Commissioner Bertram Robert Cottine directed the case for review.

(H) On September 24, 1982, the Secretary filed a motion for suspension of briefing schedule in order to execute this stipulation and settlement agreement.

III.

Complainant hereby agrees to amend Citation No. 2 for willful violation to allege a serious violation of the cited standard and to reduce the proposed penalty to $900.00. Complainant further agrees reduce to $100.00 the penalty proposed for citation No. 1.

IV.

Respondent hereby agrees to withdraw its notice of contest of the citations and penalties proposed therefor, as amended above, states that it has abated the violations set forth in the citations, and agrees to pay the amended proposed penalty of $1000.00 within fifteen (15) days from the filing of this stipulation and settlement agreement with the Commission.

V.

Complainant and respondent hereby agree to bear their own fees and other expenses incurred by them in connection with any stage of this proceeding.

VI.

Respondent certifies that on 11/10/82, 1982, it posted this stipulation and settlement agreement in accordance with Commission Rule 7.

VII.

Except for this matter between the Secretary and respondent, and except for the issuance by the Secretary of a notification of failure to correct these alleged violations or any other subsequent OSHA proceeding between the Secretary and respondent, none of the foregoing agreements, statements, findings and actions taken by respondent shall be deemed an admission by respondent of the allegations contained within the citations and notifications of proposed penalty or the complaint. The agreements, statements, findings and actions taken by respondent herein are made only for the purpose of compromising and settling this matter economically and amicably, and they should not be used for any other purpose, except as herein stated.

VIII.

Upon approval of this agreement by the Commission, the agreement shall constitute a final order of the Commission.

WHEREFORE, the Secretary and Respondent request the Commission to approve this stipulation and settlement agreement.

FOR THE COMPLAINANT

FOR THE RESPONEDNT

Dated this 2nd day of December, 1982.

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

November 26, 1982

IN REFERENCE TO SECRETARY OF LABOR V.

Antonio Levesque & Sons DOCKET NO. 82-578

NOTICE IS GIVEN TO THOSE LISTED BELOW:

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FOR EMPLOYEES

Judge Foster Furcolo
OSHRC
John W. McCormack Post Office
& Courthouse RM 414
Boston, Mass 02109

## NOTICE OF DOCKETING

Notice is given that the above case was docketed with the Commission on November 26, 1982. The decision of the Judge will become a final order of the Commission on December 27, 1982 unless a Commission member directs review of the decision on or before that date.

Petitions for discretionary review should be received early in order to permit sufficient time for their review. See Commission Rule 91, 29 C.F.R. Sec. 2200.91.

All pleadings or other documents that may be filed shall be addressed as follows:

Executive Secretary
Occupational Safety and Health
Review Commission
Room 401
1825 K St., N. W.
Washington, D. C. 20006.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

11/82

9

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant<br>v.<br>ANTONIO LEVESQUE & SONS, INC.,<br>Respondent | OSHRC DOCKET NO. 82-578 |

APPEARANCES:

Ronald Glover, Esq., for Complainant

Gerald E. Rudman and Philip D. Buckley, Esqs., for Respondent

DECISION AND ORDER

This case arose under 29 USC, sec. 651 et seq. of the Occupational Safety and Health Act of 1970 (the Act). As a result of an inspection by the Occupational Safety and Health Administration (OSHA) of the Respondent's premises on or about February 23 - March 26, 1982, Citation #1 was issued on or about May 17, 1982, charging that the Respondent violated sec. 5(a)(2) of the Act by the serious violation of the standard at 29 CFR 1910.266(e)(2)(i) in that the Respondent did not instruct fellers engaged in pulpwood harvesting to plan a retreat path and clear a path as necessary before the cut was started.

On or about May 27, 1982, the Respondent filed Notice of Contest to the Citation and the penalty proposed therefor.

The pertinent sections of the Act and the standards concerned are appended to this decision under appropriate titles.

## PRELIMINARY

In the course of its business, the Respondent operated a sawmill to which it brings lumber from trees felled by its employees at various forests, including the worksite in question. The lumber is processed into boards of various lengths, saw-logs, chips, pulpwood, and other products that customers have previously ordered or purchased on sight.

The worksite was a stand of trees near the Respondent's camp at McNally Pond. The trees, which were in snow 36 - 39 inches deep, were in "compartments" about 600 - 1500 feet along the roadway and 1500 - 2000 feet perpendicular from the road to the rear. The Respondent's employees worked in groups of two, consisting of a "skidder" and a "chopper". The skidder operates tree-hauling equipment that drags the tree after the chopper has felled it with a chain-saw. The chopper puts cuts in the tree at places he believes will make the tree fall in a determined direction. The retreat path is intended to be a safe area for the chopper.

## THE ISSUES

1. Was the Respondent engaged in a pulpwood logging operation?

2. Had the fellers been instructed to plan a retreat path, and clear it, before the cut was started?

3. Were conditions at the worksite such that it was necessary to clear a retreat path?

## .266(e)(2)(i)

The testimony offered by both parties clearly established that employees had not been instructed to plan a retreat path of any kind. The fellers themselves [Yves Levesque, Roland Levesque, Sylvain, and Marquis], who all impressed me as honest, hard-working people, so testified...Tr. 162, 170, 176, 178, 179, 185.

The Respondent's logging supervisor [Tardie], who also impressed me as an honest, hard-working man, so testified...Tr. 200, 201, 267. Since I not only believe those witnesses but there was no testimony to contradict them, I find that fellers had not been instructed to plan a retreat path or clear it.

A question of interpretation arises because of the wording of the standard: "The feller shall be instructed to plan retreat path and clear path as necessary...". Do the words "as necessary" modify the clause "shall be instructed" or the clause "clear path" or both? In my opinion, they modify only the clause "clear path". However, if they modify both clauses, the facts in the instant case establish that it was "necessary" to instruct the fellers to plan a retreat path because there was a danger of a tree falling in an unintended fashion, and the feller had not planned a retreat path of any kind. And, if a retreat path had been planned [e.g., the footprints leading to the tree], it certainly had not been cleared, which was necessary because of the depth of the snow. Consequently, regardless of what interpretation is given to the words "as necessary", a violation of the standard has been established.

Would the Respondent be excused from "instructing" the employees simply because they were skilled workers who should themselves have known what safety precautions to take? The law is clear that the employer cannot shift such a responsibility to the employees. The standard here specifically states that the feller "shall" be instructed. Moreover, the interpretation given an analogous standard [the general safety standard, 29 CFR 1926.21(b)(2)] is to the same effect. That standard's specific words "shall instruct each employee" have been construed on several occasions. For example, in the Pohl case [7 OSHC 1483] the Administrative Law Judge held that compliance with the standard at 29 CFR 1926.21(b)(2) required instructions beyond the scope covered in a general safety program. In the Cleveland Wrecking Company case

[6 OSHC 1821], where the Respondent hired only experienced demolition men, the Administrative Law Judge ruled that experience cannot be substituted for the safety instruction mandated by the standard at .21(b)(2). It was also pointed out that the veteran employee may be imperilled by complacency. In the National Industrial case [6 OSHC 1914] the 8th Circuit Court of Appeals held that compliance with .21(b)(2) requires more than a general safety program, especially for new employees.

The cases make it clear that if the proper instructions are not given [where the standard says "shall instruct"], regardless of the reason for failing to do so, it is a violation of the standard. That is because it is not only salutary to remind the employee of the hazard but also it may result in greater care being taken by an employee who is made aware of the fact that the employer is insisting that precautionary measures be followed.

There was testimony from which it might be argued that the workers' footsteps to the tree might constitute a "path". Assuming such an inference were possible, certainly such a path was not cleared "as necessary" where the snow was 36 - 39 inches deep and, for most of the employees, was either waist high or chest high according to the testimony of all the witnesses for both parties... Tr. 17, 155, 162, 164, 177, 185, 201. Such footsteps in the snow would not constitute a "clear" path.

I find that no path was cleared as was necessary under the conditions at the worksite.

## HAZARD

The hazard of not having a retreat path planned and cleared was that, if the tree did not fall in the intended direction, the employee might be seriously injured or killed if it fell on him...Tr. 58 - 60.

All the witnesses agreed that trees do not always fall in the intended direction. It was clearly established that it was not unusual for an employee to be injured by the limb or trunk of a felled tree or by some part of another tree. In fact, two of the witnesses had themselves been struck by falling trees...Tr. 159, 160, 167. The Respondent's logging supervisor testified that working among large trees is unsafe...Tr. 241. And the testimony of the Respondent's expert also tended to establish the hazardous nature of tree felling...Tr. 105, 106, 111.

Although the hazard to the tree-feller is the same whether the lumber is eventually processed into pulpwood or one of the other products [e.g., saw-logs], the standard nevertheless protects only those employees who fell trees that are destined for the pulpwood industry. That is the anomalous result of its wording even though the time, place, and methods of felling two identical trees are exactly the same in every aspect except the ultimate use of the processed lumber. As pointed out in the uncontradicted testimony of the expert, Rolston [Tr. 80, 81, 88], that result apparently was intended by those who drew up the ANSI standard. In any event, whether intended or unintended, the unambiguous words of the standard mandate such a distinction based on the ultimate product processed from the tree.

KNOWLEDGE

Supervisory personnel of the Respondent were on the worksite frequently, were completely familiar with conditions there, and knew that there had been no specific instruction given to employees on planning or clearing a retreat path. Moreover, there had been previous incidents where trees fell and hit or narrowly missed employees...Tr. 157, 246, 264, 267, 274.

I find that the Respondent knew, or should have known, of the hazardous

conditions.

.266(a)

The Respondent contended that the standard at .266(e)(2)(i) did not apply to it because its operation at the worksite related to saw-logs, which is exempted by the standard at 29 CFR 1910.266(a).

The standard at .266(e)(2)(i) specifically applies to "pulpwood logging operations" and specifically excludes "logging operations relating to saw-logs".

The evidence tended to establish that the major portion of the Respondent's operation had to do with pulpwood. As explained by the expert [Rolston], there is a difference in the way the tree is cut when it's related to saw-wood logging as distinguished from pulpwood purposes. For saw-logging, it is important to have a cut parallel to the ground so that the end is square cut; and that is not of such concern in pulpwood logging. He also said that a larger tree is preferred for saw timber than for pulpwood. He explained that it does not matter if the bottom of the tree is split in pulpwood logging whereas in hardwood logging that might reduce the board length by a couple of feet.

As he testified: In saw-log logging it is important "to be very careful that the butt of the log is in good shape...have to take good care that your cuts are relatively parallel to the ground so that you get a good square cut on the end...this is very important in utilization at the mill...so, the feller has to be more careful in cutting saw timber than he does in pulpwood logging..." He also pointed out that the feller is "dealing with generally a larger tree for utilization of saw timber than for pulpwood."...Tr. 91, 92.

Yet the chopper Levesque testified without contradiction that his boss never suggested how to make a cut and he was given no instructions about how the bottom end of the stump should look...Tr. 165, 174. While that evidence is

not conclusive, of course, it is more consistent with a finding that it was a pulpwood operation than a saw-log one.

The same conclusion is true of Levesque's testimony that some of the trees felled were only 5, 6, 8, and 10 inches in circumference...Tr. 165. It is not likely that such small trees were felled for saw lumber.

I was very favorably impressed with the qualifications and honesty of the Compliance Officer [Cyr]. He testified that the Respondent's personnel director [Caron] said that the Respondent was harvesting pulpwood; that, while some of the wood was for saw-logs, the majority was being used to make chips for pulpwood; and that the main body of the wood was being used for pulp or chips to be sold as pulp...Tr. 46, 125, 150. He also testified that trucks at the jobsite were hauling full tree lengths, a common method of transporting pulpwood... Tr. 124.

Although Caron testified that only "some of the waste product lumber...was converted into chips", he did not specifically deny the Compliance Officer's statement of the conversation...Tr. 281.

The Respondent's employee [Marquis] testified that the Respondent's logging supervisor [Tardie] told him the Respondent had a contract to sell chips to the Fraser Company, and had so many thousand cords to cut...Tr. 186, 187. The employees' union representative [Trepanier] testified that the Respondent's logging supervisor told him the same thing, and that that was the only thing keeping the Respondent operating because saw-logs were not selling...Tr. 193. Those statements of Marquis and Trepanier were not contradicted or denied by the Respondent.

The Respondent's logging supervisor [Tardie] testified that the lumber was not being harvested for pulpwood...Tr. 205, 206. However, he made several other

statements that would tend to contradict that conclusion. He said that, before work was begun at the McNally Pond worksite, the Respondent advertised for laborers at pulpwood rates...Tr. 199, 200. He also said that the Respondent had a contract with the Fraser Paper firm to provide it with chips...Tr. 204. He estimated that 10 - 15 percent, or at least 10 percent, of the roundwood would end up in the pulp process...Tr. 249, 250.

On all the evidence, it seems clear that the Respondent was engaged, at least to some degree, in pulpwood logging. However, the question still arises: what is the standard's application when the operation relates in part to pulpwood logging (where the language of the standard is that it applies) and in part to saw-logs (which is exempted)?

In my opinion, no reasonable interpretation of the standard would require that the operation be solely and exclusively pulpwood logging; if that were not so, a Respondent could avoid its consequences merely by having some slight percentage [e.g., 1%] of the process be in other than pulpwood. Certainly no legislative body would have intended such an unreasonable result. Having in mind that the purpose of the law is to protect employees, the standard should be interpreted to apply if a significant part of the operation was in pulpwood logging. Here, what part of the operation was in pulpwood? And was that part "significant"?

While the evidence is not overwhelming, a clear preponderance of it leads to the conclusion that at least some part of the Respondent's operation constituted "pulpwood logging". No one bit of evidence in itself would establish that conclusion — but the sum total of various items do so. They include the above specified admissions attributed to the Respondent's personnel director and logging supervisor, the trucks hauling full tree lengths, the contract with Fraser Paper,

the advertisements relating to pulpwood rates, the felling of small circumference trees, the lack of instructions to fellers to cut parallel to the ground, and other evidence of facts more consistent with pulpwood logging than saw-logging. I find that the evidence has established that the logging operation at McNally Pond was primarily, substantially, and significantly [if not completely] related to pulpwood; and that the standard cited applies.

CONTINUANCE?

At the hearing, the parties were advised that, if the Complainant requested time to meet any evidence offered by the Respondent to support its motion to strike or defense based on the standard at 29 CFR 1910.266(a), such time would be granted. No such continuance was ever requested.

ALTERNATE FINDING

If upon review it be decided that pulpwood logging at the jobsite related to no more than 10% of the Respondent's operation [in keeping with the testimony of the Respondent's logging supervisor at Tr. 250], I find that that would be such a significant part of the Respondent's operation that the standard cited applies.

MOTIONS

The Respondent's motion to dismiss the Complaint for failure to state a claim, which was filed at the hearing and renewed in its brief, is denied for the reasons stated above under the topic entitled ".266(a)".

The Respondent's motion to dismiss the Complaint because the Complainant did not timely comply with the order to furnish it with a list of witnesses was denied...Tr. 5-7. The Respondent was advised that, if it felt prejudiced in any way because of the delay, any request by it for additional time would be granted. No request was ever made.

## FINDINGS OF FACT

Having heard the testimony, observed the witnesses, and examined the exhibits, the following Findings of Fact are made:

1. At all times concerned, the Respondent regularly received, handled or worked with goods which had moved across state lines.

2. As concerns Citation #1, the Respondent's employees were not instructed to plan a retreat path or clear it as necessary before starting a cut in trees.

3. The snow at the jobsite was 36 - 39 inches in depth and footsteps in it did not constitute an adequate path.

4. A significant part of the work at the jobsite was related to pulpwood logging.

5. The conditions described in Citation #1 exposed the Respondent's employees to sustaining serious or fatal harm because of the hazard of a tree falling on the feller.

6. One or more officers or supervisory personnel of the Respondent knew of the hazardous conditions described herein and knew that employees were exposed to such hazard.

## CONCLUSIONS OF LAW

1. At all times concerned, the Respondent was an employer engaged in a business affecting commerce within the meaning of the Act; and the Occupational Safety and Health Review Commission has jurisdiction over the subject matter and the parties.

2. At all times concerned, the Respondent knew, or with the exercise of due diligence should have know, of the alleged violation.

3. On the date in question, the Respondent was not in compliance with the standard at 29 CFR 1910.266(e)(2)(i), and the Complainant has sustained the

burden of proving the Respondent violated sec. 5(a)(2) of the Act (sec. 654).

**ORDER**

The whole record having been considered, and due consideration having been given to 29 U.S.C. sec. 666(j), it is ordered:

1. Citation #1 is affirmed and a penalty of $315 assessed therefor.

SO ORDERED.

Foster Furcolo

FOSTER FURCOLO
JUDGE, OSHRC

Dated: November 22, 1982
Boston, Massachusetts

## APPENDIX

## THE ACT

Section 654 [section 5(a)(2)] Employer "...shall comply with occupational safety and health standards..."

Section 666 [section 17(b)] "...employer who has received a citation for a serious violation...of this Act...shall be assessed a civil penalty of up to $1,000 for each such violation."

Section 666 [section 17(j)] "...assess all civil penalties...giving due consideration to...the size of the business...gravity of the violation, the good faith of the employer, and the history of previous violations."

Section 666 [section 17(k)] "...a serious violation shall be deemed to exist...if there is a substantial probability that death or serious physical harm could result...unless the employer did not, and could not...know of the presence of the violation."

## THE STANDARDS

29 CFR 1910.266(a): "This section applies to pulpwood logging operations including but not limited to the operations of felling...and other operations associated with the preparation and movement of pulpwood timber from the stump to the point of delivery. The provisions of this section do not apply to logging operations relating to saw-logs..."

29 CFR 1910.266(e)(2)(i): "The feller shall be instructed to plan retreat path and clear path as necessary before cut is started."

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| | [Remand] | | |
| | (Judge's decision) | | 74/B7 |
| 76-5125 | CARPENTER RIGGING INCORPORATED | 12/29/82 | 74/E7 |
| | (Judge's decision) | | 74/F1 |


NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

| Year Decision Issued | The Official Reporter | The No. of Fiche Where Decision Is Printed | Coordinates on the Fiche for First Page of Cited Decision | Cite to Specific Page of Cited Decision |
|---|---|---|---|---|

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

December 29, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Cox Enterprises, Inc. d/b/a Atlanta Newspapers, Inc.

OSHRC DOCKET NO. 12074

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION (REMAND)

To wit: See attached.

FOR THE SECRETARY OF LABOR

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FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Rev. 10/1/76

Atlanta Paperhandlers Union Number 28
2708 Arbor Avenue, Southeast
Atlanta, GA. 30317

Judge's Office
Occupational Safety & Health
Review Commission
1365 Peachtree Street Room 240
Atlanta, GA. 30309

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | |
| COX ENTERPRISES, INC., d/b/a ATLANTA NEWSPAPERS, | : | OSHRC Docket No. 12074 |
| Respondent. | : | |
| ATLANTA WEB PRESSMEN UNION LOCAL 10, | : | |
| Authorized Employee Representative. | : | |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

The issue in this case is whether Respondent, Cox Enterprises, Inc., d/b/a Atlanta Newspapers ("Cox"), failed to abate a violation of the noise standard at 29 C.F.R. § 1910.95(b)(1).[1/] Resolution of that issue turns

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1/ 29 C.F.R. § 1910.95(b)(1) provides:

§ 1910.95 Occupational noise exposure.

* * *

(b)(1) When employees are subjected to sound exceeding those listed in Table G-16, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided

(continued on next page)

on whether engineering controls beyond those Cox had implemented were feasible. Administrative Law Judge John S. Patton found that the Secretary failed to prove the feasibility of additional controls and vacated the failure to abate notification. We set aside his decision and remand for further proceedings.

I

Cox publishes the major morning and afternoon newspapers in Atlanta, Georgia, the Atlanta Constitution and the Atlanta Journal, and a combined Sunday edition, the Journal-Constitution. On August 23, 1972, the Secretary

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1/ (continued)

and used to reduce sound levels within the levels of the table.

* * *

TABLE G-16—PERMISSIBLE NOISE EXPOSURES[1]

| Duration per day, hours | Sound level dBA slow response |
|---|---|
| 8 | 90 |
| 6 | 92 |
| 4 | 95 |
| 3 | 97 |
| 2 | 100 |
| 1-1/2 | 102 |
| 1 | 105 |
| 1/2 | 110 |
| 1/4 or less | 115 |

[1] When the daily noise exposure is composed of two or more periods of noise exposure of different levels, their combined effect should be considered, rather than the individual effect of each. If the sum of the following fractions: $C_1/T_1 + C_2/T_2$ $C_n/T_n$ exceeds unity, then, the mixed exposure should be considered to exceed the limit value. $C_n$ indicates the total time of exposure at a specified noise level, and $T_n$ indicates the total time of exposure permitted at that level.

Exposure to impulsive or impact noise should not exceed 140 dBA peak sound pressure level.

of Labor ("Secretary") issued a citation to Cox pursuant to section 9(a), 29 U.S.C. § 658(a), of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"). The citation alleged that Cox violated section 1910.95(b)(1) by failing to implement feasible administrative or engineering controls when sound levels exceeded those listed in Table G-16 of the standard. The citation required that the violation be corrected by August 2, 1973. Cox did not contest the citation, and it therefore became a final order of the Commission pursuant to section 10(a) of the Act, 29 U.S.C. § 659(a). Cox was subsequently granted extensions of the abatement date to November 4, 1974. On December 4, 1974, the Secretary conducted a follow-up inspection at Cox's worksite. As a result of this reinspection, Cox was issued a notification of failure to correct the violation pursuant to section 10(b) of the Act, 29 U.S.C. § 659(b). Cox's contest of the failure to abate notification is now before the Commission. Cox concedes that excessive noise continued to exist at its worksite after the final abatement date of November 4, 1974, but contends that it complied with the citation by installing all feasible engineering and administrative controls to reduce the noise exposure of its employees.

This case involves the noise generated by Cox's printing presses. In Cox's press room are six presses, each consisting of a number of printing units and a folder. When a press is operating, the noise level at the folder of that press is 106-107 dBA. Cox's pressmen have various duties to perform while the presses are running that require their presence at the folder, and they are therefore exposed to these high noise levels. The

pressmen also have other duties to perform in the press room and reel room[2/] at locations where the noise levels are lower than at the folder, but still in excess of 90 dBA.

On a normal day, Cox employs two shifts of pressmen: a night shift to print the next day's Constitution, and a day shift to print that day's Journal. Each shift lasts 7 1/2 hours, but the presses do not run during an entire shift. During a shift, the pressmen work in crews containing at least three members, and the crew members rotate at the presses at 30 minute intervals. Thus, an individual pressman will work a 30 minute period and will then have no duties to perform for at least an hour. It is not unusual for an individual pressman to work consecutive night and day shifts, and a pressman will sometimes work three consecutive shifts. Additional shifts are sometimes added, particularly on Thursdays and Saturdays when certain sections of the Sunday paper are printed. These additional shifts, however, occur during the same time periods as the regular shifts on these days and are manned by different crews than those working the regular shifts. On Saturdays, when the Sunday paper is being printed, a shift will sometimes exceed 7-1/2 hours.

After receiving the original citation, Cox assigned Robert Simonton, its Director of Personnel, and Glenn Elvidge, its Director of Engineering and Production, the task of bringing the company into compliance with the

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2/ The printing presses are fed newsprint from large reels located underneath the presses. The area in which the reels are located is called the reel room. The reel room and press room, however, are not two distinct rooms, but are sections of a large open area. The same employees work in the reel room as the press room. Moreover, the main noise sources in the reel room are the printing presses, and controls that would reduce noise in the press room would also reduce the noise levels in the reel room. Accordingly, in our subsequent discussion, our references to the press room will also include the area called the reel room.

noise standard. Simonton and Elvidge concluded that, because of the unpredictable duration of any individual pressman's noise exposure during a working day, the only way to achieve full compliance with the standard was to reduce the noise level in the press room to less than 90 dBA. With this objective in mind, they contacted various consultants and investigated what other newspapers had done to control excessive noise.

At the printing facility of the Dayton Daily News, another newspaper in Cox's chain, Simonton and Elvidge observed an acoustical folder enclosure in use. The enclosure reduced the noise level by 7 dBA, but the noise level outside the folder was still 100 to 101 dBA. They also observed a Wall Street Journal printing plant in New Brunswick, New Jersey, in which a wall-type barrier had been erected between the presses and the employees. They determined that the noise level outside the barrier was 96 dBA. Elvidge also contacted the manufacturer of its presses, MGD Graphics Systems, known in the trade as "Goss." He learned that Goss had commercially available a folder enclosure that would produce a 10 dBA reduction in the noise level at the folder.

One of the consultants Simonton and Elvidge contacted, M.J. Kodaras and Associates, performed a study of Cox's press room and concluded that there was no feasible means of achieving compliance with the standard short of redesigning the equipment in the room. Two other consultants made recommendations which Simonton and Elvidge found to be unsatisfactory, but they did not elaborate on their reasons for reaching that conclusion. Simonton and Elvidge ultimately concluded that it was impossible to achieve a noise level of less than 90 dBA at the folders of its presses. They therefore determined that the best approach was to isolate the employees from the noise during the periods when the employees had no duties to

perform at the presses rather than to attempt to eliminate the sources of noise. A company called Noise Abatement Systems offered to build quiet rooms within the press room and guaranteed that the noise level within the quiet rooms would be less than 90 dBA. Cox contracted to have three such quiet rooms built at a cost of $110,000. When completed, the noise level within the quiet rooms was between 82 and 85 dBA. Thus, when pressmen were not working at the presses during their 30 minute rotations, they could enter a quiet room in which the noise level was less than 90 dBA. However, while outside the quiet rooms, pressmen were still exposed to noise in excess of the levels permitted by the standard.[3/]

II

Much of the evidence and argument presented to the judge concerned whether engineering controls were available to Cox to reduce the noise level in its press room to less than 90 dBA.[4/] In vacating the failure to abate notification, the judge found that although "[a] substantial reduction in noise can be accomplished" by use of engineering controls, the Secretary had not proven that such controls were available to reduce

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3/ The parties stipulated that Cox provided personal hearing protection equipment to its employees and required that such equipment be used whenever an employee was in the press room. However, the provision and use of personal protective equipment does not diminish an employer's responsibility under the standard to implement whatever engineering or administrative controls are feasible to reduce noise levels. See Turner Co., 76 OSAHRC 108/A2, 4 BNA OSHC 1554, 1976-77 CCH OSHD ¶ 21,023 (No. 3635, 1976), rev'd on other grounds, 561 F.2d 82 (7th Cir. 1977).

4/ The Secretary argued that it was not necessary for controls to achieve Table G-16 levels in order to be feasible but that, in any event, he had proven that Cox could have achieved G-16 levels. Cox argued that it could not have achieved G-16 levels and that controls were therefore not feasible.

noise to that permitted by the standard.[5/] Since the judge issued his decision, however, the Commission has held repeatedly that the Secretary is not required to prove that controls can achieve Table G-16 levels in order to establish their feasibility. In Continental Can Co., 76 OSAHRC 109/A2, 4 BNA OSHC 1541, 1976-77 CCH OSHD ¶ 21,009 (No. 3973, 1976), appeal withdrawn, No. 76-3229 (9th Cir. Apr. 26, 1977), the Commission held that controls are technologically feasible within the meaning of section 1910.95(b)(1) if they are capable of achieving a significant reduction in noise levels. This holding was reiterated in Samson Paper Bag Co., 80 OSAHRC 60/A2, 8 BNA OSHC 1515, 1980 CCH OSHD ¶ 24,555 (No. 76-222, 1980). The Commission has recently overruled the additional

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5/ The Secretary filed a petition for discretionary review, which Commissioner Cleary granted pursuant to 29 U.S.C. § 661(i). The petition argued that the judge had erred in holding that administrative or engineering controls must achieve the noise levels given in Table G-16 in order to be considered feasible.

After the expiration of the 30-day period in which a Commission member may direct review pursuant to 29 U.S.C. § 661(i), the Secretary filed a supplemental petition for discretionary review, arguing that the judge had erred in finding that engineering controls could not achieve Table G-16 levels at Cox's worksite and in finding that Cox's employees were adequately protected against excessive noise by personal protective equipment. This supplemental petition was brought to the attention of the three members of the Commission, who all agreed that the parties should be afforded the opportunity to brief the additional issues it raised. The parties were notified of this decision through a document entitled "Direction For Review," which was signed by William S. McLaughlin, who was then the Commission's Executive Secretary. This document inadvertently made it appear that Mr. McLaughlin had granted the Secretary's supplemental petition. Cox contends that the issues raised in the supplemental petition are not properly before the Commission because the petition was not timely filed and because only a Commission member, and not the Commission's Executive Secretary, can direct that a case be reviewed.

Our disposition of this case is predicated on the issue raised in the Secretary's original petition for discretionary review. Accordingly, we need not decide whether the issues raised in the supplemental petition are properly before the Commission.

holding of Continental Can that the economic feasibility of controls must be determined by a cost-benefit analysis. Sun Ship, Inc., OSHRC Docket No. 16118 (Dec. 17, 1982). The decision in Sun Ship, however, reaffirmed the holding of Continental Can that controls need not be capable of reducing noise to Table G-16 levels in order to be feasible. Slip op. at 12 n.11.

The evidence clearly establishes that engineering controls in addition to the quiet rooms Cox installed were technologically feasible. Cox's own investigation into printing press noise controls showed that other newspapers, notably the Dayton Daily News and the Wall Street Journal, had achieved significant noise reductions by means of folder enclosures and acoustical barriers. Moreover, folder enclosures for the type of Goss presses Cox owned were commercially available. William Rouse, the manager of product safety and environment for Goss, testified that such an enclosure had reduced the noise at the Lansing State Journal to 90 dBA. Although Rouse stated that he would not recommend the same type of installation for Cox, he believed that the noise levels in Cox's press room could have been reduced significantly, possibly to 90 dBA, by a more complex system of enclosures and sound barriers. Michael Hine, a highly qualified noise expert who testified for the Secretary, was of the opinion that a 9 dBA reduction could be achieved in Cox's press room by partial enclosures around the presses and that the Lansing-type enclosure, optimized for Cox's operation, could have produced a 20 dBA reduction.[6/]

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6/ Hine also believed that certain controls in addition to enclosures were feasible. However, if any control that Cox did not implement was feasible, then Cox failed to abate the violation as alleged.

(continued on next page)

Section 1910.95(b)(1) requires that controls be economically, as well as technologically, feasible. Sun Ship, Inc., supra. In order to be economically feasible, the cost of controls must not be so great as to threaten the employer's long-term profitability and competitiveness, unless the employer's inability to afford the cost of controls results from the employer having lagged behind its industry in providing safety and health protection for employees. Id.

The parties presented some evidence concerning the cost to Cox of installing enclosures similar to the Goss enclosure used at the Lansing State Journal. Hine estimated that the total cost would be $300,000, although it is not clear whether this figure included costs associated with his suggestion that the Lansing design be optimized for Cox's operation. Elvidge testified that Cox had been informed by Goss that an enclosure for each folder would cost $40,000 to $50,000, for a total cost of $240,000 to $300,000 for Cox's six presses. However, Rouse, Goss's manager of product safety and environment, estimated that the Lansing-type enclosures, modified to take into account the configuration of Cox's press room, would cost $150,000 per press.

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6/ (continued)

As we conclude that the record demonstrates the technological feasibility of enclosures, we need not decide whether the additional controls mentioned by Hine are feasible. See Cyprus Mines Corp., OSHRC Docket No. 76-616 (Dec. 17, 1982), slip op. at 8. Although Cox has been proceeding on the assumption that it must reduce the noise levels to less than 90 dBA because its pressmen sometimes work longer than eight hours per day, the evidence concerning the manner in which the pressmen rotate suggests that each individual pressman spends substantially less than eight hours per day outside of a quiet room, even during a day in which the pressman works a double shift. We note that Table G-16 permits higher noise levels than 90 dBA for periods of exposure shorter than eight hours per day.

This case was tried before the Commission issued its decision in Sun Ship, Inc., supra. Accordingly, the parties were not on notice that Cox's ability to afford the cost of controls was relevant to the economic feasibility of the controls, and the parties presented no evidence concerning Cox's financial condition from which we could conclude whether or not the cost of enclosing its presses would threaten Cox's long-term profitability and competitiveness. Although the parties presented some evidence on the cost of enclosures, they did not focus as sharply on this point as they might have had they known such costs would be relevant. Moreover, the parties have not had the opportunity to argue the impact of our decision in Sun Ship on this case. We will therefore remand this case to allow the parties an opportunity to present further evidence and argument on the economic feasibility of enclosures, and for the judge to apply our holding in Sun Ship to this case.[7/]

III

The Commission issued a supplemental briefing order asking whether the Commission has the authority to establish a new abatement date if it should affirm the failure to abate notification. This question arises because, if the Commission were to find that additional feasible engineering controls were available to Cox, unless a new abatement date was established for the installation of such controls, Cox could be subject to additional penalties if it should fail to install the controls immediately.

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7/ At one point in his testimony, Simonton stated that noise enclosures "would make it very difficult to operate and work on the press efficiently." This suggests that such enclosures might impose additional, indirect costs on Cox. On remand, the parties may present additional evidence bearing on such indirect costs as well as on the direct cost of enclosures. See Cyprus Wire Corp., supra.

Because we are not affirming the failure to abate notification, the issue stated in the supplemental briefing order need not be decided at this time. However, on remand, the judge should afford the parties the opportunity to present evidence concerning a reasonable time period for the installation of enclosures in Cox's press room. If the judge should ultimately affirm the failure to abate notification, he should then consider whether it is appropriate to establish a new abatement date for the installation of the enclosures.

Accordingly, the judge's decision is set aside, and the case is remanded to the Chief Judge[8/] for further proceedings consistent with this opinion. SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

DATED: DEC 29 1982

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8/ Judge Patton has retired.

COTTINE, Commissioner, concurring:

The majority opinion sets forth my rationale for the disposition of this case. However, it fails to respond to a fundamental error in the dissenting opinion affecting the application of the noise standard to this and related cases involving engineering and administrative controls. The dissent expresses the Chairman's personal view that engineering or administrative controls should not be preferred over personal protective equipment,[1/] notwithstanding the explicit requirements of the standard, 29 C.F.R. § 1910.95(b). However, it is not within the Commission's authority as an adjudicatory body to question the wisdom, effectiveness or appropriateness of a standard promulgated by the Secretary. Sun Ship, Inc., OSHRC No. 16118, slip op. at 23-24 n.20 ((Dec. 17, 1982); H.H. Hall Construction Co., 81 OSAHRC 91/D12, 10 BNA OSHC 1042, 1047 1981 CCH OSHD ¶25,712 at p. 32,056 (No. 76-4765, 1981) W.J. Lazynski, Inc., 79 OSAHRC 108/B6, 7 BNA OSHC 2064, 2072, 1980 CCH OSHD ¶24,145 at p. 29,336 (No. 13864, 1979); Austin Bridge Co., 79 OSAHRC 81/A2, 7 BNA OSHC 1761, 1764, 1979 CCH OSHD ¶23,934 at p. 29,021 (No. 76-93, 1979).[2/] Nor is it for the

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1/ The Chairman relies on note 12 of his dissenting opinion in Sun Ship to conclude that "personal protective equipment is capable of as much as a 20 to 30 dB attenuation in existing noise levels and can reasonably be expected to produce a 10 to 15 dB attenuation." Slip op. at 38. That dissent cited as authority the recent revision of the noise standard to require a hearing conservation program. OSHA Occupational Noise Standard: Hearing Conservation Amendment, 46 Fed.Reg. 4078 (1981)(codified at 29 C.F.R. § 1910.95(c)-(s)). However, the preamble to that modification contradicts the dissent's representation, stating that a more reasonable estimate of the "real world attenuation of hearing protectors" would be 10 dB. 46 Fed.Reg. at 4114.

2/ The dissent overlooks the fact that the hearing conservation program supplements the requirements for feasible engineering and administrative controls. 46 Fed.Reg. at 4078, 4161. The Assistant Secretary expressly deferred any modification of either the permissible exposure level for occupational noise exposure or the priorities among compliance methods. Id. at 4078, 4102, 4105, 4111. The preamble states:

> Engineering controls provide more consistent and dependable protection to worker hearing than personal hearing protectors and are still preferred by OSHA.

Id. at 4114. The dissent attempts to accomplish in adjudication what the Secretary declined to do in rulemaking.

Commission to predict the outcome of presently-pending standard-setting proceedings on personal protective equipment for occupational noise exposure. See Modern Drop Forge Co. v. Secretary of Labor, 683 F.2d 1105, 1111 (7th Cir., 1982); Koppers Co., 77 OSAHRC 44/A2, 2 BNA OSHC 1354, 1974-75 CCH OSHD ¶19,063 (No. 3449, 1974); United States Steel Corp., 77 OSAHRC 12/C3, 2 BNA OSHC 1343, 1974-75 CCH OSHD ¶19,047 (Nos. 2975 & 4349, 1974), (alternate holding), appeal dismissed, 517 F.2d 1400 (3d Cir. 1975).[3/] The modification of the legal preference established by the noise standard would exceed the Commission's exclusive authority as an adjudicatory body, 29 U.S.C. § 651(b)(3), and contravene the statutory delegation of rulemaking functions to the Secretary, 29 U.S.C. § 655(b). Moreover, it would be contrary to the dissenter's expressed view in Sun Ship, Inc. that it is the Secretary's exclusive authority to modify a standard through the statutory rulemaking process. Slip op. at 33 n.7, 39 (Rowland, Chairman, dissenting); see also Id., slip op. at 23-25 n.20 (Cottine, Comm'r, concurring). In fact, it now appears that the dissent would "short circuit" the standard-setting process by declaring the requirement for feasible engineering and administrative controls to be "unenforceable" and thus achieve a preference for personal protective equipment that has not been duly promulgated by the Secretary in conformity with the rulemaking requirements of the statute.

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3/ Compare 29 C.F.R. § 1910.1000, Table Z-1 (coal tar pitch volatiles standard previously applicable to coke ovens) with 29 C.F.R. § 1910.1029 (coke oven emissions standard).

ROWLAND, Chairman, dissenting:

I dissent from the majority's decision to remand this matter for further proceedings in light of Sun Ship, Inc., OSHRC Docket No. 16118 (Dec. 17, 1982). For the reasons stated in my dissenting opinion in that case, I would find the noise standard unenforceable to the extent that it requires the employer to use "feasible" administrative or engineering controls to reduce noise levels. Accordingly, I would vacate the failure to abate notification at issue here.

In the usual case involving citations to employers for failure to use administrative or engineering noise controls, I have dissented on the above ground without commenting further on the majority's decision. E.g., Cyprus Mines Corp., OSHRC Docket No. 76-616 (Dec. 17, 1982). The circumstances of this case, however, are such that further comment is appropriate.

As the majority notes, Cox, having previously been cited for an alleged violation of the noise standard, attempted to abate the violation by installing quiet rooms for use by its employees. In accordance with its decision in Sun Ship, the majority remands for a determination whether additional measures, specifically enclosure of the presses themselves, would "threaten Cox's long-term profitability and competitiveness." In so doing, the majority fails to give appropriate consideration to the measures Cox has already implemented and to the failure of the additional controls suggested by the Secretary to reduce the noise at Cox's workplace within the levels specified by Table G-16 of 29 C.F.R. § 1910.95(b)(1).

As the majority correctly points out, under the conditions presently existing in Cox's facility, its employees are exposed to excessive noise levels during the time that they are outside of the quiet rooms. As a result of the system of employee rotation in use by Cox, each employee is stationed at the presses for approximately one-third of his total working time, about five hours over two shifts. An employee, therefore, may be exposed to noise levels of as much as 106-107 dBA during that time. [1] However, Cox required its employees to wear personal hearing protection in accordance with Commission precedent holding that such equipment must be used when controls are not sufficient to reduce noise to within the levels permitted by the standard. [2]

Personal hearing protection would also have to be worn even if Cox were to install the enclosures found by the majority to be technologically feasible. As explained above, employees normally spend approximately five hours during the workday at the presses where noise levels are between 106 and 107 dBA. Reducing these levels to between 95 and 97 dBA [3] would not be sufficient to bring the exposure of Cox's

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1 As the majority points out, the presses do not operate continuously but rather intermittently during a shift. According to Cox's witness Simonton, the periods of operation of presses may coincide with an employee's rotation to the presses.

2 See note 3 of the lead opinion.

3 Although the majority notes the evidence regarding the extent of noise reduction which could be achieved through folder enclosures, it refrains from making a finding as to that reduction. See note 6 of the lead opinion. According to Elvidge, Cox's engineering and production manager, Goss represented that its commercially available enclosures attenuate noise by 10 dBA. This

(Continued)

employees to within the limits prescribed by the standard since the standard permits exposure to such levels for only three to four hours. As a result, even if Cox were to implement the further controls which the majority finds technologically feasible, its employees still would have to wear personal hearing protection for a substantial portion of the time they are working at the presses.

The circumstances here demonstrate the weakness of the majority's interpretation of the term "feasible" on which I commented in my dissenting opinion in Sun Ship. In attempting to comply with the requirements of the noise standard, Cox determined that it would not be possible to reduce noise levels to within those permitted under the standard by engineering changes to the presses themselves. Considering that its employees work on a rotating basis, Cox decided instead to isolate employees from the presses during most of their working shift. By focusing solely on whether Cox could financially

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(Continued)

representation is consistent with Hine's testimony that these enclosures had achieved a noise level reduction of 11 dBA at the Lansing State Journal. While both Rouse, an engineer for the press manufacturer, Goss, and Hine, the Secretary's expert, gave opinions that greater reductions could be achieved in Cox's facility, neither specified how such reductions could be accomplished. Rouse had never visited the facility, and he did not consider it appropriate to make specific recommendations on behalf of Goss. Similarly, Hine testified that in order to determine how Lansing-type enclosures could be "optimized" for Cox, a "design analysis study" would have to be performed. Accordingly, the most that can be said for the effectiveness of enclosures on this record is that Cox could reasonably expect a reduction of 10-11 dBA through the installation of the enclosures commercially available from Goss. Cf. Snyder Well Servicing, Inc., 82 OSAHRC 10/C5, 10 BNA OSHC 1371, 1380, 1982 CCH OSHD ¶ 25,943 at 32,515 (No. 77-1134, 1982) (Rowland, dissenting in part) (mere opinion, unsupported by any specific evidence, is not a sufficient basis on which to find a violation).

afford to implement yet further controls, without any regard to the nature of the noise problem or the effectiveness of the measures already undertaken by Cox, the majority simply second-guesses Cox's informed judgment as to how best to spend its resources for the protection of its employees. The majority's failure to give due consideration to the combination of quiet rooms and personal hearing protection instituted by Cox is particularly inappropriate in view of the potential effectiveness of hearing protection in reducing noise levels. As I noted in my dissenting opinion in Sun Ship, slip op. at 35 n.12, personal protective equipment is capable of as much as a 20 to 30 dB attenuation in existing noise levels, and can reasonably be expected to produce a 10 to 15 dB attenuation.

As I concluded in Sun Ship, the majority's interpretation of the standard's requirement that controls be "feasible" is erroneous. For the reasons stated above, that interpretation is also inappropriate when applied to the particular facts of this case. Accordingly, I dissent from the majority's decision to remand this case for further proceedings under the majority's test for economic feasibility.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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| SECRETARY OF LABOR, | ) | |
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| Complainant, | ) | OSAHRC Docket |
| | ) | |
| v. | ) | No. 12074 |
| | ) | |
| COX ENTERPRISES, INC. | ) | |
| d/b/a/ ATLANTA NEWSPAPERS, | ) | |
| | ) | |
| Respondent. | ) | |

## DECISION

APPEARANCES: Robert H. Buckler, Esquire, Office of the Solicitor, U. S. Department of Labor, Atlanta, Georgia, on behalf of complainant.

C. Lash Harrison, Esquire, Atlanta, Georgia, on behalf of respondent.

James D. Fagan, Esquire, Atlanta, Georgia on behalf of intervenor.

## STATEMENT OF CASE

Patton, Judge: This is a proceeding pursuant to Section 10 of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651, et seq., 84 Stat. 1590, hereinafter referred to as the Act) alleging a refusal to abate a violation of the Occupational Safety and Health Act.

As a result of an inspection by the complainant, citation against respondent was issued on August 23, 1972, pursuant to section 9(a) of the Act. Said citation alleged a violation of standard 29 CFR 1910.95(b)(1) in that respondent

failed to use feasible administrative or engineering controls to reduce the noise of its presses and folders to sound levels permitted in Table G-16. Abatement date was set as August 2, 1973.

Respondent did not file a contest of citation and proposed penalty and in accordance with section 10(a) of the Act, the citation and penalties as proposed became the final order of the Commission. Petitions for modification of abatement date were filed and said petitions were granted, first extending time of abatement to September 10, 1973, and subsequently extending the time of abatement to November 4, 1974.

Reinspection by an authorized representative of the Secretary was conducted on December 4, 1974, and following said inspection, a Notice of Failure to Abate the Violation was served upon the respondent. A Notive of Additional Penalty in the amount of $400 was also served upon the respondent. The respondent filed a contest of said Notice of Failure to Abate and Notice of Additional Penalty and on June 10 and 11, 1975, a hearing was held before the undersigned Judge in Atlanta, Georgia. Atlanta Web Pressman's Union Number 10 intervened in said hearing and participated through counsel.

## LAW AND ISSUES OF THE CASE

Standard 29 CFR 1910.95(b)(1) is as follows:

"When employees are subjected to sound exceeding those listed in Table G-16,

> feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table."

It is conceded that the respondent's pressroom did not meet the sound levels required by Table G-16. The issue for determination in this case is whether there are feasible administrative or engineering controls. It is the position of the respondent that feasible controls do not exist; whereas, the complainant maintains that there are several feasible methods whereby the sound levels may be reduced to those permitted by Table G-16. It is the further contention of the complainant that if the evidence should fail to establish that the sound level can be reduced to the level permitted by Table G-16 and it is shown that there is a feasible method to reduce the noise by a lesser amount, the respondent is required to install said engineering controls. It is the position of the respondent that unless engineering controls can reduce the noise to the level permitted by Table G-16, the respondent is not required to install further engineering controls.

## EVIDENCE IN THE CASE

The answer of the respondent admitted that respondent has a place of business and does business at 72 Marietta Street, Northwest, Atlanta, Georgia, where it is engaged in newspaper publishing. The evidence established that Atlanta Newspapers, Inc.

is a part of a multi-state chain of municipal newspapers.

It is stipulated that the Commission has jurisdiction of this case. It is further stipulated that respondent is a corporation engaged in newspaper publishing and at all times relevant to this proceeding has engaged in a business affecting commerce within the meaning of the Act. It is further stipulated that following receipt of the August 23, 1972, citation and prior to the December 4, 1974, inspection, respondent installed "quiet rooms" in its pressroom. The noise level in the quiet rooms is below 90 dBA. It was stipulated that on December 4, 1974, as well as other days since the installation of the quiet rooms, respondent has had employees in its pressroom subjected to sound levels exceeding those listed in Table G-16. The employees of respondent are subjected to sound levels exceeding those of Table G-16 on a regular basis; however, there are no employees who are subjected to sound levels in excess of Table G-16 on every work day. It was further stated that nothing contained in the stipulation prevented respondent from asserting a defense that as a result of its employees wearing hearing protection they are not exposed to sound levels in excess of Table G-16. It is further stipulated that respondent has a program under which personal hearing protection is supplied to employees as a mandatory requirement that hearing protection be worn in its pressroom when the presses are operating.

Each hearing day's transcript is numbered beginning number one. References to the transcript for the hearing held June 10, 1975, will have, following the number of the transcript to which reference is made, the letter (a), whereas references to the transcript of June 11, 1975, will incorporate the letter (b) following the reference to the page number.

The respondent publishes two newspapers, The Atlanta Constitution with a daily circulation of approximately 225,000 newspapers and The Atlanta Journal with a daily circulation of 247,000 to 248,000 newspapers. The joint Sunday edition runs approximately 547,000 papers (Tr. 9, 10(b)). The respondent has six folders (Tr. 56(b)). The respondent has eight presses (Tr. 84(b)). It is possible for the same employees to work both on The Atlanta Constitution and The Atlanta Journal as pressmen. The union controls the time they work. They have worked as much as 13 shifts a week (Tr. 175-176(a)). The folderman working next to the folder rotates with the apprentice if the apprentice has been there long enough to get in the rotation system. The rotation is 30 minutes on the clock (Tr. 178-179(a), 6(b)). The noise level in the pressroom was approximately 106 dBA (Tr. 65(a)). Exposure to the noise is not uniform. A man might spend his 30 minutes while the press is running and on the other hand, the press might not be running during his 30 minutes. Another man might be on the job for the first minutes while the press is running and then he'd be the next man to go back when the

press started back up. For these reasons, according to Mr. Simonton, official with the respondent, it is extremely difficult to figure out the amount of time that an employee is exposed to the noise of the presses. If the press breaks down, he is still subject to the surrounding noise because other presses are still running (Tr. 7-8(b)). The Atlanta Constitution presses average running two and one-half hours a day and The Atlanta Journal average three and one-half hours a day. However, parts of the Sunday paper are run through the presses on several weekdays adding to the time that the presses are running during certain days of the week (Tr. 9(b)). The same employees who work on the daily paper will at times work on the Sunday paper the same day (Tr. 11(b)). A number of employees arrive at 9:00 a.m. or 10:00 a.m. and with an exception of a break in the afternoon, will be there until approximately 5:00 p.m. or 7:00 p.m. If they are having a good run, no presses will run from 5:00 p.m. to 7:00 p.m. If they are having a bad run, they will run during that time. The employees often come back at 7:00 p.m. and work until 3:00 a.m. or 4:00 a.m. getting out the Sunday edition (Tr. 11(b)). They will frequently run a 7:30 p.m. shift, have a short break and then run another shift. At times, the employees are exposed over eight hours (Tr. 15(b)). Pressmen often work 21 out of 24 hours when the work triples (Tr. 12(b)).

A number of possible ways to reduce the noise was suggested by the complainant. A partial enclosure of the press

and the folder was suggested as was a full enclosure of the press and folder. Doctor Michael J. Hine testified for the respondent. Doctor Hine is a professional engineer licensed by the State of Pennsylvania having a Bachelor's Degree in mechanical engineering, and a degree as Doctor of Philosophy (Tr. 12-13(a)). He is a member of the Acoustical Society of America. He received his degree as Doctor of Philosophy from the Institute of Sound and Vibration Research of the University of Southampton, England. He said that it is the only school so far as he knows of that type in the world. His doctoral dissertation was in the area of sound and vibration and his thesis topic was on the acoustically induced vibrations of slender rods in a cylindrical duct. His major area of research interest in school was noise and vibration control. He has had experience in the United Kingdom's patent office examining patent applications in the area of vibration control and transmission design for technical competence. He has worked at Cummins Diesel Engine Company in Columbus, Indiana, on diesel engine crankshaft vibration analysis. He went to the University of Southampton and did postgraduate work in the area of acoustically induced structural vibration specifically for a field problem in nuclear reactors. He did a complete study on noise within limited boundaries, that is, air volumes within contained boundaries. He studied the radiation of sound from vibrating structures

and studied the complete interaction mechanisms of sound waves on solid structures. He worked in the research laboratory of Westinghouse Electric Company doing fundamental noise reduction experimentation on large marine gears on all kinds of electric motors and machinery noise enclosures. He also did vibration analysis control. He worked a year and a half at Harris Corporation in the printing equipment group research establishment in Cleveland, Ohio, where he was engaged to carry out corporate-wide research into noise reduction techniques for web presses. He also carried out experiments during that time on noise reduction for web presses. He went to Southern California Edison Company where he did noise and vibration control of all kinds of equipment located in utility plants. He also performed numerous consultant assignments.

He was of the opinion that full enclosures could be used around the pressroom units or the folders. He stated that a full enclosure is similar in structure to a partial enclosure except that all possible sides of the box-like structure are covered up except small openings for the inlet and exit of paper products, which openings are suitably acoustically treated to prevent the transmission of sound from within the enclosure to the outside of the enclosure (Tr. 50(a)). Such an enclosure was used at The Lansing State Journal, Lansing, Michigan (Tr. 50(a)). According to Dr. Hine, they had Goss Headliner Mark II Presses with a 3-2 folder (Tr. 50(a)). There were full enclosures

around the folder and press units. They had metal panels encasing the folder units with absorptive treatment on the inside of the panels. There were access doors which were spring-loaded in some cases to the open position and latched closed for visual inspection of the inside of the folder enclosure as well as for access. They also had glass or other non-opague material type of windows so that they could see inside the enclosure without opening up the enclosure. Absorbent material used at Lansing formed a type of lined tunnel along which the operators could walk while the press was running and they could "flick the color control switches" (Tr. 51-52(a)). It was stated that an 11 dBA reduction was obtained at the folder. Sixty-seven thousand papers were run per hour. Goss has such an enclosure on the market today (Tr. 52(a)). Dr. Hine was of the opinion that a similar reduction could be achieved by respondent by use of the full enclosure. He stated that in his opinion the reduction could go as high as 20 dBA at respondent's press-room. Reduction of noise would be reduction of noise from motors and gear boxes. Dr. Hine further stated that full enclosures existed at The Norwich Bulletin and that he improved upon it. The full enclosure reduced the dBA from 108 to 93. There were six units at Norwich and one folder (Tr. 67-68(a)). He had only actually seen this done at The Norwich Bulletin, Lansing Journal, Meredith Press and National Geographic (Tr. 69(a)).

In his recommendations he was not considering costs (Tr. 7). Dr. Hine, however, stated that an operator would have to get to the controls to operate the press and it is not possible to use remote switches with the type of press that the respondent had (Tr. 82-83(a)). The National Geographic magazine, however, had remote color control consoles behind the barrier which were effective in reducing the operating noise at the color controls (Tr. 83(a)). Lansing State Journal's full controls are the only ones that he has seen (Tr. 91(a)). He did not know the reading prior to the installation of the full enclosure but knew it was 96 dBA after installation. There were 67,000 papers run per hour (Tr. 92(a)). The witness stated, however, that he built one full enclosure which would be capable of a reduction of 27 dBA (Tr. 92(a)). He stated that at Harris, the whole press and folder had been enclosed rather than individual units and this would be the most effective way of doing it. He predicted noise levels between 85 and 90 dBA operating full speed up to 80,000 papers per hour would be accomplished (Tr. 93(a)). The employee would be outside the barrier and there would be remote controls. He stated Harris had not done all that could have been done to make maximum reduction. Heat could be disposed of (Tr. 96-97(a)). He observed no problem in the operation of the newspaper at Lansing State Journal (Tr. 105-106(a)). They did not have to get in the enclosure to operate the press except for webbing up (Tr. 106(a)). The

enclosure had sliding doors and hinged access doors for getting the press ready for a print run and maintenance access both in the print room and the folder. An employee would merely undo a latch in the door and the door would automatically open of its own accord. Around the press unit they had sliding doors which could be freely swung out of the way to gain access to the press units (Tr. 106(a)). Union exhibit 1 which was introduced into evidence shows the doors of the press and folder and discusses the sound enclosures (Tr. 107(a)). He was of the opinion that what had been done at Lansing could be improved on and that other noise sources should be enclosed, for example, electric motor and gear train in the reel room (Tr. 127(a)).

Mr. Robert Simonton, personnel director for the respondent, stated that after inspecting The Wall Street Journal, he did not recommend it be done by respondent because the sliding doors and everything partitioned would make it very difficult to operate and work on the press efficiently. He was also of the opinion that it would still be necessary to use ear protection with earplugs or muffs (Tr. 25(b)).

Mr. Glen E. Elvidge, director of engineering and production for respondent, has a Bachelor's Degree in mechanical engineering. He is a member of ANPA Production Management Committee and was involved in the installation of respondent's presses. He is also a member of the subcommittee

on environmental control of ANPA (Tr. 52-53(b)). He has seen folder enclosures at Dayton, Houston Post; Miami Herald, Jacksonville, Hollywood and Macon. As far as he is aware, none of them have a noise level around their folders of below 90 (Tr. 54(b)). He was at no installation that has reached a level as low as 89 dBA. He stated that he has knowledge of this subject due to his position with ANPA and that he has participated in committee meetings which gave him an opportunity to have knowledge (Tr. 59(b)). He has knowledge of how to operate noise measurement devices and has taken sound readings for respondent and elsewhere. The readings that he gave, however, were only received for the purpose of showing good faith as it was not established that he had sufficient training to testify as to the dBA from said readings.

Mr. William H. Rouse who is employed by MGD Graphic Systems, Inc., a subsidiary of Rockwell International, testified for the respondent. He stated that he is manager of product safety and environment for said association and has worked for them for 13 years. He has been in his current position two and one-half years. He stated that said association is also known as Goss. He stated that Goss spent over $1,750,000 attempting to engineer noise out of printing presses. They used some outside consultants and had liaison with MIT. He stated that Doctor Lyon and Doctor Manning did some work on quietening of folding machines (Tr. 79-80(b)). A great deal of theory was

established but he stated it was not possible to reduce it in practice. He stated that he was familiar with the Lansing operation. He described it stating that the heart of the installation is a self-standing folder enclosure which is not fastened to the frame of the machine at all. It stands on the floor. In addition, each unit has been fitted on the operating side with a partial barrier in a U section with a very short up-right and a very long horizontal part (Tr. 82(b)). He stated, however, that it is not comparable to respondent's because it was only done for one press, whereas the respondent has eight presses and that he would not recommend it for Atlanta. There are six presses with folders in Atlanta (Tr. 84(b)). He stated that it is generally possible to use remote controls in Atlanta. There would have to be some rebuilding of the ink fountains which he stated would be quite costly. It would cost about $10,000 per unit and there is the equivalent of 68 units making a cost of $680,000 (Tr. 84-85(b)). He stated that remoting of the folder can be done by adjustment. A folder would be about $1,500 per adjustment. He stated that it is impossible to approach reducing the approximately 107 or 108 dBA at respondent's pressroom to 90 from the folder without enclosures. He stated that respondent has problems incident to a metropolitan paper with as many machines as they have and with the machines arranged as they are which wouldn't appear at Lansing and for that reason he wouldn't recommend the Lansing

approach (Tr. 80(b)). He knows of no instance aside from Lansing where a level of 90 dBA or less has been achieved (Tr. 88(b)). He stated that they have never guaranteed any product to accomplish that. Goss has worked with American Newspaper Publishers Association Research Institute in an effort to solve some of these problems (Tr. 88(b)). He stated that no newspaper other than Lansing in the domestic United States has placed an order for a similiar type installation (Tr. 89(b)). Between 70 and 85 percent of the major metropolitan newspapers use Goss (Tr. 90(b)). He stated so far as qualifications are concerned that he was acquainted with all noise work they had done, all environmental work they had done, all the safety work they had done and in addition was rather familiar with the general conformation of the machine and a great deal of the electrical detail (Tr. 91(b)). He stated, however, that he was of the opinion the noise in the Atlanta press room could be reduced significantly (Tr. 92(b)). He stated it possibly could meet the 90 dBA level (Tr. 93(b)). He stated he has ideas of how it could be done but would not want to advance a theory without talking to other members of his team. It would be more than speculation, however. He stated that because the pressroom has parallel rows with the operating side of one press facing the drive side of another, it is essential at that point that a sound barrier be erected between the drive side of one press and the working area at the

operating side of the other press. He was inclined to think it would also be necessary to close up the operating side of the other press to a greater degree than they did at Lansing. He estimated, however, that this would cost approximately $150,000 per press (Tr. 96-97(b)). He stated that it would be necessary not only to box in the press but also the folder and that this contributed to the $150,000 he was talking about. He stated, however, that it was a very rough estimate.

Mr. George R. Cashau testified that he has a Bachelor's Degree in mechanical engineering, and is production engineer for the American Newspaper Publishers Association Research Institute, otherwise known as ANPA RI. He has been with them slightly more than 20 years. He is production engineer which means that he does consulting work, advisory work, development work, and research work for the daily newspapers of the United States who are members of the organization. His function at the time of hearing was environmental work and helping the membership to comply with the Act (Tr. 98-99(b)). He stated he is involved in the noise abatement program. The respondent is a member of the Association. He stated that they purchased sound meter instruments and he checked The Houston Post, Waukeegan Sun, New York Times, Cincinnati Enquirer, Chicago Tribune, Kansas City Star, Miami Herald, and others which use folder enclosures (Tr. 104(b)). He stated that when running 50,000 newspapers per

hour, none was able to reduce to 90 dBA (Tr. 105(b)). He has seen 40 newspapers and has not seen any running at full speed that managed to reduce to less than 90 dBA (Tr. 108(b)). He has seen folder enclosures at some newspapers and some with end treatment (Tr. 109(b)). He stated that said Association has investigated some enclosures in pressrooms and has achieved some reduction, approximately 7 dBA (Tr. 110(b)). He stated that they have a scientific advisory team to advise on problems of noise and environment. He stated that they have renowned scientists, two of whom are former advisors of the President (Tr. 110-11(b)). He stated that no press manufacturer has ever told him of any procedures that reduce to below 90 (Tr. 112(b)). He has seen folder enclosures, barriers, room treatment, quiet rooms and quiet rooms with remote controls (Tr. 114(b)). He stated the only thing that could reduce below 90 is a quiet room with remote controls when the operator is inside, which they have at The Washington Star (Tr. 114(b)).

There were other means suggested for reduction of noise. Dr. Hine also recommended a partial enclosure. He described a partial enclosure as an enclosure which attacks the direct noise field generated by a noisy machine. It consists essentially of a box-like structure placed around the machine with one or more sides of the box removed. It might substantially be a four or five-sided box. He stated that by box he meant a

rectangular box with panel-like sides. He was of the opinion that a reduction of 9 dBA could be accomplished by respondent by such a procedure. He stated using absorbent room treatment, an additional 4 dBA reduction could be accomplished (Tr. 46-47(a)). He described absorbent treatment as materials that absorb sound energy and prevent or minimize a reflection of incident sound energy on them. He stated they come in several forms. They can be a panel-like material which is either hung on the wall or attached to the wall in a flat-like manner. It can be attached to the ceiling. It can also come in the form of a metal panel which has one solid side and an acoustically transparent side. Inside the panel structure there is absorbent material. Such panels can be attached either to the wall or the ceiling. He stated that there is another form of absorbent material which comes in the form of lumps of absorptive material such as a rectangular box-like structure composed of absorbent material. It can be any cross section. They are normally hung from a ceiling in a machinery room to reduce noise. There also is a spray-on type material manufactured by National Cellulose Corporation, which can be sprayed on flat or irregular-type surfaces to reduce reverberant noise. He would not recommend the absorbent remedy alone but in conjunction with barriers (Tr. 34-40(a)). He stated that both partial enclosure and absorbent material were used at The Norwich Bulletin, Norwich,

Connecticut. They accomplished a 15 dBA reduction there (Tr. 48(a)). At Meredith Printing Company in Des Moines, Iowa, a similar method was applied without room treatment (Tr. 48(a)). He stated they also used Armstrong ceiling tile. He was of the opinion, however, that at said company it was primitively done and not airtight (Tr. 48-49(a)). They did not use the best absorptive treatment (Tr. 49(a)). They accomplished a 6 dBA reduction (Tr. 50(a)). He subsequently testified that the use of partial enclosures around press units and folders could result in a 9 to 13 dBA reduction (Tr. 50(a)). It also affects the noise level in the reel room (Tr. 58(a)). He stated he did not know what the dBA level was prior to installation of partial enclosures at Meredith (Tr. 86(a)). He does not know what it was after enclosures. He did observe subjective noise reduction when they opened the folder door (Tr. 86(a)). There was a partial enclosure of the folder with room treatment of absorptive material (Tr. 86(a)). The room enclosure resulted in 15 dBA noise reduction (Tr. 87(a)). He predicted a 9 dBA reduction by partial folder enclosure for respondent (Tr. 87(a)). The Norwich Printing Company used plywood sheets (Tr. 87(a)). He stated that the reduction must be considerable for a person to hear the difference which he succeeded in doing (Tr. 86(a)). There was also a partial enclosure of compensator at The Norwich Bulletin which he stated resulted in 15 dBA reduction (Tr. 86-87(a)).

He stated that his opinion was based on the published design technique for barriers that was published in the Machine Design magazine by two people from Bolt, Beranek & Newman (Tr.87(a)). Such reduction, however, could only be obtained adjacent to the folder and not in the pressroom as a whole (Tr. 87(a)). He stated the sound level at the folder of respondent was 106 (Tr. 87(a)). It could be reduced to 97 (Tr. 87(a)). There was no point in enclosing the folders and doing nothing about enclosing the press units (Tr. 88(a)). He did not test the noise when the presses where running without the folders. He stated that at Norwich when the folder was not operating, the press was 90 or less. It was running at 45,000 impressions per hour (Tr. 89(a)). The noise level would not necessarily increase at 60,000 impressions per hour (Tr. 89(a)). He took readings at 56,000 papers per hour and one run at 65,000 and they had the same dBA (Tr. 90(a)). The number of pages would increase the number of press units and that would increase the noise level within the pressroom (Tr. 90(a)). He referred to an article in Acoustical Treatment of Plant Facilities, Noise-Con 73 Proceedings, which he stated reflected 6 dBA reduction by use of ceiling absorption material alone (Tr. 119-120(a)). He stated that he agrees with this evaluation. He stated that such a procedure would be effective for respondent. It would reduce reverberant noise.

This has not been done by respondent (Tr. 121(a)). Said article was introduced into evidence by the intervenors as an exhibit. He stated the length of the pressroom has nothing to do with the ability to reduce noise (Tr. 125-126(a)). Presses run at a consistent speed during the press run, and the noise being generated is the same throughout the pressroom (Tr. 125(a)). He stated that the number of press units in a room, the larger the noise level is going to be in that room. He stated that all this means to the person who has to reduce the noise is that instead of reducing perhaps ten machines, he has to reduce the noise emitted by all the press units and folders. It just means he has to spend more time and perhaps engineering design in an effort to do that. Physically, there is no problem in treating a large number of contiguous units or a small number (Tr. 126(a)). He was of the opinion that the pressroom in Atlanta Newspapers could be reduced below 90 dBA (Tr. 126(a)).

Mr. Rouse testified that it would be possible to substitute the teakwood pads but pads wear out so fast they would not be considered practical by a metropolitan newspaper (Tr. 81(b)).

Dr. Hine also recommended a combination of absorbent material and what he described as a barrier. He described a barrier as a panel-like structure which is erected in a vertical plane between an observer or a listener and the noisy machine.

Usually such panels are a solid structure. On the face side of the noisy machine they have absorptive treatment. What the barriers usually do is prevent the direct movement of sound waves from the machine to the listener. The reason for using such barriers in conjunction with absorptive treatment is to prevent or minimize the reflected sound coming off the ceiling and coming down to the listener and thus negating most of the effectiveness of the barrier. He was of the opinion that a reduction by this combination of methods could be up to 10 dBA (Tr. 40-41(a)). He stated such barriers are available in the market (Tr. 41(a)). He has seen it used at National Geographic and at Fawcett Printing Company in Rockville, Maryland (Tr. 71(a)). At National Geographic they had two Harris presses arranged side by side with eight units to each press. Between the two press lines and at the end of the folder they had remote press controls consisting of press control consoles where the operators normally stood during a press run. Around these consoles they had erected barriers and triangular absorbers hung from the ceiling. The installation was provided by the Armstrong Cork Company. He took noise readings and found a reduction of 6 dBA (Tr. 41-42(a)). He has not seen the use of absorptive treatment in conjunction with barriers elsewhere, but he has seen barriers used by themselves. He has seen it used in the assembly floor of a corrugated box manufacturer. He stated that generally noise

from a pressroom comes from gear train noise in the press unit. There is some amplification of that noise at certain speeds by resonances within the component parts of the press unit such as the press cylinders and other cylindrical objects. The folder noise, per se, although usually large, is also composed to a great extent from gear noise. The noise generated by the operation of the folder blade and the cutting blade is somewhat impulsive in nature and occurs at a very low frequency, that is, a very low repetition rate. What that noise does is mechanically excite the other parts of the folder and attach structure to radiate noise at the resonant frequencies of the attached structural components. He stated that a box corrugating plant is somewhat analogous and that an 11 dBA reduction was accomplished at said plant (Tr. 45-46(a)). He stated that room barriers could reduce 10 dBA and also would reduce noise in the reel room especially if the reel room was acoustically treated (Tr. 57-58(a)). He was of the opinion that it is feasible to erect barriers. The operator would stand on the opposite side of the barrier to the machine while he was operating it, for instance, push buttom controls on the folder. It would involve remoting the controls on the folder, but he could see no problem in doing that because he has seen it done with corrugating machinery (Tr. 80(a)). He stated one could put ink controls which are electric switches within the barrier itself and therefore seal off the noise coming from the machine

to the operator's side of the barrier. It would also be possible to put a small opening in the barrier there so the operator could put his hands through it and not completely destroy the effectiveness to the acoustic barrier (Tr. 81(a)). He stated that considerable noise reduction would result, even with a slit and with the ear within three feet of the edge of the barrier. A barrier with no opening reduces 9 dBA. The operator would have to get to the controls to operate the press. He had not calculated the reduction if the opening was a foot or two to permit operation of the press. It would not be possible to remote switches for the press (Tr. 81, 82, 83(a)). The National Geographic magazine had remote color control consoles behind the barriers and it was effective in reducing the operating noise at the color controls. He does not know whether they had offset or letter presses (Tr. 83-84(a)).

Dr. Hine also suggested that it would be possible to change the design of the machinery. He stated there are several well-published practical methods of reducing gear and gear train noise. He stated that instead of using straight cut spur gears it would be possible to use helical gears. He stated that because of imperfections in the manufacture, additional noise results, and that geometric imperfections could be reduced (Tr. 53(a)). It is also possible to harden the gears and grind the faces of the teeth. He stated that finer pitch gears can be

used. It is also possible to use wider face width gears. Noise can be reduced in gears by introducing plastic-type gears into the gear train and in sequence. Every gear in the gear train would be made of nylon or some other plastic to reduce noise (Tr. 53-54(a)). He stated that at the time of his appointment at Harris Press he recommended this type of change on the presses there and they were instituted. They reduced the noise level of the machine and the press. He stated the next engineering approach would be to tackle the noise generated by the paper, that is, by the movement of the paper in and out of the press units. It was established that paper noise contributed about 4 dBA to 6 dBA of the noise observed adjacent to the press unit. It is feasible, he stated, to reduce that noise by dampening the motion of the web of paper as it enters and leaves the press unit. Dampening means applying a spring-loaded damp roller to the face of the paper (Tr. 53-54(a)). He stated it is also possible to place nip roll absorbent objects very close to the nip of the rollers to prevent the exit of noise from the nip. It is possible to look at different viscosities of ink to reduce the tearing type noise that results when the paper is pulled away from the printing rolls. It is possible to tackle the cutting noise that goes on in the folder by suitably redesigning the cutter blade and the abutting part of the folder cylinder that the cutting blade strikes. It is possible to resiliently

mount the cutting blade and its abutting member so as to reduce the impact forces of these two parts. It has been shown by experimental redesign of the cutting cylinder that it is possible to reduce cutting noise, per se, by 18 decibels (Tr. 54-55(a)). It is possible to redesign the folding mechanism so as to prevent the high impact forces that result with the action of a folding blade moving into the jaws of its mating cylinder. It is possible to use plastic-faced folding blades. The folding blade essentially tucks the paper into a U-shape cavity. The cavity is lined with plastic. There is a reduction in the impacting forces of the blade as it smashes into the cavity. He stated press unit noise could be reduced by stiffening up the side plate structures of the unit so that they do not radiate noise so efficiently. It is possible to mechanically isolate the gang-walks for the second level of the press units and other attached parts from the press side frames. Press units and folders consist of several mechanical components which have numerous vibrational resonances within the operating speed range of the press. When a component part gets into mechanical vibration resonance, the noise is amplified generated by that part. The way to avoid that is to design that component so that resonant frequencies are out of the range of the forcing frequencies to which it is subjected.

He was also of the opinion that it would be possible

to acoustically seal off the opening between the pressroom and the reel room resulting in quietening of the reel room. A tunnel-like structure could be put over the paper route with absorbent liners. It would also be possible to enclose with full enclosures the drive motors and attached gear box set for the reel stands in the press units. At least 10 and perhaps even a 20 dBA reduction could be accomplished (Tr. 56-57(a)). At Harris he instigated dampening treatments on the V-15A press of the gear panels, also, noise control covers for another web press for a different division as well as a folder enclosure for that other press. He stated that without the use of enclosures, booths and absorption equipment, just changes in the press did not reduce to 90 dBA but that presses running 45,000 impressions per hour had a printing press unit below 90 (Tr. 63(a)). If the folder was operated, it increased the noise to 93 dBA (62-63(a)). The lowest reading in respondent's reel room was 94 dBA (65(a)). He stated that a 2 dBA reduction could be obtained by using plastic-cheeked knife cases -- up to 40,000 copies per hour (Tr. 114). After that speed, the dominant noise is the folding blade slap.

There was considerable evidence introduced as to the cost of accomplishing the various suggested remedies for the noise. The cost of absorption material on the ceiling would be approximately $30,000 (Tr. 70(a)). The cost of panels

would be $20 per square foot. The reel room and pressroom ceilings are approximately 47,000 square feet. At $20 a square foot for installing panels it would come to $940,000.00 (Tr. 74-78(a)). Mr. Hine stated that due to the cost, he would not recommend it (Tr. 78(a)). The attorney for the complainant offered to withdraw that proposal (Tr. 78(a)). The cost of securing remote controls by rebuilding of the ink fountains would be approximately $10,000 per unit for 68 units or $680,000 (Tr. 85(b)). The cost of enclosing the presses would be approximately $150,000 per unit. With eight presses, this would be $1,200,000.

The respondent has made substantial efforts to protect its employees from the effects of noise. In 1967, the respondent offered pressmen earmuffs to wear at their option. In 1969, they were offered either earmuffs or plugs and the wearing of them was made compulsory. The respondent also started a hearing conservation program at the same time (Tr. 146(a)). The conservation program was under the direction of Mr. Robert Simonton, personnel director. The respondent signed a contract with Doctor's Memorial Hospital in Atlanta to test its employees' hearing. Two employees in Mr. Simonton's department were trained to give tests. They were given to all employees in the mechanical department whether they worked in pressroom or not (Tr. 146-147(a)). This program cost $5,000 or $6,000 a year (Tr. 147(a)). They used the Bausch and Lomb Quiet

Ear Protector, Model 5N85. They used Comfit earplugs from Sigma Engineering Company (Tr. 148(a)). Those with ear problems were custom fitted by Adcomold Division of Trend, Incorporated (Tr. 148). The manufacturer's specifications for these three types of personal protective equipment were followed. The respondent also contacted Acousti Engineering Company of Atlanta. They were called in and recommended M. J. Kodaras and Associates of New York. An octave band study was made by Kodaras and recommendations for the pressroom followed (Tr. 149-150(a)).

The respondent decided to and did build what was known as "quiet rooms." They were enclosures with roofs built four feet back from the presses. There were a number of openings (Tr. 165). It reduced the noise to between 82 and 85 dBA (Tr. 165(a)). The said company that did the work for them contracted to enclose the folder if the quiet room did not achieve a reduction below 90 (Tr. 166(a)). Outside the quiet room where the folder was running, the noise was either 106 or 107 dBA (Tr. 166). The cost of the quiet room was $10,000 (Tr. 166-167(a)). The quiet room did not reduce noise next to the folders and if the employees were outside the quiet room they had to wear hearing protection. The quiet room is an area where they could take off earmuffs, smoke and be protected from excessive noise. When they were not in the quiet room they were out working (Tr. 41, 106, 107(a)). In a quiet room an employee could observe

but could not perform work (Tr. 48(b)). In the quiet room, they have buttons to start and stop the press and control the speed of the press. It is remoted in the quiet room at the folder of each press (Tr. 49(b)). Respondent concluded that the only way to protect the employees adequately, other than the wearing of protective equipment, was to isolate the people from the noise and enclose the people rather than the noise, and that is the reason the quiet room was erected (Tr. 59(b)). It was testified by Mr. Cashau that the only thing that would reduce the noise below 90 is a quiet room with remote controls when the operator's inside. This is used at The Washington Star (Tr. 114(b)). At The Washington Star, the sound level at the folder operation is approximately 106 or 107 running about 55,000 units per hour. Three feet above that, in the quiet room, the level is between 82 and 84 dBA (Tr. 114-115(b)).

## EVALUATION OF THE EVIDENCE

It is admitted by the respondent that the level of noise in the pressroom runs as high as 106 or 107 dBA. There is no question, therefore, that Table 16 is not met. A problem arises, however, in determining whether there is a feasible way by which the standard may be complied with. The parties admit that the respondent's employees are wearing either earplugs or earmuffs and there is no contention found in the record that the earmuffs and earplugs fail to protect the employees from a noise

in excess of that listed in Table G-16. It therefore appears that the employees are not actually being exposed to a noise hazard.

The standard, however, provides for the use of earplugs or earmuffs as an adequate protection only in the event that either administrative or engineering controls are not feasible. The respondent cites the case of Secretary v. Continental Can Company, Inc., _____ OSAHRC _____ (Docket No. 3973, 1974), which case is now pending on review, in which Judge Burchmore held that if the employees were protected by either earplugs or earmuffs they were not subjected to a hazard and therefore a standard requiring the adoption of engineering or administrative controls was not a standard authorized by the Act. This case above stated is on review and therefore can not be treated as precedent by this Judge. In the opinion of this Judge, the argument made by Judge Burchmore that if employees are not being subjected to noise because of the wearing of personal protective equipment, a respondent should not be required to spend immense sums of money to bring about another safeguard against excessive noise, is as a matter of practicality, extremely persuasive. It is not, however, within the province of a Judge to determine the wisdom of the acts of the Secretary. The Secretary is the person authorized to promulgate standards. The judiciary may only determine whether a standard conforms to the Constitution and the Act, and if so, whether that standard has been violated. It

is not a judicial function to determine the wisdom of legislation. Engineering controls do constitute a means of protecting employees from a noise which, admittedly, exists in excess volume in the respondent's pressroom. It is within the province of the Secretary to determine the method that must be used to accomplish the result of protection of employees. There is a hazard caused by noise and the Secretary has stated in the standard that engineering methods must be used if feasible to effectuate a protection against the hazard. This Judge cannot second-guess the Secretary by preferring another less expensive method of accomplishing the same result. Therefore, while a good argument may be made as to the wisdom of requiring engineering controls where earplugs will do the job, such argument must be directed either to the Secretary or to the Congress and not to one making a judicial determination.

The testimony does establish that by use of some of the methods suggested by Dr. Hine, a reduction in decibels can be accomplished. A further legal question arises as to whether "feasible" means that it is possible through engineering controls to reduce the noise level below that set forth in Table G-16 or whether any reduction in noise which may be accomplished by engineering controls will establish feasibility. The standard set forth in Table G-16 is a definite standard. A respondent, therefore, has a definite guide to go by in determining whether or not the law

is being violated in the absence of use of feasible controls. If, however, a respondent is required to adopt engineering controls which reduce the volume of noise to some level different from that in the table, there is no "signpost" by which a respondent can determine under what circumstances and conditions respondent is required to adopt engineering methods.

If any degree of reduction in noise necessitates the use of engineering methods, a reduction of one decibel or even a fraction of a decibel would require the expenditure of all necessary money to accomplish such reduction. It is difficult to believe that it was either the intention of Congress or the Secretary that a respondent should be required to spend a million dollars or more in order to make an inconsequential reduction in the volume of noise. If such be the case, the question then arises at just how many decibel reductions meet the test of feasibility. Is it necessary to resort to engineering controls if only a three decibel reduction would be accomplished, if only a five decibel reduction would be accomplished or if only an eight decibel reduction would be accomplished? The answer to this question can only be guessed at by a company faced with a noise problem. The respondent, at its peril, must guess at whether it is required to spend hundreds of thousands or even millions of dollars in order to conform with the law. If this is the result achieved, the standard is a denial of due process of law and is void because of indefiniteness. If a statute or a standard is

subject to more than one construction and one will make the standard legal and the other construction will cause the standard to be void, the construction should be applied which is consistent with legality and validity of the standard. This Judge, therefore, is of the opinion that unless it is established by a preponderance of the evidence that there is a feasible way to reduce the noise to that permitted by the table, no feasible means of engineering control can be held to exist.

It is the position of the complainant that the issue of feasibility is an affirmative defense and that the burden of establishing a lack of feasibility rests upon the respondent and the burden of establishing feasibility does not rest upon the complainant. This position does not appear to be sound.

Standard 29 CFR 1910.95(b)(1) provides that when employees are subjected to sounds exceeding those listed in Table G-16, feasible administrative engineering controls shall be utilized. If feasibility is necessary for there to be a requirement for engineering controls to be adopted, there is no requirement unless such action is feasible. It is necessary that it be established that there is a feasible means before any obligation upon the respondent. It is the duty of the complainant to carry the burden of proof and the issue of feasibility is a part of the complainant's burden.

The issue, therefore, must be determined as to whether

or not the complainant has borne this burden of establishing that there is a feasible means of bringing the noise level down to 90 dBA or less. In the opinion of this Judge, the evidence does establish that there are feasible means whereby the noise can be reduced a number of decibels. For the above stated reasons, however, even if a reduction of eight or ten or more decibels may be accomplished by the use of engineering controls, the respondent is not required to adopt such controls unless it is established by a preponderance of the evidence that said engineering controls will bring the noise level down to that permitted by Table G-16. There is substantial evidence in the record to the effect that such a result is obtainable. A more difficult question arises, however, as to whether the complainant's contention in this regard is established by a preponderance of the evidence. Dr. Hine, who is a very highly trained and experienced expert, suggests several means whereby such a result may be accomplished. He expressed the opinion that a full enclosure of the folders and presses would be the most effective means of reducing the decibels to the required level and he is of the opinion that they could be reduced to less than 90 decibels. Respondent takes the position that an enclosure would be impractical from an engineering standpoint and would hamper their operations. This defense, however, would not appear to have merit as it is established that the Lansing

presses and folders are enclosed and the newspaper appears to be quite capable of properly maintaining the production of its product. The previously stated question, however, as to whether the desired results would be adequately obtained still remains. Enclosures did reduce the noise at Lansing to a level of 90 decibels or less and therefore could be considered a success. The evidence establishes, however, that Lansing is a far smaller operation than is the respondent's and that there is a difference of enclosing one press and enclosing seven or eight presses. There is some conflict of testimony as to whether the results of use of a full enclosure would be substantially affected by a difference in the size of the operation. Dr. Hine was of the opinion that it would not greatly complicate the problem. On the other hand, witnesses introduced by the respondent were of the opinion that the situations were not comparable, but that a greater problem would be caused by the volume of paper and size of operation of the respondent. Dr. Hine was of the opinion that the Lansing method could be improved. It will be observed, however, that The Houston Post, Waukeegan Sun, New York Times, Cinncinati Enquirer, Chicago Tribune, Kansas City Star, Miami Herald and other papers used folder enclosures, but although the enclosures do bring about varying degrees of relief of noise, none of them bring the noise level to the level set forth in Table G-16. Such papers as The Houston Post, New York Times,

Kansas City Star and the Miami Herald would appear to be much more comparable to the respondent in the size of the communities they serve than would be the Lansing newspaper. Serious doubt is therefore raised as to whether the isolated successful experience of Lansing, a much smaller paper, would be duplicated to the same degree by the respondent. Dr. Hine testified that the use of absorbent material and barriers would reduce the noise level 10 or 11 decibels. Even if this be true, this method would still not reduce the decibels to the level set forth in the table. Other methods are suggested such as changing the engineering structure of the presses themselves which would appear to mean a substantial change in the press machines. The initial cost of the presses is $10 million and although the amount of cost is not set forth in the record for the changing of gears and so forth, it could very well run into millions of dollars. The extent to which this would reduce the total noise is not clearly set forth in the record. It is suggested that a dampening treatment would also bring about some improvement. The testimony of Dr. Hine, due to his very excellent expertise, is convincing; however, the testimony of Mr. Cashau raises substantial doubts as to whether the reduction would be of the required level. He testified that the company with which he is affiliated has made an extensive effort to find an answer to the problem of noise. He has observed presses of 40 large newspapers and does not know of any single one

which has managed to, at full speed, reduce the noise to less than 90. He lists nine large newspapers specifically as having enclosures and states that there are also others which he has not specifically named. Mr. Rouse stated that the MDG Graphic System, Incorporated, with which he is associated, also referred to as Goss, has spent over $1,750,000 in attempting to engineer the noise out of printing presses. Seventy to eighty-five percent of the major metropolitan newspapers in the country use his company. He stated the noise might possibly be reduced as low as 90 dBA in Atlanta at a cost of approximately $150,000 per press. The statement that it possibly might be reduced as low as 90 is quite a different thing from saying it can be.

The testimony of Dr. Hine and the statement of Mr. Rouse convince this Judge that it may be possible through the various engineering controls suggested, and most particularly through the use of enclosures coupled with absorbent materials, to reduce the decibels in respondent's pressroom and reel room to below 90 decibels. It is not necessary that this type of success be guaranteed or be certain. The respondent's employees' hearing is not being imperiled due to the use of protective wearing equipment and a quiet room and the evidence shows the cost of improving the situation would range anywhere from $300,000 to $1,500,000. Due to these facts, engineering controls should not be required because such controls <u>might</u> reduce the decibels

to the level required by Table G-16. As above stated, only one newspaper has been cited as meeting the required noise level by use of the suggested methods. This newspaper is substantially smaller than the respondent's. On the other hand, a large number of papers, more comparable to respondent, have been shown to use such methods with some success, but not with such success as to bring them within the level of Table G-16. These facts raise serious doubt as to whether the adoption of the suggested methods in the respondent's pressroom and reel room would meet the requirements of the standard. The only protection to the employees which the record shows is certain to work is the method already being adopted which is the use of earplugs or mufflers and the use of a quiet room to which the employees may go from time to time to get out of the noise. There is no contention that any of the employees' ears are receiving more than 90 decibels of noise. It is entirely possible that one or more of the methods suggested by Dr. Hine would work, but this will not be definitely known until they are tried. The respondent should not be required to spend up to $1,500,000 to answer this open question. This Judge is of the opinion that while such methods might work and reduce the noise to the standard set forth in Table G-16, the evidence does not establish that there is anything approaching substantial assurance of this result. Theory would indicate that enclosures might be successful, whereas the weight of the testimony as to

practice indicates that such changes probably would not be successful in meeting the standard. Other suggested methods would not reduce the noise to the required extent. The respondent can not be found guilty of failure to abate if there is no feasible way in which abatement may be accomplished. The complaint, therefore, can not be sustained.

## FINDINGS OF FACT

1. Respondent is a corporation having a place of business at 72 Marietta Street, Northwest, Atlanta, Georgia, where it is engaged in newspaper publishing. Respondent is a part of a chain of newspapers known as Cox Enterprises, Inc., which chain has newspapers in various states throughout the United States.

2. Respondent is and at all times relevant to this cause has been an employer engaged in a business affecting commerce within the meaning of the Act.

3. On December 4, 1974, as well as subsequent thereto, the respondent's employees have worked in a pressroom in which the sounds exceed those listed in Table G-16 of standard 29 CFR 1910.95(b)(1).

4. Said employees work at various times for a period of time exceeding that permitted by Table G-16 for the sound levels listed in Table G-16.

5. The respondent has since 1969 required its employees subjected to said noise to at all times wear either earplugs or earmuffs.

6. Said employees, while wearing earplugs or earmuffs, are not subjected to noise of as much as that permitted by Table G-16 of standard 29 CFR 1910.95(b)(1).

7. The respondent, prior to December 4, 1974, installed rooms in its pressroom known as "quiet rooms" in which the level of noise was below 90 dBA.

8. The employees could observe the presses and turn them on and off from the quiet room, but to adequately perform their jobs, they had to be outside the quiet room for substantial periods of time.

9. A substantial reduction in noise can be accomplished by the use of full enclosures, absorbent material, partial enclosures, barriers, and changes in the structure of the presses and folders themselves.

10. The evidence establishes that the use of full enclosures with absorbent material may reduce the level to that set forth in Table G-16 of standard 29 CFR 1910.95(b)(1), but the complainant has not proven through a preponderance of the evidence that the use of said procedures either singularly or in combination will reduce the noise to that permitted by

Table G-16 of standard 29 CFR 1910.95(b)(1).

## CONCLUSIONS OF LAW

1. Respondent is engaged in a business affecting interstate commerce and is within the jurisdiction of the Occupational Safety and Health Act.

2. Standard 29 CFR 1910.95(b)(1) is not invalid insofar as it requires the use of feasible engineering controls when personal protective equipment is preventing excessive sounds from reaching the ears of employees.

3. The burden of proving that there is a feasible means of engineering controls rests upon the complainant.

4. The respondent is not required to adopt engineering controls unless such controls will reduce the noise to a level below 90 dBA.

5. The complainant having failed to establish by a preponderance of the evidence that there are feasible engineering controls which will reduce the level of noise below that set forth in Table G-16 of standard 29 CFR 1910.95(b)(1), the respondent is not required to abate the alleged violation of standard 29 CFR 1910.95(b)(1).

## ORDER

It is therefore ORDERED that:

The Notice of Failure to Abate and the complaint alleging failure by the respondent to abate standard

29 CFR 1910.95(b)(1) be and the same hereby are dismissed.

Dated this 4th day of November 1975.

JOHN S. PATTON, Judge

Copies sent by certified mail to:

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Atlanta, Georgia 30303

Atlanta District Lodge Number 46, I.A.M.
4135 Sunrise Trail
College Park, Georgia 30337

Atlanta Paperhandlers Union Number 28
2708 Arbor Avenue, Southeast
Atlanta, Georgia 30317

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

December 29, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Carpenter Rigging Incorporated

OSHRC DOCKET NO. 76-5125

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF COMMISSION DECISION

To wit: See attached.

FOR THE SECRETARY OF LABOR

- Counsel for Regional Litigation
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  200 Constitution Ave., NW. - Rm. S-4014
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FOR EMPLOYEES

-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Judges Office, OSHRC
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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>CARPENTER RIGGING, INC.,<br>Respondent. | OSHRC Docket No. 76-5125 |

DECISION

Before: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

The decision of the administrative law judge with respect to citation 1 is affirmed. The judge correctly found that the cited standard was preempted by a specifically applicable standard. See 29 C.F.R. § 1910.5(c)(1). Inasmuch as Carpenter Rigging was not alleged to have violated the specifically applicable standard, it is unnecessary to consider the judge's finding that Carpenter Rigging was in substantial compliance with that standard. Accordingly, the judge's decision is affirmed.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: DEC 29 1982

COTTINE, Commissioner, dissenting:

The administrative law judge vacated a citation alleging noncompliance with the construction standard published at 29 C.F.R. § 1926.500(d)(1) on the basis that the Respondent, Carpenter Rigging, Inc.("Carpenter Rigging"), substantially complied with the more specifically applicable steel erection standard published at 29 C.F.R. § 1926.750(b)(1)(iii). The judge's rulings are in error both on the applicability issue and the merits of the citation. My colleagues summarily affirm the first erroneous ruling and avoid the second.

I.

Carpenter Rigging was engaged in the installation of equipment in a corn elevator under construction. At the time of inspection steel erection was 80% completed. The cited area was on the second floor where Carpenter Rigging's employees allegedly were exposed to a 25 foot fall hazard because of the failure to comply with the following guarding requirements of § 1926.500(d)(1):

> (d) Guarding of open-sided floors, platforms, and runways.
> (1) Every open-sided floor or platform 6 feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f)(1)(i) of this section, on all open sides...

Paragraph (f)(1) of § 1926.500 describes a standard railing as consisting of (1) a top rail, approximately 42 inches from the upper surface of the top rail to the floor, (2) an intermediate rail, halfway between the top rail and the floor, and (3) a toeboard.

Carpenter Rigging's employees allegedly were exposed to a 51-inch-wide perimeter opening approximately 25 feet above ground. The opening was located on a stairwell landing, two to three feet from the top riser of the stairway. A steel beam extended across the opening at a height

of 3 or 4 inches above the floor. A second beam extended across the opening at a height of 4 feet 5 inches above floor level. The compliance officer testified that an employee who stumbled at the top of the stairwell could fall through the opening. He further testified that a cord observed lying on the floor between the top of the stairs and the opening created a tripping hazard that could result in an employee falling through the opening. The compliance officer's testimony was not rebutted. In addition, it is undisputed that on the day of inspection at least one Carpenter Rigging employee used the stairwell to gain access to higher levels during the normal course of his duties.

Although employees of another employer were engaged in welding stairway handrails above the second level, no structural steel work was being performed in the area of the cited hazard. Furthermore, there is no dispute that the metal floor on the second level was already firmly bolted and secured, although the walls of the structure were not yet in place. Carpenter Rigging installed equipment in the structure before the walls were erected because of the large size of the equipment. However, the Respondent's project manager testified that equipment would not be brought in through the cited opening on the landing, but through an open wall on either side of the stairs. Therefore, the witness concluded that the passage of equipment would not prevent the installation of a rail at the cited location.

II.

The administrative law judge found that the structure was in the structural steel assembly stage, only temporary steel decking had been installed, and permanent concrete floors had not yet been installed.

He concluded that the steel erection standard at 29 C.F.R. § 1926.750 (b)(1)(iii)[1/] was the more specifically applicable standard. Finding that "the 3-4 inch toeboard and horizontal structural steel member at the 53 inch height...was in substantial compliance with Section 1926.750(b)(1)(iii)," the judge vacated the citation.

On review the Secretary specifically excepts to the finding that the flooring was temporary, arguing that the record establishes that the flooring was permanent, thereby rendering the steel erection standard inapplicable.

Carpenter Rigging maintains that "[a]lthough steel floor had been bolted at the point where the open side existed (R.10), permanent floors had not been installed throughout the building (R. 68)." Respondent's Brief at 6. The Respondent further maintains that "[t]he fact that steel erection had been completed on the floor in question does not automatically trigger the standard at Section 1926.500(d)(1)." Respondent's Brief at 7. Accordingly, Carpenter Rigging concludes that "[w]here permanent floors have been partially completed, but structural steel assembly remains to be completed, Section 1926.750(b)(1)(iii) applies." Respondent's Brief at 8.

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1/ Section 1926.750(b)(1)(iii) provides:

> (b) Temporary flooring - skeleton steel construction in tiered buildings. (1)
>
> * * *
>
> (iii) Floor periphery - safety railing. A safety railing of 1/2-inch wire rope or equal shall be installed, approximately 42 inches high, around the periphery of all temporary-planked or temporary metal-decked floors of tier buildings and other multifloored structures during structural steel assembly.

III

A.

In concluding that the steel erection standards apply to the facts of this case, the judge found that only temporary steel decking had been installed and the permanent concrete flooring had not yet been poured. However, the record contains no evidence to support the finding that the flooring in the location cited was temporary. To the contrary, unrebutted evidence establishes that the metal flooring in the area cited was firmly bolted and secured, rendering the floor "permanent flooring" under the steel erection standards. See 29 C.F.R. § 1926.750(a)(2). Furthermore, there is no evidence that a concrete floor was to be poured at any time. It is obvious from the Respondent's arguments in this case that it does not consider the flooring at the cited location to be "temporary." Rather, it argues that, because permanent flooring had not been installed throughout the rest of the structure, the steel erection standard applies.

It is unnecessary to the disposition of this case to determine whether the steel erection standards are at all applicable to worksite areas where skeletal steel erection is no longer being performed because there are no steel erection standards applicable to the guarding of open-sided permanent floors. Accordingly, the judge erred and the Commission compounds that error by concluding that section 1926.750(b)(1)(iii), a standard that unambiguously applies exclusively to temporary floors, is specifically applicable to the facts of this case.

B.

Both the cited standard and the steel erection standard applied by the judge require the presence of a safety barrier "approximately 42 inches high" to protect against fall hazards. In Dick Corp., 79 OSAHRC 101/E8, 7 BNA OSHC 1951, 1979 CCH OSHD ¶24,078 (No. 16193, 1979), the

Commission held unanimously that employees working near the open end of a scaffold 23 feet above ground level were not adequately protected by a single horizontal bar located 4 to 6 feet above the scaffold platform.[2/] The Commission stated that the bar "did not even provide protection equivalent to that provided by a top rail, which under the standard must be 'approximately 42 inches high.' " 7 BNA OSHC at 1954, 1979 CCH OSHD ¶24,078 at p. 29,250. The 53-inch-high steel bar in this case is no more equivalent to the protection required by the standard than was the 48 to 60-inch-high steel bar considered in Dick Corp. In addition, there is a total absence of the protection that would be provided by a midrail installed in accordance with the cited standard.

The judge's "substantial compliance" test is also inconsistent with Commission precedent. Well established precedent properly holds that "technical noncompliance" with a standard that results in only a negligible effect on employee safety and health is deemed a de minimis violation not warranting an abatement order or penalty assessment. E.g., Triple "A" South, A Div. of Triple "A" Machine Shop, Inc., 81 OSAHRC 29/B13, 9 BNA OSHC 1543, 1981 CCH OSHD ¶25,295 (Nos. 77-2922 & 77-3169, 1981); Continental Oil Co., 79 OSAHRC 42/C3, 7 BNA OSHC 1432, 1979 CCH OSHD ¶23,626 (No. 13750, 1979); Clifford B. Hannay & Son, Inc. 78 OSAHRC 12/A2, 6 BNA OSHC 1335, 1978 CCH OSHD ¶22,525 (No. 15983, 1978); Rust Engineering Co., 77 OSAHRC 37/C8, 5 BNA OSHC 1183, 1977-78 CCH OSHD ¶21,693 (No. 12200, 1977); National Rolling Mills Co., 76 OSAHRC 121/D7, 4 BNA OSHC 1719, 1976-77 CCH OSHD ¶21,114 (No. 7987, 1976); Van Raalte

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2/ Dick Corp. involved an alleged violation of the scaffold guarding standard at 29 C.F.R. § 1926.451(d)(10). The scaffold standard contains the same 42-inch height requirement for guardrails contained in sections 1926.500(d)(1) and 1926.750(b)(1)(iii). The only relevant differences among these standards is that sections 1926.451(d)(10) and 1926.500(d)(1) require guardrails made of 2 x 4-inch lumber or equivalent, plus midrails and toeboards, whereas section 1926.750(b)(1)(iii) provides for the use of a single safety railing made of "1/2-inch wire rope or equal."

Co., Inc., 76 OSAHRC 49/B8, 4 BNA OSHC 1151, 1975-76 CCH OSHD ¶20,633 (No. 5007, 1976). However, the uncontradicted evidence in this case establishes that at least one of Carpenter Rigging's employees was exposed to a serious fall hazard of 25 feet, exacerbated by the presence of a tripping hazard in front of an opening that was not adequately guarded to prevent a fall. A de minimis violation could not be found on these facts.

C.

Accordingly, for the reasons set forth above, the judge's decision should be reversed and the citation affirmed.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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| SECRETARY OF LABOR,<br>Complainant<br>v.<br>CARPENTER RIGGING, INC.,<br>Respondent | OSHRC DOCKET NO. 76-5125 |

APPEARANCES:

Louis DeBernardo, Esq., for Complainant
Paul M. Sansoucy, Esq., for Respondent

DECISION AND ORDER

This case arose under Section 10(c) of the Occupational Safety and Health Act, 29 U.S.C. §659(c), and came on for hearing on April 11, 1977 at Syracuse, New York.

On November 17, 1976 Respondent was issued one serious citation for which the Secretary of Labor recommended a penalty of $700 and a nonserious citation for which no penalty was proposed. Respondent contested both charges.

Respondent is a corporation organized under the laws of the State of New York, engaging in construction activities; it maintains an office and place of business at Syracuse, New York; many of the materials and supplies used by Respondent were manufactured outside the State of New York; hence, Respondent engages in a business affecting commerce, within the meaning of Sections 3 (3) and 3 (5) of

the Act (Ans. II, III). Based on the foregoing, it is found that jurisdiction over the parties and the subject matter is vested in the Commission.

On November 2, 1976 a compliance officer of the Department of Labor inspected a job site at Montezuma, New York, where a corn processing plant, consisting of several buildings, was under construction (Tr. 5).

29 U.S.C. §654(a)(2) requires that each employer comply with occupational safety and health standards promulgated under the Act.

Pursuant to 29 U.S.C. §666(b), an employer shall be assessed a civil penalty of up to $1,000 for each serious violation.

Section 666(c) provides that an employer may be assessed a civil penalty of up to $1,000 for each nonserious violation.

29 U.S.C. §666(j) declares that "a serious violation shall be deemed to exist in a place of employment if there is a substantial probability that death or serious physical harm could result from a condition which exists, or from one or more practices, means, methods, operations, or processes which have been adopted or are in use, in such place of employment unless the employer did not, and could not with the exercise of reasonable diligence, know of the presence of the violation."

Civil penalties shall be imposed only after considering the size of the business of the employer, the gravity of the violation, the good faith of the employer, and the history of previous violations. 29 U.S.C. §666(i).

The serious citation alleges a violation of the standard at 29 CFR §1926.500(d)(1) in that open-sided floors or platforms, six feet or more above adjacent floor or ground level, were not guarded by a standard railing or the equivalent on all open sides.

The cited standard states:

> Subpart M--Floor and Wall Openings, and Stairways.
>
> §1926.500 Guardrails, handrails, and covers.
>
> ***
>
> (d) Guarding of open-sided floors, platforms, and runways. (1) Every open-sided floor or platform six feet or more above adjacent floor or ground level shall be guarded by a standard railing, or the equivalent, as specified in paragraph (f)(i) of this section, on all open sides, except where there is entrance to a ramp, stairway, or fixed ladder. The railing shall be provided with a standard toeboard wherever, beneath the open sides, persons can pass, or there is moving machinery, or there is equipment with which falling materials could create a hazard.

Complainant contends that on November 2, 1976 (Tr. 11) Respondent failed to properly guard the open side of a landing at the second level of a stairwell in a multi-floored skeleton steel structure being erected (Tr. 8, 9, 13, 27). The structure was to be a corn elevator (Tr. 13).

Respondent's main function at the site was to install equipment, including tanks, hammermills, and bucket elevators; it also intalled some temporary structural platforms (Tr. 47 - 48).

The cited landing, about three feet wide (Tr. 74), had an opening on one side about 25 feet above ground level (Tr. 10).

About 20 feet from the opening stood another building (Tr. 72 - 73). The open side, 51 inches wide (Tr. 74), had a toeboard 3 - 4 inches high (Tr. 28 - 29); across the opening at a height of 53 inches above floor level (Tr. 9) there was a girt, a horizontal structural steel member (attached to beams) to which the siding of the building was to be fastened (Exh. J-1, Tr. 50).

At the time of the inspection, construction had reached to a height of approximately 140 feet (Tr. 68), with perhaps 80% of the steel erection completed (Tr. 48). At the second level the steel floor had been tacked down (Tr. 9 - 10), but the structure was still in a skeleton stage, without walls (Tr. 9).

Only the temporary steel decking had been installed. There had been no installation of permanent concrete flooring. The building under consideration was still in the structural steel assembly stage. In these circumstances, I find that the standard at 29 CFR §1926.500(d)(1) is preempted by 29 CFR §1926.750(b)(1)(iii), which controls multi-floored structures "during structural steel assembly." 29 CFR §1910.5(c)(1) declares that if a particular standard is specifically applicable to a condition, practice, means, method, operation, or process, it shall prevail over any different general standard which might otherwise be applicable.

The applicable standard provides:

> Subpart R—Steel Erection
>
> §1926.750 Flooring requirements.
>
> ***

(b) Temporary flooring—skeleton steel construction in tiered buildings. (1)

***

(iii) Floor periphery—safety railing. A safety railing of 1/2-inch wire rope or equal shall be installed, approximately 42 inches high, around the periphery of all temporary-planked or temporary metal-decked floors of tier buildings and other multifloored structures during structural steel assembly.

In June 1975 the U.S. Department of Labor issued OSHA 2202, a booklet entitled "Construction Industry." The publication describes itself as a digest of construction industry standards compiled to aid employers, supervisors, and safety personnel in their efforts to achieve compliance with OSHA (Occupational Safety and Health Administration) standards. The booklet covers steel erection at pages 27-28. Section 1926.750(b)(1)(iii) is discussed thusly:

56. STEEL ERECTION

***

d. A safety railing of 1/2-inch wire rope or equivalent shall be installed around the perimeter of all temporarily floored buildings, approximately 42 inches high, during steel assembly.

It is worthy of note that this interpretation of the standard encompasses "all temporarily floored buildings," which would certainly include the floor in the instant case.

Section 1926.750(b)(1)(iii) requires a "wire rope or equal." Subpart R offers no definition of the expression "or equal." We are also left with the uncertainty as to how high a protective railing must be to satisfy the required height of "approximately

42 inches high." There was no safety railing of wire rope at the second floor landing, but I find that from the standpoint of safety, the 3 - 4 inch toeboard and horizontal structural steel member at the 53-inch height equalled a 1/2-inch wire rope "approximately" 42 inches high. In light of the foregoing, it is found that Respondent was in substantial compliance with Section 1926.750(b)(1)(iii), which applies to the facts herein.

Since I find that the general standard cited in the serious citation does not apply, and that Respondent was in substantial compliance with the specific steel erection standard which does apply, the serious citation will be ordered vacated.

The nonserious citation involves 29 CFR §1926.25(a). Complainant alleges that empty boxes, scrap lumber, and rags were not cleared from the front approach to the work area on the north side of the corn elevator, exposing employees to accidental tripping over these materials.

The standard reads:

> Subpart C-General Safety and Health Provisions
>
> ***
>
> §1926.25 Housekeeping.
>
> (a) During the course of construction, alteration, or repairs, form and scrap lumber with protruding nails, and all other debris, shall be kept cleared from work areas, passageways, and stairs, in and around buildings or other structures.

Scrap materials were piled in an area outside the corn elevator structure (Tr. 20) on November 2, 1976 (Tr. 21), in

an area about 10 feet by 10 feet (Tr. 40). Respondent's millwright foreman testified that the debris was "approximately eight feet, at least" (Tr. 70) to the side of the entrance to the structure. The inspecting officer described the scrap as being "in front of the building" (Tr. 21). A photograph of record (Exh. C-2) shows, and I so find, that the materials are not directly in the passageway to the entrance, but are off to the side.

Since the debris was not in a work area, or passageway, or on stairs, the Secretary has not shown a violation of the cited standard, and it is so found.

Upon consideration of the record in its entirety, it is concluded that on November 2, 1976 Respondent was not in violation of Section 5(a)(2) of the Act, 29 U.S.C. §654(a)(2), for noncompliance with the standards at 29 CFR §§1926.500(d)(1) or 1926.25(a).

Accordingly, it is ordered that the serious and nonserious citations issued on November 17, 1976 and the proposed penalty notification be and the same hereby are vacated.

Abraham Gold

ABRAHAM GOLD
Judge, OSHRC

Dated: June 27, 1977
Boston, Massachusetts

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NOTE: (1) Underlined cases are Commission decisions. All others are Judge's decisions which have become final orders, except that the notation, "Judge's decision," indicates a decision reviewed by the Commission.

(2) Cite decision on fiche as follows: 75 OSAHRC 1 with reference to the coordinates of the first page of the cited decision. Example: Secretary v. J.W. Black Lumber Co., 75 OSAHRC 1/B9, p.2.

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UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D C 20006

December 29, 1982

**IN REFERENCE TO SECRETARY OF LABOR v.**

Farthing & Weidman, Inc.

OSHRC DOCKET NO. 78-5366

**NOTICE IS HEREBY GIVEN TO THE FOLLOWING:**

OF COMMISSION DECISION

To wit: See attached.

**FOR THE SECRETARY OF LABOR**

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**FOR EMPLOYEES**

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Judge's Office
Occupational Safety & Health
Review Commission
1114 Market Street Room 608
St. Louis, Missouri 63101

Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | |
|---|---|
| SECRETARY OF LABOR,<br>Complainant,<br>v.<br>FARTHING & WEIDMAN, INC.,<br>Respondent. | OSHRC Docket No. 78-5366 |

DECISION

BEFORE: ROWLAND, Chairman; CLEARY and COTTINE, Commissioners.

BY THE COMMISSION:

An amended citation issued by the Secretary of Labor alleges that Farthing & Weidman, Inc. ("F&W") violated four crane safety standards. Administrative Law Judge Vernon Riehl vacated the citation on the ground that any violations were caused by employee misconduct for which F&W is not liable. The case is before us under 29 U.S.C. § 661(i). We affirm the judge's disposition in part and reverse in part.

Items 1(b) and (c); 29 C.F.R. §§ 1910.180(h)(3)(vi) and (h)(4)(ii).

Items 1(b) and (c) of the amended citation allege violations of 29 C.F.R. §§ 1910.180(h)(3)(vi) and (h)(4)(ii). These standards stated that "[t]he operator should avoid carrying loads over people" and "[n]o person should be permitted to stand or pass under a load on the hook." These standards, like their source standards, sections 5-3.2.3.f and 5-3.2.4.b of ANSI B30.5--1968," Crawler, Locomotive and Truck Cranes," use the word "should." Section V of the introduction to the ANSI source standard states that "should" signifies an advisory standard. Such standards are not mandatory and may not be applied here. 1/

1/ See General Electric Co., 80 OSAHRC 127/F10, 9 BNA OSHC 1185, CCH OSHD ¶ 25,079 (No. 76-2982, 1980); Brown & Root, 80 OSAHRC 112/D2, 9 BNA OSHC 1027, 1029, 1980 CCH OSHD ¶ 24,958, p. 30,795 (No. 76-2938, 1980) (involving

We also do not inquire whether F&W violated 29 U.S.C. § 654(a)(1), section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678, which the Secretary pleaded in the alternative. The adoption by the Secretary of a standard covering a condition--here, the presence of an employee under a load--precludes citation under section 5(a)(1) of the Act, whether the standard is mandatory or advisory. 2/ Items 1(b) and (c) are therefore vacated. 3/

Item 1(a); section 1910.180(h)(3)(i)(b)

Item 1(a) alleges noncompliance with section 1910.180(h)(3)(i)(b), which requires that a load be "well secured and properly balanced in the sling or lifting device before it is lifted more than a few inches." F&W employees had attached sling hooks to an opening in the top of a very large aluminum tank. The sides of the opening that the sling hook contacted were not strong enough to support the tank's weight. One end of the tank was lifted. An employee crawled underneath. The sling hooks then ripped through the metal and the tank fell on the employee, killing him.

F&W operated a truck crane, which is governed by section 1910.180. See section 1910.180(b)(1) (application of section). Also the parties do not dispute

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(Footnote 1 cont'd)

section 5-3.2.3.f of the same ANSI standard, adopted indirectly under section 1926.550(a)(17)), pet. for rev. dismissed, No. 81-4003 (5th Cir. Jan. 20, 1981); A. Prokosch & Sons Sheet Metal 80 OSAHRC 96/A2, 8 BNA OSHC 2077, 2080-81, 1980 CCH OSHD ¶ 24,840, pp. 30,628-9 (No. 76-406, 1980) (same, adopted under section 1926.550(b)(2)), pet. for rev. dismissed, No. 80-4241 (2d Cir. March 27, 1981); McHugh & McHugh, 77 OSAHRC 35/A2, 5 BNA OSHC 1165, 1977-78 CCH OSHD ¶ 21,629 (No. 13010, 1977) (involving section 1910.180(h)(4)(ii)).

2/ See Prokosch, 8 BNA OSHC at 2080-81, 1980 CCH OSHD at pp. 30,629-30.

3/ Commissioner Cottine dissents from this disposition for the reasons stated in his dissenting opinion in Prokosch. As in Prokosch and John T. Brady & Co., 82 OSAHRC 9/D10, 10 BNA OSHC 1385, 1982 CCH OSHD ¶ 25,941 (No. 76-2894, 1982), rev'd, No. 82-4082 (2d Cir. Oct. 14, 1982), he believes that the merits of the Secretary's allegations under section 5(a)(1) should be determined by the Commission.

that a load was not well secured in a sling. In any event, a load is obviously not well secured within the meaning of the standard when it is suspended by sling hooks attached to a portion of the load too weak to support the load's weight.

F&W's argument at the hearing 4/ was that the load was not "lifted" within the meaning of the standard because only one end of the load was raised into the air. We are unconvinced. To say that the tank involved here was "lifted" hardly strains the meaning of the word, and, indeed, accords well with its plain meaning. In any event, we must construe this standard in light of its purpose: 5/ to prevent loads from falling to the ground. To hold that partially suspended loads may be poorly secured, and hence may fall to the ground, would be inconsistent with that purpose. 6/

Given the presence of employees in close proximity to the lifting operation, we also have no difficulty in concluding that the record sufficiently shows access to the violative condition. We emphasize that our case law, which requires that the Secretary show access, does not require that the Secretary precisely track the movements of employees to show that they will be or have been in a zone of danger. We have rejected such a brinkmanship approach to employee safety and health. See Otis Elevator Co., 78 OSAHRC 88/E5, 6 BNA OSHC 2048, 2050, 1978 CCH OSHD ¶ 23,135, p. 27,952 (No. 16057, 1978); Gilles & Cotting, Inc., 76 OSAHRC 30/D9, 3 BNA OSHC 2002, 1975-76 CCH OSHD ¶ 20,448 (No. 504, 1976)(concurring opinion). In any event, the driver of the truck that was to be backed up to the raised end of the tank would have been in the zone of danger had the work

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4/ F&W did not file a brief before either the judge or the Commission.

5/ See, e.g., Anaconda Aluminum Co., 81 OSAHRC 27A/A2, 9 BNA OSHC 1460, 1477, 1981 CCH OSHD ¶ 25,300, p. 31,349 (No. 13102, 1981).

6/ F&W's argument is founded on the premise that the "load" is the tank. This may not be so. Section 1910.180(a)(26) defines "load (working)" as the "external load, in pounds, applied to the crane...," i.e., as the weight of

proceeded as planned. Also the deceased employee was under the tank. Access has been clearly established. 7/

We also find that F&W is responsible for the conduct and knowledge of its supervisory employee at the site. Mr. Kirklin, F&W's foreman and crane operator at the site, personally inspected and approved the sling arrangement before he lifted up the tank. Inasmuch as Mr. Kirklin was a supervisor, and a corporation such as F&W can have knowledge and take action only through persons such as Mr. Kirklin, Mr. Kirklin's knowledge and conduct ordinarily would be imputed to F&W. 8/ We have held, however, that an employer may not be held liable for the knowledge and conduct of a supervisor if his actions were contrary to effectively communicated and enforced work rules. 9/

On the day before the violation occurred here, the president of F&W showed Mr. Kirklin and the other F&W employees at the site how the tank was to be lifted out of the ground. He told them to secure a chain sling around a railroad tie, drop it into the hole in the tank, and then lift the railroad tie. This would distribute the load so that stress was not placed on only a single spot on the top of the tank. The tank was later lifted out of the ground in this way.

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(Footnote 6 cont'd)

the matter being raised. See Havens Steel Co., 78 OSAHRC 53/C11, 6 BNA OSHC 1740, 1743 n. 8, 1978 CCH OSHD ¶ 22,875, p. 27,673 n.8 (No. 15538, 1978); Alfred A. Austin Constr. Co., 76 OSAHRC 50/A2, 4 BNA OSHC 1166, 1976-77 CCH OSHD ¶ 20,660 (No. 4809, 1976). It may therefore be that the weight of one end of a tank is itself a load and therefore may not be lifted more than a few inches without being well secured in a sling.

7/ If the deceased employee's presence in the zone of danger had been contrary to an enforced workrule of the employer, his presence could not be the predicate for a finding of access. See Frank Swidzinski Co., 81 OSAHRC 4/E14, 9 BNA OSHC 1230, 1232, 1981 CCH OSHD ¶ 25,129, p. 31,032 (No. 76-4627, 1981). F&W does not argue, however, and nothing in this record shows that F&W employees had ever been told to not go under a suspended load.

8/ See Daniel Construction Co., 82 OSAHRC 23/A2, 10 BNA OSHC 1549, 1551-2, 1982 CCH OSHD ¶ 26,027, p. 32,672 (No. 16265, 1982); H.E. Wiese, Inc., 82 OSAHRC 18/A2, 10 BNA OSHC 1499, 1505, 1982 CCH OSHD 25,985, p. 32,613-4 (No. 78-204, 1982).

9/ Id.

The Secretary claims that this evidence does not warrant a finding that F&W is not responsible for Mr. Kirklin's conduct the next day, when the alleged violation occurred. He maintains that F&W's work rule--that the tank be lifted with a chain sling wrapped around a railroad tie--was not shown to be directed or to be understood as being directed at the lifting operation the employees were to perform the next day. He argues that just as F&W itself attempted to draw a distinction at the hearing between lifting the tank entirely out of the ground and lifting up only one end to place it onto the truck trailer, the employees also might not have understood that the tank was to be tilted in the same way it was entirely lifted.

We have many times emphasized that it is not enough for an employer to merely communicate safety rules. If safety rules are to serve as useful vehicles for implementing an employer's final responsibility for compliance with occupational safety and health standards, employees must understand that the rules will be enforced. 10/ This principle is at least as important for supervisors as it is for other employees. When a supervisor violates a safety rule, he not only endangers himself and others; he also suggests to his subordinates that safety rules are not to be taken seriously. It is for this reason that an employer who seeks to avoid liability for the conduct and knowledge of its supervisory employees must show that the rule was accompanied by enforcement. 11/

We therefore find it critical here that F&W neither claimed nor attempted to show that it ever enforced its safety rules. We note in this connection that F&W's president was present at the hearing and Mr. Kirklin was presumably avail-

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10/ E.g., Marson Corp., 82 OSAHRC 29/C4, 10 BNA OSHC 1660, 1662, 1982 CCH OSHD ¶ 26,075, p. 32,804 (No. 78-3491, 1982). On the necessity for enforcement, see Niagara Mohawk Power Corp., 79 OSAHRC 36/A2, 7 BNA OSHC 1447, 1979 CCH OSHD ¶ 23,670 (No. 76-2414, 1979). See also B-G Maintenance Management, 76 OSAHRC 60/A2, 4 BNA OSHC 1282, 1976-77 CCH OSHD ¶ 20,744 (No. 4713, 1976).

11/ Judge Riehl erred in failing to consider whether F&W's safety rules were enforced.

able to testify on F&W's behalf. Absent evidence that F&W's safety rules were enforced, we impute Mr. Kirklin's knowledge and conduct to F&W, and affirm item 1(a).

Item 1(d); section 1910.180(h)(4)(i).

Item 1(d) alleges noncompliance with section 1910.180(h)(4)(i), which states that "[t]he operator shall not be permitted to leave his position at the controls while the load is suspended." The standard was violated when Mr. Kirklin, F&W's crane operator and supervisor at the site, left the controls while one end of the tank was suspended. The compliance officer testified that F&W's president had said that crane operators always had been told not to leave crane controls while a load was suspended and that he (the compliance officer) believed that was correct. He also testified that he had no reason to believe the crane operator's action was more than an isolated occurrence. As with item 1(a), however, F&W neither claimed nor showed that its workrule was enforced. We therefore impute Mr. Kirklin's knowledge and conduct to F&W, and affirm item 1(d).

Penalty

The Secretary alleged that the violations as serious within the meaning of section 17(k) of the Act, 29 U.S.C. § 666(j). We agree. Incidents that occur as a result of a violation of either sections 1910.180(h)(3)(i)(b) or (h)(4)(i) present a substantial probability of death or serious physical harm. See Wright & Lopez, Inc., 81 OSAHRC 92/D10, 10 BNA OSHC 1108, 1114, 1981 CCH OSHD ¶ 25,728, p. 32,079 (No. 76-256, 1981).

Section 17(j) of the Act, 29 U.S.C. § 666(i), requires that the Commission consider the size of the employer's business, the gravity of the violation, the employer's good faith and history of previous violations. The manner in which the Secretary calculated his proposed penalty indicates that F&W is a small employer, had no history of previous violations and acted in good faith. The gravity of the violations could be severe, as the fatality here demonstrates.

However, there was limited exposure to the hazard. Under these circumstances, we find that the Secretary's proposed penalty of $240 is appropriate.

Accordingly, the judge's decision is affirmed in part and reversed in part. Items 1(b) and 1(c) are vacated; items 1(a) and 1(d) are affirmed. A penalty of $240 is assessed.

SO ORDERED.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

DATED: DEC 29 1982

ROWLAND, Chairman, dissenting in part:

Although I join in vacating items 1(b) and 1(c), I would also vacate items 1(a) and 1(d). The majority concludes that F&W failed to rebut the Secretary's showing that it knew or with the exercise of reasonable diligence could have known of the violations. I disagree. It is unnecessary in my view for an employer to come forward with evidence that he not only informed a supervisory employee of a workrule but that he warned the supervisor that discipline would be imposed if the rule were not followed.

Under Commission precedent, a violation of the Act cannot be found unless the record establishes that the employer knew or with the exercise of reasonable diligence could have known of the presence of the violation. Prestressed Systems, Inc., 81 OSAHRC 43/D5, 9 BNA OSHC 1864, 1981 CCH OSHD ¶ 25,358 (No. 16147, 1981); General Electric Co., 81 OSAHRC 42/A2, 9 BNA OSHC 1722, 1981 CCH OSHD ¶ 25,345 (No. 13732, 1981), and cases cited. These cases reflect both the long-established principle that the Act does not impose strict liability on employers and the congressional intent that employers be held responsible only for hazards they can reasonably be expected to prevent. See generally Marson Corp., 82 OSAHRC 29/C4, 10 BNA OSHC 1660, 1664, 1982 CCH OSHD ¶ 26,075, pp. 32,805 (No. 78-3491, 1982)(dissenting opinion). Because an employer normally acts through agents, however, the actions and knowledge of supervisory employees are ordinarily imputed to their employer. Id. I have previously acknowledged that the employer may rebut a showing of imputed knowledge by going forward with evidence that workrules were communicated to supervisory employees and enforced but I reserved decision on whether the employer need enforce the workrules. See H.E. Wiese, Inc., 82 OSAHRC 18/A2, 10 BNA OSHC 1499, 1508-9 n.8, 1982 CCH OSHD ¶ 25,985, p. 32,617 n.8 (No. 78-204, 1982)(dissenting opinion).

There can be little doubt that F&W communicated workrules implementing the cited standards. The president of F&W had only the day before shown Mr. Kirklin,

the crane operator and foreman at the site, the correct way to lift the tank. Kirklin also knew of F&W's rule that crane operators were not to leave the crane controls while a load is suspended. This is not enough for the majority, however.

The majority seems to fault F&W for two reasons: first, that F&W did not prove that it had actually disciplined employees for past infractions of its rules; and second, that F&W did not prove that its supervisor understood that F&W's rules would be enforced. Neither of these reasons are persuasive.

To hold an employer in violation of the Act for failing to show that a rule has been enforced in the past is utterly illogical where, as here, there is no suggestion in the record that F&W had ever had occasion to discipline its employees. 12/ And if the majority is to be consistent, it cannot fault F&W for not showing that Mr. Kirklin had been disciplined after the violation allegedly occurred, for the majority has held that the imposition of discipline after the fact is insufficient. 13/

It therefore seems that the majority decision reduces to little more than this: To rebut the Secretary's showing of knowledge, an employer must show that his supervisors were made to understand that work rules would be enforced. Presumably, such understanding would come through admonishment to the supervisor that infractions of the rules will result in discipline. This goes too far.

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12/ See Asplundh Tree Expert Co., 78 OSAHRC 77/E12, 6 BNA OSHC 1951, 1954, 1978 CCH OSHD ¶ 23,033, p. 22,841 (No. 16162, 1978); cf. Jones & Laughlin Steel Corp., 82 OSAHRC _____, 10 BNA OSHC 1778, 1783, 1982 CCH OSHD ¶ 26,128, p. 32,888 (No. 76-2636, 1982)(employer unaware of violations of rules; need for monitoring therefore not perceived).

13/ Western Masschusetts Electric Co., 81 OSAHRC 63/B13, 9 BNA OSHC 1940, 1945, 1981 CCH OSHD ¶ 25,470, p. 31,766 (No. 76-1174, 1981); Niagara Mohawk Power Corp., 79 OSAHRC 36/A2, 7 BNA OSHC 1447, 1449-1450, 1979 CCH OSHD ¶ 23,670, p. 28,702 (No. 76-2414, 1979).

A supervisor has risen to a responsible position because he has demonstrated his understanding that his employer's workrules are to be obeyed and enforced. Indeed, one of his primary functions is to ensure that his subordinates comply with his employer's rules. To require employers to show that supervisors have also been specifically warned not to violate those rules is excessive and insulting. When an employer tells his supervisors of a workrule, he does not offend their intelligence and sense of loyalty with an overbearing reminder of the consequences of disobedience. I therefore do not join the majority in imposing this unnecessary burden of production. The Commission should at least presume that a supervisor understands that workrules will be enforced. Accordingly, an employer should be held to have successfully rebutted the Secretary's showing of knowledge when the record shows that the employer communicated to supervisors workrules implementing the cited standards. 14/ I therefore dissent.

---

14/ I express no opinion on whether and to what extent the Secretary could himself come forward with evidence of the employer's failure to enforce workrules against supervisors. I also express no opinion on whether an employer is required to do more than communicate workrules to non-supervisory employees. See Marson Corp., 10 BNA OSHC at 1666 nn.14 & 16, 1982 CCH OSHD at p. 32,807-8 nn.14 & 16.

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|
| SECRETARY OF LABOR,<br><br>Complainant<br><br>v.<br><br>FARTHING & WEIDMAN, INC.,<br><br>Respondent | DECISION AND ORDER<br>OSHRC DOCKET No. 78-5366 |

APPEARANCES: ROBERT S. MILGRIM, Esquire, U. S. Department of Labor, Office of the Solicitor, Kansas City, Missouri
For the Complainant

J. R. MARTIN, Esquire, Blanchard, Van Fleet, Martin, Robertson and Dermott, P. O. Box 729, Joplin, Missouri
For the Respondent

STATEMENT OF CASE

Vernon Riehl, Judge, OSHRC

This is a proceeding pursuant to section 10 of the Occupational Safety and Health Act of 1970 (29 USC 651 et seq.) contesting a citation issued by the complainant against the respondent under the authority vested in the complainant by section 9(a) of that Act. The citation alleged that an inspection of a workplace under the ownership, operation and control of respondent revealed the existence of workplace conditions that violated section 5(a)(2) of the Act for the reason that these conditions failed to comply with certain occupational safety and health standards promulgated

by the Secretary of Labor pursuant to section 6 thereof.

A description of the alleged violations contained in said citation states:

> Item Number 1
> Section 5(a)(1) of the Occupational Safety and Health Act of 1970: Employment and a place of employment which were free from recognized hazards causing or likely to cause death or serious physical harm to employees were not provided, in that:
>
> On or about October 19, 1978, an employee was allowed to work under a suspended load (aluminum tank) which was improperly secured to a chain sling. The tank was not properly blocked or secured to prevent it from falling, at a job site located at Gulf Oil Chemical Company Plant located 2 Miles North of Riverton, Kansas 66770.

## DISCUSSION

Respondent employed approximately nine employees in its various business activities, including, and at all times pertinent, at its workplace at Riverton, Kansas, where it was engaged in a business affecting commerce.

As a result of an inspection by a authorized representative of the Secretary, respondent was issued a citation for a serious violation with a notification of proposed penalty. Respondent duly filed a notice of contest to the citation.

On October 19, 1978, respondent's employee, Kerry Davenport was killed when a tank which was connected to a crane fell on him (T. 4, 15). The tank was hooked to the truck mounted crane through the use of a chain sling hooked to the tank (T. 20, 21; exhibits 2, 3).

Lifting a tank which is attached to a crane by means of a hook is a recognized hazard within industry. This hazard was likely to cause death or serious physical harm, in this case did, to one of respondent's employees (T. 23).

Respondent is charged with not assuring that the load suspended from its truck mounted crane was secured and properly balanced in the sling before it was lifted more than a few inches (T. 22).

Respondent was also charged with not assuring that the operator of its truck mounted crane avoided carrying a load over one of its employees (T. 21). Also, that one of respondent's employees was permitted to pass under a load on the hook of its truck mounted crane (T. 21). Respondent is charged with permitting the operator of a truck mounted crane to leave his position while a load was suspended (T. 21, 22). Respondent's employee, Kerry Davenport, died as a result of his exposure to the hazard of a tank falling on him.

A careful examination of the credible evidence of record establishes that this was an isolated occurrence and that respondent was not in violation of either 5(a)(1) or of any of the standards for which he was cited.

The Secretary of Labor called just one witness, Harold Johnston compliance officer for the Occupational Safety and Health Administration. The record consists of Johnston's testimony, plus certain statements made by both counsel.

Also as a part of the record were a number of photo exhibits of the tank involved in the accident.

The following bits of testimony in the record would indicate that respondent had properly instructed its employees the day before the accident and that the occurrence was an isolated incident:

> Q. (by Mr. Milgrim)
> You testified just a few moments ago that you had a conversation with Mr. Weidman, sitting over here, at the time you went to the Gulf facility, is that correct?
>
> A. That is correct.
>
> Q. What did you discuss with Mr. Weidman?
>
> A. I discussed what he thought caused the accident. Mr. Weidman was very cooperative. He explained, to his fullest knowledge, what he knew, as he was not there at the time of the accident. He did state that he had been there the day previous. (T. 14)

Mr. Weidman, the president of respondent company, stated that the day prior to the accident they had lifted a similar tank and he had instructed his employees to use a portion of a railroad tie and secure the chain sling around the railroad tie and drop it into the hole, so it would distribute the load, and they would not be pulling on the aluminum tank (T. 19).

This would of course show that respondent's president had informed the employees the day before of the proper method of completing the operation.

Mr. Weidman stated that the same crew hooked up the tank the day before, as which lifted it out of the ground, on the day of the

accident. The same crew involved in the accident, October 19, had used a railroad tie which they slipped inside the tank and hooked the chain sling onto, to do the lifting. The compliance officer said he had no reason to doubt that this was the situation, and it was the proper method of lifing the tank.

The compliance officer said this method as used on the first day, and directed by Mr. Weidman, would have been acceptable and not a violation of the Act; that there would not be a citation for the actions used on the first day as directed by Mr. Weidman. In other words, respondent's employees knew how to properly lift a tank on the first day when they were lifting it and being instructed by Mr. Weidman (T. 26). The compliance officer, on examination, also stated that he learned from Mr. Weidman that the crane operators always have been instructed never to leave the controls on a crane that had any load suspended on it. He, the compliance officer, believed that was correct.

The following testimony took part at this point:

> JUDGE RIEHL: Before you go any further, have you any reason to believe, from any other witnesses or any other source, that this more than just an isolated occurrence?
>
> THE WITNESS: No, I have not.
>
> JUDGE RIEHL: As far as you know, it was just an isolated occurrence.
>
> You may proceed. (T. 27)

On the day of the accident Mr. Weidman was not present, three

of his employees were, Mr. Kirklin, Mr. Davenport and Mr. Osburn.

Mr. Kirklin was the operator of the crane and the supervisor. Mr. Osburn was the operator of the truck and Mr. Davenport was a helper, laborer (T. 28). On the day of the accident, October 19, there was no intention to lift the tank into the air. The compliance officer was informed that respondent's employees were tilting the tank by using the crane to lift it.

The compliance officer also testified the following:

> JUDGE RIEHL: Let me go into this just a little further. You have no information from anybody who saw it or talked to him before he went in, as to why he went in?
>
> WITNESS: No, I do not.
>
> JUDGE RIEHL: All you have is conclusions from the various parties involved?
>
> WITNESS: That is right.
>
> JUDGE RIEHL: Let me ask this, Mr. Milgrim. Do you have any further evidence of witnesses to bear on this?
>
> MR. MILGRIM: No, I do not, Your Honor. When Mr. Martin is finished with cross-examination, I would like to move to redirect. (T. 31, 32)
>
> MR. MILGRIM: Your honor, it is the Secretary's position that we do not have to prove that this particular employee had a job function underneath the tank on the particular occasion. It is the Secretary's position that, just like an unguarded punch press or any other piece of equipment like that where in the functioning of the punch press, you do not have to put your hands in the machine but hands do go into machines and employees do, somehow fall under tanks.
>
> JUDGE RIEHL: Yes, but what are you establishing

> a pattern of ever having been done before? As I understand it, this is sort of an ad hoc deal, isn't it, just a one time deal?
>
> MR. MARTIN: This is right, Your Honor. That is exactly right. That is the reason we are hearing this thing. It was ridiculous to have been filed in the first place. (emphasis added) T. 35, 36)

The complainant has cited the case of Floyd S. Pike Electrical Contractors, Inc., v. Occupational Safety and Health Review Commission, 576 F.2d 72 (5th. Cir. 1978). The court held:

> * * * But an employer is responsible if it knew or, with the exercise of reasonable diligence, should have knows of the existence of a serious violation. A particular instance 'of hazardous employee conduct may be considered preventable even if no employer could have detected the conduct, or its hazardous nature, at the moment of its occurrence, . . . [where] such conduct might have been precluded through feasible precautions concerning the hiring, training and sanctioning of employees.

In the instant case we are dealing with an ad hoc situation, a one-time shot. This is not a regular part of the conduct of the work at respondent's workplace. Therefore it must be viewed in a slightly different light. We fail to see how the employer could have done more than he did, when on the preceding day he showed the workers how to properly use a railroad tie and lift a tank in a manner which the compliance officer said was entirely proper.

We feel it is an isolated incident, when the employees whom you have told how to do a thing properly the day before, for some strange reason, decide to do the opposite and cause an accident. This is an isolated occurrence which could not have been prevented

under the circumstances prevailing.

There is no evidence to rebut the preponderance of uncontradicted evidence of record which establishes a showing of respondent moving the tanks properly the day before the violation, proper instruction by Mr. Weidman, owner of the company, and, the complete disregard of his instructions the next day. The citation therefore must be vacated.

It is very evident that the foreman, for some reason, acted contrary to respondent's previous safety instructions the day before and respondent could not reasonably have been expected to have foreseen the foreman's error. Floyd S. Pike Electrical Contractor Incorporated v. Occupational Safety and Health Review Commission, 576 F.2d 72.

To hold the respondent in compliance with an absolute duty of guranteed compliance at all times in this singular situation would be to impose a duty which is not achievable, a result not intended by Congress.

The probative evidence of record establishes that the respondent did take all the necessary precautions under the circumstances to prevent the occurrence of the violation.

Accordingly, respondent can not be chargeable with failure as set forth in the complaint.

## FINDINGS OF FACT

1. Mr. Weidman, the president of respondent's company, on the day prior to the accident and the consequent citation, had

supervised the lifting of a similar tank on his premises and had instructed its employees to use a portion of a railroad tie and secure the chain sling around the railroad tie and drop it in the hole so it would distribute the load.

2. The day the accident occurred, respondent's employees were in the process of removing a portion of the tank, the deceased employee climbed up a ladder, installed a chain sling by hooking one hook in the upper portion of the tank and the other hook in the lower portion of the tank, he then got down, and respondent's employee Kirklin went up and reviewed the way it was hooked to the open portions of the tank. The hooks on the chain sling were hooked directly into the top of the aluminum tank.

3. Exhibits 2 and 3 show the method of hooking up the tank. The tank was then lifted and tipped approximately 3 feet. Employee Osburn went back to check the situation and all of a sudden the tank fell killing respondent's employee, Davenport (T. 26, 27).

4. Respondent's employee Kirklin had left the controls when the tank fell, his statement was, "I got off to see what was happening and the tank fell." The hooks on a chain sling are not designed to lift particular parcels. They are designed to hook into a lifing mechanism or to be wrapped around a load and hooked back to the chain itself. The design of a hook on a chain is such that if you lift a load with a hook, you put all the weight on the smallest portion of the hook. This should be knowledgeable to anyone who does this type of operation. The material can rip out

(T. 22, 23).

5. Such conduct, on the part of respondent's employees on the day of the accident, constitutes a recognized hazard within respondent's industry (T. 23).

6. Complainant had been permitted to amend his complaint to charge as well as a 5(a)(1) violation, to 29 CFR 1910.180(h)(3)(vi), thus making their pleading in the alternative. The day preceding the accident respondent's president, Mr. Weidman, raised another tank by using the proper methods as he directed the tank moving operation. The compliance officer had no information from anybody who saw the accident or talked to the deceased employee before he went into the area of peril, or why he went in (T. 32).

7. The complainant presented only one witness, the compliance officer. The compliance officer said this is the only case of such violation by respondent that he knows of, and he had no indication that anyone had done it on a previous occasion.

## CONCLUSIONS OF LAW

1. Respondent is, and was at all times, an employer within the meaning of section 5(a) as defined in section 3(3) and 3(5) of the Act.

2. Jurisdiction is conferred upon the Commission by section 10(c) of the Act, and the citations issued were in accordance with section 9(a) of the Act.

3. Respondent is not in violation of section 5(a)(1), or of 5(a)(2) of the Act in the standards as set forth in the amendment

to the complaint.

4. The incident for which respondent was cited was an ad hoc (one-time work effort) action on the part of respondent. It was not a part of its usual work schedule in its regular business but a one-time action to remove tanks.

5. The failure to comply with the standard resulted from the unpreventable misconduct of the foreman and respondent's employees.

6. Respondent's president, Mr. Weidman, directed the work efforts on the preceding day before the accident and removed a tank with the appropriate methods as set forth and approved by the Act and the standards thereunder.

7. The respondent took all reasonable precautions to properly instruct his employees on the day preceding the accident and conducted a work effort in accordance with the Act and the standards thereunder.

8. The respondent had done all that reasonably could have been expected of it to insure compliance with the provisions of the Act.

9. The violations committed by the employees were a result of an unexpected disregard of instructions given them on the preceding day before the accident by Mr. Weidman, the president of respondent's company. This constituted an isolated incident.

## DECISION

Based upon the above findings of fact and conclusions of law, it is hereby ORDERED: The citation for violation of 5(a)(1) and of

5(a)(2) and the standards as set forth in the complaint are vacated.

Date: September 25, 1979

Vernon Riehl, Judge, OSHRC

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

November 29, 1982

IN REFERENCE TO SECRETARY OF LABOR V.

Bethlehem Steel Corporation DOCKET NO. 80-4257

NOTICE IS GIVEN TO THOSE LISTED BELOW:

FOR THE SECRETARY OF LABOR

Counsel for Regional Trial Litigation
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Bethlehem, Pa. 18016

FOR EMPLOYEES

Edward A. Bobrick
Judge, OSHRC
55 East Monroe Street
Room 1530
Chicago, Illinois 60603

## NOTICE OF DOCKETING

Notice is given that the above case was docketed with the Commission on November 29, 1982. The decision of the Judge will become a final order of the Commission on December 29, 1982 unless a Commission member directs review of the decision on or before that date.

Petitions for discretionary review should be received early in order to permit sufficient time for their review. See Commission Rule 91, 29 C.F.R. Sec. 2200.91.

All pleadings or other documents that may be filed shall be addressed as follows:

Executive Secretary
Occupational Safety and Health
Review Commission
Room 401
1825 K St., N. W.
Washington, D. C. 20006.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

11/82

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

| | | |
|---|---|---|
| SECRETARY OF LABOR, | : | |
| Complainant, | : | |
| v. | : | OSHRC Docket No. 80-4257 |
| BETHLEHEM STEEL CORPORATION, a Corporation, | : | |
| Respondent. | : | |

## DECISION AND ORDER

Appearances:

T. TIMOTHY RYAN, JR., Esq., Solicitor of Labor,
JAMES E. WHITE, Esq., Regional Solicitor,
JORDANA WILSON, Esq., Office of the Solicitor,
Dallas, Texas, for Raymond J. Donovan, Secretary of Labor, U.S. Department of Labor, Complainant.

ANDREW J. RODRIGUES, Esq., for Bethlehem Steel Corporation, Respondent.

BOBRICK, Judge

This proceeding was commenced pursuant to Section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, et seq., (hereinafter referred to as the Act), wherein Respondent, Bethlehem Steel Corporation, contested several Citations issued by Complainant, Raymond J. Donovan, Secretary of Labor, U.S. Department of Labor. Trial was held in this matter before the Honorable Jerry W. Mitchell.

During the course of the hearing the parties agreed to amicably resolve all of the contested citations, except for Serious Citation No. 1, Item 1; the parties on June 22, 1981, filed a settlement agreement under which an Order could be issued disposing of these Citations. On February 11, 1982, this matter was reassigned to me upon the departure from the Occupational Safety and Health Review Commission of Judge Mitchell on March 1, 1982. An Order was issued advising the parties of the reassignment and allowing any party who believed there existed credibility determinations crucial to resolving any factual dispute, as to the remaining contested Citation, to request either a partial hearing or a de novo hearing if that was deemed necessary. Neither party to these proceedings requested such a hearing. Proposed Findings of Fact and Conclusions of Law were filed by the parties. This matter is now ready for decision.

Citation No. 1, Item 1, charged Respondent with a serious violation of the general duty clause of the Act, 29 U.S.C. 654(a)(1), Section 5(a)(1).[1/] The Citation alleged that Respondent had violated Section 5(a)(1) in that:

> "The employer did not protect his employees from the recognized hazard of falling from an elevation posed by lifting of personnel with a defective crane. The employer could have protected his employees by means such as enforcing their policy of crane operators turning in, "Crane Operators Daily Checklists" on a daily basis. Also, to make sure that defective equipment on these checklists such as inoperable dogs be repaired before allowing lifts of personnel by crane. Employees were exposed to the hazard of falling from an elevation in areas such as the dry dock area of the Rigging Department."

---

1/ Section 5(a)(1) reads in pertinent part:

> (a) Each employer -- (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.

## FACTS OF THE CASE

Respondent, Bethlehem Steel Corporation, operates a shipbuilding and repair facility in Beaumont, Texas. At its worksite, Respondent operates several gantry cranes which are used in its shipbuilding and ship repair work. The cranes are operated by skilled personnel who are given comprehensive on the job training as crane operators (Tr. 371, 417). A gantry crane is a crane situated on top of a tower that is mobile; the tower runs on rails. The crane itself has one motor which powers its winches. One winch operates what is referred to as "the boom hoist line", a wire line which raises or lowers the boom in elevation. A second winch, operates the "light load line", which is used to raise or lower the load suspended from the boom. Power from the single motor in the crane is transferred to the winches through a clutch mechanism. Only one winch can be powered at any one time.

The winch motor comes equipped with an automatic braking mechanism and each winch has a foot pedal operated friction brake mechanism. The automatic brake is one which is automatically engaged when there is a disruption in the power to the motor. Thus when power is applied to the motor powering the winch, the brake disengages and remains so until that time power is again disrupted. The foot brake is engaged when the operator steps on a foot pedal in his cab; a mechanical brake is then applied to the winch (Tr. 455-457, 468, 469).

There exists on the winches devices known as "dogs". This is a mechanical device that engages the teeth of the ratchet wheel on the winch. The dog, once engaged, will prevent the winch from rotating in a direction that allows the wire line to unwind from the winch so as to lower the load suspended from the crane. The function of the dog was likened by several

witnesses to an emergency brake of a car and is engaged when the winch is placed in a stop position; to engage the dog, the operator would push on a threaded shaft that extended out of the dashboard or panel of the crane cab. Generally speaking, the witnesses agreed that the dog would be used when a load was to be suspended from the boom for other than a short period of time, or when personnel were to be suspended by the crane. It was further agreed that the crane could be operated safely without use of the dog (Tr. 421, 449, 472, 492, 493).

There existed at the worksite a work practice whereby the operator of the crane, upon initially manning the crane, would review a checklist prior to placing the crane in operation (Tr. 436). The checklist, entitled CRANE OPERATOR'S DAILY CHECKLIST, dealt with the material condition of twenty-four separate mechanical components of the crane. As the operator progressed through the checklist he would mark each particular item as being either "OK" or "FAULTY". The first ten of these items were printed in red and the checklist bore the following instruction:

> "Check the following items at the start of each shift for each crane operated. If any RED item is faulty DO NOT OPERATE CRANE but notify your supervisor immediately. ALL FAULTS MUST BE CHECKED BY SUPERVISOR AND reported to maintenance as soon as possible but never later than end of shift."

Among those first ten items marked in red was the item "CONTROL LEVERS AND DOGS" (Complainant's Exhibit #25).

When the operator had completed going through the checklist, marking it as appropriate, he would then turn in the checklist to his immediate supervisor, who in turn would forward it to the maintenance department for assignment of a mechanic to make the repairs (Tr. 436, 440, 447). In those instances where one of the items listed in red was marked as defective, or where there was a significant problem with the crane, the operator would

signal for the supervisor to come to the crane whereupon he would inform the supervisor of the problem or of the defective item marked on his checklist (Tr. 498). The supervisor in turn would then make an assessment whether the crane could be operated safely, notwithstanding the problem or existence of the red item noted as defective (Tr. 348, 362, 438, 471, 488, 489). If the supervisor determined that the crane would not be safe to operate with the defective equipment he would advise the operator not to operate the crane until repairs had been made (Tr. 349, 444, 490, 512). In most all events the supervisor would immediately inform the maintenance department of the problem or defect, as noted on the checklist or as related by the operator, and repairs would be quickly made (Tr. 343, 348, 449, 451, 481, 561). Each operator had the option of not operating the crane when he believed the crane was unsafe because of any particular defect in its mechanisms (Tr. 349, 452, 477, 486).

On April 11, 1980, crane operator, Mr. Jack Richard, reported to Gantry Crane No. 15. Prior to placing Crane No. 15 into operation he reviewed and marked the checklist noting that, among other defects, the dog was not engaging the ratchet of the light load line winch. He marked as defective the item shown as "CONTROL LEVERS AND DOGS". Later in his shift he found that the swing brake on the crane needed adjustment (Plaintiff Exhibit #31, Tr. 411). He notified his immediate supervisor, Mr. Red Chreene, about the swing brake (Tr. 342, 411, 609, 615). While Mr. Richard indicated on the checklist that the dog was defective, he apparently never informed Mr. Chreene of that fact (Tr. 343, 344, 351, 359, 524, 609, 610, 615). Supervisor Chreene, in turn notified the maintenance department of the swing brake on Crane No. 15 and a mechanic was dispatched to make repairs to the swing brake and to correct any other problems which the operator might bring to the mechanic's attention (Tr. 342).

The mechanic who reported to the crane was informed by Mr. Richard that the swing brake was defective, which he in turn repaired. Mr. Richard did not inform the mechanic that there was a problem with the light line dog (Tr. 609, 610, 613). Once the swing brake was fixed, Mr. Richard resumed full operation of the crane.

During the morning the crane was used to suspend a scaffold holding painters who were painting the side of a ship. At approximately 9:00 a.m., crane operator Richard was directed to lower the boom of his crane so as to lower and re-position the scaffold (Tr. 373, 375). According to Mr. Richard, he then began to operate the controls so as to lower the boom (Tr. 375-380). During the course of his lowering of the boom, he heard the cable reeling off the light load line spool and realized that the scaffold holding the men was falling (Tr. 377). By the time Mr. Richard realized what was happening, it was too late to apply the friction brake and the scaffold hit the ground injuring those men who were painting from the scaffold (Tr. 377).

The Respondent conducted an investigation of the incident almost immediately after it took place. Two supervisors and a crane operator went to Crane No. 15 to test the various mechanical components of the crane to determine the cause of the scaffold falling and to determine whether the incident could be attributable to a malfunction of any of the crane's equipment or mechanisms (Ex. C-29, Tr. 192, 515). The crane was given a thorough checkout in all modes revealing that none of its mechanical components were defective (Tr. 345, 346, 497). The inspection team did notice that a nut had been placed upon the threads of the light load dog shaft that extended from the dashboard, and that this nut prevented the light load dog from engaging the teeth of the ratchet on the winch. Once the nut was removed the light load dog worked properly (Tr. 353, 354, 361, 369, 522, 536). This was the first instance that Respondent knew such a condition

existed wherein a nut was placed on the shaft handle of the light load dog (Tr. 354, 367, 479, 504, 522, 534, 554, 562, 610, 615). The simple removal of the nut remedied that situation preventing the light load dog from being engaged (Tr. 536, 614, 615).

There existed no reasonable explanation or reason why the nut was placed on the shaft of the dog preventing the dog's normal operation (Tr. 354, 612). Respondent had no actual knowledge of the existence of the condition. Nor could Respondent reasonably anticipate or foresee both the existence of the condition and the failure of a trained and qualified crane operator, who considered the dog to be a safety device, to inform his supervisor of the condition (Tr. 481, 485). Additionally, there was no degree of reasonable foreseeability to a trained and qualified operator failing to inform a repairman, who had reported to the crane to affect other repairs, of the dog's defective condition thereby preventing the quick and immediate repair of the inoperative dog (Tr. 554, 562, 609-611, 614-615).

## ALLEGED VIOLATION OF SECTION 5(a)(1) OF THE ACT

Section 5(a)(1) of the Act requires of an employer that he "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees". Commission rulings concerning the Secretary's burden in establishing the existence of a 5(a)(1) violation hold that there must be a showing that the employer failed to render its workplace "free" of a hazard, that the hazard was "recognized" and that the hazard was causing or likely to case death or serious physical harm to its employees. K-Mart, 1982 CCH OSHD para. _____; Jones & Laughlin Steel Corp., 1982 CCH OSHD para. 26,128, 10 BNA OSHC 1778; Brown and Root, Inc., 1980 CCH

OSHD para. 24,853. With respect to recognition of the hazard, Commission rulings place upon the Secretary the burden to show that the manner in which an employer went about the activity criticized in the Citation was known by it to be hazardous or was generally recognized as such by its industry. United States Steel Corp., 1982 CCH OSHD para. 26,123, 10 OSHC 1752; Pratt & Whitney, 1980 CCH OSHD para. 24,447; SSC Corp, 1976-77 CCH OSHD para. 20,814.

The Commission has further pointed out that it is upon the Secretary to show that there were feasible steps the employer could have taken to avoid the Citation -- in other words it is the Secretary who must establish the feasibility of its abatement charge within its Citation. Brown and Root, Inc., supra. The courts have adopted the Commission's views as to what proof the Secretary must establish in order to sustain its charge that an employer violated Section 5(a)(1) of the Act. Baroid Division of NL Industries, Inc. v. OSHRC, 660 F. 2d 439 (10th Cir. 1981); Whirlpool Corp. v. OSHRC, 645 F. 2d 1096 (D.C. Cir. 1981); Pratt and Whitney Aircraft v. Secretary of Labor, 649 F. 2d 96 (2nd Cir. 1981); Usery v. Marquette Cement Manufacturing Co., 568 F. 2d 902 (2nd Cir. 1977); National Realty and Construction Co. v. OSHRC, 489 F. 2d 1257 (D.C. Cir. 1973).

Viewing the instant record, I find that the credible evidence in this case has established that the Secretary has not met his burden of proof in establishing that a violation of Section 5(a)(1) of the Act existed at Respondent's workplace, as that burden of proof has been articulated by both the Review Commission and reviewing courts.

The Complainant maintains that Respondent violated the general duty clause of the Act by its failure to protect employees from the recognized hazard of falling from an elevation caused by lifting personnel with a

defective crane. Complainant, as part of its Section 5(a)(1) charge, submits that the employer could have protected its employees from such hazard by enforcing its policy of crane operators turning in the "CRANE OPERATORS DAILY CHECKLIST" on a daily basis and then taking appropriate corrective action on same. Further, the Complainant urges that the Respondent knowingly operated Crane No. 15 with inoperable dogs, equipment Complainant considered to be essential safety devices required to be in operation at all times.

The Respondent, on the other hand, argues that the handling or processing of its operator checklists was not the primary means of addressing and correcting defective or faulty mechanisms or components which might render a crane, or a part thereof, unsafe, and that it had in place well established and recognized procedures for handling and correcting defects. Respondent's procedure had the operator, after completing its checklist and noting any defectives in equipment, immediately notify his supervisor of any defects in those first ten items listed in red or of other mechanical problems considered serious (Tr. 348, 436, 437, 438, 442, 443, 450, 471, 488, 489, 522, 539); the supervisor would then make a determination whether the crane could still be operated safely or not, and whether the crane's activities in whole or part should be curtailed (Tr. 438, 490, 542). The supervisor would instruct the operator as to the limits of his use of the crane and would arrange for the defective equipment to be corrected immediately (Tr. 348, 349, 480, 481, 483). According to Respondent the crane operator, in any event, could decline to use the crane if he believed it to be unsafe (Tr. 349, 452, 454).

Respondent argues that this method of reporting and correcting defects was the most effective and immediate method by which unsafe conditions on

the crane could be quickly remedied. Further, Respondent argues that it did not know of the defective dog or knowingly operate the crane with a defective dog, and that it could not have anticipated that an experienced trained operator would fail to inform both his supervisor and a repairman, who was readily available to repair the malfunction in the dog, of the condition of the dog. Lastly, Respondent argues that notwithstanding the fact that it considered the defective dog not to render the crane unsafe, had it been informed of the condition of the dog, that condition would have been corrected immediately, and that the cause of the defective dog not being repaired was solely chargable to the misconduct of the crane operator.

I find that the overwhelming evidence in this case substantiates Respondent's position. The Complainant totally misconstrues the objective evidence in this case and further ignores the essential fact that the accident would never have taken place had the crane operator not violated Respondent's established procedure of informing the supervisors or maintenance department of the red listed defective equipment, in this case the faulty light line dog.

The Complainant in determining that a violation of the general duty clause existed, places undue emphasis on the administrative handling of the crane operator checklist. Complainant holds to the theory that once a check was placed on the checklist for any red item the crane was not to be operated until the fault was corrected, and that the checklists were to be administratively handled and circulated in an expeditious manner to accomplish same. Complainant has pointed out that at times the checklists were seen by the maintenance department at the end of the day or at times not at all.

I do not find the handling of the checklist, in whatever fashion shown in this case, to be the type of safety procedure comtemplated by Complainant, since the purpose of the checklist was to aid the operator in reviewing the material condition of the crane rather than as a voucher to obtain repair services for critical components. It is hard to distinguish Respondent's CRANE OPERATOR DAILY CHECKLIST from an airplane pilot's checklist used to check out the essential workings of the plane prior to engaging in flight. The Respondent had in place a well run and well established program wherein the operator informed his supervisor of any significant defects; the supervisor in turn arranged for immediate repair and evaluated the condition to determine if the crane could be safely operated. The credible facts in this case proved that this system worked effectively and efficiently to insure safe operation of the cranes (Tr. 343, 347, 348, 362, 436, 440, 444, 447, 448, 449, 451, 452, 458, 471, 481, 485, 488, 489, 490, 498, 512, 539, 542).

I believe the objective evidence has demonstrated that Complainant's insistence that the method by which the checklist was circulated or handled was a breach of some safety procedure is ill-founded. As Respondent cogently throughout the trial pointed out, the checklist did not require the discontinuation of use of the crane when any of the first ten red items were marked as faulty. The checklist specifically provided that "all faults must be checked by supervisor and reported to maintenance as soon as possible". The evidence clearly established that this was done, except for the instance involved in this case. Additionally, this method of addressing defects in the mechanical components of a crane is in accord with standards for the operation of cranes issued by the American National Standards Institute (ANSI) Section 4-2.2.2(a), notwithstanding Complainant's argument

to the contrary.[2/] The Complainant's argument essentially chooses form over substance. The Complainant's argument that the completion, routing and processing of a checklist is a preferred safety procedure over a method whereby mechanical problems are resolved through personal conversations between the crane operator, supervisor and maintenance department is just not persuasive as a matter of fact. Complainant's charge that a violation of Section 5(a)(1) occurred by reason of Respondent's failure in "enforcing their policy of crane operators turning in "crane operations daily checklist" on a daily basis" is not found actionable in these proceedings. In this regard, I do not find the existence of a hazard (whether recognized or not) as alleged by Complainant to support its Citation. Jones & Laughlin Steel Corp., supra; Brown and Root, Inc., supra; United States Steel Corp., supra.

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2/

Complainant, in attempting to establish the existence of a recognized hazard, forwards the proposition that by reason of the wide acceptance of the standards published by the American National Standards Institute (ANSI), concerning the operation and inspections of cranes, "the clear inference from these standards is that operating cranes with defective controls and safety equipment exposes individuals near the cranes to hazards". Complainant, in reaching this conclusion, relies on ANSI standard B30.4-1973, entitled Portal, Tower, and Piller Cranes, which at Section 4-3.1.3(k) provides "All controls shall be tested by the operator at the start of the new shift. If any controls do not operate properly, they be adjusted or repaired before operations are begun", and Section 4-2.1.2(d), which provides that all safety devices shall be frequently inspected and a determination made as to whether any deficiencies constitute a hazard. Also cited by Complainant is Section 4-2.1.3(e) which requires periodic inspection of pawls and ratchets for excessive wear (Exhibit 34). I do not agree with Complainant's view in this matter since Respondent was in complete compliance with ANSI Standard 4-2.3.3(e) entitled Adjustments and Repairs, which provided that "A defect disclosed by the inspection requirements of Section 4-2.1 shall be corrected before operation of the crane is resumed, except where a qualified engineer certifies that the crane may be operated". As can be seen, Section 4-2.3.3(a) sets forth what action is to be taken when complying with 4-3.1.3(k) and 4-2.1.2(d); it follows then that the option given by the ANSI standards to allow the crane to be used notwithstanding the existence of a defect, does not support that inference given by Complainant.

Notwithstanding the merits of Complainant's argument concerning the "checklist" procedure, consideration must be given to the operation of the crane with the defective dog, especially when the crane was used to hoist workmen, and whether that amounted to a violation of the general duty clause. Complainant argues that the light load line dog was a safety device whose operation was essential to safety. Respondent disagrees.

A dog is a mechanical device that engages the teeth of the ratchet on the drum of the winch to prevent the winch from rotating in a manner as to allow the wire rope to pay out from the drum of the winch. The dog cannot be engaged if the winch is rotating (Tr. 359). It can only be engaged when the winch is in a stopped position. While the light load line dog has been characterized as a safety device for use on the winch, it generally was agreed that it was not used during momentary pauses in suspending loads (Tr. 382,449). Apparently the dog is used when a load is suspended from the crane while the crane is moving, or when a load is to be suspended for a long period of time (Tr. 449). In instances where the load is suspended in one position for only five or ten minutes, the crane operators find it unnecessary to engage the light load dog (Tr. 449). It was good procedure to use the dog when personnel were being suspended from the crane, as was practicable (Tr. 492,293). Clearly though, the option to use the dog is a decision left to the crane operator as a preference, rather than as a regular procedure (Tr. 477). The correct functioning of the dog did not always relate to the safe operation of the crane (Tr. 421, 449, 472, 492, 493).

The accident that gave rise to the inspection of Respondent's worksite, and which formed the basis for issuance of the Citation involved herein, dealt with the suspension of a scaffold carrying workmen at Crane No. 15, the position of such scaffold being continually changed both in location

and in height throughout the morning of April 11, 1980 (Tr. 381). Whether the use of the light load dog at that time was a safety necessity is a debatable point and apparently will remain so when viewing, in its best light, that evidence submitted by the Complainant on this point. It is clear though that the condition of the dog on Crane No. 15 was not a factor in the accident occurring April 11, 1980, since it could not have prevented the fall of the scaffold. The dog was not designed nor did it have the capacity to stop a rotating drum (Tr. 301, 362).

It is noteworthy, however, to mention that the witness who was most positive on the need for the use of the dog for the safe operation of the crane was Mr. Richard, the operator of Crane No. 15 at the time of the accident (Tr. 382, 399, 422). The most persuasive evidence established that it was he who failed to inform both his supervisors and a repairman, who was dispatched to the crane to perform any repairs necessary, of the defective dog (Tr. 343, 344, 349, 351, 379, 524, 609, 610, 613), notwithstanding his claim of doing so (Tr. 406, 409, 413, 428, 431). The actions of Mr. Richard in effect allowed the crane to be operated with a faulty dog while suspending personnel on the scaffold. The repairman who had reported to the crane to effect repairs to the swing brake could have easily repaired the dog, once informed, before the crane was placed in use to suspend personnel from the scaffold since correction of the problem amounted to no more than the simple removal of the nut from the dog's shaft handle. (Tr. 504, 522, 556, 562, 612, 613, 614, 615). It can only be concluded that this witness, upon whom Complainant relies in large measure to establish his case, did not after all appear to be concerned about the condition of the dog as a safety device, or as an essential component in the safe operation of the crane, since he had at hand the means of effecting complete and

immediate repair to the faulty dog yet failed to take advantage of it. It follows that his testimony in general cannot be considered at all helpful in resolving the factual issues in this case.

I do find the testimony of employee Gabriel Comeaux, a crane operator for 35 years, more credible than any other witness on the subject of crane operations and work conditions at Respondent's workplace.[3/] Mr. Comeaux testified that the use of the light load dog was unnecessary when suspending loads for five to ten minutes (Tr. 449). He further indicated that some operators when going from use of the light load friction brake to the boom friction brake would engage the dog and that this was an extra safety precaution to keep the load from falling if something should happen to the brake, but it was the operator who would make this determination in the safe operation of the crane (Tr. 454, 459, 471). Whether the use of the dog was necessary or appropriate for use on April 11, 1980, in view of the fact that the position of the scaffold carrying the personnel was frequently being changed, is an issue that cannot be resolved on this record.

After considering the persuasiveness of all the testimony given on use of the dog, only one certain conclusion can be reached and that is that the Complainant has failed to present sufficient credible evidence to preponderate on the issue of whether or not the operation of the crane with a defective light load dog was a recognized safety hazard to which employees were exposed. I find that the Complainant has failed to meet his burden of proof in establishing the existence of a recognized hazard and as such the Citation must be vacated.

---

3/ The testimony of crane operator Gaspard concerning the use of the dog (Tr. 492) when considered in context with the fact that repairmen were readily available to fix any defects listed as the 10 red marked items of the checklist was not enough to bring the required certainty to Complainant's argument.

Assuming arguendo that Complainant had met his burden in establishing that the operation of the crane with the defective light load dog, under Respondent's work practice involving its use and processing of the CRANE OPERATOR DAILY CHECKLIST, amounted to a recognized hazard, the Citation would nonetheless have to be vacated since the Respondent established that it was without knowledge of the condition, nor could it have known, and that the condition was caused solely by the isolated act of a trained employee contrary to well established work rules.

ALLEGED AFFIRMATIVE DEFENSE

Basically Respondent in defense to the Citation has alleged, as an affirmative defense, that it was by reason of an isolated instance of employee misconduct that the condition which gave rise to the citation existed. Viewing what is necessary for this defense to be successful the U.S. Court of Appeals for the Fifth Circuit in H. B. Zachry Co. v. OSHRC, 638 F. 2d 812, 1981, stated:

> In order to prevail in this defense, an employer must demonstrate that (i) all feasible steps were taken to avoid the occurrence of the hazard, General Dynamics v. OSHRC, 599 F. 2d 453, 464 (7 OSHC 1373, 1380) (5th Cir. 1977); Horne Plumbing and Heaing Co. v. OSHRC, 528 F. 2d at 571 (3 OSHC at 2065). This includes the training of employees as to the dangers and the supervision of the worksite, Horne, 528 F. 2d 564 at 569 (3 OSHC 2060, 2063). And (ii) the actions of the employee were a departure from a uniformly and effectively communicated and enforced work rule of which departure the employer had neither actual or constructive knowledge. See, e.g., General Dynamics, 599 F. 2d at 465 (7 OSHC 1373 at 1380); Ames Crane and Rental Services Inc. v. Dunlop, 532 F. 2d 123 (4 OSHC 1060) (8th Cir. 1976).

The record in this case established that those elements necessary for Respondent to prevail on this issue has been proven.

Work rules concerning the use of a checklist to discover defects in the operation of the crane, and the manner by which the defects were

expeditiously corrected, were uniformly and effectively communicated and followed by Respondent's employees. The crane operators, skilled well-trained workmen, by demonstrating the ability to operate the crane in accordance with specific operating and safety rules were qualified to hold the job of crane operator. On the day of the accident Respondent's established work practice concerning the reporting and correction of defects found on the crane was followed by crane operator Johnson. As discussed earlier, he notified his supervisor of a swing brake deficiency on the crane. The supervisor in turn dispatched a workman to repair that defect as well as any other defects brought to his attention. The workman arrived prior to placing the crane in use to lift personnel.

Unfortunately, it was crane operator Johnson who did not fully use the work rule when he failed to report to his supervisor the fact of the inoperative light line winch dog (Tr. 343, 344, 351, 359, 524). He again failed to fully use the work practice by not informing the repairman who reported to the crane to repair the swing brake of the defect in the dog (Tr. 609, 610, 613). The crane operator persisted in operating the crane with the defective dog notwithstanding an immediate and readily available means for repair of the inoperative dog that had been provided to him by Respondent. This blatent departure by the crane operator from a well established and effective work practice designed to correct defects in the crane was one the employer could neither actually nor constructively anticipate.

While Complainant points out that the dog had repeatedly been reported as defective for some time prior to the incident, the credible evidence established that the continuing problem with the dog involved a minor matter dealing with the dog skipping a tooth on the winch drum ratchet when it was

engaged. At times it was found that the dog would not engage the first one or two teeth of the ratchet but would, upon jogging the winch, safely engage it as designed. This in no manner diminished the operation of the dog but was merely a problem which chronically persisted on the cranes, notwithstanding continual adjustment to the dog (Tr. 550, 552, 553, 556, 557). Once engaged the dog was fully operative performing its safety functions. The dog on Gantry Crane No. 15 was operative until someone unknown to any party in these proceedings surreptitiously placed a nut on the shaft handle preventing it from being engaged, a condition no one reasonably could have known of or anticipated (Tr. 354, 365, 367, 504, 522, 534, 554, 556, 562, 563, 611, 612, 614, 615).

On the date of the accident had the crane operator merely mentioned to the repairman that the dog was inoperative, a simple one minute repair involving the removal of the nut would have placed the dog back into full operation and the cited condition would never have existed. It was solely the unanticipated and unforeseeable act of the crane operator who specifically violated Respondent's well established work rule that allowed the crane to be operated with the defective dog on the date of the accident. The evidence established that Respondent was essentially without any opportunity to have instituted preventive or corrective measures. Respondent having established a valid affirmative defense, the Citation accordingly must be vacated.

## FINDINGS OF FACT

1. This is an action brought by the Secretary of Labor, United States Department of Labor, pursuant to the provisions of Section 10(c) of the Occupational Safety and Health Act of 1970. 29 U.S.C. Section 651, *et seq*.

2. As a result of a safety and health inspection held May 5, 1980, through June 13, 1980, Respondent was issued Citations on June 25, 1980, for serious and non-serious violations of regulations promulgated pursuant to the Act and for serious violations of the general duty clause. The Citations proposed a total penalty of $5,200.00 pursuant to Sections 10(a) and 17(k) of the Act.

3. Respondent timely filed its Notice of Contest.

4. Respondent in its answer filed September 26, 1980, admitted that the Occupational Safety and Health Review Commission has jurisdiction of the proceedings, that Respondent is an employer engaged in a business affecting commerce and has employees within the meaning of Section 3(5) of the Act, that the inspection was conducted by an authorized representative of the Complainant pursuant to Section 9(a) of the Act, and that the Citations which were attached to the Complaint were issued.

5. Joint Exhibit No. 1 disposes of all issues before the Commission for Items 2 and 6 of Citation No. 1 issued June 25, 1980 and Item 1 of Citation No. 2 issued June 25, 1980.

6. On February 27, 1980, during hearing, the parties entered into an agreement disposing of all issues before the Commission for Item 4 of Citation No. 1 and Item 2 of Citation No. 2.

7. On June 22, 1981, the written settlement agreement setting out the terms of the stipulations and agreements was agreed to by counsel for the respective parties and was served upon unrepresented affected employees by service of the fully executed Settlement Agreement on each authorized employee representative.

8. Respondent is engaged in the business of shipbuilding, ship repair and the construction of oil rigs at its worksite located at 850 Pine Street, Beaumont, Texas.

9. Each of Respondent's Crane Operators is required, at the start of each shift, to fill out a Crane Operator Daily Checklist which constitutes a written safety rule with respect to the inspection and operation of Respondent's cranes. The top of the checklist contains the name, badge number, crane number, date and shift. The remainder of the checklist reads as follows:

> "Check the following items at the start of each shift for each crane operated. If any RED item is faulty DO NOT OPERATE CRANE but notify your supervisor immediately. ALL FAULTS MUST BE CHECKED BY SUPERVISOR AND reported to maintenance as soon as possible but never later than end of shift."

The following items were marked in red on the checklist and were to be checked as "OK" or "Faulty" by Respondent's Crane Operators: (1) LIMIT SWITCHES: (20 BRAKES; (3) CONTROL LEVERS AND DOGS: (4) AIR PRESSURE: (5) HYDRAULIC SYSTEM: (6) OUT RIGGERS OPERABLE: (7) ENGINE LUBRICANT: (8) STEERING: (9) RADIATOR & PUMP: (10) EMERGENCY STOP SWITCHES (Complainant's Exhibit 25, Tr. 4361).

10. When Items Nos. 1 through 10 on the checklist are faulty, the Crane Operators are not to operate the crane but immediately notify the Maintenance Department and a maintenance man reports to the crane within 20 minutes and makes the necessary repairs (Tr. 348, 362, 438, 471, 488, 489, 498).

11. Respondent does not rely on receipt of the checklist prior to making any necessary repairs on the cranes; rather, Respondent relies on the Crane Operator's immediate oral communication of the malfunction on the crane to their supervisors who in turn promptly notify the Maintenance Department supervisors who immediately dispatch a maintenance man to the crane (Tr. 349, 444, 490, 512).

12. The collection of the checklist is a ministerial function to keep track of the repairs that are made on the crane.

13. The practice of requiring the crane operator to immediately notify his supervisor of needed repairs and having the maintenance department make the repairs immediately is an effective method to obtain the inspection and repair of defects to the crane.

14. The work rule referred to in Findings of Fact 9 through 13, has been adequately communicated to all of Respondent's Crane Operators, their supervisors and members of the maintenance department.

15. Whenever any crane including Gantry Crane No. 15 was faulty, especially with respect to Items Nos. 1-10 (under which defective dogs were reported) on the checklist, the Crane Operators immediately notified Respondent's supervisors who in turn immediately notified the maintenance department who sent a maintenance man to make the necessary repairs (Tr. 436, 440, 447).

16. The light load dog on Gantry Crane No. 15 was not faulty or defective. The problem with the dog noted by the Crane Operators involved the light load dog not being able to immediately engage the first tooth of the ratchet of the drum in every instance; it would engage in the second tooth when the drum was rotated. This was not unsafe since once engaged it remained so (Tr. 550, 552, 553, 556, 557).

17. On April 10, 1980, the light load dog was rendered inoperative by an unknown person who placed a nut on the dog's sliding shaft handle extending from the panel, causing the light load dog not to engage the teeth on the light load hoist drum. The Crane Operator determined at the start of the shift that the light load dog was not operating but, in violation of

Respondent's safety rule as noted on the checklist, failed to notify his supervisor and the maintenance man dispatched to the crane to repair the swing brake (Tr. 343, 344, 349, 351, 479, 524, 609, 610, 613).

18. Neither Respondent nor its supervisors were aware of the nut on the shaft on April 10, 1980, or on the previous single occasion when a nut was placed on the sliding shaft attached to the light load dog. Respondent learned of these two incidents after an accident occurring on April 10, 1980 (Tr. 354, 365, 367, 504, 522, 534, 554, 556, 562, 563, 611, 612, 614, 615).

19. On April 10, 1980, Crane No. 15 was used to lift and suspend a platform containing men who were to paint the sides of a ship.

20. The suspended platform, on which the painter was working prior to the accident, was constantly being raised and lowered and remained at each new position for very short periods (Tr. 381). While being lowered, the platform fell a number of feet to the ground injurying the men who were on it.

21. When the crane was inspected immediately after the platform had fallen, the nut on the dog's shaft was found. It was then removed and the crane worked properly without any additional repairs to the light load dog, the brakes, or any other item listed on the checklist. The light load brake and the friction brake, when tested immediately after the accident, stopped the falling gangway immediately - there was no malfunction with respect to either braking system.

22. The proper procedure to stop a falling load, gangplank, is to apply the foot brake, or friction brake. The dog was not designed to stop a falling load, nor could it do so (Tr. 361, 362).

## CONCLUSIONS OF LAW

1. Jurisdiction of the parties and the subject matter herein is confirmed upon the Occupational Safety and Health Review Commission by Section 19(c) of the Act.

2. At all times relevant hereto Respondent was an employer engaged in a business affecting interstate commerce, within the meaning of Section 3(5) of the Act, and as such it was subject to the requirements of Section 5(a)(1) and 5(a)(2) of the Act and the safety standards promulgated by the Complainant.

3. Complainant's motion to withdrawn Citation No. 1, Item 2 alleging a violation of Section 5(a)(1) of the Act and Citation No. 1, Item 5 alleging a violation of 29 C.F.R. Section 1916.51(a) is granted.

4. Complainant's amendment of the characterization of Item 6 of Citation No. 1 issued June 25, 1981 and Item 5 of Citation No. 2 issued June 25, 1980 to de minimis is approved.

5. The reduction of the proposed penalty in Item 4 of Citation No. 1 issued June 25, 1980, to $450.00 is approved and hereby assessed.

6. Respondent did not violate Section 5(a)(1) of the Act as charged by Complainant in Citation No. 1, Item No. 2. 4/

7. Respondent did not violate Section 5(a)(1) of the Act as charged by Complainant in Citation No. 1, Item No. 3.

8. Respondent violated Section 5(a)(2) of the Act by its failure to comply with the safety standards promulgated by Complainant and codified at 29 C.F.R. 1916.47(b) as charged in Citation No. 1, Item Nos. 4(a) and 4(b).

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4/ The parties entered into a formal settlement agreement in respect of Citation No. 1, Items Nos. 2, 4, 5, and 6 and Citation No. 2, Items Nos. 1 and 2.

9. Respondent did not violate Section 5(a)(2) of the Act as charged by Complainant in Citation No. 1, Item No. 5.

10. Respondent violated Section 5(a)(2) of the Act by its failure to comply with the safety standards promulgated by Complainant and codified at 29 C.F.R. 1910.309(a) as charged in Citation No. 1, Item No. 6.

11. The Complainant failed to establish that a recognized hazard existed at Respondent's workplace by reason of the manner in which Crane No. 15 was operated on April 11, 1980. K-Mart, 1982 CCH OSHD para. _____; Jones & Laughlin Steel Corp., 1982 CCH OSHD para. 26,128, 10 BNA OSHC 1778; Brown & Root, Inc., 1980 CCH OSHD para. 24,853; United States Steel Corp., 1982 CCH OSHD para. 26,123, 10 OSHC 1752; Pratt & Witney, 1980 CCH OSHD para. 24,447; SSC Corp, 1976-77 CCH OSHD para. 20,814; Baroid Division of NL Industries, Inc. v. OSHRC, 660 F. 2d 439 (10th Cir. 1981); Whirlpool Corp. v. OSHRC, 645 F. 2d 1096 (D.C. Cir. 1981); Pratt & Whitney Aircraft v. Secretary of Labor, 649 F. 2d 96 (2nd Cir. 1981); Usery v. Marquette Cement Manufacturing Co., 568 F. 2d 902 (2nd Cir. 1977); National Realty and Construction Co. v. OSHRC, 489 F. 2d 1257 (D.C. Cir. 1973).

12. The operation of Crane No. 15 with a defective light line dog was unknown to Respondent and could not have been foreseen or reasonably prevented precluding the existence of a violation of the general duty clause. Prestressed Systems, Inc., 9 BNA OSHC 1864, 1981 CCH OSHD para. 25,358; General Electric Co., 9 BNA, OSHC 1722, 1981 CCH OSHD para. 25,345. The operation of Crane No. 15 with a defective dog was solely caused by reason of the misconduct of the crane operator, was an isolated act by an employee which the Respondent could not have foreseen or reasonably prevented, and thus not chargable to Respondent. H. B. Zachry Co. v. OSHRC, 638 F. 2d 812 (C.A. 5, 1981).

13. Respondent did not violate Section 5(a)(1) of the Act as charged by Complainant in Citation No. 1, Item No. 1.

## ORDER

Based upon the foregoing reasons as set out in my Decision and Order, and for good cause shown, it is ORDERED that:

1. Serious Citation No. 1, Item 1 is hereby VACATED.

2. The Partial Settlement Agreement, which has been posted in accordance with Rules 7 and 100 of the Commission Rules of Procedure, is approved. No objection has been filed by or on behalf of affected employees. It is therefore ORDERED that the Citations and proposed penalties as modified or amended by said Partial Settlement Agreement are AFFIRMED. Those Citations which have been withdrawn by the Complainant under terms of the Settlement Agreement, are hereby VACATED.

3. It is further ORDERED that the terms, conditions and stipulations contained within said Partial Settlement Agreement shall be adopted and incorporated herein as part of the final order of the Commission.

Edward A. Bobrick
Judge, OSHRC

Dated: November 24, 1982

Chicago, Illinois

UNITED STATES OF AMERICA

**OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION**

1825 K STREET, NW
WASHINGTON, D.C. 20006

December 30, 1982

IN REFERENCE TO SECRETARY OF LABOR v.

Norfolk Shipbuilding and Dry Dock Company

OSHRC DOCKET NO. 80-2973

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

OF ORDER

To wit: See Attached.

FOR THE SECRETARY OF LABOR

- Counsel for Regional Litigation
  Office of the Solicitor, USDOL
  200 Constitution Ave., NW. - Rm. S-4014
  Washington, D.C. 20210

- Marshall H. Harris
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FOR EMPLOYER

- Robert L. O'Donnell, Esq.
  Vandeventer, Black, Meredith & Martin
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  One Commerical Place
  Norfolk, Virginia 23510

FOR EMPLOYEES

-

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

Benjamin G. Usher
Judge, OSHRC
1515 Broadway
Room 3800
New York, N.Y. 10036

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Rev. 10/1/76

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

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|---|---|---|
| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>Norfolk Shipbuilding & Dry Dock Company,<br><br>Respondent. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | OSHRC Docket No. 80-2973 |

ORDER

The Parties' Stipulation and Settlement Agreement is Approved.

FOR THE COMMISSION

Ray H. Darling, Jr.

Ray H. Darling, Jr.
Executive Secretary

Dated: DEC 30 1982

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

---

RAYMOND J. DONOVAN, SECRETARY OF LABOR,

Complainant,

v.

OSHRC DOCKET
NO. 80-2973

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,

Respondent.

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STIPULATION AND SETTLEMENT AGREEMENT

I.

The parties have reached a full and complete settlement of the instant matter which is presently pending before the Commission on review.

II.

The parties stipulate as follows:

(a) The Occupational Safety and Health Review Commission (hereinafter the Commission), has jurisdiction of this matter pursuant to section 10(c) of the Occupational Safety and Health Act of 1970 (29 U.S.C. §651 et seq.)

(b) Respondent, Norfolk Shipbuilding & Drydock Corporation, is a corporation with its principal place of business at Liberty Street, Norfolk, Virginia. Respondent is and was during all times during this proceeding an employer affecting commerce within the meaning of sections 3(3) and 3(5) of the Act and employed employees within the meaning of section 3(6) of the Act.

(c) As a result of an inspection conducted between February 22 and 28, 1980, there issued on May 6, 1980 a citation alleging violations of the OSH Act. Respondent timely contested these citations. All of the contested matters were resolved except for citation item 1(a) and 1(b) which were affirmed, but modified to reflect "other-than-serious" violations by Commission Judge Benjamin Usher. Respondent petitioned for review of the judge's decision and its petition was granted on November 23, 1981.

III.

(a) Complainant agrees to withdraw citations 1(a) and 1(b) which are before the Commission on review.

(b) Complainant reaffirms, as stated at pages 5 and 6 of the transcript in this proceeding, that adherence to the following procedure renders de minimis Respondent's failure to have separate lockers for employees engaged in asbestos insulation rip-out or removal as charged in citation 2 item (c):

> 1. Employees will remove and dispose of their coveralls in a change area prior to removing their respirators.
>
> 2. Prior to removing their coveralls employees will vacuum their coveralls.
>
> 3. After removing and disposing of their coveralls, employees will vacuum the clothing worn underneath the coveralls.
>
> 4. After vacuuming their street clothing, employees will remove their respirators and leave the change area.

Complainant agrees that continuation of these procedures is deemed as acceptable to OSHA in lieu of the provision of separate lockers for employees' street clothes and disposable coveralls and that Complainant will not cite Respondent for violation of 29 CFR 1910.1001(d)(4)(ii) if Respondent continues to insure that its employees follow these procedures in a manner sufficient to prevent employees from leaving their workplace with asbestos fibers on their clothing.

(c) Respondent agrees to continue the following abatement procedures when performing asbestos removal or rip-out operations, as specified in its stipulation with respect to Citation 1, item (c), and Citation 2, item (a) (transcript 5-6):

> 1. Employees will cut insulation material from pipes only after adequately wetting the point of contact and will adequately wet the area again after removing the outer wrapping of the insulation.
>
> 2. Respondent also agrees that when insulation removal or rip-out operations are performed it will isolate the work area with plastic from other areas in which employees are present.
>
> 3. Employees will continue to wear full suit disposable coveralls when working in an area in which insulation rip-out or removal operations are being performed.
>
> 4. Employees will wear respiratory equipment which adequately protects them from the asbestos levels present in the work area.

5. Employees will wear rubber gloves taped to their coveralls.

6. Employees will wear appropriate protective goggles over their eyes.

7. Employees will continue to be provided with pre-employment and annual physical examinations as set forth in 29 CFR 1910.1001(j).

Complainant agrees that continuation of these procedures is deemed acceptable to OSHA under the present state of technology in lieu of the provisions of 29 CFR 1910.1001(c)(1)(i) and (iii) (except when the use of a glove box is feasible) and that Complainant will not cite Respondent for violations of these sections if Respondent continues to insure that its employees follow these procedures; unless, there is a technological advance after the date of this agreement which makes it technically feasible to control the dispersion of asbestos fibers at its source during insulation rip-out or removal operations and/or unless Complainant believes that use of a glove box is feasible to control the dispersion of asbestos fibers at its source.

IV.

The parties agree that each party will bear its own costs and attorney's fees.

V.

Respondent will post the instant Stipulation and Settlement Agreement in accordance with Rule 7 of the Rules of Procedure of the Commission.

WHEREFORE, the parties respectfully request that this stipulation and settlement agreement be approved by the Commission.

FOR THE COMPLAINANT

FOR THE RESPONDENT

Dated this 3 day of November, 1982.

UNITED STATES OF AMERICA

# OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

November 30, 1982

IN REFERENCE TO SECRETARY OF LABOR V.

The Baltimore & Ohio Railroad Co. DOCKET NO. 82-458

NOTICE IS GIVEN TO THOSE LISTED BELOW:

FOR THE SECRETARY OF LABOR

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William D. Crawford, Gen V.P.
Brotherhood Railroad Carmen of the
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400 First Street, N.W.
Washington, D. C. 20001

Judge James D. Burroughs
OSHRC
1365 Peachtree St., N.E.
RM 240
Atlanta, GA 30309

## NOTICE OF DOCKETING

Notice is given that the above case was docketed with the Commission on November 30, 1982. The decision of the Judge will become a final order of the Commission on December 30, 1982 unless a Commission member directs review of the decision on or before that date.

Petitions for discretionary review should be received early in order to permit sufficient time for their review. See Commission Rule 91, 29 C.F.R. Sec. 2200.91.

All pleadings or other documents that may be filed shall be addressed as follows:

Executive Secretary
Occupational Safety and Health
Review Commission
Room 401
1825 K St., N. W.
Washington, D. C. 20006.

FOR THE COMMISSION

Ray H. Darling, Jr.

RAY H. DARLING, JR.
EXECUTIVE SECRETARY

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1365 PEACHTREE STREET, N.E., SUITE 240
ATLANTA, GEORGIA 30309

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| SECRETARY OF LABOR,<br><br>Complainant,<br><br>v.<br><br>THE BALTIMORE AND OHIO RAILROAD COMPANY,<br><br>Respondent,<br><br>and<br><br>BROTHERHOOD RAILWAY CARMEN OF THE UNITED STATES AND CANADA, AFL-CIO-CLC,<br><br>Authorized Employee Representative. | OSHRC Docket No. 82-458 |

## ORDER ON REMAND

The Commission, by order dated Sepember 30, 1982, set aside the judge's order of August 18, 1982, and remanded the case for consideration of the "union's apparent opjections and for any further proceedings that may be appropriate." The union had indicated that it objected to the respondent's withdrawing its notice of contest.

A hearing was scheduled in this matter for November 8, 1982, in accordance with the Commission's order of remand. On October 29, 1982, a letter was received from William D. Crawford, General Vice President and National Legislative Representative of the Brotherhood Railway Carmen of the United States and Canada, wherein he stated that the union "hereby withdraws any objections it has to Respondent's Withdrawal of its Notice of Contest in the above captioned matter." Accordingly, it is

ORDERED: 1. That respondent's motion to withdraw its notice of contest which was received on August 16, 1982, is granted; and

2. That the "other" citation issued to respondent on April 1, 1982, is affirmed.

Dated this 22nd day of November, 1982.

/s/ James D. Burroughs
JAMES D. BURROUGHS
Judge